SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 18b
Honorable Shella Deen, Presiding
Farris Bryant, Courtroom Clerk
191 North First Street, San Jose, CA 95113

DATE: November 19, 2024 TIME: 9:00 A.M.

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

****Please specify the issue to be contested when calling the Court and Counsel****

LAW AND MOTION TENTATIVE RULINGS

FOR APPEARANCES: Department 18 is fully open for in-person hearings. The Court strongly prefers **in-person** appearances for all contested law and motion matters. For all other hearings, the Court strongly prefers either **in-person or video** appearances. If you must appear virtually, you must use video. Audio-only appearances are permitted, but disfavored, as they cause significant disruptions and delays to the proceedings. Please use telephone-only appearances as a last resort. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 18:

https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

SCHEDULING MOTION HEARINGS: Please go to https://reservations.scscourt.org or call 408-882-2430 between 8:30 a.m. and 12:30 p.m. (Mon.-Fri.) to reserve a hearing date for your motion before you file and serve it. You must then file your motion papers no more than five court days after reserving the hearing date, or else the date will be released to other cases.

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LAW AND MOTION TENTATIVE RULINGS

LINE #	CASE #	CASE TITLE	RULING
LINE 1	21CV385675	Michelle Santos vs Amandeep Singh	**Order of Examination (Bohr Bhandal)** Notice properly provided on August 8, 2024. Parties to appear unless mutually agreed otherwise. If no appearance, the matter will be ordered OFF CALENDAR
LINE 2	23CV427416	ANA ALVAREZ et al vs JOEL BARRIENTOS et al	**Demurrer** Scroll down to LINE 2 for Tentative Ruling.
LINE 3	24CV431707	BRANDI PIZZOLA et al vs VAL CHRIS INVESTMENTS, INC et al	**Demurrer** Scroll down to LINE 3 for Tentative Ruling.
LINE 4	24CV432228	Scott Johnson vs KX INVESTMENT INC	**Motion to Strike** Plaintiff's motion to strike Defendant's answer. No proof of service filed showing service of the motion on Defendant. Absent an amended poof of service showing that timely notice of hearing was given, the hearing will not go forward. If no appearance is made by the moving party the matter will be ordered OFF CALENDAR.
LINE 5	22CV402833	SISCARE RX LLC et al vs JAMES WONG et al	**Motion for Summary Judgment/Adjudication** Scroll down to LINE 5 for Tentative Ruling.
LINE 6	22CV404624	JANE DOE D.L. vs JOHN DOE 1 et al	**Motion Summary Judgment** Scroll down to LINE 6 for Tentative Ruling.

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LAW AND MOTION TENTATIVE RULINGS

LINE 7	23CV418757	Jiayan Li et al vs Ting Hong et al	**Motions to Compel (Multiple)** Plaintiff Jiayan Li's motions to compel further responses and responsive documents to Defendant Morad Mahpour's requests for production of documents, form interrogatories and special interrogatories. Plaintiff also seeks evidence sanctions and monetary sanctions of $9,151.50. As an initial matter, Plaintiff should have brought a separate motion for each set of discovery in dispute – it is improper to have filed 4 discovery issues as *one* motion. The motion is incomplete in that a separate statement was not filed until after Defendant's reply brief and the parties have failed to meet and confer in good faith. Defendant must comply with the Court's June 7 order by serving code compliant responses and responsive documents. The hearing of these motions to compel is CONTINUED to January 30, 2025, at 9a.m. in Department 18b. The parties are ordered to (1) meet and confer, either in person, by phone or video conference, for *each* of the items in dispute in each of the motions to compel and (2) file a *joint* statement no later than December 30, 2024, identifying the discovery items that remain in dispute, and the reasons why they should be compelled/not compelled. Moving party to prepare formal order.
LINE 8	24CV431381	Jpmorgan Chase Bank N.a. vs David Shapiro	**Motion to Deem Requests for Admission Admitted** Motion withdrawn by moving party.
LINE 9	21CV383740	Eric Figueroa et al vs City of Palo Alto et al	**Motion for New Trial** This motion will be heard by Judge Pennypacker in Department 6. Please see Department 6's Tentative Rulings.

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Calendar Line 2
Case Name: *Ana Silvia Alvarez, et al. v. Joel Barrientos, et al.*
Case No.: 23CV427416

Before the court is defendant Meta Platforms, Inc.'s demurrer to plaintiffs' first amended complaint. Pursuant to California Rule of Court 3.1308, the court issues its tentative ruling as follows.

I. Background.

This is an action for sexual harassment and related causes of action. The original complaint alleged plaintiffs Olga Urtusuastegui ("Urtusuastegui") and Ana Silvia Alvarez ("Alvarez") (collectively, "Plaintiffs") were employed by defendant Service By Medallion ("SBM"). (Complaint, ¶¶1-2.) Defendant SBM is a California corporation that provides commercial janitorial and building maintenance services. (Complaint, ¶3.) Defendant Joel Barrientos ("Barrientos") is employed by SBM as a supervisor at the jobsites where Plaintiffs worked. (Complaint, ¶4.) Defendant Meta Platforms, Inc. ("Meta") is a Delaware corporation doing business as Facebook. (Complaint, ¶5.) Plaintiffs worked at Meta's campuses in Mountain View and Sunnyvale, and Meta controlled these job sites and had the authority to stop illegal activities occurring there. (*Id.*)

Defendants Meta and SBM are business agents of each other. (Complaint, ¶6.) Meta knew or had reason to know that sexual harassment was occurring, but they turned a blind eye, refused to cooperate in the investigation, and denied access to critical information. (Complaint, ¶7.) Defendant Meta ratified and condoned and assisted in covering up the harassment and hostile work environment and allowed defendants SBM and Barrientos to do whatever they wanted without any accountability. (*Id.*)

Plaintiffs each began working for defendants Meta and SBM in or about November 2018, and they were assigned to perform janitorial work at Facebook. (Complaint, ¶¶17, 22.) Plaintiffs initially began working at Facebook's Mountain View campus and were later transferred to Facebook's campus in Sunnyvale. (Id.) Defendant Barrientos sexually harassed plaintiffs Urtusuastegui and Alvarez. (Complaint, ¶¶18, 23.)

Defendant Barrientos began harassing plaintiff Urtusuastegui when she worked at the Mountain View campus, and continued harassing her when she was transferred to the Sunnyvale campus. (Complaint, ¶18.) Defendant Barrientos's sexual harassment of plaintiff Urtusuastegui was regular and continuous and included making unwanted advances, sending texts and pictures of himself to her, putting his hands on her, and rubbing her breasts. (*Id.*) In or about October 2022, Defendant Barrientos sexually assaulted plaintiff Urtusuastegui when he physically attacked her, groped her, and slapped her buttocks. (*Id.*)

Defendant Barrientos began harassing plaintiff Alvarez after she was transferred to Facebook's Sunnyvale campus, and he harassed plaintiff Alvarez regularly and continuously. (Complaint, ¶23.) Defendant Barrientos's sexual harassment of plaintiff Alvarez included openly staring at her private area, asking her to walk in front of him so he could look at her buttocks, touching her breasts and shoulders, staring at her and biting his lips in a sexual way, and asking to see her naked body. (*Id.*) In or around October 2022, plaintiffs Urtusuastegui and Alvarez learned that defendant Barrientos was harassing both of them. (Complaint, ¶¶18-19, 24.)

In or around October 2022, plaintiff Urtusuastegui complained to defendant SBM's site manager and human resources personnel about defendant Barrientos. (Complaint, ¶20.) Plaintiff Urtusuastegui shared text messages from defendant Barrientos and provided detailed accounts of his sexual harassment. (*Id.*) After weeks of silence, defendant SBM personnel told plaintiff Urtusuastegui that they closed the investigation and that they could not verify her story because Facebook denied them access to Facebook's internal security/surveillance cameras. (*Id.*)

In or around October 2022, plaintiff Alvarez complained to defendant SBM's site manager and human resources personnel about defendant Barrientos. (Complaint, ¶25.) Plaintiff Alvarez gave detailed accounts of defendant Barrientos's conduct and reported what was happening to plaintiff Urtusuastegui. (*Id.*) After weeks of silence, defendant SBM personnel told plaintiff Alvarez that the investigation was closed because there was not enough evidence against defendant Barrientos and Facebook could not find anything from their cameras. (*Id.*)

Defendant Barrientos continues to work at the same Facebook campus with plaintiffs Urtusuastegui and Alvarez. (Complaint, ¶¶21, 26.) Defendant Meta aided and abetted defendants SBM and Barrientos's sexual harassment by ratification and condonement, by failing to enforce compliance with applicable law, and by concealing evidence, refusing to cooperate in investigations, and denying access to critical information and data. (Complaint, ¶¶31-33.)

On December 11, 2023, Plaintiffs filed a complaint against defendants, setting forth causes of action for:

(1) SEXUAL HARASSMENT [AGAINST ALL DEFENDANTS]

(2) FAILURE TO PREVENT HARASSMENT [AGAINST DEFENDANTS SBM AND META]

(3) NEGLIGENT HIRING, SUPERVISION AND RETENTION [AGAINST DEFENDANTS SBM AND META]

On February 9, 2024, defendants SBM and Barrientos filed a joint answer to Plaintiffs' complaint.

On April 8, 2024, defendant Meta filed a demurrer to Plaintiffs' complaint. On May 22, 2024, the court (Hon. Pennypacker) issued an order sustaining defendant Meta's demurrer to Plaintiffs' complaint with leave to amend.

On June 7, 2024, Plaintiffs filed the now operative first amended complaint ("FAC"). The only observable changes from the original complaint are the found at paragraphs 6 – 8 of the FAC wherein Plaintiffs allege defendant CBRE Group, Inc. ("CBRE") provides facilities management, project management, transaction (both property sales and leasing) and consulting services and valuation, among others. (FAC, ¶6.) Defendant CBRE worked for defendant Meta to provide facilities management services at defendant Meta's properties, including the Facebook campuses where plaintiffs performed their work and were sexually harassed by defendant Barrientos. (*Id.*) Defendant CBRE was an agent for defendant Meta. (*Id.*)

Defendants CBRE and Meta, by and through defendant CBRE, had the right to control the means and manner by which defendant SBM employees (including Plaintiffs) performed their work, exercised considerable direct and indirect control over their working conditions, had the authority and/or did give specific instructions to them on what to do an how to perform

their work, had the authority to and/or did direct and control how and when defendant SBM employees performed their work and had the authority to and/or did directly or indirectly inspected and supervised their work to ensure that they were following the instructions set out by defendants CBRE and Meta. (FAC, ¶7.)

Defendants CBRE and Meta, by and through defendant CBRE, had policies and procedures in force to protect the employees who worked on their property or under the supervision of defendant CBRE, who assigns the tasks for the plaintiffs and supervises them and defendant Barrientos. (FAC, ¶8.) Defendant CBRE reported to defendant Meta. (*Id.*) Defendant CBRE had the authority to investigate allegations of sexual harassment and to terminate SBM employees. (*Id.*)

Plaintiffs' FAC continues to assert the same causes of action asserted in the original complaint but adds CBRE as a defendant.

On August 8, 2024, defendant Meta filed the motion now before the court, a demurrer to Plaintiffs' FAC.

II. DEFENDANT META'S DEMURRER TO PLAINTIFFS' FAC IS SUSTAINED.

A. MEET AND CONFER.

As a preliminary matter, plaintiffs argue in their opposition that defendant Meta failed to meet and confer as required by Code of Civil Procedure section 430.41, subdivision (a) which states, in relevant part, "Before filing a demurrer pursuant to this chapter, the demurring party shall meet and confer in person or by telephone with the party who filed the pleading that is subject to demurrer for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised in the demurrer." "As part of the meet and confer process, the demurring party shall identify all of the specific causes of action that it believes are subject to demurrer and identify with legal support the basis of the deficiencies." (Code Civ. Proc., §430.41, subd. (a)(1).)

In the declaration accompany defendant Meta's demurrer to the FAC, defendant Meta's counsel states, in relevant part, "On July 3, 2024, I sent an email to Plaintiffs' counsel stating Meta's intentions of filing a second demurrer to the FAC on all causes of action ('Second Demurrer'). … I also provided Plaintiffs' counsel with the legal basis for the Second

Demurrer… Plaintiffs' counsel did not respond."[1] "Despite my repeated attempts to meet and confer with Plaintiffs' counsel, they have refused and ignored my communications with respect to Meta's challenges to both the Complaint and the FAC."[2]

In their opposition, Plaintiffs complain that there "was no detailed information or supporting authorities cited by Defendant before they filed this demurrer."[3] Plaintiffs' assertion is devoid of any evidentiary support. The undisputed evidence before the court on this issue is that defendant Meta satisfied its statutory obligations and it is ***Plaintiffs*** who failed to meet and confer. Nevertheless, "Any determination by the court that the meet and confer process was insufficient shall not be grounds to overrule or sustain a demurrer." (Code Civ. Proc., §430.41, subd. (a)(4).) The court will consider defendant Meta's demurrer on its merits. The court reminds all parties not to treat Code of Civil Procedure section 430.41 as a procedural hurdle and, instead, the parties should undertake the obligations set forth therein with sincerity and good faith.

B. **JOINT EMPLOYER.**

Defendant Meta demurs by arguing generally that the three new paragraphs added in the FAC do nothing to establish any liability against defendant Meta. Defendant Meta incorporates by reference the arguments it previously asserted in its earlier demurrer and asks this court essentially to affirm Judge Pennypacker's earlier ruling which sustained defendant Meta's demurrer to the original complaint as it is defendant Meta's position that no substantive changes have been made to the FAC.

In opposition, plaintiffs contend the newly added allegations support liability against defendant Meta as a joint employer. "The possibility of dual employment is well recognized in the case law. Where an employer sends an employee to do work for another person, and both have the right to exercise certain powers of control over the employee, that employee may be held to have two employers—his original or 'general' employer and a second, the 'special' employer." (*Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168, 174 (*Kowalski*).)

