TENTATIVE RULINGS

DEPT C11

Judge Andre De La Cruz

Court Reporters: Official court reporters (*i.e.*, court reporters employed by the Court) are not provided for law and motion matters in this Department. If a party desires a record of a law and motion proceeding, it will be the party's responsibility to provide a court reporter. Parties must comply with the Court's policy on the use of privately retained court reporters, which can be found at:

- Civil Court Reporter Pooling; and
- Court Reporter Interpreter Services.

Tentative rulings: The Court endeavors to post tentative rulings on the Court's website no later than Friday afternoon immediately preceding Monday's hearing. However, ongoing proceedings such as jury trials may prevent posting by that time. Moreover, tentative rulings may not be posted in every case.

Please do not call the department for tentative rulings if tentative rulings have not been posted.

The Court *will not* entertain a request to continue a hearing or the filing of further documents once a tentative ruling has been posted. Further, a motion may not be taken off calendar once a tentative ruling has been posted unless the entire action has been dismissed.

Submitting on tentative rulings: If all counsel intend to submit on the tentative ruling and do not desire oral argument, please advise the Courtroom Clerk by sending an email to: ctownsend@occourts.org and copied to eveloz@occourts.org. Please do not call the Department unless all parties submit on the tentative ruling. If all sides submit on the tentative ruling and so advise the Court, the tentative ruling shall become the Court's final ruling and the prevailing party shall give notice of the ruling and prepare an order for the Court's signature if appropriate under Cal. R. Ct. 3.1312.

When a proposed order is required, even if motion is unopposed, the parties are ordered to submit it in two formats: (1) one draft in MS Word (*.doc or *.docx); and (2) one draft in PDF format with all attachments/exhibits attached thereto in accordance with Cal. R. Ct. 3.1312(c)(1) and (2).

Non-appearances: If nobody appears for a hearing and the Court has not been notified that all parties submit on the tentative ruling, the Court shall determine whether the matter is taken off calendar or the tentative ruling becomes the final ruling. The Court also might make a different order at the hearing. *See Lewis v. Fletcher Jones Motor Cars, Inc.*, 205 Cal. App. 4th 436, 442 (2012), fn. 1.

Appearances: Department C11 conducts non-evidentiary proceedings, such as law and motion, remotely, by Zoom videoconference pursuant to Code of Civil Procedure § 367.75 and Orange County Local Rule (OCLR) 375. All counsel and self-represented parties appearing for such hearings must check-in online through the Court's website at https://www.occourts.org/media-relations/civil.html prior to the commencement of their hearing. Once the online check-in is completed, participants will be prompted to join the courtroom's Zoom hearing session. Participants will initially be directed to a virtual waiting room pending the start of their specific video hearing.

Check-in instructions and instructional video are available at https://www.occourts.org/media-relations/aci.html. The Court's "Appearance Procedures and Information—Civil Unlimited and Complex" ("Appearance Procedures") and "Guidelines for Remote Appearances" ("Guidelines") will be strictly enforced. It is your responsibility to ensure that your *audio **and** video* are functioning properly prior to your hearing.

Parties preferring to appear in-person for law and motion hearings may do so pursuant to Code of Civil Procedure § 367.75 and OCLR 375.

Public Access: The courtroom remains open for all evidentiary and non-evidentiary proceedings.

No filming, broadcasting, photography, or electronic recording is permitted of the video session pursuant to California Rules of Court, rule 1.150 and OCLR 180.

