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: 04-16-24 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear in person or by video. Parties are asked NOT to appear by telephone only.

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 will call the cases of those who appear in person first. If you 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. You must use the current link.

TO SET YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. You may make an online reservation to 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. Go to the Court's website at www.scscourt.org to make the reservation.

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	21CV377860 Hearing: Order of Examination	George Jones vs Michael Liddle et al	All parties are to appear in Department 16 at 9:00 AM, either in person or via TEAMS. If all parties appear, the Court will administer the oath and the examination will take place off line. If there is no appearance by the moving party, the matter will be ordered off calendar.
LINE 2	21CV377860 Hearing: Order of Examination	George Jones vs Michael Liddle et al	All parties are to appear in Department 16 at 9:00 AM, either in person or via TEAMS. If all parties appear, the Court will administer the oath and the examination will take place off line. If there is no appearance by the moving party, the matter will be ordered off calendar.
LINE 3	23CV412344 Motion: Quash	Sophie Shen Holdings Trust vs Michael Fulton et al	See Tentative Ruling. Defendant shall submit the final order.
LINE 4	23CV417018 Hearing: Demurrer	ESTATE OF MONTE GARRETT et al vs CITY OF SANTA CLARA et al	See Tentative Ruling. The Court will prepare the final order.
LINE 5	23CV422344 Hearing: Demurrer	GERARDO SEGURA vs COUNTY OF SANTA CLARA et al	See Tentative Ruling. The Court will prepare the final order.

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

LINE 6	23CV417250 Motion: Compel	Gonzalo Ramirez et al vs General Motors, LLC	See Tentative Ruling. Defendant shall submit the final order.
LINE 7	23CV417250 Motion: Compel	Gonzalo Ramirez et al vs General Motors, LLC	See Tentative Ruling. Defendant shall submit the final order.
LINE 8	21CV392825 Motion: Order Motion for Successor Interest	Danny Brown vs Ford Motor Company et al	Notice appearing proper, the unopposed motion is GRANTED. Plaintiff shall submit the final order.
LINE 9	23CV411125 Motion Order for Substitution of Service	Brandon Avila vs RAY NAMMOUR, INC. et al	Good cause appearing, the motion is GRANTED. Plaintiff is ordered to make service within 10 days of the final order. Plaintiff must submit the final order within 10 days of the hearing. The Court suggests that in the future, in such a situation, plaintiff should file an ex parte app and order rather than wait 3 months for the order. The Court is setting a case management conference for June 11, 2024 at 10 a.m. in Department 16.
LINE 10	23CV427403 Hearing: Petition Compel Arbitration	ATHELAS, INC. vs Sumit Mahendru	See Tentative Ruling. Plaintiff shall submit the final order.
LINE 11	2006-1-CV-065452 Motion: Leave to Amend	Daimlerchrysler Financial Services Americas LLC vs N. Udtohan	Notice appearing proper, the unopposed motion is GRANTED. Plaintiff shall submit the final order.
LINE 12			
LINE 13			

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LINE 14			
LINE 15			
LINE 16			
LINE 17			

- oo0oo -

Calendar Line 3
Case Name: *Sophie Shen Holdings Trust v. Fulton, et al.*
Case No.: 23CV412344

I. Background

Plaintiff Sophie Shen Holdings Trust ("Plaintiff") brings this action against EMC International Inc. ("EMC"), a Barbados international business corporation, and Michael J. Geoffrey Fulton ("Defendant"), a Canadian citizen. The action stems from a breach of contract claim.

After investigation, Plaintiff determined EMC is no longer doing business in or registered in Barbados and has no registered agent to serve. Plaintiff has been unable to serve EMC.

Defendant is a citizen of Canada and was a board director and significant shareholder of EMC. After another investigation, Plaintiff found a residential address for Defendant. In October 2023, Plaintiff engaged a Canadian process server to conduct personal service on Defendant, but this was unsuccessful.

In November or December 2023, Plaintiff retained a new process server who was able to serve Defendant through substitute service. The process server left the summons with Defendant's wife, Patricial Lynn McDonald ("McDonald"), at their place of residence.

On January 10, 2024, Defendant filed a motion to quash service, asserting that Plaintiff's December 5, 2023 service was defective. Plaintiff opposes the motion. Defendant has filed a reply.

II. Motion to Quash Service

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).) "When a defendant argues that service of summons did not bring him or her within the trial court's jurisdiction, the plaintiff has 'the burden of proving the facts that did give the court jurisdiction, that is the facts requisite to an effective service.'" (*American Express Centurion Bank v. Zara* (2011) 199 Cal.App.4th 383, 387, citing *Coulston v. Cooper* (1966) 245 Cal.App.2d 866, 868.)

The plaintiff must demonstrate by a preponderance of the evidence that proper service of the summons and complaint was effectuated. (*Boliah v. Superior Court* (1999) 74 Cal.App.4th 984, 991.) The filing of a proof of service that complies with applicable statutory requirements by itself creates a rebuttable presumption that service was proper. (*Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1441.) Additionally, a declaration of service by a registered process server establishes a presumption that the facts stated in the declaration are true. (Evid. Code, § 647; *Rodriguez v. Cho* (2015) 236 Cal.App.4th 742, 750.)

b. Analysis

Defendant argues Plaintiff has failed to properly serve him for the following reasons: 1) it is unclear whether Plaintiff intended to serve Defendant or EMC because the summons is not properly filled out, rendering the summons invalid; 2) if Plaintiff intended to serve Defendant personally, the service is deficient; and 3) Plaintiff cannot show proper substitute service.

i. Plaintiff Intended to Serve Defendant and the Summons is Not Invalid

Defendant asserts that it is unclear whether Plaintiff intended to serve him or EMC because the summons does not identify which defendant is being served. (Demurrer, p. 2:23-27, citing Code Civ. Proc., § 412.20, subd. (a).) He contends that if Plaintiff was intending to serve EMC, the service failed because neither he nor his wife are authorized to accept service for EMC and EMC has long been dissolved and cannot be sued.

In opposition, Plaintiff argues there is no doubt that Defendant himself was being sued because the top of the summons indicates a "Notice to Defendant: [EMC] and Michale [sic] J. Geoffery [sic] Fulton, a Canadian citizen." (Opposition, p. 5:15-17, citing McDonald Decl., Ex. 1.) Plaintiff additionally contends that there is no statutory requirement that it must fill out the boxes at the bottom of the summons form.

A party must be served with process, including a code-compliant summons, for a court to acquire personal jurisdiction over that party. (*Ruttenberg v. Ruttenberg* (1997) 53 Cal.App.4th 801, 808-809.) However, Defendant's reliance on Code of Civil Procedure section 412.20, subdivision (a) is unpersuasive. Nothing in subdivision (a) states that a plaintiff is required to fill out the boxes on the summons form. Subdivision (a) requires: the title of the court in which the action is pending; the names of the parties to the action; a direction that defendant file a response within 30 days after summons is served; a reminder of default for failure to respond; a reminder to seek the advice of an attorney; and specific introductory language in English and Spanish. (Code Civ. Proc., § 412.20, subds. (a)(1)-(6).)