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[1] See ¶7 to the Declaration of Christopher Reilly in Support of Defendant Meta Platforms, Inc.'s Demurrer to Plaintiffs' First Amended Complaint ("Declaration Reilly").
[2] See ¶9 to the Declaration Reilly.
[3] See page 2, lines 5 – 6 of Plaintiffs' Opposition to Defendant Meta Platforms, Inc.'s Demurrer to First Amended Complaint; Memorandum of Points and Authorities.

After carefully reviewing Judge Pennypacker's earlier ruling, it does not appear Judge Pennypacker considered Plaintiffs' assertion now that defendant Meta is liable pursuant to allegations that defendant Meta was a joint employer.[4] [To the extent defendant Meta relies on the same arguments asserted in its earlier demurrer, defendant Meta did not address the potential for liability as a joint employer in its earlier briefing.]

> "If general and special employment exist, 'the injured [worker] can look to both employers for [workers'] compensation benefits. [Citations.]' " (*Kowalski v. Shell Oil Co., supra*, 23 Cal.3d at p. 175.) We see no reason not to permit an employee injured by violations of FEHA laws to likewise look to both employers for redress. Applying this doctrine promotes the purpose of FEHA, which is to prevent and eliminate sexual harassment and discrimination in the workplace. (See *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 493 [59 Cal. Rptr. 2d 20, 926 P.2d 1114] ["The FEHA itself requires that we interpret its terms liberally to accomplish the stated legislative purpose"]; *Fisher v. San Pedro Peninsula Hospital* (1998) 214 Cal. App. 3d 590, 624 [262 Cal. Rptr. 842] [provisions of FEHA are to be construed liberally to achieve its purpose of preventing and eliminating sexual harassment in the workplace].) To hold otherwise would allow Norrell and other temporary employment agencies to send their employees into hostile and discriminatory workplaces and to ignore complaints of harassment without fear of liability. By contrast, the purposes of FEHA are promoted if both the staffing agency and its client are treated as the employer, and employees of the client entity are treated as

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[4] Presumably, Plaintiffs attempt to allege defendant Meta is a joint employer because in a claim for sexual harassment, "The employer is strictly liable for acts of sexual harassment by a supervisor." (*Dickson v. Burke Williams, Inc.* (2015) 234 Cal.App.4th 1307, 1313, fn. 7.) "The employer is liable for harassment by a nonsupervisory employee only if the employer (a) knew or should have known of the harassing conduct and (b) failed to take immediate and appropriate corrective action." (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1041.) By alleging that defendant Meta is Plaintiffs' and defendant Barrientos's joint employer and alleging that defendant Barrientos is Plaintiffs' supervisor (see FAC, ¶¶4, 21, and 26), Plaintiffs seek to hold defendant Meta strictly liable without having to allege defendant Meta knew or should have known of the harassing conduct.

coworkers of employees of the staffing agency, within the meaning of FEHA. (*Carrisales v. Department of Corrections*, *supra*, 21 Cal.4th at p. 1140.)

(*Mathieu v. Norrell Corp.* (2004) 115 Cal.App.4th 1174, 1184-1185.)

In their opposition, Plaintiffs rely heavily upon *Vernon v. State of California* (2004) 116 Cal.App.4th 114 (*Vernon*) where the plaintiff, an African American firefighter, sued the City of Berkeley (City) and the State of California (State) for employment discrimination, violation of civil rights, and declaratory relief. The plaintiff suffered from a skin condition occurring exclusively in African American males which caused facial hairs to "curl back into the facial skin." To avoid the pain and disfigurement caused by this condition, plaintiff wore a short beard to alleviate the condition. Firefighters often use a respirator to fight fires. At some point, City implemented a new policy prohibiting any person with visible facial hair from taking a respirator mask fit test, the effect of which was to preclude any employee with facial hair from working in fire suppression. The new City policy was prompted by State regulations which specifically prohibited the use or testing of respirators by employees with facial hair. When City could not obtain a variance from the State regulation, City removed plaintiff from his position as a firefighter and terminated his employment. The plaintiff alleged the State regulation had a discriminatory impact upon African American males.

The trial court sustained a demurrer by the State on the ground, among other, that State was not plaintiff's employer. Plaintiff acknowledged City was his direct employer but argued State was an indirect employer. The *Vernon* court disagreed explaining:

> "The FEHA, however, prohibits only 'an employer' from engaging in improper discrimination. (§ 12940, subd. (a).)" [Footnote omitted.] (*Reno v. Baird* (1998) 18 Cal.4th 640, 644 [76 Cal. Rptr. 2d 499, 957 P.2d 1333].) The FEHA predicates potential "liability on the status of the defendant as an 'employer.' (§ 12926.)" (*Kelly v. Methodist Hospital of So. California*, *supra,* 22 Cal.4th 1108, 1116.) The fundamental foundation for liability is the "existence of an employment relationship between the one who discriminates against another and that other who finds himself the victim of that discrimination." (*Hill v. New York City Bd. of Educ.* (E.D.N.Y. 1992) 808 F. Supp. 141, 146.) FEHA requires

> "some connection with an employment relationship," although the connection "need not necessarily be direct." (*Lutcher v. Musicians Union Local 47* (9th Cir. 1980) 633 F.2d 880, 883.)

(*Vernon, supra*, 116 Cal.App.4th at p. 123.)

However, when it comes to determining the existence of an employment relationship, the *Vernon* court recognized:

> "There is no magic formula for determining whether an organization is a joint employer. Rather, the court must analyze 'myriad facts surrounding the employment relationship in question.' [Citation.] No one factor is decisive. [Citation.]" (*Choe-Rively v. Vietnam Veterans of America* (D.Del. 2001) 135 F. Supp. 2d 462, 470; see also *Graves v. Lowery* (3rd Cir. 1997) 117 F.3d 723, 729.) "[T]he precise contours of an employment relationship can only be established by a careful factual inquiry." (*Graves v. Lowery, supra*, at p. 729.)
>
> Factors to be taken into account in assessing the relationship of the parties include payment of salary or other employment benefits and Social Security taxes, the ownership of the equipment necessary to performance of the job, the location where the work is performed, the obligation of the defendant to train the employee, the authority of the defendant to hire, transfer, promote, discipline or discharge the employee, the authority to establish work schedules and assignments, the defendant's discretion to determine the amount of compensation earned by the employee, the skill required of the work performed and the extent to which it is done under the direction of a supervisor, whether the work is part of the defendant's regular business operations, the skill required in the particular occupation, the duration of the relationship of the parties, and the duration of the plaintiff's employment. [Citations omitted.] "'Generally, … the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations.' [Citation.]" [Citation omitted.]

> "Of these factors, the extent of the defendant's right to control the means and manner of the workers' performance is the most important." [Citations omitted.] In all cases, an "employer must be an individual or entity who extends a certain degree of control over the plaintiff." [Citation omitted.] The focus of our evaluation of the right to control the plaintiff's work performance is upon "not only the result but also the means by which the result was accomplished." [Citation omitted.] And particularly, the inquiry considers the level of control an organization asserts over an individual's access to employment opportunities. [Citations omitted.] Further, "the control an organization asserts must be 'significant,' [citation], and there must be a 'sufficient indicia of an interrelationship … to justify the belief on the part of an aggrieved employee that the [alleged co-employer] is jointly responsible for the acts of the immediate employer.' [Citations.]" [Citations omitted.] In determining liability under the FEHA, we look " 'to the degree an entity or person significantly affects access to employment' … ." [Citation omitted.]

(*Vernon*, *supra*, 116 Cal.App.4th at pp. 124-126.)

The *Vernon* court is noteworthy in that the appellate court affirmed a trial court's ruling on a pleading challenge, i.e., State's demurrer to the plaintiff's amended pleading. The *Vernon* court identified a number of factual omissions from plaintiff's pleading to justify its finding that the State was not the plaintiff's employer.[5] Normally, on a demurrer, a court looks to what is found in the plaintiff's complaint, not what is absent.[6] This court attributes the *Vernon*

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[5] See *Vernon*, *supra*, 116 Cal.App.4th at pp. 126 – 127: "State neither compensated appellant nor engaged his services in any way;" "The pleading does not allege that the State hired appellant, set his compensation, or maintained any personnel records for him;" "not trained by the State;" "no direct interference or participation by the State in the employment relationship;" "The State also had no apparent authority or discretion to discipline, promote, transfer, or terminate appellant. Nothing in the allegations or record indicates that appellant was covered by personnel policies that specifically govern State employees. Thus, the State did not set appellant's work schedule, determine the specific nature of the daily work he performed, or supervise the execution of his employment duties. Nor has appellant asserted that the State had the means or final authority to control discriminatory practices or policies within the City's Fire Department;" "We find none of the indicia of an employment relationship with the State in the allegations of the first amended complaint."

[6] "The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded." (*Vernon v. State of California* (2004) 116 Cal.App.4th 114, 121-122.)

court's reasoning to the fact that the demurrer was by defendant State who is only liable pursuant to statute and the claim at issue was brought pursuant to the statutory provisions of the FEHA. (*Id.* at p. 122—"public entities may be liable only if a statute declares them to be liable" and "[t]he crucial inquiry in the present case is whether the State may be liable to appellant under the statutory provisions of the FEHA.")

Although defendant Meta is not a public entity, because the court is testing for sexual harassment liability under FEHA, a statutory cause of action, the court applies "the general rule that statutory causes of action must be pleaded with particularity." (*Covenant Care, supra*, 32 Cal.4th at p. 790.) "[Where] recovery is based on a statutory cause of action, the plaintiff must set forth facts in his [or her] complaint sufficiently detailed and specific to support an inference that each of the statutory elements of liability is satisfied. General allegations are regarded as inadequate. [Citations.]" (*Mittenhuber v. City of Redondo Beach* (1983) 142 Cal.App.3d 1, 5.)

Here, Plaintiffs employs some key buzzwords and makes some conclusory allegations at paragraph 7 of its FAC. As noted earlier, Plaintiffs allege defendant Meta, by and through defendant CBRE, had the right to control the means and manner by which defendant SBM employees (including Plaintiffs) performed their work, exercised considerable direct and indirect control over their working conditions, had the authority and/or did give specific instructions to them on what to do an how to perform their work, had the authority to and/or did direct and control how and when defendant SBM employees performed their work and had the authority to and/or did directly or indirectly inspected and supervised their work to ensure that they were following the instructions set out by defendants CBRE and Meta.

However, just as the *Vernon* court found a number of factual omissions to be determinative, the court here also finds Plaintiffs' FAC to be lacking in specificity with regard to the various factors to support the existence of an employment relationship between Plaintiffs and defendant Meta. (See also fn. 4, above.) Accordingly, defendant Meta's demurrer to plaintiffs' FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] is SUSTAINED with 10 days' leave to amend.

The Court will prepare the formal order.

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Calendar Line 3
Case Name: *Pizzola v. Val Chris Investments, Inc., et al.*
Case No.: 24CV431707

Before the Court is a Demurrer by Defendants Val Chris Investments, Inc. and Richard A. Rodriguez, Trustee of the Richard Rodriguez Trust Dated June 30, 2016 to Plaintiff Brandi Pizzola's Second Amended Complaint. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background

Plaintiff Brandi Pizzola ("Plaintiff") is the resident and owner of the property located at 186 Damsen Drive, San Jose, CA 95116 ("Subject Property"). (Second Amended Complaint ["SAC"] at ¶ 1.) On November 29, 2022, Plaintiff obtained an interest only mortgage loan on the Subject Property for $50,000 with an interest rate of 12.50% from Defendant Val Chris Investments, Inc. ("VCI" or "Defendant") through a Deed of Trust. (SAC at ¶ 10.) An Assignment of the Deed of Trust was recorded in Santa Clara County, California Recorder's Officer from Defendant VCI to Defendant Richard A. Rodriguez, Trustee of the Richard Rodriguez Trust dated June 30, 2016 ("RR Defendant") (collectively "Defendants"). (SAC at ¶ 11.)

On August 25, 2023, a Notice of Default and Election to Sell Under a Deed of Trust for arrears in the amount of $2,445.82 was recorded in the Santa Clara County, California Recorder's Office. (SAC at ¶ 12.) A Notice of Trustee's Sale was recorded in the Santa Clara County, California Recorder's Office on December 1, 2023 with a sale date set for December 27, 2023, and later continued to January 24, 2024. (SAC at ¶ 13.) As of the date of the recording, Plaintiff had missed 6 payments in the amount of $520.83 each for a total of $3,124.98 excluding late payment fees. (SAC at ¶ 14.)

Prior to December 2023, Plaintiff alleges that she was advised by Maria Romo Rangel ("Ms. Rangel"), a servicing representative from VCI that they had received her check for $1,565.00, but that there were additional foreclosure fees and costs required to reinstate the loan. (SAC at ¶ 16.) Plaintiffs alleges "Maria Romo further stated that the investor (RR Defendant) was providing PLAINTIFF with a reinstatement quote and she could reinstate the loan if she agreed. MARIA ROMO further instructed PLAINTIFF that she should send a

cashier's check payable to Val Chris Investments in the amount of $6,091.00 hereinafter 'reinstatement amount' and mail it to 2601 Main Street, Suite 400, Irvine, CA 92614. Maria Romo attached the reinstatement letter to an email for her file." (SAC at ¶ 17.) In sum, Plaintiff was advised that if she paid the $6,091.98 amount, her loan would be reinstated and no foreclosure would take place. (SAC at ¶ 18.)

On December 7, 2023, Plaintiff paid the amount of $6,091.98 to Defendant VCI through a cashier's check sent via UPS. (SAC at ¶ 20.) Plaintiff further provided proof that the property tax and insurance was current. (SAC at ¶ 22.) Plaintiff received proof that the cashier's check had been received by Defendant VCI the next day on December 8, 2023. (SAC at ¶ 23.) Plaintiff alleges that "[t]hus, as of December 8, 2023, Plaintiff had complied with the reinstatement requirements and the loan should have been reinstated as per their written agreement, that if she paid the $6,091.98 the loan would be reinstated and would no longer be in default or foreclosure." (SAC at ¶ 24.)

