SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 10
Honorable Frederick S. Chung

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

DATE: November 7, 2023 TIME: 9:00 A.M.

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

The courthouse is open: Department 10 is now fully open for in-person hearings, as of April 18, 2023. The court strongly prefers **in-person** appearances for all contested law-and-motion matters. For all other hearings (*e.g.*, case management conferences), the court strongly prefers either **in-person or video** appearances. Audio-only appearances are permitted but disfavored, as they cause significant disruptions and delays to the proceedings. Please use telephone-only appearances as a last resort.

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

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

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

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

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	19CV343781	Minh Vo v. Thai Nguyen	Order of examination: parties to appear.
LINE 2	19CV358256	Wendy Towner et al. v. Gilroy Garlic Festival Association, Inc. et al.	Click on LINE 2 or scroll down for ruling in lines 2-4.
LINE 3	19CV358256	Wendy Towner et al. v. Gilroy Garlic Festival Association, Inc. et al.	Click on LINE 2 or scroll down for ruling in lines 2-4.
LINE 4	19CV358256	Wendy Towner et al. v. Gilroy Garlic Festival Association, Inc. et al.	Click on LINE 2 or scroll down for ruling in lines 2-4.
LINE 5	22CV401151	John Doe 1 et al. v. Berryessa Union School District et al.	Click on LINE 5 or scroll down for ruling.
LINE 6	19CV347525	Crysti Flowers-Haywood v. Bryan Rios et al.	Click on LINE 6 or scroll down for ruling.
LINE 7	21CV379921	Kent Taylor v. Aifeng Su et al.	Click on LINE 7 or scroll down for ruling.
LINE 8	21CV390243	KG-Bryant LLC v. Eric Schimmel et al.	Click on LINE 8 or scroll down for ruling.
LINE 9	19CV360975	Sophie Shen v. Weiping Xia et al.	Click on LINE 9 or scroll down for ruling.
LINE 10	20CV371090	Institute for Business & Technology, Inc. v. Fortune Companies Management Corp. et al.	Click on LINE 10 or scroll down for ruling.
LINE 11	22CV403749	Joel Torres v. Steven Bobby et al.	Motion for leave to amend complaint: parties to appear. Notice is apparently not proper, as plaintiff failed to file and serve an amended notice of hearing, as required by the local rules. Because of the notice defect, the court has not received a timely response to the motion. The court requests that the parties appear to address the notice issue.

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Calendar Lines 2-4
Case Name: *Wendy Towner et al. v. Gilroy Garlic Festival Association, Inc. et al.*
Case No.: 19CV358256

I. BACKGROUND

This case arises out of a horrific shooting at the Gilroy Garlic Festival on July 28, 2019 by a single shooter, who is not a party to this civil action. Plaintiffs Wendy Towner, Francisco Aguilera, Nick McFarland, Justin Bates, Brynn Ota-Matthews, Gabriella Gaus, Harry de la Vega, Barbara V. Aguirre, Alberto Romero, Barbara J. Aguirre, Lesley Sanchez, and Leslie Andres (collectively, "Plaintiffs") have filed causes of action alleging negligence and premises liability, among other claims, against defendants Gilroy Garlic Festival Association ("GGFA"), First Alarm Security & Patrol, Inc., the City of Gilroy (the "City"), and Century Arms, Inc. ("Century Arms").

On July 23, 2021, Plaintiffs filed the operative pleading, the fifth amended complaint ("5AC"), which alleges the following causes of action:

1. Negligence - against all defendants except the City;
2. Premises Liability - against all defendants except the City;
3. Wrongful Death – against all defendants;
4. Public Entity Liability – against the City;
5. Joint Venture Liability – against the City and GGFA;
6. Products Liability re: WASR Assault Rifle – against Century Arms;
7. Negligence re: WASR Assault Rifle – against Century Arms; and
8. Public Nuisance re: WASR Assault Rifle – against Century Arms.

Two additional groups of plaintiffs were consolidated into this lead case on January 5, 2021 for discovery purposes only (not trial). (See January 5, 2021 Order.) They have also filed pleadings against the defendants, including Century Arms, but their pleadings are not at issue on these motions. Accordingly, the defined term "Plaintiffs" refers only to the 12 plaintiffs identified above.[1]

On September 3, 2021, Century Arms filed three motions: (1) a demurrer; (2) a motion to strike; and (3) a motion to quash service of summons for lack of personal jurisdiction. In their original opposition to the motion to quash, Plaintiffs argued that they needed to obtain discovery regarding Century Arms's "minimum contacts" before they could substantively address the personal jurisdiction issues raised by the motion. On January 25, 2022, the court (Judge Kulkarni) agreed, ordering that the three motions be continued to allow Plaintiffs to obtain that jurisdictional discovery. In doing so, Judge Kulkarni observed the following:

> Here, the Court believes that Plaintiff [Towner] has shown that the additional discovery she seeks is relevant—not dispositive, but relevant—to whether specific jurisdiction exists in California over Defendant [Century Arms]. (The Court is quite doubtful that general personal jurisdiction would exist in California over Defendant.) It may be that even after obtaining this discovery,

[1] The additional plaintiffs are Juan Salazar, Lorena Salazar, Lyann Salazar, Eduardo Ponce, Dasha Pimentel, and Veronica Henderson.

> Plaintiff cannot show specific personal jurisdiction, but the Court believes Plaintiff should get a chance to obtain this discovery . . . .

(January 25, 2022 Order at pp. 1:26-2:3.) After multiple continuances, the hearing on these motions was finally reset for November 7, 2023. On October 16, 2023, Century Arms filed a "supplemental memorandum of points and authorities" in support of the motion to quash, although it is not apparent that Judge Kulkarni or any other judge previously authorized such a filing. At any rate, Plaintiffs filed an opposition on October 25, 2023 (as well as oppositions to the demurrer and motion to strike) that responds directly to the supplemental memorandum. The court will therefore consider it.

II. CENTURY ARMS' MOTION TO QUASH

A. Legal Standard

Code of Civil Procedure section 418.10, subdivision (a)(1), authorizes a defendant to file a motion to quash service of summons "on the ground of lack of jurisdiction of the court over him or her." (Code Civ. Proc. § 418.10, subd. (a)(1).)

