SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 18b
Honorable Shella Deen, Presiding
Thomas Duarte, Courtroom Clerk
191 North First Street, San Jose, CA 95113

DATE: October 3, 2024 TIME: 9:00 A.M.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E

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

LAW AND MOTION TENTATIVE RULINGS

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

https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

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

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

https://www.scscourt.org/general_info/court_reporters.shtml

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

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LAW AND MOTION TENTATIVE RULINGS

LINE #	CASE #	CASE TITLE	RULING
LINE 1	21CV385105	Ryoga Vee, Individually vs City of San Jose	**Motion for Summary Judgment/ Adjudication** Scroll down to Line 1 for Tentative Ruling.

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LAW AND MOTION TENTATIVE RULINGS

LINE 2	23CV427952	Anil Godbole vs Satish Soman	**Motion to Compel (Form Interrogatories)** Defendant Satish Soman's Motion to Compel Further Responses to Form Interrogatories, and request for sanctions of $2,440 against Plaintiff Anil Godbole. Notice of hearing was given electronically on July 24, 2024. The form interrogatories were served and then re-served with a new response deadline of April 18, 2024. Responses were served, but after the deadline, thus all objections, including that of privilege, have been waived. (Code Civ. Proc. § 2030.290). No opposition to this motion was filed by Plaintiff. A failure to oppose a motion may be deemed a consent to the granting of the motion. CRC Rule 8.54c. Failure to oppose a motion leads to the presumption that Plaintiff has no meritorious arguments. (*Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal. App. 3d 481, 489.) Plaintiff's responses are not code complaint. Moving party has met his burden of proof. There is also good cause to grant this motion. Good cause appearing, the Motion to Compel is GRANTED; Plaintiff shall provide verified, code compliant responses to *all* parts of form interrogatories 17.1, 50.1 and 50.2, without objections, by October 15, 2024. Sanctions of $2,440 are awarded to Defendant against Plaintiff and shall be paid by October 15, 2024. Defendant shall prepare a formal order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 3	24CV428728	DAVID MARTINEZ, Jr. vs JI LEE	**Motion to Compel (Request for Production of Documents)** Plaintiff's motion to compel further responses to his document request from Defendant Ji Chung Lee and request for sanctions. Given that Defendant has served further responses to the requests at issue, this motion is MOOT. Plaintiff's request for sanctions is DENIED. The parties do not appear to have met and conferred in good faith and Defendant acted with substantial justification. The parties are ordered to (1) meet and confer either in person, by phone or video conference, for each of the items in dispute in the motion to compel set for hearing on November 5, 2024, and (2) file a joint statement no later than October 29, 2024 identifying the discovery items in that motion that remain in dispute, and the reasons why they should be compelled/not compelled. Moving party to prepare the formal order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 4	23CV409917	Blossom Hill Estates Homeowners Association vs Louise Wollert et al	**Motion for Leave to Amend Judgment** This motion was initially heard on June 25, 2024. A that time the motion was denied without prejudice as the moving papers and supporting declaration did not provide sufficient prove up to amend the judgment to include the foreclosure of the lien or permit the sale of the subject property. The amended motion does not include the proposed Amendment to Judgment Entered April 9, 2024, and Order of Sale of Property referred to in the Declaration of Jordan O'Brien, nor was any additional specific prove up submitted to allow the Court to grant the Association's request to amend the previously entered Judgment. Merely attaching the CC&R's without any reference to those CC&R's for the amendments sought is not persuasive to the Court. Specific declarations regarding foreclosure and sale are required. As such, the amended motion is DENIED, without prejudice. Moving party to prepare the formal order that conforms with this Tentative Ruling.