In this case, the summons contains Defendant's name in all caps at the top of the form and therefore complies with the requirement of stating the names of the parties to the action. Defendant cites to no further authority to support his argument that a summons is invalid if the boxes at the bottom of the form are not selected. Furthermore, the Court finds persuasive Plaintiff's argument that if Defendant was aware that EMC could not be sued, and that he was not authorized to accept service on its behalf, he received the summons as an individual in the lawsuit.

Accordingly, the Court declines to grant the motion to quash on the basis that the summons is invalid.

ii. Attempt at Personal Service is Deficient

Defendant next argues that "assuming Plaintiff intended to serve [him] personally, that service is deficient." (Motion, p. 3:16.) Defendant contends that Plaintiff did not exercise "reasonable diligence" to personally serve him because he is not aware of any effort whatsoever to serve him personally. (*Id.* at p. 4:2-3, 11-12.)

In opposition, Plaintiff asserts it tried to serve Defendant personally by hiring an Ontario process server, as required by Ontario, Canada law; however, the server was unsuccessful at personally serving Defendant. (Opposition, p. 2:22-24; Li Decl., ¶ 2.) Plaintiff contends that the relevant Ontario law provides that there must be "an attempt" to effect personal service before the plaintiff may resort to substitute service. (Opposition, p. 4:3-7, citing Ontario Civil Rules of Procedure, R.R.O 1990, Reg. 194, r. 16.03(5).)[1]

Ontario's Civil Rules of Procedure states:

> ***Service at Place of Residence***
> (5) Where ***an attempt*** is made to effect personal service at a person's place of residence and for any reason personal service cannot be effected, the document may be served by,
> (a) leaving a copy, in a sealed envelope addressed to the person, at the place of residence with anyone who appears to be an adult member of the same household; and
> (b) on the same day or the following day mailing another copy of the document to the person at the place of residence, and service in this manner is effective on the fifth day after the document is mailed.

(Ontario Civil Rules of Procedure, R.R.O. 1990, Reg. 194, r. 16.03(5) [emphasis added].) Based on the language of the Ontario Civil Rules of Procedure, Plaintiff is correct that only one attempt at personal service is required.

Nevertheless, aside from the Li Declaration, Plaintiff provides no additional evidence that it hired a process server who tried to personally serve Defendant at all.[2] The process server declaration that is attached speaks only to the attempt at substitute service. Plaintiff does not provide an affidavit or declaration from the original process server that was hired to attempt personal service. Moreover, it is unclear if the declaration of Plaintiff's counsel, J. James Li ("Li") is based on counsel's personal knowledge, as Li was substituted in as counsel after any October 2023 attempts at personal service were made, and thus, the declaration cannot be relied on. (See Evid. Code, § 702 [generally, "the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter"]; see also November 29, 2023 Substitution of Attorney.)[3]

Accordingly, Plaintiff has failed to meet its burden to establish by a preponderance of the evidence that an attempt at personal service was made.

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[1] Plaintiff provides a link to the relevant Ontario law: R.R.O. 1990, Reg. 194: RULES OF CIVIL PROCEDURE (ontario.ca).

[2] The Court also notes that it does not appear that Plaintiff has filed a proof of service with the court, in violation of California Rules of Court, Rule 3.110, subd. (b). (See also Cal. Rules of Court, Rule 3.110, subd. (f).)

[3] Court may take judicial notice of the substitution of attorney on its own motion. (See *BFGC Architects Planners, Inc. v. Forcum/Mackey Construction, Inc.* (2004) 119 Cal.App.4th 848, 853.)

iii. Substitute Service is Improper

Defendant next argues Plaintiff did not effectuate proper substitute service because Plaintiff "merely hand[ed] [his wife] . . . a blank envelope without explanation" and this is insufficient. (Motion, p. 3:21-28, citing Code Civ. Proc., § 415.20, subd. (b).)

In Opposition, Plaintiff asserts that substitute service was proper under Code of Civil Procedure section 413.10, subdivision (c).

Code of Civil Procedure section 413.10, subdivision (c) states that except as otherwise provided by statute, a summons shall be served on a person:

> **(c)** Outside the United States, as provided in this chapter or as directed by the court in which the action is pending, or, if the court before or after service finds that the service is reasonably calculated to give actual notice, as prescribed by the law of the place where the person is served or as directed by the foreign authority in response to a letter rogatory. These rules are subject to the provisions of the Convention on the "Service Abroad of Judicial and Extrajudicial Documents" in Civil or Commercial Matters (Hague Service Convention).

(Code Civ. Proc., § 413.10, subd. (c).)

Plaintiff contends it complied with Ontario law and thereby, complied with Code of Civil Procedure section 413.10, subdivision (c). (See Opposition, pp. 3:19-24, 5:8-11.) Plaintiff relies on the affidavit of Mohammed Ahmed, a process server who attempted to effectuate substitute service on Defendant. (See Li Decl., Ex. A.)

In reply, Defendant asserts that Exhibit A of the Li Declaration does not comply with California requirements for affidavits and declarations made under penalty of perjury, and therefore cannot be considered in adjudication of his motion. (Reply, p. 2:1-3.)

Pursuant to Code of Civil Procedure section 2015.5, an affidavit executed outside of California must state that it is certified under penalty of perjury under the laws of the State of California. (Code Civ. Proc., § 2015.5, subd. (b).) Here, the process server's affidavit was executed outside of California in Ontario, Canada. The affidavit does not contain a statement that it is certified under penalty of perjury under the laws of California. Thus, the Court declines to consider the affidavit. (See *Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601, 611 ["It seems clear that out-of-state declarations offend section 2015.5, and are not deemed sufficiently reliable for purposes of that statute, unless they follow its literal terms."]; see also *Sweetwater Union High School Dist. v. Gilbane Building Co.* (2019) 6 Cal.5th 931, 941.)

Defendant further contends that even if the affidavit could be considered, Plaintiff still did not comply with Code of Civil Procedure section 413.10, subdivision (c) because the summons and complaint were not left in a sealed envelope addressed to the person being served as required by Ontario Rule of Civil Procedure 16.03(5). Rather, the process server left a blank envelope with Defendant's wife, McDonald. (Motion, p. 2:1-2; McDonald Decl., ¶ 2 [stating she was handed an unmarked envelope and the process server did not describe the contents of the envelope]; see also Reply, p. 5:1-19.)

The Court finds this argument persuasive. As stated above, under Ontario law, substitute service may be made by "leaving a copy, in a sealed envelope addressed to the person, at the place of residence with anyone who appears to be an adult member of the same household" and then "on the same day or the following day mailing another copy of the document to the person at the place of residence[.]" (Ontario Civil Rules of Procedure, R.R.O. 1990, Reg. 194, r. 16.03(5).) Here, Defendant asserts the envelope was blank and not addressed to him. Plaintiff provides no admissible evidence to support the assertion that the envelope was addressed to Defendant. Further, the affidavit does not indicate who the summons was mailed to and could be construed as saying it was mailed to Defendant's wife. Thus, Plaintiff does not meet its burden to establish it complied with Code of Civil Procedure section 413.10, subdivision (c) and therefore, substitute service was insufficient.[4]

Based on the foregoing, the motion to quash is GRANTED.

III. Conclusion and Order

The motion to quash is GRANTED. Defendant shall prepare the final Order.

