SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

(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: 02-08-24 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	22CV401583 Motion: Judgment on Pleadings	SHEET METAL WORKERS PENSION TRUST OF NORTHERN CALIFORNIA et al vs KB HOME, a Delaware Corporation et al	See Tentative Ruling. Court will prepare the final order.
LINE 2	23CV420187 Hearing: Demurrer	Jane Doe 1 et al vs Alum Rock Union School District et al	R See Tentative Ruling. Court will prepare the final order.
LINE 3	22CV404240 Motion: Summary Judgment/Adjudication	Jeeysi Arango-Jones vs Morgan Hill Unified School District	See Tentative Ruling. Court will prepare the final order.
LINE 4	21CV387639 Motion: Compel	Elizabeth Chung vs Altva Capital Management Limited et al	See Tentative Ruling. Mr. Chung 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 5	22CV394726 Motion: Compel	HRSearle Media, LLC et al vs Manish Arora et al	Defendants failed to include a separate statement as required. Defendants are warned that the court will not overlook its failure to comply with rules again. It is not clear to the court why Plaintiff cannot answer the requested admissions, despite the fact that an expert may opine as to the proper interpretation of the facts. As such, the Court GRANTS the motion. Plaintiff shall provide code-compliant responses within 20 days of the final order and Defendants shall submit the final order.
LINE 6	23CV412664 Motion: Compel	Rosie Cofre vs Ford Motor Company et al	See Tentative Ruling. Defendant shall submit the final order.
LINE 7	21CV384863 Hearing: Compromise of Minor's Claim	Jane Wyatt vs Rick Gomez, Jr.	The GAL and Counsel for GAL shall appear at the hearing so that the court can conduct voir dire and determine that the settlement is reasonable and knowing.
LINE 8			
LINE 9			
LINE 10			
LINE 11			
LINE 12			

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Calendar Line 1
Case Name: *Sheet Metal Workers Pension Trust of Northern California et al. v. KB Home et al.*
Case No.: 22CV401583

This action arises from an alleged breach of a collective bargaining agreement. Plaintiffs Sheet Metal Workers Pension Trust of Northern California, Sheet Metal Workers Local 104 Health Care Trust, Sheet Metal Workers Local 104 Supplemental Pension Fund, Sheet Metal Workers Local 104 Vacation-Holiday Savings Fund, Sheet Metal Workers Local 104, and Bay Area Industry Training Fund (collectively, "Sheet Metal Plaintiffs"), Rick Werner, and Sean O'Donoghue (collectively, "Trustee Plaintiffs"),[1] bring this action pursuant to Labor Code sections 218.7, subdivision (b)(2) and 218.8, subdivision (b)(2) against defendants KB Home, KB Home South Bay Inc., and Lefco, Inc. (collectively, "Defendants.")

I. Background

A. Factual

Sheet Metal Plaintiffs are employee benefit plans and multi-employer plans as defined in the Employee Retirement Income Security Act of 1974 ("ERISA"), with their principal place of business in Pleasanton, California. (Complaint, ¶¶ 1-2.) Sheet Metal Plaintiffs' Board of Trustees are the named fiduciaries of Trust Funds under ERISA. (*Ibid*.) Trustee Plaintiffs are trustees of the Trust Funds with "authority to act on behalf of all Trustees." (*Ibid*.) Sheet Metal Plaintiffs' Board of Trustees of the Sheet Metal Workers Pension Trust "are authorized to bring suit and collect monies for all Plaintiffs" to which Defendants are obligated to contribute under the Bargaining Agreement. (*Ibid.*)

KB Home and KB Home South Bay Inc., (collectively, "KB Defendants"), are both licensed to conduct business in the State of California. KB Defendants are home builders and general contractors who owned and/or facilitated construction of residences known as "Communication Hill" and "Glen Loma Ranch." (Complaint, ¶¶ 3, 7.)

Defendant Lefco, Inc. ("Lefco,") a California corporation, is an employer under ERISA and engaged in the business of general contracting, subcontracting, or other activity related to Communication Hill and Glen Loma Ranch. (Complaint, ¶ 4.)

Lefco is bound to the Standard Form of Union Agreement between Sheet Metal Workers Local Union 104 and Bay Area Association of SMACNA Chapter ("the Bargaining Agreement.") (Complaint, ¶ 9.) The Bargaining Agreement incorporates the terms of the Trust Agreement establishing the above-mentioned Trust Funds. (*Ibid*.) The Agreements require employers to make payment of contributions to Sheet Metal Plaintiffs. (*Ibid*.)

Under the terms of the Agreements, Lefco is required to pay contributions to several named Bargained Plans. Sheet Metal Plaintiffs' Board of Trustees are authorized to collect and distribute the money due under the Agreements. (Complaint, ¶ 10.) Lefco is also required to regularly pay Sheet Metal Plaintiffs, Bargained Plans, and the Union certain sums of money determined by the hours worked by Lefco's employees. (*Id*. at ¶ 11.) These payments are due

[1] Sheet Metal Plaintiffs and Trustee Plaintiffs are referred to collectively as "Plaintiffs."

on the 22nd of each month and are considered delinquent if not received by that date. (*Ibid*.) Lefco must also pay liquidated damages for each delinquent payment and interest on the unpaid amounts until paid. (*Ibid*.) Finally, Lefco is required to reimburse Plaintiffs for attorneys' fees and costs incurred in relation to the collection of Lefco's delinquent payments. (*Ibid*.)

From, approximately, June 2021 through June 2022, Sheet Metal Plaintiffs' participants furnished and supplied to Lefco "sheet metal labor and work" for construction projects at Communication Hill and Glen Loma Ranch. (Complaint, ¶ 16.) The total price of labor furnished on these projects is estimated at $673,423.66 and no part of this sum has been paid. (*Id*. at ¶ 18.)

Plaintiffs now assert Lefco breached both the Bargaining and Trust Agreements by failing to pay the money owed to Plaintiffs. (Complaint, ¶ 12.) Lefco currently owes Plaintiffs approximately $748,248.51 "in principal fringe benefit contributions", plus 20% liquidated damages, interest at 10%, attorneys' fees and costs. (*Id*. at ¶¶ 13, 19.) Upon information and belief, Plaintiffs allege "Lefco continues to work" for KB Defendants thereby owing additional payments from "May 2022 to the present." (*Id.* at 19.) Given Lefco's ongoing work, Plaintiffs request, in both their causes of action and prayer for relief, the Court to compel Defendants to provide their payroll records for work performed to the present. (*Id* at ¶¶ 27, 35.)

Plaintiffs assert they have "fully performed their obligations" under both Agreements, and have attempted to recover "all amounts owed" by Lefco, to no avail. (Complaint, ¶ 15.)

B. Procedural

On July 14, 2022, Plaintiffs filed their unverified, operative Complaint against Defendants, asserting the following causes of action:

1) Direct Contractor Liability to ERISA Benefit Plans (California Labor Code § 218.7)[2]
2) Direct Contractor Liability to ERISA Benefit Plans (§ 218.8).

On October 14, 2022, KB Defendants filed an unverified answer to the Complaint. On October 17, 2023, KB Defendants filed a motion for judgment on the pleadings, currently before the Court. On January 25, 2024, Plaintiffs opposed the motion. KB Defendants filed a reply on February 1, 2024.

II. Motion for Judgment on the Pleadings

KB Defendants move for judgment on the pleadings on the ground that Plaintiffs' action is preempted by the Employee Retirement Income Security Act of 1974 ("ERISA").

