SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 6
Honorable Evette D. Pennypacker, Presiding

David Criswell, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2160

DATE: September 19, 2024 TIME: 9:00 A.M.

RECORDING COURT PROCEEDINGS IS PROHIBITED

FOR ORAL ARGUMENT: Before 4:00 PM today you must notify the:

(1) Court by calling (408) 808-6856 and

(2) Other side by phone or email that you plan to appear at the hearing to contest the ruling

(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

FOR APPEARANCES: The Court strongly prefers in-person appearances. If you must appear virtually, you must use video. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 6:
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

FOR COURT REPORTERS: The Court does **not** provide official court reporters. If you want 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

FOR YOUR NEXT HEARING DATE: Use Court Schedule to reserve a hearing date for your next motion. Court Schedule is an online scheduling tool that can be found on the court's website here:
https://reservations.scscourt.org/

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	24CV438904	Jpmorgan Chase Bank N.a. vs Vanessa Martinez	Plaintiffs' motion for judgment on the pleadings is DENIED. Defendant was served with notice of this hearing date and time by U.S. mail on July 22, 2024 and did not oppose the motion. "[T]he failure to file an opposition creates an inference that the motion or demurrer is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) However, Plaintiff is incorrect in its assertion that "Defendant does not deny any allegations of the complaint. Defendant does not deny that defendant owes this debt. Defendant does not set forth any valid affirmative defenses. Defendant just describes some financial difficulties." Defendant admits all the statements of the complaint are true EXCEPT paragraph 10(a) of the complaint, which prays for $10,680.98 in damages. Defendant also states: "The Plaintiff is requesting damages of $10,680.98 but has not provided verification of how those damages were calculated. What was the balance at charge off [sic]. When was the last payment made and how much was the payment [sic]. How much are the actual charges, actual late fees, actual assigned interest and actual accrued interest since assignment to Hunt & Henriques, LLP [sic]." Plaintiff's entire motion is based on the faulty premise that Defendant failed to deny any material allegation made in the complaint. While Defendant does not deny having had the credit card account alleged, Defendant unequivocally denies owing the amount alleged. Accordingly, Plaintiff's motion for judgment on the pleadings is DENIED. Court to prepare formal order.
2	18CV334861	Fernando Murrain vs Tesla, Inc. et al	Tesla's motion for summary adjudication is GRANTED, IN PART. Scroll to line 2 for complete ruling. Court to prepare formal order.
3	22CV401300	A. A. vs Palo Alto Unified School District	Defendants' motion for summary adjudication is GRANTED, IN PART. Scroll to line 3 for complete ruling. Court to prepare formal order.
4	23CV410044	Mark Smith vs Terry Drymonacos et al	Will be heard in Department 18b.
5	23CV422882	Estate of DANIEL BUGARIN-HERNANDEZ et al vs KEVIN ALVAREZ et al	Vacated; addressed by the Court's September 12, 2024 order.
6	22CV398389	Charito Rosario et al vs Jerilyn Alfred et al	Plaintiff's motion to enforce settlement pursuant to Code of Civil Procedure section 664.6 is GRANTED. A notice of motion with this hearing date and time was served by electronic mail on August 29, 2024. No party opposed the motion. "[T]he failure to file an opposition creates an inference that the motion or demurrer is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) All parties also signed a stipulation for settlement agreeing that the Court would retain jurisdiction to enforce the settlement terms set forth therein pursuant to Code of Civil Procedure section 664.6, and Plaintiff submits evidence that no party presented any basis to oppose such enforcement. Plaintiff's motion is therefore granted. Moving party to prepare formal order.

7	23CV409783	Bart Ziegenhagen et al vs Marie Hitchcock	Marie A. Hitchcock's motion to set aside order authorizing service by publication and to quash summons and service of summons by publication is GRANTED. A notice of motion with this hearing date and time was served on Plaintiffs b y U.S. mail on July 24, 2024. Plaintiffs failed to oppose the motion. "[T]he failure to file an opposition creates an inference that the motion or demurrer is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) Once Defendant comes forward with evidence that service was improper, it is Plaintiffs' burden to demonstrate proper service. Having failed to oppose the motion, Plaintiffs fail to meet their burden. While Plaintiffs are self-represented, Self-represented litigants are entitled to the same, but no greater, consideration than other litigants and attorneys. (*County of Orange v. Smith* (2005) 132 Cal.App.4th 1434, 1444.) Self-represented litigants "are held to the same standards as attorneys" and must comply with the rules of civil procedure. (*Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 543; see also *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985.) Court to prepare formal order.
8	23CV417060	Annabella Gonzalez vs CITY OF PALO ALTO	Plaintiff's motion to set aside is DENIED. First, Plaintiff failed to file a timely opposition to the first demurrer. The rules are in place so that everyone can play on the same field; the rules are what make this process have the hope of being fair. For this reason, even self-represented litigants are entitled to the same, but no greater, consideration than other litigants and attorneys. (*County of Orange v. Smith* (2005) 132 Cal.App.4th 1434, 1444.) If the Court must hold self-represented litigants to the task of complying with the Code of Civil Procedure, counsel plainly must do the same. This is the second time Plaintiff failed to timely respond to a demurrer. And, counsel cannot be permitted to use Code of Civil Procedure section 473(b) as an end run around a legitimately issued adverse judgment. This is particularly true here, where Plaintiff's failure to oppose the demurrer was not the sole basis for the Court's sustaining it without leave to amend. Plaintiff failed to comply with the Government Claims Act, the CRD complaint was insufficient to remedy this, thus her claims are simply barred. The Court pointed this issue out in its order sustaining the first demurrer with leave to amend. The Second Amended Complaint did not correct this issue, nor does the proposed Third Amended Complaint. Accordingly, Plaintiff's motion to set aside is DENIED. Court to prepare formal order.
9	23CV427524	Swift Financial, LLC as Servicing Agent for WebBank vs Venkatapathi Rayapati et al	Swift Financial, LLC as Servicing Agent for WebBank's petition to confirm arbitration award is GRANTED. The record reflects proper service of the petition and no response. Accordingly, the April 12, 2023 arbitration award attached to the petition is confirmed. Petitioner to prepare formal order and judgment.
10	21CV378021	Bank of America, N.A. vs Ramiel E Chamaki	Defendant's motion to set aside default and default judgment is DENIED. Defendant's motion is untimely, and his arguments were already addressed and rejected by Hon. Christopher Rudy before default was entered. These orders will be reflected in the minutes.
11	22CV403929	Suemi Gonzales et al vs Santa Clara Valley Transportation Authority	Defendants' demurrer is SUSTAINED WITHOUT LEAVE TO AMEND. Scroll to line 11 for complete ruling. Court to prepare formal order.

Calendar line 2
Case Name: *Fernando Murrain v. Tesla, Inc., et al.*
Case No.: 18CV334861

Before the Court is defendant Tesla Inc.'s ("Tesla") motion for summary judgment, or in the alternative, summary adjudication against plaintiff Fernando Murrain. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background

This is an action arising out of Plaintiff's employment by and subsequent alleged wrongful termination from SolarCity. According to the Complaint, Plaintiff worked for SolarCity from October 2013 until October 12, 2017. (Complaint, ¶¶ 33, 93-94.) In 2016, SolarCity was acquired by Tesla. (Complaint, ¶ 50.) In 2017, Plaintiff took family medical care leave to care for his wife, who was scheduled for major surgery related to her breast cancer. (Complaint, ¶ 51.) After his return, he was reprimanded for his performance by director Ginger Skinner and later demoted to his former position. (Complaint, ¶¶ 67-74.) Prior to his leave, Plaintiff received at least a 3 out of 5 on his performance evaluations, however, in October 2017, he received a copy of a performance review in which Skinner gave him a 2 out of 5, the first negative performance review Plaintiff received during his employment. (Complaint, ¶¶ 86-88.) This review prevented Plaintiff from transferring out of Skinner's department. (Complaint, ¶ 89.) On October 12, 2017, a meeting was scheduled to address his review before it was submitted for finalization. (Complaint, ¶ 90.) However, at the meeting, Skinner informed Plaintiff he was being terminated effective October 18, 2017. (Complaint, ¶ 91.) Plaintiff later learned that Tesla terminated approximately 400 employees from October 12-October 13, 2017. (Complaint, ¶ 93.)

On September 14, 2018, Plaintiff filed the Complaint, asserting claims for (1) California's Family Rights Act ("CFRA")-Interference, (2) CFRA-Retaliation, (3) Family and Medical Leave Act ("FMLA")-Interference, (4) FMLA-Retaliation, (5) Fair Employment and Housing Act ("FEHA")-Discrimination/Association with Disabled Person, (6) FEHA-Retaliation, (7) FEHA-Failure to Prevent, (8) Americans with Disabilities Act ("ADA")-Discrimination/Association with Disabled Person, (9) ADA-Retaliation, and (10) Wrongful Termination in Violation of Public Policy.[1] On June 25, 2024, Tesla filed the instant motion, which Plaintiff opposes.

[1] The CFRA is part of the FEHA.

II. Evidentiary Objections

Plaintiff submits objections to Skinner's declaration and Tesla submits objections to Plaintiff's declaration and Camillia Murrain's declaration.

Plaintiff's and Tesla's objections do not fully comply with California Rules of Court, rule 3.1354, and the Court thus need not rule on them. (See *Vineyard Springs Estates v. Superior Court* (2004) 120 Cal.App.4th 633, 642 [trial court has duty to rule on evidentiary objections presented in the proper form]; *Hodjat v. State Farm Mutual Automobile Ins. Co.* (2012) 211 Cal.App.4th 1, 9 [trial court not required to give party who fails to comply with formatting requirements of California Rules of Court, rule 3.31354 a second chance to file properly formatted objections.].) Objections that are not ruled on are preserved for appellate review. (See Code Civ. Proc., § 437c, subd. (q).)

III. Untimely Reply

Code of Civil Procedure section 437c, provides, "a reply to the opposition shall be served and filed by the moving party not less than five days preceding the notice or continued date of hearing, unless the court for good cause orders otherwise." (Code Civ. Proc., § 437c, subd. (b)(4).) Tesla's reply was due on September 14, 2024. The Court received two sets of reply papers from Tesla, one set filed on September 16, 2024, and another one filed on September 17, 2024. However, it appears the papers are identical. On September 17, 2024, Plaintiff filed his objection to the reply filings, objecting that Tesla asserts new arguments for the first time in reply, new evidence, and Tesla's reply separate statement and response to Plaintiff's Additional Material Facts are not permitted under the statute. Tesla could not have submitted some of the evidence included in counsel's reply declaration earlier because the depositions had not been taken when the motion was filed. Nevertheless, given that Tesla filed its reply at least 2 days late, its filings are voluminous, and Plaintiff did not have the opportunity to reply substantively to any new arguments or evidence, the Court declines to consider the filings.

IV. Legal Standard

Any party may move for summary judgment. (Code of Civ. Proc., §437c, subd. (a); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) The motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code of Civ. Proc., 437c, subd. (c); *Aguilar, supra*, 25

Cal.4th at p. 843.) The object of the summary judgment procedure is "to cut through the parties pleading" to determine whether trial is necessary to resolve the dispute. (*Aguilar, supra,* 25 Cal.4th at p. 843.)

