

TENTATIVE RULINGS

FOR: October 14, 2020

If you do not see a tentative ruling for a scheduled matter, then attendance at the hearing is required.

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Dept. A Zoom

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PROBATE CALENDAR – Hon. Victoria Wood, Dept. A (Historic Courthouse) at 8:30 a.m.

Estate of Lydia H. White

19PR000090

REPORT ON WAIVER OF ACCOUNT AND PETITION FOR ORDER FOR FINAL DISTRIBUTION AND FOR STATUTORY ATTORNEY’S FEES

TENTATIVE RULING: GRANT petition, including fees as prayed.

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Conservatorship of Carson Wesley Power

19PR000184

REVIEW HEARING

TENTATIVE RULING: The matter is continued to November 25, 2020, at 8:30 a.m. in Dept. A to allow the conservator to file a Determination of Conservatee’s Appropriate Level of Care (Judicial Council form GC-355). The clerk is directed to send notice to the parties.

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In the Matter of Gertrude Ann Caldwell Trust

26-35822

TENTH ACCOUNT AND REPORT OF TRUSTEE AND PETITION FOR SETTLEMENT OF ACCOUNT AND APPROVAL FOR FEES

TENTATIVE RULING: The Petition is GRANTED, including fees as prayed.

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In the Matter of Runyon Family Trust

26-56652

TENTH ACCOUNT AND REPORT OF TRUSTEE AND PETITION FOR SETTLEMENT OF ACCOUNT, AND FOR APPROVAL OF TRUSTEE FEES

TENTATIVE RULING: The petition is GRANTED, including fees as prayed.

CIVIL LAW & MOTION CALENDAR – Hon. Victoria Wood, Dept. A (Historic Courthouse) at 8:30 a.m.

Stefanie Johnson v. Jeremy W. Abbott

20CV000702

DEFENDANT’S DEMURRER TO COMPLAINT

TENTATIVE RULING: The demurrer is SUSTAINED as to the first cause of action for quantum meruit, with 10 days’ leave to amend, and OVERRULED in all other respects.

Defendant Jeremy W. Abbott demurs, pursuant to Code of Civil Procedure section 430.10, subs. (e) and (f), to the Complaint filed in this matter by Plaintiff Stefanie Johnson on the grounds that “the first, second, third, fourth, sixth, and seventh purported causes of action contained therein: (1) fails to state facts sufficient to constitute a cause of action against Defendant and (2) is uncertain, ambiguous and unintelligible as to the Defendant.” (Notice of Demurrer at 2:1-4.)

A. Request for Judicial Notice

Defendant’s Request for Judicial Notice is GRANTED. The Court takes judicial notice of the Complaint filed with the California Superior Court in and for the County of San Francisco in case number CPF-20-517065, but not for the truth of the matters alleged therein. The Court takes

judicial notice of the Stipulation for Change of Venue and Order Thereon filed August 24, 2020, with the California Superior Court in and for the County of San Francisco in case number CPF-20-517065.

B. Defendant’s Argument that Plaintiff’s Claims are Barred Pursuant to Code of Civil Procedure section 426.30, Subdivision (a) is Not Properly Before the Court

Through his reply, Defendant argues that, “[n]othing in Plaintiff’s Opposition to Defendant’s Demurrer...addresses her Complaint’s glaring issue: that her claims should have been made by compulsory cross complaint in the LLC’s pending action against her...and therefore her instant claims regarding the LLC are wholly barred. (C.C.P. 426.30(a).)” (Reply at 1:26-2:2.) There appears good reason why Plaintiff’s opposition would fail to address the issue: the Court can find no mention of it in either Defendant’s Notice of Demurrer and Demurrer or his Memorandum of Points and Authorities in Support thereof.

The notice of motion must state exactly what relief is sought and upon what grounds that relief is sought. (See Code Civ. Proc. §1010 [“the notice of a motion, other than for a new trial, must state...the grounds upon which it will be made”]; see also Rules of Court, Rule 3.1110 [“[a] notice of motion must state in the opening paragraph the nature of the order being sought and the grounds for issuance of the order”]; see also *People v. American Sur. Ins. Co.* (1999) 75 Cal.App.4th 719, 726.) Moreover, “the court may disregard arguments or grounds for demurrer first raised in a reply brief.” (Weil & Brown, *et al.*, Cal. Practice Guide: Civ. Proc. Before Trial (The Rutter Group 2020) §7:122.9, p. 7(I)-54; see also *Balboa Ins. Co. v. Aguirre* (1983) 149 Cal.App.3d 1002, 1010 [“[t]he salutary rule is that points raised in a reply brief for the first time will not be considered unless good cause is shown for the failure to present them before”].)

