SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 8, Honorable Sunil R. Kulkarni
Mark Rosales, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone 408.882.2280

To contest the ruling, call (408) 808-6856 before 4:00 P.M.

LAW AND MOTION TENTATIVE RULINGS
DATE: JANUARY 17, 2019 TIME: 9:00 A.M.
PREVAILING PARTY SHALL PREPARE THE ORDER
UNLESS OTHERWISE ORDERED (See California Rule of Court 3.1312)

LINE #	CASE #	CASE TITLE	RULING
LINE 1	17CV312553	Drew Moxon et al v. Alana Pague et al.	OEX cannot proceed until there is proof of service on Alana Pague. Currently, no such proof of service is in the Court's file.
LINE 2	17CV312553	Drew Moxon et al v. Alana Pague et al.	OEX can proceed against Ana Pague, as the Court's file reflects proof of service on Ana Pague.
LINE 3	18CV329071	MELISSA EGGE, MD v. PHOUNG NGUYEN, MD et al.	See tentative ruling. Court to prepare final order.
LINE 4	18CV335385	TUSCANY HILLS HOMEOWNERS ASSOCIATION v. BLUE MOUNTAIN CONSTRUCTION SERVICES, INC.	See tentative ruling. Court to prepare final order.
LINE 5	16CV295330	Katie Salzano v. Walter Neal et al.	The Court will reserve any ruling until it knows whether plaintiff will appear at the 1/17/19 hearing.

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LINE 6	16CV295330	Katie Salzano v. Walter Neal et al.	On December 3, 2018, Plaintiff, acting in pro per, filed a declaration in support of dismissing her case with prejudice against defendants. The Court interprets that declaration—especially since it came from a self-represented litigant—as seeking a request for dismissal, even though no formal dismissal request was ever filed. The Court will grant the implied request and DISMISSES the case with prejudice. As such, defendants' summary judgment motion is MOOT. In the alternative, defendants filed a summary judgment motion against all of plaintiff's claims. Plaintiff never opposed the motion. After reviewing the motion and the accompanying evidence, the Court is satisfied that no reasonable jury could rule in plaintiff's favor on any of her claims. The Court therefore GRANTS summary judgment to defendants. The Court will discuss with the parties what to do with defendants/cross-complainants' cross-claims (even assuming these claims are still live). Court will prepare final order.
LINE 7	17CV315879	Prasenjit Gupta et al v. Susan De Jongh-Kearl et al.	OFF CALENDAR. Continued to 2/21/19 at 9 am in D8.

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LAW AND MOTION TENTATIVE RULINGS

LINE 8	18CV325935	Alisha Dunnell et al v. Mohammad Salman et al.	The Court GRANTS defendants' motion to compel for the following reasons: 1) document requests are not overbroad; 2) a mutually-agreed-upon protective order can protect any alleged trade secrets of Key Health; 3) the requested discovery is relevant and, in the Court's view, essential to a fair resolution of the lawsuit. Plaintiffs is entitled to discovery to determine whether there is a nexus between the amount paid by Key Factor for plaintiff's medical expenses and the reasonable value of the medical expenses. (See *Upenskaya v. Meline* (2015) 241 Cal.App.4th 996, 1007.) The Court orders the parties to meet and confer promptly on a protective order. The requested documents must be produced within 30 days of this order, assuming a protective order is in place. Because Key Health was reasonably justified in its arguments opposing production, the Court WILL NOT award monetary sanctions. Court will prepare final order.
LINE 9	17CV308732	John Avina v. Select Portfolio Servicing, Inc.	The Court GRANTS plaintiff counsel's motion to withdraw, and will sign proposed order. Plaintiff will need to find new counsel or handle his case pro per.
LINE 10	18CV330598	JH Portfolio Debt Equities, LLC v. Raul Herrera	OFF CALENDAR due to the parties' 1/14/19 stipulation/order. 2/11/19 court trial remains on calendar.
LINE 11			
LINE 12			
LINE 13			
LINE 14			

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LAW AND MOTION TENTATIVE RULINGS

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Egge v. County of Santa Clara, Case No. 18CV329071