The "party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact…" (*Aguilar, supra,* 25 Cal.4th at p. 850; see Evid. Code, § 110.) "A prima facie showing is one that is sufficient to support the position of the party in questions. (*Aguilar, supra,* 25 Cal.4th at p. 851.)

If the moving party makes the necessary initial showing, the burden of production shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. (Code of Civ. Proc., 437c, subd. (c); *Aguilar, supra,* 25 Cal.4th at p. 850.) A triable issue of material fact exists "if, and only if, the evidence would allow of reasonable trier of fact to find the underlying facts in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra,* 25 Cal.4th at p. 850, fn. omitted.) If the party opposing summary judgment presents evidence demonstrating the existence of a disputed material fact, the motion must be denied. (*Id*. at p. 843.)

"Another way for a defendant to obtain summary judgment is to 'show' that an essential element of plaintiff's claim cannot be established. Defendant does so by presenting evidence that plaintiff 'does not possess and cannot reasonably obtain, needed evidence' (because plaintiff must be allowed a reasonable opportunity to oppose the motion)." (*Aguilar, supra,* 25 Cal.4th at pp. 854-855.) "Such evidence usually consists of admissions by plaintiff following extensive discovery to the effect that he or she has discovered nothing to support an essential element of the cause of action." (*Ibid.*)

Throughout the process, the trial court "must consider all of the evidence and all of the inferences drawn therefrom." (*Aguilar, supra*, 25 Cal.4th at p. 856.) The moving party's evidence is strictly construed, while the opponent's is liberally construed. (*Id*. at 843.)

Pursuant to Code of Civil Procedure section 437c, Tesla moves for summary judgment against Plaintiff, or in the alternative, summary adjudication of each cause of action.

V. Summary Judgment/Adjudication in FEHA Discrimination/Retaliation Cases

Special rules govern the allocation of the burden of proof on motions for summary judgment in wrongful termination and employment discrimination cases, under both federal and state law. State courts follow the approach taken by federal courts in these cases. (*Moore v. Regents of Univ. of Calif.* (2016) 248 Cal.App.4th 216, 233.) Because direct evidence of discrimination is seldom available, courts use a system of shifting burdens as an aid to the presentation and resolution of such cases both at trial and on a motion for summary judgment. (*Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal.4th 317, 354-355 (*Guz*).) "California has adopted a three-stage burden-shifting test established by the United States Supreme Court for trying employment discrimination claims that are based on the disparate treatment theory. Under this *'McDonnell Douglas* test,' (1) the plaintiff must establish a prima facie case of discrimination; (2) if the plaintiff is successful, the employer must offer a legitimate nondiscriminatory reason for its actions; and (3) if the employer produces evidence on that point, the plaintiff must show that employer's reason was a pretext for discrimination." (*Trop v. Sony Pictures Entertainment, Inc.* (2005) 129 Cal.App.4th 1133, 1144 [citations omitted]; see also *King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 433 (*King*).) CFRA retaliation claims are also subject to the *McDonnell Douglas* test. (See *Bareno v. San Diego Community College Dist.* (2017) 7 Cal.App.5th 546, 560 (*Bareno*).)

When the employer is the moving party, the initial burden rests with the employer to show that no unlawful discrimination occurred. (Code Civ. Proc., §437c(p)(2); See *Guz*, *supra* at pp. 354-355; *Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 309; *McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1523 [employee has no obligation to produce evidence until defendant "has established either the existence of a complete defense or the absence of an essential element of plaintiff's claim."].) The employer may do this by presenting admissible evidence either: negating an essential element of the employee's claim; or showing some legitimate, nondiscriminatory reason for the action taken against the employee. (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 202-203.) An example of negating an essential element would be establishing that no adverse employment action occurred.

An employer may also "move for summary judgment against a discrimination cause of action with evidence of a legitimate, nondiscriminatory reason for the adverse employment action. A legitimate, nondiscriminatory reason is one that is unrelated to prohibited bias and that, if true, would preclude a finding of discrimination. The employer's evidence must be sufficient to allow the trier of fact to conclude that it is more likely than not that one or more legitimate, nondiscriminatory reasons were the sole basis for the adverse employment action." (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1158 (*Featherstone*) [citations omitted].) The burden is then on the plaintiff employee to rebut with evidence raising an inference that intentional discrimination occurred. "The stronger the employer's showing of a legitimate, nondiscriminatory reason, the stronger the plaintiff's evidence must be in order to create a reasonable inference of a discriminatory motive." (*Id*. at p. 1159.) Summary judgment for the employer should be granted where, "given the strength of the employer's showing of innocent reasons, any countervailing circumstantial evidence of discriminatory motive, even if it may technically constitute a prima facie case, is too weak to raise a rational inference that discrimination occurred." (*Guz, supra*, at p. 362.)

If the employer meets the initial burden, to avoid summary judgment the employee must produce "substantial responsive evidence that the employer's showing was untrue or pretextual" thereby raising at least an inference of discrimination. (*Hersant v. Cal. Dept. of Social Services* (1997) 57 Cal.App.4th 997, 1004-1005 (*Hersant*).) A plaintiff's "suspicions of improper motives . . . primarily on conjecture and speculation" are not sufficient to raise a triable issue. (*Kerr v. Rose* (1990) 216 Cal.App.3d 1551, 1564.) Evidence showing facts inconsistent with the employer's claimed reasons tends to prove the employer's discriminatory intent; that the stated reason was mere pretext. (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1735; *Reeves v. MV Transp., Inc.* (2010) 186 Cal.App.4th 666, 675. "Pretext" does not require proof that discrimination was the only reason for the employer's action. It is enough that discrimination was a determinative factor; i.e., that discriminatory intent was a substantial motivating factor in the employer's decision to take the adverse action. (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 (*Harris*); *Mendoza v. Western Med. Ctr. Santa Ana* (2014) 222 Cal.App.4th 1334, 1341-1342) A

"plaintiff's subjective beliefs in an employment discrimination case do not create a genuine issue of fact; nor do uncorroborated and self-serving declarations." (*King, supra,* 152 Cal.App.4th at p. 433; see also *Doe v. Dept. of Corrections & Rehabilitation* (2019) 43 Cal.App.5th 721, 733, quoting *King*.)

VI. Analysis

Tesla's facts are as follows: Plaintiff was hired by SolarCity as a Field Energy Advisor in San Mateo. (Tesla's Separate Statement of Undisputed Material Facts ("UMF"), No. 1.) In 2015, he accepted an offer to relocate to Utah and moved later that year. (Tesla's UMF, No. 2.) He lived in Utah from the time he relocated through the end of his employment. (Tesla's UMF, No. 3.) Skinner promoted Plaintiff to Contract Reassignment Supervisor in August 2015 and he reported to Amber Henwood Mantooth in the Salt Lake City office. (Tesla's UMF, No. 4.) On June 12, 2016, Plaintiff was promoted to Asset Control Manager in Salt Lake City. (Tesla's UMF, No. 5.) He requested and was approved for a baby bonding leave of absence under the FMLA, which went from April 11, 2016 to June 6, 2016. (Tesla's UMF, No. 6.) He requested and was approved for an FMLA leave of absence from March 9, 2017 to March 24, 2017 to take care of his wife and he returned to work on March 27, 2024. (Tesla's UMF, No. 7.) Plaintiff was aware he needed to submit a medical certification by February 8, 2017, for his request to be approved, but he failed to do so. (Tesla's UMF, No. 8.) He was provided an extension until February 16, 2017, however approval of his request was delayed as a result. (Tesla's UMF, No. 9.) He was absent from work beginning February 22, 2017, but he requested that his FMLA leave begin on March 9, 2017 and he used his paid time off to account for the time before his leave officially began. (Tesla's UMF, No. 10.) Plaintiff did not ask to have the paid time off before his leave officially began to be designated as protected family care leave. (Tesla's UMF, No. 11.) No one told Plaintiff that he would lose his job if he did not return to work or if he took additional time off. (Tesla's UMF, No. 12.) There are no other employees that he believes were treated better than him by Tesla because they did not take the same time off. (Tesla's UMF, No. 13.)

Skinner repeatedly flew from San Mateo to Utah during Plaintiff's time off, to directly manage his team. (Tesla's UMF, No. 14.) During this time, she discovered that Plaintiff was not managing,

guiding, or directing his team at all. (Tesla's UMF, No. 15.) For instance, Plaintiff regularly approved timecards for one employee who consistently did not work a full workday. (*Ibid.*) Plaintiff was supposed to conduct one-on-one meetings with another employee, but he did not follow up with him, which resulted in that employee reading leisure books during work hours because he had no work assignments. (*Ibid.*)

After Plaintiff returned in April 2017, Skinner met with him in the Salt Lake City office to discuss issues with his performance that she had discovered while he was out. (Tesla's UMF, No. 16.) Skinner offered Plaintiff the option to return to his former position, rather than facing discipline for performance issues in his manager position and Plaintiff chose to return to his former position and reported to Mantooth again. (Tesla's UMF, Nos. 17-18.) Mantooth was his manager from April 2017 until his termination in October 2017. (Tesla's UMF, No. 20.) Skinner was still in Plaintiff's chain of command, but she was not his direct supervisor after he returned to his former role. (Tesla's UMF, No. 21.)

In the fall of 2017, Tesla underwent a companywide reduction in force ("RIF") as part of a general corporate restructure following its acquisition of SolarCity. (Tesla's UMF, No. 22.) The benchmark used to determine which employees would be laid off was based on the results from the 2017 Annual Performance Reviews. (Tesla's UMF, No. 23.) After all the annual reviews were submitted, unbeknownst to the reviewers, Tesla issued a directive that any employee who received a 2 or below out of 5 on their annual performance review would be terminated as part of the company-wide RIF. (*Ibid.*) Mantooth and Skinner gave Plaintiff a 2 on his 2017 Annual Performance Review. (Tesla's UMF, No. 24.) On October 18, 2017, Plaintiff was terminated as part of Tesla's RIF based on his 2017 Annual Performance Review. (Tesla's UMF, No. 25.) Plaintiff was terminated in the Salt Lake City office. (Tesla's UMF, No. 26.) He was one of several hundred employees in Tesla Energy (and one of five employees reporting to Skinner) who were terminated throughout 2017 as part of the corporate restructuring and RIF. (Tesla's UMF, No. 27.)

Plaintiff's additional material facts are as follows: When he was hired in 2013, among his hiring documents was one entitled, "**CALIFORNIA EMPLOYEES ONLY"**: At-Will Employment, Confidential Information, Invention Assignment and Arbitration Agreement (the "Arbitration

Agreement"), which Plaintiff understood only applied to California employees. (Plaintiff's Additional Material Facts ("AMF"), No. 1.) Plaintiff lived and worked in California when he was hired and anticipated continuing to live and work there. (Plaintiff's AMF, No. 2.) In 2014, he was selected as a member of SolarCity's Contract Reassignment team, effective January 1, 2015. (Plaintiff's AMF, No. 4.) In Spring 2015, Plaintiff reached out to Skinner and Curtis Cook about his interest in a more senior and/or supervisory role and around that time, SolarCity notified Plaintiff that their overall group was relocating out of state. (Plaintiff's AMF, No. 6.) They were also notified that anyone who remained in California could retain their jobs but would not have an opportunity for future promotion within the company. (*Ibid*.) Accordingly, Plaintiff agreed to relocate to Salt Lake City, Utah as of September 1, 2015. (Plaintiff's AMF, No. 7.) In July 2015, while Plaintiff was still living and working in California, he was promoted to a supervisor position for SolarCity. (Plaintiff's AMF, No. 8.)