A month later, on January 9, 2024, Ms. Rangel e-mailed Plaintiff stating "the lender has agreed to accept the reinstatement subject to receiving the January monthly payment. Please remit the monthly payment online or via check on or before the next Friday [*sic*] (19th)." (SAC at ¶ 25.) Plaintiff responded on January 16, 2024, advising Ms. Romo that her trial period plan had been accepted, she was current with her first mortgage, and that she'd be making the January $520 payment through the portal on the 18th when she received her paycheck. (SAC at ¶ 29.) However, Ms. Rangel responded that the lender did not want to accept the funds unless the senior loan was current, and planned to return the cashier's check back to Plaintiff. (SAC at ¶ 31.)

Plaintiff alleges that the first mortgage was in forbearance prior to putting her on a trial period plan or loan modification. (SAC at ¶ 30.) Plaintiff further alleges that these new conditions were never part of the initial requirement to reinstate the loan, and neither was the requirement to make the January 2024 payment. (SAC at ¶ 32.) Nevertheless, Plaintiff alleges she consented to these new terms, sent additional documents to show she was current, and was ready to make the January payment by the deadline, but was blocked out of the payment portal. (SAC at ¶ 33.)

On January 25, 2024, Plaintiff received an e-mail stating that VCI sold the Subject Property despite receiving her reinstatement check. (SAC at ¶ 40.) Plaintiff alleges that the fair market value of the Subject Property at the time of sale was $550,000. (SAC at ¶ 42.) The Subject Property sold at $130,000. (SAC at ¶ 43.) Plaintiff only owed $203,000 on her first mortgage, and lost in excess of $291,000 of equity had she been allowed to sell the Subject Property herself or file for Chapter 13 bankruptcy. (SAC at ¶¶ 44, 45.)

Plaintiff filed suit on February 23, 2024 and has twice amended the complaint. On July 25, 2024, Plaintiff filed her verified Second Amended Complaint ("SAC)" alleging seven causes of action for: (1) Violation of Civil Code § 2924c; (2) Breach of Contract; (3) Breach of the Covenant of Good Faith and Fair Dealing; (4) Promissory Estoppel; (5) Intentional Misrepresentation; (6) Wrongful Foreclosure; (7) Unfair Business Practices in Violation of Bus. & Prof. Code § 17200, et seq.

Defendants filed their Demurrer to the SAC on August 8, 2024. Plaintiff filed her Opposition on October 29, 2024. Defendants filed their Reply on November 12, 2024.

II. DISCUSSION

a. TIMELINESS

"A person against whom a complaint or cross-complaint has been filed may, within 30 days after service of the complaint or cross-complaint, demur to the complaint or cross-complaint." (Code Civ. Proc., § 430.40, subd. (a).)[7] Even if a demurrer is untimely filed, the Court has discretion to hear the demurrer so long as its action ". . . 'does not affect the substantial rights of the parties.' [Citations.]" (See *McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 281-282.) As stated above, Plaintiff filed the SAC on July 25, 2024. Defendants filed their Demurrer to the SAC on August 8, 2024, or within 30 days of service. Accordingly, the Demurrer is timely.

b. MEET & CONFER

"Before filing a demurrer pursuant to this chapter, the demurring party shall meet and confer in person or by telephone with the party who filed the pleading that is subject to demurrer for the purpose of determining whether an agreement can be reached that would

[7] All further undesignated statutory references are to the Code of Civil Procedure.

resolve the objections to be raised in the demurrer." (§ 430.41, subd. (a).) "As part of the meet and confer process, the demurring party shall identify all of the specific causes of action that it believes are subject to demurrer and identify with legal support the basis of the deficiencies." (§ 430.41, subd. (a)(1).) "Any determination by the court that the meet and confer process was insufficient shall not be grounds to overrule or sustain a demurrer." (§ 430.41, subd. (a)(4).)

In the Declaration of Bryan Theis, Defendants' counsel indicates that the parties have engaged in ongoing meet and confer efforts with respect to the pleadings. (See generally Declaration of Bryan Theis ["Theis Decl."].) Specifically with respect to the SAC, counsel indicates that he met and conferred with Plaintiff's counsel on June 22, 2024 and June 29, 2024. (Theis Decl. at ¶¶ 7,8, 9.) Counsel attaches his correspondence with Plaintiff's counsel as exhibits to his declaration. (Theis Decl., Ex 1, Ex. 2.) Although counsel does not indicate that he attempted to meet and confer telephonically, even if these efforts are insufficient the Court may still reach the merits of the Demurrer.

c. LEGAL STANDARD

A demurrer must distinctly specify the grounds upon which a pleading is objected to; a demurrer lacking such specification may be disregarded. (§ 430.60.) Defendants object to the Complaint pursuant to Code of Civil Procedure section 430.10, subdivision (e).

As relevant to the instant case, "[t]he party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in 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." (§ 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. (§§ 430.10, 430.50, subd. (a).)

A party against whom a complaint has been filed may also object by demurrer as provided in Section 430.30 to the pleading on the grounds that the pleading is uncertain. (§ 430.10, subd. (f).) "As used in this subdivision, 'uncertain' includes ambiguous and unintelligible." (*Ibid.*) A "[d]emurrer for uncertainty will be sustained only where the complaint is so bad that the defendant cannot reasonably respond; i.e. he or she cannot

reasonably determine what issues must be admitted or denied, or what counts or claims are directed against him." (*Khoury v. Maly's of Calif., Inc.* (1993) 14 Cal.App.4th 612, 616.)

The court in ruling on a demurrer treats it "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, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "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.) "If the allegations in the complaint conflict with the exhibits, we rely on accept as true the contents of the exhibits. However, in doing so, if the exhibits are ambiguous and can be construed in the manner suggested by plaintiff, then we must accept the construction offered by plaintiff." (*SC Manufactured Homes, Inc. v. Liebert* (2008) 162 Cal.App.4th 68, 83.)

d. MERITS

Defendants demur to the first cause of action for violation of Civil Code section 2924c, second cause of action for breach of contract, third cause of action for breach of the covenant of good faith and fair dealing, fourth cause of action for promissory estoppel, fifth cause of action for intentional misrepresentation, sixth cause of action for wrongful foreclosure, and seventh cause of action for a violation of Business and Professions Code section 17200.

With respect to these causes of action, Defendants assert that there are no allegations stated against RR Defendant in particular, and as such it must be dismissed from this action. (Amended Demurrer at p. 9:2-4; Reply at p. 5:21-24.) However, the SAC alleges that Defendant VCI is the loan servicer acting on behalf of the beneficiary, RR Defendant. (SAC at ¶ 2.) Here, VCI is authorized to proceed with foreclosure on RR Defendant's behalf by

recording the Notice of Default. (Civ. Code, § 2924c.) The SAC alleges that Ms. Rangel proceeded with imposing additional conditions on Plaintiff and eventually rejecting her tender of default based on the instructions provided by the investor, RR Defendant. (SAC at ¶¶ 25, 31.) Based on these allegations and because the agent is authorized to do any acts which the principal may do (Civ. Code, § 2304), the Court declines to dismiss RR Defendant from this action and finds that its acts are implicated by the acts of VCI with respect to each cause of action addressed below.

i. FIRST CAUSE OF ACTION FOR VIOLATION OF CIVIL CODE § 2924C

Defendants argue Plaintiff fails to state that $6,091.00 was the "entire" amount due under Civil Code section 2924c, subdivision (a)(1). The relevant text of that statute provides:

> Whenever all or a portion of the principal sum of any obligation secured by deed of trust or mortgage on real property . . . has, prior to the maturity date fixed in that obligation, become due or been declared due by reason of default in payment of interest or of any installment of principal . . . the trust or mortgagor . . . at any time within he period specified in subdivision (e), if the power of sale therein is to be exercised, or, otherwise at any time prior to entry of the decree of foreclosure, may pay to the beneficiary or the mortgagee or their successors in interest, respectively, the entire amount due at the time payment is tendered, with respect to (A) all amounts of principal, interest, taxes, assessments, insurance premiums, or advances actually known by the beneficiary to be, and that are in default and shown in the notice of` default, under the terms of the deed of trust or mortgage and the obligation secured thereby, (B) all amounts in default on recurring obligations not shown in the notice of default, and (C) all reasonable costs and expenses, subject to subdivision (c), which are actually incurred in enforcing the terms of the obligation, deed of trust, or mortgage, and trustee's or attorney's fees subject to subdivision (d), other than the portion of the principal as would not then be due had no default occurred, and thereby cure the default theretofore existing, and thereupon, all proceedings theretofore had or instituted shall be dismissed or discontinued and the obligation and deed of trust or mortgage shall be reinstated and shall be and remain in force and effect, the same as if acceleration had not occurred . . . For the purposes of this subdivision, the term 'recurring obligation' means all amounts of principal and interest on the loan, or rents, subject to the deed of trust or mortgage in default due after the notice of default is recorded; all amounts of principal and interest or rents advanced on senior liens or leaseholds which are

> advanced after the recordation of the notice of default; and payments of taxes, assessments, and hazard insurance advanced after recordation of the notice of default. If the beneficiary or mortgagee has made no advances on defaults which would constitute recurring obligations, the beneficiary or mortgagee may require the trustor or mortgagor to provide reliable written evidence that the amounts have been paid prior to reinstatement.

(Civ. Code, § 2924c, subd. (a)(1).) In sum, "the borrower can cure the default and reinstate the loan by paying the amount of the default, including fees and costs resulting from the default, rather than the entire accelerated balance. The mortgage lender must inform the borrower of the correct amount due to reinstate the loan." (*Taniguchi v. Restoration Homes LLC* (2019) 43 Cal.App.5th 478, 483-484 [internal citation omitted].)

Here, the initial Notice of Default issued on August 25, 2023, states that Plaintiff owed $2,445.82 and that this amount would increase until her account becomes current. (SAC, Ex. C.) The Notice of Default further provides:

> Upon your written request, the beneficiary or mortgagee will give you a written itemization of the entire amount you must pay. You may not have to pay the entire unpaid portion of your account, even though full payment was demanded, but you must pay all amounts in default at the time payment is made. However, you and your beneficiary or mortgagee may mutually agree in writing prior to the time the notice of sale is posted (which may not be earlier than the end of the three-month period stated above) to, amount other things, (1) provide additional time in which to cure the default by transfer of the property or otherwise, or (2) establish a schedule of payments in order to cure your default; or both (1) and (2).

(SAC, Ex. C.)

The Notice of Default further instructs Plaintiff to contact Defendants to find out the amount she must pay or to arrange for payment to prevent foreclosure. (SAC, Ex. C.) Plaintiff alleges that she was in constant contact with Defendant VCI to cure her default, and was told that this loan did not qualify for modification. (SAC at ¶ 15.) Plaintiff further alleges that prior to December 2023, VCI representative Ms. Rangel advised her that although they had received a check in the amount of $1,565.00, there were additional fees to be paid to reinstate the loan since it was in foreclosure at that point. (SAC at ¶ 16.) Ms. Rangel further advised that the investor, RR Defendant, provided a reinstatement quote of $6,091.00 to be mailed to

Defendants' offices. (SAC at ¶ 17.) Plaintiff alleges that she was advised that if she provided $6,091.98, her loan would be reinstated and the foreclosure sale would not take place. (SAC at ¶ 18.) Plaintiff sent a cashier's check for $6,091.98 on December 7, 2023, which was received by Defendant the following day, on December 8, 2023. (SAC at ¶¶ 20, 23.) Based on the Notice of Default and subsequent conversations with Ms. Rangel, Plaintiff has sufficiently alleged that $6,091.98 was the entire amount due to reinstate the loan. Although the Notice of Default indicates that "the beneficiary or mortgagee may require as a condition to reinstatement that you provide reliable written evidence that you paid all senior liens, property taxes, and hazard insurance premiums," (SAC, Ex. C), the conditions set forth by the investor were required on a later date after she had paid the reinstatement amount through a cashier's check. (SAC at ¶ 25.) Accordingly, the SAC sufficiently states a claim for violation of Civil Code section 2924c, and Defendants' challenges to this cause of action are without merit. Therefore, the Demurrer to the first cause of action for a violation of Civil Code section 2924c is OVERRULED.

ii. SECOND CAUSE OF ACTION FOR BREACH OF CONTRACT

Defendants argue no contract exists because the Plaintiff refers to various agreements such as the reinstatement letter and series of e-mails, but fails to include them in the SAC. (Amended Demurrer at pp. 7:16-8:5.) The elements of a cause of action for breach of contract are: (i) existence of the contract; (ii) Plaintiff's performance or excuse for nonperformance; (iii) Defendant's breach; and (iv) damage to plaintiff resulting therefrom. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.)

A contract exists only if the parties have a "'meeting of the minds on all material points.'" (*Bustamante v. Intuit, Inc.* (2006) 141 Cal.App.4th 199, 215 (*Bustamante*), quoting *Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 359; *Fair v. Bakhtiari* (2006) 40 Cal.4th 189, 203.) It is not enough that the parties agree on "some of the terms." (*Bustamante*, *supra*, 141 Cal.App.4th at p. 215.) Nor is it sufficient if the "essential terms [are] only sketched out, with their final form to be agreed upon in the future." (*Id.* at p. 213.) A contract exists only of the agreed-upon terms "provide a basis for determining the existence of a breach and for giving an appropriate remedy." (*Weddington Productions, Inc. v.*

Flick (1998) 60 Cal.App.4th 793, 811; *Bower v. Raymond J. Lucia Companies, Inc.* (2012) 206 Cal.App.4th 724, 734 [same].)

