**SUPERIOR COURT, STATE OF CALIFORNIA**
**COUNTY OF SANTA CLARA**

**Department 16**
**(Dept 16 is now hearing cases that were formerly in Dept 2)**
## Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

**DATE: 08-08-24 TIME: 9 A.M.**

**All those intending to speak at the hearing are requested to appear in person or by video. Parties are asked NOT to appear by telephone only.**

**To contest the ruling, call (408) 808-6856 before 4:00 P.M.**
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.
**The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)**

**TO CONTEST THE RULING: Before 4:00 p.m. today you must notify the:**

(1) Court by calling (408) 808-6856 and
(2) Other side by phone or email that you plan to appear and contest the ruling
(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

**TO APPEAR AT THE HEARING**: The Court will call the cases of those who appear in person first. If you appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to Department 16.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml. You must use the current link.

TO SET YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. You may make an online reservation to reserve a date before you file your motion. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Go to the Court's website at www.scscourt.org to make the reservation.

**FINAL ORDERS:** The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

**COURT REPORTERS**: The Court no longer provides official court reporters. If any party wants a court reporter, the appropriate form must be submitted. See court website for policy and forms.

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| LINE # | CASE # | CASE TITLE | RULING |
|---|---|---|---|
| LINE 1 | 21CV386089<br>Hearing: Order of Examination | Bella Cargile vs Power Bowl, LLC, a California limited liability company et al | It does not appear that a proper proof of service has been filed. All parties are to appear in Department 16 at 9:00 AM, either in person or via TEAMS. If all parties appear, the Court will administer the oath and the examination will take place off line.If the debtor does not appear, the matter will be continued to allow proper notice. If there is no appearance by the moving party, the matter will be ordered off calendar. |
| LINE 2 | 22CV404565<br>Hearing: Order of Examination | Rossi, Hamerslough, Reischl & Chuck vs. Diana George et al. | All parties are to appear in Department 16 at 9:00 AM, either in person or via TEAMS. If all parties appear, the Court will administer the oath and the examination will take place off line. If there is no appearance by the moving party, the matter will be ordered off calendar. |

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**The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)**

| | | | |
|---|---|---|---|
| LINE 3 | 24CV441190<br>Hearing: Order of Examination | BALBOA CAPITAL CORPORATION vs ERIC GLENN PRIVETT, a sole proprietorship et al | It does not appear that a proper proof of service has been filed. All parties are to appear in Department 16 at 9:00 AM, either in person or via TEAMS. If all parties appear, the Court will administer the oath and the examination will take place off line.If the debtor does not appear, the matter will be continued to allow proper notice. If there is no appearance by the moving party, the matter will be ordered off calendar. |
| LINE 4 | 23CV410115<br>Motion: Demurrer and Motion to Strike | ISIDRO MILLAN vs JUAN RODRIGUEZ et al | See Tentative Ruling. Court will issue the final order. |
| LINE 5 | 23CV421990<br>Hearing: Demurrer | Brian Doyle vs The City of Santa Clara | See Tentative Ruling. Court will issue the final order. |
| LINE 6 | 23CV410157<br>Motion: Protective Order | Jane Doe vs Support Systems Homes, Inc. et al | See Tentative Ruling. Plaintiff shall submit the final order. |
| LINE 7 | 18CV329214<br>Motion: Order to Dismiss for failure | Remedios Domondon et al vs Fely Mabutas et al | See Tentative Ruling. Plaintiffs shall submit the final order. |
| LINE 8 | 18CV329214<br>Motion: Order to Dismiss for failure | Remedios Domondon et al vs Fely Mabutas et al | See Tentative Ruling. Plaintiffs shall submit the final order. |

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**The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)**

| | | | |
|---|---|---|---|
| LINE 9 | 21CV383029<br>Motion: Reconsider | Santa Clara County Federal Credit Union vs Livingston Mikaio | Notice appearing proper and good cause appearing, the unopposed motion to modify the judgment to add attorney fees is GRANTED. Plaintiff shall submit the final order with the amended judgment. Please submit with order cover sheet so that the judgment will come to this Court's queue. The court apologizes for the oversight and notes that the backlog on defaults has been eliminated. |
| LINE 10 | | | |
| LINE 11 | | | |
| LINE 12 | | | |
| LINE 13 | | | |
| LINE 14 | | | |
| LINE 15 | | | |
| LINE 16 | | | |
| LINE 17 | | | |

**- oo0oo -**

**Calendar line 4**
**Case Name:** *Millan v. Pavers & Landscaping Express, Inc., et al.*
**Case No.:** 23CV410115

Urban Pacific Construction Inc. ("UPC" or "Defendant") demurs to the operative Second Amended Complaint ("SAC") filed by Isidro Romero Millan, an individual ("Plaintiff.")

## I. Background

### A. Factual

This is an action to recover damages for whistleblower retaliation and employment discrimination brought by Plaintiff against defendants UPC, Pavers & Landscaping Express, Inc. ("Pavers, Inc."), Stones Landscaping, Inc. ("Stones, Inc."), and Juan Carlos Rodriguez ("Rodriguez"), an individual (collectively, "Defendants").

Plaintiff was allegedly employed by the three Defendant business entities during the "relevant time period." (SAC, ¶¶ 4-5) Rodriguez, an alleged agent of UPC, managed and supervised the daily work of Plaintiff during the course of his employment. (SAC, ¶ 7.) The defendants acted in concert with one another to commit the wrongful acts alleged in the SAC. (SAC, ¶ 32.)

According to allegations of the SAC, on or around June 15, 2022, Plaintiff began working for Defendants as "a full-time non-exempt,"[1] general construction laborer and worked until his termination on November 21, 2022. (SAC, ¶¶ 19-20, 22, 24) Approximately two months later, on August 29, 2022, Plaintiff sustained a work-related injury while working for Defendants at a job site located in Los Altos Hills, California. (SAC, ¶ 32.) Specifically, while at work, Plaintiff was "using a rotary saw" without "proper assistance or equipment to cut metal bars" and sustained a lesion to his left wrist. (See SAC ¶ 32.) Plaintiff immediately informed Defendants about the incident and he went to the emergency room that same day where he received "over 10 stitches." (*Ibid.*) On September 6, 2022, Plaintiff was "placed off work" to undergo left wrist surgery, and he returned to work on October 1, 2022, with restrictions. (*Ibid*.) Plaintiff was in chronic pain because he suffered damage to his tendons "from his wrist to his left pinky and ring finger" causing immobility and numbness. (*Ibid.*) His injury resulted in physical impairment which limited his ability to perform certain tasks and Plaintiff required reasonable accommodations based on his doctor's work restrictions. (*Ibid.*) Upon his return to work, Plaintiff timely informed Defendants about his injury and his work-related restrictions "as they arose," but Defendants failed to provide Plaintiff with "appropriate modified work duties," and Defendants failed to engage in an interactive process with Plaintiff. (*Ibid.*)

Plaintiff further alleges Defendants failed to pay him "for all hours worked" and paid Plaintiff a lower wage than contractually promised. (SAC, ¶¶ 25, 52-56.) Plaintiff worked "off-the-clock," for a work period "of more than 10 hours per day," without being provided with a

[1] Plaintiff was a non-exempt employee within the meaning of the applicable Industrial Welfare Commission ("IWC") Order, and allegedly performed routine duties for Defendants subject to Division of Labor Standards Enforcement ("DLSE") (SAC, ¶¶ 20-21.)

second meal period "of not less than 30 minutes." (SAC, ¶¶ 24, 52-53, 66, 117.) Plaintiff alleges this is in violation of various Labor Codes involving wage, hour, and meal periods. (*Ibid*.)

