SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 18
Honorable Shella Deen, Presiding
Catherine Pham, Courtroom Clerk
191 North First Street, San Jose, CA 95113

DATE: June 13, 2024 TIME: 9:00 A.M.

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

****Please specify the issue to be contested when calling the Court and Counsel****

LAW AND MOTION TENTATIVE RULINGS

FOR APPEARANCES: Department 18 is fully open for in-person hearings. The Court strongly prefers **in-person** appearances for all contested law and motion matters. For all other hearings, the Court strongly prefers either **in-person or video** appearances. If you must appear virtually, you must use video. Audio-only appearances are permitted, but disfavored, as they cause significant disruptions and delays to the proceedings. Please use telephone-only appearances as a last resort. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 18:
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

SCHEDULING MOTION HEARINGS: Please go to https://reservations.scscourt.org or call 408-882-2430 between 8:30 a.m. and 12:30 p.m. (Mon.-Fri.) to reserve a hearing date for your motion before you file and serve it. You must then file your motion papers no more than five court days after reserving the hearing date, or else the date will be released to other cases.

FOR COURT REPORTERS: The Court is no longer able to provide official court reporters for civil proceedings (as of July 24, 2017). If you want to have a court reporter to report your hearing, you must submit the appropriate form, which can be found here:
https://www.scscourt.org/general_info/court_reporters.shtml

RECORDING IS PROHIBITED: As a reminder, most hearings are open to the public, but state and local court rules prohibit recording of court proceedings without a court order. This prohibition applies to both in-person and remote appearances.

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LAW AND MOTION TENTATIVE RULINGS

LINE #	CASE #	CASE TITLE	RULING
1.	2005-1-CV-036173	National Credit Acceptance, Inc. vs P. Morin	**Order of Examination** (Pedro Morin aka Pedro R. Morin aka Pete Morin). No Proof of service on file. If there is no appearance, the matter will be ordered OFF CALENDAR.
2.	23CV420031	Abedurezak Ebrahim et al vs The County of Santa Clara	**Demurrer**. Scroll down to Line 2 for Tentative Ruling.
3.	23CV427732	Bradley Land vs Apple, Inc., a Delaware Corp.	**Judgment on Pleadings.** Scroll down to Line 3 for Tentative Ruling.
4.	23CV412605	GREGORY BLANDA et al vs AMERICAN HONDA MOTOR CO., INC.	**Motion to Compel (Discovery)**. OFF CALENDAR
5.	23CV412605	GREGORY BLANDA et al vs AMERICAN HONDA MOTOR CO., INC.	**Motion to Compel (Discovery)**. OFF CALENDAR
6.	23CV412605	GREGORY BLANDA et al vs AMERICAN HONDA MOTOR CO., INC.	**Motion to Compel (Discovery)**. OFF CALENDAR

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LAW AND MOTION TENTATIVE RULINGS

7.	23CV425715	Rita Gutierrez vs General Motors LLC et al	**Motions to Compel (1) Form Interrogatories, (2) Requests for Admission, (3) Requests for Production of Documents, and (4) Special Interrogatories.** All four motions are CONTINUED to August 6, 2024, at 9 a.m. in Department 18. Thus far Plaintiff's meet and confer "efforts" do not appear to be reasonable or in good faith. As such, the parties are ordered to conduct good faith, reasonable and meaningful meet and confers, either in person, by phone or video conference, to try to narrow the many issues in these motions. If any issues remain after the meet and confer efforts, which may span several sessions, the parties shall file an updated joint statement no later than July 23, 2024, which shall identify the remaining items in dispute and the reasons why further responses should/should not be compelled. Moving party to prepare the formal order after hearing.
8.	23CV426228	Jan Krieg vs Sheng Hu et al	**Motion to Compel**. At defense counsel's request at the April 30, 2024 Case Management Conference, the Motion to Compel is OFF-CALENDAR.
9.	23CV426228	Jan Krieg vs Sheng Hu et al	**Motion to Compel**. At defense counsel's request at the April 30, 2024 Case Management Conference, the Motion to Compel is OFF-CALENDAR.

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LAW AND MOTION TENTATIVE RULINGS

10.	21CV382651	Gregory Gilbert, MD vs Stanford Health Care et al	**Motion to Seal Records.** Scroll down to Line 10 for Tentative Ruling.
11.	22CV406184	Richard Gohl vs Susan Bereczky et al	**Motion to Withdraw**. Motion of Attorneys Steburg Lawfirm, Anita Steburg and Lauren Bradach to be relieved as counsel for Defendant Susan Bereczky. Notice of hearing was given to Defendant and all counsel via mail service on May 10, 2024, at Defendant's last known address. No opposition was filed. A failure to oppose a motion may be deemed a consent to the granting of the motion. CRC Rule 8.54c. Failure to oppose a motion leads to the presumption that Defendant client has no meritorious argument. (See *Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal. App. 3d 481, 489.) Moving parties have met their burden of proof. Good cause appearing, the Motion is GRANTED. The Trial Setting Conference currently set for June 25, 2024, is CONTINUED to September 3, 2024 at 11 a.m. in Department 18. The Order will take effect upon the filing and service of the executed order of this Court. Moving parties to prepare the formal order after hearing, to include the continued Trial Setting Conference date, time and location.

