PARTIES/ATTORNEYS

Plaintiff	Salvador A Portillo	Nathan Kingery, Esq. Wilshire Law Firm
Defendant	McMogul Inc. and Marcos Salazar (erroneously sued as Marcos Rubio)	Anthony C. Waddell, Esq. Melanie M. Butler, Esq. Resnick & Louis, P.C.

TENTATIVE RULING

For all the reasons discussed below, the motion is denied.

The parties are instructed to appear at the hearing for oral argument. Appearance by Zoom Videoconference is optional and does not require the filing of Judicial Council form RA-010, Notice of Remote Appearance. (See Remote Appearance (Zoom) Information | Superior Court of California | County of Santa Barbara.)

Plaintiff Salvador Portillo (plaintiff or Portillo) alleges that he was employed as a maintenance technician by defendant McMogul, Inc. (McMogul) beginning January 29, 2021. He became ill on or around August 23, 2022, and was placed on medical leave until on or around September 23, 2022. In September 2022, plaintiff began experiencing vertigo, and his medical leave was extended. On October 23, 2022, Portillo contacted his supervisor, Marcos Salazar (erroneously sued as Marcos Rubio), to verify his return to work on November 2, 2022, indicating he may need accommodations because his vertigo could still affect him. Salazar told Portillo that he would need a medical note clearing him to return to work without any restrictions. On November 28, 2022, Portillo provided a doctor's note clearing him to return to work "without restrictions." When Portillo communicated his medical release to Salazar, he was terminated.

On September 14, 2023, plaintiff filed a complaint against defendants, asserting the following causes of action: (1) discrimination based on physical disability; (2) failure to accommodate; (3) failure to engage in good faith interactive process; (4) age discrimination; (5) harassment; (6) intentional infliction of emotional distress; (7) negligent hiring; (8) failure to prevent discriminatory practices; (8) retaliation; (9) Fair Employment & Housing Act Retaliation; (10) Failure to Provide California Family Rights Act Leave; (11) Interference with

California Family Rights Act Leave; (12) Retaliation for Requesting/Taking California Family Rights Act Leave; (13) Failure to Pay Meal Break Compensation; (14) Failure to Pay Rest Break Compensation; (15) Failure to Comply with Employment Wage Statement and Record Provisions; (16) Statutory Waiting Time Penalties; (17) Wrongful Termination in Violation of Public; and (18) Unlawful Business Practices.

Interrogatory Responses at Issue

Portillo moves for an order compelling defendant McMogul, Inc. (defendant) to provide further responses to Interrogatory Nos. 113-116, all of which ask for information involving the identity of the person or persons who created, revised, reviewed, or finalized a document titled "Translation Document and Texts," which was a translation of the text exchange between Portillo and Salazar regarding his employment. It was prepared by defendant's counsel and was the subject of a previous motion for protective order based on attorney work product.

Because this text exchange is the focus of the motion, the court will review its history, and the court's previous ruling, in some detail.

Translation Document and Texts

Salazar was Portillo's supervisor at McMogul. Portillo speaks, reads and writes only in Spanish and Salazar speaks, reads and writes in English and Spanish. When Portillo became ill, he kept Salazar apprised of his return-to-work plan via text message. On October 23, 2022, Portillo texted, stating that he would return to work on November 2, 2022. Salazar stated that he would need a doctor's note clearing Portillo to return to work without any restrictions. On November 2, 2022, Portillo texted Salazar to clarify where he would be working. Salazar again stated he was waiting for a doctor's note clearing Portillo to return to work without restrictions. On November 21, 2022, Portillo stated he would be ready by Wednesday and would bring the note then. Salazar stated he needed the note first. On November 22, 2022, Portillo sent an image of a doctor's note via text. Salazar stated the note had been cut off and requested it be re-sent. Portillo complied. On November 28, 2022, Salazar replied and advised Portillo that he needed to fill the maintenance position; that Portillo was eligible to reapply when the doctor clears him to work; and that his last day was Sunday, August 21, 2022. On November 30, 2022, Portillo sent Salazar another letter from his doctor stating he was ready to work without restrictions. Salazar stated he didn't receive a letter clearing Portillo to work without restrictions and once Portillo had it, he could reapply for the job. Portillo insisted the note stated he could work without restrictions; Salazar responded that he had to follow the doctor's guidance; Portillo maintained the note included no restrictions; Salazar stated: "The way that letter is written implies restrictions. Good afternoon." (Kingery Decl., Exh. 1.)

