TENTATIVE RULINGS

DEPT W15

JUDGE RICHARD Y. LEE

Date: May 16, 2024

Civil Court Reporters: The Court does not provide court reporters for law and motion hearings. Please see the Court's website for rules and procedures for court reporters obtained by the Parties.

Tentative Rulings: The Court will endeavor to post tentative rulings on the Court's website by 5 p.m. on Wednesday. Do NOT call the Department for a tentative ruling if none is posted. **The Court will NOT entertain a request for continuance or the filing of further documents once a tentative ruling has been posted.**

Submitting on the Tentative Ruling: If ALL counsel intend to submit on the tentative ruling and do not wish oral argument, please advise the Court's clerk or courtroom attendant by calling (657) 622-5915. If all sides submit on the tentative ruling and so advise the Court, the tentative ruling shall become the Court's final ruling and the prevailing party shall give Notice of Ruling and prepare an Order for the Court's signature if appropriate under CRC 3.1312. **Please do not call the Department unless ALL parties submit on the tentative ruling.**

Non-Appearances: If no one appears for the hearing and the Court has not been notified that all parties submit on the tentative ruling, the Court shall determine whether the matter is taken off calendar or whether the tentative ruling shall become the final ruling.

Remote Appearances: Department W15 generally conducts non-evidentiary proceedings, including law and motion, *remotely, by Zoom videoconference*: (1) All counsel and self-represented parties appearing for such hearings **must,** prior to 1:30 p.m. on Thursday, check-in online via the Court's civil video appearance website at https://www.occourts.org/media-relations/civil.html. (2) Participants will then be prompted to join the courtroom's Zoom hearing session. (3) The calendar will be displayed and participants will then be instructed to rename their Zoom name to include their hearing's calendar number. Check-in instructions and an instructional video are available on the court's website. All remote video participants shall comply with the Court's "Guidelines for Remote Appearances" posted online. In compliance with Local Rule 375, parties preferring to be heard in-person, instead of remotely, **shall** provide *notice of in-person appearance* to the court and all other parties five (5) days in advance of the hearing. (See the appropriate Local Form available at https://www.occourts.org/forms/formslocal.html).

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100	Jalomo vs. City of Santa Ana 19-01118103	*Off-calendar.*

101	Wamar International, LLC vs. Thales Avionics, Inc. 23-01360170	Defendant, Thales Avionics, Inc. ("Thales") petitions this Court to dismiss the Complaint in favor of arbitration, or alternatively, to compel Plaintiff, Wamar International, LLC ("Wamar"), to arbitrate its claim against Thales and stay this action pursuant to 9 U.S.C. §§ 2 to 4 and Code of Civil Procedure §§ 1281, 1281.2, and 1281.4. *Pro Hac Vice* Preliminarily, the Court notes that there is on calendar an unopposed application allowing John W. Lomas, Jr. to appear as counsel pro hac vice for Defendant, Thales Avionics, Inc. In reviewing the application for pro hac vice, there appears to be a number of deficiencies. Under California Rules of Court, rule 9.40(c)(1), the applicant must file proof of service by mail of a copy of the application and of the notice of hearing of the application on the State Bar of California at its San Francisco. Additionally, under California Rules of Court, rule 9.40(e), the applicant must pay a reasonable fee not exceeding $50 to the State Bar of California with the copy of the application and notice of hearing that is served on the State Bar. Here, the proof of service attached to the Application does not show service on the State Bar of California. Second, while Attorney Lomas provides that "following the filing of this Application, my office will cause a copy of this pro hac vice application and payment of $50.00 to be submitted to the State Bar of California via the State Bar's online Applicant Portal," there is no other evidence showing that this was, in fact, completed. As a result, the Court is willing to advance the hearing to today's date and GRANT the Application on the condition that supplemental evidence be filed before or at the hearing showing service and payment on the State Bar of California as required by California Rule of Court, Rule 9.40. *Merits of Motion* Thales contends that Wamar's sole claim for breach of contract, i.e., breach of Section 2.17 of the Confidential Settlement Agreement and Release (the "Settlement Agreement"), presupposes the existence of a payment obligation and default under Section 2.8, and is

		subject to a mandatory agreement to arbitrate disputes, controversies or claims arising out of or in connection with the Settlement Agreement. Thales contends that Sections 2.8, 2.8.1, and 2.8.2 of the Settlement Agreement provides for payments by Thales to Wamar provided that Emirates Airlines confirms the purchase of the 100 option B777-X aircrafts and therefore the purchase of IFE and connectivity systems part of the BAFO referred 82184429 rev 1 dated 2nd of April 2015, and that Wamar's Complaint claims that the payment described in Section 2.8.2 is now due, but that by the express terms, the payment obligations in Section 2.8 were ones with a condition precedent, that Thales disputes that this condition precedent has been met, and that this disputed issue falls within the exclusive jurisdiction of an arbitral tribunal. Thales contends that Wamar's Complaint does not state a cause of action for breach of Section 2.8.2 because a claim for breach of this section is subject to the Settlement Agreement's mandatory mediation and arbitration provision, as stated in Section 5.13 of the Settlement Agreement. Thales also asserts that due to the parties' dispute over whether the condition precedent has been satisfied, Thales initiated mediation proceedings with the International Chamber of Commerce ("ICC") as required by Section 5.13 of the Settlement agreement; Thales and Wamar have both paid their share of the deposit for the ICC's administrative expenses; that the ICC appointed a mediator on December 12, 2023; and that the mediation proceedings are set to end by December 20, 2023. Thales thus contends that Wamar's Complaint is, at best, premature. Thales additionally contends that the Court need not, and should not, decide whether Wamar's Complaint falls within the arbitration agreement's scope because the parties have delegated threshold arbitrability questions to the arbitrators. Thales asserts that express incorporation of the ICC rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability. Thales further asserts, in an abundance of caution, that Section 2.17 of the Settlement Agreement provides that Thales has no payment guarantee

		obligation unless and until (1) a payment by Thales or Thales USA is due and (2) Thales or Thales USA defaults on such payment, and that the dispute is over whether the condition precedent to any further payment under the Settlement Agreement has been satisfied, which is a dispute that (1) arises out of or in connection with the Settlement Agreement and (2) does not fall within the scope of the exception to the arbitration agreement such that questions of arbitrability are within the purview of an arbitrator. Wamar contends that Thales' attempts to recast the allegations of Wamar's Complaint, when the Complaint expressly asserts a claim against Thales arising from the absolute and unconditional payment guarantee in Section 2.17 of the Settlement Agreement (the "Guaranty"). Wamar contends that Thales fails to establish the existence of an agreement to arbitrate the Guaranty as between Thales and Wamar, that there is no agreement to arbitrate the claims asserted in this action, and that the arbitration provision is not applicable to the Guaranty claim brought by Wamar against Thales because the Settlement Agreement explicitly exempts Wamar's Guaranty claim from arbitration, and instead provides that Wamar may enforce the Guaranty in the Superior Court of California. More specifically, Wamar contends that Section 2.17 of the Settlement Agreement contains an absolute and unconditional guaranty by Thales of the full and punctual payment of all payments due to Wamar under Section 2.8.2; that the plain and unambiguous language of the Guaranty expressly states that the Guaranty is immediate, independent of and not contingent upon having to first seek resolution on the primary obligation of Section 2.8.2; and that the independent nature of the Guaranty is further confirmed by the fact that the Settlement Agreement provides for attorneys' fees and costs, as well as that Section 5.13 provides for litigation in the Superior Court of California for the Guaranty. Wamar asserts that its enforcement of the unconditional payment guarantee by Thales is enforceable in the Superior Court of California which is an express exception to the ADR provision that applies to all other parties and aspects of the Settlement Agreement. Wamar additionally contends that

