SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 6
Honorable Evette D. Pennypacker, Presiding
David Criswell, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2160

DATE: June 13, 2024 TIME: 9:00 A.M.

RECORDING COURT PROCEEDINGS IS PROHIBITED

FOR ORAL ARGUMENT: Before 4:00 PM today you must notify the:

(1) Court by calling (408) 808-6856 and

(2) Other side by phone or email that you plan to appear at the hearing to contest the ruling

(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

FOR APPEARANCES: The Court strongly prefers in-person appearances. If you must appear virtually, you must use video. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 6:
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

FOR COURT REPORTERS: The Court does **not** provide official court reporters. If you want a court reporter to report your hearing, you must submit the appropriate form, which can be found here:
https://www.scscourt.org/general_info/court_reporters.shtml

FOR YOUR NEXT HEARING DATE: Use Court Schedule to reserve a hearing date for your next motion. Court Schedule is an online scheduling tool that can be found on the court's website here:
https://reservations.scscourt.org/

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Date: June 20, 2024
Time: 12-1:00
Place: Microsoft Teams: https://msteams.link/YGLE

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1-2	19CV360721	Kathleen Radivojec et al vs Vintage Towers et al	Defendant Avanth Capital Management, LLC's motions to compel Plaintiffs Kathleen Radivojec's and Robert Radivojec's responses to form interrogatories-general (set one) and for $930 in sanctions are GRANTED. Notices of motion for this hearing date and time were served by electronic mail on April 29, 2024. No oppositions were filed. "[T]he failure to file an opposition creates an inference that the motion or demurrer is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) This discovery was served on January 20, 2024. After several telephone conferences, Plaintiff finally served *unverified* responses on April 26, 2024—only after Defendant made clear it intended to file a motion to compel by that date. Serving unverified responses is akin to serving no responses at all under the Code of Civil Procedure. (Code Civ. Pro. §2030.290(b); *Appleton v. Superior Court* (1988) 206 Cal.App.3d 632, 636.) Accordingly, Plaintiffs are ordered to serve verified responses without objections within 15 days of service of the formal order, which formal order the Court will prepare, and to pay Defendant $930 for both motions (there was no opposition, so no reply or hearing is likely necessary).
3	20CV374091	Financial Pacific Leasing, Inc. vs J. Medina	Parties are ordered to appear for debtor's examination.
4	21CV392282	Sara Huff et al vs Cole Halvorson et al	Moving party settled; motion off calendar.
5	22CV405073	Rhonda Sandifer vs Santa Clara Valley Transportation Authority	Defendant Santa Clara Valley Transportation Authority's motion for summary judgment is GRANTED. Scroll to line 5 for complete ruling. VTA to submit form of judgment within 10 days of service of the formal order, which order the Court will prepare.

6	22CV405430	Alison Perea vs Sidney Flores et al	Plaintiff's motion to compel Defendant's further deposition is GRANTED. Defendant is ordered to appear for an additional 4 hours of time on the record at deposition (the four hours does not include breaks or other time off the record). It appears Defendant produced additional documents and information after his first deposition and made numerous improper objections. The Court therefore finds it appropriate for Defendant appear for further deposition where he should fully and completely answer questions. Plaintiff's motion for monetary sanctions is GRANTED, IN PART. Defendant is ordered to pay $940 in attorney's fees related to the motion to compel a further deposition. Plaintiff's motion is otherwise DENIED. The trial court has broad discretion to impose discovery sanctions; a judge's sanction order will not be reversed absent "a manifest abuse of discretion that exceeds the bounds of reason." (*Rutledge v. Hewlett-Packard Co.* (2015) 238 Cal.App.4th 1164, 1191.) However, a sanction should not provide a windfall to the other party by putting that party in a better position than it would have been in if the party had obtained the discovery. (*Kwan Software Eng'g, Inc. v. Hennings* (2020) 58 Cal.App.5th 57, 74-75.) The basic purpose of a discovery sanction is to compel disclosure of discoverable information. (*Rutledge*, 238 Cal.App.4th at 1193.) Sanctions may not be imposed solely to punish the offending party. (*Id.*; *Kwan*, 58 Cal.App.5th at 74-75.) Here, Defendant did not willfully or negligently defy the Court's discovery order. The record is clear that Defendant made substantial efforts to produce Code compliant responses. The materials withheld on privilege relate to communications with counsel regarding this dispute between the parties in this litigation and before the state bar and Defendant's other clients. The Court did not order Defendant to produce his communications with litigation counsel about this dispute, and Defendant does not have the right to unilaterally waive the privilege he has with other clients. Plaintiff's other concerns do not evince Defendant's violation of the Court's discovery order but rather a lack of information Defendant has in his possession, custody, or control to support his affirmative defenses. Plaintiff has other ways to address this issue. Court to prepare formal order.

7-8	23CV421433	Nik's Aircraft LLC vs Mark Starritt et al	Plaintiff's motion for leave to file a first amended complaint is GRANTED. A notice of motion for this hearing date and time was served by U.S. and electronic mail on April 26, 2024. No opposition was filed. "[T]he failure to file an opposition creates an inference that the motion or demurrer is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) Moreover, [it] is a rare case in which 'a court will be justified in refusing a party leave to amend his pleadings so that he may properly present his case.' (*Guidery* v. *Green*, 95 Cal. 630, 633; *Marr* v. *Rhodes*, 131 Cal. 267, 270. If the motion to amend is timely made and the granting of the motion will not prejudice the opposing party, it is error to refuse permission to amend and where the refusal also results in a party being deprived of the right to assert a meritorious cause of action or a meritorious defense, it is not only error but an abuse of discretion. (*Nelson* v. *Superior Court*, 97 Cal.App.2d 78; *Estate of Herbst*, 26 Cal.App.2d 249; *Norton* v. *Bassett*, 158 Cal. 425, 427.)" (*Morgan v. Superior Court of Los Angeles County* (1959) 172 Cal. App. 2d 527, 530-531 (error for trial court to fail to give leave to amend). Plaintiff's request is timely and will not prejudice Defendant and is therefore granted. Plaintiff is ordered to file the first amended complaint within 10 days of service of the formal order, which the Court will prepare. Defendant Mark C. Starritt's motion for leave to file a cross-complaint is GRANTED. Mark Starritt is ordered to file the cross-complaint within 10 days of service of the formal order and to properly serve Cross-Defendant Nicknam Nickravesh, since he is not currently a party to the case. Cross-Defendant Nik's Aircraft is ordered to respond to the cross-complaint within 30 days of when Mark Starritt files the cross-complaint. The July 9, 2024 trial setting conference is VACATED, and a case management conference is set for September 3, 2024 at 10 a.m. in Department 6. The ENE should be continued to a time after Nicknam Nickravesh has been served with the cross-complaint and consistent with this order. Court to prepare formal order.
9	23CV425003	Haki Dervishi et al vs Google, LLC, a California Limited Liability Company	Defendant's demurrer is SUSTAINED WITHOUT LEAVE TO AMEND. Scroll to line 9 for complete ruling. Court to prepare formal order.
10	24CV430013	EMMANUEL LEAL SOTO vs DEBARTOLO CORPORATION et al	Government Defendants' demurrer to the fifth and sixth causes of action is SUSTAINED WITH 20 DAYS LEAVE TO AMEND; Government Defendants' demurrer on the ground that the SCPD is improperly named as a defendant in this case is OVERRULED. Scroll to line 10 for complete ruling. Court to prepare formal order.