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LAW AND MOTION TENTATIVE RULINGS

LINE 5	24CV440713	Ezequiel Ramirez vs R & S Erection North Peninsula, Inc. et al	**Motion to Withdraw as Attorney** Motion of Attorney Malek H. Shraibati and BD&J, PC to be relieved as counsel for Plaintiff Ezequiel Garcia Ramirez, filed on July 18, 2024. Notice of hearing was given to Plaintiff Ramirez by mail service on July 18, 2024, at Plaintiff Ramirez's last known address. No opposition was filed. A failure to oppose a motion may be deemed a consent to the granting of the motion. CRC Rule 8.54c. Failure to oppose a motion leads to the presumption that Plaintiff client has no meritorious arguments. (See *Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal. App. 3d 481, 489.) Moving parties have met their burden of proof. Good cause appearing, the Motion is GRANTED. The Order will take effect upon the filing and service of the executed order of this Court. Moving party to prepare the formal order after hearing, to include notice of the upcoming Case Management Conference on December 17, 2024 at 2:50pm in Department 18b.

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LAW AND MOTION TENTATIVE RULINGS

LINE 6	22CV401772	ROBERT FOSS vs CHERYL DURZY et al	**Motion to Compel (Request for Production of Documents)** Plaintiff's Motion to Compel Responses to his Requests for Production of Documents and for Monetary and Issue Sanctions of $5225 against Defendant Liberation Distribution, LLC and its counsel. Plaintiff served a Fourth Request for Production of Documents on Defendant on June 4, 2024, seeking records related to Defendant's sales of alcohol. As of the time of the filing of Plaintiff's reply brief, Defendant had promised, *but still not served* responses or responsive documents to Plaintiff's document request. Good cause appearing, the motion is GRANTED in part and DENIED in part. The motion is GRANTED with respect to the motion to compel further responses and production of documents: Defendant shall serve verified, code complaint responses, without objections, and serve responsive documents by October 15, 2024. Plaintiff's request for issue sanctions is DENIED. Plaintiff's request for sanctions is GRANTED against Defendant in the amount of $3,575 to be paid no later than October 15, 2024. Plaintiff to prepare formal order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 7	23CV426254	City of San Jose, a charter city vs Brent Lee et al	**Order to Show Cause (Preliminary Injunction)** By Order filed September 12, 2024, this Court set an Order to Show Cause re: Preliminary Injunction for Defendants to appear on October 3, 2024 at 9am in Department 18b. A Proof of Service by mail, electronic transmission and electronic service, reflecting service on Defendants on September 13, 2024, of all ordered documents, was filed on September 13, 2024. A Receiver's Bond in the amount of $10,000 was filed on September 16, 2024. Any opposition by Defendants was to be filed by September 25, 2024. No opposition was filed. Parties to appear.

- oo0oo -

Calendar Line 1
Case Name: *Ryoga Vee v. City of San Jose, et al.*
Case No.: 21CV385105

Before the Court is defendant City of San Jose's motion for summary judgment, or, in the alternative, for summary adjudication. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background.

On or about May 30, 2020, at or near the intersection of 3rd Street and San Fernando Street in San Jose, plaintiff Ryoga Vee ("Plaintiff") was peacefully protesting the murder of George Floyd along with thousands of other protesters. (Complaint, ¶6.) Plaintiff saw police officers employed by defendant City of San Jose ("City") forming a skirmish line extending across San Fernando Street and deploying flash-bang grenades towards a group of peaceful protesters. (*Id.*) Plaintiff consciously chose to stay away to avoid any potential conflict. (*Id.*)

While standing alone in the crosswalk watching the events, Plaintiff suddenly and without warning felt an intense pain in the back of his neck. (Complaint, ¶6 (mislabeled).) Plaintiff later learned he had been shot with a less-than-lethal rubber projectile. (*Id.*) Plaintiff turned toward the direction of the projectile and saw defendant City police officers firing their rifles at others in the street who were peacefully protesting. (*Id.*)

Plaintiff was one of hundreds of peaceful protesters who was unarmed, not throwing any objects at police, not holding anything in his hands which could be construed as a weapon, and not a posing a reasonable threat to anyone's safety. (Complaint, ¶7.) The police officers who fired at Plaintiff had no reason to believe Plaintiff was armed, dangerous, or creating a serious threat to anyone's safety so as to justify any use of force. (Complaint, ¶8; see also ¶22.)