TENTATIVE RULINGS
May 13, 2024

#	Case Name	Tentative
1	Barriga vs. American Honda Motor Co., Inc. 2022-01253659	Motion to Compel Physical/Mental Examination filed by American Honda Motor Co., Inc. on 1/3/24 **Continued to June 12, 2024**
2	Conrad vs. Hoag Memorial Hospital Presbyterian 2023-01323133	**1**. Demurrer to Amended Complaint **2**. Motion to Strike Portions of Complaint filed by Hoag Memorial Hospital Presbyterian on 1/4/24 **3**. Case Management Conference Defendant Hoag Memorial Hospital Presbyterian ("Defendant") demurs to the First Amended Complaint of Plaintiff Herbert Conrad ("Plaintiff") and moves to strike portions of the same. Before filing a demurrer or motion to strike, the demurring party or party moving to strike *shall* meet and confer in person or by telephone with the party who filed the pleading being attacked to determine whether a resolution may be reached. Code Civ. Proc. §§ 430.41(a), 435.5(a). Here, counsel states he *attempted* to meet and confer with Plaintiff twice before filing and Plaintiff did not respond. However, Plaintiff asserts in his own declaration that he attempted to call counsel twice to meet and confer and was informed that counsel was unavailable both times and that he could not leave a message. While the parties did not meet and confer by telephone or in person, *as required*, the issues raised in this Demurrer and Motion to Strike are virtually identical to the issues raised in Defendant's prior Demurrer and

Motion to Strike against the original Complaint. The Court notes that the parties met and conferred as required with regard to the original Complaint. Thus, the Court will consider the merits of the instant matters, as it appears that the parties would not have reached any informal resolution by further meet and confer. However, the Court admonishes counsel and Plaintiff that the future failure to comply with *all applicable statutes and rules* may result in a motion being denied or taken off calendar and sanctions, where appropriate.

I. First Cause of Action for Breach of Contract

Defendant contends this claim fails because Plaintiff has not adequately pled the existence of a contract or breach. Defendant argues that because the allegations relate to performance of duties in excess of those required under the purported contract, those extraneous duties cannot constitute any breach.

"A cause of action for breach of contract requires pleading of a contract, plaintiff's performance or excuse for failure to perform, defendant's breach and damage to plaintiff resulting therefrom." *McKell v. Washington Mut., Inc.*, 142 Cal. App. 4th 1457, 1489 (2006).

The "failure to attach or to set out verbatim the terms of the contract [is] not fatal to [a] breach of contract cause of action." *Miles v. Deutsche Bank Nat'l Trust Co.*, 236 Cal. App. 4th 394, 402 (2015). Rather, "'a plaintiff may plead the legal effect of the contract rather than its precise language.'" *Id.*, citing *Construction Protective Services, Inc. v. TIG Specialty Ins. Co.*, 29 Cal. 4th 189, 199 (2002).

Plaintiff alleges that he was hired to provide security services as a Level 2 Security Guard pursuant to a written employment contract with Defendant.

Defendant was required to pay Plaintiff wages per the terms of the contract and state law and Plaintiff was assured continued employment and that he would not be terminated without good cause. Plaintiff further alleges that Defendant caused Plaintiff to perform services outside the contract but failed to pay him for those duties and, when Plaintiff made several wage grievance reports, Defendant terminated his employment.

Here, Plaintiff has adequately alleged each element. He does not need to attach a copy of the contract or cite the contract verbatim so long as he pleads the legal effect of it, which he has done. The contract required Defendant to pay Plaintiff certain wages and to not terminate Plaintiff without good cause and required Plaintiff to provide security services. This satisfies the first element.

As for the element of breach, Defendant focuses on the allegations regarding services outside of the contract but ignores the fact that Plaintiff also alleges that he was terminated after making wage grievance reports. Accepted as true, these allegations are sufficient to establish breach of the obligation not to terminate Plaintiff without good cause. Thus, the third element of breach is also satisfied.

Based on the above, the Demurrer to the first cause of action is **OVERRULED**.

II. Second Cause of Action for Breach of Covenant of Good Faith and Fair Dealing

Defendant also argues that the second claim fails because it is unclear what contractual term was frustrated and it appears that Plaintiff is merely restating the same facts that appear in his breach of contract claim.