Once a defendant files a motion to quash, the burden is on the plaintiff to establish the facts of jurisdiction by a preponderance of the evidence. (*Lebel v Mai* (2012) 210 Cal.App.4th 1154, 1160; see also *HealthMarkets, Inc. v. Superior Court* (2009) 171 Cal.App.4th 1160, 1167 ["A plaintiff opposing a motion to quash service of process for lack of personal jurisdiction has the initial burden to demonstrate facts establishing a basis for personal jurisdiction."].) Evidence of the jurisdictional facts or their absence may be in the form of declarations. "Where there is a conflict in the declarations, resolution of conflict by the trial court will not be disturbed on appeal if the determination is supported by substantial evidence. However, where the evidence of jurisdictional facts is not conflicting, the question of whether a defendant is subject to personal jurisdiction is one of law." (*Elkman v. National States Ins. Co.* (2009) 173 Cal.App.4th 1305, 1312-1313 (*Elkman*), internal citation omitted; see also *Greenwell v. Auto-Owners Ins. Company* (2015) 233 Cal.App.4th 783, 789 (*Greenwell*), citing *Elkman.*)

"There are 'two kinds of personal jurisdiction: general (sometimes called all-purpose) jurisdiction and specific (sometimes called case-linked) jurisdiction.'" (*Preciado v. Freightliner Custom Chassis Corp.* (2023) 87 Cal.App.5th 964, 976 (*Preciado*) [quoting *Ford Motor Company v. Montana Eighth Judicial District Court* (2021) 592 U.S. __, 141 S.Ct. 1017 (*Ford Motor*)].) Where general jurisdiction exists as a result of a non-resident defendant's "continuous and systematic" activities in a state, the defendant can be sued on causes of action not related to its activities within the state. (*Cornelison v. Chaney* (1976) 16 Cal.3d 143, 147.)

If a non-resident defendant's contacts with California are not sufficient for general jurisdiction, the defendant may still be subject to specific personal jurisdiction by the state if it meets a three-prong test: 1) the defendant must have purposefully availed itself of the state's benefits; 2) the controversy must arise out of or be related to the defendant's contacts with the state; and 3) considering the defendant's contacts with the state and other factors, California's exercise of jurisdiction over the defendant must comport with fair play and substantial justice. (*Pavlovich v. Superior Court* (2002) 29 Cal.4th 262, 269 (*Pavlovich*).)

B. Analysis

In this case, the parties agree that Century Arms is not subject to California's general jurisdiction, given that it is a Vermont corporation with a principal place of doing business in Florida, and given the apparent absence of any *direct* activities in California. Plaintiffs allege instead that Century Arms is subject to specific personal jurisdiction in the state. (5AC, ¶ 137.) Thus, the three-prong test for specific jurisdiction—purposeful availment, a controversy that arises out of (or relates to) defendants' contact with the state, and fundamental fairness—must be satisfied in order to maintain this action against Century Arms.

Century Arms concedes the first prong of purposeful availment, as it does import from Romania and sell in the United States a "California compliant" version of the "WASR-10" rifle that was used in the Gilroy shooting. But Century Arms argues that Plaintiffs cannot show that the present controversy either *arises out of* or *relates to* its contacts with California, because the version of the WASR-10 rifle that was actually used in the shooting was not "California compliant" and was not authorized to be sold in this state. Rather, the "non-California compliant" version was authorized to be sold only in other states: the particular rifle used by the shooter was lawfully sold by Century Arms in Texas, lawfully resold by someone else in Nevada, and then illegally transported by the shooter across state lines into California.

Century Arms goes on to argue, in the alternative, that even if the second prong of the specific jurisdiction test were met here, the exercise of jurisdiction by this court would not comport with fair play and substantial justice, as Century Arms could not "reasonably anticipate" being haled into a California court to account for its sale, in Texas, of the non-California-compliant rifle at issue. (*World-Wide Volkswagen Corp. v. Woodson* (1980) 444 U.S. 286, 298; *Pavlovich*, *supra*, 29 Cal.4th at pp. 268-269.)

1. Arising Out of or Relating to Century Arms' Contacts with California

Plaintiffs rely heavily on *Ford Motor* and *Preciado*, *supra*, in their analysis of the "arise out of or related to" prong. Both cases involved product liability claims in which the injury occurred in the forum state, but the defendant manufactured and/or sold the product elsewhere.

In *Ford Motor*, the U.S. Supreme Court rejected Ford's narrow, purely causal approach to the second prong, which focused solely on the "arises out of" language; instead, the Court held that "our most common formulation of the rule demands that the suit 'arise out of *or relate to* the defendant's contacts with the forum.' [Citations] The first half of that standard asks about causation; but the back half, after the "or," contemplates that some relationships will support jurisdiction without a causal showing." (*Ford Motor, supra,* 141 S.Ct. at p. 1027, emphasis in original.) The Court ultimately found a strong "relationship among the defendant, the forum, and the litigation," because Ford had "systematically served a market in [the forum states] for the very vehicles that the plaintiffs allege malfunctioned and injured them in those States." (*Id.* at p. 1028.) The Ford models that were sold in the forum states (the Ford Explorer and Ford Crown Victoria) were exactly the *same* models at issue in the litigation.

In *Preciado*, the California Court of Appeal applied the standard in *Ford Motor* to a products liability lawsuit against the manufacturer of an allegedly defective bus chassis,

following a bus accident. (*Preciado, supra,* 87 Cal.App.5th at p. 964.) The Court held that the motion to quash was properly granted because plaintiffs failed: 1) to present evidence that the chassis manufacturer made or sold the same or similar chassis in California, and 2) to establish any other connection between the defendant's California contacts and their claim. (*Id.* at p. 984.) The Court first noted that the plaintiffs' proffered evidence of webpage printouts failed to establish that the chassis manufacturer "ever advertised, sold, or serviced the model of chassis at issue in [the] lawsuit *in California*." (*Id*. at p. 982 [emphasis in original].) While the plaintiffs urged the court to equate the two chassis models shown in the webpages with the model at issue in the case, the *Preciado* court declined to do so, noting that the evidence was insufficient to link them. (*Id.* at p. 983.) The Court observed that in *Daimler Trucks North America LLC v. Superior Court* (2022) 80 Cal.App.5th 946 (*Daimler*), the plaintiff provided substantial evidence showing the defendant-manufacturer's "connections to California, including activity specifically related to the model of truck at issue in the lawsuit." (*Preciado, supra,* 87 Cal.App.5th at p. 984 [citing *Daimler, supra,* 80 Cal.App.5th at 957.) That evidence was absent in *Preciado*.

Here, as in *Preciado*, Plaintiffs have failed to meet the threshold requirement of showing that Century Arms advertised, sold, or serviced, *in California*, the "non-California complaint" model of the WASR-10 rifle used in the shooting. While Plaintiffs do submit an online sales listing of "California compliant" WASR-10 rifles, as well as interrogatory responses showing the number of sales of "California compliant" WASR-10 rifles in the state, there is no evidence of any sale (or advertising or service) of any non-California-compliant WASR-10 rifle in California. Instead, Plaintiffs maintain that because there is "no material difference" in the features and functions of the California-compliant and non-California-compliant versions of the rifle, the shooter's use of a non-California-compliant rifle is sufficiently "related to" Century Arms' sales of California-compliant rifles. (Opposition, p. 5:21-22.) This contention is based on a misapplication of language quoted by *Preciado*. In *Preciado*, the Court quoted language from other, out-of-state opinions applying *Ford Motor* and noted that other courts had found that specific jurisdiction could potentially extend to forum activity (e.g., sales) of a different model of the product at issue if "'other models of the same product type that were produced by the defendant manufacturer could or would share the same design defect, manufacturing defect, or defective warnings as the particular model at issue in the litigation.'" (*Preciado*, 87 Cal.App.5th at p. 983 [quoting *Adams v. Aircraft Spruce & Specialty Co.* (Conn. 2022) 345 Conn. 312, 340].) In other words, if "no material difference" could be shown in the features or functions of an allegedly defective product and other product models "of the same product type," then the litigation could potentially be "related to" the manufacturer's forum activities under the second prong of the specific jurisdiction test.