A. Legal Standard

A motion for judgment on the pleadings is the functional equivalent of a general demurrer, but is made after the time for demurrer has expired. (See *Evans v. California Trailer Court, Inc.* (1994) 28 Cal.App.4th 540, 548; see also *Shea Homes Limited Partnership v.*

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

County of Alameda (2003) 110 Cal.App.4th 1246, 1254 (*Shea*).) "The grounds for the motion must appear on the face of the complaint, and in any matters subject to judicial notice. The court accepts as true all material factual allegations, giving them a liberal construction, but it does not consider conclusions of fact or law, opinions, speculation, or allegations contrary to law or judicially noticed facts." (*Shea*, *supra*, 110 Cal.App.4th at p. 1254 [citations omitted]; *Kapsimallis v. Allstate Ins. Co.* (2002) 104 Cal.App.4th 667, 672.)

B. Merits of the Motion

1. Defendants Are Not Signatories to the Collective Bargaining Agreement

KB Defendants contend that only signatories to the collective bargaining agreement must make contributions to the employees' retirement plans under ERISA. Defendants further argue -because non-signatories cannot be sued for failing to make fringe benefit contributions per ERISA statute - Plaintiffs' claims "conflict with applicable federal law" by imposing liability on a non-signatory. (MJOP, p. 8).

In Opposition, Plaintiffs assert they have never alleged that KB Defendants are signatories, and concede that there is no remedy under ERISA to collect from a non-signatory. They further concede that KB Defendants' relationship with "Plaintiff Trust Funds" is not governed by ERISA. (Opp., pp. 3-4.) In short, Plaintiffs concede that they are not alleging that KB Defendants were employers or signatories to the Collective Bargaining Agreement. In fact, they concede that they are not stating a claim under ERISA and that they are relying solely on state law. These concessions are well taken. (See *Trustees of the Screen Actors Guild-Producers Pension and Health Plans v. NYCA, Inc.* (2009) 572 F.3d 771, 776 [holding the Trustees' request "to impose obligations above and beyond those required by collective bargaining agreements," namely, payment of benefit plan contributions, to a non-signatory on a "joint employer" theory directly conflicts with the plain language of 29 U.S.C. § 1145].) Here, not only are KB Defendants non-signatories to Plaintiffs' Agreement with Defendant Leftco, they are also not Plaintiffs' employers. KB Defendants' contract only exists with Defendant Lefco, an ERISA-based subcontractor. (29 U.S.C. § 1002 [ERISA defines an "employer" as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan"].)

Instead, Plaintiffs assert the California Legislature's newly passed Labor Code sections 218.7 and 218.8 allow them to sue "general contractors" to collect unpaid fringe benefit contributions for work performed on the general contractors' projects, i.e., Communication Hill developments. (*Ibid.*) Thus, this Court must go on to consider whether the applicable Labor Code language conflicts with the ERISA statutes pertaining to employee benefit plans such that Plaintiffs' claims against KB Defendants are preempted.

2. ERISA Preemption of Sections 218.7 and 218.8 of the Labor Code

a. General Preemption Law

"'Under the supremacy clause of the United States Constitution (U.S. Const., art. VI, cl. 2), federal law "shall be the supreme Law of the Land." [Citation.] Therefore Congress may preempt state laws to the extent it believes such action is necessary to achieve its purposes.'

[Citation.]" (*Curtin Maritime Corp. v. Pacific Dredge & Construction, LLC* (2022) 76 Cal.App.5th 651, 669 (*Curtin*).)

"'Congress may exercise that power expressly, or the courts may infer preemption under one of three implied preemption doctrines: conflict, obstacle, or field preemption. [Citation.] Express preemption occurs when Congress defines the extent to which a statute preempts state law. [Citation.] Conflict preemption exists when it is impossible to simultaneously comply with both state and federal law. [Citation.] Obstacle preemption occurs when state law stands in the way of full accomplishment and execution of federal law. [Citation.] Field preemption applies when comprehensive federal regulations leave no room for state regulation.' [Citation.]" (*Curtin, supra,* 76 Cal.App.5th at p. 669.)

"'Preemption may be based either on federal statutes or on federal regulations that are properly adopted in accordance with statutory authorization. As a result, a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation and "render unenforceable state or local laws that are otherwise not inconsistent with federal."' [Citation.]" (*Curtin, supra,* 76 Cal.App.5th at p. 669.)

"'[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action. In all pre-emption cases, and particularly in those in which Congress has "legislated … in a field which the States have traditionally occupied," [citation], we "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." [Citations.]' [Citations.]" (*Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1088.)

"Although federal law may preempt state law, '[c]ourts are reluctant to infer preemption, and it is the burden of the party claiming that Congress intended to preempt state law to prove it.' [Citation.]" (*Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 815.)

b. Law Regarding ERISA Preemption

ERISA was enacted to "'protect…the interests of participants in employee benefit plans and their beneficiaries' by setting out substantive regulatory requirements for employee benefit plans and to 'provid[e] for appropriate remedies, sanctions, and ready access to the Federal courts.' The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans." (*Aetna Health Inc. v. Davila* (2004) 542 U.S. 200, 208.) "[A]ny state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and therefore is pre-empted." (*Id*. at p. 209.) "State law causes of action seeking to recover unpaid benefits under a welfare benefit plan regulated under [ERISA] are generally conflict preempted." (*Port Medical Wellness, Inc. v. Connecticut General Life Insurance Company* (2018) 24 Cal.App.5th 153, 159.)

"ERISA has two distinct preemption provisions: preemption pursuant to 29 U.S.C. § 1144), known as conflict or ordinary preemption; and so-called complete preemption pursuant to 29 U.S.C. § 1132, subd. (a)). Conflict preemption is an affirmative defense to a plaintiff's state law cause of action that entirely bars the claim; that is, the particular claim involved

cannot be pursued in either state or federal court." (*Morris B. Silver M.D., Inc. v. International Longshore & Warehouse etc.,* (2016) 2 Cal.App.5th 793,799.) "'Ordinary preemption' is an affirmative defense to the allegations in a plaintiff's complaint asserting a state law claim claiming that a state law conflicts with, and is overridden by a federal law." (*Ibid*.)

c. The Parties' Contentions

KB Defendants argue that ERISA preempts sections 218.7 and 218.8 under a conflict preemption because they directly relate to, and contradict, ERISA's benefit plan provisions. (MJOP, ¶¶ 10-15.)

In Opposition, Plaintiffs argue that its claims under sections 218.7 and 218.8 against KB Defendants, who are general contractors, are not preempted by ERISA because the statutes at issue fall under the traditional area of state regulation for payment of benefits and "do not refer to an employee benefit plan or affect an ERISA regulated relationship." (Opposition, p. 15.) In other words, Plaintiffs argue it is asserting a state law remedy free of federal preemption because the "history and evolution of ERISA preemption" demonstrate that their claim is "remotely" or "tenuously" related to an ERISA benefit plan. (Opp., pp. 3-5, 10-15.)

In its Reply, KB Defendants persuasively assert that Courts have "specifically and repeatedly" rejected efforts to make non-signatories to a bargaining plan liable for a "shortfall" in fringe benefits as it impermissibly imposes liability on additional parties – a direct conflict of federal law. (Reply, p. 7.)

d. Plaintiffs' Claims Under Sections 218.7 and 218.8 Are Preempted Because They Attempt to Expand the Remedies Available Under ERISA

Notably, neither party points the Court to any case law involving ERISA preemption in the context of sections 218.7 and 218.8 and the court has found no such authority. Plaintiffs insist that courts have narrowed the circumstances under which preemption can be found and they are now less inclined to conclude ERISA preempts areas that are "quite remote" from areas regulated by the states. (Opposition, p. 12.)

In *California Div. of Labor Standards Enforcement v. Dillingham Construction* (1997) 519 U.S. 316 (*Dillingham*)*,* the Court explained that a law relates to a covered employee benefit plan if it (1) makes reference to, or (2) has a connection with such a plan. (*Id.* at 324.) In *N.Y. State Conference of Blue Cross and Blue Shield Plans v. Travelers' Ins. Co*. (1995) 514 U.S. 645*,* 655, the Supreme Court emphasized, "the starting point for preemption analysis under ERISA is the principle that in fields of traditional state regulation, Congress is not assumed to supercede state law absent a showing of clear intent to do so." "To determine whether a state law has the forbidden connection, we look both to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive, as well as the nature of the effect of the state law on ERISA plans." (*Dillingham*, *supra*, 519 U.S. at p. 325, internal quotations marks and citations to *Travelers, supra,* omitted.)