		The implied covenant of good faith and fair dealing imposes upon the contracting parties the obligation to do everything that the contract presupposes they will do to accomplish the purpose of the contract. *Careau & Co. v. Security Pacific Business Credit, Inc*., 222 Cal. App. 3d 1371, 1393 (1990). A breach of the implied covenant requires more than a mere breach of a contractual duty, but "a conscious and deliberate act, which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement." *Id*. at 1394-1395. "If the allegations do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated." *Id*. at 1395. Thus, when a cause of action for breach of the implied covenant is nothing more than a duplicative claim for contract damages, it is proper to sustain a demurrer without leave to amend. *Id*. at 1401. Here, Plaintiff alleges that Defendant breached the covenant of good faith and fair dealing by retaliating against him and terminating his employment, which prevented him from receiving the benefits of employment. These allegations *do not* go beyond the same allegations in support of Plaintiff's breach of contract cause of action. Thus, the second claim for breach of the implied covenant of good faith and fair dealing is superfluous. Based on the above, the Demurrer to the second cause of action is **SUSTAINED without leave to amend**. III. Third Cause of Action for Wrongful Termination

		Defendant argues that Plaintiff has not adequately alleged the element of termination substantially motivated by a violation of public policy because the "policy" violated must be supported by either constitutional or statutory provisions, it must serve the interests of the public rather than merely of the individual, it must be articulated at the time of the discharge, and the policy must be substantial and fundamental. Defendant contends that none of these requirements have been alleged. "The elements of a claim for wrongful discharge in violation of public policy are: (1) an employer-employee relationship, (2) the employer terminated the plaintiff's employment, (3) the termination was substantially motivated by a violation of public policy, and (4) the discharge caused the plaintiff harm." *Yau v. Allen*, 229 Cal. App. 4th 144, 154 (2014). Here, Plaintiff alleges that he made several complaints to his supervisor and the Human Resources department regarding payment of wages owed to him and he was terminated on May 6, 2021, after his complaints were made. He further alleges that at the time he was terminated, Defendant admitted that he had a wage dispute with Defendant but said that the wage dispute was no longer an issue because Plaintiff was being terminated and would no longer be owed the money for services already performed. The prompt payment of wages due to an employee is a fundamental public policy of this state. *Gould v. Maryland Sound Industries, Inc*., 31 Cal. App. 4th 1137, 1147 (1995). Thus, Defendant's argument that Plaintiff has failed to allege any violation of public policy lacks merit. Plaintiff alleges he was wrongfully terminated after complaining that he had not received payment of wages for the services provided. Therefore, the Demurrer to the third cause of action is **OVERRULED**.

IV. Fourth Cause of Action for Retaliation

As to the fourth cause of action, Defendant argues that Plaintiff has failed to allege that he engaged in a protected activity that pertains to the subject matter of a FEHA statute. Defendant argues that the allegation that Plaintiff worked in excess of his contract does not constitute protected activity under Government Code § 12940(h).

Government Code § 12940(h) states that it is an unlawful employment practice "[f]or any employer . . . to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under [FEHA] or because the person has filed a complaint, testified, or assisted in any proceeding under [FEHA]." In other words, section 12940(h) makes it unlawful for an employer to retaliate against an employee who reports or otherwise opposes prohibited discrimination or harassment.

"To establish a *prima facie* case of retaliation, the plaintiff must show: (1) he or she engaged in a protected activity; (2) the employer subjected the employee to an adverse employment action; and (3) there exists a causal link between the protected activity and the employer's action." *Colarossi v. Coty US Inc*., 97 Cal. App. 4th 1142, 1152 (2002).

Plaintiff alleges he was terminated in retaliation for his complaints of unpaid wages. He further alleges that his age was a substantial factor in Defendant's decision to terminate him because he was older than most other security employees and Defendant preferred younger employees who would not assert their rights such as Plaintiff.

Plaintiff's alleged complaints of unpaid wages do not constitute protected activity because the failure to pay

		wages is not a discriminatory or harassing practice forbidden under FEHA. Further, Plaintiff's allegation that Defendant terminated his employment based on his age fails to support a cause of action for retaliation because Plaintiff does not allege that he ever engaged in any protected activity with regard to discrimination or harassment based on his age. Thus, Plaintiff has failed to establish the first element of a retaliation claim and the Demurrer to the fourth cause of action is accordingly **SUSTAINED**. Leave to amend is **DENIED**. It is a plaintiff's burden to state how a valid cause of action can be pled. *See Hendy v. Losse*, 54 Cal. 3d 723, 742 (1991). Plaintiff has not shown how he can amend to state a valid cause of action. Further, Plaintiff has already had the opportunity to amend once, as he filed the FAC after Defendant filed the original Demurrer and Motion to Strike based on the same arguments raised here. Because Plaintiff has already had an opportunity to amend and has not stated a valid cause of action, it appears that there is no reasonable possibility that the defect can be cured by further amendment. V. Motion to Strike The motion to strike the prayer for attorney's fees is **GRANTED**, as Plaintiff is not entitled to any attorney's fees as a *pro per* litigant. If Plaintiff obtains counsel in this action in the future, Plaintiff may seek leave to amend his pleading to add a request for attorney's fees. Defendant to file an Answer to the surviving claims of the FAC within fifteen (15) days. Defendant to give notice.
3	Elshenawi vs. Elshenawi	**1**. Motion for Protective Order filed by Rika Koizumi-Warnack on 11/29/23