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

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LAW AND MOTION TENTATIVE RULINGS

12.	21CV377641	Armando Tapia Urrutia vs Julieanne Romualdo Agsalog et al	**Compromise of Minor's Claim (Perla Ruby Tapia Arias)**. No Proof of service on file for Petition for Approval of Compromise of Claim. The hearing of this Petition is CONTINUED to June 27, 2024 at 9 a.m. in Department 18 to allow Petitioner to file a Proof of Service. Moving party to prepare the formal order after hearing.
13.	21CV377641	Armando Tapia Urrutia vs Julieanne Romualdo Agsalog et al	**Compromise of Minor's Claim (Armando Tapia Arias, Jr.)**. No Proof of service on file for Petition for Approval of Compromise of Claim. The hearing of this Petition is CONTINUED to June 27, 2024 at 9 a.m. in Department 18 to allow Petitioner to file a Proof of Service. Moving party to prepare the formal order after hearing.

Calendar Line 2
Case Name: *Abedurezak Ebrahim, et al., v. The County of Santa Clara, et al.*
Case No.: 23CV420031

Before the court is defendant County of Santa Clara's demurrer to plaintiffs' second amended complaint. Pursuant to California Rule of Court 3.1308, the court issues its tentative ruling as follows.

I. Background.

On or about September 16, 2022, Abedurezak Ebrahim ("Decedent") was admitted to Santa Clara Valley Medical Center ("Hospital"), a 659-bed general acute care hospital providing 24-hour inpatient care operated by defendant The County of Santa Clara ("County"), for hypertension and pulmonary edema. (Second Amended Complaint ("SAC"), ¶¶3, 6, and 25.) On or about September 17, 2022, Decedent suffered an unwitnessed fall in his room while attempting to use the restroom. (SAC, ¶25.) At the time of the fall, Decedent was connected to a heart monitor which alerts defendant County's nursing station if it becomes disconnected for any reason. (*Id.*) When Decedent suffered his fall, his heart monitor became disconnected and alerted the nursing station. (*Id.*) Despite the alert, and due to understaffing, nursing staff failed to render help to Decedent for over thirty minutes, causing Decedent to go into cardiac arrest resulting in profound anoxic brain injury. (*Id.*)

From that point on, defendant County knew from assessments and medical history that Decedent was at an extremely high risk of developing pressure sores. (SAC, ¶¶26 – 27.) Although Decedent's skin was intact at the time of admission, defendant County failed to protect Decedent from this high risk of pressure sores. (*Id.*) Despite advance knowledge on the part of defendant County, Decedent's basic custodial needs were ignored by Hospital staff due to the deliberate decision by defendant County to understaff and underfund Hospital and to maximize profits at the expense of health and safety of elderly and infirm adults entrusted to their care and custody, including Decedent. (SAC, ¶28.)

Upon admission on September 16, 2022, defendant County documented Decedent had no pressure sores. (SAC, ¶30.) One week later on September 23, 2022, a member of defendant County's nursing staff identified a pressure sore caused by pressure and moisture due to incontinence. (*Id.*) Defendant County failed to implement a wound care plan which caused

Decedent's sacral pressure sore to progress into a severe stage IV pressure sore, including the presence of black eschar, a collection of necrotic, dead tissue within a wound. (SAC, ¶31.)

No one from Hospital timely and/or accurately notified Decedent's family, physician, or legal representative of the development of pressure wounds on his body. (SAC, ¶32.) Hospital staff concealed these conditions from Decedent's family, physician, and legal representative and untruthfully represented the extent, nature, and cause of these issues. (*Id.*) Ultimately, on December 18, 2022, Decedent succumbed to his injuries and passed away due, in part, to the serious and severe pressure sore which was caused by Hospital's neglect. (SAC, ¶33.)

On July 27, 2023, Decedent (by and through his successor-in-interest) and Decedent's ("Plaintiffs") filed a complaint against defendant County asserting causes of action for:

(1) Dependent Adult Abuse

(2) Medical Negligence

(3) Wrongful Death

(4) Negligent Hiring and Supervision

On September 7, 2023, Plaintiffs filed a first amended complaint ("FAC") continuing to assert the same four causes of action asserted in the original complaint.