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[4] Plaintiff also contends that substitute service was proper under Code of Civil Procedure section 415.20, subdivision (b). For the same reasons, Plaintiff has not met its burden to establish compliance with Code of Civil Procedure section 415.20, subdivision (b), which states, "a summons may be served by leaving a copy of the summons and complaint at the person's dwelling house [or] usual place of abode . . . in the presence of a competent member of the household . . . at least 18 years of age, who shall be informed of the contents thereof, and by thereafter mailing a copy of the summons and of the complaint by first-class mail, postage prepaid to the person to be served at the place where a copy of the summons and complaint were left."

Calendar line 4
Case Name: *Estate of Monte Garrett, et al. v. City of Santa Clara, et al.*
Case No.: 23CV417018

I. Background

A. Factual

This is a negligence, premises liability, and loss of consortium case.

Plaintiffs Brandon Valdez ("Valdez,") the Estate of Monte Garrett[5] (collectively, "Employee Plaintiffs,") Jackie Valdez, and Patti Garrett (collectively, "Plaintiffs,") bring their first amended complaint ("FAC") against the City of Santa Clara ("Santa Clara City,") the City of San Jose ("San Jose City") (collectively, "City Defendants,"), and the County of Santa Clara ("Santa Clara County") (collectively, "Defendants.")

Plaintiffs Valdez and Garrett were employed by Kiewit[6] Infrastructure West Corporation ("Kiewit Corporation") as Journeyman Pipe Fitters, working at San Jose-Santa Clara Regional Wastewater Facility ("Wastewater Facility.") (FAC, ¶ 19.) The Wastewater Facility is jointly owned and operated by the City Defendants. (FAC, ¶ 18.)

On or around June 14, 2022, Employee Plaintiffs' employer was contracted by Defendants to replace and update equipment at the Wastewater Facility. (FAC, ¶ 20.) As a result, Valdez and Garrett were working in an underground tunnel moving pipes when Valdez heard a sudden pop and felt a strong pressure. (FAC, ¶ 21.) Once Valdez opened his eyes, he saw Garrett on the ground. (*Ibid*.) A large, improperly installed pipe had collapsed onto Valdez and Garrett. (FAC, ¶ 22.) Valdez suffered severe injuries after a blow to his head. (FAC, ¶ 23.) Garrett's injuries were fatal. (*Ibid*.)

On August 15, 2022, Valdez filed an Application for Adjudication of Claim ("Application") before the California Workers' Compensation Appeals Board ("Appeals Board") based on his injuries sustained while working at the Wastewater Facility. (FAC, ¶ 24.) The Application was served on his employer, Kiewit Corporation. (*Ibid*.) On September 20, 2022, an Application before the Appeals Board was filed on behalf of Garrett. That Application was served on Kiewit Corporation as well. (FAC, ¶ 25.) Kiewit Corporation received notice of the workers' compensation claim. (FAC, ¶ 26.)

On September 22, 2022, Defendants were each served with administrative claims on behalf of Plaintiffs pursuant to Government Code section 810. (FAC, ¶¶ 14-16.) San Jose City was served with an amended claim on October 12, 2022. (FAC, ¶ 16.) On October 28, 2022, Plaintiffs received notice from Santa Clara County rejecting their claims. (FAC, ¶ 15.) On November 3, 2022, Plaintiffs received notice from San Jose City rejecting their claims. (FAC,

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[5] The Court will refer to Monte Garrett, the individual, as Garrett.

[6] City Defendants mistakenly address Valdez and Garrett's employer as "Kiewitt" Corporation. Consequently, the Court will adopt Plaintiffs' spelling of "Kiewit" Corporation given that it is the correct version.

¶ 16.) On November 8, 2022, Plaintiffs received notice from Santa Clara City rejecting their claims. (FAC, ¶ 14.)

B. Procedural

Based on the foregoing allegations, Plaintiffs initiated this action on June 5, 2023.[7] City Defendants each filed a demurrer to the initial complaint on July 27, 2023. After the hearing on City Defendants' initial demurrers on November 16, 2023, this Court issued a final order sustaining the demurrer (on grounds that the initial complaint is time-barred) with fifteen days' leave to amend. (See Court Order, Case No. 23CV417018 entitled *Brandon Valdez, et al. vs. City of Santa Clara, et al.,* filed on November 20, 2023.) On November 21, 2023, Plaintiffs filed their currently operative pleading, the FAC, asserting the following causes of action:

1) Public Employee Negligence/Wrongful Death (against Defendants);
2) Dangerous Condition of Public Property (against Defendants);
3) Negligence – Wrongful Death (against Doe defendants only);
4) Premise Liability and Wrongful Death (against Doe defendants only);
5) Loss of Consortium (against all defendants on behalf of plaintiffs Jackie Valdez and Patti Garrett); and
6) Survival Action (against all defendants on behalf of the Estate of Monte Garrett).

On January 3, 2024, Santa Clara City filed a demurrer to the FAC. On January 5, 2024, San Jose City filed a demurrer to the FAC. Both City Defendants demur to the first, second, fifth, and sixth causes of action. Plaintiffs opposed both demurrers on April 3, 2024. City Defendants concurrently filed replies two days later.

II. Procedural Violation

As a preliminary matter, the Court acknowledges City Defendants' contention that Plaintiffs' oppositions are untimely electronically filed and served pursuant to Code of Civil Procedure section 1010.6, subdivision (a)(3)(B). Code of Civil Procedure section 1005, subdivision (b) states, "[a]ll papers opposing a motion … shall be filed with the court and a copy served on each party at least nine court days … before the hearing."

Even if the oppositions are untimely, the Court has discretion to consider a late filed paper. (See Cal. Rules of Court, rule 3.1300.) Here, City Defendants have already filed their substantive replies to Plaintiffs' oppositions, and thus, have not suffered any prejudice from a potentially late filing. Accordingly, the Court will consider Plaintiff's opposition.

III. Merits of the Demurrers

As an initial matter, City Defendants filed nearly identical demurrers to the entirety of Plaintiffs' FAC, and nearly identical replies to Plaintiffs' opposition. Consequently, as a matter of convenience, the Court will only reference the demurrer and reply filed by Defendant San Jose City.

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[7] The parties refer to a June 8, 2023 filing date in their moving papers, but that appears to be a typo or mistake.

A. 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.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

B. San Jose City's Demurrer

San Jose City demurs to the first, second, fifth, and sixth causes of action of the operative FAC on the ground they are time-barred under Government Code section 945.6. (Memorandum of Points and Authorities in Support of Defendant City of San Jose's Demurrer ("MPA") to the FAC, pp. 1-2.)

A court may sustain a demurrer on the ground of failure to state sufficient facts if "the complaint shows on its face the statute [of limitations] bars the action." (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1315.) A demurrer is not sustainable if there is only a possibility the cause of action is time-barred; the statute of limitations defense must be clearly and affirmatively apparent from the allegations in the pleading. (*Id.* at pp. 1315-1316.) When evaluating whether a claim is time-barred, a court must determine (1) which statute of limitations applies and (2) when the claim accrued. (*Id.* at p. 1316.)

Government Code section 945.6 provides a six-month statute of limitation for commencing suit against a public entity once written notice of rejection of a claim is given to the party. (Gov. Code, § 945.6, subd. (a)(1); Gov. Code, § 913.)