Calendar line 5
Case Name: *Rhonda Sandifer v. Santa Clara Valley Transportation Authority, et al.*
Case No.: 22CV405073

Defendant Santa Clara Valley Transportation Authority ("VTA") moves for summary judgment against plaintiff Rhona Evette Sandifer. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background

This is an action for negligence. On August 10, 2021, Plaintiff was a passenger on a VTA bus. (Complaint, p. 4.) During the ride, the bus driver slammed on the brakes, which caused Plaintiff to strike the interior of the bus with great force. (*Ibid*.) As a result, she sustained injuries. (*Ibid*.)

Plaintiff filed her Complaint on October 3, 2022, asserting general negligence and motor vehicle negligence. On January 10, 2024, VTA filed the instant motion, which Plaintiff opposes.

II. Request for Judicial Notice

VTA requests judicial notice of Plaintiff's Complaint, however, judicial notice is not required as the Court must necessarily consider the pleadings on a motion for summary judgment. (See *Snatchko v. Westfield LLC* (2010) 187 Cal.App.4th 469, 477 [pleadings frame the issues to be resolved on summary judgment].) Thus, VTA's request for judicial notice is DENIED.

III. Evidentiary Objections

A. Plaintiff's Objections

Plaintiff's objections do not comply with Rule of Court 3.1354 ("Rule 3.1354"). Rule 3.1354 requires two documents to be submitted when evidentiary objections are made: the objections and a separate proposed order on the objections, both of which must be in one of the two approved formats set forth in the rule. (See *Vineyard Spring Estates v. Super. Ct.* (2004) 120 Cal.App.4th 633, 642 (*Vineyard*) [trial courts only have duty to rule on evidentiary objections presented in the proper format]; *Hodjat v. State Farm Mutual Automobile Ins. Co.* (2012) 211 Cal.App.4th 1 (*Hodjat*) [trial court not required to rule on objections that do not comply with Rule of Court 3.1354 and not required to give objecting party a second chance at filing properly formatted papers].) Thus, the Court declines to rule on the evidentiary objections. Objections that are not ruled on are preserved for appellate review. (See Code of Civ. Proc., § 437c, subd. (q).)

B. VTA's Objections

VTA submits objections to Plaintiff's evidence, however, its objections fail to comply with Rule 3.1354. Therefore, as with Plaintiff, the Court declines to rule on VTA's evidentiary objections. The objections are preserved for appellate review. (See Code of Civ. Proc., § 437c, subd. (q).)

IV. Legal Standard

Any party may move for summary judgment. (Code of Civ. Proc., §437c, subd. (a); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) The motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code of Civ. Proc., 437c, subd. (c); *Aguilar, supra*, at p. 843.) The object of the summary judgment procedure is "to cut through the parties pleading" to determine whether trial is necessary to resolve the dispute. (*Aguilar, supra*, at p. 843.)

The "party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact…" (*Aguilar, supra*, 25 Cal.4th at p. 850; see Evid. Code, § 110.) "A prima facie showing is one that is sufficient to support the position of the party in questions. (*Aguilar, supra*, at p. 851.)

Where a plaintiff (or cross-complainant) seeks summary judgment, the burden is to produce admissible evidence on each element of a "cause of action" entitling him or her to judgment. (Code Civ. Proc. § 437c, subd. (p)(1); See *Hunter v. Pacific Mechanical Corp.* (1995) 37 Cal.App.4th 1282, 1287, disapproved on other ground in *Aguilar*; *S.B.C.C., Inc. v. St. Paul Fire & Marine, Ins. Co.* (2010) 186 Cal.App.4th 383, 388.) It is not enough for a moving defendant to show merely that a plaintiff currently "has no evidence" on a key element of plaintiff's claim. The moving defendant must also produce evidence showing plaintiff cannot reasonably obtain evidence to support that claim. (See *Gaggero v. Yura* (2003) 108 Cal.App.4th 884, 891[citing *Aguilar* ["[T]he absence of evidence to support a plaintiff's claim is insufficient to meet the moving defendant's initial burden of production. The defendant must also produce evidence that the plaintiff cannot reasonably obtain evidence to support his or her claim."]].) "Such evidence may consist of the deposition testimony of the plaintiff's witnesses, the plaintiff's factually devoid discovery responses, or admissions by the plaintiff in deposition or in response to requests for admission that he or she has not discovered anything that

supports an essential element of the cause of action." (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 110 [citing *Aguilar*, among others].)

This means that plaintiffs, who bear the burden of proof at trial by a preponderance of evidence, therefore "must provide evidence that would require a reasonable finder of fact to find any underlying material fact more likely than not—otherwise, he would not be entitled to judgment as a matter of law but would have to present his evidence to a trier of fact." (*Aguilar, supra*, at 851; See also *LLP Mortgage v. Bizar* (2005) 126 Cal.App.4th 773, 776 [burden is on plaintiff to persuade court there is no triable issue of material fact].)

If the moving party makes the necessary initial showing, the burden of production shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. (Code of Civ. Proc., 437c, subd. (c); *Aguilar, supra*, at p. 850.) A triable issue of material fact exists "if, and only if, the evidence would allow of reasonable trier of fact to find the underlying facts in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra*, at p. 850, fn. omitted.) If the party opposing summary judgment presents evidence demonstrating the existence of a disputed material fact, the motion must be denied. (*Id*. at p. 843.)

Throughout the process, the trial court "must consider all of the evidence and all of the inferences drawn therefrom." (*Aguilar, supra*, 25 Cal.4th at p. 856.) The moving party's evidence is strictly construed, while the opponent's is liberally construed. (*Id*. at 843.)

Pursuant to Code of Civil Procedure section 437c, VTA moves for summary judgment on the grounds that Plaintiff cannot establish a breach of duty.