### B. Procedural

Plaintiff timely filed a Complaint of Discrimination with the California Department of Fair Employment and Housing ("DFEH") and obtained a right to sue letter, dated January 17, 2023. (SAC, ¶ 18; Exh. 1[2] – Notice of Right to Sue Letter). Plaintiff claims he has exhausted his administrative remedies to pursue claims under the Fair Employment and Housing Act ("FEHA"). (*Ibid*.) Plaintiff initiated the instant action on January 19, 2023, with the filing of the original complaint. On June 13, 2023, Plaintiff filed a first amended complaint without filing a motion for leave to amend. Plaintiff subsequently filed an amended motion for leave to amend on November 22, 2023, which was unopposed. The Court granted the unopposed motion on February 29, 2024, and Plaintiff filed the operative SAC that same day, which asserts the following claims: (1) failure to pay overtime wages (Lab. Code, §§ 510, 1194, 1198); (2) failure to pay minimum wages and secret underpayment of wages (Lab. Code, §§ 223, 1197, 1998 and "IWC Wage Order"); (3) failure to indemnify for expenses and losses in discharging duties (Lab. Code § 2802); (4) failure to provide meal periods (Lab. Code §§ 226.7, 512); (5) failure to provide rest periods (Lab. Code § 225.7); (6) failure to provide and maintain accurate itemized wage statements in violation of Labor Code, §§ 226, 1174, 1198; (7) failure to pay wages due upon termination (Labor Code, §§ 201-203); (8) unfair business practice in violation of Business & Professions Code §§ 17200, et seq.; (9) retaliation (Lab Code, § 232); (10) wrongful termination in violation of public policy; (11) FEHA wrongful termination (Gov. Code, §§ 12900 & 12940 et seq.); (12) FEHA failure to provide reasonable accommodation (Gov. Code, § 12940, subd. (m)); (13) failure to engage in the interactive process-FEHA (Gov. Code, § 12940, subd. (n)); and (14) breach of contract (against Defendant Rodriguez only).

On March 20, 2024, Plaintiff filed a Notice of Errata Regarding SAC indicating that he had inadvertently failed to attach Exhibits 2 and 3 to the SAC, which include photographs of Plaintiff's wrist injury and a "Letter of Acceptance of Responsibility," signed by Defendant Rodriguez on September 1, 2022, respectively. The Notice of Errata includes the missing exhibits and "incorporated herein by reference." (See Notice of Errata, pp. 1-2; Exh. A.)

On April 26, 2024, Defendant UPC filed the instant demurrer and motion to strike portions of Plaintiff's SAC, which Plaintiff opposes. Defendant filed a reply on August 1, 2024.

## II. Defendant's Demurrer

Defendant UPC demurs to the first through thirteen causes of action on grounds that Plaintiff fails to state facts sufficient to constitute a cause of action. (See Code Civ. Proc., § 430.10, subd. (e).)

### A. Legal Standard

[2] It appears Plaintiff inadvertently placed an "Exhibit ''1'" cover sheet for the final page of his SAC – a portion of his Prayer for Relief. (See SAC, p. 60.) This Court will assume the Exhibit 1 cover sheet is in reference to the Notice of Right to Sue Letter.

The court in ruling on a demurrer treats it "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "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.) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

**B. Merits of the Demurrer**

**1. First through Thirteenth Causes of Action - Failure to State Sufficient Facts – Joint Employer Theory**

A party may demur to the pleading if it "does not state facts sufficient to constitute a cause of action." (Code Civ. Proc., § 430.10, subd. (e).) "[T]he complaint need only allege facts sufficient to state a cause of action; each evidentiary fact that might eventually form part of the plaintiff's proof need not be alleged." (C*.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 872.)

Here, Defendant UPC argues that the first through thirteenth causes of action fail and that it should be dismissed from this action because Plaintiff does not plead sufficient facts supporting that he was jointly employed by UPC. (Memorandum of Points and Authorities in Support of UPC's Demurrer and Motion to Strike Plaintiff's SAC ("Dem.Str. MPA,") p. 5:18-27.) Specifically, Defendant asserts the SAC, and accompanying Exhibit A, reveal that individual Defendant Rodriguez, alone, was Plaintiff's employer, and Plaintiff makes conclusory allegations that UPC exercised control over Plaintiff's hiring, payment of wages, and his working conditions, among other things. (Dem.Str. MPA, p. 5:21-24.) There is no dispute that Defendant UPC's liability in this case is predicated on it being a joint employer of Plaintiff.

In opposition, Plaintiff insists he pleaded sufficient facts of joint employment by identifying Plaintiff's employers, namely UPC, holding UPC legally responsible as joint employer. (Plaintiff's Opposition to Dem.Str. MPA ("Opp.,") p. 6:15-22.)

As noted above, Plaintiff is bringing claims for unlawful employment practices under various Labor Codes and FEHA. Although courts look to cases addressing FEHA for guidance on determining whether a party qualifies as an employer, (*Miner v. Fedex Office & Print Services, Inc.* (N.D.Cal. 2016) 182 F.Supp.3d 966, 989-990), "FEHA provides limited definitions of the terms 'employee' and 'employer.' " (*Shepard v. Loyola Marymount Univ.* (2002) 102 Cal.App.4th 837, 842; Gov. Code § 12926, subds. (c) and (d).) Therefore, courts have adopted tests to assess whether there is or is not an employer/employee relationship. (*Vernon v. State of California* (2004) 116 Cal.App.4th 114, 124-125 (*Vernon*).) If the plaintiff is relying on a joint employment theory, facts demonstrating the existence of such a relationship must be pleaded in the complaint. (*Vernon, supra,* 116 Cal.App.4th at p. 123.)

Whether an employment relationship exists between two parties is determined by "a totality of the circumstances test, that reflect[s] upon the nature of the work relationship of the

parties, with emphasis upon the extent to which the defendant controls the plaintiff's performance of employment duties." (*Vernon, supra,* 116 Cal.App.4th at p. 123.) Courts look to a variety of factors, including "payment of salary or other employment benefits and Social Security taxes, the ownership of the equipment necessary to performance of the job, the location where the work is performed, the obligation of the defendant to train the employee, the authority of the defendant to hire, transfer, promote, discipline or discharge the employee, the authority to establish work schedules and assignments, the defendant's discretion to determine the amount of compensation earned by the employee, the skill required of the work performed and the extent to which it is done under the direction of a supervisor, whether the work is part of the defendant's regular business operations, the skill required in the particular occupation, the duration of the relationship of the parties, and the duration of the plaintiff's employment." (*Vernon, supra,* p. 125.) Among these factors, the most important is the extent of the defendant's right to control the means and manner of the worker's performance. (*Vernon, supra,* p. 126.) "That control must be significant in order to hold the alleged employer responsible, especially when the conduct underlying the claim was committed indirectly, by an immediate employer other than the defendant." (*McCoy v. Pacific Maritime Association* (2013) 216 Cal.App.4th 283, 302 ("*McCoy"*).)

Defendant UPC states the applicable test to determine joint employment is the totality of the circumstances test stated in *Vernon.* (Dem.Str. MPA, p. 5:24-28; *Vernon, supra*, 116 Cal.App.4th at 122.) In contrast, Plaintiff relies on *Mathieu v. Norrel Corp.* (2004) 115 Cal.App.4th 1174, 1183 (*Mathieu*) for the position that the law recognizes "dual" employment relationship contexts, which considers both a temporary employment agency and a client as employers when an employee experiences harassment. (*Mathieu, supra,* 115 Cal.App.4th at p. 1183; Opp., p. 6:16-19.) Plaintiff's reliance on this theory is misplaced, as it arises in the very limited circumstance of where the employer sent an employee to work for another person, and both had the right to exercise certain powers of control over the employee. (*Mathieu, supra,* at p. 1184.) Here, the SAC alleges that UPC employed Plaintiff and that "PLAINTIFF was employed by the DEFENDANTS to perform services for a wage." (SAC, ¶¶ 3-4.) But, it does not allege that UPC assigned or sent Plaintiff to work for Rodriguez (or any other client of UPC's) as occurred in *Mathieu*. Plaintiff's conclusory allegations that all defendants allegedly hired and employed him are insufficient to establish the application of *Mathieu* to the instant case.

The Court finds the *Vernon* test is correctly applied to this case. The test "reflect[s] upon the nature of the work relationship of the parties, with emphasis upon the extent to which the defendant controls the plaintiff's performance of employment duties." (*Vernon, supra*, 116 Cal.App.4th at p. 124.) Courts consider a variety of factors in determining if joint employment exists, including "payment of salary or other employment benefits and Social Security taxes, the ownership of the equipment necessary to performance of the job, the location where the work is performed, the obligation of the defendant to train the employee, the authority of the defendant to hire, transfer, promote, discipline or discharge the employee, the authority to establish work schedules and assignments, the defendant's discretion to determine the amount of compensation earned by the employee, the skill required of the work performed and the extent to which it is done under the direction of a supervisor, whether the work is part of the defendant's regular business operations, the skill required in the particular occupation, the duration of the relationship of the parties, and the duration of the plaintiff's employment." (*Vernon, supra,* 116 Cal.App.4th at p. 125.) The most important factor is "'the extent of the

defendant's right to control the means and manner of the workers' performance…' [Citations.]" (*Vernon, supra*, 116 Cal.App.4th at p. 126.)

