SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 10
Honorable Frederick S. Chung

Rachel Tien, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408-882-2210

DATE: December 7, 2023 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.

The courthouse is open: Department 10 is now fully open for in-person hearings, as of April 18, 2023. The court strongly prefers **in-person** appearances for all contested law-and-motion matters. For all other hearings (*e.g.*, case management conferences), the court strongly prefers either **in-person or video** appearances. 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.

***New information* (please read)**: To set future motion hearings, you no longer need to file your motion before receiving a hearing date. Phone lines are now open for you to call and reserve a hearing date *before filing and serving* your motion. Please call 408-882-2430 between 8:30 a.m. and 12:30 p.m. (Mon.-Fri.) to reserve your date. This will obviate the need to file and serve a separate amended notice at a later time. Please note: if your motion papers are not filed within five business days of reserving the hearing date, the date will be released to other cases.

CourtCall is no longer available: Department 10 uses Microsoft Teams for remote hearings. Please click on this link if you need to appear remotely, and then scroll down to click the link for Department 10: https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml. Again, the court strongly prefers in-person or video appearances. Telephonic appearances are a sub-optimal relic of a bygone era.

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.

Court reporters: Unfortunately, the court is no longer able to provide official court reporters for civil proceedings (as of July 24, 2017). If any party wishes to have a court reporter, the appropriate form must be submitted. See https://www.scscourt.org/general_info/court_reporters.shtml.

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 10
Honorable Frederick S. Chung
Rachel Tien, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408-882-2210

DATE: December 7, 2023 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.

LINE #	CASE #	CASE TITLE	RULING
LINE 1	22CV396170	Christian Humanitarian Aid v. AM Star Construction, Inc. et al.	Click on LINE 1 or scroll down for ruling in lines 1-2.
LINE 2	22CV396170	Christian Humanitarian Aid v. AM Star Construction, Inc. et al.	Click on LINE 1 or scroll down for ruling in lines 1-2.
LINE 3	19CV360439	Mesfin Regassa Ayle et al. v. Keith Laverne Booth et al.	Click on LINE 3 or scroll down for ruling in lines 3-4.
LINE 4	19CV360439	Mesfin Regassa Ayle et al. v. Keith Laverne Booth et al.	Click on LINE 3 or scroll down for ruling in lines 3-4.
LINE 5	22CV408364	Jane Doe v. Giorgio Raul Garcia et al.	Click on LINE 5 or scroll down for ruling.
LINE 6	19CV347686	Maria Elena's Restaurant, Inc. v. Patricia A. Boyes, Esq. et al.	Motion for attorney's fees on appeal of anti-SLAPP ruling: notice is proper, and the motion is unopposed. The court finds that defendants' counsel's hourly rate ($450) is reasonable and that the amount of time expended on the appeal (90.4 hours) was reasonable. The amount of time spent on this motion (8.5 hours) was also reasonable. The court grants the request for a fee award of $44,505. Moving party to prepare final order and judgment.
LINE 7	22CV400959	Abraham Calderon Gomez et al. v. Cesar Fernandez et al.	Click on LINE 7 or scroll down for ruling.
LINE 8	23CV419331	Daniel Ballesteros et al. v. David West	Petition to confirm attorney-client fee arbitration award: notice is proper, and the petition is unopposed. The court GRANTS the petition. Petitioner shall prepare both the proposed order and the judgment for the court's signature.

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 10
Honorable Frederick S. Chung
Rachel Tien, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408-882-2210

DATE: December 7, 2023 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.

LINE 9	23CV420628	NRT West, Inc. v. Kelly Magreevy	Petition to confirm arbitration award: notice appears to be proper, and the petition is unopposed. The court GRANTS the petition. Petitioner shall prepare the order and the judgment for the court's signature.

- oo0oo -

Calendar Lines 1-2
Case Name: *Christian Humanitarian Aid, Inc. v. AM Star Construction, Inc., et al.*
Case No.: 22CV396170

I. BACKGROUND

This case involves a dispute over an architectural services contract and related agreements entered into by plaintiff Christian Humanitarian Aid ("Plaintiff" or "CHA") and defendants AM Star Construction, Inc. ("AMS"), Michael Achkar ("Achkar," the owner of AMS), and Shultz & Associates (the architect for the project). CHA filed the original complaint in this matter on March 23, 2022. It filed the operative First Amended Complaint ("FAC"), adding defendant Link Corporation ("Link"), on March 15, 2023. The FAC states claims for: (1) Fraud in the Inducement (against AMS, Achkar, and various Does); (2) Fraud and Deceit (against AMS, Achkar, and various Does); (3) Breach of Contract (against AMS and various Does); (4) Breach of the Implied Covenant of Good Faith and Fair Dealing (against AMS and various Does); (5) Professional Negligence (against Schultz & Associates); (6) Breach of Contract (against Schultz & Associates); (7) Breach of Contract (against Link); (8) Negligence (against Link); and (9) Declaratory Relief (against AMS and various Does, seeking a declaration as to the validity of a mechanic's lien).

Schultz & Associates filed a cross-complaint on May 25, 2023 and an amended cross-complaint on September 27, 2023.

AMS and Achkar filed a verified cross-complaint on July 25, 2023. This cross-complaint states 11 causes of action for: (1) Breach of Contract (against CHA and cross-defendants Archangel Michael and Saint Mercurius Coptic Orthodox Church (the "Church"), St. Michael Preschool and Infant Care (the "Preschool), and various Roes); (2) Breach of the Implied Covenant of Good Faith and Fair Dealing (against the same parties); (3) Foreclosure of Mechanic's Lien (against CHA and various Roes); (4) Fraud and Deceit (false promise without intent to perform) (against CHA, the Church, the Preschool and various Roes); (5) Fraud and Deceit (intentional misrepresentation) (against CHA, the Church, the Preschool, cross-defendant Bishoy William, and various Roes); (6) Equitable Indemnity (against Schultz & Associates and various Roes); (7) Contribution (against Schultz & Associates and various Roes); (8) Assault and Battery (against CHA, the Church, the Preschool, Bishoy William, and various Roes); (9) Assault and Battery (against CHA, the Church, the Preschool, Bishoy William, cross-defendant Mary William, and various Roes); (10) Intentional Infliction of Emotional Distress (against CHA, the Church, the Preschool, Bishoy William, and various Roes, based on the eighth cause of action); and (11) Intentional Infliction of Emotional Distress (against CHA, the Church, the Preschool, Bishoy William, Mary William, and various Roes, and based on the ninth cause of action). The last four causes of action (8-11) are alleged on behalf of plaintiff Achkar alone.