In general, where a moving party raises issues for the first time on reply, this Court is amenable to continuing hearing on the matter and permitting the opposing party additional opportunity to fully brief the issue. That course does not appear to be appropriate in this case, however, because Defendant fails to provide any further discussion or argument on the subject.¹ It is unclear to the Court what it is that Plaintiff would be charged with opposing, if the Court were to grant her additional time and opportunity to supplement her opposition papers.

Based on the foregoing, the Court declines to consider Defendant’s assertion that Plaintiff’s claims are barred pursuant to Code of Civil Procedure section 426.30, subdivision (a). This ruling is made without prejudice to Defendant’s right to subsequently raise the issue in an appropriate manner.

C. Legal Analysis

A complaint must contain “facts constituting the cause of action.” (Code Civ. Proc. §425.10, subd. (a)(1).) A demurrer is treated as “admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The Court may also consider as grounds for a demurrer any matter that is

¹ The Court acknowledges the several places in which Defendant reasserts his legal conclusion that the claims of the Complaint are barred by the cited statute. (See, *e.g.*, Reply at 4:9-12, 24-25; 5:9-12, 21-24.) None of these sections, however, supports the asserted conclusion with any substantive discussion or argument.

judicially noticeable under Evidence Code sections 451 or 452. (See Code. Civ. Proc., §430.30, subd. (a).) “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.” (*Comm. on Children’s Television, Inc. v. Gen. Foods Corp.* (1983) 35 Cal.3d 197, 213-14.) In reviewing a demurrer, the Court must “construe the allegations of a complaint liberally in favor of the pleader.” (*Skopp v. Weaver* (1976) 16 Cal.3d 432, 438.) A general demurrer will also lie “where the complaint has included allegations that clearly disclose some defense or bar to recovery.” (*Cryolife, Inc. v. Super. Ct.* (2003) 110 Cal.App.4th 1145, 1152.)

1. *Defendant’s Demurrer on the Grounds of Uncertainty Fails*

Defendant’s demurrer to each cause of action on the ground of uncertainty is **OVERRULED**. An uncertainty demurrer is strictly construed, even where a pleading is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures. (See *Khoury v. Maly’s of Calif., Inc.* (1993) 14 Cal.App.4th 612, 616.) A demurrer for uncertainty should only be sustained when the complaint is so bad that the defendant cannot reasonably respond. (*Ibid.*) The Court finds that the Complaint is sufficiently certain to allow Defendant to understand the nature of the allegations and the theory of liability in order to fashion an appropriate response.

2. *The Complaint Fails to Allege Facts Sufficient to State a Claim for Quantum Meruit*

To state a good cause of action for quantum meruit, a plaintiff must plead that she performed certain services for defendant, the reasonable value of said services, that the services were rendered at the special instance and request of defendant, and that plaintiff remains unpaid for them. (See *Haggerty v. Warner* (1953) 115 Cal.App.2d 468, 475.) “[I]n order to recover under a quantum meruit theory, a plaintiff must establish both that he or she was acting pursuant to either an express or implied request for such services from the defendant and that the services rendered were intended to and did benefit the defendant.” (*Day v. Alta Bates Medical Center* (2002) 98 Cal.App.4th 243, 248.) “The theory of quasi-contractual recovery is that one party has accepted and retained a benefit with full appreciation of the facts, under circumstances making it inequitable for him to retain the benefit without payment of its reasonable value.” (*Truestone, Inc. v. Simi West Industrial Park II* (1984) 163 Cal. App. 3d 715, 724.)

