SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 20, Honorable Socrates Peter Manoukian, Presiding

Courtroom Clerk: Hien-Trang Tran-Thien

191 North First Street, San Jose, CA 95113

Telephone: 408.882.2320

Department20@scscourt.org

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

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

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

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

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

---oooOooo---

DATE: Thursday, 18 January 2024
TIME: 9:00 A.M.

This Department prefers that litigants use Zoom for Law and Motion in and for Case Management Calendars. Please use the Zoom link below.

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

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

Join Zoom Meeting
https://scu.zoom.us/j/96144427712?pwd=cW1JYmg5dTdsc3NKNFBpSjlEam5xUT09
Meeting ID: 961 4442 7712
Password: 017350

Join by phone:
+1 (669) 900-6833
Meeting ID: 961 4442 7712

One tap mobile
+16699006833,,961 4442 7712#

APPEARANCES.

Appearances are usually held on the Zoom virtual platform. However, we are currently allowing in court appearances as well. If you do intend to appear in person, please advise us when you call to contest the tentative ruling so we can give you current instructions as to how to enter the building.

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

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

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

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

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

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

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

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

CIVILITY.

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

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

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

COURT REPORTERS.

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

This Court no longer provides for Court Reporters in civil actions except in limited circumstances. If you wish to arrange for a court reporter, please use Local Form #CV-5100. All reporters are encouraged to work from a remote location. Please inform this Court if any reporter wishes to work in the courtroom. This Court will approve all requests to bring a court reporter. Counsel should meet and confer on the use of a court reporter so that only one reporter appears and serves as the official reporter for that hearing.

PROTOCOLS DURING THE HEARINGS.

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

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

TROUBLESHOOTING TENTATIVE RULINGS.

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

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

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 1	22CV402556	John Doe vs Berryessa Union School District; Irma Martinez Chavez.	**Demurrer of Defendant Berryessa Union School District to Plaintiff's Complaint.** Defendant Berryessa Union School Distrist's demurer the complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [**Code Civ. Proc.**, §430.10, subd. (e)], i.e., the claims are barred by the Government Claims Act] is OVERRULED. Defendant is given 20 days within which to ANSWER the complaint. SEE ATTACHED TENTATIVE RULING.
LINE 2	22CV407608	Michael Holys vs County Of Santa Clara	**Demurrer of Defendant County of Santa Clara to Plaintiffs' First Amended Complaint.** Defendant County's demurrer to the first and second causes of action in plaintiff Holys's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] and on the ground that the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is SUSTAINED with 10 days' leave to amend. SEE ATTACHED TENTATIVE RULING.
LINE 3	23CV416723	Steven Nemec vs Elia Victor Betbadal; ERRC Systems, Inc.; Said Arnold Mejia; Steven Nemec.	**Motion Of Plaintiff To Deem Requests For Admissions Served on Defendants Dishnet Direct, Inc., Elia Victor, Betbadal and Said Arnoldo Mejia To Be Admitted etc.** There does not appear to be opposition to this motion. The motion is GRANTED unless responding party provided code-compliant responses prior to the hearing on the motion. SEE ATTACHED TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 4	23CV416723	Steven Nemec vs Elia Victor Betbadal; ERRC Systems, Inc.; Said Arnold Mejia; Steven Nemec.	**Motion of Defendant ERRC Systems, Inc. To Strike Portions of Plaintiff's First Amended Complaint.** The motion is GRANTED and DENIED. SEE ATTACHED TENTATIVE RULING.
LINE 5	23CV416723	Steven Nemec vs Elia Victor Betbadal; ERRC Systems, Inc.; Said Arnold Mejia; Steven Nemec.	**Demurrer of Defendant ERRC Systems, Inc. To Portions of Plaintiff's First Amended Complaint.** The demurrer is SUSTAINED and DENIED.. SEE LINE #4.
LINE 6	17CV318915	Alex Borja, et al. v. James Richard Brown, et al.	**Motion of Defendants for Summary Judgment.** Defendant Berryessa Union School Distrist's demurer the complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [**Code Civ. Proc.**, §430.10, subd. (e)], i.e., the claims are barred by the Government Claims Act] is OVERRULED. SEE ATTACHED TENTATIVE RULING.
LINE 7	21CV381402	Patricia Halfman vs County of Santa Clara et al	**Motion of Defendant for Summary Judgment.** NO TENTATIVE RULING.
LINE 8	19CV360733	Edward Kellar vs Richard Gregersen	**Motion of Plaintiff to Seal Records.** GRANTED. NO FORMAL TENTATIVE RULING.
LINE 9	19CV360733	Edward Kellar vs Richard Gregersen	**Motion of Defendant Accounting Data Associates Inc. to Compel Court Appointed Receiver Further Responses to Deposition Subpoena.** GRANTED and DENIED. NO FORMAL TENTATIVE RULING.
LINE 10	23CV418944	Zane Ali; Natalin Benitez vs Normandin's d.b.a. Normandin Chrysler Dodge Jeep Ram; Federated Mutual Insurance; Wells Fargo Auto.	**Motion of Plaintiff to Compel Defendant Normandin's to Provide Further Responses to Special Interrogatories.** The motion of plaintiffs to compel defendant Normandin's to provide further responses is GRANTED and DENIED as follows: Defendant is ordered to reserve proper responses without boilerplate objections. If new information comes up that might cause the defense to change a response, well-known rules of professionalism would suggest that the defense voluntarily amends their responses. SEE ATTACHED TENTATIVE RULING.
LINE 11	23CV418944	Zane Ali; Natalin Benitez vs Normandin's d.b.a. Normandin Chrysler Dodge Jeep Ram; Federated Mutual Insurance; Wells Fargo Auto.	**Motion of Plaintiff to Compel Defendant Normandin's to Provide Further Responses to Form Interrogatories.** SEE LINE #10.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 12	23CV418944	Zane Ali; Natalin Benitez vs Normandin's d.b.a. Normandin Chrysler Dodge Jeep Ram; Federated Mutual Insurance; Wells Fargo Auto.	**Motion of Plaintiff to Compel Defendant Normandin's to provide Further Responses to Request for Admissions.** SEE LINE #10.
LINE 13	23CV418944	Zane Ali; Natalin Benitez vs Normandin's d.b.a. Normandin Chrysler Dodge Jeep Ram; Federated Mutual Insurance; Wells Fargo Auto.	**Motion of Plaintiff to Compel Defendant Normandin's to provide Further Responses to Request for Production of Documents.** SEE LINE #10.
LINE 14	23CV418944	Zane Ali; Natalin Benitez vs Normandin's d.b.a. Normandin Chrysler Dodge Jeep Ram; Federated Mutual Insurance; Wells Fargo Auto.	**Petition of Defendant Normandin's etc. to Compel Arbitration.** The motion of defendant Normandin's etc. to compel arbitration is GRANTED. That the arbitration shall be conducted by American Arbitration Association, or National Arbitration and Mediation or, if the parties agree, "you or we" may choose a different arbitration organization. SEE ATTACHED TENTATIVE RULING.
LINE 15	22CV396332	James Helmer vs Thomas Helmer; Susan M. Helmer	**Motion of Plaintiff for Entry of Default Judgment against Defendant Susan M. Helmer.** The application is in good form and is GRANTED without an appearance. The Court will execute the proposed judgment without a formal hearing. The Court understands that plaintiff has reached an agreement with defendant Thomas M. Helmer to sell the property. NO FORMAL TENTATIVE RULING.
LINE 16	22CV399500	VCBLA Nido, LLC vs Arch Insurance Company	**Motion of Defendant Arch Insurance Co. to File a First Amended Answer.** Plaintiff filed nominal opposition. The motion for leave to file an amended answer is GRANTED. Defendant should submit a to the clerk via the e-filing queue and then serve a file-endorsed copy upon plaintiff. Plaintiff will then have 20 days from the date of service within which to RESPOND to the amended answer. NO FORMAL TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 17	23CV416108	Travelers Property Insurance Co. of America v. Liberty Insurance Corporation; National Union Fire Insurance Company of Pittsburgh, PA; Navigators Specialty Insurance Company; DPR Construction, a general partnership; DPR Construction Inc.	**Liberty Insurance Corporation's Motion for Leave to File an Amended Cross-Complaint.** Moving party requests leave to file an amended cross-complaint to assert certain extracontractual and equitable causes of action against Travelers. Travelers opposes the motion, claiming that there is no conceivable additional insured coverage owed by Travelers to DPR. The Court does not believe that the issue concerning the merits of the amended cross-complaint can be resolved on this motion. The motion for leave to file an amended cross-complaint is GRANTED. Defendant should submit a to the clerk via the e-filing queue and then serve a file-endorsed copy upon plaintiff. Plaintiff will then have 20 days from the date of service within which to RESPOND to the amended cross-complaint. NO FORMAL TENTATIVE RULING.
LINE 18	23CV416895	Lynley Kerr Hogan vs Michael	**Motion of Plaintiff for Leave to File an Amended Complaint.** The Motion for Leave to Amend is moot. On 18 November 28, 2023, the Court sustained Mr. Shtein's Demurrer and granted his Special Motion to Strike (anti-SLAPP) with leave to amend one cause of action. Plaintiff has amended her Complaint, which is now subject to a further Special Motion to Strike set for February 20, 2024. Therefore, the current motion before this court is MOOT. The next court date will be 20 February 2024 at 9:00 AM in this Department. NO FORMAL TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 19	23CV417302	Jane Doe J. Jane E. vs Doe 1; St. Francis High School.	**Motion of James W. Lewis and Slater, Slater, Schulman, LLP to be Relieved as Counsel for Plaintiff.** Counsel for defendant seeks to withdraw as counsel due to a breakdown of the attorney-client relationship. Communication between client and counsel has deteriorated due to an irreconcilable breakdown of the attorney-client relationship. Therefore, counsel is filing this motion to withdraw as counsel. Mr. Reed alleges that his client will not be prejudiced by the withdrawal. The motion to be relieved as counsel is GRANTED. The Order will take effect upon the filing and service of the executed order of this Court and an order that is written on Form MC-053 and that otherwise complies with California ***Rules of Court***, rule 3.1362(e). Counsel should add the next court date (06 June 2024 at 10:00 for Dismissal Review) on ¶ 8 pf the proposed order (not a courtroom in San Diego) and submit it to this Department via the Clerk's efiling queue. This Court has a relationship with St. Francis High School such that , a person aware of the facts might reasonably entertain a doubt that the Judge would not be able to be impartial. (***Code of Civil Procedure***, § 170.1, subd. (a)(6)(A)(iii).) The Calendar Secretary is asked to reassign this matter to a different Department. NO FORMAL ATTACHED TENTATIVE RULING.
LINE 20	2014-1-CV-260786	TBF Financial I, LLC vs Sierra Environmental Inc.; Nalini Bahadur; Manouchehr Hajiagahi; Sierra Environmental, Inc.; X.	**Motion of Plaintiff to Set Aside Judgment with Respect to Nalini Bahadur and Manouchehr Hajiagahi Only.** There is no opposition on file and the motion is GRANTED. Pursuant to stipulation, these two defendants shall file an answer to the complaint within 30 days of the service of the order. This Court will set a Trial Setting Conference on 19 March 2024 at 11:00 AM in Department 20. NO FORMAL TENTATIVE RULING.
LINE 21	21CV389368	Karina Diaz vs McGuire and Hester, et al.	**Compromise of Minor's Claim (Amy Razo).** The paperwork is in good order and the Court will APPROVE the compromise and execute the proposed order without a formal appearance. NO FORMAL TENTATIVE RULING.
LINE 22	21CV389368	Karina Diaz vs McGuire and Hester, et al.	**Compromise of Minor's Claim (Ian Razo).** The paperwork is in good order and the Court will APPROVE the compromise and execute the proposed order without a formal appearance. NO FORMAL TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 23	16CV295730	Cyrus Hazari vs Mandy Brady	**Petition To Determine Validity of Third-Party Claim (Dagmar Horzath.)** The Court intends to defer ruling on the claim to 14 March 2024 at 9:00 am in this Department until after the hearing on Ms. Brady's motion to amend judgment and attorney fee order.
LINE 24			SEE ATTACHED TENTATIVE RULING.
LINE 25			SEE ATTACHED TENTATIVE RULING.
LINE 26			SEE ATTACHED TENTATIVE RULING.
LINE 27			SEE ATTACHED TENTATIVE RULING.
LINE 28			SEE ATTACHED TENTATIVE RULING.
LINE 29			SEE ATTACHED TENTATIVE RULING.
LINE 30			SEE ATTACHED TENTATIVE RULING.