Currently before the court is a demurrer to AMS and Ackhar's cross-complaint, and a motion to strike portions of that cross-complaint, brought by CHA, the Church, the Preschool, Bishoy William, and Mary William (hereinafter, "Cross-Defendants"). Both were filed on July 28, 2023. AMS and Achkar filed an opposition to the demurrer on November 22, 2023, the last date any timely opposition to either the demurrer or motion to strike could have been filed. The court has not considered AMS and Achkar's extremely tardy opposition to the motion to

strike, filed at 11:28 p.m. on November 29, 2023. (See Cal. Rules of Court, rule 3.1300(d).) The latter opposition was filed *over a week* late, without prior leave of court.

II. REQUEST FOR JUDICIAL NOTICE

"Judicial notice may not be taken of any matter unless authorized or required by law." (Evid. Code, § 450.) A precondition to judicial notice in either its permissive or mandatory forms is that the matter to be noticed must be relevant to the material issue before the Court. (*Silverado Modjeska Recreation and Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 307, citing *People v. Shamrock Foods Co*. (2000) 24 Cal.4th 415, 422, fn. 2.) It is the court, and not the parties, that determines relevance. Evidence Code section 453, subdivision (b), requires a party seeking notice to "[furnish] the court with sufficient information to enable it to take judicial notice of the matter."

Cross-Defendants filed a request for judicial notice on July 28, 2023, the same day as its demurrer and motion to strike. The request fails to state if it is submitted in support of the demurrer, motion to strike, or both. The request seeks judicial notice of Exhibit B to the FAC pursuant to Evidence Code section 452, subdivision (d) (court records). A copy of the document is not submitted with the request, even though that is required by Rule of Court 3.1306(c). Cross-Defendants state that the reason for the request is that AMS's cross-complaint "includes a cause of action for breach of contract against parties that were not signatories to the written agreement" (the Church and the Preschool), and they assert that AMS "should not be permitted to add parties to this lawsuit on a breach of contract theory—with whom it had no contractual relationship—by artfully electing not to attach the written contract between AM Star and CHA." (Request at pp. 2:25-3:2.)

Court records (other than court orders) can only be noticed as to their existence and filing dates, not as to the truth of their contents. *County of Los Angeles Child Support Services Dept. v. Superior Court* (2015) 243 Cal.App.4th 230, 241, fn. 4, cited by Cross-Defendants in the request, does not provide any additional support for taking judicial notice of the submitted document pursuant to subdivision (d). The existence and terms of a contract between private parties also normally cannot be judicially noticed pursuant to subdivision (h) on a demurrer or motion to strike. (See *Gould v. Maryland Sound Industries, Inc., et al* (1995) 31 Cal.App.4th 1137, 1145 [in wrongful termination action, trial court erred in sustaining employer's demurrer by taking judicial notice of existence of written employment agreement between the parties].)

Nevertheless, where a contract forms the basis of a claim but is not attached to the pleading, a court may take judicial notice of the contract at the request of the demurring party. (See *Ingram v. Flippo* (1999) 71 Cal.App.4th 1280, 1285 n.3 [taking judicial notice of a letter and media release that formed the basis of the allegations in the complaint]; *Ascherman v. General Reinsurance Corp*. (1986) 183 Cal.App.3d 307, 310-311 [taking judicial notice of terms of reinsurance contract referenced in complaint, where the parties did not dispute the existence of the contract].) Therefore, the court on its own motion takes judicial notice of Exhibit B to the FAC under *subdivision (h)*, as the contract's existence and terms are undisputed. "The interpretation of a contract is a question of law unless the interpretation turns on the credibility of extrinsic evidence." (*Sierra Vista Regional Medical Center v. Bo*nta (2003) 107 Cal.App.4th 237, 245.) The only parties to this written contract—the same contract referenced in paragraph 14 of the AMS/Achkar cross-complaint—are plaintiff CHA and defendant/cross-complainant AMS.

III. DEMURRER TO THE AMS/ACHKAR CROSS-COMPLAINT

A. General Standards

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.) Allegations are not accepted as true on demurrer if they contradict or are inconsistent with facts judicially noticed. (See *Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1474 [rejecting allegation contradicted by judicially noticed facts]; see also Witkin, *California Evidence* (5th Ed., 2012) 2 Judicial Notice §3(3) ["It has long been established in California that allegations in a pleading contrary to judicially noticed facts will be ineffectual; i.e., judicial notice operates against the pleader."].)

"Where a pleading includes a general allegation, such as an allegation of an ultimate fact, as well as specific allegations that add details or explanatory facts, it is possible that a conflict or inconsistency will exist between the more general allegation and the specific allegations." (*Perez v. Golden Empire Transit Dist.* (2012) 209 Cal.App.4th 1228, 1235.) "To handle these contradictions, California courts have adopted the principle that specific allegations in a complaint control over an inconsistent general allegation." (*Id*. at pp. 1235–1236.) "Under this principle, it is possible that specific allegations will render a complaint defective when the general allegations, standing alone, might have been sufficient." (*Id*. at p. 1236.) "It is well established that in the context of a demurrer, specific allegations control over more general ones." (*Chen v. PayPal, Inc*. (2021) 61 Cal.App.5th 559, 571-572 [citing *Perez* among others].)

The court considers only the pleading under attack, any attached exhibits, and any facts or documents for which judicial notice is properly requested and may be granted. The court cannot consider extrinsic evidence in ruling on a demurrer or motion to strike. The court has only considered the declarations from Cross-Defendants' counsel to the extent that they describe compliance with procedural meet-and-confer requirements. The court has not considered any of the exhibits attached to these declarations.

B. Pleading Based on "Information and Belief"

Both the FAC and the AMS/Achkar cross-complaint are replete with allegations made on information and belief. In general, a party cannot, "by placing the incantation 'information and belief' in a pleading, [ ] insulate herself or himself" from the requirements of Code of Civil Procedure section 128.7, irrespective of whether the pleading is verified or unverified. (*Mabie v. Hyatt* (1998) 61 Cal.App.4th 581, 596, fn. 9.) Additionally, even when it is permissible to allege an ultimate fact on the basis of information and belief, a party cannot simply include the phrase "information and belief" without more. (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1158-59.) To plead an allegation on the basis of information and belief properly, a plaintiff must allege the facts or information that led him or her to infer or believe the truth of the ultimate factual allegation. (*Gomes, supra*, 192 Cal.App.4th at pp.

