SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 20, Honorable Socrates Peter Manoukian, Presiding

Courtroom Clerk: Hien-Trang Tran-Thien

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"Every case is important" . . . . . "No case is more important than any other."— United States District Judge Edward Weinfeld (https://www.nytimes.com/1988/01/18/obituaries/judge-edward-weinfeld-86-dies-on-us-bench-nearly-4-decades.html)

"The Opposing Counsel on the Second-Biggest Case of Your Life Will Be the Trial Judge on the Biggest Case of Your Life."—Common Wisdom.

As Shakespeare observed, it is not uncommon for legal adversaries to "strive mightily, but eat and drink as friends." (Shakespeare, The Taming of the Shrew, act I, scene ii.)" (*Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 309.)

Counsel is duty-bound to know the rules of civil procedure. (See *Ten Eyck v. Industrial Forklifts Co.* (1989) 216 Cal.App.3d 540, 545.) The rules of civil procedure must apply equally to parties represented by counsel and those who forgo attorney representation. (*McClain v. Kissler* (2019) 39 Cal.App.5th 399.)

By Standing Order of this Court, all parties appearing in this Court are expected to comply with the Code of Professionalism adopted by the Santa Clara County Bar Association: https://www.sccba.com/code-of-professional-conduct/

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DATE: Thursday, 21 September 2023
TIME: 9:00 A.M.

Please note that for the indefinite future, all hearings will be conducted remotely as the Old Courthouse will be closed. This Department prefers that litigants use Zoom for Law and Motion and for Case Management Calendars. Please use the Zoom link below.

"A person's name is to him or her the sweetest and most important sound in any language."—Dale Carnegie. All Courts of California celebrate the diversity of the attorneys and the litigants who appear in our Courts. Do not hesitate to correct the Court or Court Staff concerning the pronunciation of any name or how anyone prefers to be addressed. As this Court is fond of saying, "with a name like mine, I try to be careful how I pronounce the names of others." Please inform the Court how you, or if your client is with you, you and your client prefer to be introduced. The Court encourages the use of diacritical marks, multiple surnames and the like for the names of attorneys, litigants and in court papers. You might also try www.pronouncenames.com but that site mispronounces my name.

You may use these links for Case Management Conferences and Trial Setting Conferences without Court permission. Informal Discovery Conferences and appearances on Ex Parte applications will be set on Order by the Court.

Join Zoom Meeting
https://scu.zoom.us/j/96144427712?pwd=cW1JYmg5dTdsc3NKNFBpSjlEam5xUT09
Meeting ID: 961 4442 7712
Password: 017350

Join by phone:
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Meeting ID: 961 4442 7712

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APPEARANCES.

Appearances are usually held on the Zoom virtual platform. However, we are currently allowing in court appearances as well. If you do intend to appear in person, please advise us when you call to contest the tentative ruling so we can give you current instructions as to how to enter the building.

Whether appearing in person or on a virtual platform, the usual custom and practices of decorum and attire apply. (See ***Jensen v. Superior Court (San Diego)*** (1984) 154 Cal.App.3d 533.). Counsel should use good quality equipment and with sufficient bandwith. Cellphones are very low quality in using a virtual platform. Please use the video function when accessing the Zoom platform. The Court expects to see the faces of the parties appearing on a virtual platform as opposed to listening to a disembodied voice.

For new Rules of Court concerning remote hearings and appearances, please review California ***Rules of Court***, rule 3.672.

This Court expects all counsel and litigants to comply with the Tentative Rulings Procedures that are outlined in Local Civil Rule 8(E) and ***California Rules of Court***, rule 3.1308. If the Court has not directed argument, oral argument must be permitted only if a party notifies all other parties and the Court at (408) 808-6856 before 4:00 p.m. on the court day before the hearing of the party's intention to appear. A party must notify all other parties by telephone or in person. A failure to timely notify this Court and/or the opposing parties may result in the tentative ruling being the final order in the matter.

Please notify this Court immediately if the matter will not be heard on the scheduled date. ***California Rules of Court***, rule 3.1304(b). If a party fails to appear at a law and motion hearing without having given notice, this Court may take the matter off calendar, to be reset only upon motion, or may rule on the matter. ***California Rules of Court***, rule 3.1304(d). A party may give notice that he or she will not appear at a law and motion hearing and submit the matter without an appearance unless this Court orders otherwise. This Court will rule on the motion as if the party had appeared. California Rules of Court, rule 3.1304(c). Any uncontested matter or matters to which stipulations have been reached can be processed through the Clerk in the usual manner. Please include a proposed order.

All proposed orders and papers should be submitted to this Department's e-filing queue. Do not send documents to the Department email unless directed to do so.

While the Court will still allow physical appearances, all litigants are encouraged to use the Zoom platform for Law & Motion appearances and Case Management Conferences. Use of other virtual platform devices will make it difficult for all parties fully to participate in the hearings. Please note the requirement of entering a password (highlighted above.) As for personal appearances, protocols concerning social distancing and facial coverings in compliance with the directives of the Public Health Officer will be enforced. Currently, facemasks are not required in all courthouses. If you appear in person and do wear a mask, it will be helpful if you wear a disposable paper mask while using the courtroom microphones so that your voice will not be muffled.

Individuals who wish to access the Courthouse are advised to bring a plastic bag within which to place any personal items that are to go through the metal detector located at the doorway to the courthouse.

Sign-ins will begin at about 8:30 AM. Court staff will assist you when you sign in. If you are using the Zoom virtual platform, it will helpful if you "rename" yourself as follows: in the upper right corner of the screen with your name you will see a blue box with three horizontal dots. Click on that and then click on the "rename" feature. You may type your name as: Line #/name/party. If you are a member of the public who wishes to view the Zoom session and remain anonymous, you may simply sign in as "Public."