As previously argued, San Jose City maintains Government Code section 945.6's statute of limitations is mandatory and must be strictly complied with. (MPA, p. 3:26-28.) It contends that the FAC alleges Plaintiffs received written notice of rejection on November 3, 2022 and so the six-month period commenced no later than this date. (MPA, p. 4:3-11, citing Declaration of Ana M. Davila in Support of Defendant City of San Jose Demurrer to FAC ("Davila Decl.,") Exh. A, ¶ 30).) It further asserts that the initial complaint had to be filed by May 3, 2023 at the latest, but was not filed until June 5, 2023 and is therefore time-barred. (*Ibid*.)

In opposition, Plaintiffs argue that the statute of limitations was equitably tolled while Employee Plaintiffs pursued workers' compensation claims. (Plaintiffs' Opposition to Defendant City of San Jose's Demurrer to the FAC ("Opp.,") p. 6:20-27.) Plaintiffs primarily rely on *Elkins v. Derby* (1974) 12 Cal.3d 410 (*Elkins*), *Addison v. State of California* (1978) 21 Cal.3d 313 (*Addison*), and *Hopkins v. Kedzierski* (2014) 225 Cal.App.4th 736 (*Hopkins*) to support their argument. (Opp., pp. 7-8.) The Court addressed much of this authority in depth in its November 20, 2023 order sustaining City Defendants' previous demurrers. Accordingly, that analysis will not be repeated here.

Plaintiffs contend that it is well established that the pursuit of a workers' compensation claim may equitably toll the statute of limitations for personal injury lawsuits. (Opp., p. 6:21-26.) As noted in the Court's order on the previous demurrers, this is a correct statement of the law. However, equitable tolling requires: 1) timely notice; 2) lack of prejudice; and 3) reasonable and good faith conduct on the part of plaintiffs. (*Addison, supra,* 21 Cal.3d at p. 319; *Hopkins, supra,* 225 Cal.App.4th at p. 747.)

In this case, Plaintiffs contend all three elements are present such that equitable tolling should apply. (Opposition-SJ, p. 9:1-2.)

i. Timely Notice of the First, Second, Fifth, and Sixth Causes of Action

As previously argued, San Jose City maintains Plaintiffs did not provide timely notice to City Defendants because Kiewit Corporation is not an agent of San Jose City. (MPA, p. 4.) Specifically, San Jose City contends Plaintiffs' allegation of agency is unsupported by facts and contrary to the FAC allegation that Kiewit Corporation was "contracted" by City Defendants at the time of Valdez and Garrett's injuries. (MPA, pp. 4-5.) San Jose City cites *Malloy v. Fong* (1951) 37 Cal.2d 356 and *Secci v. United Independent Taxi Drivers, Inc.* (2017) 8 Cal.App.5th 846, 855, for the proposition that agency relationships depend "primarily on whether the activities of the alleged agent are controlled by the alleged principal for whom work is done." (MPA, p. 5:10-24.) San Jose City concludes that Kiewit Corporation's status as an "independent contractor," without more, is "insufficient to impute notice" of Plaintiffs' workers' compensation claims where San Jose City was not a named party. (MPA, p. 6: 1-13; Reply, pp. 2-3.)

As correctly noted in Plaintiffs' opposition, "[t]he timely notice requirement essentially means that the first claim must have been filed within the statutory period. Furthermore the filing of the first claim must alert the defendant in the second claim of the need to begin investigating the facts which form the basis for the second claim." (*Collier v. City of Pasadena* (1983) 142 Cal.App.3d 917, 923, 924-925, see also *McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 102.)

In opposition, Plaintiffs assert that San Jose City had timely notice through Employee Plaintiffs' workers' compensation claims that arose from the work being performed at the Wastewater Facility. (Opp., p. 9:16-27.) Specifically, Plaintiffs argue that Employee Plaintiffs' employer Kiewit Corporation, which was contracted by City Defendants at the time of the injury, received notice of the workers' compensation claim, and therefore, San Jose City had notice of the claim because San Jose City was the principal of Kiewit Corporation. (*Ibid.*) Plaintiffs conclude that lack of notice from Kiewit Corporation is "immaterial." (Opp., p. 10:1-6.)

Plaintiffs are correct that "'[a]s against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other.'" (*Chaplis v. County of Monterey* (1979) 97 Cal.App.3d 249, 262.) "Thus, it is a well established rule in California that the principal is chargeable with, and is bound by the knowledge of, or notice to, his agent, received while the agent is acting within the scope of his authority, and which is in reference to a matter over which his authority extends." (*Trane Co. v. Gilbert* (1968) 267 Cal.App.2d 720, 727.) In this Court's previous ruling, it found that Plaintiffs' initial complaint was devoid of

allegations establishing an agency relationship. Plaintiffs have now cured this issue by sufficiently pleading additional facts in the FAC.

Plaintiffs' amended complaint alleges Kiewit Corporation was "contracted by" City Defendants, to replace control equipment at Wastewater Facility, and was, *at all times*, an agent or employee of City Defendants and City Defendants were principals; on demurrer, these allegations are taken as true. (FAC, ¶¶ 20, 26-29; see *Committee on Children's Television, Inc. v. General Foods Corp.*, *supra*, 35 Cal.3d at 213-214.) Plaintiffs' agency allegations are sufficient for pleading purposes because it is well-established that general allegations of agency constitute averments of ultimate fact sufficient to survive demurrer. (See *Skopp v. Weaver* (1976) 16 Cal.3d 432, 437 [finding that "numerous cases have held a pleading of agency an averment of ultimate fact"]; *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 886 [stating that "an allegation of agency is deemed an allegation of ultimate fact"].)

San Jose City fails to cite any relevant authority requiring more than what is currently being pled by Plaintiffs to establish an agency relationship. (Reply, p. 2: 21-28-3:1-6.) Instead, in its reply, San Jose City simply concludes "Plaintiffs cannot just make conclusory allegations" (Reply, p. 3:1-6) and cites to *Boyle v. City of Redondo Beach* (1999) 70 Cal.App.4th 1109, 1114 for the general proposition that demurrers test the legal sufficiency of factual allegations raised in the complaint. (See *Boyle, supra*, 70 Cal.App.4th at p. 1114, n. 2.) A point asserted without citation to relevant authority will be disregarded. (*People v. Dougherty* (1982) 138 Cal.App.3d 278, 282.) Defendants do not provide sufficient authority or analysis to support the conclusion that Kiewit Corporation is not an agent or employee.

The FAC asserts that Kiewit Corporation had notice of the worker's compensation claims and that City Defendants had notice of Plaintiffs' workers' compensation claims because City Defendants were the principal of Kiewit Corporation. (FAC, ¶¶ 26, 29.) Plaintiffs further allege, based on information and belief, Defendants were "actually informed about the injury in the course of Kiewit Corporation's defense of the workers' compensation action. (*Ibid.*) As a result, City Defendants were provided with "notice and opportunity to investigate prior to the statute of limitations running." (FAC, ¶ 29.)