1158-59; see also *Brown v. USA Taekwondo* (2019) 40 Cal.App.5th 100, 1106 ["where factual allegations are based on information and belief, the plaintiff must allege 'information that "lead[s] [the plaintiff] to believe that the allegations are true."'"].) Allegations made on "information and belief" that lack supporting information are not accepted as true on demurrer.

C. Legal Basis for Cross-Defendants' Demurrer

Cross-Defendants demur to the first, second, fourth, fifth, eighth, ninth, tenth, and eleventh causes of action on the ground that those claims fail to state sufficient facts under Code of Civil Procedure section 430.10, subdivision (e). (See Notice of Demurrer and Demurrer at pp. 3:2-4:15.)

D. Analysis

As an initial matter, the court notes that Cross-Defendants cannot "demur" to prefatory, general allegations (*e.g.*, Cross-Complaint, ¶¶ 1-22) under section 430.10, subdivision (e). (See Cross-Defendants' Memorandum of Points and Authorities in Support of Demurrer at p. 8:7-19.) That is the function of a motion to strike.

1. First Cause of Action

The court SUSTAINS the Church and Preschool's demurrer to the first cause of action (breach of contract) on the ground that it fails to state sufficient facts.

To state a breach of contract claim, a plaintiff (or cross-complainant) must allege: (1) the existence of a valid contract; (2) plaintiff's performance or excuse for nonperformance; (3) Defendant's breach; and (4) damage to plaintiff resulting from that breach. (*Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 228, citing *Careau & Co. v. Security Pacific Business Credit, Inc*. (1990) 222 Cal.App.3d 1371, 1388.) A non-party to a contract cannot be sued for breach of that contract.

As noted above, specific allegations control over general ones, and AMS/Achkar are bound by the specific allegation in paragraph 14 of the cross-complaint that the only parties to the contract at issue in this case—a written agreement entered into "[o]n or about November 18, 2019"—were AMS and CHA. This is consistent with the terms of the judicially noticed Exhibit B to the FAC. The allegation that the Church and Preschool "also agreed to pay" AMS, made only on information and belief without any supporting information, is nothing more than a conclusory statement that cannot be accepted as true on demurrer. There are no allegations that the Church or the Preschool are third-party beneficiaries to the contract; certainly, Exhibit B to the FAC does not identify any express third-party beneficiaries.

Contrary to what the opposition argues, allegations that some work or "change orders" were performed at the "special [insistence] and request" of the Church and/or the Preschool, *well after* the contract was already signed, are clearly insufficient to make either entity a party to the contract who could be sued for its breach. (Opp. at pp. 3:21-4:14.) The same is true for allegations that the Church or the Preschool "failed to pay" for work performed. (*Ibid.*; see also Cross-Complaint at ¶¶ 17-25.)

A plaintiff or cross-complainant bears the burden of proving an amendment would cure the defect identified by a demurrer. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074,

1081.) The opposition does not meet this burden, as it simply makes a generic request for leave to amend if any part of the demurrer is sustained. "[W]here the plaintiff requests leave to amend the complaint, but the record fails to suggest how the plaintiff could cure the complaint's defects, 'the question as to whether or not [the] court abused its discretion [in denying the plaintiff's request] is open on appeal . . . .' (Code Civ. Proc., § 472c, subd. (a).) Because the trial court's discretion is at issue, we are limited to determining whether the trial court's discretion was abused as a matter of law. Absent an effective request for leave to amend the complaint in specified ways, an abuse of discretion can be found 'only if a potentially effective amendment were both apparent and consistent with the plaintiff's theory of the case.'" (*Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 507, disapproved on another ground in *Yvanova v. New Century Mortg. Corp*. (2016) 62 Cal.4th 919, 934, 939, fn. 13; see also *Shaeffer v. Califia Farms, LLC* (2020) 44 Cal.App.5th 1125, 1145 ["The onus is on the plaintiff to articulate the 'specifi[c] ways' to cure the identified defect, and absent such an articulation, a trial or appellate court may grant leave to amend 'only if a potentially effective amendment [is] both apparent and consistent with the plaintiff's theory of the case. [Citation.]'"].)

Nevertheless, even though the court does not discern how the first cause of action could possibly be amended to state a claim against the Church or Preschool without contradicting paragraph 14 of the cross-complaint and Exhibit B to the FAC, the court sustains the demurrer with 10 days' leave to amend, given that this is the first pleading challenge and given that the court is only 99% certain that such an amendment would be futile.

2. Second Cause of Action

The court SUSTAINS Cross-Defendants' demurrer to the second cause of action on the basis that it fails to state sufficient facts, again with 10 days' leave to amend.

"The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made. The covenant thus cannot 'be endowed with an existence independent of its contractual underpinnings.' It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (*Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 349-350.) "[W]here breach of an actual term is alleged, a separate implied covenant claim, based on the same breach, is superfluous." (*Id*. at p. 327.)

The demurrer to the second cause of action, as alleged against the Church and the Preschool, is sustained for the same reason that the demurrer to the first cause of action is sustained as to these parties—neither entity is a party to the contract between CHA and AMS. The allegation that the contract is somehow "binding on all other Cross-Defendants against whom this cause of action is alleged" is a legal conclusion, made solely on information and belief with no supporting information, that the court does not accept as true on demurrer. (Cross-Complaint at ¶ 28.) The generic allegation is also contradicted, again, by the specific allegations of paragraph 14 of the cross-complaint and the judicially noticed language of Exhibit B to the FAC. Again, the opposition makes no effort to explain how the cause of action could be properly amended, and the court is highly dubious that it could be. (See Opposition at pp. 4:15-5:12.) Nevertheless, the court grants 10 days' leave to amend vis-à-vis the Church and the Preschool for the reasons stated above.