CIVILITY.

In the 48 years that this Judge has been involved with the legal profession, the discussion of the decline in civility in the legal profession has always been one of the top topics of continuing education classes.

This Court is aware of a study being undertaken led by Justice Brian Currey and involving various lawyer groups to redefine rules of civility. This Judge has told Justice Currey that the lack of civility is due more to the inability or unwillingness of judicial officers to enforce the existing rules.

The parties are forewarned that this Court may consider the imposition of sanctions against the party or attorney who engages in disruptive and discourteous behavior during the pendency of this litigation.

COURT REPORTERS.

This session will not be recorded. No electronic recordings, video, still photography or audio capture of this live stream is allowed without the expressed, written permission of the Superior Court of California, County of Santa Clara. State and Local Court rules prohibit photographing or recording of court proceedings whether in the courtroom or while listening on the Public Access Line or other virtual platform, without a Court Order. See Local General Rule 2(A) and 2(B); ***California Rules of Court***, rule 1.150.

This Court no longer provides for Court Reporters in civil actions except in limited circumstances. If you wish to arrange for a court reporter, please use Local Form #CV-5100. All reporters are encouraged to work from a remote location. Please inform this Court if

any reporter wishes to work in the courtroom. This Court will approve all requests to bring a court reporter. Counsel should meet and confer on the use of a court reporter so that only one reporter appears and serves as the official reporter for that hearing.

PROTOCOLS DURING THE HEARINGS.

During the calling of any hearing, this Court has found that the Zoom video platform works very well. But whether using Zoom or any telephone, it is preferable to use a landline if possible. IT IS ABSOLUTELY NECESSARY FOR ALL INDIVIDUALS TO SPEAK SLOWLY. Plaintiff should speak first, followed by any other person. All persons should spell their names for the benefit of Court Staff. Please do not use any hands-free mode if at all possible. Headsets or earbuds of good quality will be of great assistance to minimize feedback and distortion.

The Court will prepare the Final Order unless stated otherwise below or at the hearing. Counsel are to comply with ***California Rules of Court***, rule 3.1312.

TROUBLESHOOTING TENTATIVE RULINGS.

To access a tentative ruling, move your cursor over the line number, hold down the "Control" key and click. If you see last week's tentative rulings, you have checked prior to the posting of the current week's tentative rulings. You will need to either "REFRESH" or "QUIT" your browser and reopen it. Another suggestion is to "clean the cache" of your browser. Finally, you may have to switch browsers. If you fail to do any of these, your browser may pull up old information from old cookies even after the tentative rulings have been posted.

This Court's tentative ruling is just that—tentative. Trial courts are not bound by their tentative rulings, which are superseded by the final order. (See *Faulkinbury v. Boyd & Associates, Inc.* (2010) 185 Cal.App.4th 1363, 1374-1375.) The tentative ruling allows a party to focus his or her arguments at a subsequent hearing and to attempt to convince the Court the tentative should or should not become the Court's final order. (*Cowan v. Krayzman* (2011) 196 Cal.App.4th 907, 917.) If you wish to challenge a tentative ruling, please refer to a specific portion of the tentative ruling to which you disagree.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 1	23CV409659	Outertainment Construction, Inc. v. Valerie's Swimming Pool, Inc., et al.	**Defendants' Demurrer To Plaintiff's Complaint.** Defendant Romero's demurrer to plaintiff OCI's complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] is SUSTAINED with 10 days' leave to amend. Defendant VSP's demurrer to the sixth cause of action of plaintiff OCI's complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] and on the ground that the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is SUSTAINED with 10 days' leave to amend. SEE ATTACHED TENTATIVE RULING.
LINE 2	23CV410545	David Martin vs Google LLC; City of Sacramento; City of West Sacramento; Emalee Ousley; José A. Ramírez	**Demurrer of Defendant Emalee Ousley to Plaintiff's Complaint.** Plaintiff is given 10 days leave within which to file an amended complaint. The matter is continued to 26 October 2023 at 10:00 AM in Department 20