V. Analysis

A. Parties' Undisputed Material Facts

VTA's undisputed material facts are as follows: on October 3, 2022, Plaintiff filed this action for injuries she sustained on August 10, 2021, when the bus driver "came to an abrupt stop by slamming the brakes causing Plaintiff to strike the interior of the bus with great force" (the "Incident"). (VTA's Undisputed Material Facts ("UMF"), No. 1.) Salvador "Sal" Adan ("Adan"), a VTA employee, was operating the subject bus at the time of the Incident. (VTA's UMF, No. 2.) As Adan was pulling the bus away from the bus stop curb, a car suddenly and without any warning cut

into the bus's lane and turned into a driveway. (VTA's UMF, No. 3.) As soon as the car entered the bus's right-out-way, Adan applied the brakes. (VTA's UMF, No. 4.) The level of brake force used by Adan was necessary to avoid a collision between the bus and the car. (VTA's UMF, No. 5.) VTA served contention interrogatories on Plaintiff, seeking identification of facts, witnesses, and documents that support Plaintiff's claims against VTA. (VTA's UMF, No. 6.) In response to VTA's special interrogatories seeking facts to support her contention that she was harmed by the negligence of VTA or its bus operator, Plaintiff alleged, Adan "suddenly and without warning…slammed on the brakes causing Plaintiff to be violently thrown into a plexiglass with great force." (VTA's UMF, No. 7.) She alleged the same in response to VTA's special interrogatory seeking facts to support her contention that the "sudden braking of the VTA bus" was a negligent act. (VTA's UMF, No. 8.) She identified Adan and Rick Roy in response to VTA's special interrogatories seeking the identity of persons with knowledge of information to support her contentions of negligence on the part of VTA and its bus operators as well as negligent braking. (VTA's UMF, No. 9.) But Plaintiff subsequently admitted that Roy has no knowledge regarding how the Incident occurred and Adan has knowledge of information to refute her contentions of negligence. (*Ibid*.) Plaintiff identified VTA's surveillance footage of the Incident and medical records as materials to support her contentions, however, the footage refutes her contentions and her medical records do not contain any admissible evidence to support her contentions. (VTA's UMF, No. 10.)

According to Plaintiff, Adan does not know what time he woke up on August 10, 2021; how many hours he slept; how many hours he worked on the day of the Incident; or the details of his shift that day with VTA. (Plaintiff's Separate Statement of Disputed Material Facts in Opposition ("Plaintiff's DMF"), No. 2.) As part of his regular custom and practice, Adan performed a brake test at the start of each shift and if the bus had been travelling under 5 miles per hour, a brake check would have resulted in the bus coming to an immediate stop. (Plaintiff's DMF, No. 3.) Adan got "cut off" and had to slam on the brakes to stop and avoid a collision. (Plaintiff's DMF, No. 4.) If the bus brakes had been functioning properly and the driver had not been speeding, it would have stopped immediately. (*Ibid*.) Adan saw the driver cut him off once he started to pull away from the bus stop; he had been traveling less than 5 miles per hour at the time. (Plaintiff's DMF, No. 5.) Adan testified

both that he had to slam on the brakes, but that the bus was able to come to an immediate stop at the time of braking. (*Ibid*.) Plaintiff never admitted that Roy has no knowledge regarding how the Incident occurred and she does not admit that Adan has knowledge to refute her contentions. (Plaintiff's DMF, No. 9.) Surveillance footage, which was provided by VTA for the first time in support of its motion, simply depicts the Incident but does not refute anything alleged in the Complaint. (Plaintiff's DMF, No. 10.) Plaintiff's medical records remain a proper indicium of the Incident. (*Ibid*.)

1. First and Second Causes of Action: Negligence and Motor Vehicle Negligence

"An action in negligence requires a showing that the defendant owed the plaintiff a legal duty, that the defendant breached the duty, and that the breach of a proximate or legal cause of injuries suffered by the plaintiff." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673.) When operating a motor vehicle, a driver is "required to act as a reasonably prudent person under the same or similar circumstances." (*Watkins v. Ohman* (1967) 251 Cal.App.2d 501, 502-503.) "A carrier of person for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill." (Civ. Code, § 2100.) A public rapid transit bus is a common carrier under Civil Code section 2100. (See *Acosta v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 19, 27; *Lopez v. Southern Cal. Rapid. Transit District* (1985) 40 Cal.3d 19 (*Lopez*); see also Civ. Code, § 2168 ["Everyone who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he thus offers to carry"].) "The special relationship of common carrier and passenger gives rise to the highest duty of care." (*McGettigan v. Bay Area Rapid Transit Dist.* (1997) 57 Cal.App.4th 1011, 1017.) "The duty imposed by section 2100 applies to public carriers as well as private carriers and requires them to do all that human, care, vigilance, and foresight reasonably can do under the circumstances. Common carriers are not, however, insurers of their passenger's safety. Rather, the degree of care and diligence which they must exercise is only such as can reasonably be exercised consistent with the character and mode of conveyance adopted and the practical operation of the business carrier." (*Lopez, supra*, 40 Cal.3d at p. 785 [internal citations omitted].) "Breach is the failure to meet the standard of care." (*Coyle v. Historic Mission Inn Corp.* (2018) 24 Cal.App.5th 627, 643.)

VTA argues Plaintiff cannot establish Adan breached a duty of care. VTA provides Plaintiff's responses to its special interrogatories, specifically, numbers 1, 4, and 7.

Special interrogatory number 1 requests:

> State each and every fact that supports YOUR contention that YOU were harmed on August 10, 2021, by VTA's negligence.

(Exh. B., p. 2:24-25.)

Special interrogatory number 4 requests:

> State each and every act that supports YOUR contention that YOU were harmed by the negligence of the VTA employee who was driving the VTA bus on which YOU were a passenger on August 10, 2021.

(Exh. B, p. 3:4-6.)

Special interrogatory number 7 requests:

> IDENTIFY each and every fact that supports YOUR contention that the VTA employee's sudden braking of the VTA bus on which YOU were a passenger on August 10, 2021, which allegedly caused YOU to strike the interior of the bus, was a negligent act.

(Exh. B., p. 3:15-18.)

After asserting objections to each special interrogatory, Plaintiff provided the following response:

> On August 21, 2021, Plaintiff was a passenger aboard VTA Bus No. 8713, Route No. 22, when the bus driver suddenly and without warning made an abrupt stop, slammed on the brakes causing Plaintiff to be violently thrown into a plexiglass with great force causing her to sustain injuries to her left shoulder, fractured rib, back, tailbone, and bilateral shins. Defendant by and through its agent/employee/bus driver was negligent and negligent per se for amongst other things Defendant violated Civ. Code §§ 2100 and 2168 and California Vehicle Code § 22350 proximately causing the subject incident, Plaintiff's injuries and damages…

(Exh. C, p. 2:25-3:6.)

