SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 20, Judge Sunil R. Kulkarni, Presiding
(covering for Judge Manoukian)

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"Every case is important" . . . . . "No case is more important than any other."—United States District Judge Edward Weinfeld (https://www.nytimes.com/1988/01/18/obituaries/judge-edward-weinfeld-86-dies-on-us-bench-nearly-4-decades.html)

"The Opposing Counsel on the Second-Biggest Case of Your Life Will Be the Trial Judge on the Biggest Case of Your Life."—Common Wisdom.

As Shakespeare observed, it is not uncommon for legal adversaries to "strive mightily, but eat and drink as friends." (Shakespeare, The Taming of the Shrew, act I, scene ii.)" (*Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 309.)

Counsel is duty-bound to know the rules of civil procedure. (See *Ten Eyck v. Industrial Forklifts Co.* (1989) 216 Cal.App.3d 540, 545.) The rules of civil procedure must apply equally to parties represented by counsel and those who forgo attorney representation. (*McClain v. Kissler* (2019) 39 Cal.App.5th 399.)

By Standing Order of this Court, all parties appearing in this Court are expected to comply with the Code of Professionalism adopted by the Santa Clara County Bar Association: https://www.sccba.com/code-of-professional-conduct/

DATE: Thursday, December 7, 2023
TIME: 9:00 A.M.

If you are appearing remotely, please use the Zoom link below.

"A person's name is to him or her the sweetest and most important sound in any language."—Dale Carnegie. All Courts of California celebrate the diversity of the attorneys and the litigants who appear in our Courts. Do not hesitate to correct the Court or Court Staff concerning the pronunciation of any name or how anyone prefers to be addressed. As this Court is fond of saying, "with a name like mine, I try to be careful how I pronounce the names of others." Please inform the Court how you, or if your client is with you, you and your client prefer to be introduced. The Court encourages the use of diacritical marks, multiple surnames and the like for the names of attorneys, litigants and in court papers. You might also try www.pronouncenames.com but that site mispronounces my name.

You may use these links for Case Management Conferences and Trial Setting Conferences without Court permission. Informal Discovery Conferences and appearances on Ex Parte applications will be set on Order by the Court.

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APPEARANCES.

Appearances are usually held on the Zoom virtual platform. However, we are currently allowing in court appearances as well.

Whether appearing in person or on a virtual platform, the usual custom and practices of decorum and attire apply. (See ***Jensen v. Superior Court (San Diego)*** (1984) 154 Cal.App.3d 533.). Counsel should use good quality equipment and with sufficient bandwith. Cellphones are very low quality in using a virtual platform. Please use the video function when accessing the Zoom platform. The Court expects to see the faces of the parties appearing on a virtual platform as opposed to listening to a disembodied voice.

For new Rules of Court concerning remote hearings and appearances, please review California ***Rules of Court***, rule 3.672.

This Court expects all counsel and litigants to comply with the Tentative Rulings Procedures that are outlined in Local Civil Rule 8(E) and ***California Rules of Court***, rule 3.1308. If the Court has not directed argument, oral argument must be permitted only if a party notifies all other parties and the Court at (408) 808-6856 before 4:00 p.m. on the court day before the hearing of the party's intention to appear. A party must notify all other parties by telephone or in person. A failure to timely notify this Court and/or the opposing parties may result in the tentative ruling being the final order in the matter.

Please notify this Court immediately if the matter will not be heard on the scheduled date. ***California Rules of Court***, rule 3.1304(b). If a party fails to appear at a law and motion hearing without having given notice, this Court may take the matter off calendar, to be reset only upon motion, or may rule on the matter. ***California Rules of Court***, rule 3.1304(d). A party may give notice that he or she will not appear at a law and motion hearing and submit the matter without an appearance unless this Court orders otherwise. This Court will rule on the motion as if the party had appeared. California Rules of Court, rule 3.1304(c). Any uncontested matter or matters to which stipulations have been reached can be processed through the Clerk in the usual manner. Please include a proposed order.

All proposed orders and papers should be submitted to this Department's e-filing queue. Do not send documents to the Department email unless directed to do so.

While the Court will still allow physical appearances, all litigants are encouraged to use the Zoom platform for Law & Motion appearances and Case Management Conferences. Use of other virtual platform devices will make it difficult for all parties fully to participate in the hearings. Please note the requirement of entering a password (highlighted above.) As for personal appearances, protocols concerning social distancing and facial coverings in compliance with the directives of the Public Health Officer will be enforced. Currently, facemasks are not required in all courthouses. If you appear in person and do wear a mask, it will be helpful if you wear a disposable paper mask while using the courtroom microphones so that your voice will not be muffled.

Individuals who wish to access the Courthouse are advised to bring a plastic bag within which to place any personal items that are to go through the metal detector located at the doorway to the courthouse.

Sign-ins will begin at about 8:30 AM. Court staff will assist you when you sign in. If you are using the Zoom virtual platform, it will helpful if you "rename" yourself as follows: in the upper right corner of the screen with your name you will see a blue box with three horizontal dots. Click on that and then click on the "rename" feature. You may type your name as: Line #/name/party. If you are a member of the public who wishes to view the Zoom session and remain anonymous, you may simply sign in as "Public."

CIVILITY.

In the 48 years that this Judge has been involved with the legal profession, the discussion of the decline in civility in the legal profession has always been one of the top topics of continuing education classes.

This Court is aware of a study being undertaken led by Justice Brian Currey and involving various lawyer groups to redefine rules of civility. This Judge has told Justice Currey that the lack of civility is due more to the inability or unwillingness of judicial officers to enforce the existing rules.

The parties are forewarned that this Court may consider the imposition of sanctions against the party or attorney who engages in disruptive and discourteous behavior during the pendency of this litigation.

COURT REPORTERS.

This session will not be recorded. No electronic recordings, video, still photography or audio capture of this live stream is allowed without the expressed, written permission of the Superior Court of California, County of Santa Clara. State and Local Court rules prohibit photographing or recording of court proceedings whether in the courtroom or while listening on the Public Access Line or other virtual platform, without a Court Order. See Local General Rule 2(A) and 2(B); ***California Rules of Court***, rule 1.150.

This Court no longer provides for Court Reporters in civil actions except in limited circumstances. If you wish to arrange for a court reporter, please use Local Form #CV-5100. All reporters are encouraged to work from a remote location. Please inform this Court if

any reporter wishes to work in the courtroom. This Court will approve all requests to bring a court reporter. Counsel should meet and confer on the use of a court reporter so that only one reporter appears and serves as the official reporter for that hearing.

PROTOCOLS DURING THE HEARINGS.

During the calling of any hearing, this Court has found that the Zoom video platform works very well. But whether using Zoom or any telephone, it is preferable to use a landline if possible. IT IS ABSOLUTELY NECESSARY FOR ALL INDIVIDUALS TO SPEAK SLOWLY. Plaintiff should speak first, followed by any other person. All persons should spell their names for the benefit of Court Staff. Please do not use any hands-free mode if at all possible. Headsets or earbuds of good quality will be of great assistance to minimize feedback and distortion.

The Court will prepare the Final Order unless stated otherwise below or at the hearing. Counsel are to comply with ***California Rules of Court***, rule 3.1312.