Here, Defendant UPC argues that Plaintiff has not sufficiently alleged facts demonstrating UPC had day-to-day control over his actions, but instead, he alleges, via a "Letter of Acceptance of Responsibility," Defendant Rodriguez alone, was Plaintiff's employer. (Dem.Str. MPA, p. 5:20-21-6:19-25; see also Notice of Errata; Exh. A – Letter of Acceptance of Responsibility.) Defendant further asserts Plaintiff alleges "bare conclusions" to suggest that UPC exercised control over Plaintiff's hiring, payment of wages, and working conditions, and these conclusory allegations are insufficient under *Vernon, supra,* 116 Cal.App.4th at p. 12. (Dem.Str. MPA, p. 6:16-18.)

Plaintiff maintains that, at this stage, Plaintiff adequately pleads joint employer theory and that the SAC identifies Plaintiff's employers. (Opp., p. 6:20-28.) Specifically, Plaintiff argues that Defendant UPC along with Defendants Pavers, Inc. and Stones, Inc., "were Plaintiff's employers by way of, either direct employment or joint employment, contracted with said Defendants "to hire and pay workers," including Plaintiff, and that UPC "hired and employed Plaintiff to work at its job site, control and monitored his work and gave specific instructions" regarding various construction tasks, and through its authorized agents. (*Id*., p. 7:1-9, citing SAC ¶¶ 4-17, 23, 32, 37-38, 42-43, 134-l36,141, 147-149, 153-155, 171, 176, 193, 200, 210-211.) But, as noted by UPC, the allegations in the SAC as to joint employment are conclusory and the majority of Plaintiff's string cites are simply portions of the SAC mentioning all "DEFENDANTS" collectively "exercised control over PLAINTIFF'S wages, hours, and working conditions…" (SAC, ¶ 22). We agree with Defendant UPC that these conclusory allegations are insufficient to plead joint employment under *Vernon*.

Additionally, Defendant UPC argues that Defendant Rodriguez's "Letter of Acceptance of Responsibility" indicates that only Rodriguez "oversaw [his] daily work" and "directly paid Plaintiff's wages at all relevant times." (Dem.Str. MPA, p. 6: 19-28; SAC, ¶¶ 7, 24.) Notably, Defendant correctly points out that the "Letter of Acceptance of Responsibility," *generally* incorporated to the SAC via Notice of Errata, unequivocally states that Plaintiff "work[ed] for Mr. Juan Carlos Rodriguez" when he was injured, and the letter does not identify any other individual or company address. (Dem.Str. MPA, p. 6: 20-22; UPC Reply Brief in Support of Dem. ("Reply,") p. 4:19-26; SAC ¶ 218; Notice of Errata; Exh. A.) As noted by UPC, the Letter only mentions and addresses Defendant Rodriguez: "[t]he Acceptance Letter does not mention UPC at all, let alone provide a basis to suggest that Mr. Rodriguez was acting as UPC's agent or that UPC exercised any modicum of control over Plaintiff's employment." (Dem.Str. MPA, p. 6:22-25; Notice of Errata; Exh. A.)

Defendant's argument, that Plaintiff's own allegations and "Letter of Acceptance of Responsibility" demonstrates he was not jointly employed by UPC and Rodriguez at the time of his termination, is persuasive. (See Reply, p. 2:1-8; SAC ¶¶ 7, 24.) Although Plaintiff pleads he was employed by Defendant UPC and that UPC retained the other entity Defendants to supervise Plaintiff's work, this Court cannot ignore the contradictory nature of Defendant Rodriguez's Letter and the SAC allegations that *all* Defendants collectively employed Plaintiff, even at this stage of the pleadings. (SAC ¶¶ 4-17, 23, 32, 37-38; see also *Vernon, supra,* 116 Cal.App.4th at pp. 127-128 ["The right to control the employment relationship . . . is essential to subject the defendant to liability" and includes the right to "hire, fire, transfer, promote, discipline, set the terms, conditions and privileges of employment, train and pay the

plaintiff"].) After all, case law dictates that Courts generally "accept as true all facts appearing in exhibits attached to the complaint and give such facts precedence over contrary allegations in the complaint." (*Stecks v. Young* (1995) 38 Cal.App.4th 365, 369 (*Stecks*), citing *Dodd v. Citizens Bank of Costa Mesa* (1990) 222 Cal.App.3d 1624, 1627 (*Dodd*).) Notably, in its reply, Defendant correctly points out that Plaintiff filed a Request for Entry of Default Judgment against Defendants Rodriguez, and Pavers, Inc., but not UPC, which again, weakens Plaintiff's argument that he was jointly employed by *both* UPC and Rodriguez. (See Reply, p. 2, fn. 2; see also Plaintiff's Request for Entry of Default, section 1.c.)

Plaintiff argues that although Rodriguez's Letter identifies Defendant Rodriguez as the sole responsible party, it does not necessarily mean UPC did not jointly supervise his work, or "rule out the probability that other employers exist." (Opp., p. 8:4-8.) This Court disagrees given that the SAC fails to clarify the potential ambiguity of "'the extent of the defendant's right to control the means and manner of the workers' performance…' [Citations.]" (*Vernon, supra*, 116 Cal.App.4th at p. 126.) As noted above, defendant's right to control is the most important factor to consider under the *Vernon* test, and Rodriguez's Letter contradicts Plaintiff's allegation that UPC had a full right to control the manner of Plaintiff's performance. (*Vernon, supra,* 116 Cal.App.4th at p. 124 [the establishment of an employment relationship largely hinges "upon the extent to which the defendant controls the plaintiff's performance of employment duties"].)

Plaintiff also maintains that the Letter of Responsibility, attached as an exhibit to the SAC, "cannot be considered on a demurrer" because it is only in support of Plaintiff's breach of contract claim" against Rodriguez only. (Opp., p. 3:16-23.) This argument is unavailing in light of *Stecks* and *Dodd* which conclude exhibits attached to the complaint, will take precedence over "contrary allegations" in the complaint. (See *Stecks, supra,* 38 Cal.App.3d at p. 369.) Notably, in support of his proposition, Plaintiff cites *City of Pomona v. Superior Court* (2001) 89 Cal.App.4th 793, 800 (*Pomona*), but this case strengthens, rather than refutes, Defendant UPC's position. The *Pomona* court, as noted by Plaintiff himself, held that "[w]here written documents are the foundation of an action and are attached to the complaint and incorporated therein by reference, *they become a part of the complaint and may be considered on demurrer*." (*Pomona, supra,* 89 Cal.App.4th at p. 800, italics added.) This holding directly contradicts Plaintiff's main argument that Rodriguez's Letter of Responsibility cannot be considered generally on demurrer. In that same vein, in its reply, Defendant argues that Plaintiff "has no legal support for the proposition" that this Court can consider the Rodriguez's Letter "only when it suits Plaintiff," and that Plaintiff concedes California courts "are clear that written documents attached to a complaint are incorporated therein by reference." (See Reply, p. 4:1-8; see also *Qualcomm, Inc. v. Certain Underwriters at Lloyd's, London* (2008) 161 Cal.App.4th 184, 191.) Defendant maintains the Letter "patently contradicts the notion that anyone other than" Defendant Rodriguez was Plaintiff's employer "such that any other party should be held liable for the claims in this action." (Reply, p. 4:19-26.) Defendant further persuasively argues that the Letter of Acceptance can and should be considered given that it sheds light on whether Plaintiff has adequately alleged facts to maintain a joint employer theory under the *Vernon* test. (Reply, p. 5:6-8.) This Court agrees.

Plaintiff has not alleged sufficient facts to demonstrate joint employment per the *Vernon* test. The demurrer to the first through thirteenth causes of action on the ground that Plaintiff fails to allege joint employment is SUSTAINED, in its entirety, WITH 20 DAYS' LEAVE TO AMEND. Consequently, as noted above, given that UPC's liability in this case is

predicated on it being a joint employer of Plaintiff, this Court need not address the remaining arguments raised on demurrer. (See *Weinbaum v. Goldfarb* (1996) 46 Cal.App.4th 1310, 1315 [indicating liability for the tort of wrongful termination simply does not exist absent an employment relationship].)