Defendant County of Santa Clara ("Defendant" or the "County") demurs to the First Amended Complaint ("FAC") filed by plaintiff Melissa Egge, M.D. ("Plaintiff").[1]

I. Factual and Procedural Background

According to the allegations of the FAC, Plaintiff is a Suspected Child Abuse and Neglect ("SCAN") physician who was hired by the County on July 1, 2011 as a Child Abuse Pediatrician at the Santa Clara Valley Medical Center ("SCVMC"). (FAC, ¶ 8.) As a component of her contractual employment agreement with the County, Plaintiff was required to abide by the Medical Staff Bylaws and the internal policies and procedures of SCVMC. (*Id*., ¶ 9, Exhibit A.) The bylaws created binding rights and duties and are legally enforceable. (*Id*., ¶ 10.)

Plaintiff reported to Dr. Stirling, Director of the Center for Child Protection at SCVMC, and was subordinate to his role as a SCAN physician. (FAC, ¶ 11.) Both Plaintiff and Dr. Stirling reported to Dr. Harris, the Chair of the Department of Pediatrics, and were required to abide by his decisions as they related to his patients and his SCVMC policy determinations. (*Id*.) Plaintiff and Dr. Stirling, the only two SCAN physicians at the facility, alternated on call for child abuse issues as they came up. (*Id*.)

On July 3, 2015, a two-year old child was transferred from O'Connor Hospital to SCVMC suffering from what were believed to be two fractures. (FAC, ¶ 12.) Plaintiff was consulted on the phone by Dr. Zhang, a common practice at SCVMC used by mandated reporters who suspected abuse in lieu of making a report to child protective services ("CPS"). (*Id*.) After Dr. Zhang described the nature of the child's injuries and his mother's explanation for them, Plaintiff stated that if the doctors at the preceding hospital suspected non-accidental trauma they should make a report, and opined that the scenario Dr. Zhang described was not a pattern of injury typical for non-accidental trauma. (*Id*., ¶ 13.) By that time, no orthopedic surgeons had seen the child, and no x-rays were available for review. (*Id*.) Plaintiff was not asked to perform an inpatient consultation and had no further clinical involvement with the child. (*Id*.)

Over the next few days, physicians at SCVMC discovered the child had suffered additional fractures and he underwent surgery. (FAC, ¶ 15.) Although there were several red flags, no reports were made and the child was eventually discharged to go home with his mother.

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[1] The Court will take judicial notice of: a) the May 7, 2018 decision by the federal court concerning Plaintiff's federal claims; and b) the transcript of the May 3, 2018 oral argument in front of the federal court. (Evid. Code, §§ 451, subd. (a), 452, subd. (d).) These documents are relevant to deciding the collateral estoppel issue presented in the County's demurrer. No party should be surprised by these documents, as they were considered during the last round of demurrer briefing. Therefore, the Court GRANTS the County's requests for judicial notice of these documents and OVERRULES Plaintiff's objections.

In November 2015, the Orthopedic Review Committee reviewed the child's case and became concerned that a report was warranted. (FAC, ¶ 16.) Dr. Harris was asked to weigh in and Plaintiff was asked to do a supplemental review of an ongoing Quality Improvement review of the child's case. (*Id*.) Plaintiff reviewed the child's records, which included details not available during the prior telephone consultation, and concluded that a CPS report should have been filed. (FAC, ¶ 17.) Plaintiff discussed the case with Dr. Stirling, the official SCAN physician listed on it, and he agreed to file the CPS report. (*Id*.)

Before leaving on vacation, Plaintiff checked with Dr. Stirling to ensure that he had made the report. (FAC, ¶ 18.) Dr. Stirling told her that he had forgotten but would do so that evening. (*Id*.) However, Dr. Stirling never made the report, and in January 2016, the child died as a result of alleged physical and sexual abuse. (*Id*.)