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 3	19CV350420	Roman Ramírez-Melero v. Zeja Wu; Hon Hai Precision Industry Co., Ltd.; Honfujin Precision Electronics (Chongging) Co., Ltd.; NEW Technology, Inc.	**Motion Of Plaintiff To Compel Nonparty Foxconn Entities To Produce Documents And For Monetary Sanctions.** All motions are OFF CALENDAR as a result of the settlement reached with Defendant Hongfujin. The parties are just waiting for an adjustment to the language in the release to finalize that settlement. Defendants Hon Hai and NWE Technology have not settled with Plaintiff and the appeal is still pending. The matter is currently set on 07 March 2024 for "Dismissal after Settlement." The Court will change that entry to "Dismissal after Settlement/Appeal Status." NO FORMAL TENTATIVE RULING.
LINE 4	19CV350420	Roman Ramírez-Melero v. Zeja Wu; Hon Hai Precision Industry Co., Ltd.; Honfujin Precision Electronics (Chongging) Co., Ltd.; NEW Technology, Inc.	**Motion of Plaintiff to Compel Further Responses to Plaintiff's Special Interrogatories (Set 2) and Requests for Sanctions.** SEE LINE #3.
LINE 5	19CV350420	Roman Ramírez-Melero v. Zeja Wu; Hon Hai Precision Industry Co., Ltd.; Honfujin Precision Electronics (Chongging) Co., Ltd.; NEW Technology, Inc.	**Motion of Plaintiff to Compel Further Responses to Plaintiff's Special Interrogatories (Set 3) and Requests for Sanctions.** SEE LINE #3.
LINE 6	19CV350420	Roman Ramírez-Melero v. Zeja Wu; Hon Hai Precision Industry Co., Ltd.; Honfujin Precision Electronics (Chongging) Co., Ltd.; NEW Technology, Inc.	**Motion of Defendant Honfujin Precision Electronics for Judgment on the Pleadings.** SEE LINE #3.
LINE 7	20CV370579	YDM Management Co.; Advanced Orthopedic Center, Inc. vs. Catherine Llavnes; Century Park Ambulatory Surgical Center, LLC. and related cross-complaint.	**Motion of Plaintiffs/Cross-Defendants YDM Management Co. and Advanced Orthopedic Center, Inc. to Compel Defendant/Cross-Complainant Century Park Ambulatory Surgical Center to Respond to Special Interrogatories, Set Two, and for Monetary Sanctions** Continued from 20 July 2023. The motion is not opposed and is GRANTED in its entirety. Responding party is to provide code-compliant responses without objections within 20 days of the filing and service of this Order. The request for monetary sanctions is code-compliant. The Court will award $1,700.00 to counsel for moving parties, payable within 20 calendar days from the filing and service of this Order. The Court notes that on 14 August 2023, plaintiff is requested Entry of Default against both defendants. NO FORMAL TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 8	20CV370579	YDM Management Co.; Advanced Orthopedic Center, Inc. vs. Catherine Llavnes; Century Park Ambulatory Surgical Center, LLC. and related cross-complaint.	**Motion of Plaintiffs/Cross-Defendants YDM Management Co. and Advanced Orthopedic Center, Inc. to Compel Defendant/Cross-Complainant Century Park Ambulatory Surgical Center to Respond to Request for Production of Documents, Set Two, and for Monetary Sanctions.** Continued from 20 July 2023. The motion is not opposed and is GRANTED in its entirety. Responding party is to provide code-compliant responses without objections within 20 days of the filing and service of this Order. The request for monetary sanctions is code-compliant. The Court will award $1,700.00 to counsel for moving parties, payable within 20 calendar days from the filing and service of this Order. NO FORMAL TENTATIVE RULING.
LINE 9	16CV297475	Nationwide Mutual Insurance Co. v. Carmen Gullicksen, et al.	**Motions of Plaintiff Nationwide Mutual Insurance Co. to Compel Defendants SBV Concrete Inc. and Glen Gilbert to Further Respond to Special Interrogatories, Set Two, and Requests for Admissions, Sets Two.** The motions are GRANTED in their entirety. Nationwide is correct that fact that foundational facts with an attorney does not waive the attorney-client privilege and is therefore discoverable. (***Mitchell v. Superior Court (Shell Oil Company)*** (1984) 37 Cal.3d 591; ***People v. Perry*** (1972) 7 Cal.3d 756.) Foundational facts concerning asserted privileges are required to be stated in a privilege log. Responding party shall serve code compliant responses within 20 days of the filing and service of this Order. In reply papers, plaintiff states that monetary sanctions are appropriate. The request is not code compliant and is DENIED. NO FORMAL TENTATIVE RULING.
LINE 10	23CV410945	The Carlton Group, LTD vs. Amond World, LLC; Origo, LLC	**Motion of Defendant Origo, LLC For Sanctions Pursuant to Code of *Civil Procedure*, § 128.7.** The Court DENIES Defendant's motion for sanctions. SEE ATTACHED TENTATIVE RULING.
LINE 11			SEE ATTACHED TENTATIVE RULING.
LINE 12			SEE ATTACHED TENTATIVE RULING.
LINE 13			SEE ATTACHED TENTATIVE RULING.
LINE 14			SEE ATTACHED TENTATIVE RULING.
LINE 15			SEE ATTACHED TENTATIVE RULING.
LINE 16			SEE ATTACHED TENTATIVE RULING.
LINE 17			SEE ATTACHED TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 18			SEE ATTACHED TENTATIVE RULING.
LINE 19			SEE ATTACHED TENTATIVE RULING.
LINE 20			SEE ATTACHED TENTATIVE RULING.
LINE 21			SEE ATTACHED TENTATIVE RULING.
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LINE 25			SEE ATTACHED TENTATIVE RULING.
LINE 26			SEE ATTACHED TENTATIVE RULING.
LINE 27			SEE ATTACHED TENTATIVE RULING.
LINE 28			SEE ATTACHED TENTATIVE RULING.
LINE 29			SEE ATTACHED TENTATIVE RULING.
LINE 30			SEE ATTACHED TENTATIVE RULING.

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Calendar Line 1

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

DEPARTMENT 20

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(For Clerk's Use Only)

CASE NO.: 23CV409659 Outertainment Construction, Inc. v. Valerie's Swimming Pool, Inc., et al.
DATE: 21 September 2023 TIME: 9:00 am LINE NUMBER: 01
This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on the 20 September 2023. Please specify the issue to be contested when calling the Court and Counsel.

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Order On Defendants' Demurrer To Plaintiff's Complaint.

I. Statement of Facts.

On or about 16 October 2019, plaintiff Outertainment Construction, Inc. ("OCI") and defendant Valerie's Swimming Pool, Inc. ("VSP") entered into a written agreement ("Pool Contract") under which defendant VSP agreed to construct a swimming pool, spa, and install a hydraulic pool cover at a single family residential property located at 1321 Paramount Drive in Saratoga ("Project Site"). (Complaint, ¶12.) Pursuant to the Pool Contract, plaintiff OCI paid defendant VSP a sum of no less than $106,800. (*Id.*) The Pool Contract included an express warranty. (Complaint, ¶13.)