		this right was specifically negotiated, in part, because Wamar is a California entity, and Thales is based in Irvine, California, while other parties to the Settlement Agreement are foreign-based entities that would be subject to the ICC, and that this exclusion of the Guaranty claim may not be ignored or rewritten to force Wamar into arbitration when it expressly exempted this claim from arbitration. Wamar asserts that this dispute is not about whether a condition precedent to payment has been met; that Wamar has alleged that it met and exceeded the required threshold for payments owed to Wamar under the Settlement Agreement; and that while the Court should not get into the merits of the claim, Thales argues facts that are not in the Complaint, and that are not supported by evidence. Wamar contends that Thales' argument is merely a defense to Wamar's claim and does not invalidate or void Wamar's contractual right to bring its claim in this Court. Wamar additionally argues that Thales' interpretation is not supported by the Settlement Agreement and that such interpretation suggests that arbitration would always be required before Wamar could bring an action in Superior Court, but that this is not expressed anywhere in the Settlement Agreement, and would contravene the clear intent of the parties to exclude the Guaranty from the arbitration provision. Wamar further notes that the parties never conducted a mediation of this dispute because Thales cancelled the mediation proceedings before the mediation was even scheduled. Lastly, Wamar asserts that the parties did not delegate the issue of arbitrability to the arbitrator; that there is not clear and unmistakable evidence that the parties agreed to delegate arbitrability questions concerning enforcement of the Guaranty to the arbitrator; that the parties specifically agreed to exclude enforcement of the Guaranty from the arbitration provision, as set forth above; and that the incorporation of arbitration rules does not necessarily provide clear and unmistakable evidence of the parties intent to delegate threshold issues to the arbitrator.

		As a threshold matter, both parties cite to the Federal Arbitration Act ("FAA") applies, implicitly asserting it applies, but do not establishing this is the case such that the FAA is inapplicable. The party asserting the FAA bears the burden to show it applies by presenting evidence establishing the contract with the arbitration provision has a substantial relationship to interstate commerce, and the failure to do so renders the FAA inapplicable. (*Carbajal v. CWPSC, Inc*. (2016) 245 Cal.App.4th 227, 234.) Additionally, despite Thales' discussion concerning the commencement and anticipated completion of mediation proceedings, it appears that after filing the instant motion, Thales did not participate in the mediation and refused to schedule a virtual or in person mediation, such that on January 11, 2024, the mediation was held in abeyance until Thales requested that the proceeding be formally closed on March 19, 2024. (Declaration of Allina M. Amuchie, ¶ 2.) *Existence of Arbitration Agreement* The court may order a petitioner and respondent to arbitrate a controversy if the court determines that an agreement to arbitrate the controversy exists and "[o]n petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy." (Code Civ. Proc. § 1281.2.) "California statutes create a 'summary proceeding' for resolving petitions or motions to compel arbitration. [Citation.] 'The petitioner bears the burden of proving the existence of a valid arbitration agreement by the preponderance of the evidence, and a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense. [Citation.] In these summary proceedings, the trial court sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court's discretion, to reach a final determination.' [Citation.]" (*Chambers v. Crown Asset Management, LLC* (2021) 71 Cal.App.5th 583, 590, 286 Cal.Rptr.3d 535, fn. omitted.) (*Kader*

		v. Southern California Medical Center, Inc. (2024) 99 Cal.App.5th 214, 317 Cal.Rptr.3d 682, 687.) Here, there is no dispute that the Settlement Agreement contains an arbitration provision. The question is whether it encompasses the claim in Wamar's Complaint in this action based on a breach of Section 2.17 of the Settlement Agreement, or whether Wamar's claim in this action is expressly excluded from the arbitration provision. *Arbitration Agreement and Relevant Portions of Settlement Agreement* "Once the existence of a valid arbitration clause has been established, '[t]he burden is on "the party opposing arbitration to demonstrate that [the] arbitration clause cannot be interpreted to require arbitration of the dispute." ' [Citation.]" (*McIsaac v. Foremost Ins. Co. Grand Rapids, Michigan* (2021) 64 Cal.App.5th 418, 422.) "The limited function reserved to the courts in ruling on an application for arbitration is not whether the claim has merit, but whether on its face the claim is covered by the contract. [Citation.]" (*Amalgamated Transit Union v. San Diego Transit Corp*. (1979) 98 Cal.App.3d 874, 879.) " "Arbitration's consensual nature allows the parties to structure their arbitration agreements as they see fit. They may limit the issues to be arbitrated, specify the rules and procedures under which they will arbitrate, designate who will serve as their arbitrator(s), and limit with whom they will arbitrate.' [Citation.]" (*Bunker Hill Park Ltd. v. U.S. Bank National Assn*. (2014) 231 Cal.App.4th 1315, 1326.) "[W]e look to the terms of the parties' contract to ascertain whether they agreed to arbitrate a particular disagreement or to restrict the arbitrator to resolving certain issues. [Citation.]" (*Ibid*.) "Ordinary rules of contract interpretation apply to [arbitration clauses.]." (*Maggio v. Winward Capital Management Co.* (2000) 80 Cal.App.4th 1210, 1214-1215.) "The fundamental goal of contractual interpretation is to give effect of the mutual intention of the parties. (Civil Code § 1636.) If contractual language is clear and explicit, it governs. (Civil Code § 1638.)" (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264.) "When a contract is reduced to

		writing, the intention of the parties is to be ascertained from the writing alone, if possible; . . . .” (Civil Code § 1639.) “Under California law, contracts are interpreted by an objective standard; the words of the contract control, not one party’s subjective intentions. (*Brant v. California Dairies, Inc*. (1935) 4 Cal.2d 128, 133.)” (Global Packaging v. Superior Court (2011) 196 Cal.App.4th 1623, 1234.) “An interpretation which gives effect is preferred to one which makes void.” (Civil Code § 3541.) If it may be done without violating the parties’ intent, we must interpret the contract in such a way as to make it “lawful, operative, definite, reasonable, and capable of being carried into effect.” (Civil Code § 1643.) “The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; . . . .” (Civil Code § 1644.) “The court should attempt to give effect to the parties’ intentions, in light of the usual and ordinary meaning of the contractual language and the circumstances under which the agreement was made [citations.]” (*Weeks v. Crow* (1980) 113 Cal.App.3d 350, 353.) There are two long-standing principles of interpretation for arbitration agreements. (*Sandquist v. Lebo Automotive, Inc*. (2016) 1 Cal.5th 233, 247.) First, “when the allocation of a matter to arbitration or the courts is uncertain, we resolve all doubts in favor of arbitration.” (*Ibid*.) “Second, ambiguities in written agreements are to be construed against their drafters. [Citations.]” (*Ibid*.) “California has a strong public policy favoring arbitration and, as a result, ambiguities or doubts about the scope of the arbitration provision should be resolved in favor of arbitration. [Citation.] In accordance with this policy, ‘an exclusionary clause in an arbitration provision should be narrowly construed.’ [Citation.] The policy favoring arbitration, however, does not apply when unambiguous language shows the parties did not agree to arbitrate all or part of the dispute. [Citation.]” (*Eminence Healthcare, Inc. v. Centuri Health Ventures, LLC* (2022) 74 Cal.App.5th 869, 875-876.)