Plaintiff contends that she has alleged that “she performed services for the Defendant’s benefit by expending time, services, finances and other resources running the former couple’s LLC. (Opposition Memo at 6:27-28.) As Defendant argues, such allegations may support a claim for quantum meruit against the limited liability company. Plaintiff fails, however, to allege how the alleged services benefited Defendant directly. The implication is that Defendant’s benefit is derivative of his capacity as an owner of the LLC. Plaintiff fails, however, to present authority for the proposition that the owner of a company may be held liable, under a quantum meruit theory, for efforts made by a Plaintiff in benefit of the company.

Based on the foregoing, Defendant’s demurrer is **SUSTAINED** as to the first cause of action for quantum meruit.

Generally, it is an abuse of discretion for a court to deny leave to amend where there is any reasonable possibility that a Plaintiff can state a good cause of action. (See *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) Plaintiff prays leave to amend, and the Court finds that there is a reasonable possibility that Plaintiff can state a good cause of action. (Opposition Memo. at 10:17-11:1.) Therefore, the Court grants Plaintiff 10 days' leave to amend the Complaint.

3. *The Complaint Alleges Facts Sufficient to State a Claim for Money Had and Received*

“A cause of action is stated for money had and received if the defendant is indebted to the plaintiff in a certain sum ‘for money had and received by the defendant for the use of the plaintiff.’ [Citation.]” (*Schultz v. Harney* (1994) 27 Cal.App.4th 1611, 1623.)

The Court finds that paragraphs 15, 27 and 28 of the Complaint allege facts sufficient to state a claim for money had and received.

Defendant argues, in effect, that the pleading lacks sufficient specificity regarding “what money, from whom the money was received, what amount of money, [and] when was the money received...” (Opposition Memo at 7:14-15.) However, [i]n reviewing a demurrer, the court must “construe the allegations of a complaint liberally in favor of the pleader.” (*Skopp v. Weaver, supra*, 16 Cal.3d at 438.) Defendant fails to cite to any authority supporting his argument that a cause of action for money had and received must be pled with specificity.

Through his reply, Defendant argues that the last sentence of paragraph 15 of the Complaint “clearly states that Defendant refinanced his property to replenish Plaintiff’s funds – there is no allegation that any money remains owed to Plaintiff.” (Reply at 3:8-11, emphasis omitted.) The Court does not accept that Defendant’s conclusion follows from his premise. Put differently, the Complaint does allege that Defendant refinanced his property to replenish Plaintiff’s funds, but the Court finds that the Complaint also adequately alleges that money remains owing to Plaintiff. (See, *e.g.*, Complaint at ¶¶ 28-29.)

For the foregoing reasons, Defendant’s demurrer is OVERRULED as to the second cause of action for money had and received.

4. *Defendant Fails to Establish that the Complaint Alleges Facts Sufficient to Establish an Affirmative Defense or Bar to Recovery to the Claim of Breach of Implied Contract*

Defendant argues that the third cause of action is subject to demurrer because allegations therein are “in direct contradiction with the Statute of Frauds and Statute of Limitations governing real property.” (Opposition Memo at 7:24-25.)

As a preliminary matter, it is unclear to the Court that the term “property” as used in the allegations of paragraphs 30-33 of the Complaint refers to real property. It is a reasonable inference given that the only property that, in the Court’s reading, Plaintiff explicitly refers to in

the Complaint is certain real property. Ultimately, however, this uncertainty is not fatal to the cause of action.

As Defendant notes, Plaintiff alleges an implied contract regarding ownership and control of “the property and LLC.” (Complaint at ¶ 31.) Assuming, *arguendo*, that the contract alleges facts sufficient to establish an affirmative defense to enforcement of the alleged contract as it relates to the real property, Defendant fails to argue that it establishes any such defense to enforcement of the alleged contract as it relates to “the LLC.” As such, Defendant’s demurrer to this cause of action fails.

Plaintiff argues that the statute of frauds defense is unavailable “when the party seeking to enforce the contract has either partially or fully performed.” (Opposition Memo at 7:25-26.) The authority cited by Plaintiff does not, however, support this position. Rather, both cases hold that the statute of frauds does not bar a claim for breach of contract by one who has *fully* performed thereunder. (See *Carruth v. Madera* (1965) 233 Cal.App.2d 688, 697 [“[i]t has been held that full performance by one party takes the remaining promise out of the statute [of frauds]”; see also *Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1176 [“[f]ull performance takes a contract out of the statute of frauds’...[Citation]”].) Plaintiff does not allege full performance of the alleged contract. (See Complaint at ¶ 33.)