During a Death Review Committee meeting in February 2016, Plaintiff learned that the child had died and subsequently checked his records where she found that on December 24, 2015, Dr. Stirling had placed a note in the chart stating that he had again reviewed the file, decided there was a low index of suspicion of child abuse, and therefore a CPS report was not warranted. (*Id*., ¶ 19.) Thus, Dr. Stirling never made the CPS report as he had promised Plaintiff he would. (*Id*.) Plaintiff believed that in the event Dr. Stirling decided not to submit a report to CPS on behalf of both of them, he would have told her of his decision so as to provide her with an opportunity to make a report herself. (*Id*., ¶ 20.) Because he did not, Plaintiff did not believe she was required to submit a report. (*Id*.)

Concerned of what had transpired, Plaintiff contacted Dr. Harris to inform him of the child's death and Dr. Stirling's failure to report the case to CPS; he had not been aware of either fact prior to that point. (FAC, ¶ 21.) Plaintiff also expressed multiple concerns that SCVMC policies and procedures were inadequate to comply with California's mandated reporting laws. (*Id*., ¶¶ 21-23.) As a result of Plaintiff's pressure to do so, SCVMC initiated an external peer review of the child's case. (*Id*.) Plaintiff told Dr. Harris that many other employees, all mandatory reporters, had failed to comply with the law and that the practices encouraged by SCVMC leadership resulted in suspicions of child abuse not getting reported. (*Id*., ¶¶ 22-23.) She further advised him of many other systematic failings which she believed may have contributed to the child's death. (*Id*., ¶ 23.)

On March 11, 2016, Plaintiff was put on administrative leave. (FAC, ¶ 24.) On April 21, 2016, the Medical Executive Committee recommended a 6-month summary suspension of Plaintiff's clinical privileges and medical staff memberships. (*Id*.) The following day, Dr. Smith, as County Executive of the County, terminated Plaintiff's employment. (*Id*.) Plaintiff was not afforded a hearing prior to the termination and her suspension and termination were completely unwarranted and arose in the context of activities that under SCVMC's bylaws entitled her to immunity. (*Id*., ¶ 25.)

In addition to the foregoing, Dr. Nguyen, on behalf of SCVMC, reported Plaintiff's suspension to the Medical Board of California, despite not being obligated to do so. (FAC, ¶ 27.) Dr. Nguyen was also aware that statements made to the Medical Board and contained in the report were false and misleading and did not provide Plaintiff with an opportunity to explain or comment. (*Id*.) The report will be a negative mark on Plaintiff's career and she

alleges that her suspension, termination and SCVMC's report to the Medical Board were committed with malice and in bad faith, with Plaintiff made a scapegoat and punished for voicing her concerns. (FAC, ¶ 28.) As a result of Defendants' conduct, Plaintiff has been unable to obtain employment in the Bay Area and has to commute weekly to Southern California in order to work as a physician. (*Id*., ¶¶ 30-31.) Plaintiff successfully appealed her summary suspension, but has yet to regain her reputation. (*Id*., ¶ 34.)

Plaintiff filed her initial complaint in this action on May 30, 2018, asserting claims for (1) breach of written contract and (2) violation of Labor Code section 1102.5 ("Section 1102.5"). Defendant (and former defendants Jeffrey Smith, M.D. and Phuong Nguyen, M.D.) demurred to both of the foregoing claims on a variety of grounds. On September 19, 2018, the Court entered an order sustaining the demurrer to the first cause of action with leave to amend on the ground of failure to state facts sufficient to constitute a cause of action and sustaining the demurrer to the second cause of action *without* leave to amend as to Drs. Smith and Nguyen on the same ground. On September 28, 2018, Plaintiff filed the FAC, asserting the same two causes of action. On October 30, 2018, Defendant filed the instant demurrer to the first cause of action on the ground of failure to state facts sufficient to constitute a cause of action.[2] (Code Civ. Proc., § 430.10, subd. (e).) Plaintiff opposes the motion.

II. Demurrer

In support of its demurrer to the breach of contract claim in the FAC, Defendant makes a single argument: that Plaintiff's breach of contract claim is barred by collateral estoppel, the issue preclusion component of the doctrine of res judicata. More specifically, Defendants maintains that the issue of Plaintiff's employment status (she maintains it was more than at-will and subject to a written agreement) was already addressed and adjudicated in Defendant's favor in a federal action brought by Plaintiff entitled *Egge v. County of Santa Clara* (N.D. Cal. May 7, 2018) 2018 WL 2096275 (the "Federal Action").