		As a general rule, a party cannot be compelled to arbitrate a dispute that he or she has not agreed to resolve by arbitration. (*Buckner v. Tamarin* (2002) 98 Cal. App. 4th 140, 142; *Benasra v. Marciano* (2001) 92 Cal. App. 4th 987, 990 ["The strong public policy in favor of arbitration does not extend to those who are not parties to an arbitration agreement, and a party cannot be compelled to arbitrate a dispute that he has not agreed to resolve by arbitration"].) "If the court determines that a written agreement to arbitrate a controversy exists, an order to arbitrate that controversy may not be refused on the ground that petitioner's contentions lack merit." (Code Civ. Proc. § 1281.2(d).) "When a party brings a motion to compel arbitration under circumstances in which there may be arbitrable and nonarbitrable issues, the trial court should 'first determine[] the arbitrable and nonarbitrable claims alleged in the complaint, order[] all of the arbitrable claims to arbitration, and stay[] all such claims pending arbitration. The court would then have . . . discretion to delay its order to arbitrate claims under section 1281.2(c), only if it first determine[s] that the adjudication of the nonarbitrable claims in court might make the arbitration unnecessary. Absent that determination, the arbitrable claims would proceed to arbitration and the nonarbitrable claims would continue to be litigated in court unless a party moved successfully pursuant to [Code of Civil Procedure] section 1281.4, to stay further litigation of such nonarbitrable claims.' [Citation.]" (*Association for Los Angeles Deputy Sheriffs v. County of Los Angeles* (2015) 234 Cal.App.4th 459, 468.) "The fact that litigation involves some nonarbitrable issues is not a basis to deny a petition to compel arbitration unless those issues involve a third party who is not contractually obligated to arbitrate. [Citations.]" (*McIsaac v. Foremost Ins. Co. Grand Rapids, Michigan* (2021) 64 Cal.App.5th 418, 424.) Here, the parties do not dispute the validity of any of the relevant sections of the Settlement Agreement which are as follows.

		Sections 2.8, 2.8.1, and 2.8.2 of the Settlement Agreement states: "2.8 Provided that Emirates Airlines confirms the purchase of the 100 optional B 777-X aircrafts and therefore the purchase of IFE and connectivity systems part of the BAFO referred 82184429 rev 1 dated 2nd of April 2015, the payments set forth below in Sections 2.8.1 and 2.8.2 shall be paid: [¶.] "2.8.2. Thales Avionics shall pay to Wamar the sum of 3,000,000 euros (€3,000,000) due within fifteen (15) days after receipt by Thales of notice of award from Emirates Airlines (the "Thales Avionics-WAMAR EK B777 Settlement Agreement Payment"). For the avoidance of doubt, this payment is fully earned and irrevocably due within fifteen (15) days of receipt by Thales of the notice of award from Emirates Airlines, and not subject to reduction, cancellation, modification or delay as a result of any subsequent event." (Ex. A to Declaration of Nabil Barakat, Settlement Agreement at p. 8, §§ 2.8 and 2.8.2.) Section 2.17 of the Settlement Agreement states: "2.17 Thales Avionics hereby absolutely and unconditionally guarantees the full and punctual payment of all payments due from Thales Avionics, Thales USA, Inc., Thales AMEWA to Wamar and/or TABA pursuant to Sections 2.3, 2.5, 2.6 and 2.8 of this Agreement. Should Thales AMEWA or Thales USA, Inc. default in making such payments pursuant to the terms and conditions herein, such payments shall be made immediately upon demand by Wamar or TABA. Thales Avionics hereby waives any right to require Wamar or TABA to: (i) proceed against Thales USA Inc. or Thales AMEWA or pursue any rights or remedies with respect to the guarantied amounts before proceeding against Thales Avionics; or (ii) pursue any other remedy whatsoever in Wamar or TABA's power. No action or proceeding brought or instituted

		under this guaranty and no recovery in pursuance thereof shall be a bar or defense to any further action or proceeding which may be brought under this guaranty by reason of any further default or defaults in payment of the amounts due under Sections 2.3, 2.5, 2.6, and 2.8. Wamar and TABA shall have the right to recover their attorneys' fees and costs in connection with the enforcement of this guaranty. Thales Avionics acknowledges that this guaranty is being executed and delivered to Wamar and TABA as a material inducement to and in consideration of Wamar and Taba entering into this Agreement, and that Wamar and TABA would not enter into this Agreement without Thales Avionics delivering this guaranty. For the avoidance of doubt, nothing in this Section waives or is intended to waive the condition precedent to the payment described in Section 2.8.1." (Ex. A to Declaration of Nabil Barakat, Settlement Agreement at pp. 10-11, § 2.17.) Section 5.13 of the Settlement Agreement contains the arbitration provision and states: "5.13 Except for the unconditional payment guarantee by Thales Avionics, which Wamar may enforce in the Superior Court of California, any other dispute, controversy or claim arising out or in connection with this Agreement, the Parties agree to submit the matter to settlement proceedings under the International Chamber of Commerce ADR Rules. If the dispute, controversy or claim has not been settled within a period of (2) months following the filing of a request for ADR pursuant to the said Rules, such dispute, controversy or claim shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed according to said Rules . . . ." (Ex. A to Declaration of Nabil Barakat, Settlement Agreement at p. 14, § 5.13.) Wamar's sole cause of action for breach of contract is based on Thales' failure to "absolutely and unconditionally" make "full and punctual payment" of the Wamar Settlement Payment as promised Section 2.17 of the Settlement Agreement, and alleges that Wamar

		has fully performed all obligations required for payment of 3,000,000 euros under Section 2.8.2 of the Settlement Agreement, but that Thales has refused to make any payments required under Section 2.8.2. (Complaint, ¶¶ 10-16, 18-20, 22.) As set forth above, Section 2.17 expressly provides that Thales "absolutely and unconditionally guarantees the full and punctual payment of all payments due from Thales Avionics, Thales USA, Inc., Thales AMEWA to Wamar and/or TABA pursuant to Sections 2.3, 2.5, 2.6 and 2.8" of the Settlement Agreement. In turn, Section 5.13 plainly, clearly, and unambiguously states that Wamar may enforce the "unconditional payment guarantee by [Thales]" in the Superior Court of California, providing for a singular exception to settlement proceedings under the ICC ADR Rules, and possible arbitration under the Rules of Arbitration of the ICC. In turn, the arbitration provision contains an express carve-out for the enforcement of the Guaranty such that Wamar's claim is not encompassed by, and is excluded from, the arbitration provision. Accordingly, the arbitration provision which incorporates the ICC Rules does not apply to Wamar's claim for breach of contract of Section 2.17 of the Settlement Agreement. Thales does not contend that the carve-out to the arbitration provision is ambiguous or reasonably susceptible to some other meaning, and does not otherwise present any evidence to support the existence of any ambiguity with respect to the carve-out for the enforcement of the Guaranty. Additionally, interpreting the enforcement of Thales' Guaranty in Section 2.17 in a manner which requires Wamar to submit said enforcement claim to arbitration if there is a dispute as to whether a payment obligation under Section 2.8 was triggered, and/or whether there has been a default, would render the explicit exception to the arbitration provision, void. Thus, Wamar's claim for breach and enforcement of Section 2.17 is not subject to the arbitration clause and the motion to dismiss is DENIED.