Pursuant to the Pool Contract, the swimming pool's interior plaster finish was to consist of "Aqua Blue Pebble," a finish defendant VSP claimed was manufactured by Pebble Technology International. (Complaint, ¶14.) Defendant VSP contracted with defendant JG Bay Area Pools Inc. ("JG") to install the swimming pool's interior plaster finish which defendant JG did so install. (*Id.*)

By July 2021, the owners of the Project Site suspected the swimming pool was leaking. (Complaint, ¶15.) Plaintiff OCI made numerous requests to defendant VSP to inspect the swimming pool which were unrequited. (*Id.*) Thereafter, plaintiff OCI engaged a third party company who found no less than seven cracks in the swimming pool's interior plaster/ pebble finish. (Complaint, ¶16.) Defendant VSP was notified specifically about discovery of the cracks. (*Id.*) Defendant VSP finally responded and, on or about 7 December 2021, defendant VSP and/or JG performed a demolition of the swimming pool's pebble finish. (Complaint, ¶17.)

On or about 18 January 2022, defendant VSP and/or JG replaced the swimming pool's since demolished pebble finish, but the replacement was grossly substandard, requiring another visit by defendant JG on or about 24 February 2022 to polish the uneven pebble finish. (Complaint, ¶18.)

On 25 March 2022, plaintiff OCI met with defendant VSP in an attempt to resolve the problematic pebble finish. (Complaint, ¶19.) Defendant VSP suggested using tile to cover the uneven portions of the swimming pool's surface. (*Id.*) On 12 April 2022, the swimming pool was drained to determine the viability of using tile per defendant VSP's suggestion. (Complaint, ¶20.) A third-party tile company (referred by defendant Ismael Hernandez-Romero

("Romero")[1]) informed plaintiff OCI that the swimming pool could only install tiles up to the swimming pool's existing tile line, resulting in uneven application. (*Id.*) Defendant VSP refused to re-tile the swimming pool up to its top to resolve the aforesaid uneven application. (*Id.*)

Plaintiff OCI, despondent with defendant VSP's refusal to correct the aforementioned deficiencies, engaged a third-party, Aquatic Technology, to perform a comprehensive inspection of the swimming pool/ spa and to review the Pool Contract. (Submitted.) On or about 25 April 2022, Aquatic Technology issued its report ("AT Report"), finding a litany of Swimming Pool failures and other deficiencies. (Complaint, ¶¶22 – 38.) Soon after the AT Report issued, plaintiff OCI shared its findings with defendants VSP and Romero. (Complaint, ¶39.)

On or about 19 May 2022, plaintiff OCI, defendant VSP, and owners of the Project Site signed a document ("May 2022 Agreement") intended to identify which of the swimming pool failures defendant VSP would agree to remedy. (Complaint, ¶40.) In addition to signing the May 2002 Agreement, defendant VSP made handwritten notations on the margin of the document stating defendant VSP would remedy the pool cover, glass tile, and sheer descent; defendant VSP would not remedy the spa's corner jets, replace the pool fittings, or fix the crooked tiles; and that all other items identified in the May 2022 Agreement would be addressed in a subsequent email by defendant VSP. (Complaint, ¶41.)

Defendant VSP did not send any subsequent email or make any attempt to remedy anything whatsoever. (Complaint, ¶42.) Defendant VSP has since refused to respond to any of plaintiff OCI's communications including a 1 November 2022 written demand from plaintiff OCI's attorney. (*Id.*)

On 6 January 2023[2], plaintiff OCI filed a complaint against defendants VSP, JG, and Romero asserting causes of action for:

(1) Breach of Written Contract [against defendants VSP and Romero]

(2) Breach of Implied Duty to Perform with Reasonable Care [against defendants VSP and Romero]

(3) Breach of Express Warranty [against defendants VSP and Romero]

(4) Breach of Implied Warranty [against defendants VSP and Romero]

(5) Professional Negligence

(6) Fraud [against defendants VSP and Romero]

On 22 March 2023, defendant JG filed an answer to plaintiff OCI's complaint.

On 4 May 2023, defendants VSP and Romero filed the motion now before the court, a demurrer to the alter ego allegations and the sixth cause of action [fraud] of plaintiff OCI's complaint.

II. Demurrers In General.

A complaint must contain substantive factual allegations sufficiently apprising the defendant of the issues to be addressed. (See ***Williams v. Beechnut Nutrition Corp.*** (1986) 185 Cal.App.3d 135, 139, fn. 2.)

A demurrer tests the legal sufficiency of a complaint. It is properly sustained where the complaint or an individual cause of action fails to "state facts sufficient to constitute a cause of action." (***Code of Civil Procedure***, § 430.10, subd. (e).) "[C]onclusionary allegations . . . without facts to support them" are insufficient on demurrer.

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[1] Defendant Romero is alleged to be the Chief Executive Officer, Secretary, Chief Financial Officer, Director, Agent for Service of Process, Responsible Managing Officer, and shareholder of defendant VSP. Defendant Romero is further alleged to be the Responsible Managing Officer and shareholder of defendant JG. (See Complaint, ¶4.)

[2] This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (**Government Code**, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (Ca. St. Civil **Rules of Court**, Rule 3.714(b)(1)(C) and (b)(2)(C).)