TROUBLESHOOTING TENTATIVE RULINGS.

To access a tentative ruling, move your cursor over the line number, hold down the "Control" key and click. If you see last week's tentative rulings, you have checked prior to the posting of the current week's tentative rulings. You will need to either "REFRESH" or "QUIT" your browser and reopen it. Another suggestion is to "clean the cache" of your browser. Finally, you may have to switch browsers. If you fail to do any of these, your browser may pull up old information from old cookies even after the tentative rulings have been posted.

This Court's tentative ruling is just that—tentative. Trial courts are not bound by their tentative rulings, which are superseded by the final order. (See *Faulkinbury v. Boyd & Associates, Inc.* (2010) 185 Cal.App.4th 1363, 1374-1375.) The tentative ruling allows a party to focus his or her arguments at a subsequent hearing and to attempt to convince the Court the tentative should or should not become the Court's final order. (*Cowan v. Krayzman* (2011) 196 Cal.App.4th 907, 917.) If you wish to challenge a tentative ruling, please refer to a specific portion of the tentative ruling to which you disagree.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 1	22CV407802	SmileDirectClub v. Align Technology et al.	The Court believes this OEX should go off calendar, given the October 2023 satisfaction of judgment form filed by Plaintiff. If that belief is incorrect, the parties are directed to appear, either in person or remotely.
LINE 2	23CV410545	Martin v. Google et al.	In light of the Court's tentative rulings on the defendants' demurrers, this motion to transfer/coordinate is DENIED AS MOOT. The Court will prepare the final order.
LINE 3	23CV410545	Martin v. Google et al.	See tentative ruling. The Court will prepare the final order.
LINE 4	23CV410545	Martin v. Google et al.	See line 3.
LINE 5	23CV410545	Martin v. Google et al.	See line 3.
LINE 6	23CV416723	Nemec v Betbadal et al.	It is unclear from the Court file whether Plaintiff's motion to deemed RFAs admitted and for monetary sanctions was properly served on Defendants. The parties are invited to appear at oral argument to explain the situation.
LINE 7	23CV416723	Nemec v Betbadal et al.	See tentative ruling. The Court will prepare the final order.
LINE 8	23CV416723	Nemec v Betbadal et al.	See line 7.
LINE 9	21CV385612	Joseph v Xilinx et al.	The Court (Judge Kulkarni) recuses itself from this matter. This motion is CONTINUED to 1/9/24 at 9 am.
LINE 10	21CV385612	Joseph v Xilinx et al.	The Court (Judge Kulkarni) recuses itself from this matter. This motion is CONTINUED to 1/9/24 at 9 am.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 11	21CV385612	Joseph v Xilinx et al.	The Court (Judge Kulkarni) recuses itself from this matter. This motion is CONTINUED to 1/9/24 at 9 am.
LINE 12	22CV395948	Andres v. AEST Realty et al.	The unopposed motion for leave to file an amended pleading is GRANTED. Such pleading needs to be filed within 20 days of this order.
LINE 13	23CV418237	Farmers Ins. Exchange v. Salmeron	The unopposed motion for leave to file an amended pleading is GRANTED. Such pleading needs to be filed within 20 days of this order.
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ORDER ON (1) DEFENDANT GOOGLE LLC'S DEMURRER TO PLAINTIFF'S FIRST AMENDED COMPLAINT; (2) [DEFENDANT CITY OF SACRAMENTO'S] DEMURRER TO PLAINTIFF'S [SECOND AMENDED] COMPLAINT; (3) DEFENDANT CITY OF WEST SACRAMENTO'S DEMURRER TO PLAINTIFF'S SECOND AMENDED COMPLAINT; (4) [DEFENDANT EMALEE OUSLEY'S] DEMURRER TO PLAINTIFF'S [SECOND AMENDED] COMPLAINT

I. Statement of Facts.

Plaintiff David Martin ("Martin"), a self-represented litigant[1], filed his original complaint in this action on 20 January 2023.[2] In the original complaint, plaintiff Martin alleges defendant Jose A. Ramirez ("Ramirez") is his landlord and that defendant Ramirez (and/or agents, employees, co-conspirators) committed trespass on plaintiff Martin's apartment.

Plaintiff Martin's original complaint further alleged that defendant Emalee Ousley ("Ousley") and defendant Ramirez (and/or agents, employees, co-conspirators) committed an assault and battery.

Plaintiff Martin's original complaint also names as defendants the City of Sacramento ("Sacramento"), City of West Sacramento ("West Sacramento"), and Google LLC ("Google"). Without much in the way of facts, plaintiff Martin's original complaint asserts the following causes of action:

(1)	Trespass [against defendant Ramirez]
(2)	Extortion [against defendant Ramirez]
(3)	Violation of California Civil Code 1940.2 [against defendant Ramirez]
(4)	Violation of California Civil Code 1942.5 [against defendant Ramirez]
(5)	Violation of California Civil Code 1947.12 [against defendant Ramirez]
(6)	Violation of California Civil Code 827 [against defendant Ramirez]
(7)	Intentional Infliction of Emotional Distress [against defendant Ramirez]
(8)	Negligence [against all defendants]
(9)	Negligence per se [against defendant Ousley]

[1] Although a judge should ensure that self-represented litigants are not being misled or unfairly treated (see *Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1284), self-represented litigants are not entitled to special treatment with regard to the Rules of Court or Code of Civil Procedure. "[W]e cannot disregard the applicable principles of law and accord defendant any special treatment because he instead elected to proceed in propria persona. [Citations.]" (*Stein v. Hassen* (1973) 34 Cal. App. 3d 294, 303.) "A litigant has a right to act as his own attorney [citation] 'but, in so doing, should be restricted to the same rules of evidence and procedure as is required of those qualified to practice law before our courts.'" (*Lombardi v. Citizens Nat'l Trust & Sav. Bank* (1955) 137 Cal.App.2d 206, 208-209.)

[2] This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (**Government Code**, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (Ca. St. Civil **Rules of Court**, Rule 3.714(b)(1)(C) and (b)(2)(C).)

(10) Nuisance [against defendant Ramirez]
(11) Violation and/or conspiracy to violate California Civil Code 52.1 [against all defendants]
(12) Assault [against defendants Ramirez and Ousley]
(13) Battery [against defendant Ousley]
(14) Violation of Right of Privacy [against all defendants]
(15) False Advertising [against defendant Google]
(16) Unfair Competition [against defendant Google]
(17) Fraud [against defendant Google]
(18) Negligent Misrepresentation [against defendant Google]

On 6 June 2023, defendant West Sacramento filed a motion for change of venue with an original hearing date of 31 August 2023. At a case management conference held on 13 June 2023, the court continued hearing on defendant West Sacramento's motion for change of venue to 26 October 2023.

On 14 June 2023, defendant Ousley filed a demurrer to plaintiff Martin's complaint with a hearing scheduled for 21 September 2023. At a case management conference held on 19 September 2023, the court continued hearing on defendant Ousley's demurrer to 26 October 2023. In the minute order from that 19 September 2023 case management conference, the court stated, "Plntff [sic] to file an Amended Complaint in 10 days."