		Thales alternatively requests that the action be compelled to arbitration and stayed pending completion of arbitration. Enforcement of Section 2.17 of the Settlement Agreement—the guaranty provision—necessarily requires a determination of whether the payment obligation of Sections 2.8 and 2.8.2 of the Settlement Agreement have been triggered. The Complaint alleges that pursuant to Sections 2.8 and 2.8.2 of the Settlement Agreement, Thales is required to pay Wamar 3,000,000 euros since Emirates awarded contracts to Thales which exceeded the required threshold for payment under Section 2.8 of the settlement Agreement, but that Thales has refused and continues to refuse to pay Wamar as required and has attempted to avoid payment by refusing to acknowledge the scope and extent of the orders confirmed by Emirates (Complaint, ¶¶ 10, 14, 15, 22.) Thus, the issue of whether Thales received notice from Emirates Airlines confirming the purchase of 100 optional B 777-X aircrafts to be equipped with IFE and connectivity systems, such that Section 2.8 and 2.8.2 of the Settlement Agreement were triggered is relevant to Wamar's claim that Thales breached the Guaranty in Section 2.17 of the Settlement Agreement. There is no carve-out for this issue in the arbitration provision. Notably, Wamar acknowledges that all other disputes would be covered by the arbitration provision. It therefore appears to the Court that Wamar's claim involves both nonarbitrable and potentially arbitrable issues. The question becomes whether the arbitrability for "any other dispute, controversy or claim arising out or in connection with this Agreement" was delegated to an arbitrator. *Deciding Arbitrability* Initially, in light of the determination above that Section 5.13 contains an express exception to arbitration in enforcing the Guaranty, i.e., Wamar's claim in this action, the arbitration provision does not apply to Wamar's claim and Thales fails to show that the parties delegated threshold arbitrability questions as to the breach and enforcement of the Guaranty to the arbitrator.

		In reply, Thales asserts that an agreement on the scope of arbitration does not change a separate agreement on delegation of arbitrability issues, and that Wamar cites to no authority for its proposition. Similarly, Thales cites to no authority for its proposition. And, contrary to Thales contention that there is a separate agreement on delegation of arbitrability issues, the delegation is within the arbitration provision. As written, Section 5.13 of the Settlement Agreement separates the carve-out from the arbitration provision containing a delegation, and the delegation modifies "any other dispute, controversy or claim arising out or in connection with" the Settlement Agreement such that the delegation applies only as to those other disputes which are encompassed by the arbitration provision. With regard to the issue of whether Thales is obligated to make payment, Thales argues that the parties' express incorporation of the ICC Rules in the Settlement Agreement constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability. Wamar does not address whether the parties delegated gateway arbitrability questions to an arbitrator as it relates to other disputes; however, Wamar asserts that the incorporation of arbitration rules does not necessarily provide clear and unmistakable evidence of the parties intent to delegate threshold issues to the arbitrator. "The question whether the parties have submitted a particular dispute to arbitration, i.e., the 'question of arbitrability,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.' [Citations.]" (*Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 U.S. 79, 83; *see also Nelson v. Dual Diagnosis Treatment Center, Inc*. (2022) 77 Cal.App.5th 643, 654 [" 'Under California law, it is presumed the judge will decide arbitrability, unless there is clear and unmistakable evidence the parties intended the arbitrator to decide arbitrability' "].) California courts look to federal law when deciding arbitration issues under state law, have "looked to the FAA when considering delegation clauses [citation], and have long held that the rules governing these clauses are the same under both state and federal law.

		[Citations.]" (*Tiri v. Lucky Chances, Inc*. (2014) 226 Cal. App. 4th 231, 239-240.) Parties to an arbitration agreement may agree to delegate to the arbitrator, instead of a court, questions regarding the enforceability of the agreement. (*Id*. at p. 241.) The court may consider the validity of the delegation clause. (*Id*. at p. 241, fn. 4.) For a delegation clause to be effective two pre-requisites must be met: (1) the language of the clause must be clear and unmistakable, and (2) the delegation must not be revocable under state contract defenses such as such as fraud, duress, or unconscionability. (*Id*. at p. 242.) The party seeking to enforce a delegation clause must show that it is clear and unmistakable; silence or ambiguity is insufficient. (*Ibid*.) Thales cites to *Portland Gen. Elec. Co. v. Liberty Mut. Ins. Co*. (9th Cir. 2017) 862 F.3d 981, 985 which concluded that incorporation of the rules of the ICC into an arbitration agreement constitutes clear and unmistakable evidence of a delegation of gateway issues to the arbitrator. Here, Section 5.13 incorporates the ICC Rules. Article 6(3) of the ICC Rules states: "If any party against which a claim has been made does not submit an Answer, or if any party raises one or more pleas concerning the existence, validity or scope of the arbitration agreement or concerning whether all of the claims made in the arbitration may be determined in a single arbitration, the arbitration shall proceed and any question of jurisdiction or of whether the claims may be determined together in that arbitration shall be decided directly by the arbitral tribunal, unless the Secretary General refers the matter to the Court for its decision pursuant to Article 6(4)." (Ex. C to Declaration of John W. Lomas, Jr., ICC Rules at p. 16, Article 6(3).) Based on the foregoing, in this case, incorporation by reference of the ICC Rules provides clear and unmistakable evidence the parties intended to delegate threshold arbitrability questions concerning any dispute arising out of or in connection with the Settlement Agreement, except for enforcement of the Guaranty, to the arbitrator.