Finally, Defendant argues that the cause of action is barred by certain statutes of limitations. (See Support Memo at 8:3-6.) Plaintiff responds that “the breach of the oral agreement did not occur until the termination of the parties’ relationship in October of 2018.” The Complaint fails, however, to allege any such thing. Paragraph 16, cited by Plaintiff in her opposition, states only that “[i]n October 2018, PLAINTIFF and DEFENDANT ended their relationship and DEFENDANT moved out of 1342 Milton Road on October 1, 2018.” The Court is unable to find any allegation suggesting when Defendant’s performance was required under the alleged contract. The Court similarly finds no allegation tending to show that Defendant’s actions in moving out of the Milton Road property constituted a breach of the alleged contract.

Ultimately, however, because the Complaint does not allege when Defendant breached the alleged contract, the Court is unable to conclude that the Complaint contains allegations which “clearly disclose” that the cause of action is barred by the statute of limitations. (*Cryolife, Inc. v. Super. Ct., supra*, 110 Cal.App.4th at 1152.)

For the foregoing reasons, Defendant’s Demurrer is OVERRULED as to the third cause of action for breach of implied contract.

5. *The Complaint Alleges Facts Sufficient to State a Claim for Breach of the Covenant of Good Faith and Fair Dealing*

“The 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.) “In essence, the covenant is implied as a *supplement* to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party’s rights to the benefits

of the contract.” (*Love v. Fire Insurance Exchange* (1990) 221 Cal.App.3d 1136, 1153.)

Defendant appears to argue that Plaintiff’s claim for breach of the covenant of good faith and fair dealing fails because her cause of action for an implied contract is barred by the statute of frauds. (See Support Memo at 8:20-22.) The Court rejected this argument herein above.

In the context of her allegations of implied contract, the Court finds that Plaintiff has alleged additional facts sufficient to state a claim for breach of the covenant of good faith and fair dealing. (See Complaint at ¶ 36.)

6. *Plaintiff Alleges Facts Sufficient to State a Claim for Partition in Kind*

Plaintiff concedes that, through her sixth cause of action, she seeks partition in kind of the company Wacco, LLC. (Opposition Memo at 9:17-19.) Defendant argues that partition in kind is not available to dismantle and distribute the assets of an LLC. Plaintiff’s opposition presumes, but does not explicitly argue, that it is. Neither party cites to authority for support of their respective position.

Plaintiff argues that she is entitled to partition pursuant to Code of Civil Procedure section 872.230. (See Opposition Memo at 9:16.) That statute lies in Title 2.5 of Part 2 of the Code of Civil Procedure which, “governs actions for partition of real property and, except to the extent not applicable, actions for partition of personal property.” (Code Civ. Proc. §872.020.) In addition, the legislature provided that, “[t]o the extent that the court determines that the provisions of this title are a suitable remedy, such provisions may be applied in a proceeding for partnership accounting and dissolution, or in an action for partition of partnership property, where the rights of unsecured creditors of the partnership will not be prejudiced.” (Code Civ. Proc. §872.730.) As noted in the Legislative Committee Comment to that statute, “Section 872.730 codifies prior case law to the effect that partition is an appropriate remedy where the affairs of the partnership are otherwise sufficiently settled and what remains is the division or sale of the property. See, e.g., *Hughes v. Devlin*, 23 Cal 501 (1863); *Logoluso v. Logoluso*, 233 Cal App 2d 523, 43 Cal Rptr 678 (1965).”

Defendant makes no showing or argument why such remedy, explicitly available in the context of a partnership, should not be available to members of a limited liability company. The Court can find no rational basis for limiting the availability of the remedy in that way.

On Reply, Defendant asserts that “[b]y statute, members of a limited liability company hold no direct ownership interest in the company’s assets. (9 Witkin Sum. Cal. Law Partn §189.)” (Reply at 5:6-7.) Defendant then concludes that “As such, Plaintiff, as a member, can only bring an action regarding the assets and/or dissolution of the LLC under CCP §17703, *et seq.*” (*Id.* at 5:7-8.)