On 29 September 2023, plaintiff Martin filed a first amended complaint ("FAC"). While plaintiff Martin's original complaint consisted of nine pages, plaintiff Martin's FAC ballooned to 177 pages in length. The FAC continues to assert the same eighteen causes of action asserted in the original complaint against the same parties identified in the original complaint.

On 5 October 2023, plaintiff Martin filed a motion to transfer action for consolidation/ coordination with a hearing date of 1 February 2024.

On 26 October 2023, the court further continued hearing on defendant West Sacramento's motion for change of venue and defendant Ousley's demurrer to 7 December 2023. The minute order states, "If Plaintiff is going to file the second amended complaint, it must be by Monday, 10/30/23. ANY Demurrers filed by counsel are to JOIN the above stated 12/7/23 motion date."

On 26 October 2023, defendant Google filed one of the five[3] motions now before the court, a demurrer to plaintiff Martin's FAC.

On 30 October 2023, plaintiff Martin filed a second amended complaint ("SAC"), 195 pages in length. The SAC continues to assert the same eighteen causes of action asserted in the original complaint against the same parties identified in the original complaint.

On 7 November 2023, defendant Sacramento filed the second of five motions now before the court, a demurrer to plaintiff Martin's [second amended] complaint.

On 9 November 2023, defendant West Sacramento filed the third of five motions now before the court, a demurrer to plaintiff Martin's SAC.

[3] Defendant West Sacramento's motion for change of venue (continued from 26 October 2023) is the fifth motion now before the court.

On 14 November 2023, defendant Ousley filed the fourth of five motions now before the court, a demurrer to plaintiff Martin's [second amended] complaint. Presumably, defendant Ousley is withdrawing her earlier demurrer to plaintiff Martin's original complaint in light of the amended pleadings filed by plaintiff Martin.

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II. Analysis.

A. Defendant Google's demurrer to plaintiff Martin's FAC.

> " '[A]n amendatory pleading supersedes the original one, which ceases to perform any function as a pleading.' " (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 884 [92 Cal. Rptr. 162, 479 P.2d 362].) "The amended complaint furnishes the sole basis for the cause of action, and the original complaint ceases to have any effect either as a pleading or as a basis for judgment. [Citation.] [¶] Because there is but one complaint in a civil action [citation], the filing of an amended complaint moots a motion directed to a prior complaint. [Citation.]" (*State Compensation Ins. Fund v. Superior Court* (2010) 184 Cal.App.4th 1124, 1131 [109 Cal. Rptr. 3d 88].) Thus, the filing of an amended complaint renders moot a demurrer to the original complaint. (*Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049, 1054 [18 Cal. Rptr. 3d 882].)

(*JKC3H8 v. Colton* (2013) 221 Cal.App.4th 468, 477 (*Colton*).)

Here, defendant Google filed a demurrer on 26 October 2023 directed at plaintiff Martin's ***FAC***. Thereafter, on 30 October 2023, plaintiff Martin filed the now operative ***SAC***. Under *Colton*, defendant Google's demurrer to the FAC would normally be rendered moot. However, since the exact same causes of action from the FAC exist in the SAC, since plaintiff Martin filed a substantive opposition, and to avoid the waste of judicial resources, the court will consider defendant Google's demurrer as though directed at plaintiff Martin's SAC.

Of the eighteen causes of action asserted in plaintiff Martin's SAC, the following seven are leveled against defendant Google: the eighth cause of action (negligence), the eleventh cause of action (violation and/or conspiracy to violate California Civil Code section 52.1), the fourteenth cause of action (violation of right of privacy), the fifteenth cause of action (false advertising, Business & Professions Code section 17500), the sixteenth cause of action (unfair competition, Business & Professions Code section 17200), the seventeenth cause of action (fraud), and the eighteenth cause of action (negligent misrepresentation).

1. Communications Decency Act of 1996 (CDA) (47 U.S.C. §230; hereafter "Section 230").

Defendant Google contends all seven of the claims asserted against it by plaintiff Martin "rest on the same alleged act: Google ceasing to distribute Plaintiff David Martin's app through Google's online platform called the 'Play Store' because the app violated various Google policies."[4] Based upon that premise, defendant Google demurs to all seven of the claims asserted against it in plaintiff Martin's SAC on the ground that they are barred by Section 230. To understand, the court looks initially at the text of Section 230 with an emphasis on the highlighted provisions below:

> (a) Findings. The Congress finds the following:

[4] See page 1, lines 5 – 7 of Google's MPA in support of demurrer to plaintiff's FAC.

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy. It is the policy of the United States—

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) Protection for "Good Samaritan" blocking and screening of offensive material.

(1) Treatment of publisher or speaker. ***No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.***

(2) Civil liability. No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1) [subparagraph (A)].

(d) Obligations of interactive computer service. A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful

to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on other laws.

(1) No effect on criminal law. Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this Act [47 USCS § 223 or 231], chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, United States Code [18 USCS §§ 1460 et seq. or §§ 2251 et seq.], or any other Federal criminal statute.

(2) No effect on intellectual property law. Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law. Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. ***No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.***

(4) No effect on communications privacy law. Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(5) No effect on sex trafficking law. Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit—

(A) any claim in a civil action brought under section 1595 of title 18, United States Code, if the conduct underlying the claim constitutes a violation of section 1591 of that title [18 USCS § 1591];

(B) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 1591 of title 18, United States Code; or

(C) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 2421A of title 18, United States Code, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.

(f) Definitions. As used in this section:

(1) Internet. The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service. The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider. The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

(4) Access software provider. The term "access software provider" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

The highlighted provisions above form the basis for defendant Google's assertion of immunity from the claims asserted by plaintiff Martin. Defendant Google cites *Murphy v. Twitter, Inc.* (2021) 60 Cal.App.5th 12, 24-25 (*Murphy*) for its explanation:

> Section 230(c)(1), which is captioned "Treatment of publisher or speaker," states: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." As relevant here, the statute also expressly preempts any state law claims inconsistent with that provision: "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." (§ 230(e)(3).) ***Read together these two provisions "protect from liability (1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider."*** (*Barnes v. Yahoo!, Inc.* (9th Cir. 2009) 570 F.3d 1096, 1100–1101, fn. omitted (*Barnes*); see *Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 804–805 [52 Cal. Rptr. 3d 376] (*Delfino*).)
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> Two California Supreme Court cases, *Hassell*, *supra*, 5 Cal.5th 522 (plur. opn.) and *Barrett v. Rosenthal* (2006) 40 Cal.4th 33 [51 Cal. Rptr. 3d 55, 146 P.3d 510] (*Barrett*), have addressed immunity under section 230, discussing at length statutory interpretation and judicial construction of the statute. [Footnote.] In both cases, our high court concluded section 230 is to be construed broadly in favor of immunity. (*Hassell*, at p. 544 (plur. opn.) ["broad scope of section 230 immunity" is underscored by "inclusive language" of § 230(e)(3), which, "read in connection with section 230(c)(1) and the rest of section 230, conveys an intent to shield Internet intermediaries from the burdens associated with defending against state law claims that treat them as the publisher or speaker of third party content, and from compelled compliance with demands for relief that, when viewed in the context of a plaintiff's allegations, similarly assign them the legal role and responsibilities of a publisher *qua* publisher"]; *Barrett*, at p. 39 [immunity provisions within § 230 "have been widely and consistently interpreted to confer broad immunity"].) California's appellate courts and federal courts have also generally interpreted section 230 to confer broad immunity on interactive computer services. (See *Doe II v. MySpace Inc.* (2009) 175 Cal.App.4th 561, 572 [96 Cal. Rptr. 3d 148] [concluding a "general consensus to interpret section 230 immunity broadly" could be derived from California and federal court cases]; *Delfino*, *supra*, 145 Cal.App.4th at p. 804; accord, *Doe v. MySpace Inc.* (5th Cir. 2008) 528 F.3d 413, 418; *Carafano v. Metrospalsh.com, Inc.* (9th Cir. 2003) 339 F.3d 1119, 1123 ["reviewing courts have treated § 230(c) immunity as quite robust"]; but see *Barnes*, *supra*, 570 F.3d at p. 1100 [text of § 230(c) "appears clear that neither this subsection nor any other declares a general immunity from liability deriving from third-party content"].)