In addition to paying the reinstatement amount of $6,091.98, Plaintiff alleges that she was given two additional terms to consent and comply with: "(1) receipt of January 2024 payment on or before January 19th and (2) proof the 1st TD was 'current.'"[8] (SAC at ¶ 70.) Although Plaintiff does not include a copy of the reinstatement letter, contrary to Defendants' assertions, Plaintiff has alleged the terms of the agreement to their legal effect and has attached the e-mails that inform the additional terms described above. In paragraphs 17 and 18 of the SAC, Plaintiff alleges the existence of a conditional agreement between the parties, whereby if she provided $6,091.98, her loan amount would be reinstated and no foreclosure proceeding would occur. (SAC at ¶¶ 17, 18.) Plaintiff alleges that she complied with these terms and paid the $6,091.98 on December 7, 2024 and that the check was received the following day. (SAC at ¶¶ 20, 23.) Plaintiff attaches her proof of payment or performance as Exhibit E to the SAC. (SAC, Ex. E.)

Plaintiff further attaches the e-mails exchanged between her and Ms. Rangel addressing the additional terms imposed on her on January 9, 2024 after she had paid the reinstatement amount. (SAC, Exs. G, H, I, J.) Therein, Ms. Rangel imposes additional conditions on Plaintiff and states: "The lender has agreed to accept the reinstatement subject to receiving the January monthly payment. Please remit the monthly payment online or via check on or before next Friday. If you would like to avoid the late charge being added please remit the payment by 01/11/2024." (SAC, Ex. G.)

Plaintiff replied on January 16, 2024, stating that she was current with her first mortgage, even while on forbearance, since her trial period plan had been accepted and that she'd be making the January $520 payment through the portal on the 18th once she received her paycheck. (SAC, Ex. H.) Although these conditions were not part of the original agreement, Plaintiff alleges that she attempted to comply with them by providing proof that she was current on the senior loan and attempting to pay the January 2024 payment. (SAC at ¶ 33.) Plaintiff alleges she was impeded from making the January 2024 payment because she had

[8] "1st TD" appears to refer to the first deed of trust.

been blocked out of the portal and her original $6,091.98 check for reinstatement of the loan had been returned to her. (*Ibid.*)

To the extent Defendants argue the allegations of the Complaint conflict with the exhibits, the Court at most finds the exhibits ambiguous in that portions of the e-mails are cut off. (*SC Manufactured Homes, Inc. v. Liebert*, *supra,* 162 Cal.App.4th at p. 83.) Nonetheless, the exhibits can be construed in the manner suggested by Plaintiff and, for the purposes of the demurrer, the Court accepts the construction offered by Plaintiff. (*Ibid.*) Defendants notably do not challenge the terms of the agreement itself or whether Plaintiff has sufficiently alleged that it is was breached. Rather, Defendants merely challenge the sufficiency of Plaintiff's statements that an agreement existed based on the allegations and exhibits attached to the SAC. As such, based on the allegations taken as true at this stage of the proceedings, and the attached exhibits Plaintiff has sufficiently stated that an agreement existed between the parties. Accordingly, the Demurrer to the second cause of action for breach of contract is OVERRULED.

iii. THIRD CAUSE OF ACTION FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

To plead a breach of the implied covenant of good faith and fair dealing, a plaintiff must allege the existence of a contractual obligation, along with conduct that frustrates his right to benefit from the contract. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1324; *Carma Developers (Cal.), Inc. v. Marathon Development California Inc.* (1992) 2 Cal.4th 342, 371.)

Defendants argues the third cause of action for breach of the implied covenant of good faith and fair dealing fails because this cause of action only applies to claims for insurance bad faith. (Amended Demurrer at p. 8:7-9.) Not so. Defendants fails to provide any authority in support of this position. Rather, "[t]he covenant of good faith and fair dealing, implied by law in *every* contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349 (*Guz*) [emphasis added].)

The covenant cannot be endowed with an existence independent of its contractual underpinnings. (*Guz*, *supra*, 24 Cal.4th at p. 349.) "It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (*Id.* at pp. 349-350.)

The only other argument Defendants make with respect to this claim is that Plaintiff has failed to allege that she complied with her end of the bargain, i.e., she performed or had an excuse for nonperformance. (Amended Demurrer at p. 8:11-26.) Defendants argue the SAC does not allege facts stating that Plaintiff paid the January payment, that she attempted to do so, or that Defendants specifically prevented her from making payment. (*Ibid.*) Contrary to Defendants' assertions and as stated above with respect to the breach of contract claim, Plaintiff states several times throughout the SAC that on the date of payment, January 19, 2024, "she was ESTOPPED from making the payment" because "[t]he portal, where she was accustomed to making the monthly payment was closed and VCI refused to open it." (SAC at ¶¶ 33, 35, 46, 53, 102.)

Even if additional conditions were permissible and Plaintiff could have made the payment via check, these conditions were disclosed after Plaintiff had already sent the reinstatement check to Defendants, and the Subject Property was scheduled for sale three business days later. Furthermore, the SAC and exhibits allege that Plaintiff's reinstatement check was being returned to her on January 16, 2024, before the original date of compliance for January 19, 2024 provided by Defendants. (SAC at ¶ 16, Ex. I.) Thus, the allegations indicate that Defendants failed to provide the complete amount of time originally agreed to for Plaintiff to satisfy performance in the first place. The Court finds these allegations sufficient to allege both breach and Plaintiff's excuse for nonperformance. Accordingly, the Demurrer to the third cause of action for breach of the covenant of good faith and fair dealing is OVERRULED.

iv. FOURTH CAUSE OF ACTION FOR PROMISSORY ESTOPPEL

Defendants argue Plaintiff has failed to state sufficient facts to support a cause of action for promissory estoppel. (Amended Demurrer at p. 9:6-17.)

"In California, under the doctrine of promissory estoppel, 'A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.' " (*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, 310.) The elements of a promissory estoppel claim are "(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance." (*Laks v. Coast Federal Savings & Loan Assn.* (1976) 60 Cal.App.3d 885, 890.)

Contrary to Defendants' assertions, Plaintiff has sufficiently stated a claim for promissory estoppel. Defendants here promised to reinstate Plaintiff's loan and not foreclosure on her home if she paid the agreed upon default amount of $6,091.98, provided the January 2024 payment, and provided proof that she was current with all senior loans. (SAC at ¶¶ 17, 18, 25.) Plaintiff paid the amount of $6,091.98 more than five days prior to the original date of sale and provided proof that she was current with all senior loans. (SAC at ¶¶ 20, 30, 33.) Plaintiff attempted to provide payment by January 19, 2024, but alleges that she was estopped from doing so because Defendants blocked her out of the payment portal. (SAC at ¶ 33.) Plaintiff relied on the promises made by Defendants and attempted to perform the conditions imposed upon her. Plaintiff has alleged that she was injured by the reliance in that she lost her home, was unable to sell it, and was unable to file for Chapter 13 bankruptcy. (SAC at ¶¶ 42-45.) Plaintiff has provided sufficient details to state a claim for promissory estoppel. For these reasons, Defendants' Demurrer to the fourth cause of action is OVERRULED.

v. FIFTH CAUSE OF ACTION FOR INTENTIONAL MISREPRESENTATION

Defendants demur to the fifth cause of action for intentional misrepresentation on the grounds that the SAC fails to meet the heightened pleading standard for fraud-based claims in that it does not state the person making the representations or disclose the fraudulent statements. (Amended Demurrer at p. 10:2-26.)

"The elements of fraud that will give rise to a tort action for deceit are: (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of

falsity (or "scienter"); (c) intent to defraud, i.e. to induce reliance; (d) justifiable reliance; and (e) resulting damage." (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974; punctuation and citations omitted.) "All of these elements must be present if fraud is to be found; one element absent is fatal to recovery." (*Okun v. Morton* (1988) 203 Cal.App.3d 805, 828.) "Fraud actions are subject to strict requirements of particularity in pleading. … Accordingly, the rule is everywhere followed that fraud must be specifically pleaded." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216.) This necessitates pleading facts which show "how, when, where, to whom, and by what means the representations were tendered." (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645.)

The Court disagrees with Defendants to the extent they allege that the SAC does not state the person making the misrepresentations or disclose the fraudulent statements. Rather, the SAC states that Ms. Rangel, and agent of Defendant VCI represented that if Plaintiff paid the $6,091.98 amount within five days of the sale date, her loan would be reinstated and her home would not be foreclosed. (SAC at ¶¶ 17, 18.) Plaintiff paid this amount on December 7, 2024 over five days before the sale date. (SAC at ¶ 20.) However, Ms. Rangel then followed up with an additional condition for Plaintiff to pay the January 2024 payment by January 19, 2024 and prove that her prior mortgage was current. (SAC at ¶ 25.) Plaintiff alleges she attempted to prove that her mortgage was current but was estopped from providing payment on January 19, 2024. (SAC at ¶ 33.) Before Plaintiff could do so, she was informed by Ms. Rangel that VCI returned her cashier's check for $6,091.98 and would no longer reinstate her loan. (SAC at ¶ 31.) Plaintiff alleges that she relied on Ms. Rangel's assurances that performance of these tasks would guarantee her reinstatement. (SAC at ¶¶ 46, 48.) Plaintiff alleges that she was harmed because her home was foreclosed, she was deprived of equity on the sale, and she was unable to file for Chapter 13 bankruptcy. (SAC at ¶ 45.) Plaintiff's allegations sufficiently identify the person or agent of the Defendants as well as the specific misrepresentations made that she relied on to her own detriment. The Court finds Defendants' challenges to this cause of action are without merit. Accordingly, the Demurrer to the fifth cause of action for intentional misrepresentation is OVERRULED.

vi. TENDER RULE AS TO THE SIXTH AND SEVENTH CAUSES OF ACTION FOR WRONGFUL FORECLOSURE AND BUSINESS AND PROFESSIONS CODE SECTION 17200

Defendant challenges the sixth and seventh causes of action for wrongful foreclosure and violation of Business and Professions Code section 17200 on the grounds that these causes of action violate the tender rule. (Amended Demurrer at p. 11:2-6.)

Under the tender rule, a mortgagor-plaintiff is "required to allege tender of the amount of [the] secured indebtedness in order to maintain any cause of action for irregularity in the sale procedure." (*Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1109.) The tender rule was created because an action to set aside a foreclosure sale is an action in equity, and "[a] person asking for equity must be willing to do equity." (*Conforti v. Dunmeyer* (1962) 209 Cal.App.2d 41, 46.) The rationale for the tender rule is that "[i]t would be futile to set aside a foreclosure sale on the technical ground that notice was improper, if the party making the challenge did not first make full tender and thereby establish his ability to purchase the property. Thus, it is sensible to require that a trustor, whose default to begin with resulted in the foreclosure, give proof before the sale is set aside that he now can redeem the property." (*United States Cold Storage v. Great Western Savings and Loan Assoc.* (1985) 165 Cal.App.3d 1214, 1225; see also *Arnolds Management Corp. v. Eischen* (1984) 158 Cal.App.3d 575, 578; see also *Karlsen v. American Sav. & Loan Assn.* (1971) 15 Cal.App.3d 112, 117 ["A valid and viable tender of payment of the indebtedness owing is essential to an action to cancel a voidable sale under a deed of trust."].)

Equitable exceptions to the tender rule include: " '(1) where the borrower's action attacks the validity of the underlying debt, tender is not required since it would constitute affirmation of the debt; (2) when the person who seeks to set aside the trustee's sale has a counter-claim or set-off against the beneficiary, the tender and the counter-claim offset each other and if the offset is greater than or equal to the amount due, tender is not required; (3) a tender may not be required if it would be 'inequitable' to impose such a condition on the party challenging the sale; … (4) tender is not required where the trustor's attack is based not on principles of equity but on the basis that the trustee's deed is void on its face (such as where the

original trustee had been substituted out before the sale occurred)[;] [(5)] when the loan was made in violation of substantive law, or in breach of the loan agreement or an agreement to modify the loan[;] [and (6)] when the borrower is not in default and there is no basis for the foreclosure … .'" (*Turner v. Seterus, Inc.* (2018) 27 Cal.App.5th 516, 525-526 (*Turner*), quoting 5 Miller & Starr, Cal. Real Estate (4th ed. 2017) § 13:256, pp. 13-1101 to 13-1102, fns. omitted.)

Plaintiff argues the tender rule does not apply because she is not only contesting irregularities in the sale or notice procedure, but also the validity of the foreclosure in the first place. (Opposition at pp. 11:14-12:19.) Although Plaintiff cites afederal court decision, *Barrionuevo v. Chase Bank, N.A.* (N.D. Cal. 2012) 885 F. Supp. 2d 964, 969, the Court finds support for Plaintiff's position in published California authority.

In *Turner*, *supra*, 27 Cal.App.5th at p. 528, the Third District Court of Appeal discussed at length the distinction between the right to redemption and the right to reinstatement. "The requirements to exercise each of each of these rights—the rights to reinstatement and the right to redemption—are proportional to the value of the relief secured, and are not interchangeable." (*Ibid.*) The tender rule "is based on the theory that one who is relying upon equity in overcoming a voidable sale must show that he is able to perform his obligations under the contract so that equity will not have been employed for an idle purpose." (*Dimock v. Emerald Properties* (2000) 81 Cal.App.4th 868, 879.) In *Turner*, the court noted that the plaintiff's wrongful foreclosure claim was based on reinstatement and not redemption where the defendant's representative likewise refused tender of the amount to cure the default on the loan even though the plaintiff "had a statutory right, up to five days before the noticed foreclosure sale, to stop the sale by tendering the amount due as specified in [Civil Code section 2924c] subdivision (a)(1)." (*Turner, supra,* 27 Cal.App.5th at p. 530.) In this regard, the court concluded:

> Civil Code section 2924c thus limits the beneficiary's contractual power of sale by giving the trustor a right to cure a default and reinstate the loan within the stated time, even if the beneficiary does not voluntarily agree. (*Bank of America v. La Jolla Group II, supra*, 129 Cal.App.4th at p. 712.) "'The law does not require plaintiff to tender the purchase price to a trustee who has no right

> to sell the property at all.'" (*Alvarez v. BAC Home Loans Servicing, L.P.* (2014) 228 Cal.App.4th 941, 951.) To adequately plead a cause of action for wrongful foreclosure, all plaintiffs had to allege was that they met their statutory obligation by timely tendering the amount required by Civil Code section 2924c to stop the foreclosure sale, but Seterus refused that tender and thus allowed the foreclosure sale to go forward when Seterus should have accepted their tender and canceled the sale. Plaintiffs did so. If Seterus had accepted the tender, which Stacey stated was sufficient to cure the default, a rescission of the foreclosure sale and reinstatement of the loan was *mandatory*, and the subsequent sale was without legal basis and void, similar to the unlawful sales in [other cases].
>
> Under the circumstances alleged, tender of the full amount of the loan is unnecessary. It would be nonsensical to require plaintiffs to tender the full amount of the loan to maintain a wrongful foreclosure cause of action based on Seterus's refusal to accept the timely tender of the amount required under Civil Code section 2924c. (*Munger v. Moore* (1970) 11 Cal.App.3d 1, 7-8 [failure to accept timely tender of amount due to cure default may constitute wrongful foreclosure allowing a plaintiff to bring an action for damages for the illegal sale resulting from the failure to accept the timely tender].) Such a requirement would thwart the statutory intent of Civil Code section 2924c by failing to "protect the debtor/trustor from [a]sect wrongful loss of the property." (*Moeller v. Lien, supra*, 25 Cal.App.4th at p. 830.) Accordingly, we find the tender rule does not bar any of plaintiffs' causes of action.