		In opposition, Wamar cites to *Gostev v. Skillz Platform, Inc*. (2023) 88 Cal.App.5th 1035, 1052, but Wamar's own description of the case that "petitioner failed to establish that the parties clearly and unmistakably delegated threshold issues of arbitrability to the arbitrator despite incorporating arbitration rules because the party was not sophisticated" is correct and belies its assertion that incorporation of ICC Rules in the arbitration provision here does not present clear and unmistakable evidence of the parties intent to delegate threshold issues to the arbitrator as it cannot reasonably be disputed that Wamar and Thales are sophisticated business entities. Therefore, the Court GRANTS the motion to compel arbitration as to the limited issue of whether Thales is obligated to make payment under Sections 2.8 and 2.8.2 of the Settlement Agreement because the conditions set forth therein have been met. *Stay* Code of Civil Procedure section 1281.4 states in part: "If a court of competent jurisdiction, whether in this State or not, has ordered arbitration of a controversy which is an issue involved in an action or proceeding pending before a court of this State, the court in which such action or proceeding is pending shall, upon motion of a party to such action or proceeding, stay the action or proceeding until an arbitration is had in accordance with the order to arbitrate or until such earlier time as the court specifies. [¶.] "If the issue which is the controversy subject to arbitration is severable, the stay may be with respect to that issue only." (Code Civ. Proc. § 1281.4.) "The word 'shall' is mandatory. [Citation.]" (*Mattson Technology, Inc. v. Applied Materials, Inc*. (2023) 96 Cal.App.5th 1149, 1161.) "A ' "[c]ontroversy" ' in this context is 'any question arising between parties to an agreement whether the question is one of law or of fact or both.' [Citation.]" (*Ibid*.) A single overlapping

		question of law or fact may qualify as a 'controversy' sufficient to require imposition of a stay. [Citations.] However, '[i]f the issue which is the controversy subject to arbitration is severable,' the court has the discretion to sever and stay proceedings on the arbitrable claims and permit any nonarbitrable issues to proceed in court. [Citations.]" (*Ibid*.) Because the issue of whether payment of 3,000,000 euros by Thales is owed under Sections 2.8 and 2.8.2 of the Settlement Agreement is a question that must be answered in order to determine the enforceability of the Guaranty in Section 2.17 of the Settlement Agreement, the Court STAYS this action pending completion of arbitration. The Court declines to consider all new points, arguments, and evidence relating to TABA General Trading & Investment Company presented for the first time on reply. (*See Balboa Ins. Co. v. Aguirre* (1983) 149 Cal.App.3d 1002, 1010; *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-1538.) The Case Management Conference is vacated. ADR Status Conference set for November 21, 2024 at 1:30 p.m. *Thales to give notice.*
102	Xia vs. Dean 23-01341697	<u>Demurrer</u> Defendants Andrew Dean, Chris Anderson, John Martinez, Brian Perry, Brad Butts, Joe Connell, Placentia Police Department, Chad Wanke and City of Placentia demur to the sole cause of action in Plaintiffs' complaint. Plaintiffs' Form Complaint attempts to allege a single cause of action for intentional tort. However, the allegations are so ambiguous as to render the pleading uncertain. While "[d]emurrers for uncertainty are disfavored" they are appropriate "if the pleading is so incomprehensible that a defendant cannot reasonably respond." (*A.J. Fistes Corp. v. GDL Best Contractors, Inc.* (2019) 38 Cal.App.5th 677, 695.)

		Here, it is unclear what Plaintiffs are alleging a grievance with. They allege that Plaintiff Aretha Li's saxophone was stolen and that the Placentia Police Department did not adequately investigate the case. They then allege that various police officers, city council members, and the mayor pro tem did not adequately investigate Plaintiffs' complaint about the Placentia Police Department's alleged mishandling of the underlying theft investigation. Plaintiffs allege that they subsequently made a report to the Orange County Sheriff's Department (Incident Report #22-035742) (Compl., Exh. 5.) Paragraph 13 of the Complaint appears to describe the relief sought by way of this action as "[t]he right for due process to obtain information requested in the complaint, monetary relief for loss of personal property, medical expenses, legal expenses, and punitive damages." (Compl. ¶13.) Exhibit 1 to the Complaint additionally states that Plaintiffs "pray for our rights to require the defendants to testify under oath regarding item I to item VI listed on page 6 to page 8 of [their] letter dated June 12, 2023" and "for our rights to require the Placentia Police Department to open investigation on case #22-035742." It is unclear from the above what relief Plaintiffs are seeking by way of this suit or what basis there is for liability as to each of the Defendants. Defendants contend that the demurrer should be sustained without leave to amend on the basis that Plaintiffs did not comply with the Government Tort Claims Act, they have not pled any statutory basis for liability, and various immunities bar the Defendants from liability. The court notes that the Complaint sufficiently alleges compliance with the Government Tort Claims Act, as a general allegation suffices. (*Gong v. City of Rosemead* (2014) 226 Cal.App.4th 363, 374.) The Complaint utilizes the Judicial Council form, and box 9(a) has been checked. As to the failure to plead a statutory basis for liability, this is a further basis for sustaining the

		demurrer pursuant to CCP §430.10(e), at least as against the government entities. "[I]n California all government tort liability is dependent on the existence of an authorizing statute or 'enactment'….and to state a cause of action every element essential to the existence of statutory liability must be pleaded with particularity, including the existence of a statutory duty." (*Searcy v. Hemet Unified School District* (1986) 177 Cal.App.3d 792, 802.) "The facts showing the existence of the claimed duty must be alleged [citation removed]. Since the duty of a governmental agency can only be created by statute or 'enactment,' the statute or 'enactment' claimed to establish the duty must at the very least be identified." (*Ibid*.) As to whether various immunities apply, the Complaint at this point is too uncertain to make such a determination. Finally, the Court notes that Plaintiffs are both in pro per. The opposition purports to be a joint opposition by both Plaintiffs. However, it is only signed by Plaintiff Xia, and the meet and confer effort conversation that occurred prior to the filing of the demurrer and motion to strike only involved Plaintiff Xia. As a pro se plaintiff, Xia cannot represent Li in this lawsuit. There is no indication that Xia is an attorney. Any future meet and confer efforts will have to be conducted with Plaintiff Li as well as Plaintiff Xia, Plaintiff Xia may not appear on behalf of Plaintiff Li at any hearings, and Plaintiff Li must sign any briefs submitted to this court on her behalf. Plaintiffs shall have 30 days from notice of this ruling to amend the Complaint. <u>Motion to Strike</u> In light of the above ruling regarding Defendants' demurrer, the motion to strike is DENIED as MOOT. The Case Management Conference is continued to August 15, 2024 at 1:30 p.m. *Defendants to give notice.*

103	Beznos vs. Horizon Construction & Remodeling, Inc. 21-01228661	Plaintiff EITAN BEZNOS seeks an Order compelling DEFENDANT HORIZON CONSTRUCTION & REMODELING, INC. to serve verified responses, without objection, to Plaintiff's Form Interrogatories - General [Set Three] (ROA 142), within ten (10) calendar days of the hearing on this Motion. Plaintiff also seeks an order that Defendant Horizon and its counsel of record Fred Hayes and Rogers, MacLeith & Stolp, LLP jointly and severally pay a monetary sanction to Plaintiff in the amount of $2,818.60 pursuant to Code Civ. Proc. §§ 2023.010, 2023.030, 2030.290(c). Plaintiff EITAN BEZNOS seeks an Order compelling DEFENDANT MARK BESNOS to serve verified responses, without objection, to Plaintiff's Form Interrogatories - General [Set Three] (ROA 143), within ten (10) calendar days of the hearing on this Motion. Plaintiff also seeks an order that Defendant Besnos and its counsel of record Fred Hayes and Rogers, MacLeith & Stolp, LLP jointly and severally pay a monetary sanction to Plaintiff in the amount of $2,818.60 pursuant to Code Civ. Proc. §§ 2023.010, 2023.030, 2030.290(c). If a party to whom interrogatories are directed fails to serve a timely response, "The party propounding the interrogatories may move for an order compelling response to the interrogatories." [Code Civ. Proc. § 2030.290(b).] Additionally, "The court shall impose a monetary sanction …against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel a response to interrogatories, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." [Code Civ. Proc. §2030.290(c).] Here, Plaintiff Beznos served Form Interrogatories Set 3 to Defendants Mark Besnos and Defendant Horizon Construction & Remodeling, Inc. on August 31, 2023. [Decl. Muller¶19.] Despite promises to provide responses, as of the date of filing these motions (10/24/2023), no responses have been received. [Id¶21.] As such, motions are GRANTED.