Consequently, this Court finds Plaintiff's allegations in the amended pleading sufficiently establish that Kiewit Corporation had knowledge of the workers' compensation claim such that San Jose City would then also be on notice by virtue of the agency relationship. Thus, Plaintiffs have sufficiently met the first element of the equitable tolling doctrine. Given the Court's ruling as to agency, it need not address Plaintiffs' argument that investigation into the Serious and Willful claims per Labor Code section 4553 imputed notice on Defendants, which was not pleaded in the FAC. (Opp., p. 10:20-24-11:1-13.)

ii. Lack of Prejudice

As to the second element, San Jose City argues, as it previously did, tolling of the claims statute would result in prejudice because it would expand Plaintiffs' right to bring claims against public entities like San Jose City beyond the strict time limitations intended by the Government Claims Act. (MPA, p. 7:1-13.)

In opposition, Plaintiffs argue San Jose City would not be prejudiced if the statute of limitations were tolled because the workers' compensation claim and the current tort action arise from the same set of facts – that Valdez and Garrett suffered severe injuries after a pipe collapsed onto them while working at the Wastewater Facility. (Opp., pp. 11:24-27-12:1-9, citing FAC, ¶ 22; see also *Collier*, *supra*, 142 Cal.App.3d at pp. 924-925 [The second element requires that "facts of the two claims be identical or at least so similar that the defendant's investigation of the first claim will put him in a position to fairly defend the second"].) They further contend that City Defendants would not be prejudiced if the statute of limitations were tolled given that they had an opportunity through the workers' compensation claims and the depositions taken in that context to identify evidence that might be needed to defend themselves against the tort claim.

In reply, San Jose City contends that the equitable tolling of Plaintiffs' claims would result in prejudice because "Defendants had no reason to have knowledge of Plaintiffs' workers' compensation claim to Kiewit" Corporation when Kiewit Corporation was just "an independent contractor." (Reply, p. 3:9-16.) Additionally, San Jose City argues because "no lawsuit was filed by the six-month deadline following rejection of Plaintiffs claims, Defendant had no reason to engage in any investigation of the complaint." (*Ibid.*)

As this Court previously concluded, it does not find City Defendants' arguments to be persuasive. Plaintiffs have sufficiently alleged, at this stage of the pleadings, that an agency relationship between San Jose City and Kiewit Corporation existed such that San Jose City was on notice of the workers' compensation claim. Moreover, as the Supreme Court noted in *Addison*, courts favor the general policy of relieving plaintiff from a statute of limitations bar where plaintiff pursues a legal remedy designed to lessen the extent of his injuries or damage. (*Addison*, *supra*, 21 Cal.3d at p. 317; see also *J.M. v. Huntington Beach Union High School Dist.* (2017) 2 Cal.5th 648, 657 [stating same; also holding that equitable estoppel did not apply where plaintiff did not pursue an alternate remedy before filing a complaint simultaneously with his petition for relief under section 946.6].)

Here, notably, Plaintiffs have provided additional allegations in their FAC demonstrating that San Jose City had knowledge of the workers' compensation claims. Specifically, Plaintiffs allege the following additional facts in their FAC: 1) Valdez and the Estate of Garrett filed Applications before the Appeals Board for injuries sustained by Employee Plaintiffs while working at the Wastewater Facility (FAC, ¶¶ 24-25); 2) Kiewit Corporation was served with the Applications, and thereby received notice of the workers' compensation claims (FAC, ¶¶ 24-26); 3) Kiewit Corporation was "contracted by" City Defendants, to replace and upgrade control equipment, thereby forming an agency relationship (FAC, ¶¶ 20, 28); and 4) as *principals*, City Defendants had notice of the workers' compensation claims and "were actually informed about the injury" during Kiewit's defense of these claims. (FAC, ¶ 29.)

Plaintiffs' FAC allegations sufficiently demonstrate San Jose City's knowledge of the workers' compensation claims and the injuries in question. Consequently, Plaintiffs have satisfied the second element for lack of prejudice.[8]

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[8] The Court acknowledges and accepts San Jose City's contention that Plaintiffs "impermissibly" attempt to introduce extrinsic evidence, namely, notice of deposition and request for production of documents, via declarations, not pleaded in the FAC. (Reply, p. 3:20-

iii. Good Faith and Reasonable Conduct

As for the last element, San Jose City contends the FAC fails to set out any reasonable justification for failure to timely file the initial complaint. (MPA, p. 7: 17-19.) It further maintains, as noted above, that Plaintiffs allege "nothing more than conclusory allegations" of an agency relationship between Kiewit Corporation and San Jose City. San Jose City contends there cannot be "reasonable belief" that notice of service of the workers' compensation claims as to Kiewit can be imputed to San Jose City. (MPA, p. 7:20-27.)

"The third prerequisite of good faith and reasonable conduct on the part of the plaintiff is less clearly defined in the cases. But in [*Addison*,] *supra*, 21 Cal.3d 313 the Supreme Court did stress that the plaintiff filed his second claim a short time after tolling ended. Perhaps, if a plaintiff delayed filing the second claim until the statute on that claim had nearly run, even after crediting the tolled period, his conduct might be considered unreasonable." (*Collier*, *supra*, 142 Cal.App.3d at p. 926.) In other words, the final requirement of good faith and reasonable conduct requires the plaintiff to file the second claim a short time after the tolling ended. (*Id.*)

In opposition, Plaintiffs acknowledge that they filed their tort action about one-month after the six-month period had run, but contend that they filed it before equitable tolling would have ended because their workers' compensation claims are still pending. They conclude, under these circumstances, no uncertainty or delay would result, as the limitations period has been tolled. Plaintiffs further contend they made a "good faith effort" to file without additional delay. (Opp., p. 12:18-23.) In reply, San Jose City asserts that Plaintiffs cite no reasonable justification for failing to timely file their initial complaint and that they were aware of the untimeliness. (Reply, p. 4:14-22.) Despite this fact, Plaintiffs neglected their government claims while pursuing their workers' compensation claims. (*Ibid.*) San Jose City claims Plaintiffs are disingenuously alleging an agency relationship between Kiewit Corporation and San Jose City "to circumvent the statute of limitations." (*Ibid.*) As noted in this Court's prior order, given the holdings in both *Elkins* and *Addison*, San Jose City's argument is unpersuasive.

Plaintiffs' FAC alleges sufficient facts to demonstrate reasonable and good faith conduct in the filing of their initial complaint. (See *Mitchell v. State Dept. of Public Health* (2016) 1 Cal.App.5th 1000, 1011 (*Mitchell*) [reversing sustaining of demurrer where complaint alleged sufficient facts to support application of the doctrine of equitable tolling, including plaintiff's *allegations of reasonable and good faith conduct on plaintiff's part*].) Here, Plaintiffs provide the following allegation of reasonable conduct: "the six-month statute of limitations to file the civil suit ran on May 3, 2023 for the City of San Jose and May 8, 2023 for the City of Santa Clara. Plaintiffs filed their original civil complaint on June 8, 2023 while their workers' compensation claim is still pending." (FAC, ¶ 30.) Plaintiffs' allegations that their initial complaint was filed only one month after the statute of limitations period had run and "well before the tolling ended" are sufficient to establish good faith. (See *Collier*, *supra*, 142 Cal.App.3d at p. 926.; *Mitchell*, *supra*, 1 Cal.App.5th at p. 1011 [finding allegations that

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28.) A demurrer "tests the pleadings alone and not the evidence or other extrinsic matters." (*SKF Farms v. Superior Court* (1984) 153 Cal.App.3d 902, 905.) As San Jose City correctly concludes, extrinsic evidence may not properly be considered on demurrer.

lawsuit was filed before tolling period ended along with right to sue letter informing plaintiff about tolling sufficient to plead good faith].) Accordingly, Plaintiffs have sufficiently amended their initial complaint as to element three.