(*Id.* at pp. 530-531.)

Plaintiff likewise alleges that she timely paid the reinstatement amount more than five days prior to the date of original sale. (SAC at ¶ 20.) However, Defendants later refused to accept the tender. (SAC at ¶ 31.) Had Defendants accepted the tender, which was sufficient to cure default, a rescission of the foreclosure would have likewise been mandatory, and the subsequent sale void. Under these circumstances, tender of the full amount would likewise be unnecessary, and the tender rule does not bar Plaintiff's six and seventh causes of action. Defendants do not challenge these causes of action on any other basis. For these reasons, the Demurrer to the sixth and seventh causes of action for wrongful foreclosure and violation of Business and Professions Code section 17200 is OVERRULED.

III. CONCLUSION

Defendant's Demurrer on uncertainty and insufficiency grounds to the first cause of action for a violation of Civil Code section 2924c, second cause of action for breach of contract, third cause of action for breach of the covenant of good faith and fair dealing, fourth cause of action for promissory estoppel, sixth cause of action for wrongful foreclosure, and seventh cause of action for a violation of Business and Professions Code section 17200 is OVERRULED in its entirety.[9]

The Court will prepare the formal order.

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[9] In their reply, Defendants contend that Plaintiff failed to address their argument that Richard A. Rodriguez, Trustee should be dismissed from the action because there are no allegations against him in the SAC. (Reply, p. 5: 21-24.) The Court sees no such argument in the demurrer. Accordingly, the court declines to consider that argument. (See *St. Mary v. Superior Court* (2014) 223 Cal.App.4th 762, 783 [points raised in the first time in reply should not be considered].)

Calendar Line 5
Case Name: *GoodLife Rx LLC, et al. v. James Wong, et al.*
Case No.: 22CV402833

Before the court is defendants and cross-complainants' motion for summary adjudication. Pursuant to California Rule of Court 3.1308, the court issues its tentative ruling as follows.

I. Background.

From 2003 and until 2019, plaintiffs and sisters Thuy Mien Thanh Le ("Mien") and Thuy Tram Thanh Le ("Tram") were working as pharmacists for defendant James Wong ("Wong") at his two pharmacies: Garcia Care and Garcia Pharmacy. (Complaint, ¶¶4 and 10.) Early in 2020, defendant Wong offered to sell both pharmacy businesses to plaintiffs Mien and Tram. (Complaint, ¶11.) Plaintiff Mien requested tax returns and profit/ loss statements for the businesses which defendant Wong provided. (*Id.*) Defendant Wong represented Garcia Pharmacy alone was generating more than one million dollars in annual profits. (*Id.*) Defendant Wong also promised that the largest account (a long-term care facility) of Garcia Pharmacy would continue using the pharmacy after the change of ownership and that the new owners should expect an increase of business from this facility due to the facility's expansion. (*Id.*)

On or around August 20, 2020, the parties signed two asset purchase agreements ("APA"). (Complaint, ¶12 and Exh. 1.) One APA provided for the transfer of assets of Garcia Pharmacy from defendant Farmacia San Jose LLC ("Farmacia") to plaintiff GoodLife Rx LLC ("GoodLife"). (*Id.*) The second APA, with virtually identical terms, provided for the transfer of assets of Garcia Care from defendant Drogueria San Jose LLC ("Drogueria") to plaintiff Siscare Rx LLC ("Siscare"). (*Id.*)

On or around December 2, 2020, Siscare and GoodLife received all necessary government approvals to operate both pharmacies. (Complaint, ¶13.) The effective date of the change of ownership for both pharmacies was December 2, 2020. (*Id.*)

After the change of ownership, plaintiffs discovered that most financial data provided by defendant Wong during the due diligence stage was incorrect and/or misrepresented because the cost of drugs in the reports provided by defendant Wong was incorrect. (Complaint, ¶14.) The businesses were not performing nearly as well as represented by

defendant Wong during the negotiations. (*Id.*) In fact, due to poor performance, substantial losses, and the pandemic, Garcia Care pharmacy had to be shut down shortly after the change of ownership. (*Id.*) Nevertheless, plaintiff still paid and continue to pay rent for Garcia Care's location due to the existing lease. (*Id.*)

Garcia Pharmacy also did not perform as promised by defendant Wong. (Complaint, ¶15.) Plaintiffs Mien and Tram focused their efforts on saving the business but the task was complicated by defendant Wong's refusal to help with business retention during the transition period as previously promised and required by the APA. (*Id.*)

In addition, defendant Wong kept Garcia Pharmacy's reimbursements and refunds which were deposited to his account post-closing for the services performed by the new owner. (Complaint, ¶16.) Defendant Wong refused to forward the funds to plaintiff GoodLife despite multiple demands. (*Id.*)

Plaintiffs also discovered that a blister pack machine and pharmacy software were non-operational which caused additional damages and costs to plaintiffs in excess of $150,000. (Complaint, ¶17.)

Despite Wong's promises, several facilities stopped using Garcia Pharmacy shortly after the change of ownership occurred. (Complaint, ¶18.)

Despite plaintiffs' efforts, Garcia Pharmacy continues to underperform and lose money. (Complaint, ¶19.)

On August 10, 2022, plaintiffs GoodLife, Siscare, Mien, and Tram filed a complaint against defendants Wong, Farmacia, and Drogueria asserting causes of action for:

(4) FRAUD

(5) BREACH OF CONTRACT

(6) VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE §17200, ET SEQ.

(7) NEGLIGENT MISREPRESENTATION

(8) DECLARATORY RELIEF

On February 16, 2023, defendants Farmacia, Drogueria, and Wong jointly filed an answer to plaintiffs' complaint.

On January 26, 2023, defendants Farmacia and Drogueria filed a cross-complaint against GoodLife, Siscare, Mien, and Tram asserting causes of action for:

(1) BREACH OF CONTRACT – GARCIA PHARMACY APA

(2) BREACH OF CONTRACT – GARCIA PHARMACY PURCHASE NOTE

(3) BREACH OF CONTRACT – GARCIA PHARMACY INVENTORY NOTE

(4) BREACH OF CONTRACT – GARCIA PHARMACY GUARANTY

(5) BREACH OF CONTRACT – GARCIA CARE APA

(6) BREACH OF CONTRACT – GARCIA CARE PURCHASE NOTE

(7) BREACH OF CONTRACT – GARCIA CARE INVENTORY NOTE

(8) BREACH OF CONTRACT – GARCIA CARE GUARANTY

(9) PROMISSORY ESTOPPEL – FARMACIA, DROGUERIA AGAINST GOODLIFE, MIEN, AND TRAM

(10) PROMISSORY ESTOPPEL – DROGUERIA AND FARMACIA AGAINST SISCARE, MIEN, AND TRAM

(11) DECLARATORY RELIEF

The cross-complaint arises from cross-defendants GoodLife, Siscare, Mien, and Tram's failure and refusal to pay over $5.5 million owed for the two pharmacies they purchased from Drogueria and Farmacia in a transaction which closed in or around December 2020. (Cross-Complaint, ¶9.)

On February 21, 2023, plaintiffs/ cross-defendants GoodLife, Siscare, Mien, and Tram jointly filed a Judicial Council form general denial of cross-complainants Farmacia and Drogueria's cross-complaint.

On April 23, 2024, defendants/ cross-complainants Farmacia, Drogueria, and Wong filed a motion for summary judgment/ adjudication of plaintiffs' complaint and cross-complainants' cross-complaint. On September 18, 2024, the court issued a tentative ruling denying defendants/ cross-complainants' motion for summary judgment/ adjudication. A minute order dated September 19, 2024 reflects, "No one has contested the Tentative Ruling. The Tentative Ruling is adopted." The court issued its order after hearing on September 20, 2024.

On September 5, 2024, prior to the ruling on defendants/ cross-complainants Farmacia, Drogueria, and Wong's motion for summary judgment/ adjudication, defendants/ cross-complainants Farmacia, Drogueria, and Wong filed the motion now before the court, a separate motion for summary adjudication directed at (1) the first and fourth causes of action of plaintiffs' complaint; (2) the second cause of action of plaintiffs' complaint; and (3) plaintiffs[/ cross-defendants]' affirmative defenses [to the cross-complaint].

On October 9, 2024, defendants/ cross-complainants Farmacia, Drogueria, and Wong filed an amended notice of motion in which they acknowledge this court [in its September 20, 2024 order] ruled and rejected their argument that the first and fourth causes of action of plaintiffs' complaint are time-barred. Defendant Farmacia, Drogueria, and Wong "accordingly withdraw such argument" from the instant motion for summary adjudication. Also on October 9, 2024, defendants/ cross-complainants Farmacia, Drogueria, and Wong filed an amended separate statement of undisputed material facts in support of motion for summary adjudication.

II. DEFENDANTS/ CROSS-COMPLAINANTS WONG, FARMACIA, AND DROGUERIA'S MOTION FOR SUMMARY ADJUDICATION IS DENIED.

C. PROCEDURAL VIOLATION.

As a preliminary matter, the court notes that defendants/ cross-complainants Wong, Farmacia, and Drogueria's memorandum of points and authorities in support of their motion for summary adjudication exceeds the page limitations set forth at California Rules of Court, rule 3.1113, subdivision (d) which states, in relevant part, "In a summary judgment or summary adjudication motion, no opening or responding memorandum may exceed 20 pages." Defendants/ cross-complainants' memorandum of points and authorities is 25 pages, exclusive of the table of contents and table of authorities. Defendants/ cross-complainants did not seek leave in advance from this court for a page extension as permitted by California Rules of Court, rule 3.1113, subdivision (e).

"A memorandum that exceeds the page limits of these rules must be filed and considered in the same manner as a late-filed paper." (Cal. Rules of Court, rule 3.1113, subd. (g).) A court may, in its discretion, refuse to consider a late-filed paper but must indicate so in the minutes or in the order. (Cal. Rules of Court, rule 3.1300, subd. (d).) ***The court hereby***

refuses to consider defendants/ cross-complainants' opening memorandum beyond page 20, particularly since defendants/ cross-complainants already sought summary judgment/ adjudication in a separate earlier-filed motion.

D. **SERIAL MOTION FOR SUMMARY ADJUDICATION.**

As a further preliminary matter, the court pauses to consider whether defendants/ cross-complainants are acting within their rights by filing a second motion for summary adjudication. "A party shall not move for summary judgment based on issues asserted in a prior motion for summary adjudication and denied by the court unless that party establishes, to the satisfaction of the court, newly discovered facts or circumstances or a change of law supporting the issues reasserted in the summary judgment motion." (Code Civ. Proc., §437c, subd. (f)(2).)

The court is aware of authority which precludes a second motion for summary judgment/ adjudication if it is merely a "reformatted, condensed, and cosmetically repackaged" version of the first motion. (See *Schachter v. Citigroup, Inc.* (2005) 126 Cal.App.4th 726, 739; see *Bagley v. TRW, Inc.* (1999) 73 Cal.App.4th 1092, 1097 [second motion showed no new law and listed no new material facts in the separate statement].) However, where the second motion is "not identical and involve[s] different legal theories," the requirements of Code of Civil Procedure section 437c, subdivision (f)(2) do not operate as a procedural bar to consideration of the second motion. (*Patterson v. Sacramento City Unified School Dist.* (2007) 155 Cal.App.4th 821, 827.)

Although the earlier motion for summary judgment/ adjudication and the present motion for summary adjudication concerns, in part, the first and fourth causes of action of plaintiffs' complaint, the arguments now being asserted are different from the ones asserted earlier, with the exception of an argument concerning the statute of limitations. Defendants, however, acknowledged the court's ruling on the earlier motion for summary judgment/ adjudication and withdrew the statute of limitations argument in their amended notice of motion. The balance of the present motion for summary adjudication is directed at plaintiffs' second cause of action [breach of contract] and affirmative defenses, neither of which were the subject of the earlier motion for summary judgment/ adjudication. Consequently, the issues/

arguments raised in the present motion are not moot and the court will consider them on their merits.

E. **DEFENDANTS WONG, FARMACIA, AND DROGUERIA'S MOTION FOR SUMMARY ADJUDICATION OF THE FIRST (FRAUD) AND FOURTH (NEGLIGENT MISREPRESENTATION) CAUSES OF ACTION IS DENIED.**

In examining defendants' various arguments to the first and fourth causes of action of the plaintiffs' complaint, the court begins by noting that, "a summary judgment motion is directed to the issues framed by the pleadings." (*Hilton K. v. Greenbaum* (2006) 144 Cal.App.4th 1406, 1412; see also *Turner v. State of California* (1991) 232 Cal.App.3d 883, 891 ["The pleadings delimit the issues to be considered on a motion for summary judgment."].)