"'Generally[,] it is an abuse of discretion to sustain a demurrer without leave to amend if there is any reasonable possibility that the defect can be cured by amendment. [Citation.] . . . Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading. [Citations.]'" (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) Here, Plaintiff does not indicate how it would amend its SAC to meet the concerns raised by this demurrer, but given that it is not clear on the face of the SAC that it cannot be cured, and that this is Defendant's first demurrer, the Court will grant leave to amend.

## IV. Motion to Strike

Given this Court's ruling on UPC's demurrer, the motion to strike is MOOT.

## V. Conclusion

The demurrer is SUSTAINED, in its entirety, WITH 20 DAYS' LEAVE TO AMEND.

Defendant's motion to strike is MOOT.

The Court will prepare the final order.

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**Calendar Line 5**
**Case Name:** *Doyle v. City of Santa Clara*
**Case No.:** 23CV421990

This action arises from an alleged unlawful termination. The City of Santa Clara ("City" or "Defendant") demurs to the operative First Amended Complaint ("FAC") filed by Brian Doyle ("Plaintiff.")

## I. Background[3]

### A. Factual

Plaintiff was a City Attorney for the City of Santa Clara, and the Stadium Authority Counsel for the Santa Clara Stadium Authority (collectively, "City Entities.") (FAC, ¶ 2.) As a City Attorney and Stadium Authority Counsel, Plaintiff had a duty to "competently" advise City Entities and to defend them in "numerous lawsuits" involving the City Entities' ownership of the "San Francisco 49ers football team." (FAC, ¶ 3.)

During his employment as City Attorney, Plaintiff alleges he reasonably believed specific City Council members, including Patricia Mahan ("Mahan,") had agreed to a *quid pro quo* arrangement with third parties acting on behalf of the San Francisco 49ers ("49ers") (FAC, ¶ 43.) Plaintiff alleges he reasonably believed the 49ers expended $700,000 in campaign funding to oppose a ballot measure[4] that would render moot an appeal in a case involving the California Voting Rights Act ("CVRA.") (FAC, ¶ 46.) Plaintiff further believes the campaign funding to oppose Measure C was "in furtherance of gaining control over a majority of the City Council," and to retaliate against public officials "who were seeking to hold the 49ers accountable to the City." (FAC, ¶ 47.)

During Plaintiff's employment, he learned that Mahan conspired with 49ers' representatives and several Council candidates, including Anthony Becker and Kevin Park, to "terminate the possibility of the City prevailing on its appeal of the judgment in the CVRA case." (FAC, ¶¶ 49-50, 52-53, 55.) Plaintiff based this allegation on the fact that Mahan's sister "had been assisting [CVRA] Plaintiffs' counsel and expert witnesses by driving them around the City of Santa Clara and explaining where she believed certain minority populations were concentrated." (FAC, ¶¶ 49, 50.) Plaintiff further alleges that Mahan's sister's conduct was the basis for a reasonable belief that "Mahan was conspiring with the Plaintiffs in the voting rights case." (FAC, ¶ 51.) Plaintiff also alleges that council members Becker and Park were involved in this conspiracy because, prior to being elected, they "attended hearings and proceedings and spoke familiarly with associates of the Plaintiffs in the [CVRA lawsuit]" and expressed views "identical" to the views of the CVRA plaintiffs at City Council meetings. (FAC, ¶¶ 52, 53.)

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[3] The factual and procedural background to the action largely mirrors the Court's Order filed on March 15, 2024, on Defendant's demurrer to the initial Complaint. Consequently, the full background will not be repeated here.

[4] In the Fall of 2019, the "then-council majority put a City Charter Amendment on the March 2020 ballot to change the way council members were elected." This ballot initiative was known as Measure C. (FAC, ¶ 44.)

Prior to a December 8, 2020, publicly held, City Council meeting, Council member Raj Chahal ("Chahal,") attempted to include a "closed session" agenda item related to the CVRA litigation. (FAC, ¶ 69.) Plaintiff asserts he denied this request because closed sessions were "generally disfavored" under the Ralph M. Brown Act ("Brown Act"), subject to limited exceptions. (FAC, ¶¶ 70, 78; see also Gov. Code, § 54956.9, subd. (a)) On December 3, 2020, Chahal then "filled out a Council Item Request Form" to "[d]iscuss and have an update on the ongoing CVRA appeal lawsuit: *Yumori-Kaku v. City of Santa Clara*, Case No. 17CV319862," but made no mention of discussing this in closed session. (FAC, ¶¶ 73, 83.) Plaintiff alleges that Chahal later "blindsided" him by requesting that the CVRA litigation matter be placed on the agenda for a closed session meeting on December 15, 2020. (FAC, ¶ 88.) Plaintiff subsequently contacted Chahal to determine what needed to be discussed at the meeting so that he could evaluate whether the closed session discussion "would meet the requirements of the Brown Act." (FAC, ¶¶ 94-95.)

Despite Plaintiff bringing the CVRA litigation topic to light at the December 8, 2020, publicly held meeting, Chahal "remained circumspect" and simply expressed the possibility of a CVRA litigation dismissal during the proposed December 15, 2020, "closed session" meeting. (FAC, ¶¶ 99-101.)

Plaintiff asserts he reasonably believed that Chahal's actions were an attempt "to violate the Brown Act." (FAC, ¶¶ 100-101, 104.) During the above-noted, publicly held meeting, Plaintiff communicated that it would be unadvisable for the City to make a settlement offer "on the eve of the December 17 oral argument at the Court of Appeal." (FAC, ¶ 118.)

On January 7, 2021, one of the "49er Five"[5] council members Sudhanshu Jain, publicly reported to the press that Plaintiff's CVRA litigation concerns "definitely gave [Plaintiff] a black eye…it doesn't look good." (FAC, ¶ 128.) Similar negative remarks about Plaintiff were made again on April 2021. (FAC, ¶ 129.) A few months later, City Council members discussed Plaintiff's submitted performance evaluation in multiple closed session meetings. (FAC, ¶¶ 136-140.) Plaintiff was ultimately terminated on September 2, 2021. (FAC, ¶ 141.)

Plaintiff alleges he was discharged in retaliation for the protected disclosures he made at the December 8, 2020, publicly held meeting, about possible violations of Penal Code section 68 and the Hobbs Act. (FAC, ¶ 143.)

**B. Procedural**

Plaintiff initiated the instant action with the filing of the original Complaint on August 30, 2023. On November 14, 2023, City Defendant filed a demurrer to the Complaint. After the hearing on Defendant's initial Demurrer on March 13, 2024, this Court issued a final order sustaining the demurrer (on failure to state sufficient facts) with twenty days leave to amend. (See Court Order Case No. 23CV421990 entitled Brian Doyle vs. The City of Santa Clara, filed on March 15, 2024.) On April 3, 2024, Plaintiff filed his operative pleading, the FAC,

[5] The Complaint defines the 49er Five as a media-coined term for five City Council members, which included Chahal. The 49er Five formed a majority voting bloc and made decisions favoring the 49ers. (Complaint, ¶¶ 59-60.)

alleging a single cause of action for retaliation in violation of Labor Code section 1102.5, subdivisions (b) and (c).)[6]

On May 7, 2024, City Defendant filed a demurrer to the operative FAC. On July 26, 2024, Plaintiff opposed the motion. City Defendant filed a reply on August 1, 2024.

## II. Defendant's Demurrer

Defendant demurs on the ground that Plaintiff fails to state facts sufficient to constitute a cause of action for retaliation under section 1102.5, subdivisions (b) and (c).

### A. Defendant's Request for Judicial Notice

"Judicial notice is the recognition and acceptance by the court, for use by the trier of fact or by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter." (*Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117, citations and quotation mark omitted.)

In support of its demurrer, Defendant requests judicial notice of the City's Charter ("Charter") (See Defendant's Request for Judicial Notice ("RJN") in Support of Demurrer to FAC; Exh. A.) This request is GRANTED. The Court may take judicial notice of the Charter, pursuant to Evidence Code section 451, subdivision (a) [judicial notice shall be taken of "[t]he decisional, constitutional, and public statutory law of this state…"]) (See *Edgerly v. City of Oakland* (2012) 211 Cal.App.4th 1191, 1194, fn. 1.)