Both parties cite *Operating Engineers Health and Welfare Trust Fund v. JWJ Contracting Co.* (9th Cir. 1998) 135 F.3d 671, 678 (*JWJ Contracting*)[3], citations omitted, emphasis added, for factors determining the proximity in relationship between an ERISA benefit plan and state law, warranting preemption. These include: *"(1) whether the state law regulates the types of benefits of ERISA employee welfare benefit plans;* (2) whether the state law requires the establishment of a separate employee benefit plan to comply with the law; (3) whether the state law imposes reporting, disclosure, funding, or vesting requirements for ERISA plans; and *(4) whether the state law regulates certain ERISA relationships, including the relationships between an ERISA plan and employer and, to the extent an employee benefit plan is involved, between the employee and employee*"].) Applying these factors, Plaintiffs' claim for unpaid fringe benefits is predicated upon reinterpreting the liability of an "employer" in relation to an ERISA plan. Consequently, as Defendants note, the Labor Code sections at issue directly conflict with federal law. The imposition of liability on non-signatory, direct contractors, like KB Defendants, impermissibly expands the scope of ERISA's definition of "employers" in relation to employee benefit plans. As a result, Plaintiffs' claim is preempted by ERISA.

Plaintiffs rely on *Betancourt v. Storke Housing Investors* (2003) 31 Cal.4th 1157 (*Betancourt*) to argue that non-signatories to a Bargaining Agreement can still be held accountable for unpaid fringe benefits, albeit in *Betancourt's* fact pattern*,* via a recorded mechanics lien. (*Betancourt, supra,* 31 Cal.4th at 1169.) In *Betancourt,* the plaintiffs were union members who worked for a subcontractor pursuant to a collective bargaining agreement. (*Id.* at 1162.) Per a separate agreement between the subcontractor and defendant, a development company, plaintiff union members worked on defendant's residential construction project. (*Ibid.*) When the subcontractor failed to make contributions to the union's trust fund per the bargaining agreement, plaintiffs recorded a mechanic's lien, pursuant to California Civil Code section 3110, for unpaid contributions against defendant's real property. (*Ibid.*) The *Betancourt* Court ultimately held the state Civil Code section under which the plaintiffs sued was a mechanic's lien law of "general application and [did] not itself refer to the ERISA plans." (*Id.* at 1167.) The Court further concluded plaintiffs' mechanic's lien action against a non-signatory does not "constitute an impermissible alternative enforcement mechanism for purposes of ERISA preemption." (*Id.* at 1169.) However, the facts in *Betancourt* are distinguishable from the facts at hand because in *Betancourt*, the claims were based on a recorded mechanic's lien to secure unpaid benefits. It did not directly reference an employee benefit trust fund, unlike the case at bar. Additionally, as KB Defendants state in their Reply, the *Betancourt* plaintiffs were not suing "in an effort to enforce the terms of an ERISA plan." Rather here, Plaintiffs are suing Defendants for the payment of Lefco's delinquent fringe benefit balance that is directly related to an employee benefit plan. (*Id.* at 1172.) Therefore, Plaintiffs' reliance on *Betancourt* is unavailing.

The relevant ERISA code section (delinquent contributions) reads as follows:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not

[3] Although the court is not bound by *JWJ Contracting*, a federal circuit court case, parties rely on it and the court finds its reasoning persuasive.

> inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

(29 U.S.C. § 1145.)

ERISA's preemption provision reads as follows:

> Notwithstanding any other provision of this section, this title shall supersede any law of a State which would directly or indirectly prohibit or restrict the inclusion in any plan of an automatic contribution arrangement. The Secretary may prescribe regulations which would establish minimum standards that such an arrangement would be required to satisfy in order for this subsection to apply in the case of such arrangement.

(29 U.S.C. § 1144, subd. (e)(1).)

> Section 218.7, subdivision (a) provides, as follows:
>
> (1) For contracts entered into between January 1, 2018, and December 31, 2021, inclusive, a direct contractor making or taking a contract in the state for the erection, construction, alteration, or repair of a building, structure, or other private work, shall assume, and is liable for, any debt owed to a wage claimant or third party on the wage claimant's behalf, incurred by a subcontractor at any tier acting under, by, or for the direct contractor for the wage claimant's performance of labor included in the subject of the contract between the direct contractor and the owner.
> (2) The direct contractor's liability under this section *shall extend only to any unpaid wage, fringe or other benefit payment or contribution*, including interest owed but shall not extend to penalties or liquidated damages.

(§ 218.7, subd. (a), emphasis added.)

> Section 218.8, subdivision (a) similarly provides:
>
> (1) For contracts entered into on or after January 1, 2022, a direct contractor making or taking a contract in the state for the erection, construction, alteration, or repair of a building, structure, or other private work, shall assume, and is liable for, any debt owed to a wage claimant or third party on the wage claimant's behalf, incurred by a subcontractor at any tier acting under, by, or for the direct contractor for the wage claimant's performance of labor included in the subject of the contract between the direct contractor and the owner.
> (2) Subject to paragraph (3), the direct contractor's liability under this section *shall extend to any unpaid wage, fringe or other benefit payment or contribution, penalties or liquidated damages, and interest owed by the subcontractor on account of the performance of the labor*.
> (3) The direct contractor's liability under this section shall extend to penalties and liquidates damages only as follows:
> If a worker employed by a subcontractor on a private construction project is not paid the wage, fringe or other benefit payment or contribution owed by the subcontractor on account of the worker's performance of labor on that project,

> the direct contractor of the project is not liable for any associated penalties or liquidated damages under paragraph (2) unless the direct contractor had knowledge of the subcontractor's failure to pay the specified wage, fringe or other benefit payment or contribution, or the direct contractor fails to comply with all of the following requirements: [requirements omitted].

(§ 218.8, subd. (a), emphasis added.)

The plain meaning of the Labor Code sections quoted above demonstrate a direct, and substantial relationship to ERISA benefit plans. Specifically, the state Labor Code sections provide an alternative scheme for holding "direct contractors" liable for unpaid fringe benefits, which is an expansion of the parties who would be required to contribute under ERISA. As KB Defendants note, 29 U.S.C. § 1144, subd. (e)(1), *supra,* resolves this precise type of conflict between state and federal benefit provisions, by preemption. Indeed, "[t]he policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. The six carefully integrated civil enforcement provisions found in § [1132(a)] of the statute as finally enacted … provide strong evidence that Congress did not intend to authorize other remedies …." (*Aetna Health, Inc. v. Davila* (2004) 542 U.S. 200, 208-209.)

Here, under the applicable standards discussed *supra,* Plaintiffs' claims for delinquent fringe benefits directly relate to, and conflict with, defined federal provisions on unpaid benefits liability. In the case at bar, Plaintiffs are seeking to enforce provisions of an ERISA-based benefit plan against non-signatory, non-employer third parties, via state law, thereby expanding liability to additional parties who would not be liable under ERISA. By expanding available remedies, Plaintiffs are essentially utilizing an alternative mechanism to hold KB Defendants liable for Lefco's breach of its agreement with Plaintiffs.

The Court notes that Plaintiffs cite certain federal district court cases including *JWJ Contracting, supra,* among others, for the proposition that statutes allowing for recovery of fringe benefits were not preempted by ERISA. (Opposition, p. 8, fn. 1.) However, those cases are distinguishable because they do not address the California Labor Code sections at issue here. Additionally, the court is not bound by the decisions of lower federal courts. (See *Hargrove v. Legacy Healthcare, Inc.* (2022) 80 Cal.App.5th 782, 789, fn. 4 [the decisions of lower federal courts are not binding on this court. Even on questions of federal law, decisions of lower federal courts are persuasive authority only].) Further, and particularly important, Plaintiffs' citation to these cases occur in a footnote devoid of reasoned explanation as to why they are controlling or persuasive authority. (See *Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52 [points asserted without reasoned argument need not be considered].)