		Defendants are ordered to provide Verified responses to Form Interrogatories Set 3, without objections, within 30 days. As to these two, simple, cut and paste, unopposed discovery motions, Plaintiff seeks $5,637.20 in sanctions. While this Court has previously awarded Attorney Muller's billable rate of $829 an hour (see ROA 178), this Court finds the total fee sought is overreaching, especially in light of the extensive motion practice that has already taken place on nearly identical issues. Court will allow 1 hour attorney time at $829 an hour ($829) + $123.30 (sum representing $61.65 X 2 for filing fees) = $952.30. Sanctions against Defendants' attorneys of record to be paid within 30 days. *Plaintiff to give notice.*
104	Laguna Beach Company, Inc. vs. City of Laguna Beach 22-01291759	Interested Party, Mohammad Honarkar, moves for an order staying proceedings pursuant to Code of Civil Procedure section 1281.4 and the Court's inherent powers under Code of Civil Procedure section 128(a)(8). The Court notes that the day after the instant motion was filed on October 25, 2023, the Motion of Latham & Watkins LLP to be relieved as counsel for Petitioner, Laguna Beach Company, Inc. ("Petitioner") was granted on October 26, 2023. (See ROA 81.) Petitioner appears to have filed a Substitution of Attorney on October 30, 2023, indicating that it is now represented by Marc Cohen, Esq. of Cohen Law Group, APC. (ROA 91.) On that same date, Petitioner filed an Association of Counsel indicating that Allen Matkins Leck Gamble Mallory & Natsis LLP, and attorneys Scott J. Leipzig, Michael R. Farrell, and Tim C. Hsu, are associating in as co-counsel for Petitioner in this matter. (ROA 92.) Mr. Honarkar contends that the instant action should be stayed because the ownership, control, and management of Petitioner is currently at issue in another pending matter entitled, *MOM CA Investco, LLC et al v. Honarkar* 2023-01322886 (the "MOM action") before Hon. David J. Hesseltine, and that on September 25, 2023, Judge Hesseltine ordered the MOM action to arbitration. Mr. Honarkar

		asserts that this case was initiated and continued at his instruction as the Chief Executive Officer of Petitioner, but that a hostile takeover has thwarted his ability to govern the company and manage this lawsuit, and which forced Petitioner's prior counsel, Latham & Watkins LLP, to move to be relieved as counsel of record. Mr. Honarkar additionally asserts that the internal corporate dispute between the two controlling members of Petitioner's holding company has thwarted Petitioner's ability to appoint new counsel and direct this litigation, such that this action should be stayed until the conclusion the related arbitration in the MOM action, and the preliminary matter of Petitioner's ownership, control, and management is adjudicated. Mr. Honarkar also asserts that there is a risk of inconsistent findings if this matter is not stayed given the issues within the MOM action, including Honarkar's rights to control and operate any of the contributed entities. Based on above, Mr. Honarkar asserts a stay is mandatory under Code of Civil Procedure section 1281.4. Further, Mr. Honarkar contends that, in the alternative, the Court can still order a stay until arbitration is completed based on the circumstances under Code of Civil Procedure section 128(a)(8). Mr. Honarkar asserts that the requested relief was agreed to by all parties, including the City of Laguna Beach, and that there would be no threat of prejudice if a stay is granted as this case is in its early stages and no trial date has been set. No opposition has been filed. Code of Civil Procedure section 1281.4 states, in part: "If a court of competent jurisdiction, . . . , has ordered arbitration of a controversy which is an issue involved in an action or proceeding pending before a court of this State, the court in which such action or proceeding is pending shall, upon motion of a party to such action or proceeding, stay the action or proceeding until an arbitration is had in accordance with the order to arbitrate or until such earlier time as the court specifies."

		Mr. Honarkar is not a party to this action and does not present any authority showing that he may bring a motion to stay this action as an "interested party" under Section 1281.4. As for the Court's inherent powers, California's Constitution provides the courts with inherent powers to control judicial proceedings. (*Neary v. Regents of Univ. of Calif.* (1992) 3 Cal.4th 273, 276.) The Court has the power "[t]o amend and control its process and orders so as to make them conform to law and justice." (Code Civ. Proc. § 128(a)(8).) "This provision is consistent with and codifies the courts' traditional and inherent judicial power to do whatever is necessary and appropriate, in the absence of controlling litigation, to ensure the prompt, fair, and orderly administration of justice." (*Neary, supra*, 3 Cal.4th at p. 276.) No notice of related case has been filed in this action although Mr. Honarkar argues that the instant case is related to the MOM action in which an arbitration is pending. The MOM action involves the issue of Mr. Honarkar's contribution of assets including all rights and interest in Petitioner, Laguna Beach Company, Inc. which plaintiffs in the MOM action contend was wholly contributed to MOM CA Investco, LLC ("MOM CA") as per the terms of the Operating Agreement and Asset Contribution Agreement as part of a joint venture. (Declaration of Sam Maralan, ¶ 4; Ex. C, MOM action, First Amended Complaint, ¶¶ 1-5, 28-31.) The MOM Entities, including MOM CA, MOM AS Investco LLC, and MOM BS Investco LLC, were established by Honarkar and the MOM Members which is a group of investors led by Mr. Mahender Makhijani. (Id., ¶ 1.) The ninth cause of action is for declaratory relief in the MOM action and alleges the following: "93. Plaintiffs MOM Members, on the one hand, and Defendant Honarkar, on the other hand, are interested parties under the ACA and the Operating Agreements, which agreements sets forth the rights and obligations of the parties as it relates to the MOM Entities' joint venture, ownership of contributed entities and businesses, and management of said entities

		and businesses. Plaintiffs MOM Entities and MOM Members thus desire a declaration of the parties' respective rights and duties pertaining to such agreements. "94. A present and actual controversy has arisen and now exists between Plaintiffs MOM Entities and MOM Members, on the one hand, and Defendant Honarkar, on the other hand, with respect to the following: "• Determining whether Honarkar has any rights to manage or interfere with the management of the various subsidiaries that were contributed to the MOM Entities pursuant to the terms of the ACA and Operating Agreements; "• Determining whether Honarkar has any rights to conduct business on behalf of the various subsidiaries that were contributed to the MOM Entities; "• Determining whether Honarkar has any rights to preclude MOM Managers' management of the MOM Entities' businesses, including those businesses of the MOM Entities' contributed and wholly-owned subsidiaries, including but not limited to the wholly-owned subsidiaries identified herein; "• Determining what rights, if any, Honarkar has under the terms of the ACA and Operating Agreements to participate in the management of the business of the MOM Entities and their wholly-owned subsidiaries; and "• Determining whether Honarkar is obligated in any fashion to indemnify and reimburse the MOM Entities and/or the MOM Members for all of their past, present and future claims, losses, costs, expenses and liabilities associated with Honarkar's interference with the MOM Entities' businesses as alleged herein." (Ex. C to Maralan Decl., MOM action, First Amended Complaint, ¶¶ 93, 94.) Plaintiffs in the MOM action claim that Mr. Honarkar has no rights to manage or interfere with the management of the various subsidiaries that were contributed to the MOM Entities pursuant to the terms of the Operating Agreements and ACAs; that Mr. Honarkar has no rights to conduct business on behalf of the various subsidiaries that were contributed to the MOM Entities; and that Mr. Honarkar has no rights under the terms of the ACA and