(***Ankeny v. Lockheed Missiles and Space Co.*** (1979) 88 Cal.App.3d 531, 537.) "It is fundamental that a demurrer is an attack against the complaint on its face, it should not be sustained unless the complaint shows that the action may not be pursued." (***Yolo County Dept. of Social Services v. Municipal Court*** (1980) 107 Cal.App.3d 842, 846-847.)

"It is not the ordinary function of a demurrer to test the truth of the plaintiff's allegations or the accuracy with which he describes the defendant's conduct. A demurrer tests only the legal sufficiency of the pleading." (***Committee on Children's Television, Inc. v. General Foods Corp.*** (1983) 35 Cal.3d 197, 213.) "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.' [Citation.]" (***Id.*** at pp. 213-214; see ***Cook v. De La Guerra*** (1864) 24 Cal. 237, 239: "[I]t is not the office of a demurrer to state facts, but to raise an issue of law upon the facts stated in the pleading demurred to.")

III. Analysis.

A. Defendants' demurrer to plaintiff OCI's complaint.

1. Defendant Romero's demurrer to plaintiff OCI's complaint is SUSTAINED.

The court understands defendant Romero to generally demur to the entirety of plaintiff OCI's complaint on the ground that plaintiff OCI has not sufficiently stated facts to hold defendant Romero liable under alter ego principles. "The alter ego doctrine arises when a plaintiff comes into court claiming that an opposing party is using the corporate form unjustly and in derogation of the plaintiff's interests." (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 300.)

"[T]wo conditions must be met before the alter ego doctrine will be invoked. First, there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the corporation alone." (*Tucker Land Co. v. State of California* (2001) 94 Cal.App.4th 1191, 1202.) Defendant Romero acknowledges the alter ego allegations found at paragraphs 43 – 50 of plaintiff OCI's complaint but contends these allegations are not sufficiently specific to support an alter ego theory.

The question here is whether plaintiff OCI's complaint alleges sufficient facts to impose liability under an alter ego theory. Looking to a few examples of the past, in *Vasey v. California Dance Co.* (1977) 70 Cal.App.3d 742, 749 (*Vasey*), plaintiff brought an unlawful detainer and breach of contract action against the defendant corporation ("CDC") and the two individuals associated with that corporation. The defendants defaulted and the lower court entered judgment against the individual defendants.

The appellate court overturned the judgment as to the two individual defendants finding that the plaintiff's complaint, "asserted a bare conclusory allegation that the individual and separate character of the corporation had ceased and that CDC was the alter ego of the individual defendants." (*Vasey*, *supra*, 70 Cal.App.3d at p. 749; emphasis added.) "In order to prevail in a cause of action against individual defendants based upon disregard of the corporate form, the plaintiff must plead and prove [1] such a unity of interest and ownership that the separate personalities of the corporation and the individuals do not exist, and [2] that an inequity will result if the corporate entity is treated as the sole actor." (*Id.*)

Vasey states the two pleading requirements to sue upon an "alter ego" theory and, by way of example, shows us that pleading only one of those two requirements in general "bare conclusory" terms is insufficient to withstand even a default judgment. In *Stodd v. Goldberger* (1977) 73 Cal.App.3d 827 (*Stodd*), we get to see an example of a sufficiently pleaded complaint under the "alter ego" theory. In *Stodd*, a California corporation, M.I.I. Corporation ("M.I.I."), entered into a joint venture agreement with Goldco, a limited partnership for the ownership and operation of a hotel. The same three general partners who made up Goldco also owned M.I.I. When the venture failed, M.I.I filed for bankruptcy. The trustee in bankruptcy then brought suit against Goldco and its three individual general partners. In its first cause of action, the trustee sought "to disregard M.I.I.'s corporate existence

and, on the theory of alter ego, establish defendants' personal liability for all of M.I.I.'s debts and recover from defendants damages in the approximate sum of $2,542,000.00." (*Stodd*, *supra*, 73 Cal.App.3d at p. 832.)

"To support the alter ego doctrine it is alleged that there is a unity of ownership between defendants and M.I.I., that defendants dominated and controlled M.I.I., that M.I.I. was created and operated by defendants pursuant to a fraudulent scheme to defraud M.I.I.'s creditors and that adherence to the fiction of M.I.I.'s separate existence would sanction a fraud and promote injustice." (*Id*.)

The defendants made and the trial court granted its motion for judgment on the pleadings (functionally the same as a demurrer) as to the alter ego cause of action. The trial court granted plaintiff 15 days' leave to amend, noting that amendment would permit plaintiff to prove that corporate assets were converted, transferred and deal with to the injury of the corporation and its creditors. However, "[p]laintiff declined to avail himself of the opportunity to amend."

In granting plaintiff leave to amend, the court was not saying that "conversion or transfer of corporate assets to the injury of the corporation" is a necessary allegation to invoke the alter ego doctrine. The *Stodd* court held that the allegations of alter ego appeared to be sufficient as plead. However, a trustee in bankruptcy is not the real party in interest and does not have standing to sue unless it can plead and prove some direct injury to the corporation itself. "In the absence of any such allegation, the asserted cause of action belongs to each creditor individually, and plaintiff (trustee in bankruptcy) is not the real party in interest." (*Id.* at p. 833.)

With respect to the pleading requirements for the alter ego doctrine, the *Stodd* court again reiterated the two basic allegation requirements for the alter ego doctrine noting however, that "the conditions under which a corporate entity may be disregarded vary according to the circumstances in each case." (*Id.* at p. 832.)