In her Complaint, Plaintiff alleges she struck the interior of the bus with great force and Plaintiff's responses to the special interrogatories state she was violently thrown into a plexiglass, but the surveillance video does not support her assertion. (See Complaint, p. 4; Exh. C, p. 2:25-3:6; Exh. G, at 1:32:22 p.m. to 1:38:34 p.m. [Cam. 5: middle door].) This is sufficient to show Plaintiff cannot reasonably obtain evidence in support of her assertion. (*Gaggero, supra,* 108 Cal.App.4th at p. 891.)

VTA also argues Adan did not breach a duty of care because his actions were a reasonable and necessary response to a sudden emergency. (MPA, p. 5:8-9.)

"Under the sudden emergency or imminent peril doctrine, a person, who, without negligence on his part, is suddenly and unexpectedly confronted with peril, arising from either the actual presence, or the appearance, of imminent danger to himself or to others, is not expected nor required to use the same judgment or prudence that is required of him in the exercise of ordinary care in calmer and more deliberate moments." (*Leo v. Dunham* (1953) 41 Cal.2d 712, 714 (*Leo*); see also *Abdulkadhim v. Wu* (2020) 53 Cal.App.5th 298, 302.) "The doctrine of imminent peril is properly applied only in cases where an unexpected physical danger is presented so suddenly as to deprive the driver of his power to using reasonable judgment." (*Pittman v. Boiven* (1967) 249 Cal.App.2d 207, 216 (*Pittman*).) "A party will be denied the benefit of the doctrine of imminent peril where that party's negligence causes or contributes to the creation of the perilous situation." (*Ibid*.) "The doctrine of imminent peril applies not only when a person perceives danger to himself, but also when he perceives an imminent danger to others." (*Damele v. Mack Trucks, Inc.* (1990) 219 Cal.App.3d 29, 37.) "The test is whether the actor took one of the courses of action which a standard man in that emergency might have taken, and such a course is not negligent even though it led to an injury which might have been prevented by adopting an alternative course of action." (*Schulz v. Mathias* (1970) 3 Cal.App.3d 904, 912-913 (*Schulz*).) The imminent peril doctrine is an affirmative defense. (*Shiver v. Laramee* (2018) 24 Cal.App.5th 395, 399, citing CACI No. 452.)

VTA provides Adan's declaration, in which he states:

He was driving the bus on the day of the Incident, he pulled over to the bus stop in order to pick up a passenger. (Adan Decl., ¶¶ 3-4.) Before he pulled away from the bus stop, he checked to make sure that the #3 lane [the lane to his left] was clear and as he was pulling the bus into the #3 lane,

traveling at less than 5 miles per hours, a car suddenly and without any warning cut into the lane directly in front of the bus to turn into a driveway. (Adan Decl., ¶¶ 5-6.) As soon as the car entered his right-of-way, he immediately applied the brake to avoid colliding with the car. (Adan Decl., ¶ 6; Adan Depo., p. 36:4-16.) He believes the bus would have collided with the car if he had not applied the brake. (Adan Decl., ¶ 7.) He believes the level of brake force he used was necessary to avoid a collision with the car. (Adan Decl., ¶ 8.)

VTA also relies on the surveillance video of the Incident, which shows the bus pulling away from the bus stop and suddenly stopping because a car cut in front of it to turn into a driveway. (Exh. G, at 1:32:22 p.m. to 1:38:34 p.m. [Cam. 1: forward facing].) The video simultaneously shows the bus route and the speed the bus was traveling. (*Ibid*.) At the time of the Incident, the bus was traveling at 3 miles per hour. (*Ibid*.) This is sufficient to establish that Adan acted as one reasonably could under the circumstances. (See *Lopez, supra*, 40 Cal.3d at p. 785.) It is also sufficient to establish Adan took a course of action that a standard person in an emergency may have taken, and his action was not negligent even though it led to an injury which might have been prevented by adopting an alternative course of action. (*Schulz, supra,* 3 Cal.App.3d 904, 912-913.) Thus, VTA meets its burden to show there is no triable issue of material fact regarding breach of a duty of care and to establish its imminent peril defense. The burden thus shifts to Plaintiff to establish a triable issue of material fact. (See *Aguilar, supra*, at p. 850.)

Plaintiff argues Adan's testimony contradicts itself and he must have been either "travelling faster than 5 miles per hour, which is why he needed to slam on the brakes, or he was travelling slower than 5 miles per hour, at which point he would not have needed to slam on the brakes; at that speed the bus would have stopped immediately." (Opp., p. 6:9-11.) Plaintiff relies on Adan's deposition testimony:

> Q. How do you inspect the brakes?
>
> A. What we call is a brake test. Press on the brakes, depress them, take off the – apply the brakes and make sure that it stops.
>
> Q. Is there a required amount of feet where a bus has to stop by?
>
> A. Can you clarify?

Q. Sure. So you press on the brakes. How do you know if the brakes are not good and the bus can't be driven versus the brakes are good and the bus can be driven. How do you distinguish the difference?

A. Well, if the bus doesn't stop, then the brakes aren't good.

Q. Okay. So the bus doesn't stop. Okay.

So give me an indication of how you tell if the bus doesn't stop. What I want to specifically know is do you press on the gas pedal, and then, like, how fast do you go and what is your expectation for stop distance, something to that effect?

A. It would be immediate.

Q. Immediate. And how fast are you going during these inspections of the brakes?

A. Five miles an hour.

Q. So you go five miles an hour and you're expecting the bus to stop immediately, correct?

A. Yes.

(Ex. 1, Adan Depo, p. 16:22- p.17:22.)[1]

Q. How do you know that it cut you off?

A. It was coming in from my left and going into the driveway that was in front of me.

Q. Okay. Now it was coming – so how far – so when was the first time that you saw it coming on your left?

A. Once I started proceeding.

Q. Proceeding meaning?

A. Once I started pulling away. Apologies.

Q. Got it. So am I understanding you correctly to be saying that once you started pulling away from the bus stop is when you saw the car approach you from the left-hand side, correct?

A. Yes.

[1] Both parties marked their exhibits using letters. To avoid confusion, the Court will refer to Plaintiff's exhibits with the corresponding numbers.

Q. And did you continue to proceed forward as the car was traveling on your left?

A. No.

(Exh. 1, Adan Depo., p. 36:3-19.)

Q. So after the incident occurred, meaning the other driver cut in front of you, as you stated prior, do you know how long it took for the bus to stop?

A. What do you mean? Can you clarify?

Q. Sure. The bus came to a stop at the time of the incident, correct?

A. Yes.

Q. Do you know how long it took for the bus to stop?

….

Q. Okay. Immediately. So when you touched the brakes, it came to an immediate stop, correct?

A. Yes.

(Exh. 1, Adan Depo., p. 38:24-39:13.)

