SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 16
(Dept 16 is now hearing cases that were formerly in Dept 2)
Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 03-14-24 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear by video.

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 prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

TO CONTEST THE RULING: Before 4:00 p.m. today you must notify the:

(1) Court by calling (408) 808-6856 and
(2) Other side by phone or email that you plan to appear and contest the ruling
(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

TO APPEAR AT THE HEARING: The Court strongly prefers in person appearances. If you must appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to Department 16.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

TO SET YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. Phone lines are now open for you to call and reserve a date before you file your motion. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Where to call for your hearing date: 408-882-2430 When you can call: Monday to Friday, 8:30 am to 12:30 pm

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

COURT REPORTERS: The Court no longer provides official court reporters. If any party wants a court reporter, the appropriate form must be submitted. See court website for policy and forms.

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	20CV372258 OEX	CREDITORS ADJUSTMENT BUREAU, INC. vs CANVAS INFOTECH INC.	Off Calendar at request of Plaintiff.
LINE 2	23CV424776 OEX	Bickmore Building Supply, LLC vs Sandie Fisher	All parties are to appear in Department 16 at 9:00 AM. If all parties appear, the Court will administer the oath and the examination will take place off-line. Judgment creditor must arrange for how that will occur. If there is no appearance by the moving party, the matter will be ordered off calendar.
LINE 3	23CV421990 Hearing: Demurrer	Brian Doyle vs The City of Santa Clara	See Tentative Ruling. Court will prepare the final order.
LINE 4	23CV415224 Motion: Summary Judgment/Adjudication	Lingsen Leung vs Tawa Supermarket, Inc. et al	See Tentative Ruling. Court will prepare the final order.
LINE 5	20CV373069 Motion: Compel	Paul Battaglia vs Nilufer Koechlin	Will be off calendar unless parties appear to explain status.
LINE 6	20CV373069 Motion: Compel	Paul Battaglia vs Nilufer Koechlin	Will be off calendar unless parties appear to explain status.
LINE 7	20CV373069 Motion: Compel	Paul Battaglia vs Nilufer Koechlin	Will be off calendar unless parties appear to explain status.
LINE 8	20CV373069 Motion: Compel	Paul Battaglia vs Nilufer Koechlin	Will be off calendar unless parties appear to explain status.

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The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

LINE 9	23CV414773 Motion: Compel	ANGELA MISENHEIMER et al vs FORD MOTOR COMPANY et al	See Tentative Ruling. Defendant shall submit the final order within 10 days.
LINE 10	18CV336932 Motion; Enforce Settlement	Geoffrey Weigand vs Santa Clara Valley Water District	Notice appearing proper, the unopposed motion is GRANTED. Plaintiff shall submit the final order.
LINE 11			
LINE 12			
LINE 13			
LINE 14			
LINE 15			
LINE 16			
LINE 17			

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Calendar Line 3
Case Name: *Doyle v. City of Santa Clara.*
Case No.: 23CV421990

This action arises from an alleged unlawful termination. The City of Santa Clara ("City" or "Defendant") demurs to the operative Complaint filed by Brian Doyle ("Plaintiff.")

I. Background

A. Factual

Plaintiff was a City Attorney for the City of Santa Clara, and the Stadium Authority Counsel ("SAC") for the Santa Clara Stadium Authority (collectively, "City Entities.") (Complaint, ¶ 2.) As both a City Attorney and SAC, Plaintiff had a duty to "competently" advise City Entities and to defend them in "numerous lawsuits" involving the City Entities' ownership of the "San Francisco 49ers football team." (*Id.* at ¶ 3.) From approximately February 2017 to December 2017, Plaintiff became the "Interim City Attorney" for the Defendant, in a "part time capacity." (*Id.* at ¶ 4.) From December 19, 2017, until his termination on September 2, 2021, Plaintiff worked in a "full-time capacity" as both City Attorney and SAC. (*Id.* at ¶ 5.)

During his employment as City Attorney, Plaintiff alleges he reasonably believed specific City Council members had agreed to a *quid pro quo* arrangement with third parties acting on behalf of the San Francisco 49ers ("49ers") (Complaint, ¶ 44.) Plaintiff alleges he reasonably believed the 49ers provided $700,000 in campaign funding to oppose a ballot measure that would render moot an appeal in a case involving the California Voting Rights Act ("CVRA.") (Complaint, ¶ 46.)

Prior to a December 8, 2020, publicly held, City Council meeting, Council member Raj Chahal ("Chahal,") attempted to include a "closed session" agenda item related to the CVRA litigation. (Complaint, ¶ 48.) Plaintiff asserts he denied this request because Chahal did not follow "proper City procedures." (Complaint, ¶¶ 48-50.) Chahal then requested that a "closed session" discussion of the CVRA litigation be scheduled on December 15, 2020. (*Id.* at ¶ 51.) Plaintiff subsequently emailed Chahal to determine what needed to be discussed at the meeting, to no avail. (*Id.* at ¶ 52.)

Despite Plaintiff bringing the CVRA litigation topic to light at the December 8, 2020 publicly held meeting, Chahal "remained circumspect" and simply expressed the possibility of a CVRA litigation dismissal during the *proposed* December 15, 2020, "closed session" meeting. (*Id.* at ¶ 58.)

Plaintiff asserts he reasonably believed that Chahal's actions were in furtherance of a *quid pro quo* agreement. (*Id.* at ¶¶ 52-54.) During the above-noted, publicly held meeting, Plaintiff communicated that certain council members should not participate in a closed session discussion of the CVRA litigation until he had adequate time to advise them of potential law violations. (*Id.* at ¶¶ 60, 63-67.) Plaintiff alleges he "reasonably believed" voting to dismiss the CVRA litigation would not only be a conflict of interest for the Defendant City, but it could also lead to criminal prosecution. (*Id.* at ¶ 59.) Plaintiff alleges he informed City Council members that if they should vote by majority to hold a special closed session, without first

informing him of the nature of the agenda, he would refuse to attend. (*Id.* at ¶ 63.) Chahal responded by saying Plaintiff is "avoiding his duty" as a City Attorney. (*Id.* at ¶¶ 65-67.) Plaintiff asserts he was later accused of "intimidating" council members by reporting his concerns and that if he does not perform his duties, he will be discharged. (*Ibid.*) The Complaint is silent on both the ultimate scheduling of the closed session meeting(s), and Plaintiff's attendance at the meeting(s).

On January 7, 2021, one of the "49er Five"[1] Council members Sudhanshu Jain, publicly reported to the press that Plaintiff's CVRA litigation concerns "definitely gave [Plaintiff] a black eye…it doesn't look good." (Complaint, ¶¶ 42-43, 69.) Similar negative remarks about Plaintiff were made again on April 2021. (*Id.* at ¶¶ 70.) A few months later, City Council members discussed Plaintiff's submitted performance evaluation in multiple closed session meetings. (Complaint, ¶¶ 74-80.) Plaintiff was ultimately terminated on September 2, 2021. (Complaint, ¶¶ 81-82.) Plaintiff alleges he was discharged in retaliation for his refusal to participate in Defendant's City Council *proposed* closed session meeting. (Complaint, ¶¶ 8, 83.) Additionally, Plaintiff asserts "it appears" he was also terminated for the protected disclosures he made at the December 8, 2020, publicly held meeting, about *possible* violations of Penal Code section 68 and the Hobbs Act. (*Id.* at ¶ 84.)

B. Procedural

On August 30, 2023, Plaintiff filed his operative Complaint against Defendant, alleging a single cause of action – retaliation in violation of California Labor Code section 1102.5, subdivisions (b) and (c).)[2]

On November 14, 2023, City Defendant filed a demurrer to the operative Complaint. On March 1, 2024, Plaintiff opposed the motion. City Defendant filed a reply on March 7, 2024.