Defendants acknowledge the plaintiffs' first and fourth causes of action allege a number of misrepresentations [concerning past or then-existing facts], but also allege a number of purportedly false promises [of some future performance]. In the court's opinion, this is significant because, "[a] motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (Code Civ. Proc., §437c, subd. (f)(1).) Code of Civil Procedure section 437c, subdivision (f) does not authorize partial summary adjudication.[1] In order to obtain summary adjudication of the first and fourth causes of action, defendants must demonstrate that each of the allegedly false representations and false promises cannot be sustained. Conversely, to overcome summary adjudication of the first and fourth causes of action, plaintiffs need only demonstrate a triable issue with regard to any one of the allegedly false representations or promises.

With these principles in mind, the court will consider one of the alleged misrepresentations found in the plaintiffs' complaint. "Defendants also represented that GarciaCare and Garcia Pharmacy were profitable with Garcia Pharmacy bringing at least a

[1] Actually, the Code of Civil Procedure does authorize partial summary adjudication. "Notwithstanding subdivision (f), a party may move for summary adjudication of a legal issue or a claim for damages other than punitive damages that does not completely dispose of a cause of action, affirmative defense, or issue of duty pursuant to this subdivision." (Code Civ. Proc., §437c, subd. (t).) However, a motion for partial summary adjudication pursuant to subdivision (t) must be pursuant to joint stipulation and order of the court (see Code Civ. Proc., §437c, subd. (t)(1)-(2)), which did not occur here.

million dollars a year. Defendants provided incorrect or fraudulent financials to support this misrepresentation." (Complaint, ¶25; see also ¶11—"Wong represented that Garcia Pharmacy alone was generating more than one million dollars in yearly profits.") "Garcia Pharmacy was not bringing a million dollars in profit, as represented by Defendants." (Complaint, ¶27.) In moving for summary adjudication, defendants argue this representation was not false.[2] In support, defendants proffer the following fact: The financial reports prepared by Sellers' [defendants Farmacia and Drogueria] accountant and provided to Buyers establish that the pharmacy had generated over a million in sales and profit.[3] Plaintiffs, however, proffer evidence in opposition disputing this assertion,[4] thereby creating a triable issue of material fact with regard to whether the alleged representation was false.

One of the requisite elements of fraud is "knowledge the misrepresentation is false" (*Cohen v. Kabbalah Centre Internat., Inc.* (2019) 35 Cal.App.5th 13, 20) or "lack of reasonable grounds for believing the assertion to be true" (*SI 59 LLC v. Variel Warner Ventures, LLC* (2018) 29 Cal.App.5th 146, 154) in the case of negligent misrepresentation. As a separate basis for summary adjudication, defendants contend even if this statement were false, they did not know such representation was false or lack reasonable grounds for believing the statement to be true. To support this contention, defendants proffer the following facts: To facilitate conversations [concerning purchase], on March 10, 2020, Wong emailed Tram Le and Mien Le a number of documents, among them, drug sales or "dispensing" reports and certain financial reports.[5] The dispensing reports were generated through Sellers' pharmacy software, Intelligent Pharmacy Software, also known and referred to as "IPS" software.[6] The financial reports were generated by QuickBooks, which the pharmacies used for financial and bookkeeping purposes.[7] Wong assisted Buyers in numerous respects, both prior to and after closing on

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[2] "The elements of fraud that will give rise to a tort action for deceit are: " '(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.' " (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974 [64 Cal.Rptr.2d 843, 938 P.2d 903], internal quotation marks omitted.)
[3] See Defendants' and Cross-Complainants' Amended Separate Statement of Undisputed Material Facts in Support of Motion for Summary Adjudication ["Defendants' UMF"], Issue No. 1, Fact No. 10.
[4] See Plaintiffs' Response to Defendants' Separate Statement of Undisputed Facts, Issue No. 1, Fact No. 10.
[5] See Defendants' UMF, Issue No. 1, Fact No. 6.
[6] *Id.*
[7] *Id.*

December 2, 2020, including introducing them to professionals such as a bookkeeper and pharmacy consultant that who could help them prepare for closing and taking over and running the businesses after the transaction closed; continuing to provide Buyers with dispensing reports from the pharmacies' IPS software, assisting with insurance and transferring the lease for the pharmacies to Buyers; helping to set-up payroll and employee benefits; contacting account holders on behalf of Buyers; assisting Buyers with their board of pharmacy application; and even making several months' of equipment lease payments post-closing.[8]

It is not entirely clear to this court how such evidence affirmatively establishes that defendants did not know their representation that Garcia Pharmacy was making one million dollars in annual profit was false or lack reasonable grounds for believing the statement to be true. At best, defendants' evidence is that its conduct before and after closing is consistent with a legitimate sale of the business and this somehow gives rise to an inference that defendant had no knowledge or reason to believe the representation they made concerning annual profits was false.

In the absence of such an inference, defendants simply assert plaintiffs have no evidence or insufficient evidence for a trier of fact to conclude that Wong knew any representation was false when he made it.

> Summary judgment law in this state, however, continues to require a defendant moving for summary judgment to present evidence, and not simply point out [footnote] that the plaintiff does not possess, and cannot reasonably obtain, needed evidence. … For the defendant must "support[]" the "motion" with evidence including "affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice" must or may "be taken." (Code Civ. Proc., § 437c, subd. (b).) The defendant may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action. The defendant may also present evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence--as through

[8] See Defendants' UMF, Issue No. 1, Fact No. 9.

admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing.

(*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854-855.)

Even if defendant's evidence were sufficient to create an inference that defendants did not have "knowledge the misrepresentation is false" or that defendants "lack[ed] reasonable grounds for believing the assertion to be true," plaintiffs proffer evidence in opposition which would create a triable issue of material fact. Specifically, plaintiffs proffer evidence that defendant Wong made other misrepresentations in connection with the sale of the businesses – that in November 2019 Wong represented Garcia Pharmacy was not approved as a Medicaid provider because the California Department of Healthcare Services ("DHCS") did not receive the application that Garcia Pharmacy had submitted to DHCS to participate as a medical provider but, in truth, DHCS had commenced legal proceedings against Garcia Pharmacy in April 2019, suggesting defendant Wong's explanation in November 2019 was untruthful.[9] "Where fraud is charged, evidence of other fraudulent representations of like character by the same parties at or near the same time is admissible to prove intent." (*Borse v. Superior Court* (1970) 7 Cal.App.3d 286, 289.)

There being a triable issue of material fact concerning one of the alleged misrepresentations, the court need not address arguments raised concerning any of the other alleged misrepresentations/ false promises. Accordingly, defendants Wong, Farmacia, and Drogueria's motion for summary adjudication of the first (fraud) and fourth (negligent misrepresentation) causes of action is DENIED.

F. **DEFENDANTS WONG, FARMACIA, AND DROGUERIA'S MOTION FOR SUMMARY ADJUDICATION OF THE SECOND (BREACH OF CONTRACT) CAUSE OF ACTION IS DENIED.**

In part, plaintiffs' second cause of action alleges, "Defendants breached the two APAs (attached as Exhibit 1) by … failing to forward the post-closing reimbursements and other

[9] See ¶¶4 and 22 to the Declaration of Thuy Mien Thanh Le in Opposition to Defendants' Motion for Summary Adjudication.

funds (which belonged to Plaintiffs) to Plaintiffs' bank account as required by the following sections of the APAs: [Sections]" 5.3, 6.5, and 7.6. (Complaint, ¶34(a).)

"To prevail on a cause of action for breach of contract, the plaintiff must prove (1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damage to the plaintiff." (*Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1186; see also CACI, No. 303.) In moving for summary adjudication, defendants contend they did not breach. Defendants simply point the court to the relevant provisions of the APAs and assert, "The APA does not contain a provision requiring that Sellers forward post-closing reimbursements to Buyers' bank account as Buyers allege, and Sellers did not breach the APAs by allegedly failing to forward post-closing reimbursements to Buyers."[10]

It is this court's opinion and finding that defendants do not meet their initial burden simply by putting this legal conclusion into their separate statement. As defendants acknowledge, section 6.5 of the APAs states:

> The Parties agree to take all steps as may be reasonably necessary to put Buyer in actual possession and control of all of the Purchased Assets. From time to time following the Final Closing, each of Owner and Garcia Pharmacy shall … transfer as Buyer may reasonably request or as may be otherwise necessary to more effectively convey and transfer to, and vest in, Buyer and put Buyer in possession of, any part of the Purchased Assets.

Given this provision of the APAs, the court finds it incumbent upon defendants to establish (through the presentation of evidence and/or argument) that the alleged "post-closing reimbursements and other funds (which belonged to Plaintiffs)" do not come within the definition of "Purchased Asset," as that term has been defined by the APAs. Defendants have not done so here. Defendants bear the initial burden on a motion for summary adjudication "of showing that a cause of action has no merit if the party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to the cause of action." (Code Civ. Proc., §437c, subd. (p)(2).) The court

[10] See Defendants' UMF, Issue No. 3, Fact No. 28.

need not decide whether defendants are entitled do summary adjudication of any of the other alleged breach(es) of contract.

As defendants have not met their initial burden, defendants Wong, Farmacia, and Drogueria's motion for summary adjudication of the second (breach of contract) cause of action is DENIED.

G. CROSS-COMPLAINANTS WONG, FARMACIA, AND DROGUERIA'S MOTION FOR SUMMARY ADJUDICATION OF AFFIRMATIVE DEFENSES IS DENIED.

[As noted above, the court has exercised its discretion not to consider defendants/ cross-complainants' memorandum of points and authorities beyond page 20 as it exceeds the page limitations. Although cross-complainants Wong, Farmacia, and Drogueria seek summary adjudication of the first through fourth, sixth through eighth, tenth through thirteenth, fifteenth, nineteenth through twentieth, and twenty-third affirmative defenses asserted by plaintiffs/ cross-defendants, the court will consider only the arguments directed at the first three.]

"[A] moving [plaintiff] may rely on factually devoid discovery responses to shift the burden of proof pursuant to section 437c, subdivision [(p)(1)]. Once the burden shifts as a result of the factually devoid discovery responses, the [defendant] must set forth the specific facts which prove the existence of a triable issue of material fact." (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 590 [mere restatement of the allegations contained in the first amended complaint is so devoid of facts that an absence of evidence can be inferred]; see also *Andrews v. Foster Wheeler LLC* (2006) 138 Cal.App.4th 96, 104 [Defendant propounded a series of special interrogatories which called for all facts regarding plaintiffs' exposure to asbestos from defendant's products. Plaintiffs' answers "contain[ed] little more than general allegations against [defendant] and does not state specific facts showing that [plaintiff] was actually exposed to asbestos-containing material from [defendant's] products."] See also *Leyva v. Garcia* (2018) 20 Cal.App.5th 1095, 1102-1103—"a defendant may show the plaintiff does not possess evidence to support an element of the cause of action by means of presenting the plaintiff's factually devoid discovery responses from which an absence of evidence may be reasonably inferred.")

Cross-complainants Wong, Farmacia, and Drogueria proffers evidence that in response to form interrogatory number 15.1 which asks cross-defendants to identify "each special or affirmative defense in your pleadings and for each (a) state all facts upon which you base the denial or special or affirmative defense," cross-defendants responded with what cross-complainants contend are "only thin, boilerplate, and factually devoid discovery responses on information and belief … refer[ring] to broad and general categories of vague documents as well lists of people … [and] refer[ring] to a boilerplate recitation of the claims made against Sellers in their Complaint, which they have provided under the heading of 'General Denial.'"[11] When later asked to provide supplemental responses to their discovery, plaintiffs/ cross-defendants stated they have "nothing further to add to [their] prior responses."[12]

The court is of the opinion that cross-complainants have not met their initial burden because the discovery responses referred to are not "factually devoid." Cross-complainants themselves acknowledge each of the responses to the first three affirmative defenses incorporates by reference a statement set forth "under the heading of 'General Denial.'" In looking at that statement (found at exhibit 8 to the Declaration of Sonya Tamiry in Support of Motion for Summary Adjudication), plaintiffs/ cross-defendants include factual statements to support their affirmative defenses. For example, "Responding Party's performance under the promissory notes and the asset purchase agreements was excused for a number of reasons, such as: the financial information provided by James Wong and his entities misrepresented businesses' expenses (namely, the cost of drugs), thereby inflating gross profits upon which plaintiffs relied in making their decision to purchase the businesses …." Although the statements tend to mirror the allegations found in plaintiffs/ cross-defendants' complaint, the court does not agree with cross-complainants' assertion that the discovery responses are so "factually devoid" that they satisfy cross-complainants' initial burden on summary adjudication.

Accordingly, cross-complainants Wong, Farmacia, and Drogueria's motion for summary adjudication of the first through fourth, sixth through eighth, tenth through thirteenth,

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[11] See Defendants' UMF, Issue No. 4, Fact No. 24.
[12] See Defendants' UMF, Issue No. 4, Fact No. 25.

fifteenth, nineteenth through twentieth, and twenty-third affirmative defenses asserted by plaintiffs/ cross-defendants is DENIED.

The Court will prepare the formal order.

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Calendar Line 6
Case Name: *Jane Doe v. John Doe et. al.*
Case No.: 22CV404624

Plaintiff Jane Doe ("Plaintiff") filed this action for battery, assault, sexual harassment, negligent failure to warn, train, or educate, negligent hiring, retention, and supervision, and negligent supervision of a minor against Doe defendants (collectively, "Defendants") based on John Doe 2's ("John Doe 2") alleged sexual assault of Plaintiff. Defendant John Doe 1, a California school district (the "District"), now brings a motion for summary judgment as to the remaining causes of action in Plaintiff's complaint.