First, the cited section of Witkin’s Summary of California Law is a discussion of derivative actions by members for injury to a limited liability company. (See 9 Witkin, Summary of Cal. Law (11th ed. 2018) Partnership, § 189, p. 753.) Its relevance to the present discussion (of whether an action properly exists for partition a limited liability company) is not immediately apparent to the Court. Second, there is no section 17703 in the Code of Civil Procedure. At other

portions of Defendant's Reply, Defendant cites to Corporations Code section 17703. (See, *e.g.*, Reply at 5:20.) That statute, however, (a) involved fee provisions in limited liability companies, and (b) was repealed in 1999.

Based on the foregoing, and construing all of the allegations of the Complaint liberally in favor of the pleader, the Court concludes that Plaintiff has stated a good cause of action for partition. (See *Skopp v. Weaver* (1976) 16 Cal.3d 432, 438.) For this reason, Defendant's demurrer is **OVERRULED** as to the sixth cause of action for partition.

To be clear, the underlying question of whether the provisions of title 2.5 of Part 2 of the Code of Civil Procedure "are a suitable remedy" is not yet before the Court. The present ruling is made without prejudice to subsequent litigation of issues regarding the propriety of partition in the present action, the interests of unsecured creditors, and other defenses and issues relating thereto. Rather, the present ruling is limited to a finding that Plaintiff has alleged facts sufficient to state a cause of action for partition under title 2.5 of Part 2 of the Code of Civil Procedure. (Code Civ. Proc. § 872.730.)

7. *Plaintiff Has Alleged Facts Sufficient to Establish a Fiduciary Duty*

Defendant argues that Plaintiff fails to allege facts sufficient to establish that he owed Plaintiff a fiduciary duty, and on that basis, her seventh cause of action fails to state a claim.² (See Support Memo at 9:12-17.) Plaintiff counters that "the parties were not only partners in their relationship, but also in their business and the properties at issue...[and]...[b]ased on these relationships, there is no question that the parties owed fiduciary duties to each other. (See Opposition at 10:2-4.) Again, however, neither party provides the Court with authority supporting their respective position.

Fiduciary duties are those owed by an agent to his principal. An agent is simply one who represents another in dealings with third persons. (See Civ. Code §§ 2295, 2307.) Generally, agency is created by express contract. (See Civ. Code § 2299.) However, agency may also be created by implied agreement (See *Bergtholdt v. Porter Bros. Co.* (1896) 1114 Cal. 681, 685) or by ratification. (See Civ. Code § 2307.) Whether an agency relationship exists, and if so the quality and scope of that relationship are questions of fact. (See *Arocho v. California Fair Plan Ins. Co.* (2005) 134 Cal.App.4th 461, 466.)

Plaintiff alleges that, "Defendant owes a fiduciary duty to Plaintiff because of the extensive relationship they had building the LLC and properties." (Complaint at ¶41.) This allegation merely asserts a legal conclusion as contention. It is, therefore insufficient to support the cause of action. (See *Blank v. Kirwan, supra*, 39 Cal.3d at 318.)

However, "any valid cause of action overcomes demurrer. It is not necessary that the cause of action be the one intended by plaintiff." (Weil & Brown, *et al.*, Cal. Practice Guide: Civ. Proc. Before Trial (The Rutter Group 2020) §7:41, p. 7(I)-21.) "If the complaint states a cause of action under any theory, regardless of the title under which the factual basis for relief is

² While Plaintiff, through her Opposition, argues the adequacy of allegations of breach of that duty, Defendant does not appear to have raised the issue in his moving papers, and therefore it is not properly presented as a grounds for demurrer.

stated, that aspect of the complaint is good against a demurrer. ‘We are not limited to plaintiffs’ theory of recovery in testing the sufficiency of their complaint against a demurrer, but instead must determine if the factual allegations of the complaint are adequate to state a cause of action under any legal theory.’” (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38-39, quoting *Barquis v. Merchants Collection Assn.* (1972) 7 Cal. 3d 94, 103.)