II. Defendant's Demurrer

Defendant demurs on the ground that Plaintiff fails to state facts sufficient to constitute a cause of action for retaliation under section 1102.5, subdivisions (b) and (c).

A. Defendant's Request for Judicial Notice

"Judicial notice is the recognition and acceptance by the court, for use by the trier of fact or by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter." (*Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117, citations and quotation mark omitted.)

In support of its demurrer, Defendant requests judicial notice of the City's Charter ("Charter") (See Defendant's Request for Judicial Notice ("RJN") in Support of Demurrer to Complaint, Exh. A.) This request is GRANTED. The Court may take judicial notice of the

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[1] The Complaint defines the 49er Five as a media-coined term for five City Council members, which included Chahal. The 49er Five formed a majority voting bloc and made decisions favoring the 49ers. (Complaint, ¶ 43.)

[2] All further undesignated statutory references are to the California Labor Code.

Charter, pursuant to Evidence Code section 451, subdivision (a) [judicial notice shall be taken of "[t]he decisional, constitutional, and public statutory law of this state…"]) (See *Edgerly v. City of Oakland* (2012) 211 Cal.App.4th 1191, 1194, fn. 1.)

The Defendant also asks this Court to take judicial notice of Plaintiff's Employment Agreement with the City. (RJN, Exh. B.) This request is DENIED. The Defendant has not shown how the Employment Agreement is relevant to the issues raised in the demurrer. Further, the existence and terms of a contract between private parties generally cannot be judicially noticed pursuant to Evidence Code section 452, subdivision (h). (See *Gould v. Maryland Sound Industries, Inc., et al* (1995) 31 Cal.App.4th 1137, 1145 [in wrongful termination action, trial court erred in sustaining employer's demurrer by taking judicial notice of existence of written employment agreement between the parties].)

Finally, Defendant asks this Court to take judicial notice of various City of Santa Clara meeting-related minutes, transcripts, and agenda. (RJN, Exhs. C-G.) This request is GRANTED. (Evid. Code, § 452, subd. (c); see also *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 9, fn. 5 [judicial notice taken of minutes of city council meeting]; *Silverado Modjeska Recreation and Parks Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 309, fn. 20 [judicial notice may generally be taken of minutes of recreation and parks district meeting]; *Ochoa v. Anaheim City School District* (2017) 11 Cal.App.5th 209, 221 [judicial notice taken of State Board of Education minutes].)

Additionally, the Court may notice relevant portions of a city's staff reports and legislative enactments. (*Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1225 [judicial notice of staff report]; see *Trinity Park, L.P. v. City of Sunnyvale* (2011) 193 Ca1.App.4th 1014, 1027 [applying Evid. Code, § 452, subd. (b) and (c) to "local ordinances and the official resolutions, reports, and other official acts of a city."].) Exhibits C, F, and G, fall into this category.

Given the above and the fact that Plaintiff has not objected to any of the requests for judicial notice, the Court GRANTS Defendant's request for judicial notice of Exhibits A, C, D, E, F, and G. Defendant's request for judicial notice of Exhibit B is DENIED.

B. Legal Standard

The court in ruling on a demurrer treats it "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214 (*Committee on Children's Television*).) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

C. Merits of the Demurrer

1. Factual Sufficiency of the Retaliation Cause of Action

i. Section 1102.5, subdivision (b)

In his Complaint, Plaintiff states that he "had reasonable cause to believe that the information provided to a public body, the City Council of Defendant, disclosed a violation of state and local law related to a potential criminal investigation for bribery." (Complaint, ¶ 96.) The Complaint also states, "Plaintiff reasonably believed that the actions of Chahal to place a matter related to the CVRA on closed session without adequate discussion of the topics to be discussed was in furtherance of the quid pro quo agreement." (Complaint, ¶ 54.) Consequently, based on his ethical duties, and unwillingness to violate state law, Plaintiff refused to participate in a proposed closed session City Council meeting. (Complaint, ¶¶ 95-97.) Plaintiff argues he was ultimately discharged for both his disclosure of protected information to City Council and his refusal to participate in an upcoming closed session meeting, in violation of section 1102.5, subdivisions (b) and (c). (Complaint, ¶¶ 98-101, 104.)

Section 1102.5, subdivision (b) provides that:

> "An employer, or any person acting on behalf of the employer, *shall not retaliate* against an employee *for disclosing information*, or because the employer believes that the employee disclosed or may disclose information, to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance, or for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, *if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute*, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties."

(Section 1102.5, subd. (b), emphasis added.)

Our highest Court outlines a two-step framework for claims brought under section 1102.5, subdivision (b): 1) plaintiff has the burden to establish, by a preponderance of the evidence, "that retaliation for an employee's protected activities was a *contributing factor* in a contested employment action," and 2) once, "the plaintiff has made the required showing, the burden shifts to the employer to demonstrate, by clear and convincing evidence, that it would have taken the action in question for legitimate, independent reasons even had the plaintiff not engaged in protected activity." (*Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703, 718, emphasis added.)

In its demurrer, Defendant contends Plaintiff's retaliation claim under section 1102.5, subdivision (b) fails because Plaintiff has not articulated facts demonstrating a reasonable belief that he was reporting illegal activity. (Memorandum of Points and Authorities in support of Demurrer ("Dem."), p. 7:2-18.) In other words, Defendant asserts Plaintiff does not allege that a reported illegal activity was actually carried out under section 1102.5. (*Ibid*; Reply, p.

2:14-17.) Defendant asserts Plaintiff's suspicions regarding the legal implications of City Council's "hypothetical actions" are too "speculative" to constitute a "reasonable belief" of a state or federal law violation. (Dem., p. 6:25-28.) Defendant concludes Plaintiff did not have "actual knowledge" of any violations committed by Council members, and Plaintiff's refusal to participate in a closed session meeting was based entirely on conjecture. (Dem., pp. 6:25-7:1.)

Defendant additionally contends Plaintiff did not highlight any of the potential criminal violations at the meeting, and, instead, indicated his concerns were based on "timing." (Dem., p. 8:2-18.) Defendant's point is well taken. The allegations in the Complaint regarding possible criminal violations including bribery and extortion did not appear to be expressed to council member Chahal or at the December 8 city council meeting. (Complaint, ¶¶ 48-58, 60, 62, 63, 65, 95.) Instead, Plaintiff raised general concerns regarding timeframes, potential liability, and, about adequately preparing for a *future* closed session meeting. (Complaint, ¶¶ 60, 63.) In pleading these facts, Plaintiff has not demonstrated that he reasonably believed City Council members were actively engaging in unlawful activity such as extortion and bribery.

In opposition, Plaintiff argues he was not required to expressly state that he believed the City Council was violating or not complying with a specific state or federal law. (Opp., p. 9:4-9.) Rather, Plaintiff is required to disclose "reasonably based" suspicions of illegal or unlawful activity. Plaintiff relies on *Ross v. County of Riverside* (2019) 36 Cal.App.5th 580, 592-593 (*Ross*) for this proposition. (*Ibid.*) But, Plaintiff's reliance on *Ross* is misplaced because the *Ross* plaintiff's disclosure involved violations pertaining to *active* criminal prosecution. (*Ibid.*) In the instant case, Plaintiff's disclosure involved the hypothetical actions of city council members at a meeting that had yet to occur at the time of Plaintiff's disclosure.

In *Ross,* the plaintiff, a deputy prosecutor, recommended that the District Attorney dismiss a murder case because plaintiff discovered both DNA evidence exculpating the defendant and an admission from defendant's roommate about being the killer. (*Ross, supra,* 36 Cal.App.5th at p. 593.) Plaintiff based his recommendation, in part, on the prosecution's risk of violating the defendant's due process rights as well as the prosecutor's ethical obligations. Plaintiff was later constructively discharged. (*Ibid.*) The *Ross* court ultimately found "the evidence shows [plaintiff] engaged in protected activity because he disclosed information to a governmental or law enforcement agency and to people with authority over him which he reasonably believed disclosed a violation of or noncompliance with federal and state law applicable to criminal prosecutions and prosecutors. Although [plaintiff] did not expressly state in his disclosures that he believed the County was violating or not complying with a specific state or federal law*, Labor Code section 1102.5, subdivision (b), does not require such an express statement. It requires only that an employee disclose information and that the employee reasonably believe the information discloses unlawful activity*. (Lab. Code, § 1102.5, subd. (b).)" (*Ibid.* emphasis added.)