On information and belief, Plaintiff alleges defendant City failed to properly train each of the shooting officers on the specific types of projectiles used against Plaintiff and failed to properly train officers on the appropriate circumstances when less-than-lethal force may be used on peaceful protesters. (Complaint, ¶¶11 and 17.) Alternatively, each of the involved police officers failed to properly implement the training they were given on the specific types of projectiles they used against Plaintiff. (Complaint, ¶12.) Moreover, each of the involved police officers failed to properly implement the training they were given on the appropriate

circumstances when less-than-lethal force may be used on peaceful protesters. (Complaint, ¶13.)

Defendant City failed to properly hire, train, and supervise each of the involved police officers based on standards taught statewide on the alternative ways of controlling peaceful protesters citizens rather than by using unreasonable force. (Complaint, ¶14.) Alternatively, each of the involved officers failed to implement the training they had received from defendant City concerning alternative ways of controlling peaceful protesters rather than by using unreasonable force. (*Id.*) The involved police officers negligently concluded Plaintiff posed a threat to their safety. (Complaint, ¶15.)

Alternatively, each of the involved police officers negligently pointed a loaded less-than-lethal weapon at Plaintiff and the weapon accidentally fired. (Complaint, ¶16.)

Plaintiff is an African-American male. (Complaint, ¶23.) On information and belief, each of the involved police officers assumed, based upon implicit bias, that Plaintiff posed a serious threat because of his race. (*Id.*)

On July 2, 2021, Plaintiff filed a complaint against defendant City and Doe defendants asserting causes of action for:

(1) Civil Rights Violations (Civil Code §§51.7, 52.1(b) and 52.1(h))

(2) Battery (Government Code §820)

(3) False Imprisonment (Government Code §820)

(4) Negligence

On November 8, 2021, defendant City filed an answer to Plaintiff's complaint.

On July 16, 2024, defendant City filed the motion now before the court, a motion for summary judgment/ adjudication of Plaintiff's complaint.

II. DEFENDANT CITY'S MOTION FOR SUMMARY JUDGMENT/ ADJUDICATION IS DENIED.

A. DISMISSAL OF DOE DEFENDANTS.

At the outset, the court understands defendant City seeks dismissal of the Doe defendants in this action pursuant to Code of Civil Procedure section 583.250, subdivision (a)(2), which states, "If service is not made in an action within the time prescribed in this article … The action shall be dismissed by the court … on motion of any person interested in

the action, whether named as a party or not, after notice to the parties." The prescribed time is set forth in Code of Civil Procedure section 583.210, subdivision (a), which states, "The summons and complaint shall be served upon a defendant within ***three years*** after the action is commenced against the defendant. For the purpose of this subdivision, an action is commenced at the time the complaint is filed." (Emphasis added.) According to defendant City, there is no proof of service of process of the complaint or of a summons on any Doe defendants as of July 16, 2024 following the filing of the complaint on July 2, 2021.[1]

Procedurally, it is this court's opinion that defendant City's request for dismissal of the Doe defendants from this action should have been made in a separate motion, not nested within defendant City's motion for summary judgment/ adjudication. Whether Doe defendants bear any individual liability does not preclude defendant City from arguing whether defendant City, as a public entity, bears any liability. Since Doe defendants' dismissal is not dispositive of defendant City's liability, the court declines (without prejudice) to rule upon defendant City's request for dismissal of the Doe defendants.

B. **IMMUNITY – GOVERNMENT CODE SECTION 820.2.**

Defendant City moves for summary judgment of all causes of action by making the same argument advanced in *Conway v. County of Tuolumne* (2014) 231 Cal.App.4th 1005 (*Conway*) which is that defendant City, as a public entity employer, is immune from liability if their employee is immune.