In its most succinct and narrow form, res judicata is described as a doctrine which "precludes parties or their privies from relitigating a cause of action [finally resolved in a prior proceeding]." (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 81, 828 [internal citations and quotations omitted].) "Thus, res judicata does not merely bar relitigation of identical claims or causes of action. Instead, in its collateral estoppel aspect, the doctrine may also preclude a party to prior litigation from redisputing *issues* therein decided against him, even when those issues bear on different claims raised in a later case. Moreover, because the estoppel need not be mutual, it is not necessary that the earlier and later proceedings involve the identical parties or their privies. Only the party against whom the doctrine is invoked must be bound by the prior proceeding." (*Id.* at p. 828 [internal citations and quotations omitted] [emphasis in original].)

Traditionally, the doctrine of collateral estoppel applies only if the following threshold requirements are met: (1) the issue sought to be precluded from relitigation must be identical to

[2] Drs. Smith and Nguyen were named as defendants in the FAC and as parties to the demurrer to the FAC. However, Plaintiff filed requests to dismiss her claims against both of defendants (without prejudice) on October 18, 2018, and such dismissals were entered a week later. Thus, the only defendant remaining in this action is the County of Santa Clara.

that decided in a former proceeding; (2) the issue must have been actually litigated in the former proceeding; (3) it must have been necessarily decided in the former proceeding; (4) the decision in the former proceeding must be final and on the merits; and (5) the party against whom the preclusion is sought must be the same as, or in privity with, the party to the former proceeding. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.) The party asserting collateral estoppel bears the burden of establishing these requirements. (See, e.g., *Vella v. Hudgins* (1977) 20 Cal.3d 251, 257.)

Defendant contends, as it did in its previous demurrer, that the court in the Federal Action already considered and rejected Plaintiff's argument that she had more than an at-will employment status based on the SCVMC Medical Staff Bylaws and the County Ordinance Code. But as the Court explained previously in expressly *rejecting* Defendant's collateral estoppel argument, it does not agree with Defendant's characterization of the Federal Action and the decision by that court. Contrary to Defendant's assertions, the federal court did *not* determine whether or not Plaintiff was an at-will employee. Instead, what the court actually determined was whether or not she had a viable property interest in her employment with SCVMC such that she could maintain a claim for federal constitutional violations under 42 U.S.C. § 1983. The court concluded that given the plain language of the County Ordinance and the bylaws, Plaintiff's allegations were "insufficient to plausibly allege a property interest in employment under the standards set forth in *Iqbal* and *Twombly*." (*Egge v. County of Santa Clara, supra,* 2018 WL 2096275 at *4.) Accordingly, Plaintiff's claims under 42 U.S.C. § 1983 were dismissed by the court, which then *declined* to exercise supplemental jurisdiction over Plaintiff's state law claims (breach of written contract, breach of oral contract, promissory estoppel and violation of California Labor Code section 1102.5) given the absence of a viable federal claim.

Whether or not Plaintiff has a property interest under the Due Process Clause of the Fourteenth Amendment is not an issue that need be reached in order to adjudicate her state law breach of contract claim in the instant action. For this claim, Plaintiff need only establish (1) the existence of an enforceable contract between herself and Defendants, (2) her performance or excuse for nonperformance thereunder, (3) Defendants' breach of the agreement, and (4) damages to Plaintiff resulting from the breach. (*CDF Firefighters v. Maldonado* (2008) 158 Cal.App.4th 1226, 1239.) Thus, the "issues" underlying the breach of contract claim are not identical to the issues adjudicated by the federal court in connection with Plaintiff's federal civil rights claim.

Specifically, the federal court did not actually and finally litigate the issue of whether the SCVMC Medical Staff Bylaws constituted an enforceable agreement between Plaintiff and Defendant. Granted, in its initial order granting Defendants motion to dismiss the claims asserted in Plaintiff's original complaint the federal court found that the pleading failed to sufficiently allege the existence of a contract based on the SCVMC's Medical Staff Bylaws. But the federal court then granted Plaintiff leave to amend. Never at any point did the federal court find as a matter of law that the bylaws absolutely *did not* constitute an enforceable agreement. The court merely found that the allegations of the original complaint were insufficient to establish that the subject bylaws constituted a contract between Plaintiff and Defendants and then did not reach the sufficiency of the amended allegations of Plaintiff's First Amended Complaint in that regard because it declined to exercise supplemental

jurisdiction over her state law claims. Thus, all of the elements necessary to find that collateral estoppel applies are not present.