Accordingly, the motion for judgment on the pleadings is GRANTED without leave to amend.

III. Conclusion

The motion for judgment on the pleadings is GRANTED without leave to amend.

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Calendar Line 2
Case Name: *Doe 1, et al. v. Alum Rock Union School District, et al.*
Case No.: 23CV420187

According to the allegations of the complaint, plaintiffs Jane Doe 1 and 2 (collectively, "Plaintiffs") are students at Adelante Dual Language Academy ("Adelante"), owned and controlled by the Alum Rock Unified School District ("District"). (See complaint, ¶¶ 1, 2, 4.) From the Spring of 2022 to Fall of 2022, plaintiff was repeatedly sexually assaulted and molested by Adelante's band and music teacher, Israel Santiago ("Santiago"). (*Id*.) Before Santiago assumed his teaching position at Adelante, he was employed at a different school within the district but left that school amid allegations of sexual misconduct with students, but was nonetheless transferred into and became fully employed as a band and music teacher at Adelante. (See complaint, ¶ 5, 9.) Defendants knew or had reason to know of Santiago's unlawful sexual conduct or propensity for such conduct but negligently assigned Santiago to teaching duties at Adelante. (See complaint, ¶¶ 10-20.)

On July 31, 2023, Plaintiffs, by and through their respective Guardian Ad Litems, filed a complaint against defendants District, Adelante and Santiago (collectively "Defendants"), asserting causes of action for:

1) Negligent hiring (against District and Adelante);
2) Negligent supervision/training (against District and Adelante);
3) Negligent retention (against District and Adelante);
4) Violation of mandatory reporting laws (Penal Code § 11165.7) (against District and Adelante);
5) Violation of statutory duties; negligence per se (against District and Adelante);
6) Sexual and physical assault and battery (against Santiago);
7) Respondeat superior liability for the sexual and physical assault (against District and Adelante);
8) False imprisonment (against all defendants);
9) Interference with exercise of civil rights, violation of Civil Code § 52.1 (against Santiago);
10) Unlawful seduction of a minor (against Santiago); and,
11) Intentional infliction of emotional distress (against all defendants).

Defendant District demurs to the seventh, eighth and eleventh causes of action on the ground that they fail to state facts sufficient to constitute causes of action against public entity District.

DISTRICT'S DEMURRER

District argues that the seventh, eighth and eleventh causes of action for sexual and physical assault, false imprisonment and intentional infliction of emotional distress respectively are legally unavailable as against public entity District as common tort governmental liability is precluded by the Government Code.

In opposition, Plaintiffs argue that the court in *Samantha B. v. Aurora Vista Del Mar, LLC* (2022) 77 Cal.App.5th 85, concluded that "the rule of respondeat superior… makes an

employer vicariously liable for the torts of its employees… includ[ing] for sexual assault and battery. (Pls.' opposition to demurrer ("Opposition"), pp.4:9-28, 5:1-28, 6:1-28, 7:1-28, 8:1-10.) Plaintiffs also argue that *Samantha B*., *supra*, also "noted that as an alternative to respondeat superior liability, an employer may be directly liable for an employee's conduct where the employer ratifies an originally unauthorized tort." (Opposition, pp.8:11-28, 9:1-28, 10:1-19.) Lastly, Plaintiffs argue Government Code section 820.4 specifically provides for liability for false imprisonment, and that there should likewise be no immunity for acts alleging physical assault and battery and the intentional infliction of emotional distress. (Opposition, pp. 10:20-28, 11:1-28, 12:1-26.)

Respondeat superior liability and negligence

In *John R. v. Oakland Unified School Dist.* (1989) 48 Cal.3d 438, the plaintiff allegedly was sexually molested by his mathematics teacher while participating in an officially sanctioned, extracurricular program, and the California Supreme Court specifically decided "whether the school district that employed the teacher can be held vicariously liable for the teacher's acts under the doctrine of respondeat superior." (*Id*. at p.441.) The Court stated that "[w]e hold that the doctrine is not applicable in these circumstances and that while the school district may be liable if its own direct negligence is established, it cannot be held vicariously liable for its employee's torts." (*Id*.) In *C.A. v. William S. Hart Union High School Dist*. (2012) 53 Cal.4th 861, the California Supreme Court again had the opportunity to revisit this issue in which the plaintiff was allegedly subjected to sexual harassment and abuse by the school's head guidance counselor. (*Id*. at p. 866.) The *C.A.* court continued:

> The statutory framework upon which the District's vicarious liability depends is easily set out. Section 815 establishes that public entity tort liability is exclusively statutory: "Except as otherwise provided by statute: [¶] (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." Section 815.2, in turn, provides the statutory basis for liability relied on here: "(a) A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative. [¶] (b) Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability." Finally, section 820 delineates the liability of public employees themselves: "(a) Except as otherwise provided by statute (including Section 820.2), a public employee is liable for injury caused by his act or omission to the same extent as a private person. [¶] (b) The liability of a public employee established by this part (commencing with Section 814) is subject to any defenses that would be available to the public employee if he were a private person." In other words, "the general rule is that an employee of a public entity is liable for his torts to the same extent as a private person (§ 820, subd.

> (a)) and the public entity is vicariously liable for any injury which its employee causes (§ 815.2, subd. (a)) to the same extent as a private employer (§ 815, subd. (b)).” (*Societa per Azioni de Navigazione Italia v. City of Los Angeles* (1982) 31 Cal.3d 446, 463 [183 Cal. Rptr. 51, 645 P.2d 102].)

(*C.A.*, *supra*, 53 Cal.4th at p.868.)

While the *C.A.* court noted that “[u]nder section 815.2, the school district is liable for the administrator’s negligence” (*id*. at p.874), it reiterated “the undesirable consequences that could flow from imposing vicarious liability on public school districts for sexual misconduct by teachers, including ‘the diversion of needed funds from the classroom to cover claims’ and the likelihood districts would be deterred ‘from encouraging, or even authorizing, extracurricular and/or one-on-one contacts between teachers and students.’” (*Id*. at p.878, quoting *John R*., *supra*, 48 Cal.3d at p.451.) The California Supreme Court then stated that it was following *John R*.’s suggestion that the goals of preventing future harm of the same nature is “best addressed ‘by holding school districts to the exercise of due care’ in their administrators’ and supervisors’ ‘selection of [instructional] employees and the close monitoring of their conduct,’ rather than by making districts vicariously liable for the intentional sexual misconduct of teachers and other employees.” (*Id*.; see also *Kimberly M. v. L.A. Unified Sch. Dist*. (1989) 215 Cal.App.3d 545, 548-549 (affirming sustaining of demurrer to cause of action against school district under the doctrine of respondeat superior for sexual molestation without leave to amend, stating that “under *John R*., appellant has no cause of action against the District for the alleged sexual molestation of appellant at school by appellant's teacher… the principal justification for the application of the doctrine of respondeat superior is to spread through insurance the risk for losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise… [t]he Supreme Court concluded that none of the reasons suggested for imposing liability on an enterprise for the risks incident to the enterprise applied to an instance of sexual molestation by a teacher… the connection between the authority conferred on teachers to carry out their instructional duties and the abuse of that authority to indulge in personal, sexual misconduct is simply too attenuated to deem a sexual assault as falling within the range of risks allocable to a teacher's employer… [i]t is not a cost this particular enterprise should bear, and the consequences of imposing liability are unacceptable”).)