As for the allegations against CHA, the court sustains the demurrer to the second cause of action, also with 10 days' leave to amend. The court agrees with CHA that the second cause of action is superfluous. It is based on exactly the same alleged conduct as the first cause of action for breach of an express contract. (Compare Cross-Complaint at ¶¶ 27-30 with ¶¶ 23-26.) The opposition's argument that alleged misrepresentations made before the contract was signed can support the second cause is incorrect. The implied covenant does not come into existence until after a contract is signed. There is no cause of action for fraudulent inducement of an implied covenant. The opposition also fails to explain how any alleged misrepresentations by CHA frustrated the purpose of the contract in any way that was distinct from the breaches of contract alleged in the first cause of action. Because it is not completely apparent to the court that leave to amend would be futile, the court grants leave to amend.

When a demurrer is sustained with leave to amend, the leave must be construed as permission to the pleader to amend the causes of action to which the demurrer has been sustained, not add entirely new causes of action. (*Patrick v. Alacer Corp*. (2008) 167 Cal.App.4th 995, 1015.) To raise claims entirely unrelated to those originally alleged requires either a new lawsuit or a noticed motion for leave to amend. Absent prior leave of court an amended complaint raising entirely new and different causes of action may be subject to a motion to strike. "Following an order sustaining a demurrer or a motion for judgment on the pleadings with leave to amend, the plaintiff may amend his or her complaint only as authorized by the court's order. The plaintiff may not amend the complaint to add a new cause of action without having obtained permission to do so, unless the new cause of action is within the scope of the order granting leave to amend." (*Zakk v. Diesel* (2019) 33 Cal.App.5th 431, 456, citing *Harris v. Wachovia Mortgage, FSB* (2010) 185 Cal.App.4th 1018, 1023.)

3. Fourth and Fifth Causes of Action

The fourth and fifth causes of action are both fraud claims—false promise to perform and intentional misrepresentation, respectively. The fourth cause is alleged against CHA, the Church, and the Preschool, while the fifth cause is alleged against these same Cross-Defendants plus Bishoy William (based on alleged misrepresentation(s) by Bishoy William).

"The elements of fraud are (1) the defendant made a false representation as to a past or existing material fact; (2) the defendant knew the representation was false at the time it was made; (3) in making the representation, the defendant intended to deceive the plaintiff; (4) the plaintiff justifiably relied on the representation; and (5) the plaintiff suffered resulting damages." (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 792 [citation omitted].) "Fraud must be pleaded with specificity rather than with general and conclusory allegations. The specificity requirement means a plaintiff must allege facts showing how, when, where, to whom, and by what means the representations were made, and, in the case of a corporate defendant, the plaintiff must allege the names of the persons who made the representations, their authority to speak on behalf of the corporation, to whom they spoke, what they said or wrote, and when the representation was made." (*Id*. at p. 793 [citation and quotation marks omitted].) Courts enforce the specificity requirement in consideration of its two purposes. (*Ibid*.) The first purpose is to give notice to the defendant with sufficiently definite charges. The second is to permit a court to weed out meritless fraud claims on the basis of the pleadings; thus, the pleading should be sufficient to enable the court to determine whether, on the facts pleaded, there is any prima facie foundation for the charge of fraud. (*Ibid*.)

The court SUSTAINS Cross-Defendants' demurrer to the fourth and fifth causes of action with 10 days' leave to amend. Cross-Defendants point out that both causes are based on inadequate allegations made solely on "information and belief" with no supporting information, and both causes are also not alleged with the required degree of specificity. The opposition's argument that the allegations incorporated by reference sufficiently support both cross-claims is unpersuasive. (See Opposition at p. 6:1-27.) These incorporated allegations are also largely made on "information and belief" without supporting information. In the case of fraud, the law is settled that "it is not sufficient to allege fraud or its elements upon information and belief, unless the facts upon which the belief is founded are stated in the pleading." (*Dowling v. Spring Valley Water Co.* (1917) 174 Cal. 218, 221; see also *Findley v. Garrett* (1952), 109 Cal.App.2d 166, 176-177; *Woodring v. Basso* (1961) 195 Cal.App.2d 459, 464-465.) The facts upon which the belief is founded refers to the sources of information that the plaintiff relied upon to support its claim of fraud, not the facts identifying the *elements* of the fraud. Here, there is no identification of the facts and information upon which AMS and Achkar's belief is allegedly founded.

Cross-Defendants also correctly point out that fifth cause of action fails to allege how the only basis for the misrepresentation claim—the alleged misrepresentation by Bishoy William that he was an "ordained priest in the Orthodox Coptic Church" in "good standing"—caused or led to the claimed reliance and damages. A party asserting fraud by misrepresentation is obliged to establish a complete causal relationship between the alleged misrepresentations and the harm claimed to have resulted therefrom. This requires a party to allege specific facts showing not only that he or she actually and justifiably relied on the defendant's misrepresentations, but also how the actions he or she took in reliance on those misrepresentations caused the alleged damages. Misrepresentation, even maliciously committed, does not support a cause of action unless the plaintiff suffered resulting damages. (See *Orcilla v. Big Sur, Inc.* (2016) 244 Cal.App.4th 982, 1008.)

In addition, as alleged against the Church and the Preschool, these fraud causes of action suffer from the same infirmity as the contractual causes of action: neither entity is a party to the agreement between CHA and AMS. AMS and Achkar fail to identify any distinct promises or misrepresentations made by the Church and the Preschool, and they also fail to set forth how they could reasonably have relied on any of these purported misrepresentations in deciding to sign the contract with CHA that it (AMS itself) drafted. They also do not allege how they could reasonably have believed that non-parties such as the Church and the Preschool were required to "perform" anything under the contract (that AMS itself drafted), or could reasonably have believed that the alleged misrepresentation by Bishoy William regarding his status as an ordained priest in good standing made the Church or Preschool responsible for performing anything under the terms of the contract (that AMS had drafted). The opposition offers no indication as to how the fourth or fifth causes of action could be amended to state sufficient claims against the Church or the Preschool, and no effective amendment is apparent to the court.

As to CHA and Bishoy William, as well, the opposition fails to explain how either cause of action could be amended to state sufficient facts. Nevertheless, as with the first and second causes of action, the court grants 10 days' leave to amend.