In *Leek v. Cooper* (2011) 194 Cal.App.4th 399, 415, the court wrote, "To recover on an alter ego theory, a plaintiff need not use the words 'alter ego,' but must allege sufficient facts to show a unity of interest and ownership, and an unjust result if the corporation is treated as the sole actor. [Citation.] An allegation that a person owns all of the corporate stock and makes all of the management decisions is insufficient to cause the court to disregard the corporate entity. [Citation.]"

In *Hasso v. Hapke* (2014) 227 Cal.App.4th 107, 155, the court wrote:

> "In California, two conditions must be met before the alter ego doctrine will be invoked. First, there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the corporation alone. [Citations.] 'Among the factors to be considered in applying the doctrine are commingling of funds and other assets of the two entities, the holding out by one entity that it is liable for the debts of the other, identical equitable ownership in the two entities, use of the same offices and employees, and use of one as a mere shell or conduit for the affairs of the other.' [Citations.] Other factors which have been described in the case law include inadequate capitalization, disregard of corporate formalities, lack of segregation of corporate records, and identical directors and officers. [Citations.] No one characteristic governs, but the courts must look at all the circumstances to determine whether the doctrine should be applied. [Citation.] Alter ego is an extreme remedy, sparingly used. [Citation.]" [Citations.]

There is a non-exclusive list of factors which the court must consider in reaching a determination on the application of the alter ego doctrine. No one factor will govern the determination. The trier of fact must look to all the circumstances. The court in *Claremont Press Publishing Co. v. Barksdale* (1960) 187 Cal.App.2d 813, 817 held, "Whether the facts are sufficient to warrant disregard of the corporate entity is largely a question for the trial court."

Here, however, even if the court were to find that plaintiff OCI has alleged a unity of ownership and interest between VSP/ JG and Romero such that the separate personalities of the corporations and the shareholder do not exist, plaintiff OCI has not made any allegation that an inequity will result if the corporate entities are treated as the sole actors.

Accordingly, defendant Romero's demurrer to plaintiff OCI's complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] is SUSTAINED with 10 days' leave to amend.

2. Defendant VSP's demurrer to the sixth cause of action [fraud] of plaintiff OCI's complaint is SUSTAINED.

As a general rule, each element in a fraud cause of action must be pleaded with specificity. (*Lazar v. Super. Ct.* (1996) 12 Cal.4th 631, 645; *Cadlo v. Owens-Illinois, Inc.* (2004) 125 Cal.App.4th 513, 519.) The court in *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645 stated that "this particularity requirement necessitates pleading facts which 'show how, when, where, to whom, and by what means the representations were tendered.' A plaintiff's burden in asserting a claim against a corporate employer is even greater. In such a case, the plaintiff must 'allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written."

Defendant VSP contends that despite the specificity required to plead fraud against a corporate defendant, plaintiff OCI alleges only, "Defendant VSP represented to Plaintiff, as evidenced by the language of the Pool Contract, that Defendant VSP would use certain materials and brands in construction of the Swimming Pool and Spa." (Complaint, ¶75.)[3] Defendant VSP contends this allegations lacks any identification of the person who made the representation, what representation was made, how it was communicated, or when the representation was made.

The court does not entirely agree with defendant VSP. The allegation conveys what representation was made (certain materials and brands would be used in construction; see also Complaint, ¶76—"Hayward brand equipment instead of Pentair and Polaris"), how the representation was made (written contract; see also Complaint, ¶12—"written contract"), and when the representation was made (see Complaint, ¶12—"on or about September 16, 2009"). The court agrees with defendant VSP, however, that the complaint lacks any specificity with regard to the name of the person who made the allegedly fraudulent representation(s) and their authority to speak.

Defendant VSP argues additionally that the alleged misrepresentation does not amount to fraud and instead merely asserts a breach of contract. "Fraud is an intentional tort; it is the element of fraudulent intent, or intent to deceive, that distinguishes it from actionable negligent misrepresentation and from nonactionable innocent misrepresentation. It is the element of intent which makes fraud actionable, irrespective of any contractual or fiduciary duty one party might owe to the other." (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 482.) While the failure to use the materials represented may constitute a breach of contract, the failure to do so coupled with fraudulent intent is what gives rise to a claim for fraud. Although they could have been stated more succinctly, plaintiff OCI does make allegations of fraudulent intent. (See Complaint, ¶¶76 – 77.) (Cf. 5 Witkin, California Procedure (4th ed. 1997) Pleading, §684, p. 143—"Intent, like knowledge, is a fact. Hence, the averment that the representation was made with the intent to deceive the plaintiff, or any other general allegation with similar purport, is sufficient.") Moreover, "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213 – 214.)

For the reasons discussed above, defendant VSP's demurrer to the sixth cause of action of plaintiff OCI's complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] and on the ground that the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is SUSTAINED with 10 days' leave to amend.

IV. Tentative Ruling.

The tentative ruling was duly posted.

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[3] In opposition, plaintiff contends this is an allegation of fraudulent concealment. The court does not find such an allegation to be one of fraudulent concealment, but rather one of affirmative misrepresentation.

V. Case Management.

The Case Management Conference currently set for 28 November 2023 at 10:00 AM in Department 20 will be RESET to 05 March 2024 at 10:00 AM in Department 20

VI. Order.

Defendant Romero's demurrer to plaintiff OCI's complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] is SUSTAINED with 10 days' leave to amend.

Defendant VSP's demurrer to the sixth cause of action of plaintiff OCI's complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] and on the ground that the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is SUSTAINED with 10 days' leave to amend.