On October 12, 2023, defendant County filed a demurrer and motion to strike portions of Plaintiffs' FAC. On March 4, 2024, the court issued an order sustaining defendant County's demurrer to the first and fourth causes of action, but otherwise overruling defendant County's demurrer. The court also granted defendant County's motion to strike Plaintiffs' request for exemplary damages with leave to amend.

On March 14, 2024, Plaintiffs filed the operative SAC which continues to assert the same four causes of action previously asserted in the original complaint as well as the FAC.

On April 16, 2024, defendant County filed the motion now before the court, a demurrer to the first and fourth causes of action of Plaintiffs' SAC.

II. Defendant County's demurrer to plaintiffs' SAC is SUSTAINED, in part, and OVERRULED, in part.

A. Elder/ Dependent Adult Abuse.

The issue before the court is whether plaintiffs have sufficiently stated a cause of action for elder/ dependent adult abuse. The court (Hon. Manoukian) previously sustained defendant County's demurrer to the same cause of action asserted in plaintiffs' FAC in an order filed on March 4, 2024. Judge Manoukian's order already set forth the relevant law. Rather than repeat that same legal authority, the court focuses in on the critical issue.

"In order to obtain the Act's heightened remedies, a plaintiff must allege conduct essentially equivalent to conduct that would support recovery of punitive damages. (Compare Welf. & Inst. Code, § 15657 [requiring "clear and convincing evidence that a defendant is liable for" elder abuse and "has been guilty of recklessness, oppression, fraud, or malice in the commission of the abuse"] with Civ. Code, § 3294, subd. (a) [requiring "clear and convincing evidence" that the defendant has been guilty of oppression, fraud, or malice].)" (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 789 (*Covenant Care*).)

> "Recklessness" refers to a subjective state of culpability greater than simple negligence, which has been described as a "deliberate disregard" of the "high degree of probability" that an injury will occur (BAJI No. 12.77 [defining "recklessness" in the context of intentional infliction of emotional distress action]); see also Rest.2d Torts, § 500.) Recklessness, unlike negligence, involves more than "inadvertence, incompetence, unskillfulness, or a failure to take precautions" but rather rises to the level of a "conscious choice of a course of action . . . with knowledge of the serious danger to others involved in it." (Rest.2d Torts, § 500, com. (g), p. 590.)

(*Delaney v. Baker* (1999) 20 Cal.4th 23, 31-32.)

Because we test for liability under the Elder Abuse Act, a statutory cause of action, we apply "the general rule that statutory causes of action must be pleaded with particularity." (*Covenant Care*, *supra*, 32 Cal.4th at p. 790.) "[Where] recovery is based on a statutory cause of action, the plaintiff must set forth facts in his [or her] complaint sufficiently detailed and specific to support an inference that each of the statutory elements of liability is satisfied. General allegations are regarded as inadequate. [Citations.]" (*Mittenhuber v. City of Redondo Beach* (1983) 142 Cal.App.3d 1, 5 (*Mittenhuber*).)

As they did previously, plaintiffs rely on *Fenimore v. Regents of University of California* (2016) 245 Cal.App.4th 1339 (*Fenimore*) to support their position that they have adequately alleged defendant County's recklessness. The court in *Fenimore* considered whether the trial court properly sustained a demurrer to a cause of action for elder abuse. Ultimately, the *Fenimore* court determined the trial court should not have sustained the defendant hospital's demurrer. In *Fenimore*, the defendant hospital admitted on George Fenimore, Jr. (George) who suffered from dementia, Alzheimer's, among other diseases, and had "a history of wandering that led to numerous falls." (*Fenimore*, *supra*, 245 Cal.App.4th at p. 1343.) The hospital knew George was "an extreme fall risk." (*Id.*) Despite this knowledge, George was left unattended and fell only minutes after entering the hospital. (*Id.*) George "received no medical attention or further assessment" the four days following the fall. (*Id.* at p. 1344.) In relevant part, the operative pleading alleged:

> The Hospital also violated several sections of the California Code of Regulations applicable to acute psychiatric hospitals. By way of example, these regulations required it to properly train its staff, have a written patient care plan, and have a sufficient number of staff on hand for the safety of patients. [Footnote omitted.] These regulatory violations caused injury to George. The Hospital acted with reckless disregard for the health and safety of George and other residents.
>
> The Hospital had a pattern and practice of understaffing and undertraining its staff to cut costs, which foreseeably resulted in the abuse and neglect of its residents, including George. It consciously chose not to increase staff numbers or increase training. The Hospital knew that insufficient staff in number and competency would lead to it not meeting patients' needs, and injuries to patients would be not only likely but inevitable. Had there been sufficient staff at the Hospital, George would have received proper supervision and assistance and would not have suffered his injuries.

(*Fenimore*, *supra*, 245 Cal.App.4th at pp. 1344-1345.)