Notwithstanding *Ross, supra,* as a general rule, "statutory causes of action must be pleaded with particularity." (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790.) As such, the plaintiff must set forth facts in his complaint that are "sufficiently detailed and specific to support an inference that each of the statutory elements of liability is satisfied." (*Mittenhuber v. City of Redondo Beach* (1983) 142 Cal.App.3d 1, 5, internal citations omitted.) Additionally, Courts have held in the context of Labor Code section 1102.5 cases that the employee must be able to point to some legal foundation for his suspicion – some statute, rule or regulation which may have been violated by the conduct he or she disclosed. (See,

e.g., *Jadwin v. City of Kern* (E.D. Cal. 2009) 610 F.Supp.2d 1129, 1154; *Love v. Motion Indus., Inc.* (N.D. Cal. 2004) 309 F.Supp.2d 1128, 1135.)

Here, as Defendant points out, Plaintiff alleges, based on City Council's hypothetical conduct, he had a reasonable belief, provisions of California Penal Code section 68 and the Hobbs Act (18 U.S.C. section 1951) were being violated. (Complaint, ¶¶ 8, 61, 84, 95.) The Complaint refers to alleged hypothetical conduct, including: 1) City Council's purported attempt to dismiss a CVRA lawsuit prior to oral argument, and 2) certain council members' potential conflict of interest due to alleged *quid pro quo* agreements. (Complaint, ¶¶ 8, 59-61.) These allegations are insufficient to state a cause of action under section 1102.5.

Though Plaintiff is correct that section 1102.5, subdivision (b) does not require the employee to have actual knowledge of the statute being violated at the time of reporting, the reasonableness of his or her belief is determined by the existence of a law that could form the basis for such belief. Here, Plaintiff does not appear to specify what law holding a closed session would actually violate. Instead, he alleges potential violations of the Penal Code and Hobbs Act, based on the conduct of council members that *could* occur at a future closed session. Consequently, Plaintiff's allegation that he reasonably believed Chahal's request to place a matter related to the unspecified CVRA litigation in a closed session, without adequate discussion of the topics to be discussed, was in furtherance of a "quid pro quo agreement" between the San Francisco 49ers and the 49er Five, is too speculative. (Complaint ¶¶ 41-46, 54.) Additionally, Plaintiff's suspicions of illegal activity based on the "highly unusual" actions taken by Chahal to place the CVRA litigation on the agenda for a closed session without any consultation with Plaintiff, does not demonstrate, with particularity, that illegal activity is afoot. (Opp., p. 12:10.) Without more, the fact that Chahal engaged in "unusual" actions does not necessarily mean he was engaging in unlawful activity.

The facts alleged in the Complaint fail to demonstrate a "reasonableness" to Plaintiff's belief that a law was *actually* being violated, at the time of his reporting. (See *Ferrick v. Santa Clara University* (2014) 231 Cal.App.4th 1337, 1346 [a plaintiff must include allegations that clearly "state or show that [the employee] had a reasonable basis to suspect" illegal activity].) Of particular importance, Plaintiff provides no authority demonstrating that a claim under section 1102.5, subdivision (b) can be made for disclosures of a *potential* violation, namely, city council members' participation in a decision that *could* result in unlawful conduct. As Defendant points out in both its demurrer and reply, Plaintiff's allegations of *potential* unlawful activity never came to fruition in the closed session meetings involving CVRA litigation. Per the December 15, 2020, closed session meeting minutes, Plaintiff attended the meeting, and noted "no reportable action from Closed Session." (Dem., p. 5:15-23; Reply, p. 2:9-28; RJN, Exhs. D, p. 3; Exh. E, pp. 2-3.)

Because no action was taken, Plaintiff could not have reported a violation of law. See *Manavian v. Department of Justice* (2018) 28 Cal.App.5th 1127; and *Mize-Kurzman v. Marin Community College District* (2012) 202 Cal.App.4th 832, 839. In *Manavian*, plaintiff was a bureau chief and representative of the Department of Justice ("DOJ"), and was part of an effort to "improve information sharing to help prevent terrorist attacks." (*Id.* at pp. 1141-1142.) (*Ibid.*) The *Manavian* court held that plaintiff's reports or communications about possible illegal provisions, i.e., use of illegal forms to collect intelligence information, were not protected activity because they were part of the plaintiff's normal duties as an upper-level administrator. (*Ibid.*) The *Manavian* court concluded plaintiff was not protected from

termination as a whistleblower under section 1102.5 because "he did not disclose or report a violation of law." (*Ibid.*)

In *Mize-Kurzman*, disapproved on other grounds, the plaintiff alleged that she had been reassigned to a less desirable position after reporting concerns to her supervisor about what she believed to be unlawful tampering with the hiring process and unlawful use of state money in a scholarship program. (*Id.,* at p. 833.) The *Mize-Kurzman* court explained that efforts to determine if a practice violates the law are not protected disclosures. (*Id.* at p. 859.) The Court quoted with approval a portion of a federal court opinion discussing the federal Whistleblower Protection Act of 1989: " . . . 'Discussion among employees and supervisors concerning various possible courses of action is healthy and normal in any organization. It may in fact avoid a violation.' . . . [Citation.]" (*Id*. at pp. 859-860, quoting *Reid v. Merit Systems Protection Bd.* (Fed.Cir. 2007) 508 F.3d 674, 678.)

In light of the above cases, the allegations in the Complaint that Plaintiff was terminated or retaliated against for refusing to participate in a closed session, that was yet to occur at the time of refusal, and where the 49er Five would potentially have a conflict of interest, are insufficient to plead a cause of action under Labor Code section 1102.5, subdivision (b). Plaintiff is preemptively disclosing *potential* misconduct, not *actual* misconduct. In opposition, Plaintiff's argument that both *Mize-Kurzman*, and *Manavian, supra*, are distinguishable, is unpersuasive. Both cases are instructive as to the "reasonable belief" and "disclosure" requirements under the whistleblowing context. (Opp., pp. 9-10.)

Alternatively, Defendant argues that even if City Council had taken a vote to dismiss the CVRA litigation, such an action would have been lawful. (Dem., p. 8:6-17.) Defendant cites *City of Fairfield v. Superior Court of Solano County* (1975) 14 Cal.3d 768, 781 (*City of Fairfield*), for the proposition that "campaign statements…do not disqualify the candidate from voting on matters…after his election" and that "it would be contrary" to principles of a free democratic society to conclude otherwise. But, that case is inapposite. In *City of Fairfield, supra,* the court reviewed an administrative mandamus proceeding arising out of a city council's denial of an application for a permit for a planned unit shopping center development. (*Id.* at p. 781.) The distinguishable facts in that case are unhelpful here, where the Plaintiff's disclosure involved the legal impact of a potential CVRA litigation dismissal via a majority vote by city council members.

Next, Defendant cites a website for the California Fair Political Practices Commission ("FPPC") similarly for the proposition that council members may take "official action in matters discussed on the campaign trail." (Dem., p. 8:18-27.) In opposition to the FPPC guidance and accompanying "Cardona Advice Letter," Plaintiff argues he could not have known about the ultimate outcome of the closed session *before* he made his alleged protected statement, "making his disclosure all the more reasonable." (Opp., pp. 12-13.) Here, because the primary authorities Defendant cites are sufficient to support the conclusion that the unlawful conduct must have actually occurred for the plaintiff to report, this Court need not delve further into the merits of the FPPC guidelines. (Opp., pp. 12-13.)