		Operating Agreements to participate in the management of the business of the MOM Entities and their wholly-owned subsidiaries. (Ex. C to Maralan Decl., MOM action, First Amended Complaint, ¶ 95.) Based on the foregoing, Mr. Honarkar's ability to control or manage Petitioner is at issue in the MOM action. In turn, the prosecution of the instant action by Petitioner, which was "initiated and continued at the instruction of Honarkar" is in question, and it appears that a determination of the rights and obligations of the parties in the MOM action will decide Petitioner's litigation of this action. No party has opposed this motion, nor has Petitioner's current counsel of record, and no prejudice appears. Interested third-party MOM CA has filed a Notice of Non-Opposition providing that it is the sole shareholder of Petitioner, does not oppose the relief sought by the instant motion, and believes this action should be stayed pending resolution of the pending arbitration which is set to commence on June 24, 2024. MOM CA's objections to the October 23, 2023 Declaration of Mohammad Honarkar in Support of the instant motion are not relevant to the disposition of the instant motion. Given these circumstances, a stay of the instant action pending completion of the arbitration in the MOM action appears warranted. The Court GRANTS the motion. All current dates in this matter including the Case Management Conference and Status Conference are vacated. The instant action is stayed until completion of arbitration of the MOM action. The Court will set an OSC re the status of the arbitration in the separate case is concluded and therefore whether the stay should be lifted for November 21, 2024 at 1:30 p.m. *Mr. Honarkar to give notice.*
105	Ziniti vs. Macchia 22-01253189	Defendants Raffaele Macchia and Sofia (erroneously sued and served as Sophia) Macchia ("Defendants") move for an order imposing terminating sanctions to dismiss the action and monetary sanctions in the amount of

		$685 against Plaintiff, Celine A. Ziniti ("Plaintiff"). The Court may impose a terminating sanction against anyone engaging in conduct that is a misuse of the discovery process by an order striking out the pleadings or parts of the pleadings of any party engaging in the misuse of the discovery process, an order staying further proceedings by that party until an order for discovery is obeyed, an order dismissing the action, or any part of that action, of that party, or an order rendering a judgment by default against that party. (Code Civ. Proc. § 2023.030(d).) Additionally, the Court may impose a monetary sanction ordering that one engaging in conduct that is a misuse of the discovery process, or any attorney advising that conduct, or both pay the reasonable expenses, included attorney's fees incurred as a result of that conduct. (Code Civ. Proc. § 2023.030(a).) The court shall impose a monetary sanction unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. (Ibid.) Misuses of the discovery process include disobeying a court order to provide discovery. (Code Civ. Proc. § 2023.010(g).) A Court has broad discretion in selecting the appropriate penalty for a party's refusal to obey a discovery order, and the trial court's determination must be upheld absent an abuse of discretion. (*Lopez v. Watchtower Bible & Tract Society of New York, Inc*. (2016) 246 Cal.App.4th 566, 604 ("*Lopez*").) "Despite this broad discretion, ... the terminating sanction is a drastic penalty and should be used sparingly. [Citation.]." (*Ibid*.) "A trial court must be cautious when imposing a terminating sanction because the sanction eliminates a party's fundamental right to a trial, thus implicating due process rights. [Citations.]." (*Ibid*.) The discovery statutes "evince an incremental approach to discovery sanctions, starting with monetary sanctions and ending with the ultimate sanction of termination." (*Doppes v.*

		Bentley Motors, Inc. (2009) 174 Cal.App.4th 967, 992.) "Although in extreme cases a court has the authority to order a terminating sanction as a first measure [citations], a terminating sanction should generally not be imposed until the court has attempted less severe alternatives and found them to be unsuccessful and/or the record clearly shows lesser sanctions would be ineffective [citations]." (*Lopez, supra*, 246 Cal.App.4th at pp. 604-605.) The mere failure to pay monetary sanctions can never justify terminating discovery sanctions. (*Newland v. Superior Court* (1995) 40 Cal.App.4th 608, 615.) Here, on September 7, 2023, the Court granted Defendants' motions to compel Plaintiff's answers to Form Interrogatories, Set One; Special Interrogatories, Set One; and Requests for Production, Set One, and ordered responses to be served within 30 days of the notice of ruling as well as ordered Plaintiff to pay sanctions in the amount of $930. (Declaration of Gerald F. Gillard, ¶ 3.) Defendants served a notice of ruling on September 7, 2023, on Plaintiff. (Ibid., Ex. A.) Plaintiff has failed to serve written discovery responses. (Id., ¶ 4.) The foregoing circumstances do not warrant, at this time, a terminating sanction to dismiss the action in the first instance. Thus, the request for terminating sanctions is DENIED. However, the Court again ORDERS Plaintiff to serve verified responses, without objections, to Defendants' Form Interrogatories, Set One; Special Interrogatories, Set One; and Requests for Production, Set One, within 30 days of the notice of ruling. As to the request for monetary sanctions, the Court AWARDS an additional $310 against Plaintiff, to be paid within 30 days of the notice of ruling. In other words, all amounts owing due to sanctions are to be paid within 30 days. The Court warns Plaintiff that ". . . any further failure to comply with the court's discovery orders could result in terminating sanctions." (*See Electronic Funds Solutions v. Murphy* (2005) 134 Cal.App.4th 1161, 1183.)

		Defendants to give notice and to include a copy of the Court's Minute Order as part of the notice.
107	Bigalimov vs. Barban 23-01330071	Defendant Claudio Barban ("Defendant") moves for an order setting aside the default entered against him on August 23, 2023 on the Complaint of Plaintiff Rolan Bigalimov ("Plaintiff"). The Court notes that Defendant has not filed any proof of service showing that Plaintiff was timely served with the moving papers. Proofs of service of moving papers must be filed no later than five court days before the date of hearing. (Cal. Rules of Court, Rule 3.1300(c).) In his Opposition, Plaintiff asserts that he was never served with the moving papers and he had to retrieve them from the Court himself. The Court also notes that Plaintiff's Opposition was served by mail. This is insufficient under Code of Civil Procedure section 1005(c), which requires all opposition papers to be served by means "reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the time the opposing papers . . . are filed." Both Plaintiff and Defendant are admonished that the failure to comply with all relevant statutes and rules in future filings may result in a motion being denied or taken off calendar and sanctions, where appropriate. While the Court may set aside a default entered against a party as a result of mistake, inadvertence, surprise, or excusable neglect (Code Civ. Proc., § 473(b)), Defendant's declaration in support of the Motion is not made under penalty of perjury and does not state the date and place of execution. Thus, the declaration is insufficient under Code of Civil Procedure section 2015.5. In light of the above deficiencies, the hearing on the instant Motion is CONTINUED to June 20, 2024 at 1:30 p.m. in Department W15. Defendant is ordered to file a supplemental declaration in support of the Motion to remedy the above-outlined deficiencies. Defendant is