In a manager-managed limited liability company, the managers owe a fiduciary duty to the members. (See Corp. Code §17704.09.) Plaintiff alleges that “PLAINTIFF and DEFENDANT entered into an Operating Agreement...specifying PLAINTIFF and DEFENDANT as members and managers of [Wacco, LLC].” (Complaint at ¶12.) This allegation, when presumed to be true, is sufficient to establish that Defendant owed Plaintiff a fiduciary duty. (See *Comm. on Children’s Television, Inc. v. Gen. Foods Corp.*, *supra*, 35 Cal.3d at 213-14; *Quelimane Co. v. Stewart Title Guaranty Co.*, *supra*, 19 Cal.4th at 38-39.)

For the foregoing reasons, Defendant’s demurrer is OVERRULED as to the seventh cause of action for breach of fiduciary duty.

PROBATE CALENDAR – Hon. Monique Langhorne, Dept. B (Historic Courthouse) at 8:30 a.m.

Estate of Emilio G. Velazquez

20PR000183

PETITION FOR PROBATE OF WILL AND FOR LETTERS TESTAMENTARY AND AUTHORIZATION TO ADMINISTER UNDER THE INDEPENDENT ADMINISTRATION OF ESTATES ACT

TENTATIVE RULING: The Petition is GRANTED.

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In the Matter of Arthur J. Gressel

20PR000197

PETITION TO ORDER AUTHORIZING PARTICULAR TRANSACTIONS: TO TRANSFER COMMUNITY PROPERTY FOR SUPPORT OF COMMUNITY SPOUSE, AND TO INCREASE COMMUNITY SPOUSE RESOURCE ALLOWANCE

TENTATIVE RULING: The Court discloses that Corbin O’Donnell is the son of a court employee. The Court can be fair and impartial. GRANT petition.

**CIVIL LAW & MOTION CALENDAR – Hon. Monique Langhorne, Dept. B
(Historic Courthouse) at 8:30 a.m.**

Shelby Klaus v. The Doctors’ Management Company

19CV000775

MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION

TENTATIVE RULING: Defendant The Doctors’ Management Company’s motion for summary judgment is DENIED. A motion for summary judgment asks the Court to determine the entire action has no merit. (Code Civ. Proc., § 437c, subd. (a).) Defendant did not advance any argument or evidence in the separate statement as to why the entire action has no merit. The motion necessarily fails.

Defendant’s motion for summary adjudication as to the first cause of action for disability discrimination – wrongful disciplinary action (Gov. Code, §§ 12926, 12940, et seq.) and third cause of action for disability discrimination – wrongful termination (Gov. Code, §§ 12926, 12940, et seq.) on the ground Klaus cannot establish a prima facie case of disability discrimination [Issues No. 1, 5] is DENIED. “To establish a prima facie case under the FEHA on grounds of physical disability, [plaintiff] had to present evidence showing he suffered a physical disability within the meaning of the FEHA, he was otherwise qualified for his job, and he suffered an adverse employment action because of the physical disability.” (*Scotch v. Art Institute of Cal.* (2009) 173 Cal.App.4th 986, 1006.)

Defendant argues Klaus cannot establish the second element because she struggled significantly in performing her executive administrator role as evidenced by, *inter alia*, the 44 occasions when she purportedly submitted untimely reimbursement requests. Klaus, however, presents evidence she kept up with the expenses and completed every expense report Chief Operating Officer William Fleming provided to her after she began supporting him around January 2017. (Defendant’s UMF, No. 7; Response to Defendant’s UMF, No. 29.) She also submits evidence from Fleming’s predecessor, Robert Francis, who Klaus supported from 2007 to 2017, stating Klaus always processed his expenses and his direct reports’ expenses in a timely fashion. (Response to Defendant’s UMF No. 29.) Moreover, Klaus sets forth evidence showing that from 2007 through the end of 2016, she always received glowing performance reviews, was considered an excellent employee, and had only positive feedback from the various executives she supported, and in particular, from Francis, who was defendant’s prior Chief Operating Officer. (Plaintiff’s Additional UMF, Nos. 1-5.) Indeed, Klaus was described as: an “excellent employee that is “reliable, dependable, and an excellent resource to many,” and an “independent worker [who] complete[s] assignments on time or even ahead of schedule.” (*Id.*, Nos. 3-5.) This evidence undercuts defendant’s conclusion that Klaus “was not performing competently in her position.”³ (Mem. at p. 16:4.)