_____ _____

DATED: **HON. SOCRATES PETER MANOUKIAN**
Judge of the Superior Court
County of Santa Clara

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SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 20

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(For Clerk's Use Only)

CASE NO.: 23CV410945 **The Carlton Group, LTD vs. Amond World, LLC; Origo, LLC**
DATE: 21 September 2023 **TIME: 9:00 am** **LINE NUMBER: 10**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on the 20 September 2023. Please specify the issue to be contested when calling the Court and Counsel.

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Motion of Defendant Origo, LLC For Sanctions
Pursuant to Code of *Civil Procedure*, § 128.7.

I. Statement of Facts.

Plaintiff The Carlton Group, Ltd. ("Carlton") is one of the world's leading real estate investment banks. (Complaint, ¶9.) One of plaintiff Carlton's specialties is arranging large amounts of construction and development equity and debt financing. (*Id.*)

In or around January 2021, plaintiff Carlton began discussions with defendant Amond World, LLC ("Amond") about assisting defendant Amond in obtaining financing to develop a refrigerated cold storage facility in Madera, California ("Proposed Facility"). (Complaint, ¶10.)

Defendant Amond intended to construct two warehouses on the site and operate them with a focus on cold storage of almonds but needed financing for construction of the facility and other start-up costs. (*Id.*) Before engaging plaintiff Carlton, defendant Amond sought financing for the project for several years without success. (*Id.*)

Plaintiff Carlton agreed to serve as defendant Amond's exclusive broker and advisor in finding a capital source to finance construction and development of the Proposed Facility, entering into an Exclusive Debt & Equity Advisory Agreement ("Exclusive Agreement"). (Complaint, ¶11 and Exh. A.)

Under the Exclusive Agreement, defendant Amond appointed plaintiff Carlton as its exclusive agent to negotiate and obtain financing for development of the Proposed Facility. (Complaint, ¶13.) In return for plaintiff Carlton's services, defendant Amond agreed plaintiff Carlton would receive a commission. (Complaint, ¶14.) In the case of any financing structure other than a first mortgage secured by the property, the agreed-upon commission was 3.5% of the maximum amount of funds committed by the financier, payable in full upon the initial closing of any such transaction. (*Id.*)

In early May 2021, plaintiff Carlton contacted defendant Origo, LLC ("Origo") which invests capital in commercial real estate transactions. (Complaint, ¶16.) Plaintiff Carlton provided defendant Origo with information about the financing opportunity and began discussions regarding the terms and structure of a potential deal. (*Id.*)

On 20 May 2021, plaintiff Carlton set up an introductory call between defendants Amond and Origo where the project for the Proposed Facility was discussed in detail. (*Id.*) At all relevant times, defendant Origo was fully aware plaintiff Carlton was acting as defendant Amond's exclusive broker and advisor pursuant to a written

agreement and that plaintiff Carlton was entitled to a commission in the event any transaction was finalized. (Complaint, ¶17.)

Defendant Origo agreed to finance the development of the Proposed Facility pursuant to a Letter of Intent dated 22 June 2021 executed by defendants Amond and Origo ("Letter of Intent"). (Complaint, ¶18 and Exh. B.) This transaction would not have happened without plaintiff Carlton introducing defendant Origo to defendant Amond. (Complaint, ¶19.)

Defendant Amond executed the Letter of Intent and sent it to defendant Origo without notifying plaintiff Carlton. (Complaint, ¶20.) Pursuant to the Letter of Intent, defendant Origo agreed to provide financing in the amount of $101,300,000. (Complaint, ¶22.)

Plaintiff Carlton repeatedly requested defendant Amond provide the documents drafted by defendant Origo and executed by defendant Amond related to the transaction, but defendant Amond has refused and failed to provide the documents. (Complaint, ¶28.)

Under the terms of the Exclusive Agreement, plaintiff Carlton's commission was due and payable in full upon the initial closing of the transaction which occurred when defendant Origo started funding the development of the Proposed Facility. (Complaint, ¶30.) In October 2022, plaintiff Carlton sent an invoice for the commission to defendant Amond but defendant Amond refused to pay, claiming the $100-plus million provided by defendant Origo did not constitute financing. (Complaint, ¶31 and Exh. C.)

Defendants Origo and Amond intentionally structured the transaction as a purported "lease" in an attempt to avoid paying plaintiff Carlton the commission it earned. (Complaint, ¶32.) Indeed, the deal between defendants Origo and Amond purports to provide defendant Origo with millions of dollars as a "brokerage fee" even though plaintiff Carlton was defendant Amond's exclusive broker and defendant Carlton acted as broker and made the transaction possible. (Complaint, ¶32.)

On 2 February 2023[4], plaintiff Carlton filed a complaint against defendants Carlton asserting causes of action for:

(1) Breach of Written Contract [against defendant Amond]

(2) Breach of Implied Covenant of Good Faith and Fair Dealing [against defendant Amond]

(3) Unjust Enrichment [against defendant Amond]

(4) Goods and Services Rendered [against defendant Amond]

(5) Intentional Interference with Contractual Relations [against defendant Origo]

On 3 April 2023, defendant Origo filed the first of two motions now before the court, a demurrer to the fifth cause of action of plaintiff Carlton's complaint.

Also on 3 April 2023, defendant Amond filed the second motion now before the court, a demurrer to the first through fourth causes of action of plaintiff Carlton's complaint.

The demurrers were argued and submitted on 27 June 2023. Following the hearing, this Court adopted its 8+ page singlespaced 11-point font overruling the demurrers.

II. Motion for Sanctions.

Origo now seeks sanctions under ***Code of Civil Procedure***, § 128.7 concerning the fifth cause of action.

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[4] This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (**Government Code**, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (Ca. St. Civil **Rules of Court**, Rule 3.714(b)(1)(C) and (b)(2)(C).)