Finally, in opposition, and in reliance on a 1992 California Attorney General Opinion interpreting Government Code section 54956.9, subdivision (a),[3] Plaintiff argues, City Council's right to enter a closed session is established upon receipt of advice from legal counsel. (Opp., p. 12:1-17.) But as Defendant correctly points out in its Reply, Plaintiff's argument is premised on an Attorney General Opinion interpreting a prior version of the Brown Act. (Reply, p. 4:22-28.) The Court also notes, "[o]pinions of the Attorney General, while not binding, are entitled to great weight. [Citations.] In the absence of controlling authority, these opinions are persuasive since the Legislature is presumed to be cognizant of that construction of the statute and we presume the interpretation has come to the attention of the Legislature, and if it were contrary to the legislative intent that some corrective measure would have been adopted … [Citation.]" (*Almond Alliance of California v. Fish & Game Com.* (2022) 79 Cal.App.5th 337, 358, internal quotation marks omitted.) Here, the opinion provides little to no guidance on the applicable version of the Brown Act. Of particular importance, Plaintiff makes no mention of Government Code section 54956.9 in the operative Complaint. Thus, even if a violation of Government Code section 54956.9 occurred, it provides no basis to overrule the demurrer.

Accordingly, Defendant City's demurrer to the single cause of action for retaliation on the ground that the pleading does not state facts sufficient to constitute a cause of action under Section 1102.5, subd. (b), is SUSTAINED.

ii. Section 1102.5, subdivision (c)

In its demurrer, Defendant also asserts that Plaintiff fails to cite cases or facts demonstrating that his attendance at a closed session meeting would be unlawful. (Dem., p. 10:6-16.) Defendant further argues mere suspicion that *some* council members could potentially violate the law, i.e., by voting to resolve the CVRA litigation or appeal at a tentative closed session, is "far too attenuated" to show that it was unlawful. (*Ibid.*) Defendant cites to *Nejadian v. County of Los Angeles* (2019) 40 Cal.App.5th 703, 719 (*Nejadian*), for the proposition that the activity in question must *actually* result in a violation or noncompliance with state law to support a violation of section 1102.5, subdivision (c).

In opposition, Plaintiff primarily reasserts arguments he made in his Complaint with respect to subdivision (b) of section 1102.5. (Opp., pp. 13-14.) Specifically, Plaintiff maintains he formed a reasonable belief that "in addition to being contrary to the City's interests, a vote to dismiss the litigation, in advance of the December 17 oral arguments in the California Court of Appeal, *could lead* to criminal prosecution of members who had a conflict of interest due to the quid pro quo agreement." (*Ibid*; Complaint, ¶ 59.) In its reply, Defendant maintains there are insufficient facts to demonstrate Plaintiff "reasonably believed" attending the closed session meeting would actually violate the law. (Reply, p. 11:1-10.)

Section 1102.5, subdivision (c) states: "An employer, or any person acting on behalf of the employer, *shall not retaliate* against an employee *for refusing to participate* in an activity

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[3] That subdivision provides, "Nothing in this chapter shall be construed to prevent a legislative body of a local agency, based on advice of its legal counsel, from holding a closed session to confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session concerning those matters would prejudice the position of the local agency in the litigation." (Gov. Code, § 54956.9, subd. (a).)

that would result in a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation."

As Defendant notes, in *Nejadian, supra,* the Court held that "[Labor Code] section 1102.5(c) requires a showing that the activity in question *actually would* result in a violation or noncompliance with a statute, rule, or regulation." (*Nejadian,* 40 Cal.App.5th at p. 719.) The *Nejadian* court further held the determination was a question of law that requires the employee to "identify what specific activity *he or she refused to participate* in and what specific statute, rule, or regulation would be violated by that activity." (*Ibid*.) An employee's reference to activities in generalities was insufficient to show a subdivision (c) violation. The *Nejadian* case is instructive as it sets forth a different standard for subdivision (c) claims than for subdivision (b) claims, requiring an *actual violation* rather than a reasonable belief of a violation. (*Ibid.*)

Admittedly, *Nejadian* was premised upon a failure of proof *after a jury trial*; it did not address the sufficiency of allegations on a demurrer. Nonetheless, Defendant's argument that an actual violation must have occurred is well-taken. In his Complaint, Plaintiff has not alleged a *refusal to participate* in an activity that has *actually* happened. Instead, the Complaint alleges that at a December 8, 2020, public hearing, Plaintiff communicated his reasonable belief that certain City Council members *should not* participate in a closed session discussion of CVRA litigation *until* he had adequate time to advise them of potential law violations. (See Complaint, ¶¶ 60-64.) This is not sufficient to constitute a refusal to participate in an activity under section 1102.5, subdivision (c). Notably, Plaintiff alleges that *should* the City Council "vote by majority to hold such a special close session," without informing him of the agenda, he *would* refuse to attend the closed session. (*Ibid.*) Plaintiff does not sufficiently allege he refused to participate in the subject improper activity as required under section 1102.5, subdivision (c).

In opposition, Plaintiff alleges that "[a]cquiescing" to council member Chahal's request to place the CVRA litigation into a closed session, against the advice of Plaintiff, would be in violation of applicable Government Code sections. (Opp. p. 13.) As the court noted above, Plaintiff's refusal to fulfill Chahal's request is not a refusal to participate in an activity, i.e., the closed session that had not yet been scheduled at the time Plaintiff expressed his refusal.

While the Court must consider all reasonable inferences of the alleged facts in ruling on a demurrer, (see *Bush v. California Conservation Corps* (1982) 136 Cal.App.3d 194, 198), the fact that Plaintiff asked why Chahal wanted a closed session meeting, and then later expressed concerns about potential consequences of that meeting, does not mean he refused to participate in the conduct, that was yet to occur at the time of his refusal. Plaintiff fails to cite authority demonstrating that a refusal to participate in *potentially* unlawful activity is sufficient for a claim under Section 1102.5, subd. (c).

Of particular importance, in its demurrer, Defendant alleges, Plaintiff ultimately did attend the closed session meetings involving the topic of CVRA litigation. After Plaintiff's voluntary participation in these meetings, he noted, publicly, Council had taken "no reportable action" and the CVRA lawsuit was not dismissed. (Dem., p. 5:15-23; RJN, Exhs. C, E.) These judicially noticed facts directly contradict Plaintiff's claim that he *refused* to participate in unlawful activity under section 1102.5, subd. (c).

Accordingly, the demurrer to the cause of action for retaliation is SUSTAINED on the ground of failure to state facts sufficient to constitute a cause of action.

D. Leave to Amend

"'Generally it is an abuse of discretion to sustain a demurrer without leave to amend if there is any reasonable possibility that the defect can be cured by amendment. [Citation.] . . . [Citations.]'" (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) While it does not appear that Plaintiff can amend the complaint, and Plaintiff does not indicate how it would amend its complaint to meet the concerns raised by this demurrer, it is not clear on the face of the complaint that it cannot be cured. Thus, because it is the original complaint, the Court will grant leave to amend.

III. Conclusion

The demurrer is SUSTAINED, in its entirety, WITH 20 DAYS' LEAVE TO AMEND.

The Court will prepare the final order.

- oo0oo -

Calendar line 4
Case Name: *Leung, et al. v. Tawa Supermarket, Inc., et al.*
Case No.: 23CV415224

This is a trip and fall case. According to the allegations of the first amended complaint ("FAC"), on April 7, 2023, plaintiff Lingsen M. Leung ("Lingsen") tripped and fell over an unsecure and empty pallet on the floor of defendant Welcome Market, Inc. dba 99 Ranch Market's ("Welcome Market") location at 10425 South De Anza Boulevard in Cupertino, sustaining serious injuries. (See FAC, ¶¶ 5, 8-9.)