I. Background

According to the allegations of the complaint, Plaintiff is an adult female born on April 16, 1962. (Complaint, ¶ 1.) In approximately 1977, Plaintiff was enrolled as a ninth-grade student in a school operated by the District. (*Id.* at ¶ 19.) John Doe 2, a ninth-grade teacher employed at this school, taught biology to Plaintiff during her ninth-grade year. (*Ibid*.) During the course of Plaintiff's freshman and sophomore years in high school, John Doe 2 allegedly sexually assaulted Plaintiff on numerous occasions in 1977 and 1978 by isolating Plaintiff in John Doe 2's classroom and a supply closet therein. (*Id*. at ¶¶ 19-21.) Plaintiff was a minor, approximately 15 years old, during the periods of sexual assault. (*Id.* at ¶ 2.)

On September 22, 2022, Plaintiff filed a complaint against Defendants, asserting causes of action for negligent hiring, retention, and supervision, sexual harassment, negligent failure to warn, train, or educate, negligent supervision of a minor, battery, and assault. On August 15, 2023, the court sustained the District's demurrer to the second and third causes of action, sexual harassment and negligent failure to warn, train, or educate, leaving only two causes of action remaining against the District. On August 30, 2024, the District moved for summary judgment as to the remaining causes of action against the District, negligent hiring, retention, and supervision and negligent supervision of a minor.[22] On November 5, 2024, Plaintiff filed an opposition to the District's motion. The District filed a reply on November 14, 2024.

II. The District's Motion for Summary Judgment

A. Legal Standard

The moving party bears the initial burden of production to make a prima facie showing that there are no triable issues of material fact. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) A motion for summary judgment or adjudication shall be granted only if it completely disposes of an entire cause of action, an affirmative defense, a claim for damages, or an "issue of duty." (See Code Civ. Proc., § 437c, subd. (f)(1); *McClasky v. California State Auto. Ass'n* (2010) 189 Cal.App.4th 947, 975 ["If a cause of action is not shown to be barred in its entirety, no order for summary judgment–or adjudication–can be entered."].)

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[22] Plaintiff's causes of action for assault and battery are alleged against John Doe 2, not the District.

"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.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable finder of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra,* 25 Cal.4th at p. 850.) "A party cannot avoid summary judgment by asserting facts based on mere speculation and conjecture, but instead must produce admissible evidence raising a triable issue of fact." (*Christina C. v. County of Orange* (2013) 220 Cal.App.4th 1371, 1378, internal citations and quotation marks omitted; see also *McHenry v. Asylum Entertainment Delaware, LLC* (2020) 46 Cal.App.5th 469, 479 [because speculation is not evidence, speculation cannot create a triable issue of material fact].)

The pleadings limit the issues presented for summary judgment or summary adjudication, and such a motion may not be granted or denied based on issues not raised by the pleadings. (See *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health Ins.* (2010) 181 Cal.App.4th 60, 74 ["[T]he pleadings determine the scope of relevant issues on a summary judgment motion. [Citations.]"].) "A moving party seeking summary judgment or adjudication is not required to go beyond the allegations of the pleading, with respect to new theories that could have been pled, but for which no motion to amend or supplement the pleading was brought, prior to the hearing on the dispositive motion. [Citations.]" (*Jacobs v. Coldwell Banker Residential Brokerage Co.* (2017) 14 Cal.App.5th 438, 444, quoting *Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403, 421.)

The moving party's evidence will be strictly construed in determining whether they negate or disprove an essential element of a plaintiff's claim "in order to resolve any evidentiary doubts or ambiguities in plaintiff's favor." (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 64.) The evidence must be liberally construed in support of the opposing party, resolving any doubts in favor of that party. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.)

B. Procedural Defects

"All references to exhibits or declarations in supporting or opposing papers must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number." (Cal. Rules of Court, rule 3.1113(k) ("Rule 3.1113").) "A trial court may decline to consider an argument that does not comply with rule 3.1113 of the California Rules of Court. [Citations.]" (*Nationwide Ins. Co. of America v. Tipton* (2023) 91 Cal.App.5th 1355, 1365.)

When a party's brief does not comply with Rule 3.1113, "the trial court ha[s] no obligation to undertake its own search of the record 'backwards and forwards to try to figure out how the law applies to the facts' of the case. [Citations.] Rule 3.1113 rests on a policy-based allocation of resources, preventing the trial court from being cast as a tacit advocate for the moving party's theories by freeing it from any obligation to comb the record and the law for factual and legal support that a party has failed to identify or provide." (*Quantum Cooking Concepts, Inc. v. LV Associates, Inc.* (2011) 197 Cal.App.4th 927, 934; see also *Alki Partners,*

LP v. DB Fund Services, LLC (2016) 4 Cal.App.5th 574, 590 ["By failing to support the factual assertions in their legal arguments with citations to the evidence, plaintiffs have forfeited their argument"].)

The District has submitted a separate statement of undisputed facts, and Plaintiff has submitted a response, but neither party cites to any of this evidence in their briefs where the parties *actually make substantive arguments*. Rather, the parties cite to this evidence in providing factual background to the court (see Opposition, pp. 1:18-5:8) and in discussing the issues present before the court (see MPA, pp. 2:6-6:3.) The District has submitted roughly forty pages of deposition transcripts and discovery responses as evidence, Plaintiff over 100 pages. The court cannot be expected to comb this through evidence unguided, nor is it required to piece together the parties' arguments from evidence cited in the parties' briefs that is not linked to the parties' *actual substantive arguments*. The court declines to deny the District's motion on this basis, or disregard Plaintiff's opposition, but notes that in the future the parties should comply with the California Rules of Court and cite evidence where they argue and apply the law.

C. The Parties' Evidentiary Showings

The District supports its motion with a memorandum of points and authorities, a separate statement of undisputed material facts, and a declaration from the District's counsel with four exhibits attached. Plaintiff submitted an opposition brief, Plaintiff's counsel attaches to her declaration five exhibits as opposing evidence, and Plaintiff also submitted a separate statement objecting to the District's undisputed facts.

D. Discussion

a. Negligent Hiring, Retention, and Supervision

The District argues that in any negligence action, a plaintiff must "demonstrate the existence of a legal duty of care, a breach of that duty, and proximate causation linking the breach with resulting injury." (Memorandum of Points and Authorities in Support of the District's Motion for Summary Judgment ("MPA"), p. 7:7-9, citing *Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1142.) According to the District, a school district and its personnel owe students "the duty to use reasonable measures to protect [them] from foreseeable injury at the hands of third parties acting negligently or intentionally," including "injuries to a student resulting from a teacher's sexual assault." (*Id.* at p. 7:20-23, citing *C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 870 (*C.A.*).) The District contends that the knowledge or notice requirement under California Code of Civil Procedure section 340.1 ("Section 340.1") "requires the victim to establish that the non-perpetrator defendant had actual knowledge, constructive knowledge (as measured by the reason to know standard), or was otherwise on notice that the perpetrator had engaged in past unlawful sexual conduct with a minor and, possessed of this knowledge or notice, failed to take reasonable preventative steps or implement reasonable safeguards to avoid acts of future unlawful sexual conduct by the perpetrator." (*Id.* at p. 9:17-22, citing *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 549 (*Los Angeles*).)

The District argues that here "there is no evidence that the District breached its duty to the Plaintiff" because Plaintiff has no evidence that the District "ever received a complaint

about John Doe 2 (during his employment and before the alleged incident) or even that John Doe 2 had engaged in pre-incident unlawful sexual conduct with minors." (MPA, p. 10:1-7.) Furthermore, the District contends that it "took reasonable steps and implemented safeguards to avoid acts of childhood sexual assault." (*Id.* at p. 10:22-23.)

Plaintiff argues that "the foreseeability analysis is not focused on the propensities of the actual perpetrator of a sexual assault." (Plaintiff's Opposition to the District's Motion for Summary Judgment ("Opposition"), p. 7:25-26.) According to Plaintiff, a duty to protect exists "'even if the school does not have actual knowledge of a particular employee's history of committing, or propensity to commit, such abuse.'" (*Id.* at p. 8:13-15, quoting *Doe v. Lawndale Elementary School Dist.* (2021) 72 Cal.App.5th 113, 119, 132 (*Lawndale*).) According to Plaintiff, the "issue is not whether it is foreseeable a particular adult will sexually abuse a student if left alone with the student," but rather "the issue is whether it is reasonably foreseeable that organizations or entities that provide services primarily or exclusively for children have employees who may sexually abuse a child if the organization fails to take reasonable measures to prevent the abuse. [Citations.]" (*Id.* at p. 10:8-18.) Plaintiff argues "the evidence in this case is more than sufficient to raise a triable issue of material fact as to whether [the District] 'failed to take reasonable steps or to implement reasonable safeguards to avoid acts of childhood sexual assault.'" (*Id.* at p. 11:16-18, citing former Code Civ. Proc., § 340.1, subd. (c).) Plaintiff also contends that the deposition testimony of the District's person most qualified deponent and a classmate of Plaintiff's "strongly suggests that there is a triable issue of material fact as to whether the District either was, or at the very least should have been, aware of the risk of sexual assault of a student by a teacher and/or the behavior of John Doe 2." (*Id.* at p. 10:4-7.)

The court notes at the outset of its discussion that both the District and Plaintiff refer to an outdated version of Section 340.1, subdivision (c). In 2023, the state legislature removed the language referred to by both parties – "[a]n action described in paragraph (2) or (3) of subdivision (a) shall not be commenced on or after the plaintiff's 40th birthday . . ." – and inserted new language into the statute.[23] (See 2023 Cal ALS 655, 2023 Cal AB 452, 2023 Cal Stats. ch. 655.)

Nevertheless, the state legislature specified in the current version of Section 340.1, subdivision (p), that "[t]his section applies to any claim in which the childhood sexual assault occurred on and after January 1, 2024. Notwithstanding any other law, a claim for damages based on conduct described in paragraphs (1) through (3), inclusive, of subdivision (a), in which the childhood sexual assault occurred on or before December 31, 2023 may only be commenced pursuant to the applicable statute of limitations set forth in existing law as it read on December 31, 2023." (Code Civ. Proc., § 340.1, subd. (p).) The law, as it existed on December 31, 2023, prior to the 2023 amendment noted by the court above, did appear to

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[23] Section 340.1, subdivision (a) currently states that "there is no time limit for the commencement of any of the following actions for recovery of damages suffered as a result of childhood sexual assault . . . an action for liability against any person or entity who owed a duty of care to the plaintiff, if a wrongful or negligent act by that person or entity was a legal cause of the childhood sexual assault that resulted in the injury to the plaintiff." (Code Civ. Proc., § 340.1, subd. (a)(2).)

include the language cited by both parties as subdivision (c) of Section 340.1. (See 2023 Cal ALS 655, 2023 Cal AB 452, 2023 Cal Stats. ch. 655.) Furthermore, the facts here concern alleged childhood sexual assault prior to January 1, 2024, and Plaintiff filed the complaint in 2022. Therefore, Section 340.1's former subdivision (c) applies here.

Section 340.1, subdivision (c), as it read in 2022, stated that: "An action described in paragraph (2) or (3) of subdivision (a) shall not be commenced on or after the plaintiff's 40th birthday unless the person or entity knew or had reason to know, or was otherwise on notice, of any misconduct that creates a risk of childhood sexual assault by an employee, volunteer, representative, or agent, or the person or entity failed to take reasonable steps or to implement reasonable safeguards to avoid acts of childhood sexual assault." (See former Code Civ. Proc., § 340.1, subd. (c).)

The court now turns to the case law cited by both parties in determining the duty owed, and allegedly breached, by the District. Neither party appears to dispute that in general, there "is generally no duty to protect others from the conduct of third parties." (*Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, 627; see *Brown v. USA Taekwondo* (2021) 11 Cal.5th 204, 215 (*Brown*).) But one exception to that rule exists when a "person is in what the law calls a 'special relationship' with either the victim or the person who created the harm." (*Brown, supra,* 11 Cal.5th at p. 215.) The Supreme Court held that such a special relationship exists between a school district and its employees and students. (*C.A., supra,* 53 Cal.4th at p. 869 ["Plaintiff, in turn, argues the special relationship between public school personnel and students imposes on the District's administrative and supervisory employees a duty of reasonable care to protect a student from foreseeable dangers, including those from other school employees. For the reasons given below, we agree with plaintiff."].)

Plaintiff cites *Lawndale* in support. In *Lawndale*, an employee of a defendant school district sexually assaulted plaintiff. (*Lawndale, supra,* 72 Cal.App.5th at p. 119.) Plaintiff appealed the trial court's decision to grant summary judgment on each of plaintiff's causes of action. (*Ibid*.) As to the plaintiff's causes of action for negligent supervision, the school district argued that it could not be liable for failing to supervise unless and until it had "actual knowledge" of abuse or of prior sexual misconduct and "that it was undisputed none of the District employees knew [the district's employee] sexually abused Doe or anyone else until the police arrested [the district's employee]." (*Id.* at p. 121.) In opposition to the motion, plaintiff argued that "because school districts have a special relationship with their students, the District had an ongoing duty to protect [plaintiff] from foreseeable harm, including sexual abuse, and that therefore the District's duty was not 'triggered only upon actual knowledge of a sexual relationship.'" (*Ibid*.)

The Court of Appeal, reversing the trial court's grant of summary judgment, found that Plaintiff's description of the district's "duty – specifically, its administrators' duty to take reasonable measures to protect her – [was] correct." (*Lawndale, supra,* 72 Cal.App.5th at p. 124.) According to the Court of Appeal, "the issue is not whether it was reasonably foreseeable [the employee's] conduct would injure [plaintiff], but whether it is reasonably foreseeable the failure of school administrators to take reasonable measures to prevent sexual abuse will injure students. . . . [S]exual abuse by members 'of an organization that provide[s] activities exclusively for children'—like an elementary school district—is reasonably foreseeable, even where the organization 'had no knowledge that [the employee] had

previously sexually or physically abused anyone or had a propensity to do so.' [Citation.]" (*Id.* at pp. 131-132.)