This case is fundamentally not a products liability case, however, and so the question of "no material difference" must focus not so much on the features or functions of the products at issue, but rather on the allegedly negligent importation, advertising, sales, and business practices of Century Arms, as set forth in the 5AC.[2] In this case, one overriding difference

[2] While the 5AC purports to allege a sixth cause of action for products liability, the gravamen of the claim sounds in negligence. In particular, the sixth cause of action alleges that "defendants knowingly breached the duty to exercise the highest degree of reasonable care in preventing the diversion of firearms to dangerous actors that they had voluntarily assumed when they entered the firearms business." (5AC, ¶ 117.) That is not a product defect claim—that is a claim alleging negligent importation and sales. All of the other factual allegations in the sixth

significantly impacts Century Arms' ability to import, advertise, sell, or otherwise conduct business relating to its WASR-10 rifles, and that difference is that one version is authorized to be sold in California, and one version is not authorized to be sold in California. That is a "material difference," and it ends the inquiry under the second prong.

Even if the court accepted Plaintiffs' interpretation of *Preciado* and applied a rule regarding manufacturing and design defects in a products liability context to allegedly negligent acts by Century Arms in a broader context, Plaintiffs would not meet their burden of showing that the "related to" language of the second prong has been satisfied. That is because the differences between the California-compliant and non-California-compliant models of the WASR-10 include not only the presence or absence of a muzzle device, bayonet lug, pistol grip, or fin grip,[3] but they also include a different magazine capacity (*i.e.*, number of rounds that can be contained in the magazine), which goes directly to the lethality of the rifle at issue. Plaintiffs argue that "the ability to receive a high-capacity magazine (and the shooter in this case used an after-market 75-round high capacity drum magazine) is identical between the two models," and so it makes "no difference" that the California-compliant model included only a 10-round magazine instead of a 75-round magazine. (Opposition (No. 2) at p. 6:9-17.) What Plaintiffs have failed to show, however, is that an "after-market 75-round high capacity drum magazine" would have been legal in California at the time *and* that it would have been reasonable for Century Arms to know and anticipate that its California-compliant model could be so modified by after-market modifications in California. There is simply no evidence to support these inferences in the record. Therefore, Plaintiffs' conclusory argument that there are "no material differences" in the features of the WASR-10 models is unavailing.

In short, Plaintiffs have failed to establish a relationship between Century Arms' contacts with California and the issues raised by this particular lawsuit. In *Preciado*, the Court held that plaintiffs failed to establish sufficient contacts because the chassis manufacturer assembled the chassis at issue in South Carolina, sold the chassis in Michigan, and "had no involvement in bringing that chassis, or the bus into which it was ultimately incorporated, into California." (*Preciado, supra*, 87 Cal.App.5th at p. 984.) Similarly, here, the 5AC alleges that ROMARM S.A., a foreign firearms manufacturer operating out of Romania, manufactured the non-California-compliant WASR-10 rifle and its parts in Romania and that assembly occurred at an unspecified location. (5AC, ¶¶ 155-157.) The 5AC also alleges California bars the sale of the rifle model at issue. (*Id*. at ¶¶ 120-121, 144.)

2. Fair Play and Substantial Justice

Because Plaintiffs have failed to meet their burden to establish the second prong of the specific jurisdiction inquiry, the court need not reach the third prong—*i.e.*, whether jurisdiction over Century Arms would comport with fair play and substantial justice.

The court GRANTS Century Arms' motion to quash.

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cause of action similarly focus on importation, advertising, sales, and business practices, not defective *features* in the gun. (*Id.* at ¶¶ 118-133.)

[3] The court has no idea what a "fin grip" is or does, as it is not explained anywhere in the parties' briefing.

III. CENTURY ARMS' DEMURRER AND MOTION TO STRIKE

In light of the court's ruling on the motion to quash, the demurrer and motion to strike are MOOT, and the court declines to address the merits of these motions.

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Calendar Line 5
Case Name: *John Doe 1 et al. v. Berryessa Union School District et al.*
Case No.: 22CV401151

I. BACKGROUND

This case arises from the alleged childhood sexual abuse of three former students, plaintiffs John Doe 1, John Doe 2, and John Doe 3 (collectively, "Plaintiffs"), while they were attending Sierramont Middle School between 20 and 26 years ago. Sierramont Middle School is a school within the Berryessa Union School District (the "District") in San Jose, California.

Plaintiff John Doe 1 filed the original complaint on July 14, 2022. John Doe 1 and John Doe 2 filed a First Amended Complaint ("FAC"), adding allegations regarding the latter, on August 31, 2022. Plaintiffs filed the operative Second Amended Complaint ("SAC"), adding allegations regarding John Doe 3, on February 10, 2023. All three Plaintiffs allege that they were sexually abused at different times by defendant Ronald Gardner ("Gardner"), while he was employed by the District.

The SAC states four causes of action (none of which are listed on the caption page). These are: (1) Sexual Abuse of a Minor, against Gardner and various Roe defendants; (2) Negligent Hiring, Supervision and/or Retention (Gov. Code, § 815.2), against the District and various Roe defendants; (3) Negligent Supervision of Plaintiffs (Gov. Code, § 815.2), against the District and various Roe defendants; and (4) Negligence of Administrators and Employees in Implementing, Training, Enforcing and/or Abiding by Protective Measures (Gov. Code, § 815.2), against the District and various Roe defendants.

The District filed its answer to the SAC on March 14, 2023. Currently before the court is the District's motion for judgment on the pleadings ("JOP"), which contends that the causes of action against the District should be dismissed because they have been brought under an unconstitutional amendment to Code of Civil Procedure section 340.1 and the Tort Claims Act.

II. REQUESTS FOR JUDICIAL NOTICE

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

A. The District's Request

In support of its motion the District has submitted a request for judicial notice of two documents, copies of which are attached as Exhibits A and B to the request. The District claims that both documents can be noticed pursuant to section 452, subdivision (c) (official acts).

The court grants judicial notice of Exhibit A, a copy of a "Floor Analysis" for Assembly Bill No. 218 ("AB 218"). The court also grants judicial notice of Exhibit B, a copy of a Contra Costa County Superior Court order, but only for the fact that it was entered by that court and the date on which it is entered. The court cannot take judicial notice of the correctness of another trial court's interpretation of the law or its findings of fact. (See *Bolanos v. Superior Court* (2008) 169 Cal.App.4th 744, 761 [a written trial court ruling has no precedential value]; *In re Marriage of Shaban* (2001) 88 Cal.App.4th 398, 409 [no "horizontal stare decisis"]; *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1565; *Fowler v. Howell* (1996) 42 Cal.App.4th 1746, 1749; *Kilroy v. State of Calif.* (2004) 119 Cal.App.4th 140, 145-148; *Barri v. Workers' Comp. Appeals Bd.* (2018) 28 Cal.App.5th 428, 437-438.)