On May 3, 2023, plaintiffs Lingsen and Hang Chun Leung (collectively, "Plaintiffs") filed the FAC against defendants Welcome Market and Welcome Market's owner, Tawa Supermarket, Inc. ("Tawa") (collectively, "Defendants") asserting causes of action for:

1) Premises liability;
2) Negligence; and,
3) Loss of consortium.

Defendants move for summary judgment, or, in the alterative, for summary adjudication of each cause of action, on the grounds that each of the causes of action lack merit against them because they were not negligent.

I. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE, FOR SUMMARY ADJUDICATION OF THE FIRST THROUGH THIRD CAUSES OF ACTION OF THE FAC.

Defendants' burden on summary judgment

"A defendant seeking summary judgment must show that at least one element of the cause of action cannot be established, or that there is a complete defense to the cause of action. … The burden then shifts to the plaintiff to show there is a triable issue of material fact on that issue." (*Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72 (internal citations omitted; emphasis added).)

"The 'tried and true' way for defendants to meet their burden of proof on summary judgment motions is to present affirmative evidence (declarations, etc.) negating, as a matter of law, an essential element of plaintiff's claim." (Weil et al., Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2007) ¶ 10:241, p.10-91, *citing Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 334; emphasis original.) "The moving party's declarations and evidence will be strictly construed in determining whether they negate (disprove) an essential element of plaintiff's claim 'in order to avoid unjustly depriving the plaintiff of a trial.'" (*Id*. At § 10:241.20, p.10-91, *citing Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107.)

"Another way for a defendant to obtain summary judgment is to 'show' that an essential element of plaintiff's claim cannot be established. Defendant does so by presenting evidence that plaintiff 'does not possess and cannot reasonably obtain, needed evidence' (because plaintiff must be allowed a reasonable opportunity to oppose the motion.) Such evidence usually consists of admissions by plaintiff following extensive discovery to the effect

that he or she has discovered nothing to support an essential element of the cause of action." (*Id*. At ¶ 10:242, p.10-92, *citing Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854-855.)

Defendants' request for judicial notice

In support of their motion, Defendants request judicial notice of the FAC. Defendants' request for judicial notice is GRANTED. (Evid. Code § 452, subd. (d).)

Defendants fail to meet their initial burden.

Defendants argue that the complaint against it lacks merit because: Defendants do not owe a duty to a plaintiff with respect to an open and obvious condition; Plaintiffs' written discovery responses demonstrate an absence of evidence; and, the loss of consortium necessarily fails because the negligence cause of action is without merit.

<u>First and second causes of action: open and obvious condition</u>

As Defendants argue, the elements for negligence and premises liability causes of action are the same: the existence of a legal duty of care, breach of that duty, and proximate cause resulting in injury. (See *Castellon v. U.S. Bancorp* (2013) 220 Cal.App.4th 994, 998 (stating that "[t]he elements of a negligence cause of action are the existence of a legal duty of care, breach of that duty, and proximate cause resulting in injury… [t]he elements of a cause of action for premises liability are the same as those for negligence: duty, breach, causation, and damages").) "Foreseeability, when analyzed to determine the existence or scope of a duty, is a question of law to be decided by the court." (*Jacobs v. Coldwell Banker Residential Brokerage Co.* (2017) 14 Cal.App.5th 438, 446.) "Foreseeability of harm is typically absent when a dangerous condition is open and obvious." (*Id*. At p.447.) "Generally, if a danger is so obvious that a person could reasonably be expected to see it, the condition itself serves as a warning, and the landowner is under no further duty to remedy or warn of the condition." (*Id*. (also stating that "[i]n that situation, owners and possessors of land are entitled to assume others will 'perceive the obvious' and take action to avoid the dangerous condition"); see also *Blodgett v. B. H. Dyas Co*. (1935) 4 Cal.2d 511, 512 (stating that "[t]he owner of property, in so far as an invitee is concerned, is not an insurer of safety but must use reasonable care to keep his premises in a reasonably safe condition and give warning of latent or concealed perils… [h]e is not liable for injury to an invitee resulting from a danger which was obvious or should have been observed in the exercise of reasonable care").) "An exception to this general rule exists when 'it is foreseeable that the danger may cause injury despite the fact that it is obvious (e.g., when necessity requires persons to encounter it).'" (*Jacobs*, *supra*, 14 Cal.App.5th at p.447.) "In other words, while the obviousness of the condition and its dangerousness may obviate the landowner's duty to remedy or warn of the condition in some situations, such obviousness will not negate a duty of care when it is foreseeable that, because of necessity or other circumstances, a person may choose to encounter the condition." (*Id*.)

Defendants contend that the subject condition was obviously dangerous and therefore they did not owe a duty to its customer, principally relying on *Blodgett*, *supra*, 4 Cal.2d 511, *Walker v. Greenberger* (1944) 63 Cal.App.2d 457, *Beauchamp v. Los Gatos Golf Course* (1969) 273 Cal.App.2d 20, *Shanley v. American Olive Co*. (1921) 185 Cal. 552, *Mathews v. City of Cerritos* (1992) 2 Cal.App.4th 1380, *Fredette v. City of Long Beach* (1986) 187

Cal.App.3d 122, *Martinez v. Chippewa Enterprises, Inc*. (2004) 121 Cal.App.4th 1179, *Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, *Davis v. City of Pasadena* (1996) 42 Cal.App.4th 701, and *Caloroso v. Hathaway* (2004) 122 Cal.App.4th 922.

In *Blodgett*, *supra*, the plaintiff was walking on the streets of downtown Los Angeles, looking at a suit of clothes in the storefront window and not watching where she was walking whereupon she fell down an open stairway. (See *Blodgett*, *supra*, 4 Cal.2d at p.512.) The trial court granted the defendant's motion for nonsuit, stating that "[t]he evidence shows without conflict that plaintiff heedlessly walked into an open stairway in broad daylight… [s]he was a pedestrian on a busy street, paying no attention whatever to where she was walking." (*Id*.) As stated above, *Blodgett* concerned a motion for nonsuit, not a motion for summary judgment. *Blodgett* is inapposite.

In *Walker*, *supra*, the plaintiff was an employee of the defendant who slipped on the floor of the "vegetable-cutting-and-washing room," had been there 100 or 150 times previously, knew that "generally there was a lot of refuse and water on the floor," and "knew that the floor therein was practically covered, in depths varying from one to several inches, with trimmings from green vegetables," such that "[i]t d[id] not appear that the defendants' knowledge of the condition of the floor of the back room was superior to that of the plaintiff." (*Walker*, *supra*, 63 Cal.App.2d at pp.461-462.) Like *Blodgett*, the *Walker* court affirmed the trial court's granting of the motion for nonsuit. (*Id*. At p.464.) Similarly, Walker is *inapposite*.

Beauchamp, *supra*, involved a golfer who was wearing shoes with half-worn spikes and slipped on level cement with a rough troweled surface on her way to the starting area. (See *Beauchamp*, *supra*, 273 Cal.App.2d at p.23.) The plaintiff's witness testified that "every golfer knows that one wearing golf spikes must walk with more care and caution on cement than on normal fairways or greens," and the plaintiff testified that "she knew her footing on cement, wearing golf spikes, wouldn't be as stable as it would have been walking on grass." (*Id*. At p.24.) Ultimately, the *Beauchamp* court stated that "[r]eviewing the evidence, we cannot say that with appellant's previous unfamiliarity with the veranda, and the absence of prior experience in walking with spikes upon it, there was an unequivocal acceptance of the risk; or that the danger of doing so was so well-known and apparent to her, that the 'visible defect rule' was applicable." (*Id*. At p.34.) "The jury may charge her with contributory negligence [citation] but the question of her appreciation of the risk, or her imputed knowledge of it, is not so overwhelming as to properly permit a nonsuit." (*Id*.) Here, *Beauchamp* actually supports the denial of Defendants' motion.