> "In California, all government tort liability must be based on statute." (*Becerra v. County of Santa Cruz* (1998) 68 Cal.App.4th 1450, 1457 [81 Cal. Rptr. 2d 165]; see *Wilson v. County of San Diego* (2001) 91 Cal.App.4th 974, 979–980 [111 Cal. Rptr. 2d 173].) "Under the provisions of the California [Government] Claims Act, '*a public employee* is liable for injury caused by his act or omission *to the same extent as a private person*,' except as otherwise specifically provided by statute. (… § 820, subd. (a), italics added.) In addition, the [Government] Claims Act further provides that '[*a*] *public entity* is liable for

[1] See Separate Statement of Undisputed Material Facts in Support of Motion for Summary Judgment, or in the Alternative, for Summary Adjudication ("City UMF"), Fact Nos. 1 and 3.

> injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment *if the act or omission would ... have given rise to a cause of action against that employee*,' unless 'the employee is immune from liability.' (… § 815.2, subds. (a), (b), italics added.)" (*Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 715 [110 Cal. Rptr. 2d 528, 28 P.3d 249].) [Footnote omitted.]
>
> Thus, the Government Claims Act "establishes the basic rules that public entities are immune from liability except as provided by statute (§ 815, subd. (a)), that public *employees* are liable for their torts except as otherwise provided by statute (§ 820, subd. (a)), that public entities are vicariously liable for the torts of their employees (§ 815.2, subd. (a)), and that public entities are immune where their employees are immune, except as otherwise provided by statute (§ 815.2, subd. (b))." (*Caldwell v. Montoya* (1995) 10 Cal.4th 972, 980 [42 Cal. Rptr. 2d 842, 897 P.2d 1320] (*Caldwell*).)

(*Italics original.*)

Following this premise, defendant City relies primarily upon *Conway* to reach the conclusion that its police officers are immune from liability for their discretionary use of force, including the use of projectile impact weapons, during civil unrest. Government Code section 820.2 provides, "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused."

In *Conway*, officers from defendant County's sheriff's department fired tear gas containers into plaintiff's mobilehome in an attempt to apprehend plaintiff's adult son. The trial court granted defendant County's motion for summary judgment finding defendant County immune for the discretionary acts of its employees and the *Conway* court agreed explaining:

> "Immunity is reserved for those '*basic policy decisions* [which have] … been [expressly] committed to coordinate branches of government,' and as to which

judicial interference would thus be 'unseemly.' (*Id.* at p. 793, italics in original.) … On the other hand, … there is no basis for immunizing lower-level, or 'ministerial,' decisions that merely implement a basic policy already formulated. (*Johnson*, *supra*, 69 Cal.2d at p. 796.) Moreover, we cautioned, immunity applies only to *deliberate and considered* policy decisions, in which a '[conscious] balancing [of] risks and advantages … took place. The fact that an employee normally engages in "discretionary activity" is irrelevant if, in a given case, the employee did not render a considered decision. [Citations.]' (*Id.* at p. 795, fn. 8.)" (Ibid.)

Discretionary immunity under section 820.2 has been found to apply to many areas of police work. …

Police officers, however, are not immune under section 820.2 when their acts are ministerial or public policy dictates against immunity.

(*Conway*, *supra*, 231 Cal.App.4th at pp. 1014-1015.)

Here, once the officers decided to arrest Donald, they were vested by the Department with discretion to determine the means by which the arrest should be carried out. This discretion included the possible use of tear gas as a way to determine whether Donald was in George's house. The officers exercised their discretion by observation and listening. As our Supreme Court has noted: "The decision, requiring as it does, comparisons, choices, judgments, and evaluations, comprises the very essence of the exercise of 'discretion' and we conclude that such decisions are immunized under section 820.2." (*Thompson v. County of Alameda* (1980) 27 Cal.3d 741, 749 [167 Cal. Rptr. 70, 614 P.2d 728].)

(*Conway*, *supra*, 231 Cal.App.4th at p. 1018.)