B. Plaintiffs' Request

With their opposition, Plaintiffs have submitted a request for judicial notice of 17 trial court orders (or tentative rulings), attached as Exhibits 1-17 to the request, pursuant to Evidence Code section 452, subdivision (c). As with the District's Exhibit B, the court grants judicial notice of the entry of these orders and their dates.

III. THE DISTRICT'S MOTION FOR JUDGMENT ON THE PLEADINGS

A. General Authority

A JOP motion is the functional equivalent of a general demurrer but is made after the time to demur has expired. (See Code Civ. Proc., § 438.) Except as provided by the statute, the rules governing demurrers apply. The motion may be brought on the same grounds as a general demurrer—*i.e.*, that the pleading at issue fails to state facts sufficient to constitute a legally cognizable claim or defense. (See *Cloud v. Northrop Grumman Corp*. (1998) 67 Cal.App.4th 995, 999; *County of Orange v. Association of Orange County Deputy Sheriffs* (2011) 192 Cal.App.4th 21, 32; *Southern Calif. Edison Co. v. City of Victorville* (2013) 217 Cal.App.4th 218, 227.) As with a demurrer, the court may not consider extrinsic evidence in ruling on a motion for JOP, the court treats a motion for JOP "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "[J]udgment on the pleadings must be denied where there are material factual issues that require evidentiary resolution." (*Schabarum v. California Legislature* (1998) 60 Cal.App.4th 1205, 1216.)

B. The Basis for the District's Motion

The District seeks judgment as to the SAC's second, third, and fourth causes of action "on the basis that AB 218 retroactively strips statutory governmental immunity from public entities, in violation of Article XVI, § 6 of the California Constitution, which expressly prohibits gifts where there is no enforceable claim, even if there is a moral or equitable obligation. To the extent AB 218 is unconstitutional as applied to public entities, the Plaintiffs do not have a viable claim against the District." (District's Notice of Motion and Motion at p. 2:8-12.)

In its supporting memorandum, the District attempts to raise an additional argument that is not clearly set forth in its notice of motion—*i.e.*, that because Plaintiffs did not comply with the Government Tort Claims Act's "claim presentation" requirement, sovereign immunity bars their claims against the District. (See Memorandum at pp. 5:10-8:6 generally.)

C. Analysis of the District's Motion

1. The Claim Presentation Requirement, AB 218, and Code of Civil Procedure Section 340.1

Under the Government Claims Act, "no person may sue a public entity or public employee for 'money or damages' unless a timely written claim has been presented to and denied by the public entity." (*County of Los Angeles v. Superior Court* (2005) 127 Cal.App.4th 1263, 1267.) In order to be timely, the claim generally must be presented to the particular entity within six months of accrual of the injury. (*A.M. v. Ventura Unified School Dist.* (2016) 3 Cal.App.5th 1252, 1257.) Absent an applicable exception, "failure to timely present a claim for money or damages to a public entity bars a plaintiff from filing suit against that entity bars a plaintiff from filing a lawsuit against that entity." (*State of California v. Superior Court* (2004) 32 Cal.4th 1234, 1239.)

There are a number of exceptions to the presentation requirement, set forth in Government Code section 905, including claims for damages from childhood sexual abuse under Code of Civil Procedure section 340.1. (See Gov. Code, § 905(m).) Before the passage of AB 218, section 340.1 permitted such claims to be brought "within eight years of the date the plaintiff attains the age of majority or within three years of the date the plaintiff discovers or reasonably should have discovered that psychological injury of illness occurring after the age of majority was caused by the sexual abuse, whichever period expires later." The Legislature significantly changed this in October 2019 with AB 218. Among other things, AB 218 lengthened the time within which an action for damages resulting from "childhood sexual assault" could be brought from *eight years to 22 years* from the date the plaintiff attains the age of majority or from *three years to five years* from the date the plaintiff "discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual assault." (See Code Civ. Proc., § 340.1(a).) AB 218 also amended Government Code section 905 by deleting from subdivision (m) the language that provided an exception only for claims arising out of conduct occurring on or after January 1, 2009—instead allowing the exception to the claim presentation requirement to apply without any date restriction—and adding Government Code section 905(p), which made this change retroactive.

Code of Civil Procedure section 340.1(q) now states: "Notwithstanding any other law, any claim for damages described in paragraphs (1) through (3), inclusive, of subdivision (a) that has not been litigated to finality and that would otherwise be barred as of January 1, 2020, because the applicable statute of limitations, claim presentation deadline, or any other time limit had expired, is revived, and these claims may be commenced within three years of January 1, 2020. A plaintiff shall have the later of the three-year time period under this subdivision or the time period under subdivision (a) as amended by the act that added this subdivision."

Code of Civil Procedure section 340.1(r) now states: "The changes made to the time period under subdivision (a) as amended by the act that amended this subdivision in 2019 [AB 218] apply to and revive any action commenced on or after the date of enactment of that act, and to any action filed before the date of enactment, and still pending on that date, including any action or causes of action that would have been barred by the laws in effect before the date of enactment."

Code of Civil Procedure section 340.1(s) now states: "Notwithstanding any other law, including Chapter 1 of Part 3 of Division 3.6 of Title 1 of the Government Code (commencing with Section 900) and Chapter 2 of Part 3 of Division 3.6 of Title 1 of the Government Code (commencing with Section 910), a claim for damages described in paragraphs (1) through (3), inclusive, of subdivision (a), is not required to be presented to any governmental entity prior to the commencement of an action."

Government Code section 905, subdivision (m), now exempts "[c]laims made pursuant to Section 340.1 of the Code of Civil Procedure for the recovery of damages suffered as a result of childhood sexual assault," from presentation requirements under the Government Code. Government Code section 905, subdivision (p) now states: "The changes made to this section by the act that added this subdivision are retroactive and apply to any action commenced on or after the date of enactment of that act, and to any action filed before the date of enactment and still pending on that date, including any action or causes of action that would have been barred by the laws in effect before the date of enactment."

These statutes are all presumed constitutional. "'The courts will presume a statute is constitutional unless its unconstitutionality clearly, positively, and unmistakably appears; all presumptions and intendments favor its validity.' The party arguing unconstitutionality has the burden of proof." (*Donorovich-Odonnell v. Harris* (2015) 241 Cal.App.4th 1118, 1134-1135, internal citation omitted.)

The amended language of these statutes make very clear the Legislature's determination that claims such as those alleged in the SAC's second, third, and fourth causes of action are not subject to claim presentation requirements and cannot reasonably be considered to be barred by any sovereign immunity associated with such requirements. Indeed, even if this court were to accept the District's argument that the claims presentation requirement constitutes an "immunity"—rather than just another iteration of a prescriptive period that limits the timeframe in which claims may be brought, like a statute of limitations—the District has failed to present any authority for the proposition that the Legislature may not modify any "immunity" under the Tort Claims Act whenever it wants to. The Tort Claims Act, after all, is simply another legislative act, just like AB 218, and there is nothing about amending it that is of constitutional dimension.