4. Eighth and Ninth Causes of Action

The eighth and ninth causes of action both allege physical assaults on Michael Achkar by Bishoy William and Mary William. "The essential elements of a cause of action for assault are: (1) defendant acted with intent to cause harmful or offensive contact, or threatened to touch plaintiff in a harmful or offensive manner; (2) plaintiff reasonably believed she was about to be touched in a harmful or offensive manner or it reasonably appeared to plaintiff that defendant was about to carry out the threat; (3) plaintiff did not consent to defendant's conduct; (4) plaintiff was harmed; and (5) defendant's conduct was a substantial factor in causing plaintiff's harm." (*So v. Shin* (2012) 212 Cal.App.4th 652, 668-669.)

Cross-Defendants assert that these two causes of action fail to allege sufficient facts against the Church and the Preschool because these entities cannot be vicariously liable for any assaults by Bishoy William and Mary William. The court agrees and SUSTAINS the demurrer to both causes of action, at least as alleged against the Church and the Preschool, with 10 days' leave to amend.

"An employer will not be held vicariously liable for an employee's malicious or tortious conduct if the employee substantially deviates from the employment duties for personal purposes. Thus, if the employee inflicts an injury out of personal malice, not engendered by the employment, or acts out of personal malice unconnected with the employment, or if the misconduct is not an outgrowth of the employment, the employee is not acting within the scope of employment. If an employee's tort is personal in nature, mere presence at the place of employment and attendance to occupational duties prior or subsequent to the offense will not give rise to a cause of action against the employer under the doctrine of respondeat superior. In such cases, the losses do not foreseeably result from the conduct of the employer's enterprise and so are not fairly attributable to the employer as a cost of doing business." (*Delfino v. Agilent Technologies, Inc*. (2006) 145 Cal.App.4th 790, 812-813 (*Delfino*), internal citations and quotations omitted.)

This principle applies in cases involving assaults and also sexual assaults. (See *Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 301-302; *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1005 [county held not vicariously liable for deputy sheriff's unwanted touching and sexual propositioning of his female coworkers during work hours, with the Court reasoning that "[i]f an employee's tort is personal in nature [as the deputy's was held to have been], mere presence at the place of employment and attendance to occupational duties prior to or subsequent to the offense will not give rise to a cause of action against the employer under the doctrine of respondeat superior"]; *Myers v. Trendwest Resorts, Inc*. (2007) 148 Cal.App.4th 1403, 1432 [no vicarious liability against employer for claims of sexual battery, false imprisonment and intentional infliction of emotional distress]; *John Y. v. Chaparral Treatment Center, Inc.* (2002) 101 Cal.App.4th 125, 128-129 [treatment center operator not liable for employee's sexual molestation of resident minor]; *Maria D. Westec Residential Security, Inc*. (2000) 85 Cal.App.4th 125, 128-129 [employer not liable for alleged sexual assault by on-duty security guard].)

"Although the question of whether a tort was committed within the scope of employment is ordinarily one of fact, it becomes one of law where the undisputed facts would not support an inference that the employee was acting within the scope of employment." (*Perry v. County of Fresno* (2013) 215 Cal App.4th 94, 101 [county corrections office writing

racially inflammatory letters to inmates was acting outside the scope of his employment].) Here, the alleged physical assaults by Bishoy William and Mary William are easily classified as torts that were personal in nature and outside the scope of any employment. (See Cross-Complaint at ¶¶ 69-75 and 81-86.) This is a determination that can be made by the court on a demurrer.

In addition, the only allegations of employment and ratification regarding the Church or the Preschool are conclusory allegations made solely on "information and belief." (See Cross-Complaint at ¶¶ 77-78 and 93-94.) Again, this is not enough to support a claim against either entity.

While AMS and Achkar's opposition does not meet its burden of demonstrating how either cause of action could be amended to state sufficient facts against the Church or the Preschool, the court grants 10 days' leave to amend.

5. Tenth and Eleventh Causes of Action

The tenth cause of action for intentional infliction of emotional distress is based on the alleged physical assault described in the eighth cause of action, and the eleventh cause of action for intentional infliction of emotional distress is based on the alleged physical assault described in the ninth.

The elements of a claim for intentional infliction of emotional distress are: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. (See *Miller v. Fortune Commercial Corp.* (2017) 15 Cal.App.5th 214, 228-229, citing *Wilson v. Hynek* (2012) 207 Cal.App.4th 999, 1009.)

Cross-Defendants make two main arguments. First, they argue that both causes of action fail to state sufficient facts against any of them because the alleged conduct is not outrageous and the emotional distress is not specifically described. On the first point, the question of whether the underlying conduct is sufficiently outrageous is usually a question of fact. (*Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1045.) There are courts, however, that have dismissed intentional infliction of emotional distress claims on demurrer where the conduct is not outrageous as a matter of law. (*Bock v. Hansen* (2014) 225 Cal.App.4th 215, 235.) "To be considered outrageous the conduct must be so extreme as to exceed all bounds of that usually tolerated in a civilized community.'" (*Ibid*.; *Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.) Conduct that merely hurts another person's feelings is not enough. (*Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 496.) Conduct is not outrageous simply because it is tortious, criminal, or intended to cause distress. (*McMahon v. Craig* (2009) 176 Cal.App.4th 1502, 1517.) Generally, the conduct must be of such character that, if an ordinary member of the public was told the facts, he or she would exclaim "outrageous!" (*KOVR-TV, Inc. v. Superior Court* (1995) 31 Cal.App.4th 1023, 1028; *McMahon v. Craig*, *supra*, 176 Cal.App.4th at 1516.)

The court does not find Cross-Defendants' first argument to be persuasive, as a reasonable fact-finder could certainly conclude that the allegedly unprovoked physical assaults described in the eighth and ninth cross-claims are outrageous enough to support the tenth and

eleventh cause of action. "[T]he trial court initially determines whether a defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery. Where reasonable [persons] can differ, the jury determines whether the conduct has been extreme and outrageous to result in liability. Otherwise stated, the court determines whether severe emotional distress can be found; the jury determines whether on the evidence it has, in fact, existed." (*Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1614.) As to Cross-Defendants' point that the emotional distress is not specifically described, there is no requirement that emotional distress be specifically alleged.

Therefore, the court OVERRULES the demurrer on this ground, which is the sole ground for the demurrer asserted by Bishoy William and Mary William.