Importantly, the plaintiff in *Lawndale* brought suit under the Child Abuse and Neglect Reporting Act (Pen. Code, § 11164 et seq.), and the Court of Appeal in *Lawndale* does not discuss Section 340.1 outside of distinguishing case law using Section 340.1. (*Lawndale, supra,* 72 Cal.App.5th at p. 130.) The Court of Appeal in *Lawndale* noted that the Section 340.1 case relied on by the trial court "was not a duty case. [*Santillan v. Roman Catholic Bishop of Fresno* (2012) 202 Cal.App.4th 708] involved Code of Civil Procedure section 340.1, subdivision (a), which 'extends the statute of limitations within which a victim of childhood sexual abuse may sue a person or entity who did not perpetrate the abuse but was a legal cause of it.'" (*Ibid*.) Given *Lawndale* is not a Section 340.1 case, the court does not find *Lawndale* persuasive as to whether Plaintiff's complaint, and the allegations therein, comply with Section 340.1.

The District cites *Los Angeles* to support its argument that Plaintiff here must show evidence the District had actual, previous knowledge of Doe Defendant's sexual assaults. (MPA, p. 9:17-28.) Plaintiffs in *Los Angeles*, suing the City of Los Angeles for negligent supervision related to sexual assault, argued that subdivision (b)(2) of Section 340.1 extended the statute of limitations to bring their claim. (*Los Angeles, supra,* 42 Cal.4th at pp. 536-537.) The court held that subdivision (b)(2) of Section 340.1 "requires the victim to establish that the nonperpetrator defendant had actual knowledge, constructive knowledge (as measured by the reason to know standard), or was otherwise on notice that the perpetrator had engaged in past unlawful sexual conduct with a minor and, possessed of this knowledge or notice, failed to take reasonable preventative steps or implement reasonable safeguards to avoid acts of future unlawful sexual conduct by the perpetrator." (*Id.* at p. 549.) At the time of decision, subdivision (b)(2) of Section 340.1 created "three conditions that must be met before it applies to a particular case: (1) the nonperpetrator defendant 'knew or had reason to know, or was otherwise on notice'; (2) that the perpetrator—'an employee, volunteer, representative, or agent'—had engaged in 'unlawful sexual conduct'; and (3) 'failed to take reasonable steps, and to implement reasonable safeguards, to avoid acts of unlawful sexual conduct in the future by that person, including, but not limited to, preventing or avoiding placement of that person in a function or environment in which contact with children is an inherent part of that function or environment.'" (*Id.* at p. 545.)

It appears that, following 2019 amendments to Section 340.1, the subdivision (b)(2) language cited by the court in *Los Angeles* became subdivision (c) of Section 340.1, the language in turn cited by the District in arguing Section 340.1 has a knowledge requirement.[24] Section 340.1, subdivision (c), however, as noted by Plaintiff (see Opposition, pp. 9:25-10:7), appears to have modified the former subdivision (b)(2) language cited by the court in *Los Angeles* such that the statute of limitations was extended if "the person or entity knew or had reason to know, or was otherwise on notice, of any misconduct that creates a risk of childhood sexual assault by an employee, volunteer, representative, or agent, *or* the person or entity failed

[24] Section 340.1, subdivision (b)(2), now reads: "[f]or purposes of this subdivision, a 'cover up' is a concerted effort to hide evidence relating to childhood sexual assault." (See Code Civ. Proc., § 340.1, subd. (b)(2).)

to take reasonable steps or to implement reasonable safeguards to avoid acts of childhood sexual assault." (See former Code Civ. Proc., § 340.1, subd. (c), emphasis added.)

The District argues that Plaintiff cannot establish that the District breached a duty to Plaintiff because Plaintiff cannot show that the District had actual or constructive knowledge of any previous sexual misconduct or assault by John Doe 2. (MPA, p. 10:1-9.) The court finds that the District has not met its burden on summary judgment solely on this basis, given the court's discussion of the outdated statute of limitations language examined by the court in *Los Angeles* – Section 340.1, subdivision (c), permits a party to bring suit if they are over the age of forty and a "person or entity failed to take reasonable steps or to implement reasonable safeguards to avoid acts of childhood sexual assault." (See former Code Civ. Proc., § 340.1, subd. (c).)

The District further argues that, regardless, the "undisputed evidence shows that the District took reasonable steps and implemented safeguards to avoid acts of childhood sexual assault."[25] (MPA, p. 10:22-23.) According to the District, John Doe 2 testified "he received training by the District during his student teaching time. [Citation.] Specifically, he was advised not to have any physical contact with students and to never be alone with students behind closed doors. [Citation.] Administrators would monitor the classrooms and supervise the hallways. [Citation.] John Doe 2 understood that it would have been a violation of the District's policies to physically assault a student, to sexually assault them, to kiss them, to touch their private parts, or to have a student touch his own private parts. [Citation.]" (*Id.* at pp. 5:25-6:3, citing Undisputed Statement of Material Facts nos. 18-20; see Declaration of Counsel in Support of the District's Motion for Summary Judgment ("Bengtson Decl."), Ex. D at pp. 35:16-36:1, 38:21-39:7, 50:15-21, 76:23-77:9.)

As Plaintiff points out in opposition, the District has not directed the court to any documentary evidence that the District had policies in place to avoid acts of childhood sexual assault, and the only relevant oral testimony before the court concerns training John Doe 2 states he received during "student teaching time." (Bengston Decl., Ex. D at pp. 34:24-35:9.) John Doe 2 testified that at no other time than during this student teaching period did John Doe 2 receive training from the District on the prevention of sexual abuse of children. (*Id.* at pp. 35:11-36:10.)

The court is skeptical that this evidence satisfies the District's burden as the moving party, and, even if it did, Plaintiff has created a triable issue of fact.[26] There is conflicting evidence as to whether the District did have a policy in place regarding sexual abuse and enforced such a policy during the time period alleged here. The District's "person most qualified" deponent, Mr. Tom Huynh, "associate superintendent of business services" (see Declaration of Susan Ulrich, Ex. D at p. 38:1-2), did not know of any policy, or documents discussing a policy, that the district would have had in place regarding the investigation of accusations of sexual abuse between 1970 and 1981, and confirmed that the District did not

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[25] As previously discussed, the District makes these statements without citing to any supporting evidence.

[26] Plaintiff's opposition brief suffers from the same defect as the District's MPA, making arguments as to triable issues of fact without citation to evidence. Again, the court reminds both parties to comply with the relevant California Rules of Court in the future.

keep records of complaints or investigations unless it led to disciplinary proceedings. (*Id*., Ex. D at pp. 60:14-61:19, 93:19-100:17, 123:4-15, 145:20-146:5.) The same deponent did not know if the District employed security guards or hall monitors at schools in the District from 1971 to 1981. (*Id*., Ex. D at pp. 107:16-24, 110:18-111:4.) Moreover, according to testimony from a fellow student who attended the same school as Plaintiff at the time Plaintiff attended that school within the District, the District had no security officer at the school where Plaintiff attended, other than the Vice Principal of the school, whose "presence was always somewhere around the school." (*Id.*, Ex. B at p. 69:2-20.)

Plaintiff directs the court to the location and layout of the classroom used by John Doe 2 – a classroom with an additional locked, windowless room that could only be accessed through the main classroom. (*Id.*, Ex. B at pp. 29:13-36:7, 54:23-58:24, 59:14-62:22, 65:24-67:9; Ex. E.) Plaintiff contends that the sexual assault occurred in both the main classroom and this additional locked, windowless room. (Complaint, ¶¶ 20-21.) Plaintiff also correctly notes that the District states, "[b]ased upon the interior location of the supply closet, if someone had walked through John Doe 2's main classroom door at the time of the assaults, that person wouldn't have been able to witness the assaults, which took between five and ten minutes." (MPA, at p. 2:13-16.) These facts create a triable issue of fact as to whether the District took reasonable steps or implemented reasonable safeguards to avoid acts of childhood sexual assault.[27]

For the foregoing reasons, the court DENIES the District's motion for summary judgment as to Plaintiff's cause of action for negligent hiring, retention, and supervision.

b. Negligent Supervision of a Minor

The District argues that its duty "of supervision was limited to the risks of harm that were reasonably foreseeable, i.e., that were known to the District or that reasonably should have been known to the District." (MPA, p. 12:3-5, citing *Thompson v. Sacramento City Unified Sch. Dist.* (2003) 107 Cal.App.th 1352, 1372.) According to the District, "[s]chool districts are not the insurers of the physical safety of students [citation], and '[s]tudents are not at risk merely because they are at school.' [Citation.] A contrary conclusion would unreasonably 'require virtual round-the-clock supervision or prison-tight security for school premises . . . .' [Citation.]" (*Id.* at p. 12:5-10, quoting *Leger v. Stockton Unified School Dist.* (1988) 202 Cal.App.3d 1448, 1459.) The District contends that, "[e]ven assuming, for argument's sake, that the Plaintiff could establish duty, the undisputed facts do not demonstrate a breach of that duty. It is not realistic to presume that a female high school student could be sexually assaulted anytime she is alone with her male teacher. This is not the legal standard now and it certainly was not the legal standard 50 years ago. The undisputed fact is that there was no reasonably foreseeable risk of harm to support a cause of action for Negligent

[27] In its reply brief, the District, for the first time, addresses whether Plaintiff can establish causation. Yet, the court need to consider arguments introduced in the reply brief. (See *REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489, 500 [refusing to entertain argument raised for the first time in reply brief]; *American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453 [noting arguments "raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument"].)

Supervision." (*Id.* at p. 13:1-6.) The District analogizes the facts here to those in *John R. v. Oakland Unified School Dist.* (1989) 48 Cal.3d 438 (*Oakland*), wherein the District contends the Supreme Court of California "rejected the proposition that sexual misconduct is foreseeable any time a minor and an adult are alone together in a room." (*Id.* at p. 12:18-20, citing *Oakland, supra,* 48 Cal.3d at p. 450, fn. 9.)

Regarding the District's argument as to Plaintiff's negligent supervision of a minor cause of action, *Lawndale* is informative. The District does not appear to make a Section 340.1 argument as to the negligent supervision of a minor cause of action, instead discussing the duty owed to Plaintiff (see MPA, pp. 11:8-12:7), and the court in *Lawndale* explicitly discusses the *Oakland* decision.[28] The school district in *Lawndale* sought summary judgment on causes of action against a school district for negligently supervising an employee and a victim of sexual abuse. (*Lawndale, supra,* 72 Cal.App.5th at p. 121 ["Doe filed this action against the District and Farr (who is not a party to this appeal). Doe asserted two causes of action for negligence—one based on negligent hiring, supervision, and retention of Farr, and one based on negligent supervision of Doe."].) The court in *Lawndale* discussed the language in *Oakland* cited by the District.

"In [*Oakland*] the Supreme Court held a school district was not vicariously liable for a teacher's sexual molestation of a student under respondeat superior. [Citation.] The lead opinion, joined by one other justice, included a footnote stating it was 'unduly pessimistic . . . to suggest that sexual misconduct is foreseeable any time a minor and an adult are alone in a room together . . . .' [Citation.] But the issue here is not whether it is foreseeable a particular adult will sexually abuse a student if left alone with the student. As the court recognized in [*Doe v. United States Youth Soccer Assn., Inc.* (2017) 8 Cal.App.5th 1118, 1132-1133], and as subsequent cases confirmed, the issue is whether it is reasonably foreseeable that organizations or entities that provide services primarily or exclusively for children have employees who may sexually abuse a child if the organization fails to take reasonable measures to prevent the abuse. In any event, to the extent [*Oakland*] suggests sexual abuse of students by school employees is not reasonably foreseeable, it is inconsistent with the Supreme Court's more recent holding in [*C.A.*] that school personnel owe students a duty to take reasonable measures to protect them from foreseeable injury, including 'injuries to a student resulting from a teacher's sexual assault.' [Citation.]" (*Lawndale, supra,* 72 Cal.App.5th at p. 132.)

The District also discusses *Dailey v. Los Angeles Unified Sch. Dist.* (1970) 2 Cal.3d 741 (*Dailey*). (See MPA, pp. 11:17-12;2.) In *Dailey,* parents of a 16-year-old boy brought a negligent supervision suit against the Los Angeles Unified School District after their son's friends killed their son while playing a boxing game during a school recess. (*Dailey, supra,* 2 Cal.3d at pp. 745-746.) The Supreme Court found, after the case was tried to a jury and plaintiffs appealed against a directed verdict the court entered against them, that there was evidence sufficient to support a verdict in favor of plaintiffs and reversed. (*Id.* at p. 751.) This case did not involve allegations of sexual abuse, but rather concerned the duty of school staff to supervise students during "recess and lunch periods." (*Id.* at p. 748.) The court does not find this opinion persuasive given differences in the facts before the court in *Dailey* and the court here, as there are cases more squarely on point addressing negligence and sexual assault in schools – namely, for example, *Lawndale.*

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[28] The court notes that neither *Oakland* nor *Lawndale* are Section 340.1 cases.

According to the court in *Lawndale*, "the issue is whether it is reasonably foreseeable that organizations or entities that provide services primarily or exclusively for children have employees who may sexually abuse a child if the organization fails to take reasonable measures to prevent the abuse." (*Lawndale, supra,* 72 Cal.App.5th at p. 132.) The court has already found that Plaintiff has raised a triable issue of fact as to whether the District failed to take reasonable steps or implemented reasonable safeguards to avoid acts of childhood sexual assault, and therefore DENIES the District's motion for summary judgment as to Plaintiff's cause of action for negligent supervision of a minor.

E. The District's Evidentiary Objections

With its reply in support of its motion, the District makes two objections to evidence submitted by Plaintiff. To the extent the District objects to portions of the opposition, the opposition is not evidence. To the extent it objects to the portions of Mark Terkelsen's deposition testimony underlying the challenged statements in the opposition, the court declines to address the objections as they are not material to the outcome of the motion. (See Code Civ. Proc., § 437c, subd. (q) [stating that "[i]n granting or denying a motion for summary judgment or summary adjudication the court need rule only on those objections to evidence it deems material to its disposition of the motion"].)

F. Conclusion

The court DENIES the District's motion for summary judgment.

The court will prepare the formal order.

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