In reversing the trial court ruling sustaining defendant Hospital's demurrer to the elder abuse cause of action, the *Fenimore* court explained why the allegations regarding recklessness were sufficient:

> The FAC supplied allegations that may show recklessness. It alleged the Hospital had a pattern and knowing practice of improperly understaffing to cut costs, and had the Hospital been staffed sufficiently, George would have been properly supervised and would not have suffered injury. On a demurrer, we must accept the allegations as true and express no opinion on whether the Fenimores can ultimately prove these allegations. We must assume the Fenimores can prove by clear and convincing evidence that the Hospital was understaffed at the time George fell, that this understaffing caused George to fall or otherwise harmed him, and that this understaffing was part of a pattern and practice. If they do so, we cannot say as a matter of law that the Hospital should escape liability for reckless neglect. The trier of fact should decide whether a knowing pattern and practice of understaffing in violation of applicable regulations amounts to recklessness.

> *Sababin* is instructive. In that case, the court found a triable issue of fact on recklessness when the defendant rehabilitation center had established but failed to follow a care plan of monitoring a patient's skin daily and reporting changes to a physician for treatment orders. (*Sababin*, *supra*, 144 Cal.App.4th at pp. 89–90.) The rehabilitation center had cared for the patient continuously for approximately three years when she was admitted to an emergency room and severe skin conditions were discovered. (*Id.* at p. 85.) The pertinent neglected care plan had been in place for approximately three months when the severe conditions were discovered. (*Id.* at pp. 85, 89.) The rehabilitation center had no skin condition reports on the patient, and no one at the center had notified her physician of the need for a treatment order. The court held the trier of fact could infer reckless failure to provide medical care from this "significant pattern" of

> ignoring the care plan: "[I]f a care facility knows it must provide a certain type of care on a daily basis but provides that care sporadically, or is supposed to provide multiple types of care but only provides some of those types of care, withholding of care has occurred. In those cases, the trier of fact must determine whether there is a significant pattern of withholding portions or types of care. A significant pattern is one that involves repeated withholding of care and leads to the conclusion that the pattern was the result of choice or deliberate indifference." (*Id.* at p. 90.) Put otherwise, recklessness may be inferred when the neglect recurs in a significant pattern.
>
> By way of analogy, here, if a jury were to find the Hospital knew of the staffing regulations, violated them, and had a significant pattern of doing so, it could infer recklessness, i.e., a "'conscious choice of a course of action … with knowledge of the serious danger to others involved in it.'" (*Delaney*, *supra*, 20 Cal.4th at pp. 31–32.) We decline to hold as a matter of law that such conduct does not constitute recklessness.

(*Fenimore*, *supra*, 245 Cal.App.4th at pp. 1349-1350.)

Judge Manoukian previously sustained defendant County's demurrer to the elder abuse cause of action in the FAC explaining:

> Although the court acknowledges the FAC's repeated reference to understaffing, weighing heavy on the court's mind is the decidedly general nature of the understaffing allegations as well as their lack of supporting facts specific to the Decedent. Put differently, the court is unable to infer recklessness as to Decedent based on the FAC's general allegations relating to a pattern and practice of understaffing.

Yet, the allegations in *Fenimore* concerning understaffing were more generally stated than is currently stated by plaintiffs in their SAC. Here, the SAC alleges defendant County had a pattern and knowing practice of understaffing and Decedent's injuries were the direct result of understaffing. (See SAC, ¶8—"DEFENDANTS, by and through their corporate officers,

directors, and managing agents including Paul Lorenz (Hospital Administrator), Jill Sproul (Hospital Nursing Director), and others … were aware of the understaffing of the HOSPITAL … [based upon] the HOSPITAL's customary practice of being issued deficiencies … as it pertains to the development of Stage III or IV pressure sores, DEFENDANTS were cited on June 4, 2010; December 13, 2010; January 22, 2013; April 14, 2016 (three (3) citations)." See also SAC, ¶10—Hospital's governing body "were focused on unlawfully increasing earnings." See also SAC, ¶12—Hospital's acts and omissions were done to "maximiz[e] profits from the operation of the HOSPITAL by underfunding and understaffing the HOSPITAL." See also SAC, ¶28—"DECEDENT's basic custodial needs were simply ignored by the HOSPITAL staff due to the deliberate decision by the DEFENDANTS to understaff and underfund the HOSPITAL, to maximize profits at the expense of the health and safety of elderly and infirm adults … including [Decedent]." See also SAC, ¶39—"As a direct result of the chronic understaffing at the HOSPITAL … HOSPITAL repeatedly left [Decedent] laying in his own feces and urine for extended and unacceptable periods of time." See also SAC, ¶42—"DEFNDANTS knew that by understaffing their HOSPITAL, … they were putting the HOSPITAL's patients including [Decedent], at risk for … severe pressure sores." See also SAC, ¶56—injuries suffered by Decedent the result of understaffing. See also SAC, ¶¶66 – 68.)