As noted, these text messages were in Spanish. In Portillo's version, the text messages show that on November 30, 2022, at 2:18 PM, Portillo sent a third doctor's note to Salazar, stating he could return to work without any restrictions, followed by a text from Portillo that said, "Well Marcos, here is the last letter issued and it says very clearly that I am now ready without restrictions to work." (Kingery Decl. Exh. 15.) Defendant's version omits these two messages. (Kingery Decl., Exh. 14.)[1]

Defendants' counsel initially prepared a translation of this conversation by uploading it into Google Translate. (Defendant's Translation, attached to Kingery Decl., Exh. 1.) This version was the subject of the inadvertent disclosure, which occurred in January 2024, when defendants prepared a response to plaintiff's first set of requests for document production. They produced responsive documents by providing plaintiff with a link to a shared drive, which included Defendants' Translation.

On January 3, 2025, Portillo propounded admissions, documents requests, and interrogatories related to Defendant's Translation, including Special Interrogatory Nos. 113-116. McMogul's attorney responded with an email identifying Defendants' Translation as protected attorney work product and demanded that Kingery destroy any copies, refrain from referring to it in this matter, and withdraw the discovery requests identified above to ameliorate the inadvertent disclosure. Defendants' motion for a protective order followed on the basis that Defendants' Translation was inadvertently produced and was protected by attorney work product.

On April 16, 2025, the court determined that the Defendants' Translation was not protected by the attorney work product doctrine and accordingly denied the protective order to the extent it argued Defendant's Translation was an inadvertent disclosure of a protected document. The court also denied the request for a protective order as to any discovery related to Defendant's Translation, which was also based on the ground that the document was attorney work product.

On May 15, 2025, defendant served its responses to the January 3, 2025, discovery requests, including Nos. 113-116. The interrogatories describe Defendants' Translation as "the document you produced as Translation of Disciplinary Action and Texts." Defendant responded with objections, including one based on relevance, and concluded with "Responding Party did not produce the document attached as Exhibit 1 to Plaintiff's special interrogatories."[2] They reserved the right to amend the response as discovery continued.

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[1] The parties have agreed to use the version of these conversations produced by a neutral translator. (Kingery Decl., ¶ 35, see Exhs. 14, 15.)

[2] In a meet and confer letter, defendants stated: "Although the document was produced in response to Plaintiff's discovery requests, it was not in fact responsive to any request. Regardless

After meeting and conferring, on June 14, 2025, defendant served supplemental responses, which included objections based on relevance, and in answer to each interrogatory stated the document was translated by a computer program on or about January 17, 2024.

After another meet and confer, on August 1, 2025, defendant served second supplemental responses to Nos. 113-116, again interposing objections, and stating that the document was translated by Google Translate.

On November 6, 2025, the parties submitted a stipulation and order requesting the court set an informal discovery conference before November 10, 2025, to determine whether further responses to Nos. 113-116 were relevant. The court declined, unable to accommodate that schedule. On December 1, 2025,[3] plaintiff's Motion to Compel Defendant's Third Further Responses was filed and set for hearing on February 4, 2026. The court reset the hearing to March 25, 2026.

At Issue

Portillo contends that McMogul admitted, in response to requests for admissions, that Salazar sent a text message to Portillo stating "Good afternoon, unfortunately I need to cover maintenance. You are eligible to reapply when the doctor discharge you." (See Motion, p. 12, ll. 4-13.)[4] However, in later discovery responses, McMogul denies Salazar said this, instead asserting, "Mr. Salazar did not say "Unfortunately I need to cover maintenance. You are eligible to reapply when your doctor clears you. The last day you work at McDonalds August 21, 2022 Sunday night." Specifically, McMogul denied that Salazar used the term "reapply" and states the word does not exist in the text messages. This is important, Portillo argues, because McMogul denies terminating him, and the responses directing that Portillo "reapply" is evidence that it did. Moreover, Portillo argues that the neutral translation shows that "many of the words Defendants denied were said . . . including the term "reapply," were in fact, written by Mr. Salazar." (Motion, p. 18, ll. 3-5.)