Here, defendant City proffers the following facts to establish that its employees (police officers) exercised their discretion in deploying projectiles and/or chemical irritants on the date of the incident: On May 29, 2020, there was looting, arson, and vandalism committed by

protestors in downtown San Jose.[2] Officers of the San Jose Police Department responded to the looting, arson, and vandalism by the crowd on May 29, 2020 by using a police line to move protestors and by deploying various projectiles or chemical irritants.[3] The San Jose Police Department Duty Manual in effect on May 29, 2020 governs the circumstances for the use of force, including the deployment of projectile impact weapons, for officers of the City of San Jose.[4]

Even if use of projectiles was a valid exercise of discretionary authority, the *Conway* court recognized there are situations in which immunity would not apply despite an exercise of discretionary authority.

> … even if a public employee's act is classified as "discretionary," the employee is not immune if the injury to another results, not from the exercise of discretion to undertake the act, "but from his negligence in performing it after having made the discretionary decision to do so." [Citation omitted.]
>
> … even if the officer exercised his discretion in undertaking the accident investigation, "section 820.2 did not clothe him with immunity from the consequences of his negligence in conducting it. He would have been immune if plaintiff's injury had been the result of [the officer's] exercise of discretion. [Citations.] It was not: it resulted from his negligence after the discretion, if any, had been exercised." (*McCorkle*, *supra*, 70 Cal.2d at pp. 261–262.) The court held that, because there was no causal connection between the exercise of discretion and the injury, statutory immunity did not apply. (*Id.* at p. 262.)

(*Conway*, *supra*, 231 Cal.App.4th at pp. 1018-1019.)

Plaintiff, in opposition, makes this very argument.[5] Plaintiff proffers evidence in opposition which, in this court's opinion, presents a triable issue of material fact with regard to

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[2] See City's UMF, Fact No. 6.
[3] See City's UMF, Fact No. 7.
[4] See City's UMF, Fact No. 8.
[5] This particular theory of liability is also found within Plaintiff's complaint. See Complaint, ¶13—"each of the involved Defendants Does 1 – 30 failed to properly implement the training they were given on the appropriate circumstances when less-than-lethal force may be used on peaceful protesters."

whether the injury sustained by Plaintiff resulted, not from the defendant City's police officers' exercise of discretion to use less than lethal force (projectiles and/or chemical irritants), but from their negligence in doing so after having made the discretionary decision to do so. More specifically, "with his back to the officers, [Plaintiff] was shot in the back with what he believed to be a 40 millimeter less than lethal weapon."[6] Before officers shot and injured Plaintiff, Plaintiff did not act in a threatening or violent manner.[7] While videotaping and taking pictures at Cesar Chavez Park, Plaintiff took a ballistic to the arm, shot by [City police] officer Jared Yuen.[8] Defendant City's officers are trained not to target certain areas such as the head, center mass and upper chest, that could cause serious injuries or death unless it is a lethal force encounter.[9] Defendant City's officers have a policy that suggests that when subjects are targeted with less-than-lethal force, the subject should be committing an act of violence or be armed and be an immediate threat to someone else in order to justify the use of force.[10] If the standards are not met, then deployment of less-than-lethal weapons would be considered out of policy by City of San Jose officers.[11]

As a triable issue of material fact exists, defendant City's motion for summary judgment, or, in the alternative, for summary adjudication of the claims asserted in Plaintiff's complaint is DENIED.

C. EXCEPTION TO THE GENERAL RULE OF IMMUNITY – GOVERNMENT CODE SECTION 815.6.

Government Code § 815 sets forth the general rule that "a tort action may not be maintained against a public entity unless the claim is based on a statute providing for liability." (*Chester v. State of California* (1994) 21 Cal.App.4th 1002, 1004-1005.) Section 815 effectively "abolishes all common law or judicially declared forms of liability for public entities." (Gov. Code, § 815 (Legislative Committee Comments).) As such, "direct tort liability of public entities must be based on a specific statute declaring them to be liable, or at

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[6] See Plaintiff's Additional Separate Statement of Material Facts ("Plaintiff's AMF"), Fact No. 12.
[7] See Plaintiff's AMF, Fact No. 14.
[8] See Plaintiff's AMF, Fact No. 21.
[9] See Plaintiff's AMF, Fact No. 28.
[10] See Plaintiff's AMF, Fact No. 29.
[11] See Plaintiff's AMF, Fact No. 30.

least creating some specific duty of care." (*Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, 1183.)