---oooOooo---

Calendar Line 1

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

DEPARTMENT 20

161 North First Street, San Jose, CA 95113
408.882.2320 · 408.882.2296 (fax)
smanoukian@scscourt.org
http://www.scscourt.org

(For Clerk's Use Only)

CASE NO.: 22CV402556 **John Doe v. Berryessa Union School Dist., et al.**

DATE: 18 January 2024 **TIME: 9:00 am** **LINE NUMBER: 1**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 17 January 2024. Please specify the issue to be contested when calling the Court and Counsel.

---oooOooo---

Order on Demurrer of Defendant Berryessa Union School District to Plaintiff's Complaint.

I. Statement of Facts.

Plaintiff John Doe ("Plaintiff") is an adult who was the victim of childhood sexual assault. (Complaint, ¶¶ 1-2.) Berryessa Union School District ("District")[1] is a public entity that maintained, operated, and employed teachers and personnel in the City of San Jose. (*Id.* at ¶3.) Doe 2 was a psychologist and/or therapist employed by District at all relevant times. (*Id.* at ¶¶4, 11.)

Doe 2 sexually assaulted Plaintiff during the 1984/1985 school years – when Plaintiff was approximately 13 years old. (Complaint, ¶ 10.) After receiving complaints and warnings about Doe 2's improper behavior involving minor students, District knew or should have known of Doe 2's unfitness to be around such students. (*Id.* at ¶12.) But District took no action against Doe 2, who continued to abuse Plaintiff through the remainder of the school year. (*Id.* at ¶¶12-13.) Doe 2 groomed Plaintiff, both on and off the Piedmont Middle School campus, and coerced Plaintiff to engage in sexual activities. (*Id.* at ¶14.) Doe 2 was arrested and convicted of sexual abuse of minors. (*Id.* at ¶15.)

Plaintiff brought this action in 2022 when he was 51 years old. (*Id.* at ¶16.)

---

[1] Plaintiff's complaint filed on 4 August 2022 identifies the school district as "Doe 1, a public entity." After receiving leave from court, Plaintiff filed an amendment to the complaint on 21 June 2023, substituting defendant "Doe 1, a public entity" with defendant "Berryessa Union School District, a public entity," hereafter referred to as "District."

On 4 August 2022[2], Plaintiff filed a complaint against Doe 1, a public entity, Doe 2, an individual, among others, asserting causes of action for:

(1) Childhood Sexual Abuse (against Doe 2)

(2) Intentional Infliction of Emotion Distress (against Doe 2)

(3) Negligent Hiring, Supervision, and Retention of Unfit Employee [**Gov. Code** §§ 815.2, 820] (against District)

(4) Failure to Report Suspected Child Abuse [**Gov. Code** §§ 815.2, 815.6, 820] (against District)

(5) Negligent Supervision of a Minor [**Gov. Code** §§ 815.2, 820] (against District)

(6) Negligence (against Does 41-50)

On 25 August 2023, District filed the motion now before the court, a demurrer to Plaintiff's complaint.

II. Demurrers in General.

A complaint must contain substantive factual allegations sufficiently apprising the defendant of the issues to be addressed. (See ***Williams v. Beechnut Nutrition Corp.*** (1986) 185 Cal.App.3d 135, 139, fn. 2.)

A demurrer tests the legal sufficiency of a complaint. It is properly sustained where the complaint or an individual cause of action fails to "state facts sufficient to constitute a cause of action." (***Code of Civil Procedure***, § 430.10, subd. (e).) "[C]onclusionary allegations . . . without facts to support them" are insufficient on demurrer. (***Ankeny v. Lockheed Missiles and Space Co.*** (1979) 88 Cal.App.3d 531, 537.) "It is fundamental that a demurrer is an attack against the complaint on its face, it should not be sustained unless the complaint shows that the action may not be pursued." (***Yolo County Dept. of Social Services v. Municipal Court*** (1980) 107 Cal.App.3d 842, 846-847.)

"It is not the ordinary function of a demurrer to test the truth of the plaintiff's allegations or the accuracy with which he describes the defendant's conduct. A demurrer tests only the legal sufficiency of the pleading." (***Committee on Children's Television, Inc. v. General Foods Corp.*** (1983) 35 Cal.3d 197, 213.) "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.' [Citation.]" (***Id.*** at pp. 213-214; see ***Cook v. De La Guerra*** (1864) 24 Cal. 237, 239: "[I]t is not the office of a demurrer to state facts, but to raise an issue of law upon the facts stated in the pleading demurred to.")

III. Analysis.

District demurs to the third, fourth, and fifth causes of action on the grounds of failure to state facts sufficient to constitute a cause of action. (District's MPA, p. 2.)

A. Legal Standard

"At the outset, it is well settled that a general demurrer admits the truth of all material factual allegations in the complaint; that the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court; and that plaintiff need only plead facts showing that he may be entitled to some relief." (***Alcorn v. Anbro Engineering, Inc.*** (1970) 2 Cal.3d 493, 496 (***Alcorn***) [internal citations omitted].)

B. Judicial Notice

---

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

Both Plaintiff and District request judicial notice.

1. Official Acts

With its moving papers, District requests judicial notice of floor analysis records regarding Assembly Bill 218. The request is GRANTED. (**Evid. Code**, §452, subd. (c) [court may take judicial notice of official acts of legislative departments].)

2. Court Records

With its moving papers, District requests judicial notice of an order after hearing filed on 13 June 2023 in the Superior Court of California, County of Contra Costa. On reply, District requests further judicial notice of a tentative decision for a hearing on 2 October 2023, also from the Superior Court of California, County of Contra Costa. In support of his opposition, Plaintiff requests judicial notice of various court records (15), consisting of orders, minute orders, and tentative decisions from the Superior Court of California, Counties of: Alameda, Los Angeles, Marin, San Bernardino, San Joaquin, and Solano.

The parties' respective requests for judicial notice of court records are GRANTED insofar as the court takes judicial notice of the existence of the court records, though not necessarily the truth of any matters asserted therein. (**Evid. Code**, § 452, subd. (d); see also ***People v. Woodell*** (1998) 17 Cal.4th 448, 455—**Evid. Code** sections 452 and 453 permit the trial court to "take judicial notice of the existence of judicial opinions and court documents, along with the truth of the results reached—in the documents such as orders, statements of decision, and judgments—but [the court] cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact.")

C. District's demurrer to Plaintiff's complaint is OVERRULED.

District contends the entire complaint is subject to demurrer because Plaintiff never presented a timely written claim for damages and the revival provisions relied upon by Plaintiff are unconstitutional. (District's MPA, pp. 2-4.) According to District, the Legislature cannot pass a law attempting to impose liability on a public entity for a past occurrence where there is no enforceable claim because such an imposition amounts to the making of a gift of public funds in violation of Article XVI, Section 6 of the **California Constitution**. (*Id.* at pp. 11-13.) District asserts the Legislature made just such an attempt in passing Assembly Bill 218.

"The Government Claims Act (**Gov. Code**, § 810 et seq.) requires that before suing a public entity, the plaintiff must present a timely written claim for damages to the entity." (***A.M. v. Ventura Unified School Dist.*** (2016) 3 Cal.App.5th 1252, 1257 (***A.M. v. Ventura Unified***) [internal punctuation and citations omitted].) Thus, "failure to timely present a claim for money or damages to a public entity bars a plaintiff from filing a lawsuit against that entity." (***State of California v. Superior Court*** (2004) 32 Cal.4th 1234, 1239 (***Bodde***).) However, as discussed further below, the Act also sets forth a number of exceptions to the claim presentation requirement. (**Gov. Code**, § 905; ***Coats v. New Haven Unified School Dist.*** (2020) 46 Cal.App.5th 415, 420 (***Coats***).)

Under **Code of Civil Procedure** section 340.1, as amended by Assembly Bill 218, in an action for recovery of damages suffered as a result of childhood sexual assault, the time for commencement of the action shall be within 22 years of the date the plaintiff attains the age of majority or within five years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual assault, whichever period expires later, for any of the following actions: (1) an action against any person for committing an act of childhood sexual assault; or (2) an action for liability against any person or entity who owed a duty of care to the plaintiff, if a wrongful or negligent act by that person or entity was a legal cause of the childhood sexual assault that resulted in the injury to the plaintiff. (**Code. Civ. Proc.**, §340.1, subd. (a)(1)-(2).) Assembly Bill 218 also amended the provision that lists exceptions to the Government Claims Act, **Government Code** section 905, by removing language in subdivision (m) that limited the exception to claims arising out of conduct that occurred on or after January 2009 and adding subdivision (p), which made this change retroactive. (See ***Coats***, *supra*, 46 Cal.App.5th at p. 424; **Gov. Code** §905, subds. (m), (p).)

As noted above, District argues that Assembly Bill 218's retroactive imposition of liability upon a public entity like District is unconstitutional under Article XVI, Section 6 of the **California Constitution**, which prohibits gifts of public funds. District cites several cases in support of its position that Assembly Bill 218 violates the gift

clause because it retroactively strips statutory government immunity from public entities by eliminating the claim presentation requirement and time limit to initiate lawsuits for childhood sexual assault claims brought pursuant to **Code of Civil Procedure** section 340.1. (See ***Bodde***, *supra*, 32 Cal.4th 1234; ***Shirk v. Vista Unified School District*** (2007) 42 Cal.4th 201 (***Shirk***); ***Jordan v. California Dept. of Motor Vehicles*** (2002) 100 Cal.App.4th 431 (***Jordan***).)

In opposition, Plaintiff relies upon ***Coats*** (*supra*, 46 Cal.App.5th 415) in arguing that the Legislature expressly modified **Government Code** section 905 so that the section could be applied retroactively. (Plaintiff's Opposition, pp. 3-6.) According to Plaintiff, the gift clause of the **California Constitution** is not implicated simply by requiring a public entity to defend a lawsuit. (*Id.* at pp. 6-7.) Plaintiff further contends the Legislature has the authority to make such a modification because doing so serves a public purpose identified by the Legislature. (*Id.* at pp. 8, 11-12.) Plaintiff also argues that, while Assembly Bill 218 allows a new class of plaintiffs to file suit, it does not create a new cause of action against the state that did not previously exist. (*Id.* at pp. 9-11.)

In this court's opinion, the controlling authorities support Plaintiff's position. It is undisputed that the Legislature expressly intended the modifications to apply retroactively to lapsed claims. (See District's MPA, p. 3; Reply, pp. 5-6.) The Legislature also had the authority to revive lapsed claims, including lapsed claims against the State. (***Liebig v. Superior Court*** (1989) 209 Cal.App.3d 828, 830 ["the Legislature has the power to retroactively extend a civil statute of limitations to revive a cause of action time-barred under the former limitations period"].) Assembly Bill 218 did not create an obligation on the part of a governmental agency to pay a claim made by Plaintiff; rather, the bill revives previously time-barred civil claims, which still must be proven in court. (See ***Heron v. Riley*** (1930) 209 Cal. 507, 517 (***Heron***) ["[J]udgments obtained against the state… bear no semblance to gifts. They must be first obtained in courts of competent jurisdiction"][3].)

By way of background, in ***Shirk***, the California Supreme Court addressed **Code of Civil Procedure** section 340.1 as it was amended in 2003, noting that the pertinent language of subdivision (c) "expressly limited revival of childhood sexual abuse causes of action to those barred 'solely' by the expiration of the applicable statute of limitations. (§ 340.1, subd. (c).)" (***Id.*** at p. 211.) "Section 340.1, subdivision (c), makes no reference whatsoever to any revival of the period in which to present in which to present a claim under the government claims statute. That lack of reference led the Court of Appeal [in ***Shirk***] to infer that because the Legislature must have been aware that by expressly reviving causes of action against entity defendants in general under subdivision (c), it implicitly revived the deadline for presenting a claim to public entity defendants." (***Id.*** at p. 212.) The California Supreme Court was not persuaded, stating that the Legislature was deemed to be aware of the existing claim presentation statute, and that if the Legislature intended to revived the claim presentation deadline, "it could have easily done so." (***Id.***, 42 Cal.4th at pp. 212-213.)