Portillo characterizes this as evidence that defendants and/or their counsel "dishonestly and unreasonably denied the Requests for Admission, and Plaintiff will request an Order to be compensated for the costs and attorney's fees incurred in the

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of the Defendants' loss on their Motion for Protective Order, Defendant stands by their objections to the Interrogatories as irrelevant and not reasonably calculated to lead to the discovery of admissible evidence." (Kingsley Decl., Exh. 6.)

[3] Defendant granted plaintiff an extension to file the motion by December 1, 2025. Thus, it is timely, and defendant does not contend otherwise.

[4] The responses in which these admissions are made are listed in the motion but not submitted to the court to avoid excess filings.

process of exposing the truth." (Motion, p. 18, ll. 3-8.) Portillo intends to bring a motion for costs of proof and in order to do so, he argues, he "must identify ***whom it is seeking costs from.***" (Motion, p. 18, ll. 9-14 [emphasis in original].) He contends that it is for this reason that a full and complete response to Nos. 113-116 is relevant and must be provided. To be clear, Portillo doesn't claim the information is relevant to the claims in the complaint, only that its relevant to prove a claim for costs of proof or other sanctions against defendants' attorney.

Costs of Proof

The court finds it can resolve this motion without considering the extent to which inconsistent discovery responses have been provided. The procedure that Portillo identifies as the basis for costs of proof is described in Code of Civil Procedure section 2033.420 subdivision (a), which provides that "[i]f a party fails to admit . . . the truth of any matter when requested to do so . . . and if the party requesting that admission thereafter proves . . . the truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees." (Code Civ. Proc., § 2033.420, subd. (a).) This mechanism is designed to reimburse reasonable expenses incurred by a party in proving the truth of a requested admission where the admission sought was of substantial importance such that trial would have been expedited or shortened if the request had been admitted. (Code Civ. Proc., § 2033.420, subd. (b); *Gamo v. Merrell* (2025) 113 Cal.App.5th 656, 667.)

Portillo contends that he must be able to identify who he is seeking costs from so he can name that person in his motion. However, unlike sanctions for discovery misconduct, *such costs cannot be awarded against attorneys*. Costs of proof may be imposed only against a party, not a party's attorney. (*Estate of Manuel* (2010) 187 Cal.App.4th 400, 402.) The *Manuel* court considered whether a costs of proof order could be directed to the denying party's counsel as well as the denying party and concluded that it could not. "The text of the statute is unambiguous, it provides for an award of costs of proof against 'the party to whom the request [for admission] was directed'; it makes no provision for an award of costs of proof against the party's attorney. Indeed, other provisions of the Civil Discovery Act demonstrate that the Legislature has expressly provided for sanctions against counsel when it chose to do so. For example, Code of Civil Procedure section 2023.030, subdivision (a) expressly allows a trial court to impose a monetary sanction against anyone 'engaging in the misuse of the discovery process, or any attorney advising that conduct.'" (*Estate of Manuel, supra,* 187 Cal.App.4th at 403.) The court also examined the history of the provision and the federal statute from which it was derived and reached the same conclusion: costs of proof are available against a party only, not its counsel.

Thus, regardless of whether Portillo's claim that defense counsel has been dishonest has any merit, and to be clear, the court reaches no conclusion on that point, Portillo's assertion that he needs the identity of the person or persons who created, reviewed, revised, and finalized Defendant's Translation to bring a motion for costs of proof has no merit.