	2022-01294879	**2**. Motion for Protective Order filed by Hosam Elshenawi on 11/29/24 **3**. Motion to Compel Production **4**. Motion to Compel Production filed by Hosam Elshenawi on 12/4/23 **Continued to July 29, 2024 at 9:00 a.m.**
4	Harman vs. Maroney 2023-01358756	**1**. Demurrer to Complaint **2**. Motion to Strike Portions of Complaint filed by Christine Maroney and City of Newport Beach on 1/4/24 **3**. Case Management Conference Defendants Christine Maroney and City of Newport Beach ("Defendants") filed a motion to strike and demurrer to the Complaint. I. Motion to Strike Defendants filed a motion to strike, seeking to strike allegations related to punitive damages. Plaintiff did not oppose the motion to strike. The Court may consider Plaintiff's non-opposition as an abandonment of any opposition to the arguments raised by Defendants in the motion to strike. *Herzberg v. County of Plumas*, 133 Cal. App. 4th 1, 20 (2005). Accordingly, the motion to strike is **GRANTED WITHOUT LEAVE TO AMEND** in its entirety. II. Demurrer to Complaint Defendants additionally filed a demurrer to the complaint, attacking the first cause of action for disability discrimination, second cause of action for failure to accommodate physical disability, third cause of action for wrongful termination, fourth cause of action for retaliation, and fifth cause of action for

failure to prevent discrimination as to both Defendants.

In opposition, Plaintiff concedes that the first, second, third, fourth, and fifth causes of action alleged against Defendant Christine Maroney are without merit. Plaintiff does not oppose the Demurrer as to these causes of action. Accordingly, the demurrer is **SUSTAINED WITHOUT LEAVE TO AMEND** as to the first, second, third, fourth, and fifth causes of action alleged against Defendant Christine Maroney.

The Court rules on the City's demurrer as follows:

- The demurrer is **OVERRULED** as to the first cause of action for discrimination. Plaintiff alleges that he had ADHD, informed Defendant of his physical disability, and received negative written performance reviews after Defendant learned of his disability, despite performing his duties in "an exemplary fashion." *Nejadian v. County of Los Angeles,* 40 Cal. App. 5th 703, 725 (2019) ("[D]owngrading of his rating on one of the categories in his performance evaluation clearly is an adverse employment action.").

- The demurrer is **SUSTAINED WITH LEAVE TO AMEND** as to the second cause of action for failure to accommodate physical disability. For purposes of an alleged failure to reasonably accommodate a disability, a 'plaintiff proves he or she is a qualified individual by establishing that he or she can perform the essential functions of the position to which reassignment is sought, rather than the essential functions of the existing position.'" *Cuiellette v. City of Los Angeles*, 194 Cal. App. 4th 757, 767 (2011). "If the employee fails to request an accommodation, the employer cannot be held liable for failing to provide one." *Spitzer v. The Good Guys, Inc.*, 80 Cal. App. 4th 1376, 1384 (2000). Here, Plaintiff does not allege that he