Next, Defendant asks this Court to take judicial notice of various City of Santa Clara meeting-related minutes. (RJN, Exhs. C-D.) This request is GRANTED. (Evid. Code, § 452, subd. (c); see also *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 9, fn. 5 [judicial notice taken of minutes of city council meeting]; *Silverado Modjeska Recreation and Parks Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 309, fn. 20 [judicial notice may generally be taken of minutes of recreation and parks district meeting]; *Ochoa v. Anaheim City School District* (2017) 11 Cal.App.5th 209, 221 [judicial notice taken of State Board of Education minutes].)

Finally, Defendant asks this Court to take judicial notice of the City of Santa Clara Resolution No. 20-8809, transcripts, and agenda. This request is GRANTED. The Court may take judicial notice of relevant portions of a city's staff reports and legislative enactments. (*Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1225 [judicial notice of staff report]; see *Trinity Park, L.P. v. City of Sunnyvale* (2011) 193 Ca1.App.4th 1014, 1027 [applying Evid. Code, § 452, subd. (b) and (c) to "local ordinances and the official resolutions, reports, and other official acts of a city."].) Exhibits B, E, F, and G, fall into this category.

Given the above and the fact that Plaintiff has not objected to any of the requests for judicial notice, the Court GRANTS Defendant's request for judicial notice of Exhibits A through G.

### B. Legal Standard

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[6] All further undesignated statutory references are to the California Labor Code.

The court in ruling on a demurrer treats it "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "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.) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

### C. Merits of the Demurrer

#### 1. Factual Sufficiency of the Retaliation Cause of Action

##### i. Section 1102.5, subdivision (b)

In his FAC, Plaintiff states that he "had reasonable cause to believe" that the information he provided to City Council "disclosed a violation of state and local law related to the Brown Act." (FAC, ¶ 155.) Next, the FAC states: "[a]t the public hearing on December 8, 2020, Plaintiff also notified the City Council, specifically Councilmember Chahal, that his attempt to put the voting rights matter active litigation into a closed session, without the advice of legal counsel, and without any effort to determine whether the City would be prejudiced by discussing the matter in open session, was a violation of the Brown Act." (FAC, ¶ 154.) Consequently, purportedly based on his ethical duties, and unwillingness to violate state and local law, Plaintiff refused to participate in a proposed closed session City Council meeting. (FAC, ¶¶ 156-158.) Plaintiff argues he was ultimately discharged for both his disclosure of protected information to City Council and his refusal to participate in an upcoming closed session meeting, in violation of section 1102.5. (FAC, ¶¶ 157-160, 163.)

Section 1102.5, subdivision (b) provides:

> An employer, or any person acting on behalf of the employer, *shall not retaliate* against an employee *for disclosing information*, or because the employer believes that the employee disclosed or may disclose information, to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance, or for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, *if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute*, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties.

(Section 1102.5, subd. (b), italics added.)

> [To] establish[] a prima facie case of retaliation … a plaintiff must show (1) she engaged in a protected activity, (2) her employer subjected her to an adverse

> employment action, and (3) there is a causal link between the two. ([*Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441,] 1453.)

(*Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1384, disapproved on another ground in *Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703, 718, fn. 2.)

In its demurrer, Defendant contends Plaintiff's retaliation claim under section 1102.5, subdivision (b) fails because Plaintiff has not articulated facts demonstrating: 1) he engaged in protected activity, and 2) that he reasonably believed he was reporting illegal activity, namely, a Brown Act violation. (Memorandum of Points and Authorities in support of Demurrer ("Dem. MPA"), p. 7:6-21.) In support, Defendant cites this Court's prior order filed on March 15, 2024, on Defendant's demurrer to the initial Complaint. (Dem. MPA, p. 7: 20-28; see also Court Order Case No. 23CV421990 entitled *Brian Doyle v. The City of Santa Clara*, filed on March 15, 2024.) Specifically, Defendant asserts Plaintiff does not sufficiently allege that a reported illegal activity, namely, a Brown Act violation, was actually carried out under section 1102.5. (*Ibid*.) Defendant further asserts "Plaintiff made clear that he had no objection to holding the closed session at a different time or for different reasons, (FAC, ¶ 124), and, "Plaintiff himself ultimately concluded that a December 15 closed session was necessary and participated in that closed session and another one the following day." (FAC, ¶ 125; Dem. MPA, p. 8:8-11.) Following each of those closed session meetings, Defendant notes, Plaintiff indicated that "no reportable action occurred" per the City Charter. (Dem. MPA, p. 8:11-14; see also RJN; Exh, C, p. 3; RJN; Exh. D, p. 3.) Defendant concludes that the purported unlawful closed session meeting never occurred, and Government Code section 54956.9 was not violated. (Dem. MPA, p. 8:12-14.)

As noted in this Court's prior order, Defendant's points are well taken. The allegations in the FAC regarding possible Brown Act violations, did not appear to be expressed at the December 8, 2020 public city council meeting. (Complaint, ¶¶ 48-58, 60, 62, 63, 65, 95.) Instead, and as noted in this Court's prior order, Plaintiff raised general concerns regarding timeframes, potential liability, and, about adequately preparing for a *future* closed session meeting. (FAC, ¶¶ 108-112) Defendant's contention - Plaintiff's "purported suspicions" that council member Chahal's request for a closed session meeting was unlawful were "speculative" and "unreasonable" - have merit, especially when Plaintiff admitted to having no objection to holding the closed session at a later time. (Dem. MPA, p. 13:20-25; FAC, ¶¶ 121-126; see RJN; Exhs. C-D.) In pleading these facts, Plaintiff has not demonstrated that he reasonably believed City Council members were actively engaging in unlawful activity, namely violating the Brown Act.

In opposition, Plaintiff argues he was not required to expressly state that he believed the City Council was violating or not complying with a specific state or federal law. (Plaintiff's Opposition ("Opp.") to Dem. MPA, p. 18:8-21.) Rather, Plaintiff correctly claims he is required to disclose "reasonably based" suspicions of illegal or unlawful activity. (See *Ross v. County of Riverside* (2019) 36 Cal.App.5th 580, 592-593 (*Ross*) ["Although Ross did not expressly state in his disclosures that he believed the County was violating or not complying with a specific state or federal law, Labor Code section 1102.5, subdivision (b), does not require such an express statement. It requires only that an employee disclose information and

that the employee reasonably believe the information discloses unlawful activity. (Lab. Code, § 1102.5, subd. (b).)].)[7]

But, in the instant case, Plaintiff's disclosure involved the hypothetical actions of city council members at a meeting that had yet to occur at the time of Plaintiff's disclosure. (FAC, ¶¶ 92-93.) As noted above, Plaintiff's disclosures included *general concerns* when he informed council member Chahal that "he would not agree to enter into a closed session because he was not presented with any information to satisfy the requirement of section 54956.9." (Opp., p. 19:20-23.)

As a general rule, "statutory causes of action must be pleaded with particularity." (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790.) As such, the plaintiff must set forth facts in his FAC that are "sufficiently detailed and specific to support an inference that each of the statutory elements of liability is satisfied." (*Mittenhuber v. City of Redondo Beach* (1983) 142 Cal.App.3d 1, 5, internal citations omitted.)

Here, as Defendant points out, Plaintiff's alleged reasonable belief is based on City Council's hypothetical conduct, which, if it were to occur, could potentially violate provisions of Penal Code section 68, the Hobbs Act (18 U.S.C. § 1951), and the Brown Act (Gov. Code, § 54956.9, subd. (a)). (FAC, ¶¶ 143, 154-156.) The FAC refers to alleged hypothetical conduct, including: 1) City Council's purported attempt to dismiss a CVRA lawsuit prior to oral argument, 2) potential violations of the Brown Act, and 3) certain council members' potential conflict of interest due to alleged *quid pro quo* agreements. (FAC, ¶¶ 43, 61, 91, 154.) These allegations are insufficient to state a cause of action under section 1102.5, subdivision (b).