Another "[o]ne of the provisions 'otherwise' creating an exception to the general rule of immunity is Government Code section 815.6, which provides: 'Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.'" (*State of California v. Superior Court (Perry)* (1984) 150 Cal.App.3d 848, 854 (*Perry*).)

"Government Code section 815.6 contains a three-pronged test for determining whether liability may be imposed on a public entity: (1) an enactment must impose a mandatory, not discretionary, duty; (2) the enactment must intend to protect against the kind of risk of injury suffered by the party asserting section 815.6 as a basis for liability; and (3) breach of the mandatory duty must be a proximate cause of the injury suffered." (*Perry*, *supra*, 150 Cal.App.3d at p. 854; citations omitted.)

At paragraph 14 of Plaintiff's complaint, Plaintiff alleges, "The CITY … failed to properly, hire, train, and supervise each of the involved Defendants DOES 1 through 30 based on standards taught statewide which are consistent with the Peace Officers Standards and Training ('P.O.S.T.') program on the alternative ways of controlling peaceful protesters citizens rather than by using unreasonable force."

Defendant City argues next that to the extent this allegation at paragraph 14 of Plaintiff's complaint is the basis for defendant City's liability pursuant to Government Code section 815.6, Plaintiff has not adequately pleaded a cause of action as statutory claims must be pleaded with particularity[12] and Plaintiff has not done so or that even if adequately pleaded, compliance with POST standards is voluntary, not mandatory.

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[12] "[T]he general rule [is] that statutory causes of action must be pleaded with particularity." (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790.) "[Where] recovery is based on a statutory cause of action, the plaintiff must set forth facts in his [or her] complaint sufficiently detailed and specific to support an inference that each of the statutory elements of liability is satisfied. General allegations are regarded as inadequate. [Citations.]" (*Mittenhuber v. City of Redondo Beach* (1983) 142 Cal.App.3d 1, 5.)

Defendant City's argument fails for the fundamental reason that Code of Civil Procedure section 437c, subdivision (f) does not authorize partial summary adjudication.[13] "A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (Code Civ. Proc., §437c, subd. (f)(1).) At most, paragraph 14 of Plaintiff's complaint comprises only a part of Plaintiff's fourth cause of action for negligence. (See also Complaint, ¶45(b).) Even if credited, defendant City's argument does not completely dispose of Plaintiff's fourth cause of action. In any case, Plaintiff concedes in opposition that he is not asserting liability against defendant City premised upon Government Code section 815.6.

D. **FIRST CAUSE OF ACTION.**

Defendant City understands Plaintiff's first cause of action entitled, "Civil Rights Violations," to assert liability under three different theories: (1) Unruh Civil Rights Act [Civil Code sections 51 and 52]; (2) Bane Act [Civil Code section 52.1]; and (3) Ralph Act [Civil Code sections 51.7 and 52]. Defendant City contends the first cause of action, on the face of the complaint[14], fails under any of these three theories.

1. **UNRUH CIVIL RIGHTS ACT.**

The court devotes little discussion to this particular theory since Plaintiff, in opposition, concedes "the Unruh Act protects [against] private business establishments from violating individual's civil rights, and … therefore the CITY, a public entity would not fall under the Unruh Civil Rights Act."[15]

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[13] The Code of Civil Procedure does authorize partial summary adjudication. "Notwithstanding subdivision (f), a party may move for summary adjudication of a legal issue or a claim for damages other than punitive damages that does not completely dispose of a cause of action, affirmative defense, or issue of duty pursuant to this subdivision." (Code Civ. Proc., §437c, subd. (t).) However, a motion for partial summary adjudication pursuant to subdivision (t) must be pursuant to joint stipulation and order of the court (see Code Civ. Proc., §437c, subd. (t)(1)-(2)), which did not occur here.