Adan further testified that it was his custom and practice to conduct an inspection of the bus prior to starting his route on August 10, 2021. (Exh. 1, Adan Depo., p. 16:9-12.) Plaintiff contends the bus would have immediately stopped if the bus was traveling under 5 miles per hour, however, this is consistent with Adan's testimony that the bus came to an immediate stop after he pressed the brakes. (See Exh. 1, Adan Depo., p. 39:6-13.) This is supported by the surveillance video, which shows the bus was traveling at 3 miles per hour at the time of the Incident and it came to an immediate stop after the bus was cut off by the car and Adan applied the brakes. (Exh. G, at 1:32:22 p.m. to 1:38:34 p.m. [Cam 1: forward facing].) Plaintiff fails to provide any evidence in support of her assertion that Adan was speeding or that the brakes were insufficiently or improperly applied. Nor does she provide any evidence that the bus did not come to an immediate stop after Adan applied the brakes. Therefore, the Court is not persuaded that Adan's testimony contradicts itself or creates a triable issue of material fact.

Plaintiff also fails to provide any evidence regarding whether the Incident could have been avoided without slamming on the brakes or that slamming the brakes constituted a breach of the

standard of care. While Plaintiff mentions her medical records in her opposition and both parties reference them, Plaintiff did not submit her medical records, thus they are not before the Court.

Plaintiff also fails to address the sudden emergency/imminent peril doctrine. (See *Sehulster Tunnels/Pre-Con v. Traylor Brothers, Inc.* (2003) 111 Cal.App.4th 1328, 1345, fn. 16 [failure to address point is "equivalent to a concession"]; see also *Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 529 [failure to challenge a contention in a brief results in the concession of that argument].) It is undisputed that a car cut the bus off as it was pulling away from the bus stop. Plaintiff fails to provide any evidence to create a triable issue of material fact as to whether Adan caused or contributed to the creation of the perilous situation, and she provides no evidence that Adan failed to act as a reasonably careful person would have in similar circumstances. (*Pittman, supra,* 249 Cal.App.2d at p. 216.) As a result, Plaintiff fails to meet her burden as to the element of breach and the imminent peril defense.

VTA's motion for summary judgment is GRANTED.

Calendar Line 9
Case Name: *Haki Dervishi, et al. v. Google, LLC*
Case No.: 23CV425003

Before the Court is defendant Google LLC's ("Google") demurrer to plaintiffs Haki Dervishi's and Neshad Asllani, M.D.'s (collectively, "Plaintiffs") first amended complaint ("FAC"). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

VI. Background

This action arises out of Google's alleged exclusion of the Albanian language from its platforms. Dervishi is a California resident who was born in the Republic of Kosovo, and he maintains close family and business ties to Kosovo and Albania. (FAC, ¶ 1.) Dr. Asllani is a Kosovo resident, doctor, and human rights activist, who has documented human rights violations in the Western Balkans for the past 30 years. (FAC, ¶ 3.)

Dervishi is a major shareholder in Zummo Flight Technologies USA, and he helped form Zummo Flight Technologies Kosovo ("Zummo Kosovo"). (FAC, ¶ 10.) When Dervishi attempted to market his business interest in Zummo Flight Technologies in Kosovo, Albania, and California, he found platforms such as Google Ads and Google Adsense were omitting the Albanian language. (FAC, ¶ 2.) As a result, he found it was impossible to market Zummo Flight Technologies due to Google's failure to designate the Albanian language as an officially supported language on its platforms. (FAC, ¶ 5.)

In 2019, Dr. Asllani co-founded Klinika Digjitale ("Klinika"), which was recognized as the most innovative digital health platform in Europe by the Patient Digital Health Awards in 2022. (FAC, ¶ 24.) He tried to advertise health care services and products through Google Ads but was unable to target Albanian-speaking patients because the Albanian language is unsupported on the platform. (FAC, ¶ 27.)

On October 31, 2023, Plaintiffs filed their complaint for discrimination. On December 18, 2023, Google filed a demurrer, which Plaintiffs opposed. On February 16, 2024, the Court issued its order, which sustained the demurrer with leave to amend. On March 7, 2024, Plaintiffs filed their FAC, asserting negligent interference with prospective business advantage. On April 11, 2024, Google filed the instant demurrer, which Plaintiffs oppose.

VII. Legal Standard

"The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in [Code of Civil Procedure s]ection 430.30, to the pleading on any one or more of the following grounds: . . . (e) The pleading does not state facts sufficient to constitute a cause of action, (f) The pleading is uncertain." (Code Civ. Proc., § 430.10, subds. (e) & (f).) A demurrer may be utilized by "[t]he party against whom a complaint [ ] has been filed" to object to the legal sufficiency of the pleading as a whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).)

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

Google demurs to the FAC on the ground Plaintiffs fail to allege facts sufficient to state their claim. (Code Civ. Proc., § 430.10, subd. (e).)

A. Negligent Interference with Prospective Advantage

"The elements of negligent interference with prospective economic advantage are (1) the existence of an economic relationship between the plaintiff and a third party containing the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) the defendant's knowledge (actual or construed) that the relationship would be disrupted if the defendant failed to act with reasonable care; (4) the defendant's failure to act with reasonable care; (5) actual disruption of the relationship; and (6) economic harm proximately caused by the defendant's

negligence." (*Redfearn v. Trader Joe's Co.* (2018) 20 Cal.App.5th 989, 1005 (*Redfearn*).) Defendant argues Plaintiffs fail to establish a duty of care between themselves and Google. (MPA, p. 9:14-15.)

"The tort of *negligent* interference with economic relationship arises only when the defendant owes the plaintiff a duty of care." (*LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 348 (*LiMandri*), citing *Stolz v. Wong Communications Limited Partnership* (1994) 25 Cal.App.4th 1811, 1825 [emphasis original].) "The 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.) "Where a special relationship exists between the parties, a plaintiff may recover for loss of expected economic advantage through the negligent performance of a contract although the parties were not in contractual privity." (*J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 804 (*J'Aire Corp*), citing *Biakanja v. Irving* (1958) 49 Cal.2d 647, 650 (*Biakanja*).) To determine whether Google owes Plaintiffs a duty of care, the Court must balance the *Biakanja* factors, which are (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct, and (6) the policy of preventing future harm. (*Biakanja, supra,* 49 Cal.2d at p. 650.)

Plaintiffs allege, on information and belief, that Google "knew or should have known that [the] relationship with their companies would be adversely affected, if they failed to act with reasonable care." (FAC, ¶¶ 14, 32.) This is insufficient. Plaintiffs also fail to allege *facts* to support their conclusory allegation that Google knew or should have known about Plaintiffs and their relationships with their own companies, how the alleged adverse effects to their businesses were foreseeable to Google, or regarding moral blame attached to Google's alleged conduct.