This Court notes that the motion was originally filed on 20 June 2023, a week before the order of this Court which overruled the demurrers.

Origo contends that the fifth cause of action for intentional interference with contractual relations in which plaintiff alleges that the fifth cause of action, alleging that Origo structured its deal with Amond World as a lease to deprive Carlton of a commission, should be dismissed claiming that Carlton and its counsel have no reasonable basis to believe the allegations underlying that claim.

III. Analysis.

A. Standard.

An attorney or unrepresented party who presents a pleading, motion or similar paper to the Court makes an implied "certification" as to its legal and factual merit; and is subject to sanctions for violation of this certification. (California Practice Guide, ***Civil Procedure Before Trial***, §9:11136 (The Rutter Group) (citing Code of Civil Procedure, § 128.7 and ***Murphy v. Yale Materials Handling Corp.*** (1997) 54 Cal.App.4th 619, 623).)

This implied certification includes the following "sub-certifications":

1. The pleading is not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
2. The claims, defenses and other legal contentions asserted in the are warranted by existing law or by a nonfrivolous argument for the extension or change in existing law;
3. Any factual contentions in the pleading have evidentiary support or, if specifically so identified, are likely to have evidentiary support after reasonable opportunity for further investigation or discovery;
4. The denials of factual allegations are warranted on the evidence or, if identified as such, are reasonably based on a lack of information or belief. (California Guide, ***Civil Procedure Before Trial***, §9: I 136 (The Rutter Group) (citing Code of Civil Procedure, § 128.7(b).)

Violation of any of these certifications may give rise to sanctions. (See ***Eichenbaum v. Alon*** (2003) 106 Cal.App.4th 967, 976.)

B. Discussion.

There are various procedural hurdles a moving party must overcome for a ***Code of Civil Procedure***, § 128.7 motion. Here, plaintiff (the non-moving party) disputes the procedural propriety of the motion. The Court therefore examines the substance of Defendant's motion.

After reviewing the claims in the complaint, the Court overruled the demurrers by both in effect to all causes of action. Origo specifically demurred to the fifth cause of action. Therefore, at least on this record, this Court finds no reason to believe that the claims are frivolous, legally unreasonable, or without factual foundation. (See ***Bockrath v. Aldrich Chem. Ca, Inc***. (1999) 21 Cal.4th 71, 82.) The Court therefore finds that plaintiff and counsel have not filed objectively unreasonable claims that would violate ***Code of Civil Procedure***, § 128.7. (See ***Peake v. Underwood*** (2014) 227 Cal.App.4th 428, 440 [noting that "[a] claim is objectively unreasonable if any reasonable attorney would agree that [it] is totally and completely without merit"} (brackets in original; internal quotes omitted).)

If there are no objectively unreasonable claims in the complaint, there is no ***Code of Civil Procedure***, § 128.7 violation and sanctions cannot be awarded, unless an improper purpose for filing the complaint can be shown. (See ***Bucur v. Ahmad*** (2016) 244 Cal.App.4th 175, 189.[5])

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[5] "A claim is factually frivolous if it is 'not well grounded in fact' and is legally frivolous if it is 'not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. In either case, to obtain sanctions, the moving party must show the party's conduct in asserting the claim was objectively unreasonable. A claim is objectively unreasonable if

Origo's motion here looks more like a mini-summary judgment motion. Mr. Hayner has filed a 112-page declaration which describes a series of discussions between himself, Mr. Rosner, Mr. Bildner, and someone from Amond World. He declares that the first time he saw a copy of the 26 March 2021 Exclusive Debt and Equity Advisory Agreement was when it was attached to the complaint. Mr. Feinstein files a 20-page declaration claiming the entitlement to sanctions.

In opposition to the motion, plaintiff sets out competing declaration setting forth facts taking issue with the declaration of Mr. Hayner. Plaintiff also points out that defendant has been somewhat obstructive in providing responses to discovery requests.

Defendant does not show such an improper purpose by Plaintiff. As plaintiff has set forth, Origo should have withdrawn this Motion at that when its demurrer was overruled because under established California law, even a complaint that doesn't survive a demurrer is not necessarily frivolous (***Kumar v. Ramsay*** (2021) 71 Cal.App.5th 1110, 1121; ***Peake v. Underwood***, supra at 448.) It would seem to follow that a complaint that does get past the demurrer stage is not frivolous. Therefore, the Court DENIES Defendant's motion for sanctions.[6]

Plaintiff makes a demand for monetary sanctions incurred in opposing this motion. Carlton asserts that on the same day that this Court overruled Origo's demurrer to the fifth cause of action, its counsel sent out an email to defense counsel suggesting that the present motion is baseless.

Should this matter proceed to hearing, this Court may inquire why Origo should not be sanctioned pursuant to ***Code of Civil Procedure***, § 128.7(h), authorizing a court to sanction a party who brings a motion for sanctions primarily for an improper purpose, "such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

IV. Tentative Ruling.

The tentative ruling was duly posted.

V. Case Management.

A Case Management Conference is currently set for 06 February 2024 at 10:00 AM in this Department. The parties should continue with discovery and discuss alternate dispute resolution. This Court is considering the setting a trial date at the next CMC.

VI. Order.

The Court DENIES Defendant's motion for sanctions.

_____ _____

DATED:

HON. SOCRATES PETER MANOUKIAN
Judge of the Superior Court
County of Santa Clara

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any reasonable attorney would agree that [it] is totally and completely without merit." (citations omitted, internal punctuation modified.)

[6] As an aside, it is not clear to this Court the amount of the sanctions being sought by Origo.

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