Misuse of Discovery

In his reply, Portillo suggests for the first time that he requires this information for filing a "C.C.P. Section 2023.030 Motion against counsel for ***knowingly creating and advising*** false and evasive Responses to discovery." (Reply, p. 3, ll. 3-4.) Courts will not ordinarily consider issues raised for the first time in a reply brief. An issue is new if it does more than elaborate on issues raised in the opening brief or rebut arguments made in the opposition. Fairness militates against allowing a party to raise an issue for the first time in a reply brief because consideration of the issue deprives the opposing party of the opportunity to counter the appellant by raising opposing arguments about the new issue." (*Golden Door Properties, LLC v. County of San Diego* (2020) 50 Cal.App.5th 467, 559; *American Indian Model Schools v. Oakland Unified School Dist.* (2014) 227 Cal.App.4th 258, 275-276.) The court can deny the motion on this basis alone.

Moreover, there is virtually no discussion of the legal parameters involved in a motion for misuse of discovery. "[California Rules of Court,] Rule 3.1113 rests on a policy-based allocations of resources, preventing the trial court from being cast as a tacit advocate for the moving party's theories by freeing it from any obligation to comb the record and the law for factual and legal support that a party has failed to identify or provide." (*Quantum Cooking Concepts, Inc. v. LV Associates, Inc.* (2011) 197 Cal.App.4th 927, 934.)

Even if the court were to consider the argument, the court finds it lacking. Section 2023.030, subdivision (a) of the Civil Discovery Act delineates the trial court's statutory authority to issue discovery sanctions in the form of monetary sanctions. Section 2023.030(a) states in relevant part:

> "The court may impose a monetary sanction ordering that one engaging in the misuse of the discovery process, or any attorney advising that conduct, or both pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct. The court may also impose this sanction on one unsuccessfully asserting that another has engaged in the misuse of the discovery process, or on any attorney who advised that assertion, or on both. If a monetary sanction is authorized by any provision of this title, the court shall impose that 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."

Section 2023.010 sets forth a nonexhaustive list of misuses of the discovery process, including but not limited to, "[m]aking an evasive response to discovery." (§ 2023.010, subd. (f).) Although not expressly included in the list of misuses in section 2023.010, courts have held that "[o]ther sanctionable discovery abuses include providing false discovery responses and spoliation of evidence." (*Kwan Software Engineering, Inc. v. Hennings* (2020) 58 Cal.App.5th 57, 74.) When a party seeking monetary sanctions against an attorney offers sufficient evidence of a misuse of the discovery process, the burden shifts to the attorney to demonstrate that he or she did not recommend that conduct. (*Id.*) "[A] party moving for discovery sanctions based on the spoliation of evidence must make an initial prima facie showing that the responding party in fact destroyed evidence that had a substantial probability of damaging the moving party's ability to establish an essential element of his claim or defense." (*Williams v. Russ* (2008) 167 Cal.App.4th 1215, 1227.)

The court has some reservation about this claim. Although the court determined that Defendants' Transcript was not protected by attorney work product, and thus a protective order was not warranted, it appears that Defendants' Transcript was not produced in response to any particular discovery request. In other words, the production remained inadvertent even if the court found that the transcript itself was not protected by work product. In this scenario, the court fails to see how its production could thus qualify as discovery misuse. To the extent Portillo suggests that the alleged omission of the two missing messages qualifies as spoliation of evidence, he must show that such evidence had a substantial probability of damaging the moving party's ability to establish an essential element of his claim. (*Williams, supra,* 167 Cal.App.4th at 1227.) It is unclear whether Portillo can prove a substantial probability of damaging the case since he was and has always been in possession of his own version of the text conversation that clearly included the omitted messages, and there is no indication that defendants are offering (or have offered) the disputed translation as fact.

In any event, the statute authorizes imposition of sanctions on the "one engaging in misuse of the discovery process" (such as the party who responds to the discovery) or on "any attorney advising that conduct." (§2023.030, subd. (a).) Portillo cites no authority that sanctions extend to the attorney's staff or any other person. Thus, to the extent Portillo claims his motion is relevant to discover the identity of any staff involved in the production of Defendant's Transcript, it must be denied.

Finally, discovery responses are signed by the party's attorney. It is unclear whether any information beyond that must be produced. Portillo has cited no authority, beyond the general discovery provisions related to requests for an order to compel further responses to special interrogatories, that suggests otherwise.

The motion is denied.