> In direct response to ***Shirk***, the Legislature enacted **Government Code** section 905, subdivision (m), which eliminates the claim presentation requirement for "[c]laims made pursuant to Section 340.1 … for the recovery of damages suffered as a result of childhood sexual abuse." (See Assem. Com. on Judiciary, Analysis of Sen. Bill No. 640 (2007–2008 Reg. Sess.) as amended June 9, 2008, p. 3 ["This bill is intended to address the ***Shirk*** decision by expressly providing that childhood sexual abuse actions against public entities are exempted from government tort claims requirements and the six-month notice requirement"].) This exemption applies to claims arising out of conduct occurring on or after January 1, 2009. (**Gov. Code**, § 905, subd. (m); ***J.P. v. Carlsbad Unified School Dist.*** (2014) 232 Cal.App.4th 323, 333, fn. 6 [181 Cal. Rptr. 3d 286]

---

[3] The court notes the following language from the ***Heron*** decision, relied upon by District: "The legislature has not attempted to create liability against the state for any past acts of negligence on the part of its officers, agents or employees – something it could not, and the doing of which would, in effect, be the making of a gift – but has provided that 'hereafter' it shall be liable for certain things done which cause damage to its citizens, its liability to be first determined by an appropriate action at law." (***Heron,*** *supra*, 209 Cal. at p. 517.) While instructive, the court does not interpret this hypothetical language from ***Heron*** to be controlling authority for the disposition of the instant demurrer, for the reasons discussed below. (See ***McDowell & Craig v. Sante Fe Springs*** (1960) 54 Cal.2d 33, 38 ["It is elementary that the language used in any opinion is to be understood in the light of the facts and the issue then before the court. [Citations.] Further, cases are not authority for propositions not considered. [Citations.]"].)

> ["Effective January 1, 2009, the government claim presentation requirement no longer applies to claims for childhood sexual abuse"]; accord, ***S.M. v. Los Angeles Unified School Dist.*** (2010) 184 Cal.App.4th 712, 721, fn. 6 [109 Cal. Rptr. 3d 270].)

(***A.M. v. Ventura***, *supra*, 3 Cal.App.5th at p. 1258.)

Similarly, the ***Coats*** decision discusses the legislative history of **Code of Civil Procedure** section 340.1 in detail. (See ***Coats***, 46 Cal.App.5th at pp. 420-431.) "In Assembly Bill 218, the Legislature made clear its intent to revive causes of action previously barred by government claims presentation requirements." (***Id.*** at p. 428.)

> "It is apparent from the history of amendments [**Code Civ. Proc.**, § 340.1; **Gov. Code**, §§ 935, 905, subd. (m)] that the Legislature has consistently worked to expand the ability of victims of childhood sexual abuse to seek compensation from the responsible parties, on several occasions in direct response to restrictive judicial opinions. In the face of a revival provision expressly and unequivocally encompassing claims of childhood sexual abuse previously barred for failure to present a timely government claim, it is clear we must reverse the trial court's judgment [entering judgment on the pleadings for failure to comply with the Government Claims Act] and remand for further proceedings on appellants' complaint."

(***Id.*** at pp. 430-431.)

It is true, as District contends, that the ***Coats*** decision does not address the gift clause but rather whether Assembly Bill 218 violates the constitutional prohibition against ex post facto laws and the due process clauses of Fifth and Fourteenth Amendments to the **United States Constitution** and the California counterpart. (***Coats***, *supra*, 46 Cal.App.5th at p. 424-426.) Nevertheless, this court finds that the rationale expressed in ***Coats*** also applies to the instant matter. Specifically, ***Coats*** addresses how "subdivision (m) was added to section 905 in 2008, in direct response to ***Shirk***," and found by enacting Assembly Bill 218, the Legislature "lengthened the time within which an action for damages resulting from 'childhood sexual assault' could be brought and revived lapsed claims that had "not been litigated to finality and that would otherwise be barred as of January 1, 2020, because the applicable statute of limitations, claim presentation deadline, or any other time limit had expired." (***Id.*** at pp. 422-424.)

Further, even if Assembly Bill 218 is considered an allocation of public funds, the stated public purpose at the heart of the bill disposes of any impermissible "gift" challenge. "The question of whether an expenditure has a public purpose is within the discretion of the Legislature. '[I]ts discretion will not be disturbed by the courts so long as that determination has a reasonable basis.' [Citations]." (***Martin v. Santa Clara Unified School Dist.*** (2002) 102 Cal.App.4th 241, 254 (***Martin v. Santa Clara Unified***) [quoting and citing ***County of Alameda v. Carleson*** (1971) 5 Cal.3d 730, 746].) "The concept of public purpose has been liberally construed by the courts, and the Legislature's determination will be upheld unless it is totally arbitrary. [Citations.] The fact that individuals may be incidentally benefitted is irrelevant." (***Mannheim v. Superior Court of Los Angeles County*** (1970) 3 Cal.3d 689.)

Here, as set forth in District's own Request for Judicial Notice, the purposes for Assembly Bill 218 are: "to allow more victims of childhood sexual assault to be compensated for their injuries and, ***to help prevent future assaults by raising the costs for this abuse.***" (See District's Request for Judicial Notice, Ex. A, p. 2 of 4 [emphasis added].) In the court's view, the prevention of future sexual assault of children by raising the costs for past abuse is a reasonable basis for a public purpose for Assembly Bill 218 and the statutory modifications it imposes.

The authority and argument offered by District do not convince the court otherwise. (See District's MPA, pp. 8-13; Reply, pp. 6-8.) For example, after acknowledging that the prevention of future abuse is one of the purposes for Assembly Bill 218, District argues that the legislative history "offers no explanation" why the application of Assembly Bill 218's modification to Plaintiff's claims here would prevent future abuse. (District's MPA, p. 13:9-24.) However, as stated above, this assertion is belied by the legislative history provided by District, stating the rationale that, by raising the costs for childhood sexual assault, the modifications imposed by Assembly Bill 218 will help prevent future abuse. (District's Request for Judicial Notice, Ex. A, p. 2 of 4.) Moreover, District has not directed the court to any controlling, appellate authority, stating that raising the costs for childhood sexual

assault is not a reasonable basis for a public purpose supporting the statutory changes made by Assembly Bill 218.

Further, while District relies on ***Jordan*** (*supra,* 100 Cal.App.4th 431) and ***Orange County Foundation v. Irvine Co.*** (1983) 139 Cal.App.3d 195 (***Orange County Foundation***), the cases support Plaintiff's position. "It is well settled that the primary question to be considered in determining whether an appropriation of public funds is to be considered a gift is whether the funds are to be used for a public or private purpose. If they are to be used for a public purpose, they are not a gift within the meaning of [Section 6 of Article XVI of the **California Constitution**]. [Citation.]" (***Jordan***, *supra*, 100 Cal.App.4th at p. 450.) "The settlement of a good faith dispute between the state and a private party is an appropriate use of public funds and not a gift because the relinquishment of a colorable legal claim in return for settlement funds is good consideration and establishes a valid public purpose." (***Ibid.*** [citing ***Orange County Foundation***, *supra*, 139 Cal.App.3d at p. 200.)

In ***Jordan***, in the context of the settlement of an attorney fee dispute, the California Supreme Court addressed "whether there is a public purpose in paying more than the state's established maximum exposure." (***Jordan***, *supra*, 100 Cal.App.4th at p. 451.) The court said the settlement of the attorney fees dispute was a public purpose, but also that only the attorneys, and not the public, would benefit from the payment of attorney's fees exceeding the statutory maximum. (***Ibid.***) Thus, because the attorneys "had no colorable claim to fees in excess of $18 million, any payment over $18 million serves no public purpose." (***Ibid.***) Similarly, in ***Orange County Foundation***, the appellate court held that "public monies paid to compromise an invalid real property claim, known to be baseless by claimant, is not an expenditure for a public purpose, and constitutes a prohibited gift of public funds." (***Orange County Foundation***, *supra*, 139 Cal.App.3d at p. 198.) The appellate court stressed that in order for state expenditures *not* to be considered "gifts" within the meaning of Article XVI, Section 6, of the **California Constitution**, "there must be some real benefit to the State which constitutes the 'public purpose' justifying the expenditure." (***Id.*** at p. 200.)

Here, Plaintiff could have sought liability against District at the time the abuse occurred, and thus, he has stated a colorable claim. As addressed above, there is a reasonable basis that lifting the claims presentation requirement serves the stated public purpose of preventing childhood sexual assault by raising its cost, and "whether an expenditure has a public purpose is within the discretion of the Legislature … [which] … 'will not be disturbed by the courts so long as that determination has a reasonable basis.' [Citations]." (***Martin v. Santa Clara Unified***, supra,102 Cal.App.4th at p. 254.) Therefore, the court is not persuaded that the amendments made by Assembly Bill 218 to **Code of Civil Procedure** section 340.1 and **Government Codes** sections 905 and 935, as applied to Plaintiff here at the pleading stage, violate the prohibition against gifts under Article XVI, Section 6 of the **California Constitution.**

Accordingly, District's demurrer to Plaintiff's complaint is OVERRULED.

IV. Tentative Ruling.

The tentative ruling was duly posted**.**

V. Case Management.

The parties should begin discovery and discussions concerning alternate dispute resolution.

The Case Management Conference currently set for 06 February 2024 at 10:00 AM in Department 20 shall be VACATED and RESET to 30 July 2024 at 10:00 AM in Department 20.

///

///

VI. Order.

Defendant Berryessa Union School District's demurer the complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [**Code Civ. Proc.**, §430.10, subd. (e)], i.e., the claims are barred by the Government Claims Act] is OVERRULED. Defendant is given 20 days within which to ANSWER the complaint.

DATED:	**HON. SOCRATES PETER MANOUKIAN** ***Judge of the Superior Court*** ***County of Santa Clara***

---oooOooo---

Calendar Line 2

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 20

161 North First Street, San Jose, CA 95113
408.882.2320 · 408.882.2296 (fax)
smanoukian@scscourt.org
http://www.scscourt.org

(For Clerk's Use Only)

CASE NO.: 22CV407608 **Michael Holys v. County of Santa Clara, et al.**
DATE: 18 January 2024 **TIME: 9:00 am** **LINE NUMBER: 2**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 17 January 2024. Please specify the issue to be contested when calling the Court and Counsel.

---oooOooo---

Order On Defendant County Of Santa Clara's Demurrer To Plaintiff's First Amended Complaint.

I. Statement of Facts.

Defendant County of Santa Clara ("County") was authorized by the State of California to place and care for children in foster care, including in private homes, juvenile halls, and group homes in Santa Clara County. (First Amended Complaint ("FAC"), ¶2.) Children in foster care within County are in the legal custody of defendant County. (*Id.*) Defendant County was responsible for the care and safety of children within Santa Clara County. (*Id.*)

Defendant County provided child welfare, child protective, and childcare services to foster children in Santa Clara County, including plaintiff Michael Holys ("Holys"). (FAC, ¶9.)

At all relevant times, plaintiff Holys was in foster care under the custody, care, and control of defendant County. (FAC, ¶23.) In approximately 1998, defendant County placed plaintiff Holys in the foster home of Jason Mero and Eric Morrison ("Foster Parents") located in Palo Alto ("Foster Home"). (FAC, ¶24.) Foster Parents and Foster Home were approved, licensed, trained, supervised, and/or compensated by defendant County. (*Id.*)

From approximately 1998 to 2001, when plaintiff Holys was approximately thirteen (13) to sixteen (16) years old, plaintiff Holys's foster father, Jason Daniel Mero ("Perpetrator"), sexually assaulted plaintiff Holys approximately daily while plaintiff Holys resided in the Foster Home. (FAC, ¶25.) Perpetrator was an individual to whom defendant County entrusted plaintiff Holys's care and custody. (FAC, ¶27.)

During the course of the aforementioned sexual abuse, plaintiff Holys's other foster parent observed plaintiff Holys being sexually assaulted by Perpetrator and was undeniably aware of the ongoing abuse. (FAC, ¶29.) The Foster Home was filthy and had only one bed which was observed by the social worker or defendant County's agent checking on plaintiff Holys while at Foster Home, who then instructed Foster Parents to make improvements to the living condition. (*Id.*)

Plaintiff Holys was regularly bruised and dirty with inadequate clothing during social worker visits. (*Id.*) Plaintiff Holys reported to defendant County that he was not being given enough food and that he was regularly locked in the garage and had to wear dirty clothing to school. (*Id.*)

Foster parents stopped taking plaintiff to medical appointments immediately after plaintiff was placed into foster care. (*Id.*)

Perpetrator forced plaintiff Holys to write a letter to the social worker stating he was not abused. (*Id.*) No action was taken, no investigation completed, and Perpetrator continued to sexually assault and abuse plaintiff Holys. (*Id.*)

Defendant County knew or reasonably should have known that the foster home in which it placed plaintiff Holys was unsafe and foreseeable that plaintiff Holys would be sexually assaulted. (FAC, ¶30.) Defendant County knew, had reason to know, or was otherwise on notice of Perpetrator's misconduct that created a risk of childhood sexual assault and/or abuse against plaintiff Holys and defendant County failed to take reasonable steps and/or implement safeguards to avoid such acts of childhood sexual assault and abuse. (FAC, ¶¶31 – 34.)