Google directs the Court to the Unruh Civil Rights Act, codified in Civil Code section 51, which provides, "nothing in this section shall be construed to require the provision of services and documents in a language other than English, beyond that which is otherwise required by other provisions of federal, state, or local law…" (Civ. Code, § 51, subd. (h).) Although Plaintiffs did not include their previous cause of action for discrimination in the FAC, the Unruh Civil Rights Act demonstrates an instance where the Legislature could have identified and protected a customer's right

to receive services in their preferred language, but it declined to do so. Based on the allegations, the balancing of the *Biakanja* factors does not support the finding of a duty of care.

Plaintiffs also argue a special relationship with Google was created by Google's dominance as the search engine used by approximately 97.1 percent of internet users in the region. The Court is not persuaded by Plaintiffs' argument. If the Court finds a special relationship with Plaintiffs based on Google's dominance as a search engine then it would have to find a special relationship with every internet user in the region and other regions where Google has such dominance. Such a finding would stretch a duty based on a special relationship far beyond its intended boundary. (See *Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, 621 [special relationships have "defined boundaries" that "create a duty of care owed to a limited community, not the public at large"].) Absent a duty of care, Plaintiffs cannot state this claim against Google. (*LiMandri, supra,* 52 Cal.App.4th at p. 348.)

Even if the Court found Google owed Plaintiffs a duty of care based on a special relationship, Plaintiffs are unable to establish the remaining elements of a negligent interference claim. It is unclear to the Court whether Zummo Flight Technologies and Klinika can constitute third parties, given that they are Plaintiffs' own companies. (See FAC, ¶¶ 10, 24.) Plaintiffs fail to allege Google's knowledge of the relationship between Plaintiffs and their respective companies, particularly Klinika, which was founded in 2019. (FAC, ¶ 24.) Plaintiffs also fail to allege any *facts* regarding Google's knowledge that the relationship between Plaintiffs and their companies would be disrupted if it failed to act with reasonable care. As a result, Plaintiffs fail to allege sufficient facts to state this claim. (See *Redfearn, supra,* 20 Cal.App.5th at p. 1005.)

Plaintiffs request leave to amend but fail to state how they can do so and it does not appear that they can successfully amend their pleading. (See *Camsi IV v. Hunter Technology Corp*. (1991) 230 Cal.App.3d 1525, 1542 (*Camsi IV*) ["absent an effective request for leave to amend in specified ways," it is an abuse of discretion to deny leave to amend "only if a potentially effective amendment were both apparent and consistent with the plaintiff's theory of the case"]; *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349 (*Goodman*) ["Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading"],

quoting *Cooper v. Leslie Salt Co*. (1969) 70 Cal.2d 627, 636 (*Cooper*); *Hendy v. Losse* (1991) 54 Cal.3d 723, 742 (*Hendy*) ["the burden is on the plaintiff… to demonstrate the manner in which the complaint might be amended"].) Thus, the demurrer to Plaintiffs' FAC is SUSTAINED WITHOUT LEAVE TO AMEND.

Calendar Line:
Case Name: *Emmanuel Diaz Leal Soto v. Debartolo Corporation, et. al.*
Case No.: 24CV430013

Before the Court is the City of Santa Clara's, the Santa Clara Stadium Authority's, and the Santa Clara Police Department's ("Government Defendants"), demurrer to Plaintiff's fifth and sixth causes of action. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This action arises from Plaintiff's stabbing at Levi Stadium ("Premise") during a soccer match. According to the complaint, on July 2, 2023, Plaintiff was lawfully on the Premise for the international soccer match between Mexico and Qatar. (Complaint ¶ 18.)

Debartolo Corporation, Forty Niners Football Company LLC, Forty Niners SC Stadium Company LLC, Forty Niners Stadium Management Company LLC ("Stadium Defendants") and Government Defendants owned/operated/maintained/managed/secured/controlled the Premise. (Complaint ¶ 11.)

During the Game, Mexico and Qatar fans repeatedly taunted and yelled at one another. Despite the tensions in the stands, and the clear signs of intimidation towards spectators rooting for their respective teams, including Plaintiff, Stadium Defendants and/or the Government Defendants failed to properly respond or properly address the safety concerns and reasonably intervene to aid Plaintiff. (Complaint ¶ 22.) Towards the end of the match, a fight, brawl and/or melee broke out in the stands, and Plaintiff was stabbed by Defendant Garcia. (Complaint ¶ 25.)

Plaintiff initiated this suit on January 29, 2024, alleging (1) general negligence [against Stadium Defendants], (2) premises liability [against Stadium Defendants], (3) negligent hiring and retention [against Stadium Defendants], (4) battery [against Mr. Garcia], (5) violation of Government Code section 815, et. seq. [against Government Defendants], and (6) dangerous condition of public property [against Government Defendants].

II. Legal Standard

"The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in [Code of Civil Procedure s]ection 430.30, to the pleading on any one or more of the following grounds: . . . (e) The pleading does not state facts sufficient to constitute

a cause of action, (f) The pleading is uncertain." (Code Civ. Proc., § 430.10, subds. (e) & (f).) A demurrer may be utilized by "[t]he party against whom a complaint [ ] has been filed" to object to the legal sufficiency of the pleading as a whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).)

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

"Liberality in permitting amendment is the rule, if a fair opportunity to correct any defect has not been given." (*Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1227.) It is an abuse of discretion for the court to deny leave to amend where there is any reasonable possibility that plaintiff can state a good cause of action. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) The burden is on the plaintiff to show in what manner plaintiff can amend the complaint, and how that amendment will change the legal effect of the pleading. (*Id*.)

III. Untimely Opposition.

Pursuant to Code. Civ. Proc. § 1005(b), an opposing brief must be filed with the court and served on each party at least 9 court days before the hearing, and reply briefs must be filed and served at least 5 court days before the hearing. Plaintiff's opposition brief was filed on May 31, 2024, at 6:12 p.m. and was electronically served only on attorneys for Alejandro Garcia and Stadium Defendants on that day. Plaintiff's proof of service shows that the moving Government Defendants were not served with the opposition.

Mr. Arnold, attorney for Government Defendants, declares he did not learn about the opposition until he checked the Court's online docket on June 5, 2024; leaving Government Defendants to review the opposition brief and prepare a reply by the next day.

The Court is sympathetic to Government Defendants' frustration in having a very limited time to prepare a reply. The Court has discretion to consider late filed papers. (*Gonzalez v. Santa Clara County Dep't of Social Servs.* (2017) 9 Cal.App.5th 162, 168.) And, where a party provides a substantive response to a late filing, the party waives all defects in service. (*Moofly Productions, LLC v. Favila* (2020) 46 Cal. App. 5th 1, 10.)

Government Defendants managed to file a timely reply, and the Court thus exercises its discretion to consider Plaintiffs' untimely opposition. Plaintiffs are cautioned, however, that future failures to timely submit oppositions or otherwise comply with the Code of Civil Procedure may result in sanctions.