After he transferred to Utah, he continued to report to and take direction from his managers and directors in California including Skinner and Senior Vice President, Fiona Taylor, who were based in California and worked from SolarCity's headquarters in San Mateo. (Plaintiff's AMF, Nos. 9-10, 23.) In Fall 2016, Tesla acquired SolarCity and began operating it as a wholly owned subsidiary. (Plaintiff's AMF, No. 11.) Plaintiff continued to report to Tesla/SolarCity management, who were in Santa Clara County (Tesla headquarters) and San Mateo. (Plaintiff's AMF, No. 12.) His personnel file was maintained in SolarCity's California offices, he continued to receive direction and management, his employment benefits and access to and receipt of his payroll and tax filings, all of his termination paperwork, and human resources and other personnel guidance emanated from Tesla/SolarCity's California headquarters. (Plaintiff's AMF, No. 13.)

Plaintiff was required to engage in regular conferences and weekly one-on-one meetings with Skinner and others concerning his team's work and direction in Utah. (Plaintiff's AMF, No. 14.) Skinner typically managed Murrain and his team from California. (Plaintiff's AMF, No. 17.) During Plaintiff's 2016 CFRA/FMLA leave, Skinner pressured Plaintiff to return to work as soon as possible. (Plaintiff's AMF, No. 18.) She attempted to negotiate his leave by offering him the option to take every other Friday off, rather than the uninterrupted leave he requested. (Plaintiff's AMF, No. 20.) Upon his return from leave to care for his wife due to her breast cancer and related surgery, Skinner

began criticizing Plaintiff's performance and in one instance, while reprimanding him, she said, he was "always tired. Is it your family?" (Plaintiff's AMF, Nos. 21-22.)

On January 15, 2017, Skinner generated a "Talent Check" for Plaintiff for January 9, 2017 to January 15, 2017 and she evaluated his performance during that period. (Plaintiff's AMF, No. 26.) In his January 2017 evaluation, he received positive ratings for his performance and Skinner responded "Definitely" when prompted whether she would "always want [Plaintiff] on her team," and she responded, "Most Likely," when prompted whether she would recommend him for increased responsibilities within a year. (Plaintiff's AMF, No. 27.) On January 20, 2017, Plaintiff informed Tesla about his wife's cancer diagnosis and requested family care leave to provide her care following her double mastectomy from February 22, 2017 to April 15, 2017, however, his leave was only approved from March 9, 2017 to March 24, 2017. (Plaintiff's AMF, Nos. 28-30.) Plaintiff took personal/sick leave from February 22, 2017 until March 8, 2017, which was characterized by Defendants as "Professional Time Off." (Plaintiff's AMF, Nos. 32-33.) After he returned, Plaintiff asked Skinner for assistance with his workload because his wife and young children still needed his care and assistance. (Plaintiff's AMF, No. 38.) While he was on leave, his workload increased, in part, because it was not addressed and Skinner instructed him to increase his relocation caseload, but she failed to inform him of substantial changes that were enacted in the relocation process during his leave. (Plaintiff's AMF, No. 40.)

On April 3, 2017, Skinner went to Utah to discipline Plaintiff, and she began a campaign against him, starting with unsubstantiated criticisms, threatening discipline. (Plaintiff's AMF, Nos. 41-42.) During the meeting, Skinner informed Plaintiff he could remain in his managerial position and be written up or be demoted to his prior position and report to his former manager Mantooth. (Plaintiff's AMF, No. 47.) Plaintiff feared retaliation and further backlash from Skinner and it was clear to him that he would have to accept the demotion if he wanted to remain employed. (Plaintiff's AMF, No. 48.) Plaintiff's functions were transferred to Michael Watts, his former subordinate and the person who replaced him in the managerial role. (Plaintiff's AMF, No. 50.)

In October 2017, Plaintiff received a copy of his Annual Performance Review and while he received positive ratings from Mantooth, Skinner overrode those ratings and issued Plaintiff a 2 out of

5. (Plaintiff's AMF, Nos. 51-54.) Taylor and Skinner had authority and discretion regarding who would be terminated in Fall 2017, and around September 27, 2017, they recommended retaining Plaintiff. However, on October 4, 2017, they decided to fire Plaintiff. (Plaintiff's AMF, Nos. 55-57.) Skinner's decision was based, in part, on Watts' report to her asserting that Plaintiff was bullying him, creating a hostile work environment, and that he told others he had retained a lawyer in case he was fired. (Plaintiff's AMF, Nos. 59-61.) Skinner conducted her own investigation based on Watts' information but did not elevate his reports to HR and Taylor was unaware of Watts' accusation. (Plaintiff's AMF, Nos. 62-63.) Skinner's reason for Plaintiff's termination was based on the managers' recommendation to do so, however, none of them made their recommendations based on the issues with Watts, and no one spoke to Plaintiff about his interactions with Watts. (Plaintiff's AMF, Nos. 64-66.)

Robert Chavarry, the senior Human Resources Manager whose job duties "included managing and supervising a team of Human Resource generalists who covered the California market," accompanied Skinner to effectuate Plaintiff's termination. (Plaintiff's AMF, Nos. 68-69.) Plaintiff continued to receive his employment benefits, payroll, tax filings, and other personnel guidance from Defendants' headquarters in California. (Plaintiff's AMF, No. 71.) His personnel file was kept in California and when he requested a copy, the California offices provided it. (Plaintiff's AMF, Nos. 72-73.) Taylor and Skinner exercised their discretion to keep other employees who received ratings of 2 out of 5. (Plaintiff's AMF, No. 75.) At his termination meeting, Skinner informed Plaintiff that he was fired because of comments he made about Watts, and he was offered severance with an agreement that he would not pursue legal action. (Plaintiff's AMF, Nos. 76-77.) During his 2016 and 2017 CFRA/FMLA leaves, Skinner interrupted his leave with work-related phone calls and communication. (Plaintiff's AMF, No. 79.) The Arbitrator's Arbitration Management Conference also determined that if the arbitration proceeds, "substantive and procedural law shall be controlled by California statutory and case law. (Plaintiff's AMF, No. 80.)

A. FEHA Application to Nonresidents

Tesla argues FEHA protections do not extend to Plaintiff, a Utah employee who was terminated in Utah. (MPA, p.5:15-17.)

State law embodies a presumption against extraterritorial application of its statutes. (*Diamond Multimedia, Sys., Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1059.) Applying this presumption, California courts have held that FEHA does not apply to non-residents employed outside the state when the tortious conduct did not occur in California. (*Campbell v. Arco Marine, Inc.* (1996) 42 Cal.App.4th 1850, 1860 (*Campbell*).) California Code of Regulations, Title 2, section 11008, provides, as relevant, "employees located outside of California are not themselves covered by the protections of the [FEHA] if the allegedly unlawful conduct did not occur in California, or the allegedly unlawful conduct was not ratified by decisions makers or participant in unlawful conduct located in California." (Cal. Code Regs. Tit. 2, § 11008, subd. (d)(1)(c).) Thus, for a claim to fall within FEHA's reach, a plaintiff residing outside California is "required to plead at a minimum that he was either employed in California or that the discriminatory conduct occurred in California." (*Gonsalves v. Infosys Techs. Ltd.* (N.D.Cal May 6, 2010) 2010 U.S. Dist. LEXIS 44401, at *5.)

Tesla relies on *Campbell, supra,* 42 Cal.App. 4th 1850, in which the California Court of Appeal addressed FEHA's presumption against extraterritoriality. In *Campbell*, the plaintiff was a Washington state resident who was employed by a company based in California. (*Id*. at p. 1852.) The plaintiff alleged several incidents of sexual harassment against a colleague, which occurred on a ship that was out at sea during the time of the incidents, except one which occurred in Washington. (*Id*. at p. 1858.) The court reviewed the statute and its legislative history and concluded that the presumption against extraterritoriality extended to FEHA. (*Id*. at pp. 1858-1860.) The court rejected the view that FEHA applies "to all California-based employers regardless of where the aggrieved employee resides and regardless of where the tortious conduct took place." (*Id*. at p. 1859.) Specifically, the court found the plaintiff's "relationship with California [was] slight," and while the company was based in California, "no one in its headquarters participated or ratified the conduct." (*Ibid*.) The court held that FEHA was "not intended to apply to non-residents, where… the tortious conduct took place outside of [California's] territorial boundaries." (*Id*. at p. 1852.)

In *Sims v. WorldPac, Inc.* (N.D.Cal. Feb. 22, 2013) 2013 U.S. Dist. LEXIS 24740 at *1 (*Sims*), a Washington resident brought a FEHA claim for age discrimination. (*Ibid*.) He specifically identified the individuals who "engaged in the alleged discriminatory conduct and retaliatory

conduct." (*Id*. at *3.) The court denied the defendant's motion to dismiss on the basis of extraterritoriality because the individuals were based in California when they took those actions. (*Ibid*. ["Sims also alleges that Cushing was in California when he and Healy advised Sims that Sims would no longer be permitted to work from his home in Arkansas…Sims also alleges that Cushing made the decision to terminate him in California, and made all arrangements associated with his termination in California"].)

Plaintiff argues Skinner and Taylor worked at Defendants' California headquarters and they made the decisions which lead to adverse actions in California. (Opp., p.8:20-22.) He further argues he lived and worked in California from 2013 to 2015 and he was promoted by Skinner and managed at least four subordinates who worked in SolarCity's headquarters. (Opp., p.8:26-p.9:1; Plaintiff's AMF, Nos. 1, 7-8.) It is undisputed that Skinner and Taylor were based in California and worked from the San Mateo headquarters. However, Plaintiff contends Skinner and Taylor made their decisions and/or ratified them in California. In support, Plaintiff relies on Taylor's testimony, which states,

> Q. And is that something that you would have to approve before that promotion could be affected?
>
> A. Yes, I think probably technically I would have the last like signoff for all the promotions on my team.
>
> Q. Okay. How about for demotions on your team, would you technically have to sign off on those as well?
>
> A. Yes.

(Taylor Depo., p.44:10-18.)

Additionally, Skinner testified,

> Q. What office would you go to regularly?
>
> A. I would go to the San Mateo office. I tried to get to Utah for a full week – really, I tried to get to Utah for two weeks, so I'd spend one weekend, so ten working days, and ten working days in San Mateo. A lot of the time it was just one week I could get to Utah.
>
> Q. Okay. So one week --

A. One week a month for sure, in general, and then a lot of the times, it was two weeks. (Skinner Depo., p.36:19-37:3.)

While it appears that the two adverse employment actions (Plaintiff's demotion and his termination) occurred in Utah, Plaintiff's evidence establishes a triable issue of material fact as to whether the allegedly unlawful conduct was ratified by the decision makers (i.e., Skinner and Taylor) in California. Therefore, the Court cannot conclude, as a matter of law, that Plaintiff is precluded from FEHA protections and summary adjudication cannot be granted on this basis. Thus, Tesla's motion for summary adjudication of the first, fifth, and seventh causes of action is DENIED.