Despite such knowledge/ notice, defendant County provided Perpetrator unsupervised access to plaintiff Holys. (FAC, ¶35.) Defendant County knew, or had reason to know, or were otherwise on notice of sexual assault and abuse of plaintiff Holys by Perpetrator and failed to take reasonable steps/ implement safeguards to avoid foreseeable acts of childhood sexual assault. (FAC, ¶36.)

In addition to actual and/or constructive notice provided to defendants, there were substantial structural and systemic flaws and deficiencies in the foster care system designed and/or implemented by defendant County. (FAC, ¶37.) Sexual assaults and abuse of juveniles placed in foster care was a chronic, unmitigated, systemic, and pervasive problem known to defendants. (FAC, ¶38.)

On 17 November 2022[4], plaintiff Holys filed a complaint against defendant County asserting a claim for negligence.

On 3 April 2023, plaintiff Holys filed the operative FAC now alleging causes of action for:

(1) Negligence [against defendant County]

(2) Breach of a Mandatory Duty [against defendant County]

(3) Negligence [against Doe defendants 2 through 25]

On 1 May 2023, defendant County filed the motion now before the court, a demurrer to plaintiff Holys's FAC.

II. Demurrers In General.

A complaint must contain substantive factual allegations sufficiently apprising the defendant of the issues to be addressed. (See ***Williams v. Beechnut Nutrition Corp.*** (1986) 185 Cal.App.3d 135, 139, fn. 2.)

A demurrer tests the legal sufficiency of a complaint. It is properly sustained where the complaint or an individual cause of action fails to "state facts sufficient to constitute a cause of action." (***Code of Civil Procedure***, § 430.10, subd. (e).) "[C]onclusionary allegations . . . without facts to support them" are insufficient on demurrer. (***Ankeny v. Lockheed Missiles and Space Co.*** (1979) 88 Cal.App.3d 531, 537.) "It is fundamental that a demurrer is an attack against the complaint on its face, it should not be sustained unless the complaint shows that the action may not be pursued." (***Yolo County Dept. of Social Services v. Municipal Court*** (1980) 107 Cal.App.3d 842, 846-847.)

"It is not the ordinary function of a demurrer to test the truth of the plaintiff's allegations or the accuracy with which he describes the defendant's conduct. A demurrer tests only the legal sufficiency of the pleading." (***Committee on Children's Television, Inc. v. General Foods Corp.*** (1983) 35 Cal.3d 197, 213.) "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.' [Citation.]" (***Id.*** at

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

pp. 213-214; see ***Cook v. De La Guerra*** (1864) 24 Cal. 237, 239: "[I]t is not the office of a demurrer to state facts, but to raise an issue of law upon the facts stated in the pleading demurred to.")

III. Analysis.

A. Defendant County's demurrer to the first and second causes of action in plaintiff Holys's FAC is SUSTAINED.

Preliminarily, defendant County points out that, "because 'all governmental tort liability is based on statute, the general rule that statutory causes of action must be pleaded with particularity is applicable. Thus, "to state a cause of action against a public entity, every fact material to the existence of its statutory liability must be pleaded with particularity." ' (*Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 795 [221 Cal.Rptr. 840, 710 P.2d 907] (*Lopez*).)" (*City of Los Angeles v. Superior Court* (2021) 62 Cal.App.5th 129, 138; see also *Zipperer v. County of Santa Clara* (2005) 133 Cal.App.4th 1013, 1020—"Under the Government Tort Liability Act, all liability is statutory.

Hence, the rule that statutory causes of action must be specifically pleaded applies, and every element of the statutory basis for liability must be alleged.").) "[Where] recovery is based on a statutory cause of action, the plaintiff must set forth facts in his [or her] complaint sufficiently detailed and specific to support an inference that each of the statutory elements of liability is satisfied. General allegations are regarded as inadequate. [Citations.]" (*Mittenhuber v. City of Redondo Beach* (1983) 142 Cal.App.3d 1, 5.)

With that particular rule in mind, the two causes of action plaintiff Holys asserts against defendant County is negligence and breach of a mandatory duty. "To prevail in a negligence action, a plaintiff must show the defendant owed a legal duty to her, the defendant breached that duty, and the breach proximately caused injury to the plaintiff." (*Doe v. L.A. County Dep't of Children & Family Servs.* (2019) 37 Cal.App.5th 675, 682 (*Doe*).)

"Except as otherwise provided by statute[,] [a] public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." (Gov. Code, §815, subd. (a).) "One of the provisions 'otherwise' creating an exception to the general rule of immunity is Government Code section 815.6, which provides: 'Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.'" (*State of California v. Superior Court* (*Perry*) (1984) 150 Cal.App.3d 848, 854 (*Perry*).)

"Government Code section 815.6 contains a three-pronged test for determining whether liability may be imposed on a public entity: (1) an enactment must impose a mandatory, not discretionary, duty; (2) the enactment must intend to protect against the kind of risk of injury suffered by the party asserting section 815.6 as a basis for liability; and (3) breach of the mandatory duty must be a proximate cause of the injury suffered." (*Perry*, *supra*, 150 Cal.App.3d at p. 854; citations omitted.)

"Whether an enactment is intended to impose a mandatory duty, as opposed to a mere obligation to perform a discretionary function, is a question of law for the court." (*Corona v. State of California* (2009) 178 Cal.App.4th 723, 728.) "An enactment creates a mandatory duty if it requires a public agency to take a particular action." (*County of Los Angeles v. Superior Court* (2002) 102 Cal.App.4th 627, 639.) For purposes of Government Code section 815.6, the term "enactment" means "a constitutional provision, statute, charter provision, ordinance or regulation." (Gov. Code, § 810.6.)

Defendant County demurs, initially, by arguing that plaintiff Holys has not adequately alleged the existence of a duty. "[T]he existence of a duty is a question of law for the court." (*Kentucky Fried Chicken of California, Inc. v. Superior Court* (1997) 14 Cal.4th 814, 819.) "The question of whether a duty exists is a question of law and must be decided by the court on a case-by-case basis." (*Dutton v. City of Pacifica* (1995) 35 Cal.App.4th 1171, 1175.) "Whether a legal duty of care exists in a given factual situation is a question of law to be determined by the court, not the jury." (*Carleton v. Tortosa* (1993) 14 Cal.App.4th 745, 754.) "The existence and

scope of duty are legal questions for the court." (*Coldwell Banker Residential Brokerage Co. v. Superior Court* (2004) 117 Cal.App.4th 158, 163.

Defendant County relies principally upon *Doe*, *supra*, 37 Cal.App.5th at pp. 682-683 where the court explained:

> A defendant does not owe a legal duty to protect against third party conduct, unless there exists a special relationship between the defendant and the plaintiff. (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 235 [30 Cal. Rptr. 3d 145, 113 P.3d 1159].) In that circumstance, "[i]n addition to the special relationship … , there must also be evidence showing facts from which the trier of fact could reasonably infer that the [defendant] had prior actual knowledge, and thus must have known, of the offender's assaultive propensities. [Citation.]" (*Romero v. Superior Court* (2001) 89 Cal.App.4th 1068, 1084 [107 Cal. Rptr. 2d 801] (*Romero*).) In short, the third party's misconduct must be foreseeable to the defendant. (*Delgado*, *supra*, 36 Cal.4th at p. 244; *Romero*, *supra*, 89 Cal.App.4th at p. 1081.)

In *Doe*, minor plaintiff sued a county department of children and family services and a private foster care agency for negligence and failure to perform mandated duties after becoming pregnant by one adult son of the foster parent she had been placed with and being raped by another adult son. On plaintiff's claim against the private foster care agency for negligently screening the foster parent's home, placing plaintiff there, and monitoring plaintiff's placement, the trial court granted nonsuit finding no evidence that the private foster care agency owed plaintiff a duty to protect against the foster parent's two adult sons because their sexual abuse was not foreseeable or imminent.

> Here, there is no real dispute that Children's Institute had a special relationship with Doe. However, nonsuit was properly granted as there was no evidence from which the jury could reasonably infer Children's Institute knew Doe had contact with [the adult sons of the foster parent], much less that the [adult sons] possessed criminal propensities that posed a risk to Doe. … Because there was no evidence showing Defendants had actual knowledge of the [adult sons'] criminal tendencies or that they posed any risk of harm, their conduct was not foreseeable. Children's Institute thus did not owe Doe an affirmative duty to protect her from the [adult sons].

(*Doe*, *supra*, 37 Cal.App.5th at p. 683.)

As against the defendant county and the county social worker, the *Doe* court's "conclusion that there was insufficient evidence of foreseeability applies equally to the negligence claim against [the county social worker] as it does to [the private foster care agency]." (*Id.* at p. 687, fn. 8.)

Although *Doe* involves a motion for nonsuit, it is nevertheless instructive. "A motion for nonsuit has the effect of a demurrer to the evidence: it concedes the truth of the facts presented by the plaintiff, but contends those facts are insufficient as a matter of law to establish a prima facie case." (*Conte v. Girard Orthopaedic Surgeons Medical Group, Inc.* (2003) 107 Cal.App.4th 1260, 1266.) Similarly, in ruling on a demurrer to a complaint, the court treats the demurrer as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of law." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

Defendant County contends, even if there is a special relationship between plaintiff Holys and defendant County, there are no specific allegations that defendant County had prior actual knowledge, and thus must have known, of Perpetrator's assaultive propensities. Instead, plaintiff Holys makes generic allegations that "Defendants knew, or in the exercise of reasonable care should have known, that the foster home in which Defendants placed Plaintiff was unsafe" and "Defendants knew, or had reason to know, or were otherwise on notice, of misconduct by Perpetrator that created a risk of childhood sexual assault and/or abuse against Plaintiff" and "Defendants knew or should have known that Perpetrator was unfit, dangerous, and a threat to the health, safety, and welfare of minors entrusted to Defendants' care" and "Defendants knew, or had reason to know, or were otherwise on notice of sexual assault and abuse of Plaintiff by Perpetrator." (FAC, ¶¶30, 31, 34, and 36.)

However, the only specific factual allegations made by plaintiff Holys are that "Plaintiff's other foster parent walked in while Plaintiff was being sexually abused by Perpetrator;" "the foster home was filthy and had only

one bed;" "Plaintiff was regularly bruised and dirty with inadequate clothing during Social Worker visits, and Plaintiff reported to Defendants that he was not being given enough food and that he was regularly locked in the garage and had to wear dirty clothing to school;" "Foster Parents also stopped taking Plaintiff to [medical] appointments;" and "Perpetrator forced Plaintiff to write a letter to the Social Worker stating that he was not being abused."

From these allegations, plaintiff Holys contends the court can infer that the social worker had notice and strong suspicion of severe abuse. Plaintiff concedes, however, these allegations amount to "***constructive*** notice of the abuse."[5] Yet, as defendant County argues and as the *Doe* court requires, a plaintiff must be able to establish and allege the defendant had ***actual*** knowledge of the offender's assaultive propensities. Moreover, since plaintiff is complaining of sexual abuse, plaintiff Holys must allege defendant County's actual knowledge of Perpetrator's sexually assaultive propensities, not just generally assaultive propensities. Plaintiff Holys has not done so here.

As to the second cause of action for breach of mandatory duty, the *Doe* court granted nonsuit because there was insufficient evidence that the breach of a mandatory duty was a proximate cause of the injury suffered. Just like plaintiff Holys here, the plaintiff in *Doe* asserted a claim that the defendant county breached mandatory duties to visit her at the foster home at least three times in the first 30 days of her placement; failed to conduct monthly visits; and failed to report plaintiff's statutory rape despite knowing she was pregnant by an 18 year old. The court found it "pure speculation to conclude the sexual abuse would not have occurred had" the county social worker fulfilled her mandatory duties and met with the plaintiff additional times. (*Doe*, *supra*, 37 Cal.App.5th at p. 688.) Additionally, the court held that the county social worker's failure to report plaintiff's pregnancy as statutory rape was the proximate cause of plaintiff's injury "as the injury had already occurred by the time she asserts it should have been reported." (*Id.* at p. 688.)

In light of the requirement for specificity for pleading statutory claims, defendant County contends plaintiff Holys has not sufficiently alleged facts to support the generic allegation that his injuries were proximately caused by defendant County's failure to discharge mandatory duties. (FAC, ¶¶72 – 73.) Plaintiff Holys does not address this particular argument in opposition.

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

IV. Tentative Ruling.

The tentative ruling was duly posted.

V. Case Management.

The Case Management Conference currently set for 19 March 2024 is VACATED and RESET to 25 June 2024 at 10:00 AM in Department 20.