[14] See *American Airlines, Inc. v. County of San Mateo* (1996) 12 Cal.4th 1110, 1117–1118—"A defendant's motion for summary judgment necessarily includes a test of the sufficiency of the complaint. [Citation omitted.] When a motion for summary judgment is used to test whether the complaint states a cause of action, the court will apply the rule applicable to demurrers and accept the allegations of the complaint as true. [Citations omitted.]"

[15] See page 19, lines 5 – 7 of Plaintiff Ryoga Vee's Opposition to Motion for Summary Judgment, or, in the Alternative, for Summary Adjudication.

2. **BANE ACT.**

> The Bane Act permits an individual to pursue a civil action for damages where another person "interferes by threat, intimidation, or coercion, or attempts to interfere by threat, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state." (Civ. Code, § 52.1, subd. (a).) "The essence of a Bane Act claim is that the defendant, by the specified improper means (i.e., 'threat[ ], intimidation or coercion'), tried to or did prevent the plaintiff from doing something he or she had the right to do under the law or to force the plaintiff to do something that he or she was not required to do under the law." (*Austin B.*, *supra*, 149 Cal.App.4th at p. 883, 57 Cal.Rptr.3d 454.)

(*King v. State of California* (2015) 242 Cal.App.4th 265, 294; see also CACI, No. 3066.)

Defendant City argues the Bane Act does not impose liability against cities, only against "persons." Civil Code section 52.1, subd. (b) states, in relevant part, "If a *person or persons*, whether or not acting under color of law, interferes by threat, intimidation, or coercion, or attempts to interfere by threat, intimidation, or coercion, … ." "The section does not define 'person.' However, section 14 of the Civil Code states that, as used in that code, 'the word person includes a corporation as well as a natural person.' Thus, Civil Code section 52.1 does not on its face provide any claim against the State itself." (*Towery v. State of California* (2017) 14 Cal.App.5th 226, 233 (*Towery*).)

However, the *Towery* court acknowledged public entity liability could flow from its vicarious liability for a public employee. In *Towery*, the plaintiff did not "allege claims against a specific state employee or employees for which the State might be vicariously liable as an employer. [Footnote omitted.] (See, e.g., *O'Toole v. Superior Court* (2006) 140 Cal.App.4th 488, 493, 509 [44 Cal. Rptr. 3d 531] (*O'Toole*) [plaintiffs' Bane Act claim against a community college district was based on the conduct of police officers employed by the district that allegedly deprived plaintiffs of their 1st Amend. rights].)" (*Towery*, *supra*, 14 Cal.App.5th at p. 233.)

Here, on the other hand, Plaintiff's claims, including the first cause of action, are premised upon liability of defendant City's police officers for which defendant City can be held vicariously liable. Defendant City, at footnote 12 of its memorandum of points and authorities, limits its argument to only "whether City is *primarily*, versus *vicariously*, liable under the relevant provisions as a pure issue of law." As noted earlier above, a motion for summary adjudication shall be granted only if it completely disposes of a cause of action. Defendant City does not completely dispose of this first cause of action simply by addressing its primary liability and without also addressing its vicarious liability.

Even if defendant City can be vicariously liable for a Bane Act violation by its employees (police officers), defendant City argues further that Plaintiff has not stated a Bane Act violation by relying upon, among others, *Shoyoye v. County of Los Angeles* (2012) 203 Cal.App.4th 947, 959, where the court wrote, "where coercion is inherent in the constitutional violation alleged, i.e., an overdetention in County jail, the statutory requirement of "threats, intimidation, or coercion" is not met. The statute requires a showing of coercion independent from the coercion inherent in the wrongful detention itself." Stated differently,

> the Bane Act makes threats, intimidation, or coercion actionable only when used as a means of interfering with an individual's rights. Thus, to state a claim under the Bane Act, a plaintiff must plead both (1) coercion, threat, or intimidation and (2) an actual or attempted interference with the plaintiff's rights. See, e.g., *Allen v. City of Sacramento*, 234 Cal. App. 4th 41, 67, 183 Cal. Rptr. 3d 654 (2015), as modified on denial of reh'g (Mar. 6, 2015) (noting these "two distinct elements").
>
> Because these are two distinct elements, the requirements of the Bane Act cannot be satisfied simply by alleging that an individual's rights were interfered with and that the interference itself was inherently coercive.