In *Shanley*, *supra*, the plaintiff was an employee of a railway company whose job was to climb and switch a carload of gravel and sand onto a "spur-track" that traversed 4-6 inches away from a building that was forty feet high, fifteen feet wide and thirty-eight feet long. (See *Shanley*, *supra*, 185 Cal. At p.554.) The plaintiff was caught between the car and side of the building while switching the car and was crushed and injured as a result, and alleged that "the accident to plaintiff 'was caused alone by the negligence of the defendant in erecting and maintaining the said building in too close proximity to the said railroad spur-track and necessary switching thereon as aforesaid'… and 'by the negligence of the defendant... in failing to give notice or warning to the plaintiff of the danger of making the switching movement as aforesaid with the said building so near thereto.'" (*Id*. At p.555.) The *Shanley* court stated that "[i]t cannot be disputed that a building forty feet high, thirty-eight feet long, and fifteen feet wide situated alongside of a spur-track and within thirty-seven inches of the

nearest rail thereof would be obvious to the sight of any person approaching it under any ordinary circumstances or conditions." (*Id*. At p.556.) *Shanley* is distinguishable because the instant case does not involve a forty-foot high building that injured Plaintiff or an injury to an employee while working in area that s/he was tasked.

The court in *Mautino*, *supra*, reversed judgment in favor of the plaintiff after a jury trial, finding that the jury instructions inaccurately stated the law and that the jury failed to consider contributory negligence. (See *Mautino*, *supra*, 211 Cal. 560-562.) *Mautino* is inapposite since it involved a judgment rendered by a jury.

In *Mathews*, *supra*, an eight-year old rode a brand new bicycle down a very steep hill in a park on an overcast day when the grass was wet with dew, knowing that the hill was too steep and dangerous for bike riding. (See *Mathews*, *supra*, 2 Cal.App.4th at pp.1382-1383.) The plaintiff was forbidden by his parents to ride his bike in the park because the plaintiff witnessed his father lose control of his bicycle in the same park, but he nevertheless disregarded his parents' rule. (*Id*. At p.1383.) The court "conclude[d] that the danger of riding a bicycle down a very steep, wet, grassy hill is obvious from the appearance of the property itself, even to children exercising a lower standard of due care." (*Id*. At p.1385 (also stating that "[e]ven children instinctively recognize steepness of a hill and slipperiness of wet grass… [w]hile it is common knowledge that children often heedlessly engage in games or activities which are dangerous or harmful to their health, at some point the obligation of the public entity to answer for the malfeasance or misfeasance of others, whether children or parents, reaches its outer limits").) *Mathews* is distinguishable as it involved voluntary acceptance of a known danger, specifically, the danger of a very steep, wet, grassy hill as posed to a bicyclist.

In *Fredette*, *supra*, after consuming 4-6 beers, the 22-year old plaintiff decided to dive off a pier of a shallow lagoon between 12:30-1:30 in the early morning when the lagoon was closed to the public and lifeguards were no longer on duty. (See *Fredette*, *supra*, 187 Cal.App.3d at pp.126-128.) There was a warning sign in the immediate vicinity of the pier on a float that "in bold letters admonished users of the facility that both fishing and diving from the 'rails' were prohibited." (*Id*. At p.128.) After a trial, the jury found returned a special verdict that the lagoon was not in a dangerous condition on the date of the plaintiff's accident, and the Second District affirmed the judgment. (*Id*. At pp.129, 136.) The *Fredette* court noted that "the condition of the pier only became dangerous when misused… [and h]aving used the lagoon on numerous occasions, plaintiff was well aware that the purpose of the pier was to provide access to the float, and was not intended as a diving platform." (*Id*. At p.133.) "Plaintiff knew of the condition and he alone created the sole risk of injury." (*Id*.) *Fredette* is inapposite as it involved a judgment after a jury trial and also a situation where the plaintiff was plainly aware of the danger, and misused the area despite warnings to not do so.

In *Martinez*, *supra*, the plaintiff slipped on wet pavement on the sidewalk or the apron of the driveway of the property, and the trial court granted the defendant's motion for summary judgment, asserting that the wetness of the area was open and obvious such that the defendant did not owe a duty to the plaintiff. (See *Martinez*, *supra*, 121 Cal.App.4th at p.1184.) However, the Second District reversed, stating that "the obviousness of a condition does not necessarily excuse the potential duty of a landowner, not simply to warn of the condition but to rectify it… [t]he court's analysis therefore was incomplete, and led to a premature conclusion of no duty and therefore no liability." (*Id*. At pp.1184-1185.) Like *Beauchamp*, *Martinez* supports the *denial* of Plaintiff's motion.

Defendants argue that "[t]he 'open and obvious' inquiry is a legal issue for the court when reasonable minds can come to but one conclusion," citing *Peterson*, *supra*, and *Davis*, *supra*. (Defs.' Memorandum of points and authorities in support of motion for summary judgment ("Defs.' Memo"), p.12:6-8, citing *Peterson*, *supra*, 36 Cal.3d at p.810 and *Davis*, *supra*, 42 Cal.App.4th at p.704.) However, the cited cases do not support Defendants' argument. In *Peterson*, *supra*, a student sustained injuries as a result of an attempted daylight rape in the parking lot area of the City College of San Francisco. (See *Peterson*, *supra*, 36 Cal.3d at p.804.) The page of the *Peterson* opinion cited by Defendants discusses the Government Code and what is necessary to state a cause of action for dangerous condition of public property against a public entity; there is no mention of an "open and obvious" inquiry. (*Id*. At p.810.) Ultimately, the *Peterson* court determined that the defendants owed the plaintiff a duty and reversed the judgment of dismissal after demurrer (*id*. At pp.814-815); *Peterson* is not helpful for Defendants. It is unclear why Defendants believe that *Peterson*—a case that discusses the duty to protect invitees from criminal third party conduct—is relevant to the instant case. In *Davis*, *supra*, the plaintiffs fell while descending an outdoor stairway at a diagonal, oblique angle without the use of the handrail. (See *Davis*, *supra*, 42 Cal.App.4th at pp.702-703.) The *Davis* court did not discuss any "open and obvious" risk; rather, it noted that "Plaintiffs contend that the combination of converging stairs and handrail 'invites' a person to descend at that location and constitutes a dangerous condition for that reason." (*Id*. At p.704.) "The very language of 'invitation' used by plaintiffs illustrates that involved here is not a defective set of steps, but rather a choice to descend them at an angle." (*Id*.) "Anyone viewing these stairs can see that descending the stairs parallel to the handrail would mean descending the stairs at an oblique angle." (*Id*.) "If a person is not willing or able to employ the care necessary to descend stairs safely at an oblique angle, the stairs can be descended perpendicularly to the steps, can be descended along other perpendicular handrails which are available nearby, or can be bypassed completely in favor of other available means of entry." (*Id*.) "The dangerous 'condition' alleged by plaintiffs is the making available of a choice of descending the stairs in the area of the diagonal handrail as an alternative to other routes of descent." (*Id*.) As with *Peterson*, *Davis* does not discuss an "open and obvious" inquiry and this case involving a choice in descending a staircase at an angle does not support their initial burden.