In *Coats v. New Haven Unified School Dist.* (2020) 46 Cal.App.5th 415, the First District Court of Appeal noted (in a different context involving claims made by a foster mother) that that it was aware of "no reason the Legislature should be any less able to revive claims in this context as it expressly did in Assembly Bill 218." (*Coats,* 46 Cal.App.5th at 428.) The Court also confirmed the retroactive application of the AB 218 amendments. "In the face of a revival provision expressly and unequivocally encompassing claims of childhood sexual abuse previously barred for failure to present a timely government claim, it is clear we

must reverse the trial court's judgment and remand for further proceedings on appellants' complaint." (*Id*. at pp. 430-431.)

2. AB 218 and the Gift Clause

Article XVI, section 6 of the California Constitution, colloquially referred to as the "gift clause," prohibits the Legislature from making "any gift or authoriz[ing] the making of any gift, or any public money or thing of value to any individual, municipal or other corporation . . . ." The term "gift" is defined as including "all appropriations of public money for which there is no authority or enforceable claim," even if there is a moral or equitable obligation. (*Jordan v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 431, 450 (*Jordan*).) Thus, "[a]n appropriation of money by the legislature for the relief of one who has no legal claim . . . must be regarded as the gift within the meaning of that term, as used in this section, and it is none the less a gift that a sufficient motive appears for its appropriation, if the motive does not rest upon a valid consideration." (*Ibid.*, internal citations and quotations omitted.)

a) AB 218 is Not an "Appropriation"

The court rejects the District's constitutional challenge for at least two reasons. First and foremost, AB 218 is not a "gift" because it is not an "appropriation of money." (*Jordan, supra,* 100 Cal.App.4th at p. 450.) AB 218 does not allocate any public money to anyone—it merely removes a time bar that previously existed for claims of childhood sexual abuse. The claimant must still prove liability for that abuse in a court of law. As a result, the present situation is entirely distinguishable from the situations described in the cases cited by the District—*Bourn v. Hart* (1892) 93 Cal. 321, 326-328 (*Bourn*); *Conlin v. Board of Supervisors of the City and County of San Francisco* (1893) 99 Cal. 17, 21 (*Conlin*); *Powell v. Phelan* (1903) 138 Cal. 271 (*Powell*); *Jordan, supra,* 100 Cal.App.4th at p. 441—all of which involved an appropriation of specific sums of money, or an identification of a specific fund, for specific recipients.[4] In contrast to those cases, there is no "appropriation" here—there is no sum of money or fund set aside or designated for a specific use—and so there is no "gift."

As Plaintiffs point out, AB 218 did not create a new tort liability that never existed before. It merely removed a procedural barrier (previously enacted by the very same California Legislature) against bringing those claims in court. Thus, the case of *Chapman v. State* (1894) 104 Cal. 690, 696, though ancient, is directly on point. In *Chapman,* the California Supreme Court held that the Legislature's provision of a judicial remedy for claims that could previously only be brought before the State Board of Examiners was not a violation of the gift clause because it did not create any *new liability*:

> We are entirely satisfied that plaintiff's cause of action, as alleged in the complaint, arises upon contract, and that the liability of the state accrued at the time of its breach; that is, when the coal was lost through the negligence of the officers in charge of the state's wharf, although there was then no law giving to the plaintiff's assignors the right to sue the state therefor. At that time the only remedy given the citizen to enforce the contract liabilities of the state, was to present the claim arising thereon to the state board of

[4] The District also cites dicta from *Heron v. Riley* (1930) 209 Cal. 507, which has no application here.

> examiners for allowance, or to appeal to the legislature for an appropriation to pay the same; but the right to sue the state has since been given by the act of February 28, 1893, and in so far as that act give the right to sue the state upon its contracts, the legislature did not create any liability or cause of action against the state where none existed before. The state was always liable upon its contracts, and the act just referred to merely gave an additional remedy for the enforcement of such liability, and it is not, even as applied to prior contracts, in conflict with any provision of the constitution.

(*Ibid.*) Rather than distinguish or discredit *Chapman*, the District's reply brief simply ignores it. For this reason alone, the JOP motion must be denied.

b) AB 218 Serves a Public Purpose

Second, even if AB 218 could somehow be construed to provide for an "appropriation," the court finds that its amendments to Code of Civil Procedure section 340.1 and Government Code section 905 are directed to a public purpose. "It is well settled that the primary question to be considered in determining whether an appropriation of public funds is to be considered a gift is whether the funds are to be used for a public or private purpose. If they are to be used for a public purpose, they are not a gift within the meaning of this constitutional prohibition. [Citations omitted].) (*California Teachers Assn. v. Board of Trustees* (1978) 82 Cal.App.3d 249, 257; see also *Teachers' Retirement Bd. v. Genest* (2007) 154 Cal.App.4th 1012, 1036.) "The benefit to the state from an expenditure for a 'public purpose' is in the nature of consideration and the funds expended are therefore not a gift even though private persons are benefited therefrom. The determination of what constitutes a public purpose is primarily a matter for legislative discretion, which is not to be disturbed by the courts so long as it has a reasonable basis." (*County of Alameda v. Janssen* (1940) 16 Cal.2d 276, 281, internal citations omitted; see also *Paulson v. Abdelnour* (2006) 145 Cal.App.4th 400, 419.)

Here, in the event that Plaintiffs prevail on their causes of action, the benefits of such a result would not be limited to Plaintiffs. The stated purpose of AB 218, in addition to allowing victims of childhood sexual abuse to be compensated for their injuries, is to "help prevent future assaults by raising the costs for [harm caused by childhood sexual abuse]" and to serve "as an effective deterrent against individuals and entities who have chosen to protect perpetrators of sexual assault over victims." (See *X.M. v. Superior Court* (2021) 68 Cal.App.5th 1014, 1027, quoting Off. Of Assem. Floor Analyses, Analysis of Assem. Bill No. 218 (2019-2020 Reg. Sess.), as amended Aug. 30, 2019, p. 2.) The prevention of future assaults on students in public schools by school employees is a benefit to the public as a whole, which contrasts sharply with the narrow scope of benefits conferred in the gift clause cases cited by the District. (*Bourn*, *Conlin*, *Powell*, and *Jordan*, *supra*.) Therefore, any liability that may ultimately result from this case or similar cases involving childhood sexual assault serves a public purpose and does not qualify as a gift within the meaning of the "gift clause" of Article XVI, section 6 of the California Constitution.

IV. CONCLUSION

The court DENIES the District's motion for judgment on the pleadings as to the SAC's second, third, and fourth causes of action "on the basis that AB 218 retroactively strips statutory governmental immunity from public entities, in violation of Article XVI, § 6 of the

California Constitution." (Notice of Motion at p. 2:8-9.) The court is not persuaded by the District's creative but ultimately sophistic constitutional challenge.

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Calendar Line 6
Case Name: *Crysti Flowers-Haywood v. Bryan Rios et al.*
Case No.: 19CV347525

Plaintiff Crysti Flowers-Haywood ("Flowers-Haywood") moves to compel further responses to employment form interrogatories, requests for production of documents, and special interrogatories from defendant Mountain View Whisman School District (the "District"). In addition, she seeks $13,847.50 in monetary sanctions. For the reasons that follow, the court GRANTS the motion in part, DENIES the motion in part, and GRANTS in part the request for sanctions.