Given the foregoing, Defendant's assertion that Plaintiff's first cause of action in the FAC is barred by collateral estoppel is without merit. Consequently, Defendant's demurrer is OVERRULED.

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Tuscany Hills Homeowners Ass'n v. Blue Mountain Construction Services, Inc., Case No. 18CV335385

Defendant Blue Mountain Construction Services, Inc. ("Defendant") demurs to the complaint ("Complaint") filed by plaintiff Tuscany Hills Homeowners Association ("Plaintiff").

I. Factual and Procedural Background

According to the allegations of the Complaint, Plaintiff and Defendant entered into a written agreement (the "Contract") in June 2015. Under this Contract, Defendant agreed to provide general contracting services for construction/repairs at a property located on Communication Hill in San Jose. (Complaint, ¶ 7, Exhibit A.) Plaintiff alleges that Defendant materially breached the Contract by, among other things: failing to perform its work according to the time requirements; failing to perform the work for which it was originally contracted; performing defective work; and failing to meet its warranty obligations. (*Id*., ¶ 9.) As a result of these breaches, Plaintiff has incurred damages, including the cost and expense of repairing the work performed by Defendant under the Contract. (*Id*., ¶ 10.)

On September 26, 2018, Plaintiff filed the Complaint asserting the following causes of action: (1) breach of contract; (2) express indemnity; (3) express warranty; (4) implied warranty; and (5) negligence. On October 31, 2018, Defendant filed the instant demurrer to the second cause of action on the ground of failure to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).) Plaintiff opposes the motion.

II. Demurrer

In demurring to the second cause of action in the Complaint, Defendant makes a single argument: that the express indemnification provision contained within the Contract does not encompass the claims between the parties. Plaintiff maintains that its allegations to the contrary, i.e., that its claims *do* come within the scope of the indemnity provision, should control.

As a general matter, indemnity may be defined as "the obligation resting on one party to make good a loss or damage another party has incurred. [Citation.]" (*Rossmoor Sanitation, Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 628.) The right to indemnification arises from two general sources: (1) "by virtue of express contractual language establishing a duty in one party to save another harmless upon the occurrence of specified circumstances; and (2) "in equitable considerations brought into play either by contractual language not specifically dealing with indemnification or by the equities of a particular case. [Citation.]" (*E.L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497, 506-507 (*E.L. White*).) Because the only issue in this demurrer is whether express indemnity exists, the Court need not discuss equitable indemnity.

Express indemnity reflects "its contractual nature, permitting great freedom of action to the parties in the establishment of the indemnity arrangements while at the same time subjecting the resulting contractual language to established rules of construction." (*E.L. White, supra,* 21 Cal.3d at 507.) "In interpreting an express indemnity agreement, the courts first look

to the words of the contract to determine the intended scope of the indemnity agreement. A key factor in determining the scope of the agreement is the specificity of the language." (*Smoketree-Lake Murray, Ltd. V. Mills Concrete Construction Co.* (1991) 234 Cal.App.3d 1724, 1737 (*Smoketree-Lake Murray*).)

In this case, the express indemnity provision at issue is contained in subsection 13.1.4 of the Contract ("Section 13.1.4"). Although Plaintiff does not specifically cite to this subsection in its Complaint, it is the only indemnity provision in the Contract, which is attached to the Complaint.[3] This subsection provides as follows:

> To the maximum extent permitted by law, Contractor [Blue Mountain] shall indemnify, defend, and hold Owner [Tuscany Hills HOA] and its members, directors, officers, agents, managing agents, employees and representatives (hereinafter 'Indemnified Party(ies)') harmless from and against any and all claims, demands, liability, costs and expenses, including all attorneys' fees and costs (collectively, 'Claims'), caused by or related to the work by Contractor and/or its subcontractors of any tier, including without limitation Claims arising from death, bodily injury, or property damage, except to the extent such Claims are caused in part or in whole by the gross negligence or willful misconduct of one or more of the Indemnified Parties.