B. *McDonnell Douglas Test*

Tesla argues the second, fourth, sixth, eighth, and ninth causes of action fail because it can provide a legitimate, non-discriminatory reason for the adverse employment actions. (MPA, p.7:21-23.) The Court agrees.

FEHA retaliation claims are analyzed under the *McDonnell Douglas* burden shifting framework. (See *Flait v. N. Am. Watch Corp.* (1992) 3 Cal.App.4th 467, 475-476.) The framework also applies to CFRA retaliation claims and FMLA retaliation claims, as well as ADA retaliation and discrimination claims. (See *Bareno, supra,* 7 Cal.App.5th at p. 560 [CFRA retaliation claims]; *Nelson v. United Technologies* (1999) 74 Cal.App.4th 597, 613 (*Nelson*) [FMLA retaliation claims]; *Wilson v. Murillo* (2008) 163 Cal.App.4th 1124, 1134 [ADA retaliation and discrimination claims].)

To establish a legitimate, nondiscriminatory reason for the employment actions, Tesla provides Skinner's declaration in which she states during Plaintiff's February 22, 2017 to March 26, 2017 leave, she became aware of numerous shortfalls in the way Plaintiff had been managing, guiding and directing his team. (Skinner Decl., ¶ 4.) "Among other issues, I discovered that [Plaintiff] had regularly approved fraudulent timecards for an employee who consistently did not work a full day but whose timecard reflected a full day of work. I also learned of an employee under his supervision who performed no work during the workday, instead spent his time doing pleasure reading because he had no work assigned as a result of Fernando's failure to conduct one-on-one meetings with the employee. I also noted that Fernando had failed to properly escalate a number of important issues to my level as required and that he had been hoarding work." (*Ibid*.) After Plaintiff returned from leave, Skinner met

with him to discuss the performance issues she discovered, informed him that she was going to formally write him up, and told him that he could return to his previous role, if he wanted to. (Skinner Decl., ¶ 5.)

Skinner also states,

> Fernando's 2017 Annual Performance Review covered the period from July 1, 2016 to June 30, 2017. Because Fernando reported to both [Mantooth] and to me during that period, we both prepared his review. Based on our assessment of his performance, Fernando received an overall rating of "2-Needs Improvement" out of a total score of 5 on his 2017 Annual Performance Evaluation and his 2017 Supplemental Performance Review for the portion of time that he was a Contract Reassignment Supervisor. He scored "2-Needs Improvement" on all categories: Mindset and Attitude; Innovation and Initiative; Collaboration and Leadership and High Productivity and Quality Results.

(Skinner Decl., ¶ 6.)

She further states, "the ratings and comments reflected on Fernando's Annual Performance Review and Supplemental Performance Review were solely the result of, and are reflective of, Fernando's skills, abilities, and performance in his assigned roles during the reporting period. The fact that Fernando took an authorized leave of absence played no role in the assessment of his performance." (Skinner Decl., ¶ 7.) This is sufficient to satisfy Tesla's burden of showing there was a legitimate, non-discriminatory reason for his termination. (See *Nakai v. Friendship House Assn. of American Indians, Inc.* (2017) 15 Cal.App.5th 32, 38-39 ["A reason is 'legitimate' if it is 'facially unrelated to prohibited bias, and which if true, would thus preclude a finding of discrimination'"].) Thus, the burden shifts to Plaintiff to show Tesla's legitimate reason is merely pretext.

"Pretext may be inferred from the timing of the discharge decision, the identity of the decisionmaker, or by the discharged employee's job performance before termination. (*Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 224 (*Hanson*).) Suspicious timing is not alone sufficient to raise a triable issue. (*Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 332 (*Arteaga*).) "In the classic situation where temporal proximity is a factor, an employee has worked for the same employer for several years, has a good or excellent performance record and then, after engaging in

some type of protected activity…is suddenly accused of serious performance problems, subjected to derogatory comments about the protected activity, and terminated. In those circumstances, temporal proximity, together with *other* evidence, may be sufficient to establish pretext." (*Id*. at p. 353-354.) The plaintiff cannot "simply show the employer's decision was wrong, mistaken, or unwise. Rather, the employee 'must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them "unworthy of credence," and hence infer "that the employer did not act for the [asserted] non-discriminatory reasons."'" (*McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 389-390.)

Plaintiff argues his 2017 performance rating was not the sole or automatic criteria for deciding who would be subject to the RIF and instead the termination decisions were based on his Annual Performance Review *or* any subjective criteria imposed by individual managers, at their discretion. (Opp., p.10:31-11:3.) He provides Taylor's deposition, in which she testified that while everyone who commented on performance for the reviews was a factor, she and Skinner made the decision about which employees to include in the RIF. (Plaintiff's Exh. H, Taylor Depo., p. 116:24-118:13.) According to communications on September 27, 2017, Skinner and Taylor considered Plaintiff an employee they planned to keep (thus, not included in the RIF). (*Id*. at pp. 179:4-24.) The reason to keep him stated, "his review was based on his performance as a manager from June 2016 to April 2017. And I submit that that was April 3rd of 2017 when that transfer was chosen. Fernando stepped down into a supervisor position in April of 2017. In his new position, which he has had for six months, he would be rated a three." (*Id*. at p. 179:24-180:4.) Plaintiff also relies on Chavarry's deposition, in which he was asked,

> Q. Okay. And so, in your best estimate, does that mean that the managers had some discretion in deciding whether or not an employee ranked as a 2 would be allowed to stay employed at Tesla either in – on the same team or reassigned or with a [Performance Improvement Plan ("PIP")]?

> A. Without remembering the specifics of the activity, I still think that the business would have retained discretion on the ultimate outcome based on the rating of what to do with the employee.

(Plaintiff's Exh. J, Chavarry Depo., p. 133:8-16.)

During her deposition, Skinner responded to the question what changed between their position on September 27, 2017 and their decision to fire Plaintiff on October 4, 2017, as follows,

> Right. Amber [Mantooth] and Dong and Misty informed me that Fernando's attitude was causing a toxic environment on the floor. That supervisor meeting where Mike [Watts] and Fernando were, he wouldn't stop being – had a vendetta against Mike. Amber had said, "I have tried and tried to talk to him. We've encouraged him to transfer. We encouraged him to move on. He won't do it. He hasn't done it, and we don't want to deal with his aggressive attitude, and we think he's bad for our department."

(Plaintiff's Exh. I, Skinner Depo., p.212:22-213:7.)

Plaintiff contends his 2 out of 5 rating was Skinner's rating alone, which means it was not the collective decision of Skinner, Mantooth, and HR. (Opp., p.11:26-30.) Plaintiff relies on Mantooth's deposition in which she stated Plaintiff reported to her prior to his termination and she gave him a 3 out of 5 rating for his performance. (Plaintiff's Exh. G, Mantooth Decl., p.91:9-23; p.111:10-113:15.) She further testified that she did not recall any complaints about Plaintiff from Watts, whether she documented any discipline based on Plaintiff's interactions with Watts, or whether she brought any complaints to HR about Plaintiff's performance. (Mantooth Depo., p.99:6-100:9.) She further testified that Skinner gave the 2 rating because it was based on performance from July 1, 2016 to June 30, 2017 and Plaintiff reported to Skinner for most of that time. (Mantooth Depo., p.103:24-104:6.) Mantooth assessed Plaintiff's performance in a Supplemental Performance Review and she rated his performance as satisfactory (or a 3 out of 5). (Mantooth Depo., p.118:23-119:25.) She also testified that based on Plaintiff's performance alone, she did not think he should be terminated, however, there were "interpersonal exchanges," and "more of attitude and events that had happened," which led to the change from September 27, 2017 to October 9, 2017. (Mantooth Depo., p.131:12-132:11.)

Although Plaintiff suggests the inconsistencies with the 2017 rating demonstrates pretext, the inconsistencies have been explained through Tesla's evidence, namely that the ratings were provided by whoever Plaintiff reported to for the relevant period and then the review was calibrated. (Plaintiff's Exh. 74.)[2]

Plaintiff further argues his purported behavior with Watts also constitutes pretext as Skinner knew of the conduct but failed to take any action until she spoke to Watts between September 26, 2017 and October 4, 2017. Plaintiff contends "in the months or weeks before making her termination decision, [Skinner] was aware of 'rumblings' concerning the alleged friction between Watts and Plaintiff yet she failed to inquire about it." (Opp., p.13:14-16.) However, Plaintiff fails to provide any evidence in support of his assertion. Rather, Skinner's testimony establishes that she learned of the conflict between Plaintiff and Watts during the interim between September 27 to October 4, 2017. (See Skinner Decl., p. 212:18-213-7.)

Therefore, Plaintiff cannot show pretext based on Skinner's alleged knowledge of the conduct between Plaintiff and Watts. Moreover, Plaintiff fails to identify or provide any evidence that Skinner did not take action until after she learned of Plaintiff's protected act or characteristic. (See Opp., p.13:7-9; *Soria v. Univision Radio L.A., Inc.* (2016) 5 Cal.App.5th 570, 596-576.)

Plaintiff attempts to demonstrate pretext through the temporal proximity of the adverse action, namely his demotion, which occurred shortly after he returned from his leave in 2017. Plaintiff states he received positive performance ratings prior to his leave, and he received negative performance ratings after his leave. However, this overlooks the fact that Skinner discovered issues with Plaintiff's performance *while* she was filling in for him during his leave in 2017. It was that discovery that resulted in Plaintiff's subsequent demotion and his resulting termination, not his protected conduct of taking family leave. Plaintiff does not provide any evidence to controvert this beyond the timeline of events, which is insufficient to establish pretext, without more. (See *Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 868 ["temporal proximity…does not, without more, suffice…to satisfy the employee's burden to show a triable issue of fact on whether the employer's articulated reason was

[2] The numbered exhibits refer to documents that Tesla produced and the parties stipulated as to its authenticity. (See Peck Decl., ¶ 15.)

untrue or pretextual"].) Plaintiff thus fails to provide "substantial responsive evidence that the employer's showing was untrue or pretextual" and as a result, he fails to raise at least an inference of discrimination or that he was terminated *because* he took family leave. (*Hersant, supra,* 57 Cal.App.4th at pp. 1004-1005.)

C. First Cause of Action-CFRA Interference (Gov. Code, § 12945.2)

The CFRA, codified in Government Code section 12945.2, "is intended to give employees an opportunity to take leave from work for certain personal or family medical reasons without jeopardizing job security." (*Bareno v. San Diego Community College Dist.* (2017) 7 Cal.App.5th 546, 558.) Under the CFRA, it is unlawful, "for an employer to refuse to hire or to discharge, fine, suspend, expel, or discriminate against any individual because of…[a]n individual's exercise of the right to family care or medical leave provided by the CFRA. (Gov. Code, § 12945.2, subd. (k)(1).) It is also unlawful "for an employer to interfere with, restrain, or deny the existence of, or the attempt to exercise, any right provided under" the CFRA. (Gov. Code, § 12945.2, subd. (t).)