1. Documents Relating to the "Kennedy Investigation" (Requests for Production Nos. 27 & 29)

The parties' primary substantive dispute centers on an investigation by the District into allegations of sexual assault committed by defendant Bryan Rios, which Flowers-Haywood refers to as the "December 2017 Kennedy Investigation." According to the District, it retained "outside counsel" to conduct this investigation after a different teacher ("Jane Doe") reported that Rios assaulted her at his apartment. The District claims that the purpose of this investigation was to obtain "legal opinions and advice relating to [Rios]." (Opposition at p. 1:21-22.) There does not appear to be any indication that the investigation was directed to Flowers-Haywood's allegations of a hostile work environment created by Rios, although the investigator did speak with Flowers-Haywood and other employees about Rios.

As an initial matter, the court notes that the parties' motion papers are entirely unclear as to whether the dispute is about a single document or multiple documents generated as part of the "Kennedy Investigation." The District's opposition focuses exclusively on a single "report" prepared by counsel, but its response to Request for Production No. 29 also refers to "[c]orrespondence" with counsel. Flowers-Haywood's memorandum of points and authorities refers to a separate "report" to the "Commission on Teacher Credentialing," "a synopsis [or] summary of [the investigator's] report," and "witness interview notes." (MPA at p. 10:17-23.) Flowers-Haywood's brief focuses on multiple "documents related to the investigation." (*Id.* at p. 11:4.) The briefs are totally unclear as to which of these documents have actually been produced and which documents have not been produced. It does appear that Flowers-Haywood did receive the "letter to the CTC," given that she quotes from it in her opening brief. (*Id.* at p. 10:24-28.)

To the extent that the motion seeks the primary "report" prepared by outside counsel, the court is inclined to find that it is indeed protected from disclosure by the attorney-client privilege, given that its purpose was to obtain "legal opinions and advice" regarding the sexual assault allegations by Doe against Rios, and given that the District ultimately terminated Rios after the report was completed. At best, the report is only tangentially connected to Flowers-Haywood's own claims against the District. While Flowers-Haywood is not necessarily incorrect that she "is entitled to discover what information (i.e., notice), if any, the District had related to Rios' conduct prior to the 2018-2019 school year," that does not mean that she is entitled to obtain that discovery through an attorney-client privileged report, as opposed to other means.

To the extent that the motion seeks other documents arising out of the "Kennedy Investigation," the court is not in a position to determine whether all of these documents are similarly privileged, because there is zero clarity as to what these documents actually are (or even how many there are). Part of this lack of clarity is the result of the lack of a privilege log, and so the court agrees with Flowers-Haywood that if the District is withholding other documents (including communications) from the "Kennedy Investigation," apart from the final report itself, they must be identified on a privilege log. The court's determination as to whether information is privileged must be made on a document-by-document basis, not on the basis of an identification of an amorphous category of documents "related to" an investigation.

For this same reason, the court is not in any position to determine that any privilege has been "waived." Flowers-Haywood argues that the District waived any privilege regarding the "investigation" because it allowed its witness, Carmen Ghysels, to testify about certain aspects of the "investigation." These vague allegations are insufficient for the court to find a waiver. The court's determination as to a waiver must also be made on a document-by-document basis, not on the basis of an undefined category of "investigation"-related documents. If it is Flowers-Haywood's contention that, by sending its "synopsis" or "summary" of the investigator's report to the Commission on Teacher Credentialing, the District waived the attorney-client privilege as to the report itself, then that must be supported by a specific showing, not generalized claims about "testimony disclosing what the summary said." (MPA at p. 10:22-23.) That is completely inadequate.

In short, as to these document requests, the motion is GRANTED in part, to the extent that it seeks a privilege log; in all other respects, it is DENIED.

2. Employment Form Interrogatory No. 200.3

The District's answer is sufficiently responsive. The fact that there may be other documents that *relate to* the employment dispute (*e.g.*, "protocols, methods, policies, procedures, and practices") does not mean that these documents necessarily *support* the contention that the employment relationship is governed by an agreement or contract. DENIED.

3. Requests for Production Nos. 3 & 31

For the same reason that the motion is denied as to Form Interrogatory No. 200.3, it is DENIED as to Request No. 3. As for Request No. 31, it is not necessary for the District to go through the exercise of amending its response to make clear that there are no responsive documents in its possession, custody, or control if that fact has been made clear to Flowers-Haywood. DENIED.

4. Special Interrogatories Nos. 6, 7, 12, 16, and 18

The District's verified responses to Interrogatories Nos. 6 and 16 are too general. It should identify the "emails and documents exchanged by the Parties" with greater precision (e.g., by Bates number). As for Interrogatories Nos. 7, 12, and 18, the answers are too circuitous and confusing. The answers should be amended (and verified)—even if the answers are simply "no" to each interrogatory. GRANTED.

5. Special Interrogatories Nos. 8, 13, and 19

The answers to these interrogatories are evasive. The obligation to answer interrogatories includes the obligation to conduct a reasonable investigation. The District must supplement or amend its response to these interrogatories within 30 days. GRANTED.

6. Special Interrogatories Nos. 9, 10, 14, 15, 20, and 21

These interrogatories are all derivative of Nos. 8, 13, and 19, discussed above. Again, the obligation to answer interrogatories includes the obligation to conduct a reasonable investigation. GRANTED, with supplemental responses due within 30 days.

7. Special Interrogatory No. 17

The court finds this interrogatory to be overbroad and that the District's answer is sufficiently responsive. DENIED.

8. Verifications

Although verifications should ordinarily be provided with each set of written discovery responses, the District has provided a single verification for multiple sets of responses. While atypical, Flowers-Haywood fails to explain why this is inadequate. With the service of this verification, the District waives any objection to its use for any of the discovery responses at issue on this motion. That should be good enough. DENIED.

9. Sanctions

The court finds that the District dragged its feet on providing timely discovery in this case. At the same time, the court finds that Flowers-Haywood still acted somewhat precipitously and without warning in filing this motion. The $13,847.50 sought by Flowers-Haywood is grossly excessive, particularly given that *both* sides acted with and without substantial justification. Because the District failed to provide a privilege log and because some of its interrogatory responses remain evasive, the court ultimately awards monetary sanctions against the District (only the District and not counsel) and in favor of Flowers-Haywood in the amount of $1,000, to be paid within 30 days of the date of this order.

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Calendar Line 7
Case Name: *Kent Taylor v. Aifeng Su et al.*
Case No.: 21CV379921

This case arises out of a traffic accident between plaintiff Kent Taylor and defendant Aifeng Su. Taylor has moved to compel the deposition of a third-party Palo Alto police officer—identified as "Officer Jun" in the parties' papers—who responded to the accident in December 2018. The City of Palo Alto indicates that it is not opposed to the deposition going forward, but that it objects to the proposed manner and location of the deposition: Taylor has proposed recording the testimony by audio only, rather than stenographically; in addition, he has proposed having the oath administered at a UPS Store in Sunnyvale (where there is a notary public) and then conducting the examination in the lobby of City Hall in Palo Alto. Like the City, defendant Su has also objected to the proposed manner and location of the deposition.