Second, as to CHA, the Church, and the Preschool, Cross-Defendants argue that the tenth and eleventh causes of action fail to state sufficient facts because the alleged conduct was outside the scope of any alleged employment.[1]

This argument is persuasive, as the alleged assaults by Bishoy William and Mary William were plainly outside the scope of any employment, for the reasons discussed above. Further, the employment and ratification allegations are again conclusory statements made only on information and belief. They do not set forth sufficient facts to support a claim against CHA, the Church, or the Preschool, based on the actions of Bishoy William or Mary William. (See Cross-Complaint at ¶¶ 103 and 111-112.) Accordingly, the court SUSTAINS the demurrer to the tenth and eleventh cross-claims by CHA, the Church, and the Preschool, with 10 days' leave to amend.[2]

IV. MOTION TO STRIKE PORTIONS OF THE AMS/ACHKAR CROSS-COMPLAINT

A. General Standards

Under Code of Civil Procedure section 436, a court may strike out any irrelevant, false, or improper matter inserted into any pleading or strike out all or part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court. The grounds for a motion to strike must appear on the face of the challenged pleading or from matters of which the court may take judicial notice. (Code Civ. Proc., § 437(a); see also *City and County of San Francisco v. Strahlendorf* (1992) 7 Cal.App.4th 1911, 1913.) In ruling on a motion to strike, the court reads the complaint as a whole, all parts in their context, and assumes the truth of all well-pleaded allegations. (See *Turman v. Turning Point of Central California, Inc*. (2010) 191 Cal.App.4th 53, 63, citing *Clauson v. Super. Ct*. (1998) 67 Cal.App.4th 1253, 1255.)

A motion to strike may be brought against a portion of a cause of action that is purportedly defective—*e.g.*, because it seeks an improper remedy. (See *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680.) As Courts of Appeal have observed, however, "[W]e

[1] For some reason, CHA does not make this argument as to the assault causes of action (the eighth and ninth), but it makes the argument as to the derivative IIED causes of action (the tenth and eleventh).

[2] The opposition of AMS and Achkar once again fails to satisfy the burden to demonstrate how either claim could be amended to state a proper claim against CHA, the Church, or the Preschool. Nevertheless, the court grants leave to amend, as it is not apparent that any amendment would necessarily be futile

have no intention of creating a procedural 'line item veto' for the civil defendant." (*Id*. at p. 1683.)

Cross-Defendants move to strike portions of paragraphs 6, 46, 56, 76, 92, 102 and 109 of the AMS/Achkar cross-complaint, as well as portions of the cross-complaint's prayer. (See July 28, 2023 Notice of Motion and Motion.) As noted above, AMS/Achkar did not file a timely opposition to the motion to strike.

B. Outcome

Cross-Defendants' motion to strike portions of paragraph 6 of the cross-complaint, part of the general allegations, is DENIED. Cross-Defendants have failed to demonstrate that the allegations regarding Cross-Defendant Bishoy William's representations as to his status within the Coptic Orthodox Church, assumed to be true for purposes of this motion, are irrelevant, false, or improper.

Cross-Defendants' motion to strike a portion of paragraph 46, part of the fourth cause of action, and the related portion of the prayer, is DENIED as MOOT in light of the court's ruling on the demurrer to the fourth cause of action.

Cross-Defendants' motion to strike a portion of paragraph 56, part of the fifth cause of action, and the related portion of the prayer, is DENIED as MOOT in light of the court's ruling on the demurrer to the fifth cause of action.

Cross-Defendants' motion to strike a portion of paragraph 76, part of the eighth cause of action, and the related portion of the prayer, is DENIED as MOOT in light of the court's ruling on the demurrer to the eighth cause of action.[3]

Cross-Defendants' motion to strike a portion of paragraph 92, part of the ninth cause of action, and the related portion of the prayer, is DENIED as MOOT in light of the court's ruling on the demurrer to the ninth cause of action.

Cross-Defendants' motion to strike a portion of paragraph 102, part of the tenth cause of action, and the related portion of the prayer, is DENIED as MOOT in light of the court's ruling on the demurrer to the tenth cause of action.

Cross-Defendants' motion to strike a portion of paragraph 109, part of the eleventh cause of action, and the related portion of the prayer, is DENIED as MOOT in light of the court's ruling on the demurrer to the eleventh cause of action.

- oo0oo -

[3] The court nonetheless observes that a physical assault does constitute "malice" (*i.e.*, conduct intended to cause injury) under Civil Code section 3294, subdivision (c)(1).

Calendar Lines 3-4
Case Name: *Mesfin Regassa Ayle et al. v. Keith Laverne Booth et al.*
Case No.: 19CV360439

In this wrongful death action, plaintiff Mesfin Regassa Ayle ("Ayle") and other members of his family (collectively, "Plaintiffs") have filed suit against multiple defendants, including the County of Santa Clara (the "County"), for a tragic accident in which Ayle's father, Regassa Ayle Walkeba, was a pedestrian struck and killed by a car on the Central Expressway near San Jose Airport on December 28, 2018. Plaintiffs' allegations against the County are based on Government Code sections 835 and 840.2: *i.e.*, a dangerous condition of public property.

The County has filed two motions to compel against plaintiff Ayle: (1) for an order requiring substantive responses to supplemental document requests, and (2) for an order requiring Ayle to consent to non-party T-Mobile USA, Inc.'s ("T-Mobile's") production of phone records pursuant to subpoena. The court GRANTS both motions, finding Ayle's oppositions to be without legal and factual support.

1. Motion to Compel Responses to Supplemental Document Requests

The County's supplemental demands for production of documents (Nos. 1-13, 19, and 37) are based on prior requests (same numbering), in response to which Ayle previously produced documents. The supplemental demands for production request information as to any additional documents that Ayle may have discovered or obtained since the time of his previous responses. This is expressly allowed under the Civil Discovery Act. (See Code Civ. Proc., § 2031.050.) Ordinarily, the responses to such supplemental demands are simple and straightforward, but in this case, Ayle's responses consist solely of objections.

Ayle argues that he is excused from responding to these requests because the County's *prior* motion to compel further responses to the original document requests, filed on February 24, 2022, was allegedly untimely. The court rejects this argument for at least two reasons. First, any alleged untimeliness in enforcing the prior discovery requests was superseded by Ayle's agreement to produce further responses to those requests (including Requests for Production Nos. 1-13, 19, and 37) at an informal discovery conference with Judge Overton in August 2022. Second, Ayle's argument is directly contrary to Judge Kirwan's prior determination on March 22, 2022 that the County's effort to compel other discovery responses (interrogatories and requests for admissions)—which was apparently governed by the same agreement as Requests for Production Nos. 1-13, 19, and 37—was not untimely. (See March 22, 2022 Order [Plaintiffs' contention is "unavailing and misstates the agreement"].)