		ordered to serve Plaintiff with the moving papers and the supplemental declaration in a timely fashion pursuant to Code of Civil Procedure section 1005 and file a proof of said service with the Court. Because Plaintiff is a self-represented litigant and there is no indication that Plaintiff has consented to electronic service, service shall be made by mail. (Cal. Rules of Court, Rule 2.251(c)(3)(B).) Any further opposition papers and reply papers shall be filed and served pursuant to the Code of Civil Procedure. The default prove-up hearing is continued to June 20, 2024 at 1:30 p.m. *Defendant to give notice.*
108	Prado vs. Nguyen 23-01326340	Plaintiff Kathleen Prado alleges one cause of action against moving Defendant Fountain Valley Regional Hospital and Medical Center ("Defendant"): professional negligence. Defendant moves for summary judgment as to this cause of action. Plaintiff has not filed an opposition to the motion. The elements of a cause of action for professional negligence (medical malpractice) are: "(1) a duty to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; (2) a breach of the duty; (3) a proximate causal connection between the negligent conduct and the injury; and (4) resulting loss or damage." (*Lattimore v. Dickey* (2015) 239 Cal.App.4th 959, 968.) "The standard of care against which the acts of a physician are to be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony." (*Hanson v. Grode* (1999) 76 Cal.App.4th 601, 606–607, as modified (Nov. 29, 1999).) "[E]xpert opinion testimony is required to prove or disprove that the defendant performed in accordance with the prevailing standard of care [citation], except in cases where the negligence is obvious to laymen." (*Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, 741.) In fact, "California courts have incorporated the expert evidence requirement into their standard for summary judgment in medical malpractice

		cases." (*Hanson, supra* 76 Cal.App.4th 601 at p. 607.) "When a defendant moves for summary judgment and supports his motion with expert declarations that his conduct fell within the community standard of care, he is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence." (*Id*. at pp. 606-607; *Webster v. Claremont Yoga* (2018) 26 Cal.App.5th 284, 289.) An expert's opinion must be based on authenticated hospital records. (*Garibay, supra,* 161 Cal.App.4th at p. 742.) "Without those hospital records, and without testimony providing for authentication of such records, [the expert's] declaration had no evidentiary basis" and therefore "no evidentiary value." (*Ibid*.) "[E]xpert opinions ... are worth no more than the reasons and factual data upon which they are based." (*Hanson, supra,* 76 Cal.App.4th at p. 607.) "A properly qualified expert may offer an opinion relating to a subject that is beyond common experience, if that expert's opinion will assist the trier of fact." (*Garibay, supra,* 161 Cal.App.4th at pp. 742–743 [citing Evid. Code, § 801, subd. (a)].) "Even so, the expert opinion may not be based on assumptions of fact that are without evidentiary support or based on factors that are speculative or conjectural, for then the opinion has no evidentiary value and does not assist the trier of fact." (Ibid.) Here, the operative Complaint contains the following three paragraph regarding Defendant's allegedly wrongful conduct: • On or about May 26, 2022, Plaintiff engaged for compensation the services of Defendants to perform medical treatment and services for Plaintiff. On said date, Defendants undertook to handle and control the medical care and treatment of Plaintiff. On said date, Defendants performed an abdominal myomectomy at Fountain Valley Regional Hospital and Medical Center. (Complaint, ¶ 12.)

		• Defendants failed to use the level of skill, knowledge, and care in diagnosis and treatment of Plaintiff that other reasonably careful medical practitioners and/or specialists of the same type would use in the same or similar circumstances. Defendants made unreasonable errors in their diagnosis and/or treatment of Plaintiff and engaged in negligent conduct that fell below the requisite standard of care. Defendants, and each of them, negligently and unlawfully failed to properly and/or correctly diagnose, render care, treat, order diagnostic studies, and provide medical services, resulting in severe injuries to Plaintiff. (Complaint, ¶ 13.) • That as a direct and proximate result of the negligent acts and omissions of the Defendants, and each of them, Plaintiff has sustained economic and non-economic damages, the exact amount of damages to be stated according to proof. (Complaint, ¶ 14.) Defendant presented arguments and evidence establishing that Defendant cannot be held liable for co-defendants Van T. Nguyen, D.O. and Diemchi Nguyenphuc, M.D.'s conduct because co-defendants were not Defendant's employees and were acting as independent contractors when they treated Plaintiff. As Defendant correctly states, Plaintiff must establish an agent or employee relationship between the hospital and the physicians to hold Defendant liable for the co-defendants' conduct. (*Mayers v. Litow* (1957) 154 Cal.App.2d 413, 417-418.) A doctor's use of "the hospital facilities to perform the operation" and "privilege[s] to bring their cases to the hospital" is insufficient to hold a hospital liable for a doctor's conduct. (*Ibid*.) Defendant's Chief Human Resources Officer testified that: (1) Defendant "has never employed Van Nguyen, D.O. or Diemchi Nguyenphuc, M.D.," (2) the physicians were working as independent contractors when they treated Plaintiff, (3) these physician were never on Defendant's payroll, (4) these physicians never received employment benefits from Defendant, and (5) Defendant has never provided these physicians with offices in the hospital or billed on behalf of these physicians when they rendered professional services to patients in the hospital.

		Based on the above and the declarations submitted in support of the motion, Defendant's involvement in Plaintiff's treatment was limited to the conduct of the nurses and nonphysician staff. In the motion for summary judgment, Defendant Fountain Valley Regional Hospital and Medical Center presented arguments and expert evidence establishing that: (1) Defendant's nurses and non-physician staff satisfied the professional standard of care and therefore did not breach any duty owed to Plaintiff and (2) Defendant's nurses and non-physician staff's conduct "did not cause or contribute to" Plaintiff's alleged injuries. For example, defense expert Dr. Michael Berman opined that Defendant's nurse and non-physician did not diagnose Plaintiff or make the determination that Plaintiff needed a myomectomy procedure. Likewise, Defendant's nurse and non-physician staff did not perform the procedure on Plaintiff. Rather, Defendant's nurse and non-physician staff's responsibilities were limited to attending the physicians' orders an properly monitoring Plaintiff while she was a patient at the hospital. Defense expert Dr. Michael Berman testified that Defendant's nurse and non-physician staff performed these responsibilities and treated Plaintiff properly, in satisfaction of "the requisite standard of care required for hospitals in the Southern California community in relation to the care." Importantly, Defendant's expert Dr. Michael L. Berman authenticated the hospital records that he reviewed and relied on in forming his opinions. (See Declaration of Michael L. Berman, ¶¶ 6-16.) Plaintiff failed to oppose the motion and therefore did not proffer any expert evidence that Defendant failed to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise or that Defendant's conduct caused Plaintiff's injuries. Plaintiff failed to carry her burden to establish a triable issue of material fact as to Plaintiff's first cause of action for medical malpractice against Defendant Fountain Valley Regional Hospital and Medical Center. Given the above, the Motion for Summary Judgment is GRANTED.

		Defendant to give notice.