(Emphasis added.)

In *Murphy*, Meghan Murphy posted several messages critical of transgender women on Twitter. Twitter removed her posts and informed her she violated its hateful conduct rules. Thereafter, Meghan Murphy posted additional similar messages and Twitter responded by suspending her account. Meghan Murphy sued alleging causes of action for breach of contract, promissory estoppel, and unfair competition. The trial court sustained Twitter's demurrer concluding Murphy's suit was barred by Section 230. The *Murphy* court affirmed the trial court holding:

> Under section 230, interactive computer service providers have broad immunity from liability for traditional editorial functions undertaken by publishers—such as decisions whether to publish, withdraw, postpone or alter content created by third parties. Because each of Murphy's causes of action seek to hold Twitter liable for its editorial decisions to block content she and others

> created from appearing on its platform, we conclude Murphy's suit is barred by the broad immunity conferred by the CDA.

(*Murphy*, *supra*, 60 Cal.App.5th at p. 17.)

> Twitter's refusal to allow certain content on its platform, however, is typical publisher conduct protected by section 230. "'[Section] 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.'" (*Barrett*, *supra*, 40 Cal.4th at p. 43, quoting *Zeran*, *supra*, 129 F.3d at p. 330; *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC* (9th Cir. 2008) 521 F.3d 1157, 1170–1171 ["any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230"].)

(*Murphy*, *supra*, 60 Cal.App.5th at pp. 25-26.)

Defendant Google contends the conduct or activity it is alleged to have engaged in is the improper removal of plaintiff Martin's app from its online Play Store. Defendant Google's alleged activity boils down to deciding whether or not to exclude material (app) that a third party seeks to place in the online Play Store. Thus, plaintiff Martin's claims inherently require the court to treat Google as the publisher of content provided by another and, as such, plaintiff Martin's claims against defendant Google are barred by Section 230. (*Cf. Ginsberg v. Google Inc.* (N.D.Cal. 2022) 586 F. Supp. 3d 998.)

In opposition, plaintiff Martin does not address the immunity offered by subdivision (c)(1) of Section 230 as argued by defendant Google and instead contends immunity under subdivision (c)(2)(A) of Section 230 is not available here. Subdivision (c)(2)(A) of Section 230 states, in relevant part, "No provider or user of an interactive computer service shall be held liable on account of any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected." Plaintiff Martin's discussion of this alternative immunity is misplaced since it is not the specific immunity placed at issue by defendant Google's demurrer.

Similarly, plaintiff Martin's reliance on *Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.* (9th Cir. 2019) 946 F.3d 1040 (*Enigma*) is not persuasive since, "The legal question before [the *Enigma* court] is whether § 230(c)(2) immunizes blocking and filtering decisions that are driven by anticompetitive animus." In *Enigma*, the court held Section 230, subdivision (c)(2), immunity was not limitless and could not be used to protect against claims of anticompetitive animus. Here, however, subdivision (c)(2) is not the basis for immunity. Instead, the court and defendant Google rely on immunity under Section 230, subdivision (c)(1), immunity.

As a further basis for opposition, plaintiff Martin contends Section 230 immunity is not available to defendant Google because it is an "information content provider" as defined under subdivision (f)(3) of Section 230. "Under the statutory scheme, an 'interactive computer service' qualifies for immunity so long as it does not also function as an 'information content provider' for the portion of the statement or publication at issue." (*Carafano v. Metrosplash.com, Inc.* (9th Cir. 2003) 339 F.3d 1119, 1123.) This same argument was made and rejected by the court in *Spy Phone Labs LLC v. Google Inc.* (N.D.Cal. Oct. 14, 2016, No. 15-cv-03756-KAW) 2016 U.S.Dist.LEXIS 143530, at *24. For the same reason, this court likewise rejects plaintiff Martin's assertion that defendant Google is an "information content provider" here. [Similarly, plaintiff Martin's reliance upon *Fair Hous. Council v. Roommates.com, LLC* (9th Cir. 2008) 521 F.3d 1157 is misplaced to the extent plaintiff asserts defendant Google is an "information content provider."]

For the reasons enunciated above, defendant Google's demurrer to plaintiff Martin's SAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] i.e., barred by Section 230, is SUSTAINED WITHOUT LEAVE TO AMEND.

B. Defendant Sacramento's demurrer to plaintiff Martin's SAC.

Of the eighteen causes of action asserted in plaintiff Martin's SAC, the following three are leveled against defendant Sacramento: the eighth cause of action (negligence), the eleventh cause of action (violation and/or conspiracy to violate California Civil Code section 52.1), and the fourteenth cause of action (violation of right of privacy).

Defendant Sacramento demurs initially to plaintiff Martin's SAC on the ground of uncertainty.

> "'[D]emurrers for uncertainty are disfavored, and are granted only if the pleading is so incomprehensible that a defendant cannot reasonably respond.'" (*Mahan v. Charles W. Chan Ins. Agency, Inc.* (2017) 14 Cal.App.5th 841, 848, fn. 3 [222 Cal. Rptr. 3d 360]; accord, *Lickiss v. Financial Industry Regulatory Authority* (2012) 208 Cal.App.4th 1125, 1135 [146 Cal. Rptr. 3d 173].) "'A demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures.'" (*Chen v. Berenjian* (2019) 33 Cal.App.5th 811, 822 [245 Cal. Rptr. 3d 378], quoting *Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 616 [17 Cal. Rptr. 2d 708].)

(*A.J. Fistes Corp. v. GDL Best Contractors, Inc.* (2019) 38 Cal.App.5th 677, 695.)

Defendant Sacramento nevertheless contends where the "complaint is framed in such a disjointed and incoherent manner[,] … "the only course open … was that of interposing a demurrer raising the questions of … uncertainty, ambiguity and unintelligibility." (*Evarts v. Jones* (1951) 104 Cal.App.2d 109, 111.) Defendant Sacramento's argument is well taken.

A "complaint need only allege facts sufficient to state a cause of action; each evidentiary fact that might eventually form part of the plaintiff's proof need not be alleged. [Citation.]' [Citation.]" (*Pich v. Lightbourne* (2013) 221 Cal.App.4th 480, 495.) Plaintiff Martin's SAC is replete with allegations of evidentiary fact, greatly muddying the waters and making it extremely difficult to discern and analyze whether he has sufficiently stated a cause of action against defendant Sacramento. As defendant Sacramento points out, defendant Sacramento is mentioned only twice in the SAC's first 181 pages.