///

///

///

[5] See page 4, line 7 of Plaintiff's Opposition to Defendant County of Santa Clara's Demurrer to First Amended Complaint.

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

_____ _____

DATED: **HON. SOCRATES PETER MANOUKIAN**
Judge of the Superior Court
County of Santa Clara

---oooOooo---

Calendar Line 3

---oooOooo---

Calendar Line 4

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 20

161 North First Street, San Jose, CA 95113
408.882.2320 · 408.882.2296 (fax)
smanoukian@scscourt.org
http://www.scscourt.org

(For Clerk's Use Only)

CASE NO.: 23CV416723 **Steven Nemec v. Dishnet Direct, Inc., et al.**
DATE: 18 January 2024 **TIME: 9:00 am** **LINE NUMBER: 04, 05**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 17 January 2024. Please specify the issue to be contested when calling the Court and Counsel.

---oooOooo---

Orders on:
(1) Defendants' Demurrer To Portions Of Plaintiff's First Amended Complaint; and
(2) Defendants' Motion To Strike Portions Of Plaintiff's First Amended Complaint.

I. Statement of Facts.

On or about 22 November 2022, at approximately 3:50pm, plaintiff Steven Nemec ("Nemec") and defendant Said Arnoldo Mejia ("Mejia") were both operating motor vehicles westbound on Montague Expressway, west of Great Mall Parkway but east of McCandless Drive. (First Amended Complaint ("FAC"), ¶8.) Defendant Mejia was operating a commercial vehicle registered to defendant Dishnet Direct, Inc. ("Dishnet") and operated with the permission and consent of defendant Elia Victor Betbadal ("Betbadal"), Chief Executive Officer of defendant Dishnet. (FAC, ¶¶3 and 9.)

Defendant Betbadal and others, including defendant Mejia, were engaged in operating defendant Dishnet on the date of the incident and continuing thereafter. (FAC, ¶10.) At the above date, time, and location, defendant Mejia was utilizing an electronic wireless communications device. (FAC, ¶11.) On or about 22 November 2022, defendant Mejia, while operating defendant Dishnet's vehicle, intentionally collided and struck plaintiff Nemec multiple times. (FAC, ¶12.)

On 30 May 2023[6], plaintiff Nemec, a self-represented litigant[7], filed a complaint against defendants Dishnet, Betbadal, and Mejia.

---

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

[7] Although a judge should ensure that self-represented litigants are not being misled or unfairly treated (see *Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1284), self-represented litigants are not entitled to special treatment with regard to the Rules of Court or Code of Civil Procedure. "[W]e cannot disregard the applicable principles of law and accord defendant any special treatment because he instead elected to proceed in propria persona. [Citations.]" (*Stein v. Hassen* (1973) 34 Cal. App. 3d 294, 303.) "A litigant has a right to act as his own attorney [citation] 'but, in so doing, should be restricted to the same rules

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

(1) Assault/ Battery

(2) Negligence

(3) Intentional Infliction of Emotional Distress

(4) Unlawful Business Practices

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

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

II. Analysis.

A. Procedural violation.

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

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

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

1. First cause of action – Assault/ Battery.

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

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

---

of evidence and procedure as is required of those qualified to practice law before our courts.'" (*Lombardi v. Citizens Nat'l Trust & Sav. Bank* (1955) 137 Cal.App.2d 206, 208-209.)

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

Next, Moving Defendants contend plaintiff Nemec fails to identify what "harmful or offensive contact" occurred. In the court's review of the FAC, plaintiff Nemec alleges, in relevant part, "intentional collisions striking Plaintiff multiple times, by Defendant MEJIA while operating Defendant [ERRC's] vehicle." (See FAC, ¶¶12, 14, 26, 28, 29, and 30.) Although not entirely clear, Moving Defendants also appear to argue that there is no harmful or offensive contact "outside of the vehicle Mr. MEJIA drove collided with Plaintiff's vehicle."[8] The court understands Moving Defendants to be arguing that there was no harmful or offensive contact apart from the parties' vehicles colliding. However,

> the tort of battery generally is not limited to direct body-to-body contact. In fact, the commentary to the Restatement Second of Torts clearly states that the "[m]eaning of 'contact with another's person' " (italics omitted) does not require that one "should bring any part of his own body in contact with another's person. … [One] is liable [for battery] in this Section if [one] throws a substance, such as water, upon the other … ." (Rest.2d Torts, § 18, com. c, pp. 30–31.) Consistent with the Restatement, in *Century Transit*, *supra*, 42 Cal.App.4th 121, the court effectively applied that rule. The insured's employee had struck demonstrators with a flashlight while acting in the scope of employment, and the court still applied the "Assault or Battery" exclusion even though no direct body-to-body contact occurred. (*Id.* at p. 130.)

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

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

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

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

The *Maria D.* court relied, in part, on the Supreme Court decision in *Lisa M.* where the plaintiff was sexually molested by an ultrasound technician employed by a hospital. The rule set forth in *Lisa M.* begins with determining whether "the assault or other intentional tort [had] 'a causal nexus' to the employee's work." (*Maria D.*,

---

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

supra, 85 Cal.App.4th at p. 143.) "In the Supreme Court's view, the required causal nexus was to be distinguished from 'but for' causation and it was not enough that the employment brought the tortfeasor and the victim together. The nature of the required additional link has been described in various ways: '[T]he incident leading to injury must be an 'outgrowth' of the employment; the risk of tortious injury must be 'inherent in the working environment' or 'typical of or broadly incidental to the enterprise [the employer] has undertaken.'" (*Id.*; citations omitted.) Alternatively,

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

(*Id.*)

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

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

(*Id.* at p. 147.)

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

In *Lisa M.*, a pregnant plaintiff sustained injury from a fall and sought treatment in defendant hospital's emergency room. The treating physician ordered an ultrasound which was performed by an ultrasound technician, a hospital employee. The technician performed the prescribed examination. "The exact placement and movement of the wand varies with the patient's body type, and on some patients the best images are obtained by passing the wand as much as an inch below the pubic hairline." (*Lisa M.*, *supra*, 12 Cal.4th at p. 295.) Under false pretenses of

determining the sex of the baby, the technician told plaintiff that, "he would need to scan 'much further down,' and it would be uncomfortable. With plaintiff's cooperation, [the technician] pulled plaintiff's shorts down and began to scan in her pubic hair. According to plaintiff, he also inserted the wand in her vagina. After a while he put down the wand and fondled plaintiff with his fingers. Plaintiff testified he moved his fingers 'around everywhere down there.' While fondling plaintiff, Tripoli said he needed to excite her to get a good view of the baby." (*Id.*)

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

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

(*Id.* at p. 301.)

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

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

(*Id.* at pp. 302 – 303.)

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

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

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

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

Moving Defendants argue the conduct alleged here is not extreme or outrageous as a matter of law. "There is no bright line standard for judging outrageous conduct and its generality hazards a case-by-case appraisal of conduct filtered through the prism of the appraiser's values, sensitivity threshold, and standards of civility. The process evoked by the test appears to be more intuitive than analytical." (*Cochran*, *supra*, 65 Cal.App.4th at p. 494; internal quotations omitted.) "Even so, the appellate courts have affirmed orders which sustained demurrers on the ground that the defendant's alleged conduct was not sufficiently outrageous." (*Id.*) The *Cochran* court went on to state, "the mere fact that the actor knows that the other will regard the conduct as insulting, or will have his feelings hurt, is not enough." (*Id.* at p. 496.) "In evaluating whether the defendant's conduct was outrageous, it is not enough that the defendant has acted with an intent which is tortious or even criminal." (*Id.*; internal punctuation omitted.)

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

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

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

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

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

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

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

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

Moving Defendants move to strike plaintiff Nemec's claim for punitive damages. "In California the award of damages by way of example or punishment is controlled by Civil Code section 3294, which authorizes that kind of award against a tortfeasor who has been guilty of 'oppression, fraud or malice, express or implied.'" (*G.D. Searle & Co. v. Superior Court* (1975) 49 Cal.App.3d 22, 26.) "Notwithstanding relaxed pleading criteria, certain tortious injuries demand firm allegations. Vague, conclusory allegations of fraud or falsity may not be rescued by the rule of liberal construction. ***When the plaintiff alleges an intentional wrong, a prayer for exemplary damage may be supported by pleading that the wrong was committed willfully or with a design to injure.***[9] When nondeliberate injury is charged, allegations that the defendant's conduct was wrongful, willful, wanton, reckless or unlawful do not support a claim for exemplary damages; such allegations do not charge malice." (*Id.* at p. 29; internal citations omitted.)

Plaintiff Nemec alleges Mejia "acted, intending to cause harmful or offensive contact." (See FAC, ¶14; see also ¶30—"Defendant MEJIA … intentionally injured Plaintiff… .") This allegation is sufficient to allege malice against defendant Mejia. "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213 – 214.)

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

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

III. Case Management.

The Case Management Conference currently set for 23 January 2024 is VACATED. A Further Case Management Conference will be set for August 06 2024 at 10:00 AM in Department 20.

the parties should commence discovery and discuss alternate dispute resolution. If the parties reach an agreement on ADR, they may submit an application to vacate and reset the next CMC.

---

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

IV. Order.

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

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

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

_____ _____

DATED:

HON. SOCRATES PETER MANOUKIAN
Judge of the Superior Court
County of Santa Clara

---oooOooo---

Calendar Line 5

---oooOooo---

Calendar Line 6

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 20

161 North First Street, San Jose, CA 95113
408.882.2320 · 408.882.2296 (fax)
smanoukian@scscourt.org
http://www.scscourt.org

(For Clerk's Use Only)

CASE NO.: 17CV318915 **Alex Borja, et al. v. James Richard Brown, et al.**

DATE: 18 January 2024 **TIME: 9:00 am** **LINE NUMBER: 7**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 17 January 2024. Please specify the issue to be contested when calling the Court and Counsel.

ORDER ON DEFENDANTS [DIANE STEMBER RICHARDS AND LANCE BROWN'S] MOTION FOR SUMMARY JUDGMENT OR, ALTERNATIVELY, MOTION FOR SUMMARY ADJUDICATION

I. Statement of Facts.

On 1 July 2017, on W. Alma at or near its intersection with W. Vine, in the city of San Jose, defendant James Richard Brown ("Brown") and Doe defendants "so negligently owned, maintained, operated, serviced and repaired" a 2008 Nissan vehicle causing the vehicle to collide with a 1960 Chevrolet operated by plaintiff Alex Borja ("Borja"). (Complaint, ¶GN-1.) Defendants caused plaintiff Borja to suffer serious and permanent injury, lost earnings/ earning capacity, and loss of use of his vehicle. (*Id.*) Plaintiff Eugenia Serrano Borja is and was plaintiff Borja's lawful spouse and has lost the care, comfort, and society of her spouse and incurred financial damage. (*Id.*)

On 9 November 2017[10], plaintiffs Borja and Eugenia Serrano Borja (collectively, "Plaintiffs") filed a Judicial Council form complaint against defendant Brown asserting a single cause of action for General Negligence.

On 27 March 2018, defendant Brown filed an answer to the Plaintiffs' complaint.

On 24 May 2018, Plaintiffs filed several amendments to the complaint substituting Doe defendants including defendants Voeks, Inc. dba Voeks Plumbing Company, Inc. ("Voeks"); Enterprise Plan B Inc. dba Spruce & Pine ("EPB"); Diane Stember Richards ("Richards"); and Lance Brown ("Lance")[11].

On 20 September 2018, defendants EPB, Richards, and Lance jointly filed an answer to the complaint.

On 18 October 2023, defendants Richard and Lance filed the motion now before the court, a motion for summary judgment/ adjudication of Plaintiffs' complaint.

///

---

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

[11] Defendant Lance Brown and defendant James Richard Brown are unrelated. For the sake of clarity, the court will refer to defendant Lance Brown by his first name. The court means no disrespect in doing so.

///

II. Analysis.

B. Defendants Richards and Lance's motion for summary judgment/ adjudication is DENIED.

The only cause of action asserted in Plaintiffs' complaint is for negligence.[12] "The elements of a cause of action for negligence are well established. They are (a) a legal duty to use due care; (b) a breach of such legal duty; [and] (c) the breach as the proximate or legal cause of the resulting injury." (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917; see also CACI, No. 400.)

Although not alleged in the complaint, Plaintiffs apparently contend defendant Brown was en route to a construction site at 1437 Weaver Drive to perform work as a plumbing contractor for defendant EPB when the vehicle defendant Brown drove collided with plaintiff Borja. Defendants Richards and Lance are co-owners of defendant EPB. Defendants Richards and Lance understand their liability to be premised upon an assertion by Plaintiffs that defendant EPB is vicariously liable for the conduct of defendant Brown and defendants Richards and Lance are individually liable under an alter ego theory as owners of defendant EPB. "Alter ego is essentially a theory of vicarious liability under which the owners of a corporation may be held liable for harm for which the corporation is responsible." (*Doney v. TRW, Inc.* (1995) 33 Cal.App.4th 245, 249 (*Doney*).)