IV. Analysis

According to the complaint, the Government Defendants' liability is allegedly based on (1) vicarious liability for negligence of their employees/independent contractors that occurred in the scope of their employment and (2) their own conduct and legal obligations occurring from the dangerous condition of a public property. (Gov. Code § 835.)

A. Vicarious Liability: Gov. Code. §§ 815.2, 815.4

Government Defendants contend (1) Government Code section 845 shields them from liability and, (2) their employees/independent contractors did not owe Plaintiff a legal duty to protect Plaintiff from a third party's criminal acts. While Plaintiff acknowledges that Section 845 immunizes public entities for failing to provide "sufficient police protection," he insists that his allegations hinge on specific negligent actions that were taken by the security officers who were present at the soccer match. (Opposition p. 4, lines 19-23.) Plaintiff contends Government Code section 845 does not shield liability for negligently performed security functions by the Government Defendants' employees and/or independent contractors, citing to *Wallace v. City of Los Angeles*, (1993) 12 Cal.App.4th 1385, *Mann v. State of California* (1977) 70 Cal.App.3d 773 and *Green v. City of Livermore* (1981) 117 Cal.App.3d 82.

It is well established that public entities generally are not liable for failing to protect individuals against crime. (*Zelig v. County of Los Angeles*, (2002) 27 Cal.4th 1112, 1124 (*Zelig*); *Williams v. State of California* (1983) 34 Cal.3d. 18, 23-24 & fn. 3 (*Williams*); *Benavidez v. San Jose Police Department* (1999) 71 Cal.App.4th 853, 859-860 (*Benavidez*).) Generally, one owes no duty to control the conduct of another or to warn those endangered by such conduct. Such a duty may exist, however, if "(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct or (b) a special relationship exists between the actor and the other which gives to the other a right to protection." (Rest.2d Torts, § 315, p. 122; *Thompson* v. *County of Alameda* (1980) 27 Cal.3d 741, 751-752; *Bonds* v. *State of California* ex rel. *Cal. Highway Patrol* (1982) 138 Cal.App.3d 314, 318.) Other than cases involving landowners and their invitees, those cases finding the existence of a special relationship most frequently involve some act or omission on the part of the defendant that either created a risk or increased an existing risk to a known person. (See *Tarasoff* v. *Regents of University of California* (1976) 17 Cal.3d 425; *Mann* v. *State of California*, *supra*, 70 Cal.App.3d 773.) More specifically, liability may be imposed if a law enforcement officer voluntarily assumes a duty to provide a particular level of protection, and then fails to do so, or if an officer undertakes affirmative acts that increase the risk of harm to the plaintiff. (See, *Zelig, supra* 27 Cal.4th at 1129; *Williams, supra,* 34 Cal.3d at 23-24; *Benavidez, supra,* 71 Cal.App.4th at 859-860.)

Here, Plaintiff's claim for violation of Government Code section 845 rests on the law enforcement officers' nonfeasance by failing to protect Plaintiff, who was an invitee on the Premises. The complaint alleges Government Defendants as owners/managers/controllers of the Premises had a duty to take reasonable precautions to protect patrons against foreseeable crimes or wrongful acts of third-parties, and Government Defendants breached their duty by failing to:

- hire competent security personnel
- enact and/or follow policies that would have prevented the attack
- conduct appropriate searches of people
- react to, prevent, and/or respond to occurring confrontations.
- properly effectuate a security plan with due care

- use reasonable technology and/or devices that would have prevented the attack
- have an appropriate security presence already installed to prevent the attack
- use appropriate barriers, markings, dividers, signage, ropes, or other forms of physical blockades necessary to appropriate security to prevent altercations and to enable swift response from security

(Complaint ¶¶ 20, 23, 25, 28, 54-58.)

Government Code section 845 provides: "A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative." (Gov. Code § 815.2.) Government code section 815.4 provides: "A public entity is liable for injury proximately caused by of the public entity to the same extent that the public entity would be subject to such liability if it were a private person. Nothing in this section subjects a public entity to liability for the act or omission of an independent contractor if the public entity would not have been liable for the injury had the act or omission been that of an employee of the public entity." (Gov. Code § 815.4.) Plaintiff seeks to hold Government Defendants vicariously liable for the alleged failures of the entire law enforcement unit that was deployed for the soccer match. However, the statutory language clearly concerns identifiable act(s) committed by an identifiable individual employee(s), which gives rise to a claim against that employee(s). Plaintiff fails to allege specific acts or omissions committed by any identifiable individual employee(s) or independent contractor(s).

"The statutes declaring immunity for damages caused by law enforcement failures encompass only discretionary law enforcement activity [Citation]. They have not barred liability when breach of a mandatory law enforcement duty was discerned." (*Roseville Community Hosp. v. State of California* (1977) 74 Cal.App.3d 583, 587.) Here, however, Plaintiff fails to allege breach of any mandatory duty by an identifiable individual officer for which Government Defendants could be held vicariously liable.

To impose liability on individual law enforcement officer(s) Plaintiff must allege facts showing the officer(s) voluntarily assumed a duty to provide a particular level of protection for the Plaintiff,

and then failed to do so, or that the officer undertook affirmative acts that increased the risk of harm to the Plaintiff. Plaintiff fails to do so. To the extent the complaint relies on the discretionary decisions of unnamed officers and employees regarding the nature and degree of security that should have been implemented at the Premise on the date of the attack, i.e., installation of barricades/ropes/dividers, use of technology to prevent the attack, effectuating a security plan, and the like, such conduct does not give rise to liability on the part of these unknown individual officers or employees.

Decisions regarding how and to what extent security services are provided can be considered discretionary and protected under Government Code section 820.2, and there is also no liability for failing to provide sufficient police protection service under Government code section 845. Plaintiff's effort to characterize their allegations as negligent performance of the officers is not persuasive. According to Plaintiff, the deployed law enforcement unit, as a whole, failed to enact policies, prevent/respond to confrontation, use technology that would have prevented criminal acts, implement a security plan, and use appropriate security measures. These are tantamount to insufficient and inadequate police protection, not breach of duty by individual officers.

Plaintiff's reliance on *Green*, *Mann*, and *Wallace* is misplaced. In each of these cases, law enforcement officers assumed a duty to provide a particular level of protection, and then failed to do so, or undertook affirmative acts that increased the risk of harm to the victims. In *Green* v. *City of Livermore, supra,* 117 Cal.App.3d at 90-91, the court found a breach of duty when officers failed to prevent intoxicated passengers from escaping by driving a vehicle after the police had arrested the driver. In *Mann* v. *State of California, supra,* 70 Cal.App.3d at 780-781, a special relationship was found where a highway patrol officer first stopped to aid stalled cars, parking behind them and using his flashing lights to warn oncoming cars, and then withdrew without warning leaving the cars and drivers exposed when they believed the officer was protecting them. In *Wallace v. City of Los Angeles, supra*, 12 Cal. App. 4th at 1396, when an 18-year-old prosecution witness was killed prior to testifying, the court found that the government's actions created a foreseeable peril to a specific foreseeable victim and thus a duty to warn arose when the danger was not readily discoverable by the endangered person. Here, as stated above, the complaint lacks any allegations showing Government Defendants' employees/independent contractors assumed a duty to provide a particular level of

protection for Plaintiff or affirmatively acted in ways that increased his risk of being stabbed by Mr. Garcia.