Samantha B. is inapposite

As to *Samantha B*., cited by Plaintiffs, while the court determined that there was sufficient evidence to support a finding that a mental health worker at a licensed acute psychiatric hospital was acting within the scope of his employment since his employment predictably created the risk that employees will commit intentional torts of the type for which liability was sought, the case did not involve a public entity whatsoever, much less a school district. *Samantha B*. is distinguishable and not controlling of this case.

Section 820.4 is not applicable and there is no common law governmental tort liability

As to Plaintiffs’ argument regarding Government Code section 820.4, that section states:

> A public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law. Nothing in this section exonerates a public employee from liability for false arrest or false imprisonment.

(Gov. Code § 820.4.)

There is no allegation that Santiago was involved with the execution or enforcement of any law. Section 820.4 is not applicable. Moreover, as District argues, assault, battery, intentional infliction of emotional distress and false imprisonment are common law torts. "There is no common law governmental tort liability in California; and except as otherwise provided by statute, there is no liability on the part of a public entity for any act or omission of itself, a public employee, or any other person." (*Gibson v. City of Pasadena* (1978) 83 Cal.App.3d 651, 655; see also *Becerra v. County of Santa Cruz* (1998) 68 Cal.App.4th 1450, 1457 (stating that "[i]n California, all government tort liability must be based on statute… Government Code section 815 'abolished all common law or judicially declared forms of liability for public entities, except for such liability as may be required by the federal or state Constitution'"); see also *Wright v. State of California* (2004) 122 Cal.App.4th 659, 672 (dismissing cause of action for intentional infliction of emotional distress against State and Department of Corrections based on their immunity from suit as public entities).)

Ratification

Lastly, as to Plaintiffs' arguments regarding ratification, the parties agree that an employer may be held liable for an employee's act when the employer subsequently ratifies that employee's act. (See *C.R. v. Tenet Healthcare Corp*. (2009) 169 Cal.App.4th 1094, 1110 (stating that "an employer may be liable for an employee's act where the employer either authorized the tortious act or subsequently ratified an originally unauthorized tort"); see also *Ventura v. ABM Industries Inc.* (2012) 212 Cal.App.4th 258, 272 (stating same).) However, as District argues, the seventh, eighth and eleventh causes of action do not allege facts to support such ratification. The seventh cause of action specifically alleges that District is "liable under a theory of respondeat superior for these acts of sexual assault and battery" (complaint, ¶ 55), and does not otherwise allege any ratification. The eighth cause of action likewise alleges that District is "liable under a theory of respondeat superior for these acts of false imprisonment" (complaint, ¶ 61), and does not allege any ratification. Regarding the eleventh cause of action for intentional infliction of emotional distress, as previously stated, this cause of action cannot be asserted against District as "[t]here is no common law governmental tort liability in California." (*Gibson*, *supra*, 83 Cal.App.3d at p.655; see also *Becerra*, *supra*, 68 Cal.App.4th at p.1457 (stating that "[i]n California, all government tort liability must be based on statute… Government Code section 815 'abolished all common law or judicially declared forms of liability for public entities, except for such liability as may be required by the federal or state Constitution'"); see also *Wright v. State of California* (2004) 122 Cal.App.4th 659, 672 (dismissing cause of action for intentional infliction of emotional distress based on immunity from suit as public entities).) Moreover, as previously stated, the California Supreme Court stated that the goals of preventing future harm of the same nature is "best addressed 'by holding school districts to the exercise of due care' in their administrators' and supervisors' 'selection of [instructional] employees and the close monitoring of their conduct,' rather than by making districts vicariously liable for the

intentional sexual misconduct of teachers and other employees." (*C.A.*, *supra*, 53 Cal.4th at p.868; see also *Kimberly M.*, *supra*, 215 Cal.App.3d at pp.548-549 (stating that "under *John R.*, appellant has no cause of action against the District for the alleged sexual molestation of appellant at school by appellant's teacher… [t]he Supreme Court concluded that none of the reasons suggested for imposing liability on an enterprise for the risks incident to the enterprise applied to an instance of sexual molestation by a teacher… the connection between the authority conferred on teachers to carry out their instructional duties and the abuse of that authority to indulge in personal, sexual misconduct is simply too attenuated to deem a sexual assault as falling within the range of risks allocable to a teacher's employer… [i]t is not a cost this particular enterprise should bear, and the consequences of imposing liability are unacceptable").) Therefore, a cause of action for intentional infliction of emotional distress based on the ratification of sexual assault is unavailable against public entity District. Instead, the alleged knowledge of Santiago's tendencies or history or reports are relevant to whether District breached a duty of care owed to Plaintiffs in their administrators' and supervisors' selection of instructional employees and their close monitoring of their conduct.

Plaintiffs do not show they can amend these causes of action

Here, it is clear that the seventh, eighth and eleventh causes of action cannot state facts sufficient to constitute causes of action, and Plaintiffs have not otherwise shown how they may amend the causes of action. (See *Ferrick v. Santa Clara University* (2014) 231 Cal.App.4th 1337, 1341 (Sixth District stating that "[t]he plaintiff 'must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading'… [t]he plaintiff must clearly and specifically set forth the 'applicable substantive law'… and the legal basis for amendment, i.e., the elements of the cause of action and authority for it… [f]urther, the plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of action… "[t]he burden of showing that a reasonable possibility exists that amendment can cure the defects remains with the plaintiff; neither the trial court nor this court will rewrite a complaint… [w]here the appellant offers no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend"), quoting *Cooper v. Leslie Salt Co.* (1969) 70 Cal.2d 627, 636; see also *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349 (stating same); see also *LeBrun v. CBS Television Studios, Inc*. (2021) 68 Cal.App.5th 199, 207 (also stating that "[t]he burden of proving such reasonable possibility [that the defect can be cured by amendment] is squarely on the plaintiff"); see also *Larson v. UHS of Rancho Springs, Inc*. (2014) 230 Cal.App.4th 336, 343.)

District's demurrer to the seventh, eighth and eleventh causes of action of the complaint on the ground that they fail to state facts sufficient to constitute a cause of action is SUSTAINED without leave to amend. The Court will issue the final order.

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Calendar Line 3
Case Name: *Arango-Jones v. Morgan Hill Unified School District, et al.*
Case No.: 22CV3404240

I. Factual and Procedural Background

This is an action for employment discrimination brought by plaintiff Jeeysi Arango-Jones ("Plaintiff") against her former employer, defendant Morgan Hill Unified School District ("Defendant" or "the District").

On or about March 7, 2022, Plaintiff was hired by the District as an academic counselor at Britton Middle School ("Britton"). (First Amended Complaint ("FAC"), ¶ 4.)

On or about May 19, 2022, Plaintiff disclosed to Defendant that she had sleep apnea, a disabling medical condition, and required accommodations. (FAC, ¶ 5.) Instead of accommodating Plaintiff, Defendant terminated her employment. (*Id.* at ¶ 6.)

Plaintiff duly and satisfactorily performed her duties of employment and was willing and able to perform her duties if reasonable accommodations had been made. (FAC, ¶¶ 4, 12.)

On June 3, 2022, Plaintiff filed a complaint with the Department of Fair Housing and Employment and she was then provided with a Right to Sue letter. (FAC, ¶ 8.)

On April 3, 2023, Plaintiff filed her FAC, asserting the following causes of action against Defendant:

1) Unlawful Termination of Employment; and
2) Failure to Accommodate Disability.

On November 21, 2023, Defendant filed its motion for summary judgment, or in the alternative, summary adjudication. Plaintiff opposes the motion.

II. Motion for Summary Judgment

Defendant moves for summary judgment, or in the alternative summary adjudication, of Plaintiff's FAC.

a. Legal Standard

A motion for summary judgment "shall be granted if all the papers submitted show that there is no triable issue of material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).)

The "party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact[.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).)