The Court finds that all three elements of equitable tolling have been sufficiently pled. The demurrer is therefore OVERRULED.

C. Santa Clara City's Demurrer

Santa Clara City's demurrer to the FAC, Plaintiffs' opposition, and Santa Clara City's reply are nearly identical to that of San Jose City's demurrer, the opposition, and the reply. As this Court previously noted, the only difference is that Santa Clara City sent written notice of rejection on November 8, 2023, and therefore, the statute of limitations would have run no later than May 8, 2023, but Plaintiffs filed their action on June 5, 2023. (Santa Clara City MPA, pp. 2:15-28.) In opposition, Plaintiffs conceded this point but assert that equitable tolling should apply for the same reasons as above. (Santa Clara City Opp., p. 12:18-23.)

Accordingly, for the same reasons explained in detail above, Santa Clara City's demurrer to Plaintiffs' FAC on the ground it is time-barred under Government Code section 945.6 is OVERRULED.

IV. Conclusion

City Defendants' demurrers to the first, second, fifth, and sixth causes of action, on the ground of failure to state a claim, are OVERRULED.

The Court will prepare the final Order.

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Calendar Line 5
Case Name: *Segura v. County of Santa Clara, et al.*
Case No.: 23CV422344

I. Factual and Procedural Background

Plaintiff Gerardo Segura ("Plaintiff") brings this employment action against defendants County of Santa Clara dba Santa Clara Valley Medical Center ("County Hospital"), Santa Clara Valley Medical Center ("SCVMC"), and Paul E. Lorenz ("Lorenz").

From about February 2020 until present, Plaintiff worked as the Sterile Processing Educator for County Hospital. (First Amended Complaint ("FAC"), ¶ 4.) Lorenz is the Chief Executive Officer of County Hospital/SCVMC. (*Id.* at ¶¶ 2, 3(a).)

During Plaintiff's employment, he observed County Hospital's failure to maintain a sanitary environment and improper handling of materials, including surgical instruments. (FAC, ¶ 11.) On and after September 2022, Plaintiff informed several people that certain instruments were incorrectly sterilized and had been incorrectly sterilized for several years. (*Id.* at ¶ 13.) Plaintiff was told not to make an incident report. (*Ibid*.) Thereafter, Plaintiff reported his concerns to Lorenz by copying him on an email; however, Lorenz did not respond. (*Ibid*.)

In October 2022, Plaintiff observed additional improper sterilization of surgical tools and again report them to Lorenz, who did not respond. (FAC, ¶ 14.) On or around October 11, 2022, Plaintiff reported the improper sterilization instances to the California State Health Department. (*Id*. at ¶ 15.)

In November 2022, Plaintiff reported his concerns to Lorenz for a third time and received no response. (FAC, ¶ 16.) Plaintiff is informed and believes that after he reported these concerns, Lorenz retaliated against Plaintiff, and Lorenz's subordinates also retaliated against Plaintiff under Lorenz's direction and knowledge. (*Ibid*.)

In response to Plaintiff's reports to the California State Health Department, the California Department of Public Health, Licensing, & Certification Program conducted an investigation and substantiated Plaintiff's complaints. (FAC, ¶ 18.)

On January 18, 2023, County Hospital placed Plaintiff on suspension without explaining the reasons for the suspension. (FAC, ¶ 31.)

On September 6, 2023, Plaintiff filed his initial pleading. Thereafter, on December 4, 2023, Plaintiff filed his FAC, asserting the following causes of action:

1) Violation of Cal. Labor Code section 1102.5 [against all defendants];
2) Violation of Cal. Government Code section 12940, et seq. [against County Hospital]; and
3) Violation of Cal. Labor Code section 2808 [against County Hospital].

On January 8, 2024, defendants County Hospital and Lorenz ("Defendants") filed a demurrer to the FAC's first and second causes of action. However, on April 2, 2024, Plaintiff filed a request to dismiss his second cause of action and dismissal was entered on that same

date. Thus, the demurrer to the second cause of action is now moot. Plaintiff opposes the demurrer to the first cause of action.

II. Legal Standard

In ruling on a demurrer, the court 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.)

III. Analysis

First Cause of Action – Violations of Labor Code § 1102.5

Labor Code section 1102.5, subdivision (b) states, in relevant part: "**(b)** An employer, *or any person acting on behalf of the employer*, shall not retaliate against an employee for disclosing information . . . ." (Lab. Code, § 1102.5, subd. (b) [emphasis added].)

To establish a prima facie case of retaliation under Labor Code section 1102.5, a plaintiff must show that "(1) [he] engaged in a protected activity, (2) [his] employer subjected [him] to an adverse employment action, and (3) there is a causal link between the two." (*McVeigh v. Recology San Francisco* (2013) 213 Cal.App.4th 443, 468.)

Defendants argue that Plaintiff has improperly named Lorenz as a defendant for violations of Labor Code section 1102.5, which prohibits retaliation against an employee for engaging in a protected activity because the Labor Code section only applies against an employer, and not an individual. (Demurrer, p. 6:8-11.)

In opposition, Plaintiff argues the language: "or any person acting on behalf of the employer" indicates that the Labor Code section does apply against individuals. (Opposition, p. 3:15-18.)

i. Reliance on Federal Authority

Both parties concede there is no binding California authority that has addressed this issue. In support of their demurrer, Defendants rely on numerous federal court cases. (See Demurrer, pp. 10:12-11:9; Reply, p. 2:22-3:11.) Plaintiff contends reliance on federal cases is improper (Opposition, p. 4:23-25); however, Plaintiff's opposition is devoid of any citation to authority supporting the contention that there is individual liability under Labor Code section 1102.5. (See *People v. Dougherty* (1982) 138 Cal.App.3d 278, 282 [a point asserted without citation to authority may be disregarded].)

The Court "observe[s] initially that while federal authority may be regarded as persuasive, California courts are not bound by decisions of federal district courts and courts of appeals." (*People v. Uribe* (2011) 199 Cal.App.4th 836, 875; see also *People v. Seaton* (2001)

26 Cal.4th 598, 653 ["[d]ecisions of the federal courts of appeal are not binding on this court"]; (*Landmark Screens, LLC v. Morgan, Lewis & Bockius, LLP* (2010) 183 Cal.App.4th 238, 251, fn. 6 [California Rules of Court do not prohibit citation to unpublished federal cases, which may properly be cited as persuasive, although not binding, authority].) This is the case, regardless of whether the federal court is interpreting state law. With that said, as one California superior court noted, "California superior courts have rendered conflicting rulings on this exact issue. Based on the foregoing, it is clear that this issue remains unsettled and there is no authority binding on this Court." (*Desio v. State Dep't of Tax & Fee Admin.* (Feb. 22, 2019, 34-2018-00242765-CU-OE-GDS) [2019 Cal. Super. LEXIS 64314, *4-5].)[9] Thus, the Court will rely on the persuasive federal authority in reaching its decision in this matter.

ii. Individual Liability

In 2013, Labor Code section 1102.5[10] was amended to impose liability on employers or any person acting on behalf of the employer. In this case, the FAC alleges Lorenz was acting on behalf of Plaintiff's employer in the capacity of Chief Executive Officer of County Hospital. (FAC, ¶ 3(a).)[11] The Court must next determine whether the language "any person acting on behalf of the employer" was meant to impose individual liability, as Plaintiff insists.