Defendant Sacramento demurs additionally to the eighth cause of action on the ground that "[u]nder the [Government Claims] Act, governmental tort liability must be based on statute; all common law or judicially declared forms of tort liability, except as may be required by state or federal Constitution, were abolished." (*Michael J. v. Los Angeles County Dept. of Adoptions* (1988) 201 Cal.App.3d 859, 866.) "[P]ublic entities are immune from liability except as provided by statute (§ 815, subd. (a))…." (*Caldwell v. Montoya* (1995) 10 Cal.4th 972, 980.) "Except as otherwise provided by statute[,] [a] public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." (Gov. Code, §815, subd. (a).)

"[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.) At best, plaintiff Martin's SAC against defendant Sacramento consists of general, not sufficiently specific, allegations.

Accordingly, defendant Sacramento's demurrer to plaintiff Martin's SAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] and on the ground that the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is SUSTAINED with 10 days' leave to amend.

C. Defendant West Sacramento's demurrer to plaintiff Martin's SAC.

Of the eighteen causes of action asserted in plaintiff Martin's SAC, the following three are leveled against defendant West Sacramento: the eighth cause of action (negligence), the eleventh cause of action (violation and/or conspiracy to violate California Civil Code section 52.1), and the fourteenth cause of action (violation of right of privacy).

Defendant West Sacramento demurs to plaintiff Martin's SAC on the same grounds that defendant Sacramento demurred to plaintiff Martin's SAC. For the same reasons discussed above, defendant West Sacramento's demurrer to plaintiff Martin's SAC on the ground that the pleading does not state facts sufficient to

constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] and on the ground that the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is SUSTAINED with 10 days' leave to amend.

D. Defendant Ousley's demurrer to plaintiff Martin's SAC.

1. Defendant Ousley's request for judicial notice is GRANTED.

In support of her demurrer, defendant Ousley requests judicial notice of a summons and complaint filed 12 January 2023 in Yolo County Superior Court, *David Martin v. Google LLC, et al.*, case number CV2023-0084; the summons and complaint filed 20 January 2023 in the instant action; and a summons and complaint filed 21 February 2023 in Sacramento County Superior Court, *David Martin v. Google LLC, et al.*, case number 34-2023-00335114. Evidence Code section 452, subdivision (d) states that the court may take judicial notice of "[r]ecords of any court of this state." This section of the statute has been interpreted to mean that the trial court may take judicial notice of the existence of the court's own records. Evidence Code section 452 and 453 permit the trial court to "take judicial notice of the existence of judicial opinions and court documents, along with the truth of the results reached—in the documents such as orders, statements of decision, and judgments—but [the court] cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact." (*People v. Woodell* (1998) 17 Cal.4th 448, 455.) Defendant Ousley's request for judicial notice in support of demurrer to plaintiff's complaint is GRANTED insofar as the court takes notice of the court records' existence, not necessarily the truth of any matters asserted therein.

2. Another action pending.

Citing to Code of Civil Procedure section 430.10, subdivision (c), defendant Ousley demurs to plaintiff Martin's SAC on the ground that "[t]here is another action pending between the same parties on the same cause of action." "The pendency of another earlier action growing out of the same transaction and between the same parties is a ground for abatement of the second action." (*Leadford v. Leadford* (1992) 6 Cal.App.4th 571, 574 (*Leadford*).) The judicially-noticed documents reflect identical complaints by plaintiff Martin in Yolo County Superior Court and Sacramento County Superior Court filed prior to and subsequent to the filing of the instant complaint.

In opposition, plaintiff Martin raises tangential matters concerning service of process; meet and confer efforts regarding dismissal, consolidation, and amendment; and a request to amend. However, plaintiff Martin offers no legal authority to overcome defendant Ousley's demurrer.

Accordingly, defendant Ousley's demurrer to plaintiff Martin's SAC on the ground that there is another action pending between the same parties on the same cause of action [Code Civ. Proc., §430.10, subd. (c)] is SUSTAINED WITHOUT LEAVE TO AMEND.

III. Order.

Defendant Google's demurrer to plaintiff Martin's SAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] i.e., barred by Section 230, is SUSTAINED WITHOUT LEAVE TO AMEND.

Defendant Sacramento's demurrer to plaintiff Martin's SAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] and on the ground that the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is SUSTAINED with 10 days' leave to amend.

Defendant West Sacramento's demurrer to plaintiff Martin's SAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] and on the ground that the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is SUSTAINED with 10 days' leave to amend.

Defendant Ousley's demurrer to plaintiff Martin's SAC on the ground that there is another action pending between the same parties on the same cause of action [Code Civ. Proc., §430.10, subd. (c)] is SUSTAINED WITHOUT LEAVE TO AMEND.

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Calendar Line 7

ORDER ON (1) DEFENDANTS' DEMURRER TO PORTIONS OF PLAINTIFF'S FIRST AMENDED COMPLAINT; AND (2) DEFENDANTS' MOTION TO STRIKE PORTIONS OF PLAINTIFF'S FIRST AMENDED COMPLAINT

I. Statement of Facts.

On or about 22 November 2022, at approximately 3:50pm, plaintiff Steven Nemec ("Nemec") and defendant Said Arnoldo Mejia ("Mejia") were both operating motor vehicles westbound on Montague Expressway, west of Great Mall Parkway but east of McCandless Drive. (First Amended Complaint ("FAC"), ¶8.) Defendant Mejia was operating a commercial vehicle registered to defendant Dishnet Direct, Inc. ("Dishnet") and operated with the permission and consent of defendant Elia Victor Betbadal ("Betbadal"), Chief Executive Officer of defendant Dishnet. (FAC, ¶¶3 and 9.) Defendant Betbadal and others, including defendant Mejia, were engaged in operating defendant Dishnet on the date of the incident and continuing thereafter. (FAC, ¶10.) At the above date, time, and location, defendant Mejia was utilizing an electronic wireless communications device. (FAC, ¶11.) On or about 22 November 2022, defendant Mejia, while operating defendant Dishnet's vehicle, intentionally collided and struck plaintiff Nemec multiple times. (FAC, ¶12.)

On 30 May 2023[5], plaintiff Nemec, a self-represented litigant[6], filed a complaint against defendants Dishnet, Betbadal, and Mejia.

On 19 July 2023, plaintiff Nemec filed the operative FAC against defendants Dishnet, Betbadal, and Mejia asserting causes of action for:

(1) Assault/ Battery
(2) Negligence
(3) Intentional Infliction of Emotional Distress
(4) Unlawful Business Practices

On 31 August 2023, defendants ERRC Systems, Inc. (erroneously sued as Dishnet Direct, Inc.; hereafter, ERRC), Betbadal, and Mejia ("Moving Defendants")] filed two of the motions now before the court, a demurrer to portions of plaintiff Nemec's FAC and a motion to strike portions of plaintiff Nemec's FAC.

On 29 November 2023, plaintiff Nemec filed opposition to the Moving Defendants' demurrer and motion to strike.

II. Analysis.

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[5] This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (**Government Code**, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (Ca. St. Civil **Rules of Court**, Rule 3.714(b)(1)(C) and (b)(2)(C).)