"Violations of the CFRA generally fall under two types of claims: (1) interference… and (2) retaliation claims in which an employee alleges that [he] suffered an adverse employment action for exercising [his] right to CFRA leave." (*Rogers v. County of Los Angeles* (2011) 198 Cal.App.4th 480, 487-488.) The elements for a retaliation claim are: "(1) the defendant was an employer covered by CFRA, (2) the plaintiff was an employee eligible to take CFRA leave, (3) the plaintiff exercised [his] right to take leave to a qualifying CFRA purpose, and (4) the plaintiff suffered an adverse employment action, such as termination, fine, or suspension because of [his] exercise of [his] right to CFRA leave." (*Faust v. California Portland Cement Co.* (2007) 150 Cal.App.4th 864, 885 (*Faust*).) *McDonnell Douglas* burden shifting applies in CFRA retaliation cases. (*Ibid*.; see also *Bareno, supra,* 7 Cal.App.5th at p. 560.)

For reasons stated above, Tesla submits evidence that supports a reasonable inference that it had a legitimate, non-discriminatory reason for terminating Plaintiff and Plaintiff fails to provide evidence to support a reasonable inference that the reason is pretextual. Thus, Tesla's motion for summary adjudication of the second cause of action is GRANTED.

D. Third Cause of Action- FMLA Interference

The FMLA provides job security to employees who must be absent from work because of their own illnesses, to care for family members who are ill, or to care for new babies. (*Bachelder v. Am. W. Airlines, Inc.* (9th Cir. 2001) 259 F.3d 1112,1119 (*Bachelder*).) "Congress recognized that, in an age when all the adults in many families are in the work force, employers' leave policies often do not permit employees reasonably to balance their family obligations and their work life. The result, Congress determined, is 'a heavy burden on families, employees, employers, and the boarder society.'... In response to these problems, the Act entitled covered employees to up to twelve weeks of leave each year for their own serious illnesses or to care for family members and guarantees them reinstatement after exercising their leave rights." (*Ibid*. [citations omitted].)

There are five elements for a prima facie case of interference with such rights. The employee must establish: (1) they were eligible for the FMLA protections, (2) their employer was covered by the FMLA, (3) they were entitled to leave under the FMLA, (4) they provided sufficient notice of his or her intent to take leave, and (5) their employer denied them FMLA benefits to which they were entitled. (*White v. County of Los Angeles* (2014) 225 Cal.App.4th 690, 701.)

An interference claim under the FMLA does not involve the burden-shifting analysis articulated by the United States Supreme Court in *McDonnell Douglas.* (*Faust, supra,* 150 Cal.App.4th at p. 879.) As stated in *Bachelder,* "there is no room for a *McDonnell Douglas* type of pretext analysis when evaluating an 'interference' claim under this statute. (*Bachelder, supra,* 259 F.3d at p. 1131.) "A violation of the FMLA 'simply requires that the employer deny the employee's entitlement to FMLA." (*Faust, supra,* 150 Cal.App.4th at p. 879.)

Plaintiff alleges Defendants unreasonably delayed approval of his leave and discouraged him from taking the full amount of FMLA leave that he was entitled to. (Complaint, ¶ 143.) He further alleges Defendants failed to provide him with the proper forms, notice, and information concerning his rights and responsibilities under FMLA. (Complaint, ¶ 144.) Defendants contacted and pressured him into returning before his leave ended and subjected him to harassment and intimidation regarding his leave request. (Complaint, ¶¶ 145-146.)

Tesla argues Plaintiff requested and was approved for baby bonding leave under the FMLA from April 11, 2016 to June 6, 2016. (Tesla's UMF, No. 5.) It further argues he requested and was

approved for FMLA leave from March 9, 2017 to March 24, 2017 to care for his wife. (Tesla's UMF, No. 6.) Tesla relies on the following portion of Plaintiff's deposition testimony,

> Q. The first part of the email says that [as read]: "We have been alerted by your Workday request that you need to take a leave of absence to care for a family member beginning March 9, 2017." Does that refresh your memory that you submitted a Workday request for a leave of absence?
>
> A. I don't know if it was a Workday request. I don't remember how I submitted it. But the document states that, so…
>
> Q. Did you understand that you needed to submit a medical certification to have your leave of absence approved?
>
> A. Yes.
>
> Q. Did you understand that you needed to submit a completed medical certification by February 8, 2017?
>
> A. No.
>
> Q. Look down in the "Action Items" section of the email, the first bullet point. It states: "To properly designate your leave of absence, we will need your family member's health care provider to complete the attached FMLA Medical Certification-Family Member. We will need this back within 15 days, no later than 2/8/17." Does that refresh your memory…?
>
> A. Yes.
>
> Q. When you made your request for leave, did you ask [for] the leave [to] begin on March 9, 2017?
>
> A. Yes.
>
> Q. Did you use PTO to take time off of work from February 22, until March 8, 2017?
>
> A. Yes.
>
> Q. Did you miss the February 8 deadline for submitting this completed medical certification?
>
> A. Yes.

(Plaintiff's Depo., p. 53:16-55:8.)

Plaintiff further testified that he was given an extension to February 16, 2017 to provide the certification and he missed that deadline as well. (Plaintiff's Depo., p. 55:19-56:2.) Plaintiff was given another extension through February 21, 2017, to provide the medical certification and he met that deadline. (Plaintiff's Depo., p. 56:12-57:2.) Plaintiff testified that he did not ask for his leave to begin earlier than March 9, 2017 and he did not recall asking anyone at SolarCity for the PTO time he took in February through March 8, 2017 to be designated as protected family care leave. (Plaintiff's Depo., p. 61:10-21.) He was informed that if he took leave before his medical certification was submitted, he could be considered to have abandoned his job. (Plaintiff's Depo., p. 61:23-62:20.) But no one told him that he would be terminated if he did not return to work at the end of his leave or if he took additional time off after his leave ended in March 2017. (Plaintiff's Depo., p.62:21-63:4.) Plaintiff's time off from February 22, 2017 to March 8, 2017 was not treated as FMLA/CFRA leave because Plaintiff failed to submit the medical certification in time for that period. Additionally, by his own admission, he did not ask for the leave to be designated as protected family leave.

29 C.F.R. § 825.300, subdivision (d), provides, "the employer is responsible in all circumstances for designating leave as FMLA-qualifying, and for giving notice of the designation to the employee as provided in this section. When the employer has enough information to determine whether the leave is being taken for a FMLA-qualifying reason (e.g., after receiving a certification), the employer must notify the employee whether the leave will be designated and will be counted as FMLA within five business days absent extenuating circumstances. (29 C.F.R. § 825.300, subd. (d)(1).) Plaintiff argues he provided the certification on February 21, 2017, one day before the first day he originally requested leave. However, this was after the deadline for Plaintiff's original request for time off. Moreover, Tesla had five business days to notify Plaintiff whether his leave would be designated, thus, Plaintiff cannot establish that Tesla failed to meet its notice obligation because it did not notify him by February 22, 2017.

29 C.F.R. §825.220, prohibits an employer "from interfering with, restraining, or denying the existence of (or attempts to exercise) any rights provided by the Act." (29 C.F.R. § 825.220, subd. (1).) Plaintiff argues Skinner frequently interrupted his CFRA/FMLA leave with work-related phone

calls, electronic communications, and voice messages. (See Camillia Murrain Decl., ¶¶ 14, 18-19 [detailing conduct during Plaintiff's 2016 protected family leave].) Plaintiff also provides his deposition testimony, which states,

> Q. In your lawsuit, you allege that [Skinner] tried to negotiate with you to take off less time for your second child's birth. What do you mean by this?
>
> A. She asked me if I could take – if I could come work – take every other Friday off and asked me if I could just come back a little sooner because she was without a manager in that position. And she was doing all of the work, basically.
>
> Q. Did you have any other discussions with her about your leave?
>
> A. No.
>
> Q. Did she tell you that you had to do that, or was she just making a request?
>
> A. She was making a request. I spoke to my wife, and we decided that it was not in our best interest. But then I came back early because of it.

(Plaintiff's Depo., p.49:4-21.)

Tesla did not make any argument regarding this point in its moving papers and it relies on new evidence in its replies papers, which the Court declines to consider. (See *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-1538 ["The general rule of motion practice…is that new evidence is not permitted with reply papers. This principle is most prominent in the context of summary judgment motions…"].)

Based on the foregoing, Plaintiff establishes there is a triable issue of material fact as to whether Skinner interfered with his protected family leave. Thus, Tesla's motion for summary adjudication of the third cause of action is DENIED.

E. Fourth Cause of Action-FMLA Retaliation

To make out a prima facie case of retaliation, the employee must show that he availed himself of protected rights under the FMLA, that he was adversely affected by an employment decision, and that there is a causal connection between the employee's protected activity and the employer's adverse employment action. (*Hodgens v. General Dynamics Corp.* (1998) 144 F.3d 151, 161.) The

McDonnell Douglas burden shifting framework applies to FMLA retaliation claims. (See *Nelson, supra,* 74 Cal.App.4th at p. 613; *Skrjanc v. Great Lakes Power Serv. Co.* (2001) 272 F.3d 309, 315.)

For reasons stated above, Tesla submits evidence that supports a reasonable inference that it had a legitimate, non-discriminatory reason for terminating Plaintiff and Plaintiff fails to provide evidence to support a reasonable inference that the reason is pretextual. Thus, Tesla's motion for summary adjudication of the fourth cause of action is GRANTED.

F. Sixth Cause of Action-FEHA Retaliation (Gov. Code, § 12940, subd. (h))

Government Code section 12940, subdivision (h), states it is unlawful "for any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part." (Gov. Code, § 12940, subd. (h).) "[I]n order to establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) [they] engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042 (*Yanowitz*).)

For reasons stated above, Tesla submits evidence that supports a reasonable inference that it had a legitimate, non-discriminatory reason for terminating Plaintiff and Plaintiff fails to provide evidence to support a reasonable inference that the reason is pretextual. Thus, Tesla's motion for summary adjudication of the sixth cause of action is GRANTED.

G. Eighth Cause of Action-ADA Associational Discrimination[3]

Larimer v. International Business Machines (7th Cir. 2004) 370 F.3d 698 (*Larimer*) has been described as "the seminal authority on disability based associational discrimination under the ADA (42 U.S.C. § 12101, et seq.)" (*Rope v. Auto-Chlor System of Washington Inc.* (2013) 220 Cal.App.4th 635, 656.) In *Larimer*, the plaintiff was hired by IBM and nine months later, his wife (also an IBM employee) gave birth to premature twins who suffered from multiple serious medical conditions. One year after the plaintiff was hired and three months after his daughters were born, IBM terminated the

[3] ADA discrimination claims are analyzed using the *McDonnell Douglas* burden shifting framework. (See *Yaronski v. Meadows At East Mountain-Barre for Nursing & Rehab., LLC,* (M.D.Pa. Mar. 31, 2023) 2023 U.S. Dist. LEXIS 57588, at *11 (*Yaronski*).)

plaintiff. He sued IBM for associational discrimination under the ADA, alleging it terminated him due to his association with his disabled daughter. (*Id*. at p. 699.) Summary judgment was granted in IBM's favor and the circuit court affirmed. (*Id*. at p. 703.) The court identified "[t]hree types of situations [which] are, we believe, within the intended scope of the rarely litigated…association section. We'll call them 'expense,' 'disability by association,' and 'distraction.' They can be illustrated as follows: an employee is fired (or suffers some other adverse personnel action) because (1) ('expense') his spouse has a disability that is costly to the employer because the spouse is covered by the company's health plan; (2a) ('disability by association') the employee's homosexual companion is infected with HIV and the employer fears that the employee will also have become infected, through sexual contact with the companion; (2b) (another example of disability by association) one of the employee's blood relatives has a disabling ailment that has a genetic component and the employee is likely to develop the disability as well (maybe the relative is an identical twin); (3) ('distraction') the employee is somewhat inattentive at work because his spouse or child has a disability that requires his attention, yet not so inattentive to perform his employer's satisfaction he would need an accommodation, perhaps by being allowed to work shorter hours." (*Id*. at p. 700.) Plaintiff's associational discrimination claim is based on the expense and distraction situations. (Complaint, ¶ 169.)