"The overwhelming majority of district courts addressing the merits [of this issue] have found that even after the amendment, § 1102.5 does not impose individual liability on non-employers." (*Dawson v. Caregard Warranty Serv., Inc.* (C.D.Cal. Jan. 12, 2024, No. 5:23-cv-01139-SB-SP) 2024 U.S.Dist.LEXIS 33737, at *4; see also *Mewawalla v. Middleman* (N.D.Cal. 2022) 601 F. Supp. 3d 574, 608 ["most district courts that have addressed the issue have held that section 1102.5 does not impose liability on supervisors"].) The federal courts that hold there is no individual liability under section 1102.5 largely rely on two decisions of the California Supreme Court addressing similar questions in the context of FEHA: *Reno v. Baird* (1998) 18 Cal.4th 640 (*Baird*) and *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158 (*Jones*).[12]

One such case is *Tillery v. Lollis* (E.D.Cal. Aug. 12, 2015, No. 1:14-cv-02025-KJM-BAM) 2015 U.S.Dist.LEXIS 106845, at *24-25 (*Tillery*). The *Tillery* Court cited numerous federal cases that determined there was no individual liability under section 1102.5. (*Id.* at pp. 22-23, citing e.g.: *Vera v. Con-Way Freight, Inc.* (C.D.Cal. Apr. 6, 2015, No. CV 15-874 AJW) 2015 U.S.Dist.LEXIS 45424, at *1; *Vierria v. Cal. Highway Patrol* (E.D.Cal. 2009) 644

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[9] The Court is also aware that California superior court rulings have no precedential value. (See e.g., *Bolanos v. Superior Court* (2008) 169 Cal.App.4th 744, 761 ["a written trial court ruling has no precedential value"].)

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

[11] Generally, a statutory cause of action must be pled with specificity. (E.g., *Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 795 ["general rule that statutory causes of action must be pleaded with particularity"].) Defendants do not address whether this allegation is sufficiently pled and so the Court will treat the allegation as sufficient.

[12] In addition to federal authority, there are a large number of California superior court cases that have concluded there is no individual liability under section 1102.5. (See e.g., *McPherson v. Aflac Inc.* (Sept. 16, 2021, 30-2020-01155054-CU-WT-CJC) [2021 Cal. Super. LEXIS 32619, *4]; *Maldonado v. L3harris Techs.* (Feb. 24, 2022, 21STCV31786) [2022 Cal. Super. LEXIS 4017, *11]; *Clifton v. Aclu of S. Cal.*, 2022 Cal. Super. LEXIS 23968, *5.)

F.Supp.2d 1219, 1244.) Further, in concluding there is no individual liability under section 1102.5, the *Tillery* court additionally examined *Baird* and *Jones*.

In *Baird*, the California Supreme Court affirmed a finding of no individual liability under the FEHA to the extent the statute defines "employer" to include "any person acting as an agent of an employer…" (*Baird*, *supra*, 18 Cal.4th at pp. 644-645.) Thereafter, the California Legislature amended the at-issue FEHA provision to *expressly* hold individual employees liable for harassment. (See *Martinez v. Michaels* (C.D.Cal. July 15, 2015, No. CV 15-02104 MMM (Ex)) 2015 U.S.Dist.LEXIS 92180, at *25, citing Cal. Gov. Code, § 12940, subd. (j)(3) ["An employee of an entity subject to this subdivision is *personally liable* for any harassment prohibited by this section that is perpetrated by that employee . . ."][emphasis added].) In this case, the language of section 1102.5 is similar to the statutory language addressed in *Baird*, before the FEHA provision was amended to expressly provide for individual liability.

In *Jones*, the Supreme Court determined that Government Code section 12940, subdivision (h), which "makes it an unlawful employment practice for 'any employer, labor organization, employment agency, or person' to retaliate" did not provide for individual liability. (*Jones*, *supra*, 42 Cal.4th at p. 1162.) There, the plaintiff argued the use of the word "person" created personal liability. The *Jones* Court explained that while the "language does lend itself to plaintiff's interpretation, . . . that is not the only reasonable interpretation of the statutory language. 'If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy.'" (*Id.* at pp. 1162-1163.)

In addition to addressing the above cases, the *Tillery* Court determined the legislative history of the amendment to section 1102.5 "emphasize[d] that the amendment applies to an employee 'acting on behalf of the employer.'" (*Tillery*, *supra*, at p. 26.) In other words, there was no intent to provide for individual liability.

In opposition, Plaintiff argues that Labor Code section 1103, which can be found in Chapter Five of the Labor Code along with section 1102.5, provides for individual liability. (Opposition, p. 3:27-28.) Section 1103 provides: "An employer or any other person or entity that violates this chapter is guilty of a misdemeanor punishable, in the case of an individual, by imprisonment in the county jail . . . ." (Lab. Code, § 1103.) Plaintiff's argument, however, supports Defendant's position. Section 1103 specifically provides for individual punishment for violations of Chapter Five of the Labor Code where an individual commits a violation. But, section 1102.5 itself does not similarly expressly provide for individual liability or punishment.

Moreover, other related sections in the same statutory scheme as section 1102.5 limit liability to the employer. (See e.g., *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1099-1100 ["a basic principle of statutory interpretation: courts do not construe statutes in isolation, but rather read every statute with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness"][internal quotations omitted].) Labor Code section 1102.6 provides that after an employee establishes a violation of section 1102.5, "the ***employer*** shall have the burden of proof to demonstrate that the conduct occurred for legitimate reasons." (Lab. Code, § 1102.6 [emphasis added].) Similarly, section 1105, the damages provision for Chapter Five of the Labor Code, only refers to an employer, stating: "nothing in this chapter shall prevent the injured employee from recovering damages *from his* ***employer*** for injury suffered through a violation of this chapter."

(Lab. Code, § 1105 [emphasis added].) Based on the foregoing, the Court finds that Labor Code section 1102.5 does not provide for individual liability.

Accordingly, the demurrer to the first cause of action is SUSTAINED without leave to amend as to Lorenz.

IV. Conclusion and Order

The demurrer to the first cause of action is SUSTAINED without leave to amend as to defendant Lorenz.[13] The demurrer to the second cause of action is MOOT. The Court shall prepare the final order.

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[13] While both County Hospital and Lorenz have demurred to the first cause of action, County Hospital's argument is only directed at Lorenz.

Calendar Lines 6 and 7
Case Name: Gonzalo Ramirez et al vs General Motors, LLC
Case No.: 23CV417250

I. Background

This is a lemon law case. Plaintiffs alleges they purchased a 2022 Chevrolet Camaro ("SUBJECT Vehicle") on April 11, 2022 and obtained an express warranty. Plaintiffs further allege that during the warranty period, the Vehicle developed defects, relating to its losing power when reversing and stopping. Plaintiffs brought this case against GM on June 9, 2023 asserting various warranty claims.