[6] Although a judge should ensure that self-represented litigants are not being misled or unfairly treated (see *Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1284), self-represented litigants are not entitled to special treatment with regard to the Rules of Court or Code of Civil Procedure. "[W]e cannot disregard the applicable principles of law and accord defendant any special treatment because he instead elected to proceed in propria persona. [Citations.]" (*Stein v. Hassen* (1973) 34 Cal. App. 3d 294, 303.) "A litigant has a right to act as his own attorney [citation] 'but, in so doing, should be restricted to the same rules of evidence and procedure as is required of those qualified to practice law before our courts.'" (*Lombardi v. Citizens Nat'l Trust & Sav. Bank* (1955) 137 Cal.App.2d 206, 208-209.)

E. Procedural violation.

As a preliminary matter, the court notes that plaintiff Nemec's opposition is untimely filed and served. Code of Civil Procedure section 1005, subdivision (b) states, "All papers opposing a motion … shall be filed with the court and a copy served on each party at least nine court days … before the hearing." Based on a hearing date of 7 December 2023 and court holidays on 23 – 24 November 2023, plaintiff Nemec's opposition had to be filed and served no later than 22 November 2023. Plaintiff Nemec did not file and serve opposition until 29 November 2023, three court days late.

California Rules of Court, rule 3.1300, subdivision (d) states, "No paper may be rejected for filing on the ground that it was untimely submitted for filing. If the court, in its discretion, refuses to consider a late filed paper, the minutes or order must so indicate." Since the court has discretion to consider a late filed paper, since Moving Defendants have not suffered any prejudice from the late filing, and to avoid the expenditure of any further judicial resources, the court will look past this procedural violation and consider the opposition on its merits. However, plaintiff Nemec is hereby admonished for the procedural violation. Any future violation may result in the court's refusal to consider the untimely filed papers.

F. Moving Defendants' demurrer to portions of plaintiff Nemec's FAC is SUSTAINED, in part, and OVERRULED, in part.

2. First cause of action – Assault/ Battery.

> The essential elements of a cause of action for assault are: (1) defendant acted with intent to cause harmful or offensive contact, or threatened to touch plaintiff in a harmful or offensive manner; (2) plaintiff reasonably believed she was about to be touched in a harmful or offensive manner or it reasonably appeared to plaintiff that defendant was about to carry out the threat; (3) plaintiff did not consent to defendant's conduct; (4) plaintiff was harmed; and (5) defendant's conduct was a substantial factor in causing plaintiff's harm. [Citations.] The essential elements of a cause of action for battery are: (1) defendant touched plaintiff, or caused plaintiff to be touched, with the intent to harm or offend plaintiff; (2) plaintiff did not consent to the touching; (3) plaintiff was harmed or offended by defendant's conduct; and (4) a reasonable person in plaintiff's position would have been offended by the touching. [Citations.]

(*So v. Shin* (2013) 212 Cal.App.4th 652, 668-669; see also CACI, No. 1301.)

In demurring to plaintiff Nemec's first cause of action for assault/ battery, Moving Defendants argue intentional torts require specificity in pleading. However, the authority cited by Moving Defendants calling for specificity of pleading concern fraud and statutory causes of action, not all intentional tort causes of action and certainly not assault and/or battery.

Next, Moving Defendants contend plaintiff Nemec fails to identify what "harmful or offensive contact" occurred. In the court's review of the FAC, plaintiff Nemec alleges, in relevant part, "intentional collisions striking Plaintiff multiple times, by Defendant MEJIA while operating Defendant [ERRC's] vehicle." (See FAC, ¶¶12, 14, 26, 28, 29, and 30.) Although not entirely clear, Moving Defendants also appear to argue that there is no harmful or offensive contact "outside of the vehicle Mr. MEJIA drove collided with Plaintiff's vehicle."[7] The court understands Moving Defendants to be arguing that there was no harmful or offensive contact apart from the parties' vehicles colliding. However,

> the tort of battery generally is not limited to direct body-to-body contact. In fact, the commentary to the Restatement Second of Torts clearly states that the "[m]eaning of 'contact with another's person' " (italics omitted) does not require that one "should bring any part of his own body in contact with another's person. … [One] is liable [for battery] in this Section if [one] throws a substance, such as water, upon the other … ." (Rest.2d Torts, § 18, com. c, pp. 30–31.) Consistent with the Restatement, in *Century Transit*, *supra*, 42 Cal.App.4th 121, the court effectively applied that rule. The insured's employee had struck demonstrators with a flashlight

[7] See page 7, lines 14 – 15 of Defendants' Memorandum of Points and Authorities.

> while acting in the scope of employment, and the court still applied the "Assault or Battery" exclusion even though no direct body-to-body contact occurred. (*Id.* at p. 130.)

(*Mount Vernon Fire Ins. Co. v. Busby* (2013) 219 Cal.App.4th 876, 881.)

Finally, Moving Defendants appear to argue defendants Betbadal and ERRC's liability for defendant Mejia's conduct is not sufficiently stated. Moving Defendants acknowledge Betbadal and ERRC's liability is premised upon a theory of respondeat superior but contend such theory fails in spite of plaintiff Nemec's conclusory allegation that "Defendants, and each of them, is the agent or employee of the other and acting in the course and scope of such agency or employment and authority and with the permission and consent of their codefendants in committing the acts alleged" and plaintiff Nemec's conclusory allegation that defendant ERRC "is sued in its capacity as Respondeat Superior for the actions of its employees." (FAC, ¶¶6 – 7.)

"Under the doctrine of respondeat superior, an employer is vicariously liable for his employee's torts committed within the scope of the employment." (*Perez v. Van Groningen & Sons* (1986) 41 Cal.3d 962, 967; see also CACI, No. 3700.) "Equally well established, if somewhat surprising on first encounter, is the principle that an employee's willful, malicious and even criminal torts may fall within the scope of his or her employment for purposes of respondeat superior, even though the employer has not authorized the employee to commit crimes or intentional torts." (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 296 – 297 (*Lisa M.*).) "Ordinarily, the determination whether an employee has acted within the scope of employment presents a question of fact; it becomes a question of law, however, when 'the facts are undisputed and no conflicting inferences are possible.'" (*Lisa M.*, *supra*, 12 Cal.4th at p. 299; see also CACI, Nos. 3720, 3722, and 3723.)

In *Maria D. v. Westec Residential Security, Inc.* (2000) 85 Cal.App.4th 125 (*Maria D.*), an on-duty security guard employed by defendant security company pulled the plaintiff over under the pretense of being a police officer and then raped her. The trial court entered summary judgment in favor of the employer. The appellate court affirmed holding, as a matter of law, that the defendant employer could not be vicariously liable under the doctrine of respondeat superior since the causal nexus between the sexual assault and the security guard's employment was too attenuated for a trier of fact to conclude the misconduct was within the scope of his employment. The court undertook a historical analysis of the legal landscape with regard to respondeat superior.