Lastly, *Caloroso*, *supra*, is a slip-and-fall case that involves the trivial defect doctrine. (See *Caloroso*, *supra*, 122 Cal.App.4th at pp.926-927 (stating that "[h]ere, Hathaway sought summary judgment on the ground that he owed no duty to the Calorosos because the defect in the sidewalk was trivial as a matter of law").) Defendants assert that *Caloroso* stands for the proposition that "[a] trial court ruling on a summary judgment motion must independently evaluate the circumstances leading to the accident in determining whether a condition is open and obvious and **where photographs of the condition in question are submitted in support of the summary judgment from which the court can conclude that the condition was open and obvious, expert witness to the contrary does not create a triable issue of material fact.**" (Defs.' Memo, p.12:8-13 (emphasis original), citing *Caloroso*, *supra*, 122 Cal.App.4th at pp.927-928.) However, Defendants are clearly wrong as *Caloroso* does not mention any condition being "open and obvious." Instead, the *Caloroso* court notes that "[i]t is well established that a property owner is not liable for damages caused by a minor, trivial or insignificant defect in property… Courts have referred to this simple principle as the 'trivial defect defense,' although it is not an affirmative defense but rather an aspect of duty that plaintiff must plead and prove." (*Caloroso*, *supra*, 122 Cal.App.4th at p.927.) This particular

doctrine is specifically applicable to "persons who maintain walkways." (*Id*. (also stating that "[i]t was undisputed that the difference in elevation created by the crack in Hathaway's walkway was less than half an inch at the highest point… [m]any decisions have held that sidewalk defects greater than this were trivial as a matter of law").) The *Caloroso* court stated that the trial court did not abuse its discretion in finding that "no expert was needed to decide whether the size or irregular shape of the crack rendered it dangerous… [since t]he photographs of the crack submitted by both sides demonstrate that the crack is minor and any irregularity in shape is minimal" and the plaintiffs' counsel conceded that" the court could judge this for itself." (*Id*. At p.928.) Here, Plaintiffs' case neither involves a sidewalk nor whether a defect was trivial as a matter of law due to the size of the differential in elevation. More importantly, the *Caloroso* case does not stand for the proposition that Defendants argue.

Defendants fail to support their arguments with any relevant case authority.

Defendants also largely rely on photographs and video evidence to support their assertions. (See Def.'s memo, p.12:14-26 (stating that "[t]he undisputed material facts, specifically the photographic and video evidence of the incident, undeniably show that the pallet on the floor of the store over which Plaintiff allegedly tripped before falling was stocked with boxes… the pallet with [sic] stocked at least to half of Plaintiff Leung's height with yellow produce boxes… [and] as can be observed on the video footage of the incident, immediately before the fall, Plaintiff stopped by the pallet, looked at the boxes stocked on the pallet, and only then proceeded to move"), citing to UMFs 3 and 4; see also Defs.' Separate statement of undisputed material facts, nos. 3 and 4, citing to Defs.' Index of exhibits, exhs. J and K and paragraph 11 of the Mdinaradze decl. in support of Defs.' Motion for summary judgment.) However, unfortunately for Defendants, exhibit J does not contain any photographs; rather it contains a commercial general liability coverage part supplemental declarations document listing Tawa Supermarket, Inc. as the named insured with an aggregate limit of liability of $2,000,000, and Welcome Market's responses to Plaintiff's requests for production of documents, set one. Exhibit K initially only contained a cover sheet indicating "WM-TAWA000004.MOV." It was only after the Court contacted Defendants to see if they actually submitted the movie file at the time of the filing of the motion that counsel for Defendants submitted the file on a thumb drive. As this movie was not filed with the motion, it ordinarily would not be considered. (See Code Civ. Proc. § 437c, subds. (a)(2) (stating that "supporting papers shall be served on all other parties to the action at least 75 days before the time appointed for hearing"), (b)(1) (stating that "[t]he motion shall be supported by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken"); see also Cal. Rule of Court 3.1350, subd. (c)(4) (requiring evidence in support of motion for summary judgment to be submitted with motion).) Moreover, the file appears to be a video of someone taking a video of their computer desktop screen, thereby having issues regarding authentication or hearsay. (See Evid. Code §§ 1200, 1401.) However, even if the court were to consider the video, the video does not demonstrate any of the asserted facts that Defendants contend. The video is grainy and it is unclear as to why the plaintiff falls, or if there is a pallet present, or if the person who the Court believes may have fallen is, in fact, the plaintiff. Defendants fail to demonstrate that the first and second causes of action lack merit.

In reply, Defendants filed additional evidence. However, evidence submitted for the first time in reply in support of a motion for summary judgment cannot be considered as it violates the opposing party's due process rights. (See *San Diego Watercrafts, Inc. v. Wells*

Fargo Bank (2002) 102 Cal.App.4th 308, 316 (stating that "[i]n considering this evidence… not filed until after assignee had responded to the issues raised in the separate statement… the court violated assignee's due process rights"); see also *Maleti v. Wickers* (2022) 82 Cal.App.5th 181, 227 (stating that "[t]he general rule of motion practice… is that new evidence is not permitted with reply papers"); see also *Moore v. William Jessup University* (2015) 243 Cal.App.4th 427, 432, fn. 3 (stating that "[g]enerally, a party moving for summary judgment may not rely on new evidence filed with its reply papers"); see also *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537 (stating that "[t]he general rule of motion practice, which applies here, is that new evidence is not permitted with reply papers"); see also *Nazir v. United Airlines, Inc*. (2009) 178 Cal.App.4th 243, 252 (stating that "[n]o such evidence… [submitted] in support of reply… is generally allowed").) The Court exercises its discretion to disregard Defendants' evidence submitted in reply.

As Defendants fail to meet their initial burden, the burden does not shift to Plaintiffs to show that a triable issue of one or material facts exists. (See Code Civ. Proc. § 437c, subd. (p)(2).) Accordingly, it is unnecessary to rule on Defendants' objections to the declaration of Sylvia Leung, Cheung Chuen Lee, and Ashwin Ladva as the Court did not rely on this evidence in ruling on the motion.

Third cause of action: loss of consortium

Defendants argue that "Mr. Hang Leung's loss of consortium cause of action must fail because Plaintiffs cannot prove premises liability/negligence against Defendants, and loss of consortium is derivative of the negligence claim." (Defs.' Memo, pp.15:25-28, 16:1-18 (also stating that "Mr. Leung's loss of consortium claim is dependent on the existence of a negligence/premises liability claim by Plaintiff Leung against Defendants… [a]s set forth above, the undisputed material facts show that there was no negligence on the part of Defendants that caused injury to Plaintiff… [a]s Plaintiffs cannot establish a claim for negligence/premises liability against Defendants, they cannot establish one for loss of consortium").) As Defendants failed to meet their initial with respect to the first and second causes of action, they necessarily fail to meet their burden as to the third cause of action as well.

Accordingly, Defendants' motion for summary judgment and the alternative motion for summary adjudication of each cause of action is DENIED in its entirety.

The Court will prepare the Order.

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Calendar line 9
Case Name: Angela Misenheimer et al. v. Ford Motor Co. et al.
Case No.: 23CV414773

I. Background

This is a lemon law case. Plaintiffs alleges they purchased a 2018 Ford Expedition ("Vehicle") on or about December 19, 2017 and obtained an express warranty. Plaintiffs further allege that during the warranty period, the Vehicle developed defects, relating to its transmission and its component parts. Plaintiffs brought this case against Ford on April 18, 2023 asserting various warranty claims, negligent repair, and fraud by concealment.

Plaintiffs now seek an order compelling Ford to produce documents relating to (1) the subject Vehicle (RFP Nos. 1, 3, 12, 15); (2) internal Knowledge and investigation Discovery (RFP Nos. 17, 19, 31, 36, and 39); (3) documents concerning summaries and memos regarding transmission defects (RFP Nos. 43, 45, and 46); (4) documents concerning buyback policies and procedures (RFP Nos. 56, 57, 58, 68, 69, and 73); and (5) Communications with Governmental Agencies (RFP Nos. 76-80, 82 and 83.

Ford makes a number of objections including that the requests are overly broad, irrelevant, and overly burdensome.

II. Legal Standard

Discovery is generally permitted "regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." (Code Civ. Pro. § 2017.010.) Everything that is relevant to the subject matter is presumed to be discoverable. (*Id.*) The Discovery Act further declares that "the court shall limit the scope of discovery" if it determines that the burden, expense, or intrusiveness of that discovery "clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." (Code Civ. Pro. § 2017.020(a); *Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 383-385.) The California Supreme Court teaches in *Greyhound* that the judge exercising discretion to limit discovery should construe disputed facts liberally in favor of discovery; reject objections such as hearsay that only apply at trial; permit fishing expeditions (within limits), avoid extending limitations on discovery, such as privileges; and, whenever possible, impose only partial limitations rather than denying discovery entirely. (*Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 383-385; *see also Tylo v. Superior Court* (1997) 55 Cal.App.4th 1379, 1386.)