(Complaint, Exhibit A, p. 5.)

It is true that this provision does not specifically limit indemnification to third parties. But "[a]n indemnitor in an indemnity contract generally undertakes to protect the indemnitee against loss or damage through liability to a third person." (*Myers Building Indus., Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 968 (*Myers Building*).) As *Myers Building* states, "a contractual clause that contains the words "indemnify" and "hold harmless" "generally obligates the indemnitor to reimburse the indemnitee for any damages the indemnitee becomes obligated to pay *to third persons*." (*Myers Building*, *supra,* 13 Cal.App.4th at 969 [emphasis added].)

Thus, under this general rule of construing indemnity clauses, the express indemnity provision here should be construed as covering only third party claims, not claims between the parties. There must be "clear and explicit language" in an indemnity agreement "[i]n order for an indemnity agreement to encompass claims between the parties to the agreement." (*City of Bell v. Superior Court* (2013) 220 Cal.App.4th 236, 252 [emphasis added].) No such language is present here. For instance, there are no allegations pleaded in the Complaint suggesting that the words of the indemnification provision are subject to some special meaning. Nor are there allegations of objective indicia—as opposed to subjective thoughts never communicated to the other side—that either of the parties understood or intended that the provision encompasses claims between them.

Plaintiff additionally maintains that it is improper for the Court to sustain a demurrer "when extrinsic evidence is necessary to determine whether there is ambiguity in in the

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[3] Because the Contract is an exhibit to the Complaint, the Court can examine its terms. The Court need not blindly rely upon the allegations in the Complaint. (See *Chisom v. Board of Retirement of County of Fresno Employees' Retirement Ass'n* (2013) 218 Cal.App.4th 400, 416.)

agreement and the proper interpretation of the agreement in light of the ambiguity." (Opp'n, at p. 7.) However, at no point in its Complaint or its opposition to the demurrer does Plaintiff actually argue that Section 13.1.4 is in any way ambiguous. "Where a written contract is pleaded by attachment to and incorporation in a complaint, and where the complaint fails to allege that the terms of the contract have any special meaning, a court will construe the language of the contract on its face to determine whether the contract is reasonably subject to a construction sufficient to sustain [its claim]." (*Hillsman v. Sutter Community Hospital* (1984) 153 Cal.App.3d 743, 749-750.) That is what the Court has done.

In addition, "[a]n interpretation of [a contract] which gives effect to all provisions of the contract is preferred to one which renders part of the writing superfluous, useless or inexplicable." (*Carson v. Mercury Ins. Co.* (2012) 210 Cal.App.4th 409, 420.) Here, Plaintiff's interpretation of the express indemnity provision would render Section 21 of the Contract superfluous. Section 21 provides for the recovery of attorney's fees for the prevailing party "in the event the parties become involved in litigation or arbitration with each other anyway related to or arising out of payments to be made to [Defendant] under this agreement for which the services or an attorney or other expert are reasonably required …." There would be no need for another provision allowing for prevailing party attorney's fees if such fees were already encompassed in the indemnity provision. The language of Section 21 also demonstrates that the parties knew how to draft a provision that encompassed claims and disputes between themselves: "In the event the parties become involved in litigation or arbitration *with each other* …." If the parties wanted to include claims "with each other" within the definition of "Claims" in the indemnity provision of Section 13.1.4, they could have, and presumably would have, by using similar language.

In sum, the Court finds that the best reading of the express indemnity provision, on its face, in Section 13.1.4 of the Contract is that the provision does *not* encompass claims asserted directly between Plaintiff and Defendant. Such direct claims are the only ones encompassed in Defendant's second cause of action. And while the Court is somewhat skeptical that Plaintiff can amend this cause of action successfully, the Court will give Plaintiff a chance to do so. Therefore, Defendant's demurrer is SUSTAINED WITH LEAVE TO AMEND. Plaintiff has 10 days to file an amended complaint if it chooses to do so.

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