If the moving party makes the necessary initial showing, the burden of production shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. (*Aguilar*, *supra*, 25 Cal.4th at p. 850.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Ibid.*) "[I]f the court concludes that the [opposing party's] evidence or inferences raise a triable issue of material fact, it must conclude its consideration and deny the [moving party's] motion." (*Id.* at p. 856.)

Throughout the process, the trial court "must consider all of the evidence and all of the inferences reasonably drawn therefrom[.]" (*Aguilar*, *supra*, 25 Cal.4th at p. 844 [internal quotations omitted].) The moving party's evidence is strictly construed, while the opposing party's evidence is liberally construed. (*Id.* at p. 843.)

Furthermore, "a motion for summary adjudication may be made … as an alternative to a motion for summary judgment and shall proceed in all procedural respects as a motion for summary judgment." (Code Civ. Proc., § 437c, subd. (f)(2).) "A party may seek summary adjudication on whether the cause of action, affirmative defense or punitive damages claim has merit or whether a defendant owed a duty to a plaintiff." (*California Bank & Trust v. Lawlor* (2013) 222 Cal.App.4th 625, 630; Code Civ. Proc., § 437c, subd. (f)(1).)

b. FEHA and *McDonnell Douglas* Test

"In analyzing an employee's claim for unlawful discrimination under the FEHA, California courts have adopted the three-stage, burden-shifting test the United States Supreme Court established in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [(*McDonnell Douglas*)] . . . 'This so-called *McDonnell Douglas* test reflects the principle that direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially. Thus, by successive steps of increasingly narrow focus, the test allows discrimination to be inferred from facts that create a reasonable likelihood of bias and are not satisfactorily explained.'" (*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 964 (*Swanson*).)

"At trial, the *McDonnell Douglas* test places on the plaintiff the initial burden to establish a prima facie case of discrimination. . . . While the plaintiff's prima facie burden is not onerous, he must at least show actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a prohibited discriminatory criterion. If the plaintiff meets this initial burden, a rebuttable presumption of discrimination arises." (*Swanson*, *supra*, 232 Cal.App.4th at pp. 964-965 [internal citations and quotations omitted].)

"The burden then shifts to the employer to rebut the presumption by producing admissible evidence, sufficient to raise a genuine issue of fact and to justify a judgment for the employer, that its action was taken for a legitimate nondiscriminatory reason." (*Swanson*, *supra*, 232 Cal.App.4th at p. 965 [internal citations and quotations omitted].)

"Finally, if the defendant presents evidence showing a legitimate, nondiscriminatory reason, the burden again shifts to the plaintiff to establish the defendant intentionally discriminated against him or her. The plaintiff may satisfy this burden by producing substantial evidence that the employer's stated reasons were untrue or pretextual, or that the employer acted with a discriminatory *animus*, such that a reasonable trier of fact could conclude that the employer engaged in intentional discrimination or other unlawful action." (*Swanson*, *supra*, 232 Cal.App.4th at p. 965 [internal citations and quotations omitted].)

That said, the *McDonnell Douglas* test was developed for use at trial, not in summary judgment proceedings. (*Swanson*, *supra*, 232 Cal.App.4th at p. 965.) "As explained above, California's summary judgment law places the initial burden on a moving party defendant to either negate an element of the plaintiff's claim or establish a complete defense to the claim. The burdens and order of proof therefore shift under the *McDonnell Douglas* test when an employer defendant seeks summary judgment." (*Id.* at pp. 965-966.) "An employer may meet its initial burden on summary judgment, and require the employee plaintiff to present evidence establishing a triable issue of material fact, by presenting evidence that either negates an

element of the employee's prima facie case, or establishes a legitimate nondiscriminatory reason for taking the adverse employment action against the employee." (*Id.* at p. 966; see also *Board of Trustees v. Sweeney* (1978) 439 U.S. 24, 25 ["employer's burden is satisfied if he simply 'explains what he has done' or '[produces] evidence of legitimate nondiscriminatory reasons'"].)

"'To avoid summary judgment on the second of these two grounds, an employee claiming discrimination must offer substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence that the employer acted with discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination.'" (*Swanson*, *supra*, 232 Cal.App.4th at p. 966 [also stating plaintiff "need only present evidence establishing a triable issue on the specific element the [defendant] challenges" and need not prove her entire case].)

c. First Cause of Action - Unlawful Termination of Employment

"The FEHA makes it 'an unlawful employment practice for an employer, because of the physical disability or medical condition of any person to bar or to discharge the person from employment[.]'" (*Swanson*, *supra*, 232 Cal.App.4th at p. 964, quoting Gov. Code, § 12940; see also *Zamora v. Security Industry Specialists, Inc.* (2021) 71 Cal.App.5th 1, 29-30 [stating same].)

To establish disability discrimination, Plaintiff must show: 1) she suffered from a disability or was regarded as suffering from a disability; 2) could perform the essential duties of a job with or without reasonable accommodations, and 3) was subjected to an adverse employment action because of the disability or perceived disability. (*Glynn v. Superior Court* (2019) 42 Cal.App.5th 47, 53, fn. 1.)

i. Defendant's Burden

The District does not dispute that Plaintiff has a medical condition protected by FEHA. Defendant contends Plaintiff's employment was temporary and that the District's decision not to reelect Plaintiff was legitimate and nondiscriminatory. (Memo, p. 5:18-19.)

Defendant asserts that California Education Code sections 44852, 44916, and 44954 permit school districts to employ individuals on a temporary basis, provided that upon commencement of employment, such temporary employees receive a written statement clearly indicating the nature of the employment. (Memo, p. 6:23-27, citing Ed. Code, § 44916.) The District proffers evidence that Plaintiff was selected mid-year to replace their former full-time Academic Counselor (UMF No. 1, citing Donohue Decl., ¶¶ 3-4, Cuevas Decl., ¶¶ 4-5); she was hired as a temporary employee to work the remainder of the 2021-2022 school year (UMF No. 2, citing Donohue Decl., ¶¶ 4-5, Exs. E, F); and that her Offer of Employment indicates her employment would end on June 3, 2022 (UMF No. 2, citing Sanchez Decl., ¶ 3, Ex. O).

The signed and dated Offer of Employment states that Plaintiff's status is "temporary" and that her services in the named position will terminate on June 3, 2022. (See Sanchez Decl., Ex. O [Signed Offer of Employment].) The District reminded Plaintiff of her temporary status on May 20, 2022 and indicated again that her employment would end on June 3, 2022, referencing Education Code sections 44954 and 44929.21. (*Id.* at Ex. P [Reminder of Temporary Status email to Plaintiff].) In addition to this evidence, Defendant proffers evidence that even before hiring Plaintiff, Britton school principal Nanette Donohue ("Donohue") indicated she did not feel Plaintiff "would be a good fit for Britton because it says that her

Educational Spanish is weak" (Donohue Decl., Ex. E [January 24, 2022 email]); and a month after Plaintiff began work, Donohue was "not confident that [Plaintiff] will be a good fit for [Britton] long term" (*id.* at Ex. G [April 6, 2022 email]).

Thus, Defendant has met its burden of demonstrating a legitimate, nondiscriminatory reason for taking the adverse employment action against Plaintiff. The burden now shifts to Plaintiff to demonstrate with substantial evidence that the District's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence that the employer acted with discriminatory animus, or a combination of the two.

ii. Plaintiff's Burden[4]

In opposition, Plaintiff states she "vigorously denies" that her employment was temporary because all new hires were deemed "temporary" by Defendant. (Opposition, p. 2:15-17.) To support this argument, Plaintiff cites to Defendant's RFA Nos. 14-17.[5] However, Plaintiff does not provide this evidence to the Court. (*Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509, 1524 [to avoid summary judgment, party must produce admissible evidence raising a triable issue of fact].)