In addition, Ayle argues at length that the County's effort to obtain this discovery is the product of "oppression, harassment, and racism" by the Deputy County Counsel in this case. (Opposition at p. 18:13.) Having reviewed the accusations contained in the opposition brief, the court finds that Ayle has not identified any concrete evidence of bias or prejudice on the part of County Counsel, which even Ayle concedes does not present itself as explicit bias ("*nowadays, it is rare that anyone comes right out and admits these things*"), but only as implicit bias. (Opposition at p. 18:23-24, italics added.) Although the court always tries to be mindful of the need to guard against implicit bias, and the court does not intend to minimize Ayle's counsel's subjective perceptions of his interactions with County Counsel—which the

court can only read about rather than witness firsthand—the court cannot act on a mere *hunch* or *gut feeling* by counsel. The court needs evidence, and that is sorely lacking here. The court finds that the opposition brief's repeated *ad hominem* attacks against the Deputy County Counsel in this case are excessive, unseemly, and unsupported by evidence.

The court would lend more credence to Ayle's arguments if the discovery sought here were clearly irrelevant or obviously designed to harass the Plaintiffs. But the court finds that the supplemental document requests here are directly pertinent to the issues in this case. Additionally, as already noted above, it is ordinarily a simple and straightforward matter to provide updated responses.

The court grants the motion to compel responses to the supplemental document requests.

2. Motion to Compel Consent to the Production of Phone Records

The court also finds that the phone records sought by the County from T-Mobile are directly relevant to the liability issues in this case. Ayle's arguments in opposition are unavailing. First, Ayle argues that "T-Mobile's rights are being ignored," but Ayle does not have standing to take positions that only T-Mobile can assert. The County has shown that T-Mobile was properly served with both the subpoena and these motion papers but has chosen not to file an opposition to the motion. Second, Ayle identifies a number of technical errors in the motion papers (citation of Code of Civil Procedure section 2031.310 and a lack of citation of section 1987.1), but these non-substantive defects are overcome by the substantive arguments contained in the motion papers as a whole. Third, the court disagrees with Ayle's reading of *Negro v. Superior Court* (2014) 230 Cal.App.4th 879, which (along with *O'Grady v. Superior Court* (2006) 139 Cal.App.4th 1423) supports the conclusion that the court may compel a party to the case to consent to the release of his or her consumer records from a third-party. Finally, the court finds unpersuasive Ayle's contentions that the County was required to enter into a "first look" agreement as a predicate to bringing this motion, and that provisions of the Penal Code (section 1546.1) and the Public Utilities Code (sections 2891-2894) bar the County from obtaining these phone records.

The court grants the motion to compel consent to the production of records from T-Mobile. The court orders Ayle to provide a signed consent to T-Mobile for its production of the records requested by the County's subpoena. This shall be done within 20 days of notice of entry of this order.

3. Request for Monetary Sanctions

The County seeks monetary sanctions of $2,520 for having had to bring its motion to compel responses to the supplemental document requests. The court notes that the purpose of discovery sanctions is compensatory, not punitive, and they are generally required, unless the court finds that the party to be sanctioned acted with "substantial justification." In this case, the court cannot find that Plaintiffs' counsel acted with substantial justification in opposing the motion to compel with facially non-meritorious arguments and in spending an inordinate time making unsupported *ad hominem* allegations against the Deputy County Counsel. The court GRANTS the request for $2,520 in sanctions. The court finds that the problematic rhetoric contained in the opposition brief is likely not attributable to the Plaintiffs themselves, but rather

to counsel alone, and so the court orders Plaintiffs' counsel to pay this amount within 30 days of notice of entry of this order.

IT IS SO ORDERED.

- oo0oo -

Calendar Line 5
Case Name: *Jane Doe v. Giorgio Raul Garcia et al.*
Case No.: 22CV408364

This is a case alleging childhood sexual abuse committed by defendant Giorgio Raul Garcia on plaintiff Jane Doe. Currently before the court is Doe's motion to compel non-party San Jose Police Department to produce a police report—specifically, Report No. 06-034-0721—that relates to an investigation of Garcia's alleged sexual battery of Doe. The City of San Jose (the "City") opposes the subpoena on behalf of the police department. Defendant County of Santa Clara does not take any express position on this motion.

The City raises two arguments in response to the motion.[4] First, the City contends that the police report is protected from disclosure by Penal Code section 11167.5, which is part of the Child Abuse and Neglect Reporting Act ("CANRA") (Pen. Code, §§ 11164-11174.3). According to the City, the report at issue was a "substantiated" report of child abuse "that result[ed] in a summary report being filed with the Department of Justice pursuant to subdivision (a) of section 11169" and therefore remains confidential except as to specified persons and agencies under section 11167.5, subdivision (b). Second, the City contends that that Doe failed to submit a "Notice to Consumer" under Code of Civil Procedure sections 1985.3 and 1985.4, which is a threshold requirement before "consumer records" may be disclosed pursuant to a subpoena.

Addressing the second argument first, the court is not convinced that defendant Garcia is a "consumer" under section 1985.3 or that the police report is a "consumer record" under section 1985.4. "Consumer" is defined in section 1985.3, subdivision (a)(1), as someone who "has transacted business with . . . the witness or for whom the witness has acted as agent or fiduciary." In no sense has Garcia "transacted business" with the San Jose Police Department except in the loosest and most colloquial sense of "business." In addition, it cannot reasonably be argued that the police department has acted as his "agent or fiduciary." The court therefore rejects the City's second argument.

Nevertheless, the court has closely reviewed Penal Code section 11167.5 and the surrounding provisions of CANRA, and it ultimately agrees with the City's interpretation of the statutory scheme. Section 11167.5, subdivision (b), sets forth an exhaustive list of persons and agencies to whom confidential reports of child abuse may be disclosed, under the appropriate circumstances, but the children themselves (or their adult selves years later) are not included in this list. Neither side cites any case law directly on point, but court has read *Cuff v. Grossmont Union High School District* (2013) 221 Cal.App.4th 582, 590-591, which emphasizes that section 11167.5 is to be read strictly. Indeed, subdivision (a) states that "[a]ny violation of the confidentiality provided by this article is a misdemeanor." In the absence of any closer authority on point from Doe to rebut the City's interpretation of the statutory language, the court determines that the report should not be produced.