In *Kelleher v. Fred A. Cook, Inc.* (2d Cir. 2019) 939 F.3d 465, an employee who had a daughter with a severe neurological condition was told he could not leave work immediately after his shifts, his request to work shortened shifts for one week was denied, and he was told his problems at home were not the company's problem. (*Id.* at pp. 466-467.) After he missed a day of work after his daughter suffered a nearly fatal seizure, he was demoted, another request for shortened shifts was denied, and he was terminated upon arriving to work 10 to 15 minutes late one day. (*Id*. at p. 467.) The court reversed the trial court's dismissal of the complaint and reasoned, "[although] the ADA does not require an employer to *provide* a reasonable accommodation to the nondisabled associate of a disabled person, an employer's *reaction* to such a request for accommodation can support an inference that a subsequent adverse employment action was motivated by associational discrimination. Thus, in this case, [the employer's] demand that the plaintiff 'leave his personal problems at home' after he

requested one week of shortened workdays supported his claim that his termination was motivated by associational discrimination." (*Id*. at p. 469 [emphasis original].)

Here, there is no such conduct. At most, Plaintiff states, "in the context of reprimanding his performance, Skinner said to Plaintiff that he was 'always tired. Is it your family?'" (Plaintiff's AMF, No. 22; Plaintiff's Depo., p.86:20-87:16.) However, according to the Plaintiff's own description, the statement was made in the context of his performance, not in relation to his leave, a request for leave, or any other request for accommodation. Moreover, as the Court stated above, Tesla sufficiently demonstrates a legitimate, non-discriminatory reason for the adverse employment actions and Plaintiff fails to raise a triable issue of material fact that the reason was pretextual. Thus, Tesla's motion for summary adjudication of the eighth cause of action is GRANTED.

H. Ninth Cause of Action-ADA Retaliation

42 U.S.C. § 12203, provides, "[n]o person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the Act." (See 42 U.S.C § 12203, subd. (a).) ADA retaliation claims are analyzed using the *McDonnell Douglas* burden shifting framework. (See *Yaronski, supra,* 2023 U.S. Dist. LEXIS 57588 at p. *11.)

As the Court stated above, Tesla sufficiently demonstrates a legitimate, non-discriminatory reason for the adverse employment actions and Plaintiff fails to raise a triable issue of material fact that the reason was pretextual. Thus, Tesla's motion for summary adjudication of the ninth cause of action is GRANTED.

I. Tenth Cause of Action-Wrongful Termination in Violation of Public Policy

"To establish a claim for wrongful discharge in violation of public policy, each of the following must be proved, (1) an employer-employee relationship, (2) termination or other adverse employment action, (3) termination of plaintiff's employment was a violation of public policy or more accurately, a 'nexus' exists between the termination and the employee's protected activity." (*Holmes v. General Dynamics* (1993) 17 Cal.App.4th 1418, 1426.) Protected conduct includes exercising a statutory right or privilege. (*Yau v. Allen* (2014) 229 Cal.App.4th 144, 155.)

Tesla argues the tenth cause of action fails if all of the other claims fail. (MPA, p. 10:22-25.) However, the motion has been denied for some claims. Thus, Tesla's motion for summary adjudication of the tenth cause of action is DENIED.

Calendar Line 3
Case Name: *A. A., a minor, by and through his GAL, Shannon McDaniel v. Palo Alto Unified School District*
Case No.: 22CV401300

Before the Court is Defendant Palo Alto Unified School District's ("PAUSD") motion for summary judgment or, alternatively, summary adjudication against Plaintiff's complaint. Pursuant to the California Rule of Court, Rule 3.1308, the Court issues its tentative ruling.

I. Background

Plaintiff attended the extended school year program at Gunn High School, which started on June 14, 2021. (Undisputed Material Facts ("UMF") 2, 8.) Plaintiff has several diagnoses, including Cerebral Palsy, Autism, generalized Epilepsy, and symptomatic generalized Epilepsy. PAUSD's personnel are familiar with Plaintiff's health conditions and that he experienced seizures. (UMF 1.) Prior to Plaintiff's attendance at the extended school year program, his neurologist prepared Seizure Action Plans ("SAP"), including instructions for administration of Nayzilam nasal spray, if Plaintiff experienced seizures while at the program. (UMF 3.)

Plaintiff's SAP allowed for trained, non-medical school employees to administer Plaintiff's medication under the supervision of the school nurse. (UMF 7.) Hard copies of Plaintiff's SAP were available in binders located in every place Plaintiff could have been during the program. (UMF 11.) Both district nurses, Ms. Orlowski and Ms. Dowell, were staffed to support the Gunn High School site during the extended school year program and were responsible for training the staff to respond to Plaintiff's seizures. (UMF 15, 16.)

On July 2, 2021, Plaintiff experienced a series of seizures while at the extended school year program. Mr. Tostado, Plaintiff's schoolroom teacher, called the onsite registered nurse and Plaintiff's parent to inform them of the situation. During his seizures, Plaintiff had at least two staff members with him – one of whom timed the duration of his seizures. (UMF 23, 24, 27.)

The complaint alleges that Plaintiff's operative SAP stated in bold and capital letters that "adults, including the District's staff, must administer 10 milligrams of Nayzilam nasal spray (5mg/nostril) for any seizure clusters lasting more than five minutes or for any individual seizure lasting greater than three minutes." The Nayzilam spray can reduce the severity of and even stop an

ongoing seizure. (Complaint ¶ 11.) However, during Plaintiff's seizures on July 2, 2021, the medication was not administered despite his mother's request. (UMF 26.)

Plaintiff filed his complaint, through his guardian ad litem, on July 12, 2022, alleging causes of action for (1) negligence, (2) negligent hiring, training, supervision, and retention, (3) negligent supervision, (4) violations of the Americans with Disabilities Act, and (5) Violations of the Rehabilitation Act.

II. Legal Standard

The function of a motion for summary judgment or adjudication is to allow a determination as to whether an opposing party cannot show evidentiary support for a pleading or claim and to enable an order of summary dismissal without the need for trial. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 843.) Code of Civil Procedure section 437c(c) requires "the trial judge to grant summary judgment if all the evidence submitted, and 'all inferences reasonably deducible from the evidence' and uncontradicted by other inferences or evidence, show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (*Adler v. Manor Healthcare Corp.* (1992) 7 Cal.App.4th 1110, 1119.)

"The function of the pleadings in a motion for summary judgment is to delimit the scope of the issues; the function of the affidavits or declarations is to disclose whether there is any triable issue of fact within the issues delimited by the pleadings." (*Juge v. County of Sacramento* (1993) 12 Cal.App.4th 59, 67, citing *FPI Development, Inc. v. Nakashima* (1991) 231 Cal. App. 3d 367, 381-382.) As to each claim framed by the complaint, the defendant moving for summary judgment must satisfy the initial burden of proof by presenting facts to negate an essential element, or to establish a defense. (Code Civ. Pro. § 437c(p)(2); *Scalf v. D. B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1520.)

A defendant may satisfy this burden by showing that the claim "cannot be established" because of the lack of evidence on some essential element of the claim. (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 574, 590.) A defendant must present evidence and not simply point out that plaintiff does not possess and cannot reasonably obtain needed evidence. (*Aguilar, supra*, 25 Cal.4th at 865-66.) Thus, a moving defendant has two means by which to shift the burden of proof under

the summary judgment statute: "The defendant may rely upon factually insufficient discovery responses by the plaintiff to show that the plaintiff cannot establish an essential element of the cause of action sued upon. [Citation.] [Or a]lternatively, the defendant may utilize the tried and true technique of negating ('disproving') an essential element of the plaintiff's cause of action." (*Leyva v. Garcia* (2018) 20 Cal.App.5th 1095, 1103.)

Until the moving defendant has discharged its burden of proof, the opposing plaintiff has no burden to come forward with any evidence. Once the moving defendant has discharged its burden as to a particular cause of action, however, the plaintiff may defeat the motion by producing evidence showing that a triable issue of one or more material facts exists as to that cause of action. (Code Civ. Proc. §437c(p)(2).) Courts "liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party." (*Dore v. Arnold Worldwide, Inc*. (2006) 39 Cal.4th 384, 389.)

III. Request for Judicial Notice

PAUSD's request for judicial notice of the complaint in this matter is GRANTED. The Court may take judicial notice of the records of any court of this state. (Evid. Code, § 452, subd. (d); *People v. Clay* (1962) 208 Cal.App.2d 773, 778 ("There is no question but that a court may take judicial notice of its own records in the very cause before it at the moment.")

IV. Evidentiary Objections

Objections to evidence made in connection with a motion for summary judgment must comply with California Rules of Court, rule 3.1354. Written evidentiary objections must be made in a separate document and must not be re-stated or re-argued in the separate statement. (Cal. Rules of Court, rule 3.1345(b).) Rule of Court 3.1354 requires filing two documents, objections and a separate proposed order on the objections, both of which must be in one of the approved formats set forth in the rule. The court is not required to rule on objections that fail to comply with California Rules of Court, rule 3.1354. (See *Vineyard Spring Estates v. Super. Ct*. (2004) 120 Cal.App.4th 633, 642 [trial courts only have duty to rule on evidentiary objections presented in proper format]; *Hodjat v. State Farm Mutual Automobile Ins. Co*. (2012) 211 Cal.App.4th 1 [trial court not required to rule on objections that do not

comply with Rule of Court 3.1354 and not required to give objecting party a second chance at filing properly formatted papers].)

Here, Plaintiff improperly asserts an objection, in his Separate Statement of Undisputed and Disputed Material Facts ("SSUDMF"), to PAUSD's UMF no. 11, without including a separate document containing his evidentiary objection. Additionally, Plaintiff objects to the admissibility of Adam Davis' and Rosemarie Dowell's Reply Declarations on the grounds that they are new evidence improperly submitted with PAUSD's reply. Plaintiff's evidentiary objections to the reply declarations are submitted on a single document without an accompanied proposed order that complies with the requirements of California Rules of Court, rule 3.1354(c). As such, Plaintiff's evidentiary objections are inadequate.

Similarly, PAUSD submitted a single document setting forth its objections without an accompanying proposed order in violation of California Rules of Court, rule 3.1354(c). Accordingly, the Court declines to rule on the parties' objections based on the above-described defects.

V. Analysis

A. Negligence, Negligent Hiring/Training/Retention, Negligent Supervision

Plaintiff's statutory basis for his negligence claims is Government Code section 815.2. "The elements of a cause of action for negligence are (1) the existence of a legal duty to use due care; (2) a breach of that duty; and (3) the breach as a proximate cause of the plaintiff's injury." (*Federico v. Superior Court (Jenry G.)* (1997) 59 Cal.App.4th 1207, 1210–1211.)