Though Plaintiff is correct that section 1102.5, subdivision (b) does not require the employee to have actual knowledge of the statute being violated at the time of reporting, the reasonableness of his or her belief is determined by the existence of a law that could form the basis for such belief. Here, Plaintiff alleges, during his years of service, he was "familiar with the requirements of, and exceptions to, the Ralph M. Brown Act," yet he does not appear to specify how holding a closed session would violate the Brown Act. (FAC, ¶ 32, 94, 96.) Instead, he alleges *potential* violations of the Penal Code, the Hobbs Act, and the Brown Act, based on the conduct of council members that *could* occur at a future closed session. Consequently, Plaintiff's allegation that Chahal's *attempted request* to place a matter related to the pending CVRA litigation, in a closed session, without adequate discussion of potential issues, was in furtherance of a "quid pro quo agreement," and in violation of the Brown Act, is highly speculative. (FAC, ¶¶ 43, 61, 91, 154.) Additionally, Plaintiff's suspicions of illegal activity based on the "highly unusual" actions taken by Chahal to place the CVRA litigation on the agenda for a closed session without any consultation with Plaintiff, does not demonstrate, with particularity, that illegal activity is afoot. (Opp., p. 13:21-22-14:8-14; see also Exh. B to the FAC – Council Item Request Form.) As noted in this Court's prior order, without more, the fact that Chahal engaged in "unusual" actions does not necessarily mean he was engaging in unlawful activity. (Dem. MPA, p. 12:19-24.)

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[7] Given this Court's prior order, it need not repeat the full *Ross* discussion here. (See Court Order Case No. 23CV421990 entitled *Brian Doyle v. The City of Santa Clara*, filed on March 15, 2024, p. 8:18-9:1-6.)

The facts alleged in the FAC again fail to demonstrate a "reasonableness" to Plaintiff's belief that a law was *actually* being violated, at the time of his reporting. (See *Ferrick v. Santa Clara University* (2014) 231 Cal.App.4th 1337, 1346 [a plaintiff must include allegations that clearly "state or show that [the employee] had a reasonable basis to suspect" illegal activity].) Of particular importance, Plaintiff provides no authority demonstrating that a claim under section 1102.5, subdivision (b) can be made for disclosures of a *potential* violation, namely, city council members' participation in a decision that *could* result in unlawful conduct. As Defendant indicates, in its demurrer, Plaintiff's allegations of *potential* unlawful activity, "never occurred" in the closed session meetings involving CVRA litigation. (Dem. MPA, p. 7:18-28.) Per the December 15, 2020, closed session meeting minutes, Plaintiff attended the meeting, and noted "no reportable action from Closed Session." (Dem., p. 5:15-23; Reply, p. 2:9-28; RJN, Exhs. D, p. 3; Exh. E, pp. 2-3; see also *Manavian v. Department of Justice* (2018) 28 Cal.App.5th 1127 [plaintiff was not protected from termination as a whistleblower under section 1102.5 because "he did not disclose or report a violation of law."]; and *Mize-Kurzman v. Marin Community College District* (2012) 202 Cal.App.4th 832, 839.)

Consistent with this Court's prior order, the Court again concludes the allegations in the FAC that Plaintiff was terminated or retaliated against for refusing to participate in a closed session are insufficient to plead a cause of action under Labor Code section 1102.5, subdivision (b).

Alternatively, Plaintiff argues that when council member Chahal *attempted* to place the CVRA litigation matter "in closed session, against the advice of [Plaintiff]", and without Plaintiff's ultimate determination on the matter, Chahal *attempted* to violate Government Code section 54956.9, subdivision (a). (Opp., p. 5:11-16;13:3-11;15:4-15; FAC, ¶¶ 88-90.) Plaintiff concludes that after disclosing "this attempted violation" at the December 8, 2020, council meeting, and refusal to participate in a closed session meeting, the City Council retaliated by terminating him. (Opp., p. 5:16-20.) Notably, Plaintiff's FAC is devoid of allegations demonstrating that he reported a Brown Act violation at the December 8, 2020, public City Council meeting, and Plaintiff's assertion is further contradicted by the meeting minutes highlighted above. (RJN, Exh. D, p. 3; Exh. E, pp. 2-3.)

In its demurrer, Defendant argues that Plaintiff fails to state a claim because his purported reasonable belief of *an attempted* legal violation was based "on an impermissible reading of the Brown Act." (Dem. MPA, p. 9:17-20.) Specifically, Defendant argues that as the City's chief legal officer, entrusted to advise the City on compliance with the Brown Act, Plaintiff cannot reasonably believe that Chahal violated the Brown Act "by requesting to discuss a matter in a closed session" without the advice of Plaintiff and that *only* Plaintiff was authorized to schedule closed session meetings to discuss "pending litigation." (Dem. MPA, p. 9:23-28.) Defendant concludes this contention not only is undermined by the judicially noticed City Charter, but it also misrepresents the requirements for a closed session meeting. (Dem. MPA. P. 10:1-4; see also Cal. Rules of Prof'l Conduct, Rules 1.2 & 1.4).

"The Brown Act requires most meetings of a local agency's legislative body to be open and public. [Citations omitted.]" (*Fowler v. City of Lafayette* (2020) 46 Cal.App.5th 360, 366 (*Fowler*).) "It 'is intended to ensure the public's right to attend the meetings of public agencies. [Citation.] To achieve this aim, the Act requires, inter alia, that an agenda be posted at least 72 hours before a regular meeting and forbids action on any item not on that agenda. [Citations.] The Act thus serves to facilitate public participation in all phases of local

government decision[-]making and to curb misuse of the democratic process by secret legislation by public bodies.'" (*Id.* at p. 366, quoting *Golightly v. Molina* (2014) 229 Cal.App.4th 1501, 1511.) "The Brown Act is 'construed liberally so as to accomplish its purpose. [Citations omitted.]'" (*Ibid.*)

"One of the exceptions to the Brown Act's open meeting requirements allows closed sessions for an agency to 'confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session concerning those matters would prejudice the position of the local agency in the litigation.'" (*Fowler, supra,* 46 Cal.App.5th at pp. 366-367, quoting Gov. Code, § 54956.9, subd. (a).)

In light of the Brown Act framework, this Court agrees with Defendant that Government Code section 54956.9, subdivision (a)[8] does not appear to require a council member to obtain approval from an attorney to place an item on calendar for closed session. In reliance on the opinion of the California Attorney General, Defendant asserts, the "advice of counsel" language under subdivision (a), is to ensure that the reason for the closed session, namely to deliberate about the pending CVRA litigation, exists, and that the closed session "is not to be used as a subterfuge to reach nonlitigation oriented policy decisions." (Dem. MPA, p. 10:23-28; see also California Attorney General's Office, The Brown Act: Open Meetings for Local Legislative Bodies (2003) Pending Litigation and the Attorney-Client Privilege, at p. 40 <https://oag.ca.gov/system/files/media/the-brown-act.pdf> (last accessed August 5, 2024).) The Court finds this argument persuasive.

Notably, and as correctly pointed out by the City, the City Charter and Government Code section 54956.9 subdivision (b)[9] further establish that Chahal's attempt to place the CVRA litigation matter in a future closed session was not an *actual* violation of the Brown Act. (Dem. MPA, p. 11, fn. 2; Reply, p. 8:16-20.) The City Charter provides, "the City Council shall have control of all legal business and proceedings" and Government Code section 54956.9, subdivision (b) provides an exception to the public meeting requirement of the Brown Act where attorney-client privilege warrants closed session meetings. (RJN; Exh. A, § 908.) As noted by Defendant, not all meetings of public agencies need to be open to the public, (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 373), and although the Brown Act requires the presence of an attorney at closed session meetings, this requirement "permits individual members of a legislative body not only to deliberate and exchange opinions with counsel but also among themselves in the presence of counsel." (75 Ops.Cal.Atty.Gen.14 (1992), p. 14, 18-19; see also *Sutter Sensible Planning v. Board of Supervisors* (1981) 122 Cal.App.3d 813, 824-825 [local governing bodies require confidential legal advice because they "face the same hard realities as other civil litigants"].)

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[8] That subdivision provides, "Nothing in this chapter shall be construed to prevent a legislative body of a local agency, based on advice of its legal counsel, from holding a closed session to confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session concerning those matters would prejudice the position of the local agency in the litigation." (Gov. Code, § 54956.9, subd. (a).)

[9] That subdivision provides, in relevant part, "…This section is the exclusive expression of the lawyer-client privilege for purposes of conducting closed-session meetings pursuant to this chapter." (Gov. Code, § 54956.9, subd. (b).)