The court agrees with the City and Su that the deposition needs to be recorded stenographically, in accordance with Code of Civil Procedure section 2025.330, subdivision (b). An audio-only recording is of limited utility, as the recording would still need to be transcribed in order to be used in court proceedings, and there is too much room for disagreement between the parties, as well as witnesses, about the accuracy of any informal transcription. The only way to avoid these issues is to have a certified court reporter record the testimony stenographically. If any party wishes to have an audio or video recording *in addition to* the stenographic record, as provided for in section 2025.330, subdivision (c), that is permissible, but the court does not read subdivision (c) as allowing for an audio recording *in lieu of* a stenographic record.

To the extent that cost is an issue, there are resources available for indigent parties, particularly the California Transcript Reimbursement Fund ("TRF"). (See Bus. & Prof. Code, §§ 8030.1-8030.10.) Taylor may wish to apply for financial instance from the TRF, if he qualifies.

As for the location of the deposition, the court agrees with the City and Su that a UPS Store and the City Hall lobby are not appropriate locations. Nevertheless, if the City is not willing to offer the use of one of its conference rooms to the parties, then it should be prepared to have the deposition go forward at either Taylor's residence or another similar location. The court urges the parties to meet-and-confer to identify a mutually agreeable location.

The court GRANTS the motion to the extent that it seeks to have a deposition of Officer Jun actually occur within the next 90 days; the court DENIES the motion to the extent that it seeks an order mandating an audio-only recording of the deposition or mandating the specific locations for the deposition proposed by Taylor.

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Calendar Line 8
Case Name: *KG-Bryant LLC v. Eric Schimmel et al.*
Case No.: 21CV390243

Plaintiff K-G Bryant, LLC ("KGB") moves for terminating sanctions against defendants Eric Schimmel and Katherine Schimmel (collectively, "Defendants" or the "Schimmels"), based on the Schimmels' failure to respond to discovery, notwithstanding this court's June 1, 2023 order compelling them to do so. The court DENIES terminating sanctions. Although Defendants have clearly disobeyed the court's prior order and have not provided necessary discovery, KGB has not shown that a terminating sanction is the appropriate remedy here, given its failure to seek less severe sanctions or show why less severe sanctions would be inadequate.

1. Recent Procedural History

KGB filed its original motion to compel against the Schimmels on February 7, 2023. One week later, on February 14, 2023, the Schimmels' attorney filed a motion to be relieved as counsel. The motion to compel was heard first, on May 23, 2023. Because the court had received no opposition to the motion to compel, and because it appeared that the Schimmels had failed to respond to any of the written discovery requests, the court granted KGB's motion. (The court signed the order after hearing on June 1, 2023.) The court also awarded KGB monetary sanctions of $800, finding KGB's requested amount of $3,025 to be too high. On July 28, 2023, the court heard and granted the Schimmels' counsel's motion to be relieved. Since then, the Schimmels have been representing themselves.

On that same day, July 28, 2023, KGB filed and served an amended notice of the hearing date for the present motion for sanctions. It appears that the amended notice was served directly on the Schimmels, but the court has received no timely response to the motion.

2. Discussion

Despite the absence of any opposition, the court concludes that terminating sanctions should be denied. The purpose of discovery sanctions is to remedy any harm that may have been suffered by the moving party as a result of the lack of discovery. It is axiomatic that this court must consider "whether a sanction short of dismissal or default would be appropriate to the dereliction." (*Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 796-797.) In this case, KGB has gone straight for the "nuclear option" of default, without properly considering (or attempting to show) whether evidence or issue sanctions would be enough to place it in the same position it would have been in if it had obtained the requested discovery from the Schimmels in the first place.[5]

In addition to terminating sanctions, KGB seeks additional monetary sanctions of $2,380 in fees and $60 in costs for having had to bring this motion. As with the original motion to compel, the court finds this amount to be too high, particularly given the simple nature of these motions. Nevertheless, given the Schimmels' ongoing failure to provide

[5] The court notes that KGB prepared the present motion for terminating sanctions just about *one month* after receiving the court's signed order granting the motion to compel. That hardly shows a careful consideration of less drastic options. Rather, it shows a rush to obtain the most extreme remedy.

discovery responses, the court grants KGB's request in part and awards $500 in monetary sanctions.

3. Conclusion

The motion for terminating sanctions is DENIED. The request for additional monetary sanctions is GRANTED IN PART, in the amount of $500.

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Calendar Line 9
Case Name: *Sophie Shen v. Weiping Xia et al.*
Case No.: 19CV360975

Plaintiff and judgment creditor Sophie Shen brings this motion for an order of sale of the home of defendant and judgment debtor Weiping Xia. Shen originally filed this motion as an ex parte application on June 15, 2023, but the court denied the application without prejudice, stating that the request needed to be brought as a noticed motion rather than an ex parte application, in order to give Xia an opportunity for "full briefing and a hearing." (See June 16, 2023 Order.) The court now understands, having reviewed Code of Civil Procedure sections 704.710-704.850 more closely, that it was only partly correct. Under section 704.750, a judgment creditor may in fact file a request for an order of sale as an ex parte application, and then the court is supposed to set a hearing "not later than 45 days after the application is filed," under section 704.770, and order the judgment debtor to show cause why the order for sale should not be made.

In any event, Xia now opposes the noticed motion on the ground that Shen has not followed the necessary steps set forth in sections 704.710-704.850. Specifically, Xia argues that Shen is supposed to have used a writ of execution from the court to obtain a levy (by the county sheriff) on the property; after the levy and proper notice of the levy occur, then Shen could apply for an order of sale with the court. (Opposition at pp. 3:14-4:2.) Shen responds that the "basic statutory requirement" is "that a court order is required to start the sale of a dwelling house." Thus, "[t]he levying process must start after, not before, the court orders the house sale." (Reply at p. 1:6-10.)

The undersigned is by no means an expert in adjudicating this "chicken and egg" problem presented by the parties, and the undersigned finds that sections 704.710-704.850 are hardly a model of clarity. Nevertheless, after reading the statutory language several times, the court ultimately agrees with Xia that Shen has not followed the correct sequence. Shen argues that she needs a court order to begin the process of ordering a house sale, but she already has a court order in the form of a *judgment after trial* against Xia. Under Code of Civil Procedure sections 699.510 and 699.520, she must first obtain, as the judgment creditor, a *writ of execution* from the clerk of court to initiate the levy. Once the levy has been made, the "levying officer shall serve notice on the judgment creditor," and then the creditor has "20 days" after service of the notice to "apply to the court for an order for sale of the dwelling and shall file a copy of the application with the levying officer." (Code Civ. Proc., § 704.750.) Upon receipt of the application, the trial court shall set an OSC hearing "not later than 45 days after the application is filed." (Code Civ. Proc., § 704.770.)

The foregoing steps have not yet been followed by Shen. Accordingly, the court DENIES the motion (again, without prejudice).