The parties agree that the duty required of an employee of a public school is that which a person of ordinary prudence, charged with his duties, would exercise under the same circumstances. (See, *C.A. v. Wm. S. Hart Union High Sch. Dist.* (2012) 53 Cal.4th 861, 869; *Pirkle v. Oakdale Union Grammar School Dist., City of Oakdale, Stanislaus County* (1953) 40 Cal.2d 207, 210.) This includes "the duty of the school authorities to supervise at all times the conduct of the children on the school grounds and to enforce those rules and regulations necessary to their protection," in a manner "identical to that required in the performance of their other duties," i.e., with ordinary prudence. (See, *C.A. v. Wm. S. Hart Union High Sch. Dist.*, *supra*, 53 Cal.4th at 869; Dailey *v. Los Angeles Unified Sch. Dist*. (1970) 2 Cal.3d 741, 747.) "Such regulation is necessary precisely because of the commonly

known tendency of students to engage in aggressive and impulsive behavior which exposes them and their peers to the risk of serious physical harm." (*Dailey v. Los Angeles Unified Sch. Dist*., *supra,* 2 Cal.3d at 748.) The inference in *Dailey v. Los Angeles* is that regulating students' behavior is expected to decrease the risk of, or prevent, serious physical harm. Indeed, "a failure to prevent injuries caused by the intentional or reckless conduct of the victim or a fellow student" could indicate the school's negligence. (*Dailey v. Los Angeles Unified Sch. Dist., supra*, 2 Cal.3d at 749.) "If a supervisory or administrative employee of the school district is proven to have breached that duty by negligently exposing plaintiff to a foreseeable danger [], resulting in his injuries, and assuming no immunity provision applies, liability falls on the school district under section 815.2." (*C.A. v. William S. Hart Union High School Dist., supra,* 53 Cal.4th at 865.)

Here Plaintiff contends Defendant is directly liable for its failure to hire/supervise/retain competent people to perform their role and is vicariously liable for its employers' failure to implement the operative SAP and to supervise Plaintiff at all times. PAUSD contends there is no evidence supporting Plaintiff's negligence claims based on the following evidence:

Ex. B. - PAUSD's Responses to Plaintiff's special interrogatories, Set One, identifying twenty-one employees who had knowledge of Plaintiff's health condition and were trained to provide and/or assist in providing medical care in accordance with his operative SAP. PAUSD's responses identify the training dates of the individuals and establishes that at least 7 of its staff members received training on June 22, 2021, i.e., nine days prior to Plaintiff's July 2, 2021, seizures.

Ex. C – Excerpts from deposition testimony of the district nurse Rosemarie Dowell stating (1) she and the district nurse Lorebelle were assigned to Plaintiff's school campus during the 2021 extended school year, (2) on June 30, 2021, she received Plaintiff's SAP from his physician instructing administration of Nayzilam nasal spray when one seizure lasting longer than 3 minutes or a cluster of seizures lasting 5 minutes without returning to baseline, (3) District nurses, onsite nurse, classroom teachers and many of the aids received training on Plaintiff's SAP, (4) Mr. Tostado, who was Plaintiff's teacher and in the classroom at the time of his seizure, had received training on Plaintiff's SAP and administration of the nasal spray, (5) the trainings were very specific about the order being dependent on Plaintiff returning to baseline or not, (6) she prepared the seizure incident report and

transcribed Mr. Tostado's and Ms. Ortiz's note that contained detailed timing of Plaintiff's seizures, (7) according to the note, Plaintiff did not have qualifying seizures and therefore the medication was not administered and EMS were not called, (8) the school follows doctor's orders and not parent's requests.

Ex. D – Copy of Plaintiff's SAP for the 2021-2022 school year dated June 30, 2021, on the top left corner of the page. The SAP provides seizure information, basic seizure first aid, emergency protocol, and special considerations and precautions. The SAP instructs calling 911 and administering the Nayzilam nasal spray for seizure clusters lasting longer than 5 minutes without return to baseline or for a prolonged seizure lasting longer than 3 minutes. The SAP was signed by Plaintiff's physician on June 29, 2021, and his mother on June 30, 2021.

Ex. E – Excerpts from the deposition testimony of Christina Ortiz stating (1) Plaintiff's SAP is kept in binders at the nurse's office, Plaintiff's classroom and every place he could be, (2) when she was called to the class room on July 2, 2021, she referred to his SAP that was in a binder in the classroom, (3) we followed the SAP's instruction and we would have administered the medication if it had gotten to that point, but it was not used.

Ex. F - Excerpts from deposition testimony of Lorebelle Orlowski stating (1) she received a SAP for Plaintiff on June 30, 2021, (2) if the SAP was received early in the day, she would have trained proper staff on it before leaving for her vacation the following day, (3) Mr. Tostado was trained about Plaintiff's SAP and administration of the nasal spray prior to start of the extended summer year.

Ex. G – Excerpts from deposition testimony of Eddie Tostado stating (1) he received training about Plaintiff's SAP during the extended summer year once Plaintiff was transferred to his class, (2) on July 2, 2017, Plaintiff was doing well when he entered the classroom but began to have seizures later, (3) Plaintiff's seizures were spaced out at first but he began to have two closer seizures lasting about 2 minutes each and about 10-15 minute break in between returning to baseline, (4) he contacted the nurse and Plaintiff's mother in between the two seizures, (5) Plaintiff had a third seizure lasting close to three minutes when the nurse arrived and we were about to administer the nasal spray but he broke out of it, (6) between the second and third seizure we laid Plaintiff down on the ground, rolled

him to his side, instructed the staff and the students to leave the classroom for Plaintiff's privacy, (7) Plaintiff had two staff with him that day; Christian and Dino began timing the seizures and making sure Plaintiff was safe, and (8) Plaintiff's father arrived shortly after.

The foregoing evidence satisfies Defendant's burden of establishing (a) it hired employees who were competent in their roles, (b) trained appropriate staff about Plaintiff's health condition and his June 30, 2021 operative SAP, (c) its employees supervised Plaintiff at all pertinent times, (d) Plaintiff was supervised when he began having seizures on July 2, 2021, and (e) its employees followed the instruction of the Plaintiff's operative SAP. Therefore, the burden shifts to Plaintiff to demonstrate a triable issue of fact.

Plaintiff primarily contends Defendant relied on a wrong SAP, did not implement the correct SAP, and did not train its staff on the correct SAP. Plaintiff argues the June 30, 2021 SAP required the staff to administer Nayzilam nasal spray for (1) any seizure greater than 3 minutes; (2) 2 or more seizures without return to baseline lasting greater than 3 minutes combined; or (3) 3 or more seizures in 1 hour regardless of whether he returns to baseline. Plaintiff had six seizures between 10 and 11 a.m. on July 2, 2024, and staff were required to administer Nayzilam after the third seizure. At 10:41 a.m., there were two seizures with only a 2-3 second break between the two, and Plaintiff did not return to baseline in between. The first seizure was 2 minutes and 45 seconds, and the second was 2 minutes and 10 seconds. Thus, the combined time was nearly 5 minutes, and the SAP required administration of the medication for 2 or more seizures without a return to baseline lasting greater than 3 minutes combined. Accordingly, the medication needed to be administered after the second seizure after 10:41 a.m.

In support of his position, Plaintiff relies on following evidence:

- Exhibit 1 – A true and correct copy of the June 29, 2019, SAP.
- Exhibit 2 – A true and correct copy of the PAUSD's Emergency Care Plan for Seizures/Nayzilam for Plaintiff.
- Exhibit 3 - A true and correct copy of the PAUSD's Individualized Health Care Plan for Plaintiff that was completed on August 10, 2021.
- Exhibit 4 – Excerpts from deposition of Rosemarie Dowell.

- Exhibit 5 - Excerpts from deposition of Lorebelle Orlowski.
- Exhibit 6 - Excerpts from deposition of Christina Ortiz.
- Exhibit 7 – A true and correct copy of PAUSD's responses to special interrogatories.

Plaintiff's key evidence is his Exhibit 1, which purportedly was the correct version of the SAP PAUSD was required to follow and implement on July 2, 2021. This version instructed administration of the Nayzilam under three distinct circumstances and allegedly modified the previous SAP, which required the administration of the medication under two circumstances. The Court notes, however, that the complaint's allegations pertain to the SAP that required administration of the Nayzilam nasal spray only under two circumstances: (1) for any seizure clusters lasting more than five minutes or (2) for any individual seizure lasting greater than three minutes. This allegation is consistent with the version of the SAP that PAUSD had on file and followed on the date of the incident.

In their reply, PAUSD asserts Plaintiff's claim of different SAP version is newly raised in their opposition and correctly notes that the pleadings delimit the issues for summary judgment. "Thus, a 'defendant moving for summary judgment need address only the issues raised by the complaint; the plaintiff cannot bring up new, unpleaded issues in his or her opposing papers.'' (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1253.) Under *Laabs*, "new factual issues presented in opposition to a motion for summary judgment should be considered if the controlling pleading, construed broadly, encompasses them. In making this determination, courts look to whether the new factual issues present different theories of recovery or rest on a fundamentally different factual basis." (*Id.*, at p. 1257.)

Here, Plaintiff seeks to change it lawsuit by asserting an SAP never identified in its complaint even though it was produced in discovery and Plaintiff had ample time to seek leave to amend. Construing the complaint broadly, as required by *Laabs*, the Court finds Plaintiff's version of the operative SAP is different than the version alleged in the complaint and thus it cannot be considered to defeat summary judgment. This finding makes it unnecessary for the Court to address or analyze PAUSD's new evidence that was submitted with its reply.

B. Violations of the Americans with Disabilities Act & Rehabilitation Act

Title II of the American with Disabilities Act ("ADA") provides:

> … No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

(42 U.S.C. § 12132.)

Title II of the ADA was expressly modeled after § 504 of the Rehabilitation Act, which provides:

> No otherwise qualified individual with a disability … shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

(29 U.S.C. § 794)

To prove that a public program or service violated Title II of the ADA, a plaintiff must show: (1) he is a "qualified individual with a disability"; (2) he was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (3) such exclusion, denial of benefits, or discrimination was by reason of his disability. (*Weinreich v. Los Angeles County Metropolitan Transp. Auth.* (9th Cir. 1997) 114 F.3d 976, 978.) Similarly, to sue under section 504, Plaintiff must show (1) he is an individual with a disability; (2) he is otherwise qualified to receive the benefit; (3) he was denied the benefits of the program solely by reason of his disability; and (4) the program receives federal financial assistance. (*Id.*)

Consequently, to recover monetary damages under Title II of the ADA or the Rehabilitation Act, Plaintiff must prove PAUSD intended to discriminate based on his disability or was deliberately indifferent to the disability. (*Duvall v. County of Kitsap* (9th Cir. 2001) 260 F.3d 1124, 1138.) Deliberate indifference is "a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." (*Patel v. Kent Sch. Dist.* (9th Cir. 2011) 648 F.3d 965, 974; internal citation omitted.) The state actor must "recognize[] [an] unreasonable risk and actually intend[] to expose the plaintiff to such risks without regard to the consequences to the

plaintiff." (*Id*.) "The deliberate-indifference inquiry should go to the jury if any rational factfinder could find this requisite mental state." (*Wood v. Ostrander* (9th Cir. 1989) 879 F.2d 583, 588 & n.4.)