Of particular importance, Plaintiff concedes, that Chahal *attempted* to place the CVRA litigation matter in closed session, but, that attempt failed. (FAC, ¶¶ 89-90, 96, 104, 108.) Moreover, by Plaintiff's own admission, "individual Councilmembers could [] place an item on an agenda by bringing a request to the full Council at an open meeting for them to vote to put the item on a future agenda." (FAC, ¶¶ 76, 154.) Notably, in reply, Defendant persuasively points out, Plaintiff "acknowledges that a closed session was warranted under the Brown Act after the City received a settlement offer from the CVRA litigation plaintiffs," yet Plaintiff indicated it was not appropriate for Chahal to request a discussion about possible settlement of litigation. (Reply, p. 8, fn. 3; Opp. p. 18:15-20.) As noted in Defendant's reply, this distinction demonstrates a difference of opinion between Plaintiff and council member Chahal about litigation strategy, rather than an actual Brown Act violation. (Reply, p. 8, fn. 3.) Consequently, as this Court has noted multiple times above, and in its prior order, Plaintiff's belief that certain council members were potentially violating the Brown Act by attempting to place pending litigation matters in a closed session meeting is unreasonable, and his allegations of potential misconduct is insufficient to plead a cause of action under Labor Code section 1102.5, subdivision (b).

Given the above ruling, this Court need not address Defendant's discussion regarding statutory interpretation principles and the Constitutional Separation of Powers Doctrine. (Dem. MPA., p. 4:12-16.)

Accordingly, Defendant City's demurrer to the single cause of action for retaliation on the ground that the pleading does not state facts sufficient to constitute a cause of action under Section 1102.5, subd. (b), is SUSTAINED. Plaintiff was already given an opportunity for leave to amend per this Court's previous order. (See *City of Stockton v. Super. Ct.* (2007) 42 Cal.4th 730, 747 (*Stockton*) [if a plaintiff has not had an opportunity to amend the complaint in response to a demurrer, leave to amend is liberally allowed as a matter of fairness].) The demurrer is therefore SUSTAINED WITHOUT LEAVE TO AMEND.

**ii. Section 1102.5, subdivision (c)**

In its demurrer, Defendant asserts Plaintiff's claim under section 1102.5, subdivision (c) has "fatal shortcomings' like his claim under subdivision (b). (Dem. MPA, p. 14:26-27.) Specifically, Defendant contends that although Plaintiff *purportedly* refused to participate in a closed session meeting to discuss the pending CVRA litigation, he concedes he eventually determined that such a closed session meeting was necessary, then scheduled, and attended, the meeting voluntarily. (Dem. MPA, p. 15: 5-8; see also FAC, ¶ 64, 95, 126.) Additionally, Defendant argues Plaintiff does not state a viable theory where his attendance would violate the law. (Dem. MPA, p. 15:9-11; see also FAC, ¶ 156.) Defendant asserts it was Plaintiff's responsibility to competently represent his client, the City Council, and Plaintiff was obligated under both the City Charter and the Rules of Professional Conduct to engage in any such conversations that would arise during closed session. (Dem. MPA, p. 15:9-21; see also RJN, Exh. A; Rules Prof. Conduct, Rule 1.2(a).)

Finally in both its demurrer and reply, Defendant concludes, for the same reasons Plaintiff cannot demonstrate a reasonable belief that he was reporting a violation of law, he cannot demonstrate that the same conduct actually would violate a law, as required by section 1102.5, subdivision (c). (Dem. MPA, p. 15:22-25; Defendant's Reply in Support of its Dem. MPA ("Reply,") p. 9:8-11.)

Section 1102.5, subdivision (c) states: "An employer, or any person acting on behalf of the employer, *shall not retaliate* against an employee *for refusing to participate* in an activity that would result in a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation."

As noted in this Court's prior order, in *Nejadian v. County of Los Angeles* (2019) 40 Cal.App.5th 703, 719 (*Nejadian*), the court concluded: "[Labor Code] section 1102.5(c) requires a showing that the activity in question *actually would* result in a violation or noncompliance with a statute, rule, or regulation." The *Nejadian* court further held the determination was a question of law that requires the employee to "identify what specific activity *he or she refused to participate* in and what specific statute, rule, or regulation would be violated by that activity." (*Ibid*.) An employee's reference to activities in generalities was insufficient to show a subdivision (c) violation. The *Nejadian* case is instructive as it sets forth a different standard for subdivision (c) claims than for subdivision (b) claims, requiring an *actual violation* rather than a reasonable belief of a violation. (*Ibid.*)

In opposition, Plaintiff argues the FAC alleges facts sufficient to show that council member Chahal violated the Brown Act by attempting to place the CVRA pending litigation, in closed session, against the advice of Plaintiff, and without his determination whether an open discussion would prejudice the City in the pending litigation. (Opp., p. 20:3-8.) Plaintiff maintains his refusal to participate in a closed session, when Chahal failed to meet the prerequisites under the Brown Act, was a refusal to participate in an illegal act being perpetrated by Chahal. (Opp., p. 20:8-14.) Given this Court's above ruling, and the prior order, it disagrees.

In the FAC, Plaintiff's new allegations still fail to demonstrate a *refusal to participate* in an *illegal* activity, and one that has *actually* happened. Instead, the FAC alleges that at a December 8, 2020, public hearing, Plaintiff communicated his reasonable belief that certain City Council members *should not* participate in a closed session discussion of CVRA litigation *until* he had adequate time to advise them of potential law violations. (See FAC, ¶¶ 103-105.) This is not sufficient to constitute a refusal to participate in illegal activity under section 1102.5, subdivision (c). Notably, Plaintiff alleges, multiple times, that he reasonably believed Chahal *attempted* to violate the Brown Act by *attempting to* place a matter of active litigation into a closed session without a determination by Plaintiff. (FAC, ¶ 104.) Given this Court's above ruling that Plaintiff's amended complaint does not sufficiently allege a Brown Act violation, it follows that Plaintiff fails to demonstrate that he refused to participate in illegal activity as required under section 1102.5, subdivision (c).)

This Court is in agreement with Defendant that Chahal's *attempt* to place the pending CVRA litigation matter on the agenda in a closed session meeting, purportedly against the advice of Plaintiff, does not indicate Chahal was in violation of the Brown Act pursuant to Government Code section 54956.9, subd. (b). As Defendant correctly points out, Plaintiff ultimately did attend the closed session meetings (as required under the Brown Act) involving the topic of CVRA litigation. After Plaintiff's voluntary participation in these meetings, he noted, publicly, Council had taken "no reportable action" and the CVRA lawsuit was not dismissed. (Dem., p. 15:6-8; RJN, Exhs. C, E; FAC, ¶ 126.) These judicially noticed facts directly contradict Plaintiff's claim that he *refused* to participate in unlawful activity under section 1102.5, subdivision. (c).

In accordance with the foregoing, Defendant's demurrer to the single claim of retaliation on the ground of failure to state facts is SUSTAINED WITHOUT LEAVE TO AMEND. "If the plaintiff has not had an opportunity to amend the complaint in response to the demurrer, leave to amend is liberally allowed as a matter of fairness, unless the complaint shows on its face that it is incapable of amendment. [Citations.]" (*Stockton, supra*, 42 Cal.4th at p. 747.) Here, Plaintiff does not explain how he could amend his FAC to cure the defects discussed above, and this was his second opportunity to do just that.

## III. Conclusion

The demurrer is SUSTAINED, in its entirety, WITHOUT LEAVE TO AMEND.

The Court will prepare the final order.

**- oo0oo -**

**Calendar Line 6**
**Case Name: Jane Doe v. Support Systems Home, Inc. et al.**
**Case No.: 23CV410157**

Plaintiff seeks to limit the scope of the questions Defendants can ask of her and of her husband in their depositions, claiming that the status of her marriage is confidential information. Plaintiff also claims that her deposition was stayed pending the resolution of this motion.

Defendants contend that Plaintiff failed to move to stay the deposition until after she had already failed to appear for it. They contend that Plaintiff cannot object to their questions, until after they are asked, and that the questions relating to the status of her marriage and to claims of domestic violence within the marriage are permissible as relevant to Defendants' ability to defend against Plaintiff's claims for emotional distress damages.

1. Stay of deposition

While the court does not necessarily disagree that Plaintiff did not properly move for a stay of her deposition, prior to the date set for her deposition, it is also true that Defendants understood that Plaintiff was filing this motion to get the Court's ruling prior to the deposition and that Plaintiff sought to have the deposition delayed until the motion was heard. There is no prejudice from the delay of the deposition and Defendant could have avoided any expense from Plaintiff's failure to attend the deposition by simply agreeing to delay it. Therefore, the Court finds that the deposition of Plaintiff was stayed by the filing of the original motion.