(*Ranero v. County of San Bernardino* (C.D.Cal. Mar. 12, 2018, No. CV 16-02655 CBM) 2018 U.S.Dist.LEXIS 228568, at *11-12.)

Defendant City directs the court's attention to that portion of Plaintiff's first cause of action which alleges, "Defendants CITY, DOES 1 through 40 interfered with [Plaintiff's] exercise and enjoyment of rights guaranteed him … including … the right to be free from unlawful force and violence from the Defendants' officers." (Complaint, ¶25.) "Defendants CITY and DOES 1 through 40 … exert[ed] unreasonable force against [Plaintiff]." (Complaint, ¶26.) Defendant City contends this is insufficient to allege a Bane Act violation because interference with a right to be free from unlawful force is itself inherently coercive.

The flaw in defendant City's argument, however, is that Plaintiff's alleged Bane Act violation is broader than the language that defendant City focuses on. Plaintiff alleges defendant City and its officers also interfered with his "right to peacefully protest." Unlike the right to be free from unlawful force and violence, there is nothing inherently coercive about Plaintiff's right to peacefully protest. Essentially, defendant City's argument attacks only a portion of the Plaintiff's first cause of action. (See *Financial Corp. of America v. Wilburn* (1987) 189 Cal.App.3d 764, 778—"[A] defendant cannot demur generally to part of a cause of action;" see also *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682—"A demurrer does not lie to a portion of a cause of action;" *Pointe San Diego Residential Community, L.P. v. Procopio, Cory, Hargreaves & Savitch, LLP* (2011) 195 Cal.App.4th 265, 274—"A demurrer challenges a cause of action and cannot be used to attack a portion of a cause of action.")

The court ends its analysis of the first cause of action here as defendant City has not completely disposed of this cause of action and, thus, summary adjudication is not warranted.

E. **IMMUNITY – GOVERNMENT CODE SECTIONS 8550, ET SEQ.**

As a final argument, defendant City contends it is immune from liability based on the fact that on May 31, 2020, the City published a proclamation of a local emergency related to the conditions of civil unrest on May 29, 2020 and May 30, 2020 in downtown San Jose in a document titled "City of San Jose Proclamation of Local Emergency related to Civil Unrest."[16]

" 'Local emergency' means the duly proclaimed existence of conditions of disaster or of extreme peril to the safety of persons and property within the territorial limits of a county,

[16] See City's UMF, Fact No. 10.

city and county, or city, caused by conditions such as … riot." (Govt. Code, §8558, subd. (c)(1).) Immunity arises from the issuance of such a proclamation.

> The state or its political subdivisions shall not be liable for any claim based upon the exercise or performance, or the failure to exercise or perform, a discretionary function or duty on the part of a state or local agency or any employee of the state or its political subdivisions in carrying out the provisions of this chapter.

(Govt. Code, §8655.)

In opposition, Plaintiff contends the immunity attaches subsequent to the issuance of the proclamation, but that his claims arise from events which transpired two days (May 29, 2020) prior to the issuance of the proclamation (May 31, 2020) so defendant City has not established that the conduct at issue in this action qualifies for immunity.

Moreover, as discussed above, defendant City's liability here is not just direct but also vicarious. Also as discussed above, Plaintiff's claim is not that defendant City's officers violated a discretionary duty, but rather that they acted with negligence after having made the discretionary decision to use less-than-lethal force against him.

For all the reasons discussed, defendant City's motion for summary judgment, or, in the alternative, for summary adjudication of the claims asserted in Plaintiff's complaint is DENIED.

The Court will prepare the formal order.

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