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Calendar Line 10
Case Name: *Institute for Business & Technology, Inc. v. Fortune Companies Management Corp. et al.*
Case No.: 20CV371090

Defendants Fortune Companies Management Corporation ("Fortune Corp."), Fortune Realty, LLC ("Fortune Realty"), and Mosaic Equities, LLC ("Mosaic") move for an award of attorney's fees, after the court entered a judgment in their favor following a dispositive motion. Plaintiff Institute for Business & Technology, Inc. ("IBT") does not dispute that defendants are the prevailing parties, nor does it contest the factual basis for the amounts sought by defendants (counsel's billing records). Nevertheless, IBT opposes the motion on three grounds, discussed below.

1. The Court's "Schedule of Reasonable Attorney Fees"

First, IBT argues that the court has published a "Schedule of Reasonable Attorney Fees" on its website and that defendants' request "is 80 times higher than allowed" by this schedule. The court rejects this argument out of hand, as it fundamentally misunderstands the purpose of this schedule. The schedule is designed to provide a guideline for reasonable fees in "all cases in which a default judgment is entered in favor of a party who pleaded and proved entitlement to reasonable attorney's fees." (Santa Clara County Court Rules, Rule 14.) There was no default judgment in the present case, and so the schedule is inapplicable. Rather, the proper determination of reasonableness is based on the lodestar method, which computes "the number of hours reasonably expended multipled by the reasonable hourly rate." (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095-1096.) Defendants have applied the lodestar method in their motion; IBT has not.

2. Attorney's Fees for Fortune Corp.

Second, IBT argues that because Fortune Corp. was not a party to the lease (only Fortune Realty and Mosaic became successors to the prior landlord), any attorney's fees for work that was performed for Fortune Corp. alone should be excluded. Defendants respond that because IBT sued Fortune Corp. "on the contract," Fortune Corp. is a prevailing party "on the contract" along with Fortune Realty and Mosaic under Civil Code section 1717. In addition, defendants respond that because the same counsel defended all three defendants at the same time in this litigation, as to claims that were "inextricably intertwined," "it is not possible to differentiate between compensable and noncompensable time." (Reply at p. 7:1-55 [quoting *Hill v. Affirmed Housing Group* (2014) 226 Cal.App.4th 1192, 1197].)

The court notes that the breach of contract (and breach of implied covenant) causes of action in the first amended complaint ("FAC") are asserted against only Fortune Realty and Mosaic, rather than against Fortune Corp. At the same time, the FAC confusingly includes numerous allegations against Fortune Corp. regarding financial transactions under the lease, misrepresentations concerning the lease, and alleged overpayments pursuant to the lease. Many of IBT's allegations against the defendants indiscriminately lump Fortune Corp. together with the other two landlord defendants in connection with the disputed lease. Indeed, even though the declaratory relief cause of action is not explicitly asserted against Fortune Corp.—only the other two defendants—the FAC's "Prayer" for relief still requests:

> . . . a declaration interpreting the Lease that defines FORTUNE CORP, FORTUNE, LLC and MOSAIC'S obligations with respect to providing restitution to IBT pursuant to section 4 of the Lease for IBT's overpayments made to FORTUNE CORP, FORTUNE, LLC, and MOSAIC . . .

(FAC at p. 17:23-26.) Thus, defendants are not unreasonable in interpreting the FAC as attempting to sue Fortune Corp. "on the contract," even though Fortune Corp. is not a party to the contract. Defendants also persuasively contend that many of the allegations against the three defendants are "inextricably intertwined."

Nevertheless, the court concludes that if there are specific line items in defendants' counsel's time entries that are clearly attributable to work that was done only for Fortune Corp. (*i.e.*, that are not inextricably intertwined with work for the other defendants), then they may properly be subtracted from the total amount requested on this motion. The problem for IBT is that it has not adequately identified those amounts. With its counsel's declaration, IBT attaches an exhibit that purports to show time entries "that clearly identify the party for which the work done as Fortune Companies Management Corp. [in] the invoices submitted by Defendants." (Declaration of Kurt D. Hendrickson, ¶ 2, Ex. B.) In reality, the vast majority of the line items on this exhibit simply state "1/3 FCMC" and then subtract 1/3 of the amount of the time entry, based on the fact that Fortune Corp. is one out of three defendants. This is improper. (See *Mountjoy v. Bank of America, N.A.* (2016) 245 Cal.App.4th 266, 282 [trial court abused its discretion in applying an "across-the-board reduction in hours claimed," based on a percentage rather than on "the number of hours that were actually included"].) Even if a specific time entry indicates that time was spent preparing discovery responses for each of the three defendants, it is highly likely that these responses would have, in many instances, been substantively identical or overlapping, and that the same responses could have been used for multiple responses—IBT fails to show otherwise. In addition, even for those line items that simply state "FCMC," no explanation is given as to why IBT contends that the entry is attributable solely to Fortune Corp. This bare and conclusory exhibit is woefully insufficient to rebut defendants' affirmative showing that their time entries reflect "the interrelated and intertwined defense of all three Defendants." (Reply at p. 8:4-6.)

The only entries identified by IBT that could appropriately be carved out are: (1) time entries related solely to discovery requests propounded to Fortune Corp. (only), (2) preparation of any opposition to a motion to compel Fortune Corp. to respond to six requests for production, and (3) preparation for (but not attendance at) the deposition of Ellen M. Cheney, the COO of Fortune Corp.[6] Although IBT has not clearly identified the time entries that are limited to these specific tasks, the court has reviewed defendants' time entries and identified nine that fall into this category: two entries on 12/3/20 ($150.43 + $300.86), one full entry on 12/7/20 ($200.57), one partial entry (where the tasks between the three defendants are broken out) on 12/7/20 ($782.02), one entry on 1/8/21 ($75.23), one entry on 1/11/21 ($125.38), one entry on 5/11/21 ($203), one entry on 6/21/21 ($225.23), and one entry on 6/16/23 ($130). These entries total **$2,192.72**.

[6] Even if Fortune Corp. had been separately represented, the other two defendants would still have attended the deposition of Cheney. IBT also claims that costs associated with the two depositions of Benjamin Efraim should be excluded, but it appears that Efraim held positions in all three defendant entities, making the work related to his deposition "inextricably intertwined" as between the defendants.

3. Defendants' "Hyper-Aggressive" Stance

Third, IBT argues that defendants litigated this case in a "hyper-aggressive" manner and should not be awarded for having done so. Based on a review of the record, the court finds no evidence to support IBT's characterization of defendants' litigation behavior. IBT's claim that defendants "lost . . . three separate motions to compel" is belied by the case file, which shows no adverse discovery rulings in the case. In addition, the court finds that IBT's arguments in opposition to the summary judgment motion and in opposition to the present motion were far less reasonable than defendants' arguments. IBT has not shown that any of defendants' actions in this case caused it to be unduly costly or time consuming.

4. Conclusion

The court GRANTS defendants' motion for $202,551.20 in attorney's fees, minus the $2,192.72 identified above. The total fees award is **$200,359.48**.

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