Additionally, Plaintiff disputes that she was hired temporarily because "temporary" was a term of art and not to be taken literally. (Plaintiff's Response to Defendant's UMF No. 2 [citing Plaintiff's Decl., ¶ 3].) Plaintiff states in her declaration that she "learned from Courtney McMains of Defendant that the term 'Temporary' on official documents used by Defendant was used for all positions offered and was not to be taken literally." (Plaintiff's Decl., ¶ 3.) Plaintiff's Declaration further states she was told that a counselor was needed for the following year and that "all counselor employment years would end on June 3, 2022, and per evaluation cycle, they restart in July, 2022 for the second year of evaluation." (*Id.* at ¶¶ 4-5.)

The Court does not find that Plaintiff has met her burden of proffering substantial evidence that Defendant's stated nondiscriminatory reason was untrue. While Plaintiff indicates in her declaration that she learned the language "temporary" was used for all positions and not to be taken literally, this does not mean that Plaintiff's specific position was not temporary or that it did not terminate on June 3, 2022, as indicated on the Offer of Employment. Moreover, that Plaintiff was informed that Britton needed a counselor the following year likewise does not mean that her position was not temporary. Finally, it appears Plaintiff concedes that her employment would end on June 3, 2022 and that there is an "evaluation cycle" to continue employment for another year. Plaintiff does not provide any additional evidence to support her contention that her position was not temporary and that she was terminated due to her disability.

Accordingly, Plaintiff fails to meet her burden.

d. Second Cause of Action - Failure to Accommodate Disability

"It shall be an unlawful employment practice . . . For an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee." (Gov. Code, § 12940, subd. (m).) "An employer is not required to make an accommodation 'that is demonstrated by the employer or

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[4] The Court did not rely on Defendant's evidentiary objections in determining the outcome of this motion.

[5] If for some reason Plaintiff is referring to the RFAs attached to Defendant's evidence, RFA Nos. 14-17 address reasonable accommodations and not temporary status of employment.

other covered entity to produce undue hardship to its operation.'" (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1003.) "The elements of a failure to accommodate claim are (1) the plaintiff has a disability under the FEHA, (2) the plaintiff is qualified to perform the essential functions of the position, and (3) the employer failed to reasonably accommodate the plaintiff's disability." (*Id.* at pp. 1009-1010.)

Under the FEHA, "reasonable accommodation" means "a modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired." (*Nadaf-Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 974.) "The employer is not obligated to choose the best accommodation or the accommodation the employee seeks. (*Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 228.) The employer "providing the accommodation has the ultimate discretion to choose between effective accommodations and may choose . . . the accommodation that is easier for it to provide." (*Ibid*.)

i. Defendant's Burden

Defendant first asserts that Plaintiff admitted she did not need an accommodation but that she was told by her doctor to take a five-minute break every two hours. (Memo, p. 8:2, citing UMF No. 15, citing Ashton Decl., Ex. C [FI No. 204.5]; UMF No. 14, citing Ashton Decl., Ex. A [RFA No. 13] and Ex. C [FI Nos. 204.3, 204.6].) Defendant proffers Plaintiff's response to Form Interrogatory No. 204.5:

> **FORM INTERROGATORY NO. 204.5:**
>
> Did the EMPLOYEE need any accommodation to perform any function of the EMPLOYEE'S job position or need a transfer to another position as an accommodation? If so, describe the accommodations needed.
>
> **RESPONSE TO FORM INTERROGATORY NO. 204.5:**
>
> No

(UMF No. 15, citing Ashton Decl., Ex. C [FI No. 204.5].)

Further, the District submits evidence it told Plaintiff the five-minute breaks were "manageable" and "totally reasonable" and that her supervisors believed she was taking her breaks. (E.g., UMF Nos. 16-17, 19.) Additionally, Plaintiff never reported to anyone that she was unable to take her breaks as needed or that she required an alternative accommodation. (UMF Nos. 20-21.) Further, Plaintiff was needed to provide coverage for another teacher during the last two weeks of the school year and that in that role she received "long breaks every two hours." (UMF Nos. 19-20 [Donohue Decl., ¶¶ 20-21, Ex. N [bell schedule]].)

Thus, Defendant proffers evidence Plaintiff did not need an accommodation, but even so was told she could take five-minute breaks every two hours and the District believed she was taking those breaks. Accordingly, Defendant has met its burden.

ii. Plaintiff's Burden

In opposition, Plaintiff asserts she requested a reasonable accommodation of a five-minute break every two hours and "Defendant would not allow this accommodation, which Defendant denies." (Opposition, p. 2:21-23.) Plaintiff again cites to RFA Nos. 14-17 but does not provide the Court with this evidence. Further, despite disputing her admission that she did not need an accommodation, Plaintiff does not address her response to Form Interrogatory No.

204.5 (See Plaintiff's Response to Defendant's UMF No. 15 ["Disputed" citing medical charts attached to Donohue Decl., and Plaintiff's Decl., ¶ 6]; see also *Shin v. Ahn* (2007) 42 Cal.4th 482, 500, fn. 12 ["a party cannot create an issue of fact by a declaration which contradicts his prior discovery responses"]) .) The Morgan Hill Unified School District Medical Verification form, attached to the Donohue Declaration at Exhibit K, is signed by Plaintiff's physician and states that the recommended workplace accommodation for her severe sleep apnea is a five-minute break every two hours. (Donohue Decl., Ex. K, p. 3.) Also attached is an email from Donohue stating "A five minute break every two hours is totally reasonable. Thank you for letting me know." (Donohue Decl., Ex. L.) As well as an email from Fawn Myers, Assistant Superintendent of Human Resources, to Plaintiff stating "a 5 minute break every two hours should be manageable." (*Ibid*.)

Plaintiff does not dispute these emails but contends she still did not get these breaks. (Plaintiff's Response to Defendant's UMF No. 16 ["Undisputed as to notification. But Defendant never allowed Plaintiff this accommodation."].) To support this, Plaintiff proffers her declaration at Paragraph 6 where she states she "expressly den[ies] that Ms. Donohue allowed me the accommodation of taking a 5 minute break every two hours of classroom attendance. No one employed by Defendant ever informed me that I could take this requested break." (Plaintiff's Decl., ¶ 6.)

Here, Plaintiff does not dispute that Britton's principal, Donohue, told her through email that a five-minute break was reasonable and thanked Plaintiff for letting her know. Thus, in effect, Plaintiff concedes that her accommodation was approved. Instead, Plaintiff appears to assert that even though the breaks were approved, she did not receive those breaks. It is not entirely clear if Plaintiff was told she could not take these five-minute breaks or if she was not informed every two hours that she should take her five-minute break. However, Plaintiff provides no evidence that she informed Defendant she was not receiving her breaks, that it was Defendant's duty to monitor these breaks, or that the accommodation was not working. (See *Brown v. Los Angeles Unified School Dist.* (2021) 60 Cal.App.5th 1092, 1108 ["If a reasonable accommodation does not work, the employee must notify the employer, who has a duty to provide further accommodation."]; *Spitzer v. Good Guys, Inc* (2000) 80 Cal.App.4th 1376, 1384 [if employer did not know a reasonable accommodation was not working, a duty to provide further accommodation never arose]; *Dailey v. Sears, Roebuck & Co.* (2013) 214 Cal.App.4th 974, 1000 [employer is required to provide breaks but is not obligated to ensure that they are taken].) Accordingly, Plaintiff fails to meet her burden.

Based on the foregoing, the motion for summary judgment is GRANTED in its entirety.

III. Conclusion and Order

The motion for summary judgment is GRANTED in its entirety. The Court shall prepare the final Order.

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Calendar line 4
Case Name: *Elizabeth Chung et al. v. Altva Capital Management Limited et al*. (and related cross-actions)
Case No.: 21CV387639

Defendant/Cross-defendant David Chung ("Mr. Chung") filed this motion to compel third-party Mikael A. Abye, of Abye Law Offices, ("Mr. Abye") to provide documents pursuant to the deposition subpoena for production of business records served on Mr. Abye on September 6, 2023. Mr. Abye was hired by plaintiff Elizabeth Chung ("Ms. Chung").