2. Whether Scope of Inquiry Shall be Limited

Plaintiff has a right of privacy concerning the state and details of her marriage. *Tylo v. Superior Court*, 55 Cal. App. 4th 1379, 1384. "When the right to discovery conflicts with a privileged right, the court is required to carefully balance the right of privacy with the need for discovery. [Citations.] Discovery may be compelled only upon a showing of a compelling public interest. [Citation]. In those situations where it is argued that a party waives protection by filing a lawsuit, the court must construe the concept of 'waiver' narrowly and a compelling public interest is demonstrated only where the material sought is *directly relevant* to the litigation. ( *Britt v. Superior Court, supra*, 20 Cal. 3d at pp. 858-859.) The party seeking the constitutionally protected information has the burden of establishing that the information sought is directly relevant to the claims. ( *Harris v. Superior Court, supra*, 3 Cal. App.4th at p. 665.)" *Tylo*, 55 Cal. App. 4th at 1387.

Plaintiff claims that under CCP § 2025.420 and § 2017.020, the court should issue a protective order to limit the scope of the deposition and prevent Defendants from asking her or her husband about marital discord. Defendants claim that they are entitled to ask these questions based on Plaintiff's complaint and requests for damages for emotional distress. Plaintiff has tendered her psychological condition as a part of this lawsuit, claiming infliction of emotional distress from Defendant's conduct and form SSH's hiring of him. Defendant has information indicating that during the same time, Plaintiff may have suffered emotional distress from affairs and/or domestic violence in her marriage.

While it does appear that Plaintiff has put her emotional state at issue, such that the entire subject of her marriage, is not off limits, any waiver by Plaintiff must be construed narrowly. *Tylo,* 55 Cal.App.4th at 1387. It would seem that Defendant can inquire as to whether Plaintiff suffered emotional distress other than that caused by Defendants conduct, if so when and whether she sought treatment for it, the severity of the condition, and what generally caused the emotional distress. The court sees little reason to think that the details of the affairs, the abuse, or the marriage, as opposed to the fact of abuse or other stresses in the marriage, would be discoverable unless Defendants are able to provide a more particularized basis.

The Court is not in a position to give much more guidance than this prospectively. This is not a case where the subject of Plaintiff's marriage or of DV within the marriage is completely off limits, but nor it is one where there are no privacy concerns or limits beyond which Defendants would not be allowed to go.

As to the issues of marital communications, the Court cannot give a prospective ruling. The scope of the privilege is limited to confidential communications between the spouses made during the course of the marriage. It is perhaps one which Plaintiff can assert, regardless of the willingness of her husband to speak. This is an area where the lawyers must assert the privilege each time they believe a question elicits privileged information.

As to the police reports, the Court does not believe the parties have fully or sufficiently briefed this issue. The parties make no mention of the official information privilege or whether that has any bearing on this case. It would appear that even if the reports are not admissible, they could be discoverable, given Plaintiffs claims for emotional distress. Perhaps the parties could craft and agree to a protective order to protect the dissemination of information contained in the reports.

As such the motion for protective order is GRANTED IN PART and DENIED IN PART. Plaintiff shall submit the final order.

**- oo0oo -**

**Calendar Lines 7 and 8**
**Case Name: Remedios Demondon, et al v. Fely Mabutas, et al**
**Case Number: 18CV329214**

On June 1, 2018, Plaintiffs filed their complaint. Normally, the time would have run on December, 1, 2023, due to the Covid extension. But Defendants claim that the five-year limitation ran on April 20, 2024, six months from the end of the bankruptcy stay of October 20, 2023 under CCP § 583.350 (which grants a six-month grace period after the end of any tolling period). The parties all agree that time from July 16, 2024 until the current date in November 2024 is excluded per stipulation.

Plaintiffs claim that they had until July 16, 2024, claiming that because the Cout denied a trial setting date when requested in December 2023, that the Court tolled the time until January 16, 2023, when it set a CMC, such that Plaintiffs had an additional six months under § 583.350.[10]

The Court finds it unnecessary to decide whether the time for bringing the case to trial was April 20, 2024 or July 16, 2024. Regardless, the Court finds that because Plaintiffs have shown reasonable diligence trying to get this case set for trial since December 2023, coupled with Defendants attempts to delay the setting of trial, time from at least the TSC of April 16, 2024 (if not the CMC of January 16, 2024) until July 16, is excluded from the applicable time period under CCP § 583.340(c).

Under CCP 583.340(c), in computing the time within which an action must be brought to trial, time shall be excluded if "bringing the action to trial . . . was impossible, impracticable, or futile." The "critical factor in applying these exceptions to a given factual situation is whether the plaintiff exercised reasonable diligence in prosecuting his or her case.' (*Bruns*, at p. 730, quoting *Moran v. Superior Court* (1983) 35 Cal.3d 229, 238 [197 Cal. Rptr. 546, 673 P.2d 216].) The question of impossibility, impracticability, or futility is best resolved by the trial court, which 'is in the most advantageous position to evaluate these diverse factual matters in the first instance.' [Citation.] The plaintiff bears the burden of proving that the circumstances warrant application of the … exception. [Citation.] … The trial court has discretion to determine whether that exception applies, and its decision will be upheld unless the plaintiff has proved that the trial court abused its discretion. [Citations.]" *Gaines v. Fidelity National Title Ins. Co*., 62 Cal. 4th 1081, 1100.

Plaintiffs have shown reasonable, even if not perfect, diligence since December 29, 2023, in trying to get this case set for trial. At that time, Plaintiffs filed a motion to get the case on a trial setting calendar. In that motion, Plaintiffs indicated that the case was more than five-years old and indicated that the time was due to expire and that the bankruptcy stay had expired. It is true that Plaintiffs could have done even more and moved for trial preference, but the motion was sufficient to show reasonable diligence. Defendant Mabutas aggressively

[10] Plaintiffs also argue that the Court granted a stay until February 1, 2024, based on the Court's statement in the minute order that the parties should calendar a bankruptcy stay status hearing no sooner than February 1, 2024. This was not a stay of the Court.

opposed that motion, arguing in direct contravention of his statements now, that Plaintiffs exaggerated the urgency of the matter and that this Court should defer to the timelines of the bankruptcy proceedings. (See Opposition to Ex Parte, at pp2-4). While there is perhaps nothing false in that opposition, it was designed to persuade the court, and did, that the bankruptcy was "actively in progress," and that the case should not proceed to trial while the bankruptcy proceedings were ongoing. Accordingly, the court did not set the case for a trial setting conference at that time, causing delay. That delay must be laid directly at the feet of Defendant Mabutas whose efforts misled the Court. The Court's order denying a TSC made it impracticable for the trial to be set within the applicable constraints at that time.

At the case management hearing on January 16, 2024, according to the Court's own notes, Plaintiffs indicated they needed a trial date and advised the court that the bankruptcy stay had ended. In contrast, Defendants indicated they were not sure whether the lifting of the stay was automatic, presumably in another effort to suggest that the case might still be stayed. Despite their current protestations, it was defendants who again tried to suggest that there was no urgency in getting the case set for trial and they even suggested the case might still be subject to stay, despite Plaintiffs' claims to the contrary. Based on the perceived uncertainty of the stay, the Court made it impossible for Plaintiffs to get a trial date within the applicable time, despite their efforts to do so, by not setting a trial setting conference until April 16, 2024.

When the issue of the five-year deadline arose at the trial conference on April 16, 2024, Plaintiffs again contended that a trial was needed as soon as possible and stated that July 16, 2024 was the last possible date. Even if the last date for trial was in fact April 20, 2024 as Defendants now contend, the Court made it impossible for the case to be tried by then, having previously relied upon Defendants' claims that trial need not or should not occur due to the bankruptcy.

Based on Plaintiffs' consistent efforts to get a trial date since December 29, 2023, and the efforts of the Defendants (particularly Defendant Mabutas) to delay the setting of a trial date by obscuring the status of the bankruptcy proceedings, the Court finds that the time from April 20, 2024 to July 16, 2024, is excluded from the applicable time. It was impossible, impracticable or futile for Plaintiffs to get a timely trial date, as the Court regrettably took Defendants' representations at face value. The Court is disappointed to see Defendants' attempt to get the case dismissed, given their efforts to delay trial in the case. Accordingly, the motion to dismiss for failure to bring the action to trial within five years is DENIED. Plaintiffs shall submit the final order within 10 days.

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