Plaintiffs now seek an order compelling GM to produce documents relating to (1) the SUBJECT Vehicle (RFP Nos. 1, 2, 3, 9, 14); (2) communications between Plaintiff and Defendant or those associated with Defendant (RFP Nos. 15 and 16); (3) documents relating to the call center, loyalty program, after warrant assistance program, or technical hotline (RFP Nos. 31-33); and (4) documents evidencing complaints made by California owners of the same make, model, year of SUBJECT VEHICLE related to two issues associated with the SUBJECT VEHICLE (RFPs 37-42). Plaintiffs also seek further responses to Special Interrogatories 14, 40-45, and 53.

GM 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 others' complaints are likely to lead to the discovery of admissible evidence. Some factors the court (or jury) may consider 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 or 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

Motion to Compel Further Responses to RFPs

Requests 1, 2, 3, 9, and 14: The Subject Vehicle

Plaintiffs claim that they are entitled to further responses to RFP Nos. 1,2, 3, 9 and 14 because they relate to the subject vehicle. But the requests seek "all" documents regarding the vehicle, with no limitation by time or subject area. Defendant rightly objects that these requests are "too broad." Plaintiffs have made no showing of how documents regarding the vehicle, but having nothing to do with the claimed defect might be relevant to her case. Simply claiming all documents related to the subject vehicle are relevant does not make them so. These requests are DENIED.

Requests 31-33

Request Nos. 31-33 concern documents related to GM's call center, technical hotline, after warranty assistance program, and customer loyalty program. The same issues of overbreadth plague these requests. The requests are not limited either in time and more significantly are not limited to cars of similar make, model, and year, nor to the alleged defect at issue. Plaintiffs simply assert the relevance of the requests without any specification of particular things needed or how such things might be relevant to the claims made. The cases cited by Plaintiffs do not support their claims. Most are not cases even discussing the scope of discovery.

Requests 37-42

Plaintiffs seek documents evidencing complaints made by California owners of the same year, make and model as the SUBJECT VEHICLE which have had the same issues identified in the repair order number 608640. GM represents that it has already agreed to supplement its production with "other customer complaints within GM's ESI database that are substantially similar to Plaintiffs' complaint(s) concerning the alleged defects, for vehicles purchased in California of the same year, make, and model as the Subject Vehicle." Opp. p6; *see also* Decl. of Kim, Ex. 5 p8 of 9. This is sufficient. To the extent GM has not so supplemented, it shall do so within 20 days of the final order.

Accordingly, the motion to compel further responses to the request for documents is DENIED, with the understanding that GM is providing the supplemental responses to RFPs 37-42 that it indicated it was already providing.

Motion to Compel Further Responses to Special Interrogatories

Plaintiffs ask for further response to SI number 14, requesting the identity of individuals who performed warranty repairs on the subject vehicle. GM has provided the documentation and further indicated that the individuals are not GM employees and that the dealerships would have further information. While Plaintiff alleges that GM is in the best position to identify these individuals, Plaintiff has provided no authority for its position. The request is DENIED.

Plaintiffs next ask for further response to SIs 40-45. SIs 40 and 41 are not limited to the SUBJECT VEHICLE and therefore are overbroad and not relevant to this case. GM answered SIs 42-45. While the answer may not be what Plaintiff wanted, GM has fulfilled its discovery obligation. These requests are DENIED.

Finally, Plaintiffs seek further response to SI 53 seeking how many days the vehicle was out of service for warranty repairs. GM replied that "it does not have personal knowledge sufficient to respond to this Interrogatory, and the information is equally available to Plaintiffs in this matter as the vehicle was taken to independently owned and operated repair facilities by Plaintiffs." Again, this is sufficient and the request is DENIED.

The motions to compel are DENIED, as are the requests for sanctions. Defendant shall submit the final order.

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Calendar line 10
Case Name: Athelas Inc. v. Sumit Mahendru
Case No.: 23CV427403

Defendant Sumit Mahendru ("Defendant") moves to compel arbitration arguing that the Employment Agreement between it and Plaintiff Athelas (Plaintiff) contains an arbitration clause which applies to any dispute relating to Defendant's employment with and services for the Company. Plaintiff asserts in opposition that its claims, as laid out in the First Amended Complaint, arise not from Defendant's breach of the Employment Agreement, but from the breach of the separate Noncompetition and Nonsolicitation Agreement ("Noncompetition Agreement") between the parties. Plaintiff argues that because the Noncompetition Agreement does not contain an arbitration clause, it cannot be compelled to arbitration.

Defendant responds that the Employment Agreement and Noncompetition Agreement should be read as one, citing both Civ. Code § 1642 and *Fillpoint, LLC v. Maas* (2012) 208 Cal.App.4th 1170, 1178-81. If read together, then the arbitration clause in the Employment Contract would apply, contends Defendant, because of its broad language and the preference for arbitration.

Section 1642 states that "[s]everal contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together." When determining whether contracts should be read as one, the courts look to a number of factors including:

(1) whether the contracts were entered at the same time (*Fillpoint,* 208 Cal.App.4th at 1178-79 ; *Blue Mountain Enterprises, LLC v. Owen*, 74 Cal.App.5th (2022) 537, 551-552 (citing fact that contracts were drafted and contemporaneously executed)).

(2) whether they are between the same parties or not (*Vacco Industries, Inc. v. Van Den Berg* (1992) 5 Cal.App.4th 34, 42 (finding contracts were separate where Vacco entered into employment contracts with a number of key employees, and separate noncompetition agreements with 12 major shareholders)); and

(3) whether the agreements cross-reference each other (see *Fillpoint*, 208 Cal.App.4th at 1179 (not separate contracts where they cross-referenced each other); and *Vacco*, 5 Cal.App.4th at 42-43 (separate contracts where they did not cross-reference each other)).

Here, the contracts were executed between the same parties on the same day. The contracts do not cross-reference one another, however. While the Noncompetition Agreement mentions the Employment Agreement (See Noncompetition Agreement paragraph 2(c)), it does not incorporate it or indicate that they should be read together. The mention is in sharp contrast with how the Employment Agreement references the Stock Purchase Agreement and the Confidential Information Agreement, the latter of which is specifically incorporated into the Employment Agreement. The Employment Agreement does not even mention the Noncompetition Agreement.

Given that Plaintiff could have cross-referenced the Noncompetition Agreement in the Employment Agreement or incorporated it into the agreement, as it did the other contracts, the fact that Plaintiff failed to do so, strongly suggests that the agreements should not be read together. This is all the more so given that the Employment Agreement has an arbitration clause and the Noncompetition Agreement specifically allows disputes to be heard in the courts. Paragraph 9(b) of the Noncompetition Agreement states that:

> Any legal action or other legal proceeding relating to this Noncompetition Agreement or the enforcement of any provision of this Noncompetition Agreement may be brought or otherwise commenced in the state and federal courts in and for the County of Santa Clara, California.

Given this separate treatment of disputes arising from the Noncompetition Agreement, as opposed to the Employment Agreement, and given that the parties certainly knew how to make the agreements dependent on one another, as they did the Employment Agreement and the Confidentiality Agreement, this Court finds that the agreements are separate and that the arbitration clause does not apply to claims arising from the Noncompetition Agreement.

The motion to compel arbitration is DENIED. Plaintiff shall submit the final order.

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