Mr. Chung issued a subpoena to Mr. Abye to produce records of Bend Capital, LLC ("Bend"). Bend has two, 50% managing members: Mr. Chung and Ms. Chung. Mr. Chung asserts that Ms. Chung did not have the right to unilaterally cause Bend to engage a law firm without his consent. Mr. Abye has since been disqualified from representing Bend but, according to Mr. Chung, he continues to withhold Bend's records related to Mr. Abye's representation and positions asserted on behalf of Bend.

Motion to Compel Documents Pursuant to Deposition Subpoena

Mr. Chung moves to compel Request Nos. 1 – 8, as detailed below:

Request 1: All documents and communications related to your purported representation of Bend in the matter of *Chung, et al. v. Altva Capital Management, et. al*, Santa Clara County Superior Court Case No. 21CV387639 (the "Matter").
Objections: Overbroad, burdensome, irrelevant, privileged information.

Request 2: Your retention agreement with Bend in the Matter.
Objections: Irrelevant, privileged information.

Request 3: Your invoices for services purportedly provided to Bend in the Matter
Objections: Irrelevant, privileged information.

Request 4: Documents related to payment of your invoices for services purportedly provided to Bend in the Matter.
Objections: Irrelevant, privileged information.

Request 5: All communications between you and Elizabeth Chung.
Objections: Overbroad, burdensome, irrelevant, already in Mr. Chung's possession, privileged information.

Request 6: All documents received from, or that you provided to, Elizabeth Chung.
Objections: Overbroad, burdensome, irrelevant, already in Mr. Chung's possession, privileged information.

Request 7: All communications between you and anyone representing Elizabeth Chung, including, but not limited to, Robert Freitas and/or anyone associated with the law firm Freitas & Weinberg LLP.
Objections: Overbroad, burdensome, irrelevant, already in Mr. Chung's possession, privileged information.

Request 8: All documents received from, or that you provided to, anyone representing Elizabeth Chung, including, but not limited to, Robert Freitas and/or anyone associated with the law firm Freitas & Weinberg LLP.
Objections: Overbroad, burdensome, irrelevant, already in Mr. Chung's possession, privileged information.

Mr. Chung and Mr. Abye appear to agree that objections to the subpoena were due by September 29, 2023, and that Mr. Abye did not serve objections until September 30, 2023. Mr. Chung contends that as a result, all objections have been waived, including privilege and work product. The Court finds that as a result of the untimeliness, all objections have been waived and are therefore OVERRULED. (See e.g., *Korea Data Sys. Co. v. Superior Court* (1997) 51 Cal.App.4th 1513, 1516 [failure to timely serve a response waives objections to the demand].)

With that said, the Court is aware that the "fundamental purpose of the attorney-client privilege is to safeguard the confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding legal matters." (*Fiduciary Trust Internat. of California v. Klein* (2017) 9 Cal.App.5th 1184, 1195 [internal quotations omitted].) "The attorney-client privilege is a legislative enactment, which courts have no power to expand or limit by creating exceptions." (*McDermott Will & Emery LLP v. Superior Court* (2017) 10 Cal.App.5th 1083, 1100.)

Moreover, Evidence Code sections 950 through 962 provide for the "lawyer-client privilege," which attaches to "confidential communications between a client and lawyer" during the attorney-client relationship. (Evid. Code, § 952.) The "holder of the privilege" is the "client." (*Id.* at § 953; see also *Wellpoint Health Networks v. Superior Court* (1997) 59 Cal.App.4th 110, 119 (*Wellpoint*) [in general, the attorney-client privilege "allows the client 'to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer'"].) The client is "a person who, directly or through an authorized representative consults a lawyer for the purpose of retaining the lawyer or securing legal services or advice from him in his professional capacity." (*Id.* at § 951.) An LLC is a "person" under Evidence Code section 175. (See also *Hoiles v. Superior Court* (1984) 157 Cal.App.3d 1192, 1198 ["Evidence Code quite clearly provides for an attorney-client privilege for all corporations with no exception for shareholders of closely held entities. Nor is it [the court's] proper function to create one, however reasonable; the area of privilege is one of the few instances where the Evidence Code precludes the courts from elaborating upon the statutory scheme"].) In other words, the law is clear that the attorney-client privilege belongs to the client, not counsel. (See Evid. Code, § 953; see also *Mylan Labs. v. Soon-Shiong* (1999) 76 Cal.App.4th 71, 80.) Thus, Mr. Abye could not have waived attorney-client privilege on behalf of Bend or Ms. Chung. (See e.g., *Wellpoint, supra,* 59 Cal.App.4th at p. 119 [attorney-client "privilege covers all forms of communication, including the transmission of specific documents . . ., so a party should not ordinarily formulate a discovery request seeking 'all documents transmitted to responding party's attorney'"].)

Accordingly, based on the untimely objections, the motion to compel is GRANTED. However, to the extent that any documents are privileged, Mr. Abye shall provide the appropriate privilege log with necessary information regarding each withheld document including date, author, and recipients, so that Mr. Chung may evaluate any claims of privilege.

Sanctions

The Court shall impose a monetary sanction against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel an answer or production, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. (Code Civ. Proc., § 2025.480, subd. (j).)

Mr. Chung has made a code-compliant request for monetary sanctions. He requests a total of $9,260 in monetary sanctions against Mr. Abye. The amount is based on 1) fifteen hours preparing the motion, separate statement, and the declaration from counsel; 2) six hours of anticipated hours reviewing the opposition and drafting a reply; and 6) and the filing fee.

First, the Court finds Mr. Abye was partially justified in opposing the motion on the basis of privilege. Nevertheless, the opposition falls short as to the majority of the opposition, as Mr. Abye's objections were untimely.[6] That said, the motion seeks only eight requests and a majority of the separate statement is copied and pasted. Moreover, the Court does not award anticipated expenses. (See *Tucker v. Pacific Bell Mobile Services* (2010) 186 Cal.App.4th 1548, 1551 [the court awards sanctions only for expenses actually incurred, not for anticipated expenses].) Thus, the Court will reduce the amount of monetary sanctions to $1,000.

Conclusion

The motion to compel is GRANTED and Mr. Abye must pay sanctions to Mr. Chung, or his counsel, in the amount of $1,000 . To the extent that any documents are privileged, Mr. Abye shall provide the appropriate privilege log. Both sanctions and code-compliant discovery and privilege log shall be due within 20 days of service of the final order. Mr. Chung shall prepare the final Order.

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[6] The Court also notes that Mr. Abye was only one day late in serving his objections and he has signed under penalty of perjury that he believed to have sent the objections on the agreed upon date. (See Abye Decl., ¶¶7-8.)

Calendar Line 6
Case Name: Rosie Confre v. Ford
Case No.: 23CV412664

I. Background

This is a lemon law case. Plaintiff alleges she purchased a 2019 Ford Expedition ("Vehicle") on or about on or about November 15, 2019 and obtained an express warranty. Plaintiff further alleges that during the warranty period, the Vehicle developed defects, relating to its transmission and its component parts. Plaintiff brought this case against Ford on March 10, 2023 asserting various warranty claims, negligent repair, and fraud by concealment.

Plaintiff now seeks 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) Summary documents and Deposition Testimony Regarding these Documents (RFP Nos. 43, 45, and 46); (4) Policies and Procedure Discovery (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.)

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 willfullness 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 Vehiclebut because it relates to all FORD cars with the same transmission as the subject vehicle renders it too broad.

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.

These same issues of overbreadth plague the other requests. Nos. 17, 19, 31, 36, and 39, as wells 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 or to the particular defect at issue. 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 and fail to limit the request to the specific defect in such cars.

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 Plaintiff do not support her 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.

Ford shall submit the final order.

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