In moving for summary judgment/ adjudication, defendants Richards and Lance argue there is no factual basis for applying the alter ego doctrine and holding them individually liable in this case. "In general, the two requirements for applying the alter ego doctrine are that (1) there is such a unity of interest and ownership between the corporation and the individual or organization controlling it that their separate personalities no longer exist, and (2) failure to disregard the corporate entity would sanction a fraud or promote injustice." (*Robbins v. Blecher* (1997) 52 Cal.App.4th 886, 892.)

"Corporate entities are presumed to have separate existences, and the corporate form will be disregarded only when the ends of justice require this result." (*Laird v. Capital Cities/ABC, Inc.* (1998) 68 Cal.App.4th 727, 737; internal citations omitted.) "The alter ego doctrine arises when a plaintiff comes into court claiming that an opposing party is using the corporate form unjustly and in derogation of the plaintiff's interests." (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 300.) The alter ego doctrine "is used to prevent a corporation from using its statutory separate corporate form as a shield from liability." (*Communist Party v. 522 Valencia, Inc.* (1995) 35 Cal.App.4th 980, 993.)

> The doctrine is applicable where some innocent party attacks the corporate form as an injury to that party's interests. The issue is not so much whether the corporate entity should be disregarded for all purposes or whether its very purpose was to defraud the innocent party, as it is whether in the particular case presented, justice and equity can best be accomplished and fraud and unfairness defeated by disregarding the distinct entity of the corporate form.

(*Id.*)

Some of the factors that may be considered in applying the alter ego doctrine include:

> commingling of funds and other assets of the two entities, the holding out by one entity that it is liable for the debts of the other, identical equitable ownership in the two entities, use of the same offices and employees, and use of one as a mere shell or conduit for the affairs of the other. Other factors which have been described in the case law include inadequate capitalization, disregard of corporate formalities, lack of segregation of corporate records, and

---

[12] "While the losses for which damages are sought in a consortium action may properly be characterized as 'separate and distinct' from the losses to the physically injured spouse [Citation.], the former are unquestionably dependent, legally as well as causally, on the latter. One spouse cannot have a loss of consortium claim without a prior disabling injury to the other spouse." (*Snyder v. Michael's Stores, Inc.* (1997) 16 Cal.4th 991, 999; see also *Danieley v. Goldmine Ski Associates* (1990) 218 Cal.App.3d 111, 119.) Plaintiff Eugenia Serrano Borja's loss of consortium claim is, therefore, dependent upon plaintiff Alex Borja's claim for negligence.

identical directors and officers. No one characteristic governs, but the courts must look at all the circumstances to determine whether the doctrine should be applied.

(*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538 – 539 (*Sonora*); internal quotation marks and citations omitted; see also *Associated Vendors, Inc. v. Oakland Meat Co.* (1963) 210 Cal.App.2d 825, 838 – 840 (*Associated*).)

The court in *Associated* sets forth a list of factors that a court may look at in determining whether to disregard the corporate form.

> A review of the cases which have discussed the problem discloses the consideration of a variety of factors which were pertinent to the trial court's determination under the particular circumstances of each case. Among these are the following: Commingling of funds and other assets, failure to segregate funds of the separate entities, and the unauthorized diversion of corporate funds or assets to other than corporate uses; the treatment by an individual of the assets of the corporation as his own; the failure to obtain authority to issue stock or to subscribe to or issue the same; the holding out by an individual that he is personally liable for the debts of the corporation; the failure to maintain minutes or adequate corporate records, and the confusion of the records of the separate entities; the identical equitable ownership in the two entities; the identification of the equitable owners thereof with the domination and control of the two entities; identification of the directors and officers of the two entities in the responsible supervision and management; sole ownership of all of the stock in a corporation by one individual or the members of a family; the use of the same office or business location; the employment of the same employees and/or attorney; the failure to adequately capitalize a corporation; the total absence of corporate assets and undercapitalization; the use of a corporation as a mere shell, instrumentality or conduit for a single venture or the business of an individual or another corporation; the concealment and misrepresentation of the identity of the responsible ownership, management and financial interest, or concealment of personal business activities; the disregard of legal formalities and the failure to maintain arm's length relationships among related entities; the use of the corporate entity to procure labor, services or merchandise for another person or entity; the diversion of assets from a corporation by or to a stockholder or other person or entity, to the detriment of creditors, or the manipulation of assets and liabilities between entities so as to concentrate the assets in one and the liabilities in another; the contracting with another with intent to avoid performance by use of a corporate entity as a shield against personal liability, or the use of a corporation as a subterfuge of illegal transactions; and the formation and use of a corporation to transfer to it the existing liability of another person or entity.

(*Associated*, *supra*, 210 Cal.App.2d at pp. 838 – 840; internal citations omitted.)

The court in *Claremont Press Publishing Co. v. Barksdale* (1960) 187 Cal.App.2d 813, 817 held, "Whether the facts are sufficient to warrant disregard of the corporate entity is largely a question for the trial court." One treatise author is in agreement with this statement.

> It is a fundamental rule that the conditions under which the corporate entity may be disregarded, or the corporation be regarded as the alter ego of the stockholders, necessarily vary according to the circumstances in each case inasmuch as the doctrine is essentially an equitable one and for that reason is particularly within the province of the trial court.

(Marsh, Marsh's California Corporation Law (4th ed. 2004 Supp.) §16.06[A], p. 16-67 citing *Associated Vendors, Inc. v. Oakland Meat Co.* (1963) 210 Cal.App.2d 825 and *Stark v. Coker* (1942) 20 Cal.2d 839, 846.)

Defendants Richards and Lance themselves acknowledge, "Whether alter ego applies is a question of fact which necessarily varies according to the circumstances of each case." (*Institute of Veterinary Pathology, Inc. v. California Health Laboratories, Inc.* (1981) 116 Cal.App.3d 111, 119; see also *Hasso v. Hapke* (2014) 227 Cal.App.4th 107, 155; see also *Claremont Press Publishing Co. v. Barksdale* (1960) 187 Cal.App.2d 813, 817— "Whether the facts are sufficient to warrant disregard of the corporate entity is largely a question for the trial court.")

In support of their motion for summary judgment/ adjudication, defendants Richards and Lance proffer the following facts which they contend preclude application of the alter ego doctrine: defendant EPB has been a California S-Corp in good standing since its incorporation in 2014.[13] Defendant EPB was created for the purpose of purchasing, renovating, and selling residential properties.[14] Defendant EPB was not established to defraud or otherwise mislead people into believing that it was something other than a company that engaged in these activities.[15] Defendant EPB is not (and has never been) a mere shell company or conduit for a single venture, but rather engages in regular business within its stated field.[16] Defendant EPB holds annual meetings and files appropriate documentation with the State of California relating to such meetings.[17] Defendant Lance is defendant EPB's President and CEO.[18] Defendant Richards is a Director.[19] Defendants Richards and Lance each owns 50% of defendant EPB.[20] Defendant EPB remains completely separate from defendants Lance and Richards as individuals.[21] In addition to its incorporation as a separate entity, defendant EPB maintains its own bank accounts, obtains its own bank loans, and has never commingled its funds with personal funds of defendants Richards or Lance.[22] Defendant EPB has always had sufficient funds to pay its debts and meet its financial obligations.[23] Defendant EPB has filed taxes in its own name every year since incorporation, which are paid separately from the taxes paid individually by defendants Richards and Lance.[24] Defendant EPB maintains its own general liability insurance policy and commercial property coverage.[25]

Plaintiffs have no evidence that defendants Richards or Lance ever personally guaranteed any debts owed by defendant EPB.[26] Plaintiffs have no knowledge of whether defendant EPB held regular shareholder or director's meetings since its formation in 2014.[27] Plaintiffs have no knowledge of whether defendant EPB issued stock to its shareholders when it was formed in 2014.[28] Plaintiffs have no knowledge of whether defendant EPB elected corporate officers.[29] Plaintiffs have no knowledge of whether defendant EPB kept corporate minutes since it was formed in 2014.[30] Plaintiffs have no knowledge of whether defendant EPB maintained its own bank account, separate from accounts owned by defendants Richards and Lance, since it was formed in 2014.[31] Plaintiffs have

---

[13] See Separate Statement of Undisputed Facts in Support of Defendants' Motion for Summary Judgment or, Alternatively, Motion for Summary Adjudication ("Defendants' SSUF"), Fact No. 1.

[14] See Defendants' SSUF, Fact No. 2.

[15] See Defendants' SSUF, Fact No. 3.

[16] See Defendants' SSUF, Fact No. 4.

[17] See Defendants' SSUF, Fact No. 5.

[18] See Defendants' SSUF, Fact No. 6.

[19] See Defendants' SSUF, Fact No. 7.

[20] See Defendants' SSUF, Fact No. 8. "Mere ownership of all the stock and control and management of a corporation by one or two individuals is not ***of itself*** sufficient to cause the courts to disregard the corporate entity." (*Meadows v. Emett & Chandler* (1950) 99 Cal.App.2d 496, 499; emphasis added.)

[21] See Defendants' SSUF, Fact No. 9.

[22] See Defendants' SSUF, Fact No. 10.

[23] See Defendants' SSUF, Fact No. 11.

[24] See Defendants' SSUF, Fact No. 12.

[25] See Defendants' SSUF, Fact No. 13.

[26] See Defendants' SSUF, Fact Nos. 14 – 16.

[27] See Defendants' SSUF, Fact Nos. 17 – 18.

[28] See Defendants' SSUF, Fact No. 19.

[29] See Defendants' SSUF, Fact No. 20.

[30] See Defendants' SSUF, Fact No. 21.

[31] See Defendants' SSUF, Fact Nos. 22 – 23.

no knowledge of whether defendant EPB ever diverted its funds to Richards and Lance.[32] Plaintiffs have no evidence suggesting defendants Richards or Lance held themselves out as personally liable for the corporate debts of defendant EPB.[33] Plaintiffs have no evidence suggesting defendant EPB ever concealed or misrepresented the identity of its corporate ownership.[34] Plaintiffs admit defendant EPB hired defendant Brown to perform plumbing services at 1437 Weaver Drive.[35] Plaintiffs admit defendant EPB owned 1437 Weaver Drive and defendants Richards and Lance never owned the property.[36]

In opposition, Plaintiffs begin by asserting, essentially, that the alter ego doctrine is not dispositive since defendants Richards and Lance (and EPB) are individually and ***directly*** liable for their negligence in hiring and supervision defendant Brown. However, this argument raises issues which go beyond the scope of the operative complaint. Plaintiffs' complaint alleges, in relevant part, only that Doe defendants (including defendants EPB, Lance, and Richards) "so negligently owned, maintained, operated, serviced and repaired" a 2008 Nissan vehicle causing the vehicle to collide with a 1960 Chevrolet operated by plaintiff Borja. (Complaint, ¶GN-1.) The pleadings serve as the "outer measure of materiality" in a summary judgment/ adjudication motion, and the motion may not be granted or denied on issues not raised by the pleadings. (See *Government Employees Ins. Co. v. Sup. Ct.* (2000) 79 Cal App 4th 95, 98; *Laabs v. City of Victorville* (2008) 163 Cal App 4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health Ins.* (2010) 181 Cal App 4th 60, 73—"the pleadings determine the scope of relevant issues on a summary judgment motion.") Since negligent hiring and/or supervision are not theories of liability pleaded in the complaint, the court will not deny the motion for summary judgment/ adjudication based on the assertion of such issues.

Plaintiffs argue next that defendant Brown was acting in the course and scope of his employment with defendant EPB thereby subjecting defendant EPB to vicarious liability under the doctrine of respondeat superior. However, the argument advanced by defendants Richards and Lance in moving for summary judgment/ adjudication assumes, for purposes of argument, that defendant EPB is vicariously liable for the conduct of defendant Brown in colliding with plaintiff Borja. The thrust of defendants Richards and Lance's argument is that, even so, defendants Richards and Lance are not individually liable under an alter ego doctrine. Plaintiffs' argument in opposition concerning defendant EPB's liability under the doctrine of respondeat superior is irrelevant.