Defendant County contends plaintiffs' allegations are no different than those in *Worsham v. O'Connor Hospital* (2014) 226 Cal.App.4th 331 (*Worsham*). However, the *Fenimore* court also distinguished *Worsham*:

> *Worsham*'s determination that understaffing constitutes no more than negligence may be true, *absent* further allegations showing recklessness. But the Fenimores have alleged more than a simple understaffing here. The FAC identified the staffing regulation the Hospital allegedly violated and suggested a knowing pattern of violating it constituted recklessness. A jury may see knowingly flouting staffing regulations as part of a pattern and practice to cut costs, thereby endangering the facility's elderly and dependent patients, as qualitatively different than simple negligence.

(*Fenimore*, *supra*, 245 Cal.App.4th at p. 1350.)

Here, as noted above, plaintiffs also allege defendant County has a pattern of deficiencies specifically with regard to patients developing stage III or IV pressure sores. A jury can infer recklessness from a pattern of conduct combined with knowledge of the serious dangerousness. Consequently, just as in *Fenimore*, plaintiffs here have stated at least one viable theory of elder/ dependent adult abuse based on recklessness. Since the court may not sustain a demurrer to only a part of a cause of action, the court need not address defendant County's alternative bases for demurrer to the first cause of action.

Accordingly, defendant County's demurrer to the first cause of action of plaintiffs' SAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for elder/ dependent adult abuse is OVERRULED.

B. Negligent Hiring/ Supervision.

"California case law recognizes the theory that an employer can be liable to a third person for negligently hiring, supervising, or retaining an unfit employee. [Citation.] Liability is based upon the facts that the employer knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materializes. [Citation.]" (*Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1054.)

" 'An employer may be liable to a third person for the employer's negligence in hiring or retaining an employee who is incompetent or unfit. [Citation.]' [Citation.] 'Liability for negligent hiring … is based upon the reasoning that if an enterprise hires individuals with characteristics which might pose a danger to customers or other employees, the enterprise should bear the loss caused by the wrongdoing of its incompetent or unfit employees.' [Citation.] Negligence liability will be imposed on an employer if it 'knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materializes.' [Citation.]" (*Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1139; see also *Federico v. Superior Court* (1997) 59 Cal.App.4th 1207.)

In Judge Manoukian's prior ruling to this same negligent hiring/ supervision cause of action in the FAC, he explained:

> "Liability for negligent supervision and/or retention of an employee is one of direct liability for negligence, not vicarious liability. [Citation.]" (*Delfino v. Agent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 815 (*Delfino*).) "[A] direct claim against a government entity asserting negligent hiring and supervision, when not grounded in the breach of a statutorily imposed duty owed by the entity to the injured party, may not be maintained." (*de Villers v. County of San Diego* (2007) 156 Cal.App.4th 238, 255-256 (*de Villers*).) "We find no relevant case law approving a claim for direct liability based on a public entity's alleged negligent hiring and supervision practices." (*Id.* at p. 252.)

Defendant County demurs now to the fourth cause of action by noting that plaintiffs continue to rely upon Government Code section 815.2 to support vicarious liability. Since negligent hiring and supervision is a direct claim, it "requires identification of a "specific statute declaring [the entity] to be liable, or at least creating some specific duty of care [by the agency in favor of the injured party]." (*de Villers*, *supra*, 156 Cal.App.4th at p. 252.)

In opposition, plaintiffs generally refer to "mandatory duties" created by "California regulations," but do not specifically identify any such duty or regulation pertaining to the hiring or supervision of employees. The duties/ regulations plaintiffs refer to may support their claim for medical negligence and/or elder/ dependent adult abuse, but plaintiffs make no showing how such duties/ regulations would support a claim for negligent hiring/ supervision.

Accordingly, defendant County's demurrer to the fourth cause of action of plaintiffs' SAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for negligent hiring/ supervision is SUSTAINED WITHOUT LEAVE TO AMEND. Plaintiffs have the burden to show in what manner it can amend its complaint and how that amendment will change the legal effect of the pleading. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) Plaintiffs have not met this burden.

The Court will prepare the formal order.

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Calendar Line 3
Case Name: *Bradley Land v. Apple, Inc., et al.*
Case No.: 23CV427732

Before the court is defendant Apple Inc.'s motion for judgment on the pleadings. Pursuant to California Rule of Court 3.1308, the court issues its tentative ruling as follows.