³ Although not proffered in the separate statement, there is a negative inference against defendant: if Klaus was “not performing competently in her position[.]” then it seems counter-intuitive to offer her an opportunity to relocate to East Lansing, Michigan, to perform the same job she supposedly was not competent to perform.

Defendant contends Klaus cannot establish the third element because there is no evidence that any adverse employment action was taken due to Klaus' disability or perceived disability. "[G]enerally an employee need only offer sufficient circumstantial evidence to give rise to a reasonable inference of discrimination." (*Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 310.) "The prima facie burden is light; the evidence necessary to sustain the burden is minimal." (*Ibid.*) Klaus has met her burden with sufficient circumstantial evidence to give rise to a reasonable inference of discrimination. The incidents, evidence, and inferences supporting them are numerous.

First, Klaus went out on approved medical leave from September 27, 2017, and returned to the office on January 2, 2018. (Defendant's UMF, Nos. 58, 60-61.) Fleming was aware Klaus was taking a medical leave of absence. (*Id.*, No. 59.) The first time Fleming raised a concern with human resources regarding Klaus' performance, specifically her processing of her expense reports, was approximately two weeks after Klaus went out on a medical leave of absence. (Plaintiff's Additional UMF, No. 7.)

Second, Fleming requested human resources perform an audit of the timeliness of Klaus' expense processing, which defendant had never performed before on an executive administrator's expense processing. (*Id.*, No. 8.)

Third, when Klaus returned from her leave of absence, she was not given access to successfully perform her job duties. She lost her access to Fleming's calendar, was blocked from access to the Concur system, and did not have access to LastPass (defendant's password management software). (*Id.*, No. 9; Plaintiff's Response to Defendant's UMF, No. 63.) This lack of access was something Klaus did not experience when she took a leave of absence a few years earlier. (Plaintiff's Additional UMF, No. 9.)

Fourth, on her second day back in the office, Klaus received a written warning from Fleming for the untimely submission of the expense reports. (Defendant's UMF, No. 41.) Klaus, however, was not given access to allow her to verify the allegations regarding her expense report submissions. (Plaintiff's Response to Defendant's UMF, No. 65.) As noted, Klaus believed she kept up with the expenses and completed every expense report Fleming provided to her after she began supporting him around January 2017. (Defendant's UMF, No. 7; Response to Defendant's UMF, No. 29.) Francis, who Klaus supported from 2007 to 2017, stated Klaus always processed his expenses and his direct reports' expenses in a timely fashion. (Response to Defendant's UMF, No. 29.)

Fifth, in the days after Klaus returned from her leave, her temporary replacement, Randi Kennedy, continued to perform substantially all of Klaus' job duties. (*Id.*, No. 21.) Fleming, in effect, gave Klaus no assignments.

Sixth, on January 4, 2018, Barbara Scriven, from the human resources department, informed Klaus she was ineligible to apply for another position within the company for one year due to the written warning from Fleming, despite Klaus having expressed an intent to Fleming that she wanted to apply to a position within the insurance operations department as soon as an opening posted. (Plaintiff's Additional UMF, No. 10.)

Seventh, on January 5, 2018, Scriven provided Klaus with a letter explaining defendant was transferring her executive administrator position to East Lansing, Michigan. (*Id.*, Nos. 13-14.) Klaus was informed defendant would not provide any relocation assistance, monetary or otherwise. (*Id.*, No. 14.) Fleming made the decision, with consultation with human resources and defendant's counsel, not to offer relocation assistance to Klaus. (*Id.*, No. 15.) Klaus had one week to decide or be terminated. (*Id.*, No. 13.) By contrast, defendant has offered non-management level employees monetary relocation assistance when asked to transfer to a different state. (*Id.*, No. 16.) Francis, the former Chief Operating Officer from 2004 to 2017, could not recall any other instance where an employee was asked to make a decision to transfer to an out-of-state office within one week. (*Id.*, No. 17.) Other employees were provided significantly more time than one week to decide whether to make the transfer. (*Id.*, No. 18.) Francis could not conceive of a good faith basis for defendant to require Klaus to advise it as to whether she would accept the transfer within one week. (*Id.*, No. 19.)