Thereafter, plaintiffs confront defendants Richard and Lance's argument by asserting that there are facts which present a triable issue with regard to whether the alter ego doctrine applies. As noted earlier, there are a number of factors the court may consider in determining whether there is a unity of ownership and interest between the corporation and the individual(s). One such factor is "the failure to maintain minutes or adequate corporate records." Plaintiffs proffer evidence in opposition which the court finds the existence of a triable issue of material fact. Namely, plaintiffs present evidence which is at least suggestive that defendants Richards and Lance failed to maintain contemporaneous minutes or adequate corporate records and, instead, prepared such minutes/ records only after this litigation commenced. (See Plaintiffs' Separate Statement of … Undisputed [Additional] Material Facts in Opposition to Defendants['] Motion for Summary Judgment, etc. ("Plaintiffs' AMF"), Fact Nos. 16 – 17 and 19.) While defendants may counter that there is more evidence or more factors in their favor, "[t]he trial court may not weigh the evidence in the manner of a fact finder to determine whose version is more likely true." (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 840.)

Defendants Richards and Lance argue, nevertheless, that the second requirement for application of the alter ego doctrine ["failure to disregard the corporate entity would sanction a fraud or promote injustice"] is also absent.

---

[32] See Defendants' SSUF, Fact Nos. 24 – 25.

[33] See Defendants' SSUF, Fact Nos. 26 – 27.

[34] See Defendants' SSUF, Fact No. 28.

[35] See Defendants' SSUF, Fact No. 29.

[36] BJ

> while the doctrine does not depend on the presence of actual fraud, it is designed to prevent what would be fraud or injustice, if accomplished. Accordingly, bad faith in one form or another is an underlying consideration and will be found in some form or another in those cases wherein the trial court was justified in disregarding the corporate entity.

(*Clejan v. Reisman* (1970) 5 Cal.App.3d 224, 239.)

> It is not sufficient that the plaintiff will not be able to collect if the corporate veil is not pierced. "In almost every instance where a plaintiff has attempted to invoke the doctrine he is an unsatisfied creditor. The purpose of the doctrine is not to protect every unsatisfied creditor, but rather to afford him protection, where some conduct amounting to bad faith makes it inequitable . . . for the equitable owner of a corporation to hide behind its corporate veil." (*Associated Vendors, Inc. v. Oakland Meat Co.*, *supra*, 210 Cal.App.2d 825, at p. 842.)

(*Roman Catholic Archbishop v. Superior Court* (1971) 15 Cal.App.3d 405, 412. See also *VirtualMagic Asia, Inc. v. Fil-Cartoons, Inc.* (2002) 99 Cal.App.4th 228, 245—"even if the unity of interest and ownership element is shown, alter ego will not be applied absent evidence that an injustice would result from the recognition of separate corporate identities, and '[d]ifficulty in enforcing a judgment or collecting a debt does not satisfy this standard.' [Citation.]".)

Defendants Richards and Lance assert there has been no bad faith conduct on their part to warrant application of the alter ego doctrine. To support this assertion, defendants Richards and Lance again point to the fact that defendant EPB incorporated in 2014, years before the incident which gave rise to this case, and has only engaged in its stated field of purchasing, renovating, and selling residential properties. The court is not persuaded that such facts are sufficient for defendants Lance and Richards to meet their initial burden. Some of the factors identified above from *Associated*, *supra*, 210 Cal.App.2d at pp. 839 – 840 (internal citations omitted) are more directly relevant to the issue of bad faith. For instance,

> the use of a corporation as a mere shell, instrumentality or conduit for a single venture or the business of an individual or another corporation; the concealment and misrepresentation of the identity of the responsible ownership, management and financial interest, or concealment of personal business activities; the disregard of legal formalities and the failure to maintain arm's length relationships among related entities; the use of the corporate entity to procure labor, services or merchandise for another person or entity; the diversion of assets from a corporation by or to a stockholder or other person or entity, to the detriment of creditors, or the manipulation of assets and liabilities between entities so as to concentrate the assets in one and the liabilities in another; the contracting with another with intent to avoid performance by use of a corporate entity as a shield against personal liability, or the use of a corporation as a subterfuge of illegal transactions; and the formation and use of a corporation to transfer to it the existing liability of another person or entity.

Defendants Richards and Lance's evidence is insufficient to demonstrate that the second requirement for application of the alter ego doctrine cannot be established.[37] The evidence defendants Richards and Lance cite to do not affirmatively establish good faith conduct on their part. Even if defendants had met their initial burden, plaintiffs proffer evidence in opposition to show that defendant Lance misrepresented the identity of responsible ownership of the Weaver property which defendants Richards and Lance assert was, undisputedly, owned by defendant EPB. (See Plaintiffs' AMF, Fact Nos. 2, 3, 6, and 9; see Defendants' SSUF, Fact No. 30.) As one of the factors to be considered in determination of the bad faith element of the alter ego doctrine, this presents a triable issue of material fact.

Accordingly, defendants Richard and Lance's motion for summary judgment or, alternatively, motion for summary adjudication is DENIED.

---

[37] "A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if the party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established…." (Code Civ. Proc., §437c, subd. (p)(2).)

III. Order.

Defendants Richard and Lance's motion for summary judgment or, alternatively, motion for summary adjudication is DENIED.

_____-
_____
DATED:

_____-
_____
HON. SOCRATES PETER MANOUKIAN
Judge of the Superior Court
County of Santa Clara

---oooOooo---

Calendar Line 7

---oooOooo---

Calendar Line 8

---oooOooo---

Calendar Line 9

---oooOooo---

Calendar Line 10

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

DEPARTMENT 20

161 North First Street, San Jose, CA 95113
408.882.2320 · 408.882.2296 (fax)
smanoukian@scscourt.org
http://www.scscourt.org

(For Clerk's Use Only)

CASE NO.: 23CV418944 **Zane Ali; Natalin Benitez vs Normandin's d.b.a. etc. et**
DATE: 18 January 2024 **TIME: 9:00 am** **LINE NUMBER: 10, 11, 12,**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 17 January 2024. Please specify the issue to be contested when calling the Co and Counsel.

---oooOooo---

Order on Motions of Plaintiffs to Compel Defendant Normandin's To Provide Further Responses to Discovery Requests.

The facts of this case are adequately discussed in the related motion of defendant Normandin's To Compel Binding Contractual Arbitration, Line #15 on today's calendar.

In brief, plaintiff propounded set of written discovery, consisting of requests for admission, requests for production of documents, form and special interrogatories. Defendant served objections to preserve them but did not provide substantive responses in order avoid any possibility of Defendant's action being considered engaging in "the machinery of litigation", as that term is used to support a claim that the party seeking to compel arbitration has waived the right to compel arbitration.

In support of this proposition, defendant Normandin's points out that the prior owner of the Cadillac Escalade in question went to the Whittier Police Department on his own and was surprised to learn that the vehicle was in an automobile accident but not while he owned it. Normandin's cites ***St. Agnes Medical Center v. PacifiCare of California*** (2003) 31 Cal.4th 1187, 1196[38], for the proposition that investigations such as describing invoking discovery procedures "not available in arbitration" and invocation of the "litigation machinery" as potentially constituting a waiver of the right to compel arbitration. (Supra at 1196.)

Normandin's makes the point that had it responded to the discovery in question, plaintiffs may have used those responses to support a claim that Normandin's waived the contractual arbitration.

A chronology might be useful:

12 July 2023: Plaintiffs filed a complaint.

14 August 2023: Normandin's answers the complaint.

28 August 2023: Plaintiffs served discovery requests upon Normandin's.

---

[38] Since this Court does try to read the authorities cited by counsel, it will correct incorrect citations.

22 September 2023: defense counsel emails counsel for plaintiffs that the prior owner of the Cadillac, Mr. John Boggs, was unaware that the vehicle was involved in an accident while he owned it. Defense counsel also referred to the arbitration clause in the subject sales contract and informed plaintiffs'counsel that it was exercising its right to demand arbitration and whether plaintiffs will agree to binding arbitration.

29 September 2023: Defendant served boilerplate objections, including "(12) This discovery is barred by the arbitration clause in the applicable contract."

17 October 2023: Counsel for plaintiff wrote an email dated to defense counsel demanding further responses within 10 days to avoid discovery motions. Concerning arbitration, counsel for plaintiffs stated that defendant had not provided a copy of the arbitration clause it alleges governs the claims and took issue with an apparent assertion that the arbitration clause precluded discovery.

15 November 2023: Plaintiffs filed the current discovery motions.

20 November 2023: Normandin's filed the petition to compel arbitration.

This Court suggests that the parties read Association of Business Trial Lawyers Report (Northern California Chapter) Volume 29, number 1 (Summer 2022) ON DISCOVERY: The Art of "Meet & Confer."

https://abtl.org/northerncalifornia/abtlreport/on-discovery/

The moving papers show an insufficient attempt to "Meet & Confer" with defense counsel prior to the filing of this motion. The attempts to "Meet & Confer" look more like a series of "drive-by shootings" than serious attempts to "Meet & Confer."

This Court believes that boilerplate objections to discovery requests asserted by the defense here are improper save for perhaps objections based on attorney-client privilege or work product when supported by an appropriate privilege log.

Notwithstanding the objections, this Court is sympathetic to the idea of resolving the arbitration question which is also being done today.

In ***St. Agnes Medical Center v. PacifiCare of California***, supra, the Supreme Court held that filing by the defendant of a separate lawsuit in another county did not repudiate the health services contract. Certainly the commencement of discovery falls within that criteria.

The motion of plaintiffs to compel defendant Normandin's to provide further responses is GRANTED and DENIED as follows: Defendant is ordered to reserve proper responses without boilerplate objections. If new information comes up that might cause the defense to change a response, well-known rules of professionalism would suggest that the defense voluntarily amends their responses.

DATED:

HON. SOCRATES PETER MANOUKIAN
Judge of the Superior Court
County of Santa Clara

---oooOooo---

Calendar Line 11

---oooOooo---

Calendar Line 12

---oooOooo---

Calendar Line 13

---oooOooo---

Calendar Line 14

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

DEPARTMENT 20

161 North First Street, San Jose, CA 95113
408.882.2320 · 408.882.2296 (fax)
smanoukian@scscourt.org
http://www.scscourt.org

(For Clerk's Use Only)

CASE NO.: 23CV418944 **Zane Ali; Natalin Benitez vs Normandin's d.b.a. etc. et al.**
DATE: 18 January 2024 **TIME: 9:00 am** **LINE NUMBER: 14**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 17 January 2024. Please specify the issue to be contested when calling the Court and Counsel.

---oooOooo---

Order on Petition of Defendant Normandin's etc. to Compel Arbitration.

I. Statement of Facts.

Plaintiff filed this complaint on 12 July 2023.[39] Plaintiff alleges that on 31 July 2022, plaintiff purchased a 2019 Cadillac Escalade.

The complaint alleges that the purchase price of the Cadillac was $103,797.50. Prior to the purchase, plaintiff asked if the car had been in an accident or sustained damage. Normandin told the plaintiff that the Cadillac had not been involved in an accident and gave a CarFax report as proof.

After the purchase, Normandin assigned the purchase contract to Wells Fargo making the bank a holder of the contract.

Plaintiff discovered that the car had been in an accident and had sustained structural damage. Plaintiff would not have purchased the Cadillac if he had known about the prior accident and damage. Plaintiff alleges causes of action for:

1. Violation of the Consumers Legal remedies Act, Civil Code § 1750, et seq.;
2. Fraud & Deceit;
3. Negligent Misrepresentation;
4. Breach of the Implied Warranty of Merchantability; . Defense counsel informed plaintiff that

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

5. Violation of the Unfair Competition Law***, Business & Professions Code***, § 17200, et seq.; and

6. Violation of ***Vehicle Code***, § 11711.

Normandin answered the complaint on 14 August 2023. Wells Fargo answered the complaint on 07 September 2023. It does not appear that defendant Federated Mutual Insurance has answered the complaint.

II. Motion To Compel Arbitration.

On 20 November 2023, defendant Normandin filed the current petition to compel arbitration,[40] claiming that plaintiffs signed a contract entitled " retail installment sale contract—simple finance charge (with arbitration provision). this contract included a binding arbitration clause requiring the parties to resolve any disputes concerning the sale of the vehicle by arbitration if either party so elects. Defendant elected arbitration but plaintiffs have refused to comply.

Plaintiffs oppose the motion to compel arbitration. They contend that defendants waived arbitration by delaying the filing of the petition for 128 days and only after plaintiff filed four motions to compel discovery responses. Second, plaintiffs contend that the arbitration provision is unconscionable because the terms of the provision took away plaintiff's right to select the arbitration forum. Third, plaintiffs contend that defendant is forcing plaintiff to arbitrate with the cheapest possible option instead of accepting plaintiff's preferred provider, JAMS.