III. Background.

During the second half of 2021, many employers decided to require their employees to get Covid shots in order to keep their jobs. (Complaint, ¶12.) Defendant Apple Inc. ("Apple") did not enact a mandatory Covid vaccine policy for employees at its Cupertino headquarters or its retail stores. (Complaint, ¶13.) At most, defendant Apple required employees take a Covid test before going to work. (*Id.*)

Plaintiff Bradley Land ("Plaintiff") worked as a Threat Intelligence Analyst on defendant Apple's Security Engineering and Architecture team. (Complaint, ¶14.) By the fall of 2021, Plaintiff had worked at defendant Apple for over thirteen years. (*Id.*) Plaintiff received excellent reviews and had no record of discipline. (*Id.*)

In 2021, defendant Apple distributed a Covid vaccination survey to its corporate employees. (Complaint, ¶15.) The survey allowed for four possible answers: (a) I am fully vaccinated; (b) I have received the first vaccine shot but not the second; (c) I am unvaccinated; (d) I choose not to answer. (*Id.*) Defendant Apple stated in the survey that it would assume anybody who selected "d" was unvaccinated, whether true or not. (Complaint, ¶16.) Defendant Apple also stated the survey results would be shared with other employees and unnamed third parties. (*Id.*)

Plaintiff was working remotely from Virginia when he received the survey. (Complaint, ¶17.) Plaintiff informed his supervisor, senior manager, and the human resources department that he objected to the forced disclosure of his personal health information. (*Id.*) Plaintiff also told them that he objected to defendant Apple making assumptions about his vaccination status and sharing that confidential information with other Apple employees and third parties. (*Id.*)

Defendant Apple responded to Plaintiff's objection by terminating his employment. (Complaint, ¶18.) Plaintiff's employment was terminated effective December 15, 2021. (*Id.*)

Defendant Apple said it fired Plaintiff for not complying with its Covid-related policies. (Complaint, ¶19.)

On December 14, 2023, Plaintiff filed a complaint against defendant Apple asserting causes of action for:

(5) Declaratory Relief - Violation of Article I Section I of the Cal. Constitution

(6) Wrongful Termination in Violation of Public Policy

On January 29, 2024, defendant Apple filed an answer to Plaintiff's complaint.

On April 26, 2024, defendant Apple filed the motion now before the court, a motion for judgment on the pleadings.

IV. Defendant Apple's motion for judgment on the pleadings is GRANTED, in part, and DENIED, in part.

As both parties recognize, "A motion for judgment on the pleadings performs the same function as a general demurrer, and hence attacks only defects disclosed on the face of the pleadings or by matters that can be judicially noticed. [Citations omitted.] Presentation of extrinsic evidence is therefore not proper on a motion for judgment on the pleadings. [Citation omitted.]" (*Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 999.)

C. Declaratory Relief – Violation of Article I Section I of the Cal. Constitution.

> [The California Supreme Court] articulated a two-part inquiry for determining whether the right to privacy under article I, section 1 has been violated. (*Hill*, *supra*, 7 Cal.4th at p. 26.)
>
> First, the complaining party must meet three "'threshold elements' … utilized to screen out claims that do not involve a significant intrusion on a privacy interest protected by the state constitutional privacy provision." (*Loder v. City of Glendale* (1997) 14 Cal.4th 846, 893 [59 Cal. Rptr. 2d 696, 927 P.2d 1200] (*Loder*).) The party must demonstrate "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy." (*Hill*, *supra*, 7 Cal.4th at pp. 39–40.) This initial inquiry is necessary to "permit courts to weed out claims

> that involve so insignificant or de minimis an intrusion on a constitutionally protected privacy interest as not even to require an explanation or justification by the defendant." (*Loder*, at p. 893.)
>
> Second, if a claimant satisfies the threshold inquiry, "[a] defendant may prevail in a state constitutional privacy case by negating any of the three elements just discussed or by pleading and proving, as an affirmative defense, that the invasion of privacy is justified because it substantively furthers one or more countervailing interests." (*Hill*, *supra*, 7 Cal.4th at p. 40.) "The plaintiff, in turn, may rebut a defendant's assertion of countervailing interests by showing there are feasible and effective alternatives to defendant's conduct which have a lesser impact on privacy interests." (*Ibid.*)

(*Lewis v. Superior Court* (2017) 3 Cal.5th 561, 571-572.)

In moving for judgment on the pleadings to Plaintiff's first cause of action, the court understands defendant Apple to argue that Plaintiff has not alleged the third of the three threshold elements, i.e., "conduct by defendant constituting a serious invasion of privacy." Defendant contends this is so because Plaintiff was not required to disclose any private information as the survey gave respondents the option, "I choose not to answer." Moreover, Plaintiff himself alleges he did not actually disclose any private information instead objecting to the forced disclosure of his personal health information.

With regard to the third element, i.e., serious invasion of privacy interest, the California Supreme Court in *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 37, explained:

> No community could function if every intrusion into the realm of private action, no matter how slight or trivial, gave rise to a cause of action for invasion of privacy. "Complete privacy does not exist in this world except in a desert, and anyone who is not a hermit must expect and endure the ordinary incidents of the community life of which he is a part." (Rest.2d Torts, supra, § 652D, com. c.) Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the

social norms underlying the privacy right. Thus, the extent and gravity of the invasion is an indispensable consideration in assessing an alleged invasion of privacy.