Here, the complaint alleges Plaintiff was a qualified individual with disability and PAUSD, intentionally or with deliberate indifference, failed to implement Plaintiff's SAP which constituted reasonable accommodation and support for his disability. As a result, PAUSD failed to provide Plaintiff access to its program and services in violation of Title II of the ADA and section 504 of the Rehabilitation Act. (Complaint ¶¶ 54, 55, 70, 71.)

Plaintiff's status as a qualified individual with disability is undisputed. (UMF 1, 3.) However, PAUSD asserts there is no evidence it discriminated or mistreated Plaintiff based on his disability. In contrast, the evidence demonstrates it accommodated Plaintiff's disability by training its staff to correctly respond to Plaintiff's medical needs and implemented the operative SAP his physician had instructed. Once again, Plaintiff argues PAUSD followed a wrong and older version of the SAP that required administration of the Nayzilam nasal spray under two circumstances and failed to make any effort to implement the purportedly correct version, which required use of the medication under three circumstances. The Court concluded Plaintiff's version of the operative SAP, referenced in his opposition, is different than the version alleged in the complaint and thus it cannot be considered to defeat summary judgment.

Based on the foregoing, PAUSD's motion for summary judgment is GRANTED.

Calendar Line: 11
Case Name: *Suemi Gonzales et.al. v. Santa Clara Valley Transportation Authority*
Case No.: 22CV403929

Before the Court is Defendant Santa Clara Valley Transportation Authority's ("SCVTA") demurrer to Plaintiffs' Suemi Gonzales, Benicio Henry Gonzales, Viviana Suemi Gonzales, Otis Henry Gonzales, and Alberto Henry Gonzales, All Minors, By And Through Their Guardian Ad Litem (Pending), Suemi Gonzales, third amended complaint ("TAC"). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This action arises from the tragic death of Mr. Henry Gonzales. On May 26, 2021, a mass shooting occurred at a SCVTA's railyard in San Jose. Mr. Henry Gonzales (Decedent) was employed by SCVTA and present on the day of the shooting. Mr. Gonzales witnessed the murder of his co-workers, and/or saw his co-workers within minutes after they were murdered, causing him to suffer severe emotional and psychological damage resulting in post-traumatic stress disorder ("PTSD"). Following the shooting, Mr. Gonzales took leave from his employment with SCVTA as instructed. (TAC, ¶¶ 7-9.)

Plaintiffs allege Decedent's mental disability required SCVTA to engage in the interactive process and provide reasonable accommodations pursuant to Government Code sections 12940 (n) and (m). (TAC, ¶ 8.) On August 6, 2021, SCVTA sent a letter to Decedent informing him that different professionals, who have dealt with tragedy and the ensuing trauma, have been engaged and a roadmap was created to resume light rail service. The letter provided a website address where Decedent could find additional information and instructed him to return to work on August 16, 2021. At the conclusion of the letter, SCVTA advised Decedent to contact a designated named employee to discuss options, should he be unprepared to return to work. (TAC, Ex. A.)

On August 16, 2021, the day Decedent was instructed to return to work, being overrun with emotions, he pulled his car over and next to an open field near Via Del Ore took his own life. (TAC, ¶ 10.) Mr. Gonzales left behind his wife, Suemi Gonzales, and his children, Benicio, Viviana, Otis, and Alberto.

Plaintiffs filed their complaint on August 16, 2022 and, after some motion practice, an amended complaint on June 12, 2024, to which Defendant demurred. The issued an order sustaining Defendant's demurrer with 20 days leave to amend on April 3, 2024. Plaintiffs then filed the TAC on June 12, 2024, alleging a single cause of action for wrongful death.

II. Legal Standard

"The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in [Code of Civil Procedure s]ection 430.30, to the pleading on any one or more of the following grounds: . . . (e) The pleading does not state facts sufficient to constitute a cause of action, (f) The pleading is uncertain." (Code Civ. Proc., § 430.10, subds. (e) & (f).) A demurrer may be utilized by "[t]he party against whom a complaint [ ] has been filed" to object to the legal sufficiency of the pleading as a whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).)

The court treats a demurrer "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 (*Committee on Children's Television*).) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

III. Requests for Judicial Notice

Defendant's request that the Court take judicial notice of Exhibit A: Division of Workers' Compensation Electronic Adjudication Management System Report, Case No. ADJ15076647 is GRANTED. The court may take judicial notice of "official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States," "[r]ecords of (1) any

court of this state or (2) any court of record of the United States or of any state of the United States," and "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evid. Code § 452, subds. (c), (d), and (h).)

IV. Analysis

A. Interactive Process and Reasonable Accommodations

California Fair Employment and Housing Act ("FEHA") requires employers to make reasonable accommodation for the known disabilities of employees to enable them to perform a position's essential functions, unless doing so would produce undue hardship to the employer's operations. Under Government Code section 12940 (m), it is an unlawful employment practice for an employer "to fail to make a reasonable accommodation for the known physical or mental disability of an applicant or employee." (Gov. Code § 12940(m); see also *Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1166-1167.) Under Government Code section 12940(n), it is an unlawful practice for an employer "to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition." (Gov. Code § 12940(n).)

A failure to accommodate claim requires a plaintiff to establish (1) plaintiff had a disability covered by the FEHA, (2) plaintiff could perform the essential functions of the position, and (3) the employer failed to reasonably accommodate the known disability. (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1192.) Each element requires the employer's actual or imputed knowledge of the employee's disability. "[T]he employee bears the burden of giving the employer notice of his or her disability." (*Featherstone, supra*, 10 Cal.App.5th at 1167.) Where an employee fails to give notice, knowledge of an employee's disability can be imputed to an employer when "the fact of disability is the only reasonable interpretation of the known facts." (*Scotch, supra*, 173 Cal.App.4th at 1008; see also *Faust v. California Portland Cement Co.* (2007) 150 Cal.App.4th 864, 887 ["an employer 'knows an employee has a disability when the employee tells the

employer about his condition, or when the employer otherwise becomes aware of the condition, such as through a third party or by observation. . . .'"].)

Here the TAC alleges:

- On May 26, 2021, a mass shooting occurred at a SCVTA railyard. Decedent was employed by SCVTA that day and witnessed the perpetrator murder his co-workers, and/or saw his co-workers within minutes after they were murdered. (TAC, ¶7.)
- Following the shooting, Decedent took leave from his employment as instructed by SCVTA. "This instruction demonstrated that VTA knew that witnessing and/or being immediately present at the site of these murders caused Decedent to suffer severe psychological and emotional damage resulting, but not limited to, PTSD." (TAC, ¶ 8.)
- Decedent's mental disability required SCVTA to engage in the interactive process to determine whether a reasonable accommodation existed that would allow him to return to work. (TAC, ¶ 8.)
- By failing to engage in the interactive process, SCVTA could not and did not offer Decedent a reasonable accommodation for his known mental disability in violation of section 12940(m). (TAC, ¶ 9.)
- On August 6, 2021, SCVTA sent a letter to its employees informing them many different professionals who had dealt with tragedy and trauma were engaged and they had developed a "Roadmap to Resume Light Rail Services." A website address for further information on the plan was provided. Decedent was instructed to return to work on August 16, 2021, when Trauma and Recovery Training would be offered at 8:30 a.m. as well as onsite grief counselors for private discussions. The letter advised employees to contact [designated named employee] in Benefits prior to their return dates if they were not prepared to return to work so that meetings could be arranged to discuss options. (TAC, Ex. A.)
- SCVTA's letter demonstrates its knew that employees, like Decedent, had suffered greatly from the shooting. This letter also demonstrates SCVTA's failure to contact Decedent to determine whether he was prepared to return to the scene of the tragedy. (TAC, ¶ 9.)

- On August 16, 2021, the day Decedent was returning to work, he became overrun with destructive emotion at being forced to return to the scene of the tragic murders and he took his own life. (TAC, ¶ 10.)
- The decedent would have been willing and able to perform his duties had SCVTA engaged in the interactive process and found a reasonable accommodation. Had SCVTA engaged in the process it would have known that Decedent was not ready to return to the workplace. Without assistance or guidance, Decedent was made solely responsible for determining whether he was emotionally prepared to return to work. (TAC, ¶ 11.)

Plaintiff again does not allege that Decedent notified anyone at SCVTA about his emotional distress. Alleging that SCVTA's knowledge of Decedent's disability can be inferred from its post shooting administrative leave to its employees and/or its August 6, 2021, letter is insufficient.

Even if the Court were to infer SCVTA's knowledge of the Decedent's mental disability as Plaintiffs urge, the TAC fails to sufficiently allege the Decedent initiated the interactive process or that the resulting limitations from his mental disability were obvious to SCVTA. The interactive process imposes burdens on both the employer and employee. The employee must initiate the process unless the disability and resulting limitations are obvious and apparent to the employer. "It is important to distinguish between an employer's knowledge of an employee's disability versus an employer's knowledge of any limitations experienced by the employee as a result of the disability. This distinction is important because ADA requires employers to reasonably accommodate limitations, not disabilities." (*Taylor v. Principal Financial Group Inc.*, (5th Cir. 1996) 93 F.3d 155, 164-165.)

In fact, the letter attached as Exhibit A to and incorporated by reference by the TAC shows Defendant offered to engage in a process with its employees to make sure they were ready to return to work: "If you are not prepared to return to work on that date, please contact [designated employee] in Benefits prior to your return date so that we may arrange a meeting with you to discuss your options moving forward. She can be reached at [email] or by calling [phone number]." (TAC, Ex. A.) Unfortunately, there are no allegations that Plaintiff sought to engage in that process, much less that he reached out to use the offered resources and was refused or that he was made to return to work after

telling Defendant he was not ready to do so. The thus Court concludes Plaintiffs fail to allege a viable FEHA claim.

B. Exclusivity of the Worker's Compensation Act's Remedies

According to Judicially Noticed Exhibit A, Plaintiffs applied for worker's compensation benefits on August 24, 2021. Defendant asserts Plaintiffs' wrongful death claim is collateral, or derivative of the Decedent's worker's compensation claim and is thus barred by the exclusivity provision of the Worker's Compensation Act ("WCA").

Plaintiffs do not address this issue in their opposition. The failure to challenge a contention results in the concession of that argument. (*Dupont Merck Pharmaceutical Co. v. Sup.Ct*. (2000) 78 Cal.App.4th 562, 566; *Westside Center Assoc. v. Safeway Stores 23, Inc*. (1996) 42 Cal.App.4th 507, 529.) By failing to address or oppose the issue, Plaintiffs implicitly concede that worker's compensation exclusive remedy rule bars their wrongful death claim.

The TAC also alleges the Decedent's emotional stress and PTSD were caused by the May 26 shooting and his death could have been avoided by Defendant's engagement in an interactive process. Consequently, Plaintiffs' psychological injury and death were sustained in and arose out of the course of his employment and thus subject to the worker's compensation exclusive remedy. (Labor Code § 3602; *Snyder v. Michael's Stores, Inc.* (1997) 16 Cal.4th 991, 997.)

This is a tragic and devastating case, and the Court cannot possibly comprehend the depth of the family's grief. However, this is the third amended complaint, and the Court does not see a way for the complaint to be further amended to state a viable wrongful death claim under FEHA.

Accordingly, Defendant's demurrer is SUSTAINED WITHOUT LEAVE TO AMEND.