III. Analysis.

A. Arbitration in General

"Although California has a strong policy favoring arbitration (see *Moncharsh v.* ***Heily & Blase*** (1992) 3 Cal.4th l, 9; ***Luster v. Collins*** (1993) 15 Cal.App.4th 1338, 1344), our courts also recognize that the right to pursue claims in a judicial forum is a substantial right and one not lightly to be deemed waived. (***Lawrence v. Walzer & Gabrielson*** (1989) 207 Cal.App.3d 1501, 1507; ***Chan v. Drexel Burnham Lambert, Inc.*** (1986) 178 Cal.App.3d 632, 643.)

Because the parties to an arbitration clause surrender this substantial right, the general policy favoring arbitration cannot replace an agreement to arbitrate. (***Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co.*** (1992) 6 Cal.App.4th 1266, 1271; ***American Home Assurance Co. v. Benowitz*** (1991) 234 Cal.App.3d 192, 200.) Thus, the right to compel arbitration depends upon the contract between the parties, (***Blatt v. Farley*** (1990) 226 Cal.App.3d 621, 625; ***Baker v. Sadick*** (1984) 162 Cal.App.3d 618, 623) and a party can be compelled to submit a dispute to arbitration only where he has agreed in writing to do so. (***Boys Club of San Fernando Valley v. Fidelity & Deposit Co.***, *supra*, 6 Cal.App.4th at p. 1271.) The agreement to arbitrate need not be contained in the contract at issue but may be contained in a collateral document which is incorporated by reference. (*Ibid.*; ***Chan v. Drexel Burham Lambert, Inc.***, *supra*, 178 Cal.App.3d at p. 639.)" (See generally ***Marsch v. Williams*** (1994) 23 Cal.App.4th 250, 254-255.)[41]

Under ***Code of Civil Procedure***, § 1281.2, a court shall order parties to arbitrate if it determines that an agreement to arbitrate exists, unless it finds that (a) the right to compel arbitration has been waived by the moving party, (b) grounds exist for revocation of the agreement, or (c) a party to the arbitration is also a party to a pending court action with a third party arising out of the same transaction. (***Sargon Enterprises, Inc. v. Browne George Ross LLP*** (2017) 15 Cal.App.5th 749, 762.)

Thus, a party seeking to compel arbitration meets its burden by "providing the existence of a valid arbitration agreement by the preponderance of the evidence[.]" (***Engella v. Permanente Med. Grp., Inc.*** (1997)

---

[40] The arbitration agreement is contained in the moving papers, page 3, line 16 to page 5, line 1.

[41] In ***Marsch***, the Court of Appeal held that the trial properly denied defendant's motion to compel arbitration since the agreement contained no arbitration provision and no collateral document containing one was ever incorporated by reference into the agreement.

15 Cal.4th 951, 972 (1997). The inquiry concludes upon the demonstration 0f the existence of an arbitration agreement; questions of the agreement's scope "are for the arbitrators and not for the court to resolve." (***Felner v. Meritplan Ins. Co.*** (1970) 6 Cal.App.3d 540, 543.)

Once that initial burden is met, the burden shifts to the party opposing arbitration, who must establish one of the limited statutory exceptions to arbitrability in sections 1281.2(a)-(d).) (***Engella v. Permanente Med. Grp., Inc***., supra.)

The right to arbitration depends upon the terms of the contract-a petition to compel arbitration is simply a suit in equity seeking specific performance of that contract. (***Fontana Teachers Assn. v. Fontana United School Dist.*** (1988) 201 Cal.App.3d 1517, 1521; ***Brock v. Kaiser Foundation Hospitals*** (1992) 10 Cal.App.4th 1790, 1795.) Where the agreement is interpreted based on undisputed evidence, the interpretation of the agreement becomes a question of law and we must make an independent determination of its meaning. (***Service Employees Internat. Union v. City of Los Angeles*** (1996) 42 Cal.App.4th 1546, 1552-1553; ***Vianna v. Doctors' Management Co.*** (1994) 27 Cal.App.4th 1186, 1189; ***Valsan Partners Limited Partnership v. Calcor Space Facility, Inc.*** (1994) 25 Cal.App.4th 809, 817.) (See generally ***United Public Employees v. City and County of San Francisco*** (1997) 53 Cal.App.4th 1021, 1026.)

B. Interpretation Of The Arbitration Contract.

Civil Code, § 1636 states that "[a] contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." The scope of the matters covered by an arbitration agreement is to be determined by the agreement itself. (***Pacific Investment Co. v. Townsend*** (1976) 58 Cal.App.3d 1, 10.) "Courts should indulge every intendment to give effect to such proceedings (***Lewsadder* v. *Mitchum, Jones & Templeton, Inc.*** (1973) 36 Cal.App.3d 255, 259) and order arbitration unless it can be said with assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." (***Pacific Inv. Co. v. Townsend*** (1976) 58 Cal.App.3d 1, 9-10.)

C. Modification of Arbitration Contracts.

In ***Armendariz*** [***v. Foundation Health Psychcare Services, Inc.***, 24 Cal.4th 83], the court reviewed the principles regarding the severance of illegal terms from an arbitration agreement rather than voiding the entire contract. The first reason is to prevent parties from gaining undeserved benefit or suffering undeserved detriment as a result of voiding the entire agreement, particularly where there has been full or partial performance of the contract. Second, the doctrine of severance attempts to conserve a contractual relationship if to do so would not be condoning an illegal scheme. The overarching inquiry is whether the interests of justice would be furthered by severance. (***Armendariz,*** supra at 123-124.)

> "In ***Armendariz***, we found two factors weighed against severance of the unlawful provisions. First, the arbitration agreement contains more than one unlawful provision; it has both an unlawful damages provision and an unconscionably unilateral arbitration clause. Such multiple defects indicate a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage. Second, in the case of the agreement's lack of mutuality, permeation [by an unlawful purpose] is indicated by the fact that there is no single provision a court can strike or restrict in order to remove the unconscionable taint from the agreement. Rather, the court would have to, in effect, reform the contract, not through severance or restriction, but by augmenting it with additional terms. ***Civil Code*** section 1670.5[42] does not authorize such reformation by augmentation, nor does the arbitration statute. ***Code of Civil Procedure*** section 1281.2 authorizes the court to

---

[42] "(a) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. [¶] (b) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination."

refuse arbitration if grounds for revocation exist, not to reform the agreement to make it lawful. Nor do courts have any such power under their inherent limited authority to reform contracts. [Citations.]" (***Armendariz***, supra, 24 Cal.4th at pp. 124-125.)" (***Little v. Auto Stiegler, Inc.*** (2003) 29 Cal.4th 1064, 1074-1075.)

1. Unconscionability.

Plaintiffs contend that the procedural unconscionability of contract 2 is high given the adhesive nature of the contract and last-minute switch through of the arbitration provision. (Opposition papers, page 5, lines 9-10.)

"Unconscionability has both a procedural and a substantive element. (***OTO, L.L.C. v. Kho*** (2019) 8 Cal.5th 111, 125.) Procedural unconscionability addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power. (Ibid. Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided.'" (Ibid.) Both elements must be proven, but they are evaluated on a sliding scale: "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required" to find it unenforceable, "and vice versa." (***Armendariz v. Foundation Health Psychcare Services, Inc.*** (2000) 24 Cal.4th 83, 114 (***Armendariz***).)" (***Haydon v. Elegance at Dublin*** (2023) 97 Cal.App.5th 1280, 1287.)

Unconscionability is a defense to enforcement of an arbitration provision in a vehicle purchase contract. (***Sanchez v. Valencia Holding Co., LLC*** (2015) 61 Cal.4" 899, 907.) Unconscionability requires some amount of procedural and substantive unconscionability, but they do not need to be present to the same degree. (*Id*. at 910).

2. Adhesion.

"In determining whether a contract term is unconscionable, we first consider whether the contract between Kaiser and Engalla was one of adhesion. (See ***Graham v. Scissor-Tail, Inc.*** [(1981) 28 Cal.3d 807] at p. 817.) In ***Madden*** [***v. Kaiser Foundation Hospitals*** (1976) 17 Cal 3d 699], we held that an agreement between Kaiser and a state employee was not a true contract of adhesion, although Kaiser's health plan was offered to state employees "on a 'take it or leave it' basis without opportunity for individual bargaining." (Id. at p. 710.) We reasoned that the Kaiser contract was not adhesive because (1) it "represents the product of negotiation between two parties, Kaiser and the [State Employees Retirement System], possessing parity of bargaining strength" and (2) the state employee could choose from among a number of different health plans, and thus was not confronted with the choice typical of a contract of adhesion of "either adher [ing] to the standardized agreement or forego[ing] the needed service." (Id. at p. 711.)"

Plaintiff does not make much of an issue of whether the contractor was adhesive and this Court concludes that it was not adhesive as it appears that plaintiffs were given the choice to sign the agreement and they appear to have voluntarily signed it, despite their assertion that they did not understand it or that there was some chicanery involved on the part of the dealer."[43]

3. Reformation.

The Court May Reform the Contract by severing the offending provisions of the arbitration contract. Where a portion of a contract cannot he performed due to mistake or impossibility, the court is empowered to reform the contract so as to give effect, to the mutual intent of the parties. (See ***Civil Code***, § 3399; ***Ike v. Doolittle*** (1998) 61 Cal.App.4th 51, 85; ***Calhoun v. Downs*** (1931) 211 Cal. 7661 770 [holding that where "there, is still a valid contract; and the contract being valid, equity will reform the instrument to make it what it should be and would have been. ... "]; see also ***Little v. Auto Steigler*** (2003) 29 Cal.4th 1064, 1075 [holding that where there is only a single offending provision of an arbitration agreement "the offending provision can be severed and the rest of the arbitration agreement left intact."].)

---

[43] The reasons why there were two contracts was explained in Defendants' moving papers and is again admitted to by Plaintiffs; quite simply they 7 wanted to change the contract after they signed it by deleted a service agreement. This hardly rises to the level of a "switcheroo," and supports the proposition that they read the contracts and understood them.

4. Discussion.

Plaintiffs' papers concede that if the Court agrees to uphold the arbitration contract, it should designate JAMS as the service provider. Defendant objects because JAMS, ADR Services and JudicateWest are unreasonably expensive, and the forums require the business to pay the entire fee in consumer arbitration cases.

The Court will focus on the following provision contained in the arbitration agreement:

> "You or we may choose the American Arbitration Association (www.adr.org) or National Arbitration and Mediation (www.namadr.com) as the arbitration organization to conduct the arbitration. If you and we agree, you or we may choose a different arbitration organization. You may get a copy of the rules of an arbitration organization b [sic] contacting the organization or visiting its website."

As this Court understands the law pertaining to the interpretation of arbitration agreements as applied to this contract, the parties will agree to either the American Arbitration Association, or National Arbitration and Mediation or, if the parties agree, "you or we" may choose a different arbitration organization.

Plaintiff concedes that it prefers JAMS but defendant does not. Defendant has offered a selection from this Court's list of arbitrators, but plaintiff has not indicated he would agree to that.

Therefore, this Court concludes that the arbitration agreement is valid, enforceable, and that the arbitration shall be conducted by American Arbitration Association, or National Arbitration and Mediation or, if the parties agree, "you or we" may choose a different arbitration organization.

This Court is not going to rewrite the arbitration contract to come to a different result.

The motion is GRANTED and the parties shall in accordance with this order.

IV. Tentative Ruling.

The tentative ruling was duly posted.

V. Case Management.

The Case Management Conference currently set for 16 April 2024 is VACATED and the Court will assign a DISMISSAL REVIEW date of 16 January 2025 at 10:00 AM in Department 20.

VI. Order.

The motion of defendant Normandin's etc. to compel arbitration is GRANTED. That the arbitration shall be conducted by American Arbitration Association, or National Arbitration and Mediation or, if the parties agree, "you or we" may choose a different arbitration organization.

_____ _____

DATED:

HON. SOCRATES PETER MANOUKIAN
Judge of the Superior Court
County of Santa Clara

---oooOooo---

Calendar Line 15

---oooOooo---

Calendar Line 16

---oooOoooo---

Calendar Line 17

---oooOooo---

Calendar Line 18

---oooOooo---

Calendar Line 19

---oooOooo---

Calendar Line 20

---oooOooo---

Calendar Line 21

---oooOooo---

Calendar Line 22

---oooOooo---

Calendar Line 23

---oooOooo---

Calendar Line 24

---oooOooo---

Calendar Line 25

---oooOooo---

Calendar Line 26

---oooOoooo---

Calendar Line 27

---oooOooo---

Calendar Line 28

---oooOoooo---

Calendar Line 29

---oooOoooo---

Calendar Line 30

---oooOoooo---