Finally, on January 12, 2018 – after giving her a one-week deadline to transfer, offering no assistance with moving, taking away her job responsibilities, telling her she could not apply for other positions within the company for one year, and denying her access to internal systems – Klaus notified defendant she could not transfer to East Lansing. (*Id.*, No. 23.) On that same date, Fleming deviated from the regular hiring process requiring the posting of an available position both internally and externally on multiple platforms. (*Id.*, No. 24.) Fleming instead contacted human resources and requested that the now open executive administrator position be posted internally only, and that Kennedy (Klaus' temporary replacement) be notified of the open position. (*Ibid.*) Kennedy was the sole applicant for the job and received it. (*Id.*, No. 26.) Defendant was not aware of any circumstances where it would normally deviate from the regular hiring process. (*Id.*, No. 24.)

Defendant's motion for summary adjudication as to the first cause of action for disability discrimination – wrongful disciplinary action (Gov. Code, §§ 12926, 12940, et seq.) and third cause of action for disability discrimination – wrongful termination (Gov. Code, §§ 12926, 12940, et seq.) on the ground Klaus cannot prove defendant's legitimate, non-discriminatory reason for the alleged adverse employment action was pretext for discrimination [Issue Nos. 2, 6] is DENIED. Defendant asserts it had legitimate, non-discriminatory reasons for the employment decisions that were made because: (1) Klaus submitted untimely expense reports on at least 44 occasions; and (2) defendant's plan of operation in the Midwest and East affected all executive administrator positions. Despite defendant's assertion to the contrary, Klaus has submitted evidence as detailed above that defendant's disciplinary action and the transfer of the position to East Lansing were pretextual.

Defendant's motion for summary adjudication as to the second cause of action for California Family Rights Act ("CFRA") retaliation – wrongful disciplinary action (Gov. Code, § 12945.2(1)) and fourth cause of action for CFRA rights retaliation – wrongful termination (Gov. Code, § 12945.2(1)) on the ground Klaus cannot establish a prima facie case of CFRA retaliation [Issue Nos. 3, 7] is DENIED. To establish a prima facie case for retaliation a plaintiff must show: (1) defendant was an employer covered by CFRA; (2) plaintiff was eligible to take CFRA leave; (3) plaintiff exercised a right to take leave for a qualifying CFRA purpose; and (4)

plaintiff suffered an adverse employment action as a result. (*Dudley v. Dep't of Transp.* (2001) 90 Cal.App.4th 255, 261.) Defendant avers Klaus cannot prove that the discipline or relocation of her position were actions taken because she went on a CFRA leave. This averment is not well-taken for the reasons previously noted.

Defendant's motion for summary adjudication as to the second cause of action for CFRA retaliation – wrongful disciplinary action (Gov. Code, § 12945.2(1)) and fourth cause of action for CFRA rights retaliation – wrongful termination (Gov. Code, § 12945.2(1)) on the ground Klaus cannot prove defendant's legitimate, non-retaliatory reason for the alleged adverse employment action was pretext for retaliation [Issue Nos. 4, 8] is DENIED for the reasons stated above.

Defendant's motion for summary adjudication as to the claim for punitive damages [Compl., Prayer for Relief, ¶ 3] on the ground there is no evidence of malice, fraud, or oppression [Issue No. 9] is DENIED. Based on the evidence submitted, as noted, a jury could find that the disciplinary action and the job transfer were done in bad faith with malicious intent.

The Court has not considered defendant's additional evidence submitted with the reply as it is improper to submit new evidence on a motion for summary adjudication. The new evidence is not contained in the separate statement and Klaus has not had an opportunity to respond to it.

Klaus' two evidentiary objections submitted with her opposition and defendant's twenty-five evidentiary objections submitted with its reply are OVERRULED as not code-compliant. (Cal. Rules of Court, rule 3.1354(c).)

The notice of motion does not provide notice of the Court's tentative ruling system as required by Local Rule 2.9. Defendant's counsel is directed to contact the opposing party forthwith and advise of Local Rule 2.9 and the Court's tentative ruling procedure. Notwithstanding the procedures set forth in Local Rule 2.9, defendant's counsel shall appear at the hearing, by Zoom, unless it is confirmed that no party requests oral argument.