"[W]hether defendant's conduct constitutes a serious invasion of privacy [is a] mixed question[] of law and fact. If the undisputed material facts show … an insubstantial impact on privacy interests, the question of invasion may be adjudicated as a matter of law." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 40.) "[T]he application of this element in *Hill* demonstrates 'that this element is intended simply to screen out intrusions on privacy that are de minimis or insignificant.' [Citation.]" (*American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 339.) Defendant Apple invites this court to reach the conclusion, as a matter of law, that its survey (as alleged in Plaintiff's complaint giving Plaintiff and other respondents the option to decline to answer) amounts to an insubstantial impact on Plaintiff's privacy interest in his Covid vaccination status.

Defendant Apple supports its argument by suggesting that its survey of its employees' Covid vaccination status is comparatively less invasive than an employer requiring vaccination and proof of vaccination which the Department of Fair Employment and Housing ("DFEH") indicated is permissible in a publication it issued on March 4, 2021. Defendant Apple requests the court take judicial notice of the existence and contents of this DFEH publication. The court declines to do so. The DFEH's guidance is not a legal determination by a court exercising superior jursidiction and thus not binding precedent which this court is obligated to follow. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455—"Under the doctrine of *stare decisis*, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction.") The DFEH publication relied on by defendant Apple does not support a conclusion that defendant Apple's survey insubstantially impacts Plaintiff's privacy interest.

Next, defendant Apple relies upon a number of federal trial court decisions for the proposition that compulsory immunization does not constitute a sufficiently serious invasion of privacy. As an initial matter, "A written trial court ruling has no precedential value." (*Santa Ana Hospital Med. Ctr. v. Belshe* (1997) 56 Cal.App.4th 819, 831.) Substantively, the court

finds defendant Apple's reliance on these federal trial court decisions to be an apples to oranges comparison.

Still, the court is persuaded by defendant Apple's common-sense assertion that a mere inquiry/ survey into an employee's medical history (Covid vaccination status) without any actual compelled disclosure does not constitute, as a matter of law, a serious invasion of privacy. Plaintiff's reliance on *Pettus v. Cole* (1996) 49 Cal.App.4th 402 and *Mathews v. Becerra* (2019) 8 Cal.5th 756 in opposition are not helpful since both of those decisions are distinguishable in that Plaintiff here alleges defendant's survey did not mandate disclosure of private information.

Plaintiff does not squarely address defendant Apple's assertion that there can be no serious invasion of privacy where Plaintiff is not required to disclose his personal information. Instead, Plaintiff points to his further allegations that, "Apple stated in the survey that it would assume anybody who selected "d" was unvaccinated, whether that was true or not" and by Plaintiff's objection to the survey, Plaintiff "essentially" chose "d" in declining to answer and defendant Apple terminated his employment for exercising his constitutional right to privacy. (Complaint, ¶¶16 – 20.) Defendant Apple's termination of Plaintiff's employment for exercising his constitutional right will be discussed, *infra*, but it does not alter Plaintiff's own allegation that defendant Apple's survey did not actually compel or mandate disclosure of Plaintiff's private information. As such, the court is inclined to agree with defendant Apple that Plaintiff has not alleged conduct by defendant Apple constituting a serious invasion of privacy.

Accordingly, defendant Apple's motion for judgment on the pleadings on the ground that the first cause of action of Plaintiff's complaint does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §438, subd. (c)(1)(B)(ii)] is GRANTED WITHOUT LEAVE TO AMEND.

D. Wrongful Termination in Violation of Public Policy.

" '[W]hile an at-will employee may be terminated for no reason, or for an arbitrary or irrational reason, there can be no right to terminate for an unlawful reason or a purpose that contravenes fundamental public policy.' [Citations omitted.]" (*Silo v. CHW Med. Found.* (2002) 27 Cal.4th 1097, 1104.) "The elements of a claim for wrongful discharge in violation of

public policy are (1) an employer-employee relationship, (2) the employer terminated the plaintiff's employment, (3) the termination was substantially motivated by a violation of public policy, and (4) the discharge caused the plaintiff harm." (*Yau v. Allen* (2014) 229 Cal.App.4th 144, 154.) "[F]or a policy to support a wrongful discharge claim, it must be: (1) delineated in either constitutional or statutory provisions; (2) "public" in the sense that it "inures to the benefit of the public" rather than serving merely the interests of the individual; (3) well established at the time of the discharge; and (4) substantial and fundamental." (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 894.)

In moving for judgment on the pleadings, defendant Apple concedes the right to privacy is a valid public policy upon which Plaintiff may rest his claim for wrongful termination[1], but contends the second cause of action is derivative of the first and since Plaintiff does not sufficiently allege an invasion of his constitutional right to privacy, this second cause of action also fails.