The *Maria D.* court relied, in part, on the Supreme Court decision in *Lisa M.* where the plaintiff was sexually molested by an ultrasound technician employed by a hospital. The rule set forth in *Lisa M.* begins with determining whether "the assault or other intentional tort [had] 'a causal nexus' to the employee's work." (*Maria D.*, *supra*, 85 Cal.App.4th at p. 143.) "In the Supreme Court's view, the required causal nexus was to be distinguished from 'but for' causation and it was not enough that the employment brought the tortfeasor and the victim together. The nature of the required additional link has been described in various ways: '[T]he incident leading to injury must be an 'outgrowth' of the employment; the risk of tortious injury must be 'inherent in the working environment' or 'typical of or broadly incidental to the enterprise [the employer] has undertaken.'" (*Id.*; citations omitted.) Alternatively,

> "California courts have also asked whether the tort was, in a general way, foreseeable from the employee's duties. Respondeat superior liability should apply only to the types of injuries that "as a practical matter are sure to occur in the conduct of the employer's enterprise." [Citation.] The employment, in other words, must be such as predictably to create the risk employees will commit intentional torts of the type for which liability is sought." [Citation.] The Supreme Court continued: "[T]he tortious occurrence must be 'a generally foreseeable consequence of the activity.' In this usage . . . foreseeability 'merely means that in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business.' [Citations.] [This] foreseeability test is useful 'because it reflects the central justification for respondeat superior [liability]: that losses fairly attributable to an enterprise—those which foreseeably result from the conduct of the enterprise—should be allocated to the enterprise as a cost of doing business.' [Citation.]

(*Id.*)

Applying those rules to the facts in *Maria D.*, the court held, "the causal nexus between the sexual assault and the security guard's employment was too attenuated for a trier of fact to conclude that the misconduct was within the scope of his employment." (*Id.* at p. 146.) "[T]he mere fact the security guard had an opportunity to abuse the trappings of his profession does not render Westec vicariously liable for the rape." (*Id.*) "That the employment brought tortfeasor and victim together in time and place is not enough." (*Id.*)

> For respondeat superior liability to apply, the security guard's acts must have been engendered by or be an outgrowth of his employment. [Citation.] Here, the security guard's motivating emotions were not fairly attributable to any work-related event or condition. [Citation.] There was no work-related dispute or emotional involvement with plaintiff that motivated or triggered the sexual assault. [Citations.] The security guard's aberrant decision to assault plaintiff did not arise out of the performance of his duties as a private security guard. [Citation.] His motivation was strictly personal and unrelated to the protection of Westec's clients' persons and property or the performance of any other duty of a security guard. [Citation.] The security guard simply took advantage of a woman driving alone in the early morning hours to commit an assault for reasons unrelated to his work. [Citation.] The sexual assault was not typical of nor broadly incidental to the security guard's employment duties. [Citation.] The security guard substantially deviated from his employment duties solely for personal purposes. [Citations.] The assault was not motivated or triggered by anything in the employment activity but was the result of only, in the words of the Supreme Court, "propinquity and lust." [Citation.]

(*Id.* at p. 147.)

With regard to foreseeability, the *Maria D.* court held the misconduct was not foreseeable from the nature of the security guard's duties. The security guard did not have authority to pull plaintiff over, to conduct field sobriety tests (which he did), or to order plaintiff into his automobile. "The security guard's sexual assault of plaintiff was not fairly attributable to any peculiar aspect of Westec's business operations. It was the independent product of his aberrant decision to engage in conduct unrelated to his duties." (*Id.*)

In *Lisa M.*, a pregnant plaintiff sustained injury from a fall and sought treatment in defendant hospital's emergency room. The treating physician ordered an ultrasound which was performed by an ultrasound technician, a hospital employee. The technician performed the prescribed examination. "The exact placement and movement of the wand varies with the patient's body type, and on some patients the best images are obtained by passing the wand as much as an inch below the pubic hairline." (*Lisa M.*, *supra*, 12 Cal.4th at p. 295.) Under false pretenses of determining the sex of the baby, the technician told plaintiff that, "he would need to scan 'much further down,' and it would be uncomfortable. With plaintiff's cooperation, [the technician] pulled plaintiff's shorts down and began to scan in her pubic hair. According to plaintiff, he also inserted the wand in her vagina. After a while he put down the wand and fondled plaintiff with his fingers. Plaintiff testified he moved his fingers 'around everywhere down there.' While fondling plaintiff, Tripoli said he needed to excite her to get a good view of the baby." (*Id.*)

With regard to the causal nexus between the sexual assault and the ultrasound technician's employment, the *Lisa M.* court explained and concluded,

> a sexual tort will not be considered engendered by the employment unless its motivating emotions were fairly attributable to work-related events or conditions. Here the opposite was true: a technician simply took advantage of solitude with a naive patient to commit an assault for reasons unrelated to his work. Tripoli's job was to perform a diagnostic examination and record the results. The task provided no occasion for a work-related dispute or any other work-related emotional involvement with the patient. The technician's decision to engage in conscious exploitation of the patient did not arise out of the performance of the examination, although the circumstances of the examination made it possible. "If . . . the assault was not motivated or triggered off by anything in the employment activity but was the result of only propinquity and lust, there should be no liability."

(*Id.* at p. 301.)

Under a foreseeability analysis, the court reached the same conclusion.

> In arguing Tripoli's misconduct was generally foreseeable, plaintiff emphasizes the physically intimate nature of the work Tripoli was employed to perform. In our view, that a job involves physical contact is, by itself, an insufficient basis on which to impose vicarious liability for a sexual assault. [Citation.] To hold medical care providers strictly liable for deliberate sexual assaults by every employee whose duties include examining or touching patients' otherwise private areas would be virtually to remove scope of employment as a limitation on providers' vicarious liability. In cases like the present one, a deliberate sexual assault is fairly attributed not to any peculiar aspect of the health care enterprise, but only to "propinquity and lust." [Footnote.]
>
> Here, there is no evidence of emotional involvement, either mutual or unilateral, arising from the medical relationship. Although the procedure ordered involved physical contact, it was not of a type that would be expected to, or actually did, give rise to intense emotions on either side. We deal here not with a physician or therapist who becomes sexually involved with a patient as a result of mishandling the feelings predictably created by the therapeutic relationship [citations], but with an ultrasound technician who simply took advantage of solitude, access and superior knowledge to commit sexual assault. [Footnote.]
>
> Although the routine examination Tripoli was authorized to conduct involved physical contact with Lisa M., Tripoli's assault on plaintiff did not originate with, and was not a generally foreseeable consequence of, that contact. Nothing happened during the course of the prescribed examinations to provoke or encourage Tripoli's improper touching of plaintiff. [Citations.] The assault, rather, was the independent product of Tripoli's aberrant decision to engage in conduct unrelated to his duties. In the pertinent sense, therefore, Tripoli's actions were not foreseeable from the nature of the work he was employed to perform.

(*Id.* at pp. 302 – 303.)

Lisa M. is relevant to the analysis of defendants Betbadal and ERRC's liability. However, *Lisa M.* is distinguishable in that the facts were more developed on a motion for summary judgment. Here, we are merely at the pleading stage and the court must accept plaintiff Nemec's allegations as true. Still, there are no allegations from which the court can derive foreseeability. Nor are there any allegations that defendant Mejia's conduct was engendered by or was an outgrowth of his employment and, thus, no causal nexus between the assault/ battery and defendant Mejia's work.