[4] The City has filed an opposition brief with several lines of text redacted. Ordinarily, such a filing would be accompanied by an unredacted version, either lodged with the court or conditionally filed under seal, but the court did not find an unredacted version anywhere in the official record of the case. After having largely written the tentative ruling, and shortly before posting, the court discovered an email to the Department 10 email address with an unredacted version of the brief. This is not the correct way to do it.

Of course, it is quite likely that the police report would be relevant to the issues in this case, and it seems particularly counterintuitive that the very person whom CANRA was enacted to protect—the minor victim of abuse or neglect—would not be permitted to obtain a copy of the confidential report. Nevertheless, the court needs plaintiff to identify some statutory or case law authority under which she would be entitled to overcome the strict provisions of Penal Code section 11167.5, and she has failed to do so. Indeed, Doe's reply brief focuses almost exclusively on the City's second argument and fails to address the first. The general provisions of the Civil Discovery Act are not enough, as they are too general to override the specific provisions of section 11167.5.

In the end, the court notes that the police report at issue is not itself first-hand information—by its very nature—and would ultimately be unlikely to serve as anything but secondary or background information for this case. The court concludes that Doe should be able to obtain similar, direct evidence through other sources—and potentially through more targeted discovery requests of the City/police department—that would not run afoul of the restrictions set forth in CANRA.

The motion is DENIED.

- oo0oo -

Calendar Line 7
Case Name: *Abraham Calderon Gomez et al. v. Cesar Fernandez et al.*
Case No.: 22CV400959

Plaintiffs Abraham Calderon Gomez and Rina Radai Calderon (individually and as guardian ad litem for her daughter Helen Rebecca Calderon) (collectively, "Plaintiffs") move for a preferential trial setting under Code of Civil Procedure section 36, subdivision (b). Although the current trial date is July 1, 2024, Plaintiffs seek to advance that date to April 3, 2024 or sooner. Defendants Cesar Fernandez and Monica Fernandez ("Defendants") oppose the motion, but their arguments are without merit. The court therefore GRANTS the motion.

Helen, the minor plaintiff, is five years old, and her blood lead level was reported to be 26.1 micrograms per deciliter while living in the home owned and managed by Defendants. According to Plaintiffs, this is 26 times the average blood lead level of a person in the United States. Plaintiffs contend that Helen suffers from neurocognitive disabilities as a result of her extended exposure to hazardous levels of lead in the home. Based on these allegations alone, Helen satisfies the criteria for a preferential trial setting under section 36, subdivision (b): she is "under 14 years of age," she brings a "personal injury" action for damages, and she has "a substantial interest in the case as a whole." Defendants do not dispute these facts.

Instead, Defendants raise various unpersuasive legal arguments. First, and most dismayingly, Defendants cite *Parlen v. Golden State Sanwa Bank* (1987) 194 Cal.App.3d 906, 912 (*Parlen*) and *Salas v. Sears, Roebuck & Co.* (1986) 42 Cal.3d 342, 349 (*Salas*) for the proposition that under section 36, subdivision (b), the court has "discretion" to deny the motion "considering factors such as dilatory conduct by plaintiff." (Opposition at p. 2:6-11.) This is a blatant misstatement of the law. Both subdivisions (a) and (b) of section 36 state that a party who satisfies the statutory criteria "shall" be entitled to a preferential trial setting—the language is mandatory, not discretionary. (See also *Landry v. Berryessa Union School District* (1995) 39 Cal.App.4th 691, 695-696 [discussing "mandatory language" of subdivision (b)].) By contrast, the *Parlen* and *Salas* cases both expressly dealt with section 36, ***subdivision (d)***, which grants the court *additional* "discretion" to *grant* a motion for preference under different circumstances. Neither *Parlen* nor *Salas* addressed the mandatory nature of subdivisions (a) and (b), and so Defendants' reliance on these cases is quite transparently misleading. Plaintiffs argue in their reply brief that "Defendants' counsel should be sanctioned for citing [*Parlen*]" (Reply at p. 8:7). While the court will not do so, the court agrees with Plaintiffs that the style of advocacy displayed in Defendants' opposition falls below the professional standard that the court expects of members of the California State Bar.

Second, Defendants argue that Plaintiffs unduly delayed in bringing this motion. Again, there is no legal basis for this argument. Defendants cite no authority for the proposition that a motion under section 36, subdivision (b), must be brought within a certain amount of time, and the court is aware of none. The fact that Plaintiffs have expressly stated an intention to file this motion for a long time (including in paragraph 2 of their June 28, 2022 complaint) only highlights how long Defendants have been on notice of the possibility of an accelerated trial schedule in this case. It underscores the lack of any excuse that Defendants may have for having failed to conduct prompt discovery during the year and a half that this case has already been pending.

Third, notwithstanding this long lead time for Defendants, they argue that granting the motion would "greatly prejudice" them and "deprive them of due process." (Opposition at p. 3:10-11.) Once more, even if the court were to accept the factual predicate for this argument (which is dubious at best), it would find that the argument lacks legal support and is based on a total misunderstanding of the law. Having found that the statutory requirements are satisfied, the court has no discretion to set a later trial date to accommodate Defendants' desire for a specific scope of discovery. The fact that application of section 36 may cause inconvenience to the court or to the other litigants, or may prevent the completion of discovery or other pretrial matters, is completely "irrelevant" in the eyes of the Legislature that enacted the law. (*Swaithes v. Superior Court* (1989) 212 Cal.App.3d 1082, 1085.) "The trial court has no power to balance the differing interests of opposing litigants in applying the provision. The express legislative mandate for trial preference is a substantive public policy concern which supersedes such considerations." (*Id.* at pp. 1085-1086.)

The court grants the motion for trial preference and advances the trial date in this matter to **Tuesday, April 2, 2024**, with a mandatory settlement conference on **March 27, 2024** (time TBD) and a trial assignment conference on **March 28, 2024 at 1:30 p.m. in Department 6** (via MS Teams).

- oo0oo -