		requested an accommodation and that an accommodation was denied. • The demurrer **SUSTAINED WITHOUT LEAVE TO AMEND** as to the third cause of action for wrongful termination. Plaintiff concedes that the third cause of action for wrongful termination against the City is barred and does not oppose the demurrer to this cause of action. • The demurrer is **SUSTAINED WITH LEAVE TO AMEND** as to the fourth cause of action for retaliation. Pursuant to Government Code section 12940(h), it is an unlawful employment practice "[f]or any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part." Gov. Code § 12940(h). Here, Plaintiff does not allege that he opposed any forbidden practices and was thereafter retaliated against. • The demurrer is **OVERRULED** as to the fifth cause of action for failure to prevent discrimination and retaliation because Plaintiff's discrimination claim survives demurrer. Defendants to give notice.
5	Ma vs. Ma 2023-01357370	**1**. Demurrer to Amended Complaint filed by Lai Ma on 3/13/24 **2**. Case Management Conference Defendant Lai Ma's Demurrer to the First Amended Complaint is **OVERRULED**.

		As to the fifth cause of action for constructive fraud, this cause of action is sufficiently pled. "Constructive fraud 'is a unique species of fraud applicable only to a fiduciary or confidential relationship. Constructive fraud 'arises on a breach of duty by one in a confidential or fiduciary relationship to another which induces justifiable reliance by the latter to his prejudice.' Actual reliance and causation of injury must be shown.'" *Prakashpalan v. Engstrom, Lipscomb & Lack*, 223 Cal. App. 4th 1105, 1131 (2014) (internal citations omitted). "[T]he elements of a representation and falsity, are absent from constructive fraud. The fraud consists of the breach of the fiduciary duty of disclosure of relevant matters arising from the relationship." *Younan v. Equifax Inc.*, 111 Cal. App. 3d 498, 517 (1980). "'In its generic sense, constructive fraud comprises all acts, omissions and concealments involving a breach of legal or equitable duty, trust, or confidence, and resulting in damages to another. Constructive fraud exists in cases in which conduct, although not actually fraudulent, ought to be so treated—that is, in which such conduct is a constructive or quasi fraud, having all the actual consequences and all the legal effects of actual fraud.'" *Prakashpalan v. Engstrom, Lipscomb & Lack*, 223 Cal. App. 4th 1105, 1131 (2014). Here, the constructive fraud cause of action alleges that Defendant was Plaintiff's financial Power of Attorney; that Defendant represented he would act in Plaintiff's best interest in managing his personal banking; that Defendant relied on Plaintiff's representation; that Defendant withdrew and/or transferred out all of Plaintiff's money in his Capital One accounts and other bank accounts during the 2013 through 2020 time frame; that but for emptying out the bank accounts, there would be $337,000 or more that would be part of Plaintiff's assets; that Plaintiff was

		harmed as a consequence; and that Defendant's alleged conduct was a but for cause to Plaintiff's harm. *See* FAC, ¶¶ 97-102. The constructive fraud cause of action incorporates all prior allegations of the FAC into it (FAC ¶ 96), which also allege that since 2013, Plaintiff entrusted Defendant as his Power of Attorney to manage his personal banking; that on October 26, 2017, Plaintiff opened two Capital One Bank Accounts under his name to purchase Certificate of Deposits ("CD"); that Plaintiff relied on Defendant's representations and took no active management role and trusted Defendant to manage and invest his money; that unbeknownst to Plaintiff, Defendant opened two joint CD accounts under both Plaintiff and Defendant's name with Capital One Bank; that Defendant gradually transferred all the money in Plaintiff's Chase Accounts to the Joint Capital One Accounts; and that in December 2020, Plaintiff first discovered that all the Joint Capital One Accounts were emptied by Defendant. *See* FAC, ¶¶ 13, 28-32, 35. These allegations are sufficient to plead a cause of action for constructive fraud as Plaintiff alleges that he entrusted Defendant to act in his best interest in managing his personal bank account and provided Defendant with a Power of Attorney over his bank accounts and that Defendant breached same. Defendant to give notice.
6	Mai vs. The Tu Firm, APLC 2020-01142902	Motion to Compel Production filed by David Mai on 12/18/23 **Off Calendar**
7	Murphey Arts and Charitable	**1**. Demurrer to Amended Complaint