The court does not find defendant Apple's argument persuasive. "The cases in which California courts have recognized a separate tort cause of action for wrongful termination in violation of public policy generally fall into four categories, where the employee is discharged for: … (3) exercising (or refusing to waive) a statutory or constitutional right or privilege (*Semore*, *supra*, 217 Cal. App. 3d at pp. 1096-1098 [employee discharged for refusal, based on state constitutional right of privacy, to submit to test for illegal drug use]." (*Pettus v. Cole* (1996) 49 Cal.App.4th 402, 454 (*Pettus*).) As the *Pettus* court observed, "What is really at stake [is whether] … termination of employment is a form of punishment or retaliation for the employee's choice to exercise (or refusal to waive) those rights." (*Pettus*, *supra*, 49 Cal.App.4th at p. 457.)

Here, Plaintiff's complaint plainly alleges, "[Plaintiff's] objection to Apple's … COVID vaccination survey—which he objected to based on his California constitutional right to privacy—was a substantial motivating reason for his discharge." (Complaint, ¶32.) Essentially, the allegation is that defendant Apple subjected Plaintiff to the Hobson's choice of

[1] By defendant Apple's own acknowledgment, "the assertion of the constitutional right to privacy is the assertion of a fundamental principle of public policy which is sufficient to state a cause of action for wrongful termination." (*Semore v. Pool* (1990) 217 Cal.App.3d 1087, 1098.)

either exercising his right to privacy upon pain of termination or giving up his right to privacy in order to remain employed. Although defendant Apple might escape liability on the first cause of action by offering employees the option of declining to answer its vaccination survey, if as Plaintiff alleges (and which this court accepts as true for purposes of demurrer) the choice was not a genuine choice but instead served as the basis for defendant Apple to terminate Plaintiff's employment, then Plaintiff has stated a sufficient claim for wrongful termination in violation of public policy.

Accordingly, defendant Apple's motion for judgment on the pleadings on the ground that the second cause of action of Plaintiff's complaint does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §438, subd. (c)(1)(B)(ii)] is DENIED.

E. Punitive Damages.

Defendant Apple also asks for Plaintiff's prayer for punitive damages to be dismissed. Such relief is not available on a motion for judgment on the pleadings. As defendant Apple itself cites, a motion for judgment on the pleadings "may only be made" on the ground that the "complaint does not state facts sufficient to constitute a ***cause of action***." (Code Civ. Proc., §438, subd. (c)(1)(B)(ii).) Punitive damages are not a "cause of action."

Accordingly, defendant Apple's motion for judgment on the pleadings on the ground that the prayer for punitive damages of Plaintiff's complaint does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §438, subd. (c)(1)(B)(ii)] is DENIED.

The Court will prepare the formal order.

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Calendar Line 10
Case Name: *Gregory Gilbert, MD vs Stanford Health Care et al*
Case No.: 21CV382651

Motion to Seal Records brought by Defendants The Board of Trustees of the Leland Stanford Junior University and Andra Blomkalns, M.D. pursuant to California Rule of Court, rules 2.550 and 2.551, to seal confidential exhibits attached to the Declarations of Andra Blomkalns, M.D. (Exhibits B, C, F, G, H and I) and Justine Samonte Murphey (Exhibits B and D) and Defendants' Memorandum and Separate Statement, which refer to and incorporate the confidential exhibits, as identified in Defendants' Notice of Motion and all lodged in support of Defendants' Motion for Summary Judgment or, in the alternative, Summary Adjudication. The exhibits have been designated as "Confidential" by the parties pursuant to the November 2, 2022 Stipulated Protective Order entered in this matter.

Notice was given. No opposition was filed.

The identified portions of the referenced Motion for Summary Judgment or, in the alternative, Summary Adjudication and the identified exhibits shall be filed under seal; the Court finds that Defendants have submitted sufficient facts such that all of the following have been established:

(1) An overriding interest exists that overcomes the right of public access to the record and supports sealing the record (Defendants confidential matters relating to business operations and proprietary information. *McGuan v. Endovascular Technologies, Inc.* (2010) 182 Cal.App. 4th 974, 988-89; November 2, 2022 Stipulated Protective Order);

(2) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;

(3) The proposed sealing is narrowly tailored and Defendants have met their burden in this regard; and

(4) There is no less restrictive means that exist to achieve the overriding interest.

Good cause appearing, the Motion is GRANTED. Cal. Rules of Ct 2.550 (d) and 2.551. This Order is limited to those portions of Defendants' Motion for Summary Judgment or, in the alternative, Summary Adjudication and exhibits identified in Defendants' Notice of Motion to Seal.

Moving party to prepare the formal Order after hearing.

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