Accordingly, defendants Betbadal and ERRC's demurrer to the first cause of action of plaintiff Nemec's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for assault/ battery is SUSTAINED with 10 days' leave to amend. Defendant Mejia's demurrer to the first cause of action of plaintiff Nemec's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for assault/ battery and on the ground that the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is OVERRULED.

3. Third cause of action – Intentional Infliction of Emotional Distress.

"The tort of intentional infliction of emotional distress is comprised of three elements: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff suffered severe or extreme emotional distress; and (3) the plaintiff's injuries were actually and proximately caused by the defendant's outrageous conduct." (*Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 494 (*Cochran*); see also *Ross v. Creel Printing & Publishing Co., Inc.* (2002) 100 Cal.App.4th 736, 744 – 745; see also CACI, Nos. 1600 and 1602.)

Moving Defendants argue the conduct alleged here is not extreme or outrageous as a matter of law. "There is no bright line standard for judging outrageous conduct and its generality hazards a case-by-case appraisal of conduct filtered through the prism of the appraiser's values, sensitivity threshold, and standards of civility. The process evoked by the test appears to be more intuitive than analytical." (*Cochran*, *supra*, 65 Cal.App.4th at p. 494; internal quotations omitted.) "Even so, the appellate courts have affirmed orders which sustained demurrers on the ground that the defendant's alleged conduct was not sufficiently outrageous." (*Id.*) The *Cochran* court went on to state, "the mere fact that the actor knows that the other will regard the conduct as

insulting, or will have his feelings hurt, is not enough." (*Id.* at p. 496.) "In evaluating whether the defendant's conduct was outrageous, it is not enough that the defendant has acted with an intent which is tortious or even criminal." (*Id.*; internal punctuation omitted.)

> "'Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community.'" (*Christensen v. Superior Court*, *supra*, 54 Cal.3d at p. 903.) "[M]ere insulting language, without more, ordinarily would not constitute extreme outrage" unless it is combined with "aggravated circumstances." (*Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 499 [86 Cal.Rptr. 88, 468 P.2d 216] (*Alcorn*).) But "'[b]ehavior may be considered outrageous if a defendant (1) abuses a relation or position which gives him power to damage the plaintiff's interest; (2) knows the plaintiff is susceptible to injuries through mental distress; or (3) acts intentionally or unreasonably with the recognition that the acts are likely to result in illness through mental distress.'" (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 946 [160 Cal. Rptr. 141, 603 P.2d 58] (*Agarwal*), disapproved on other grounds in *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 574, fn. 4 [88 Cal. Rptr. 2d 19, 981 P.2d 944].)

(*Smith v. BP Lubricants USA Inc.* (2021) 64 Cal.App.5th 138, 147 (*Smith*).)

The *Smith* court, like the *Cochran* court, recognized that:

> "whether conduct qualifies as extreme and outrageous is [**not**] always a question for the jury. …several courts have held that alleged conduct is not extreme and outrageous as a matter of law. (E.g., *Marsh v. Anesthesia Services Medical Group, Inc.* (2011) 200 Cal.App.4th 480, 487 [132 Cal. Rptr. 3d 660] [upholding sustaining of demurrer because plaintiff could not allege facts showing outrageous conduct]; *Lawler v. Montblanc North America, LLC* (9th Cir. 2013) 704 F.3d 1235, 1245 [affirming summary judgment on IIED claim because conduct was not outrageous as a matter of law].) That said, whether conduct is outrageous is "'usually' a question of fact." (*Barker v. Fox & Associates* (2015) 240 Cal.App.4th 333, 356 [192 Cal. Rptr. 3d 511].)
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> …
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> "'[w]here reasonable men may differ, it is for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability.' [Citations.]" (*Ibid.*)

(*Smith*, *supra*, 64 Cal.App.5th at pp. 147-148.)

Here, the court cannot definitively conclude, as a matter of law, that the conduct here is not extreme or outrageous as a matter of law. There are allegations that defendant Mejia collided with plaintiff Nemec multiple times, thereby giving rise to an inference of intentional conduct.

Defendants Betbadal and ERRC demur additionally by arguing, as they did earlier, that they are not vicariously liable under a respondeat superior theory. For the same reasons discussed above, defendants Betbadal and ERRC's demurrer to the third cause of action of plaintiff Nemec's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for intentional infliction of emotional distress is SUSTAINED with 10 days' leave to amend. Defendant Mejia's demurrer to the third cause of action of plaintiff Nemec's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for intentional infliction of emotional distress and on the ground that the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is OVERRULED.

G. Moving Defendants' motion to strike portions of plaintiff Nemec's FAC.

Moving Defendants move to strike plaintiff Nemec's claim for punitive damages. "In California the award of damages by way of example or punishment is controlled by Civil Code section 3294, which authorizes that kind of award against a tortfeasor who has been guilty of 'oppression, fraud or malice, express or implied.'" (*G.D. Searle & Co. v. Superior Court* (1975) 49 Cal.App.3d 22, 26.) "Notwithstanding relaxed pleading criteria, certain tortious injuries demand firm allegations. Vague, conclusory allegations of fraud or falsity may not be rescued by the rule of

liberal construction. ***When the plaintiff alleges an intentional wrong, a prayer for exemplary damage may be supported by pleading that the wrong was committed willfully or with a design to injure.***[8] When nondeliberate injury is charged, allegations that the defendant's conduct was wrongful, willful, wanton, reckless or unlawful do not support a claim for exemplary damages; such allegations do not charge malice." (*Id.* at p. 29; internal citations omitted.)

Plaintiff Nemec alleges Mejia "acted, intending to cause harmful or offensive contact." (See FAC, ¶14; see also ¶30—"Defendant MEJIA … intentionally injured Plaintiff… ."") This allegation is sufficient to allege malice against defendant Mejia. "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.)

However, inasmuch as plaintiff Nemec has not sufficiently stated causes of action for assault, battery, and intentional infliction of emotional distress against defendants Betbadal and ERRC, plaintiff has likewise not stated a sufficient basis for punitive damages against defendants Betbadal and ERRC.

Accordingly, defendants Betbadal and ERRC's motion to strike plaintiff Nemec's claim for punitive damages is GRANTED with 10 days' leave to amend. Defendant Mejia's motion to strike plaintiff Nemec's claim for punitive damages is DENIED.

III. Order.

Defendants Betbadal and ERRC's demurrer to the first cause of action of plaintiff Nemec's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for assault/ battery is SUSTAINED with 10 days' leave to amend. Defendant Mejia's demurrer to the first cause of action of plaintiff Nemec's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for assault/ battery and on the ground that the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is OVERRULED.

Defendants Betbadal and ERRC's demurrer to the third cause of action of plaintiff Nemec's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for intentional infliction of emotional distress is SUSTAINED with 10 days' leave to amend. Defendant Mejia's demurrer to the third cause of action of plaintiff Nemec's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for intentional infliction of emotional distress and on the ground that the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is OVERRULED.

Defendants Betbadal and ERRC's motion to strike plaintiff Nemec's claim for punitive damages is GRANTED with 10 days' leave to amend. Defendant Mejia's motion to strike plaintiff Nemec's claim for punitive damages is DENIED.

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[8] "'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (Civil Code §3294, subd. (c)(1).)

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