	Entertainment, Inc. vs. Kite Hill Community Association 2023-01357165	**2**. Motion to Strike Complaint filed by Clark A. Sackett, Niguel Point Properties, Inc. and Derek Gray on 10/3/24 **3**. Case Management Conference **Notice of Settlement filed, rejected.** **Continued to June 3, 2024 for corrected submission.**
8	National Funding, Inc. vs. AG Builders Plus LLC 2023-01329328	Motion for Summary Judgment and/or Adjudication filed by National Funding, Inc. on 11/15/23 Plaintiff National Funding, Inc. moves for summary adjudication on its two causes of action for breach of contract and breach of guaranty against Defendants AG Builders Plus, LLC and Terence Blackshear. Preliminarily, Defendants' evidentiary objections to the Declaration of Sandra Otero are **OVERRULED**. Ms. Otero was the signatory of the Business Loan Agreement and Guaranty on behalf of National Funding and, therefore, has personal knowledge of the loan at issue. Further, she is a custodian of record of National Funding's documents and records prepared in the ordinary course of business of financing loan transactions and has been employed by National Funding since 2001. Otero Decl., ¶ 2. Her declaration is supported by adequate foundation and her reliance on National Funding's records does not constitute inadmissible hearsay because the records are admissible under Evidence Code § 1271. Notably, Defendants have not submitted any of their own evidence in support of their Opposition and instead base their Opposition solely on the unmeritorious evidentiary objections. In light of this failure, each of the material facts set forth by National Funding is *undisputed*. Those facts establish the existence of the Business Loan Agreement and guarantee by Terence Blackshear, that on February 2,

		2023, AG Builders failed to make its required weekly payment under the loan terms, that National Funding has elected to exercise its rights under the terms to declare a breach and demand the entire outstanding balance due and payable, and that Defendants have failed to pay the outstanding amounts. Based on these facts, Plaintiff has shown that it is entitled to summary adjudication as to each of its two causes of action. Defendants have not submitted *any* evidence to raise any triable issue of material fact. Thus, the Motion is **GRANTED**. Plaintiff to prepare the appropriate order and judgment. Plaintiff to give notice.
9	Panusis vs. Ruby Jack Enterprise, LLC 2020-01165780	**1**. Motion for Summary Judgment and/or Adjudication filed by Dover Janis, and Grid Technologies, Inc. on 2/29/24 **2**. Motion for Summary Judgment and/or Adjudication filed by Tyler Worthington and Hiscox Insurance Company on 1/29/24 **Continued to June 12, 2024 at 9:00 AM**
10	Renesan Software vs. Satellite Healthcare, Inc. 2023-01366799	**1**. Motion to Appear Pro Hac Vice filed by Renesan Software on 1/3/24 **2**. Motion to Appear Pro Hac Vice filed by Satellite Healthcare, Inc. on 1/16/24 Alexandra V. Bargoot filed an unopposed verified application to appear *pro hac vice*. The application is **CONTINUED** to July 1, 2024 at 9:00 a.m. First, moving attorney failed to file a proof of service establishing service "by *mail* in accordance with Code of Civil Procedure section 1013a" on "all parties who

		have appeared in the cause and on the State Bar of California at its San Francisco office." California Rules of Court, rule 9.40(c) states: "A person desiring to appear as counsel *pro hac vice* in a superior court *must* file with the court a verified application together with proof of service by mail in accordance with Code of Civil Procedure section 1013a of a copy of the application and of the notice of hearing of the application on all parties who have appeared in the cause and on the State Bar of California at its San Francisco office. The notice of hearing must be given at the time prescribed in Code of Civil Procedure section 1005 unless the court has prescribed a shorter period." Second, moving attorney failed to provide her residence address, which is required under California Rules of Court, rule 9.40(d). Rule 9.40(d)(1) states that the "application must state . . . [t]he applicant's residence and office address." Moving attorney shall provide an amended application with the requisite proof of service no later 16 court days before the continued hearing pursuant to code. Moving attorney to give notice. The unopposed application of attorney Adam C. Buck to appear *pro hac vice* for Defendant Satellite Healthcare Inc. is **GRANTED**. Moving attorney met the requirements of California Rules of Court, rule 9.40. Moving attorney to give notice.

11	Wilder vs. General Motors LLC 2022-01272804	Motion to Compel Production filed by Gerald Wilder on 1/3/24 **Off Calendar**