The party to whom a request for production of documents has been directed can make one of three responses: (1) a statement that the party will comply with the demand, (2) a representation that the party lacks the ability to comply, or (3) an objection. (Code Civ. Pro. §2031.210(a).) A party may move for an order compelling a further response to a document demand on the ground that (1) an objection is without merit or too general, (2) a statement of compliance with the demand is incomplete, or (3) a representation of inability to comply is inadequate, incomplete, or evasive. (Code Civ. Pro. §2031.210(a).) A party seeking to

compel is required to "set forth specific facts showing good cause justifying the discovery sought by the demand." (Code Civ. Pro. §2031.210(b)(1); *Kirkland v. Superior Court* (2002) 95 Cal.App.4th 92, 98.) This burden may be satisfied by a fact-specific showing of relevance. (*TBG Ins. Services Corp. v. Superior Court* (2002) 96 Cal.App.4th 443, 448.)

Plaintiffs argue the documents it seeks regarding Ford's internal investigations and analyses are likely to lead to the discovery of admissible evidence regarding Ford's knowledge of the defect which they claim relates to the "willful" requirement for a civil penalty and to the fraud claim. With respect to willfulness, one court has opined that "[a] decision made without the use of reasonably available information germane to that decision is not a reasonable, good faith decision." (*Kwan v. Mercedes-Benz of North America, Inc.* (1996) 23 Cal.App.4th 174, 186.) Some factors the court (or jury) may consider when making a willfulness determination include:

1. Whether the manufacturer knew the vehicle was a lemon (*Lukather v. General Motors, LLC* (2010) 181 Cal. App. 4th 1041, 1051-52);

2. Whether the manufacturer or its representative was provided with a reasonable period of time or reasonable number of attempts to repair the vehicle (*Jensen v. BMW of N. Am., Inc.* (1995) 35 Cal.App.4th 112, 136);

3. Whether the manufacturer knew the vehicle had not been repaired within a reasonable time or after a reasonable number of attempts (*Jensen v. BMW of N. Am., Inc.* (1995) 35 Cal.App.4th 112, 136);

4. The lengths the manufacturer or its representative went through to and diagnose and repair the vehicle's problems (*Ramos v. FCA US LLC* (2019) 385 F. Supp. 3d 1056, 1072);

5. Whether the vehicle usually operated normally while in the shop for diagnosis and repair (*Ramos v. FCA US LLC* (2019) 385 F. Supp. 3d 1056, 1072);

6. Whether the manufacturer had reasonable suspicions that the purchaser had tampered with the vehicle (*Ramos v. FCA US LLC* (2019) 385 F. Supp. 3d 1056, 1072);

7. Whether the manufacturer had a written policy on the statutory requirement to repair or replace the vehicle (*Jensen v. BMW of N. Am., Inc.* (1995) 35 Cal.App.4th 112, 136);

8. Whether the manufacturer knew the purchaser had requested replacement or restitution (*Lukather v. General Motors, LLC* (2010) 181 Cal. App. 4th 1041, 1051-52);

9. Whether the manufacturer actively discouraged the purchaser from requesting replacement or restitution (*Lukather v. General Motors, LLC* (2010) 181 Cal. App. 4th 1041, 1051-52);

10. Whether the manufacture relied on reasonably available and germane information when deciding whether to offer to replace or pay restitution (*Kwan v. Mercedes-Benz of North America, Inc.* (1996) 23 Cal.App.4th 174, 186);

11. Whether the purchaser made multiple unsuccessful requests for replacement or restitution (*Ramos v. FCA US LLC* (2019) 385 F. Supp. 3d 1056, 1072);

;

12. Whether the manufacturer's offer to pay restitution was a lowball offer for an incorrect amount (*Ramos v. FCA US LLC* (2019) 385 F. Supp. 3d 1056, 1072).

A close study of the above categories reveals that the primary focus is on the vehicle at issue in a particular case—not sweeping discovery regarding other customers' complaints. Plaintiffs' citations to cases such as *Donlen v. Ford Motor Co.* (2013) 217 Cal.App.4th 138 and *Doppes v. Bently Motors, Inc.* (2009) 174 Cal.App.4th 967 do not change this analysis. Neither of those cases directly addressed a trial court's discovery orders in a lemon law case. *Donlen* finds the trial court did not commit error when it denied the manufacturer's motion in limine to exclude evidence of other customer complaints about the same transmission model in plaintiff's vehicle at issue in that case. *Doppes* examined the trial court's granting of terminating sanctions against the manufacturer for its repeated failure to comply with the trial court's discovery orders. Neither opinion examines the need for discovery or the weighing process undertaken by a trial court in determining the scope of discovery. (Code Civ Proc § 2019.030(a)(2) ("The court shall restrict the frequency or extent of use of a discovery method . . . if it determines . . . The selected method of discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, and the importance of the issues at stake in the litigation.").)

III. Analysis

The Subject Vehicle

Plaintiff claims that she is entitled to RFP Nos. 1,3, 12, and 15 because they relate to the subject vehicle.

RFP No. 1

Plaintiff has requested "all" documents regarding the vehicle, with no limitation by time or subject area. Defendant rightly objects that this request is "too broad." Plaintiff has made no showing of how documents regarding the vehicle, but having nothing to do with the claimed defect might be relevant to her case. The case of *Jensen v. BMW of N. Am., LLC,* 328 F.R.D. 557 (S.D. Cal. 2019) is of no help, as in that case the records requested related to the defect that the vehicle car was alleged to have had. Moreover, *Jensen* simply says that similar defects in the car of the same make, model, and year of the subject car, could conceivably be relevant to a willfulness allegation. *Jensen,* 328 F.R.D. at 562. Simply claiming all documents related to the subject vehicle are relevant does not make them so. This request is DENIED.

RFP No. 3

This asks for all investigations, reports and/or studies regarding the failure of any parts on the Vehicle. Ford again counters that this is too broad. Again, because it is not limited to the

types of defects at issue in this case, this Court fails to see how such a request is not overbroad and Plaintiff submits nothing to explain it.

RFP No. 12

This request might be ok if it were limited to the make, model, and year of the Vehicle but because it relates to all FORD cars with the same transmission as the subject vehicle renders it too broad

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RFP No. 15

This request is too broad for failing to limit the request to repairs, problems, etc. about the transmission defect found in the subject Vehicle, as opposed to any repairs or complaints.

Other Requests

These same issues of overbreadth plague the other requests. Nos. 17, 19, 31, 36, and 39, as well as RFP Nos. 43, 45, and 46, are not limited either in time and more significantly are not limited to cars of similar make, model, and year. RFP Nos. 56, 57, 58, 68, 69, and 73 seek documents, sometimes limited since 2019, related to handling of or policies related to claims under the Song Beverly Consumer Warranty Act generally, regardless of car or defect alleged. RFP Nos. 76-80 82 and 83 similarly lack reference to either the specific make, model, and year of the car.

Plaintiff simply asserts the relevance of the requests without any specification of particular things needed or how such things might be relevant to the claims made. That documents relate to the Vehicle, regardless of issue, or to a Ford Transmission, regardless of make, model or year, is not enough. The cases cited by Plaintiffs do not support their claims. Most are not cases even discussing the scope of discovery. That particular documents, not at issue, may have been relevant to the issue of fraud in a particular case, says nothing about the proper breadth of Plaintiff's requests in this case.

The motion is DENIED and no sanctions are awarded. The Court need not rule on the evidentiary objections, as the evidence was not the basis for the Court's ruling.

Ford shall submit the final order within 10 days.

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