Accordingly, Government Defendants' demurrer to the fifth cause of action for violation of the Gov. Code § 815 et. seq. is SUSTAINED WITH LEAVE TO AMEND within 20 days from the service date of the final order.

B. Dangerous Condition of Public Property: Gov. Code § 835

Government Defendants contend the complaint fails to meet the statutory requirement of Government Code section 835 because it fails to plead the existence of a dangerous condition or how this non-existing dangerous condition caused Mr. Garcia's criminal conduct. Plaintiff contends a dangerous condition was created by design of the stadium and failures in management and inadequate security.

The sole statutory basis for imposing liability on public entities as property owners is Government Code section 835. (*Cerna v. City of Oakland* (2008) 161 Cal.App.4th 1340, 1347 (*Cerna*); *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1131–1132 (*Zelig*); *Brenner v. City of El Cajon* (2003) 113 Cal.App.4th 434, 438–439 (*Brenner*).) Government Code section 835 provides that "a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either: (a) [a] negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or (b) [t]he public entity had actual or constructive notice of the dangerous condition under § 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition."

A "dangerous condition" is defined as "a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used." (Gov. Code § 830, subd. (a).) A dangerous condition exists when public property "is physically damaged, deteriorated, or defective in such a way as to foreseeably endanger those using the property

itself," or possesses physical characteristics in its design, location, features or relationship to its surroundings that endanger users. (*Bonanno, supra*, 30 Cal.4th at pp. 148–149; see *Thimon v. City of Newark* (2020) 44 Cal.App.5th 745, 754 [258 Cal. Rptr. 3d 46] (*Thimon*).) A claim alleging a dangerous condition may not rely on generalized allegations but must specify in what manner the condition constituted a dangerous condition. (*Cerna, supra*, 161 Cal.App.4th at p. 1347; *Brenner, supra*, 113 Cal.App.4th at p. 439.)

A public entity may be liable for a dangerous condition of public property even where the immediate cause of the plaintiff's injury is a third party's negligent or illegal act if some physical characteristic of the property exposes its users to increased danger from third party negligence or criminality. (*Cerna, supra*, 161 Cal.App.4th at p. 1348; *Bonanno, supra*, 30 Cal.4th at p. 152.) However, "'third party conduct by itself, unrelated to the condition of the property, does not constitute a "dangerous condition" for which a public entity may be held liable.'" (Zelig*, supra*, 27 Cal.4th at p. 1134.) There must be some defect in the physical condition of the property and that defect must have some causal relationship to the third-party conduct that injures the plaintiff. (*Id.* at pp. 1134–1140; see also *Summerfield v. City of Inglewood* (2023) 96 Cal. App.5th 983, 994 (*Summerfield*).) "[P]ublic liability lies under § 835 only when a feature of the public property has 'increased or intensified' the danger to users from third party conduct." (*Ibid.* quoting *Bonanno*, *supra* 30 Cal.4th at p. 155.)

The complaint appears to identify three features that allegedly made the Premise dangerous: (1) its design, (2) Government Defendants' failure to provide appropriate security, and (3) Government Defendants' employees' failure to use appropriate safety measures. Plaintiff alleges:

- There was a dangerous condition at the area of the Premises where the Attack occurred.
- The dangerous condition created a reasonably foreseeable risk of the kind of injury that occurred, and it was known or reasonably should have been known.
- The Government Defendants had actual and/or constructive notice of the dangerous condition for long enough time to have protected against it, and they failed to do so.
- Other similar incidents involving violent behavior at the Premises put Defendants on notice of such dangerous and unsafe conditions during the soccer match and the type of security efforts that would be necessary for protection of the attendees.

- The physical features of the premises made appropriate security measures impossible, difficult, and/or caused an unreasonable response time.
- Government Defendants failed to use appropriate barriers, ropes, dividers, or other forms of blockades at the premises that were necessary for appropriate security.
- Certain areas of the Premise lacked security officers.
- The dangerous condition was created by negligent or wrongful act or omission of an employee or contractor within the scope of his/her employment.
- Government Defendants hired contractors who negligently caused the dangerous condition to exist and/or failed to use appropriate safety measures at the Premises.
- Government Defendants and/or its contractors also modified and altered the security measures for the Premises so that it was improperly confusing to security guards, an area of the Premises lacked appropriate security and security personnel were not properly established for prevention and patrol at the Premises.

(Complaint ¶¶ 20, 63-68.)

First, presence or absence of security guards and/or law enforcement officers is not a physical characteristic of public property and thus not actionable as a dangerous condition. "A lack of human supervision and protection is not a deficiency in the physical characteristics of public property." (*Cerna, supra*, 161 Cal.App.4th at p. 1352; see *Zelig, supra*, 27 Cal.4th at pp. 1137, 1140, 1144–1145 [lack of police screening at courthouse not a dangerous condition of property].) Public entities, like the Government Defendants are immune from liability for asserted failures to provide security services and/or police presence. (§ 845; *Zelig*, at pp. 1141–1147; *Cerna, supra*, 161 Cal.App.4th at p. 1352.) Therefore, Plaintiff cannot support his claim that a dangerous condition existed because certain areas on the Premise lacked security personnel.

Second, to the extent Plaintiff claims the Government Defendants failed to provide appropriate security measures, i.e., appropriate barriers, ropes, dividers, or other forms of blockades that were necessary for appropriate security, the Court finds no support that a dangerous condition was created. The complaint does not sufficiently state how the Premise, by itself, is in a dangerous condition or is defective in such a way as to foreseeably endanger those using the property itself. Plaintiff's vague and

conclusory allegations that the physical features of the Premise made security response impossible or unreasonably untimely is insufficient to show an existing dangerous/defective condition. Claims against public entities must be specifically pleaded; generalized allegations about the dangerous condition will not suffice and, rather, must specify what the condition was and in what manner it constituted a dangerous condition. (See, *Brenner, supra*, 113 Cal.App.4th at p. 439; see *Cerna, supra*, 161 Cal.App.4th at p. 1347.)

Third, the complaint does not sufficiently plead a claim for dangerous condition of the Premise based on a third-party's stabbing coupled with the absence of ropes, barriers, barricades, new technology to detect attacks, and/or adequate security. Plaintiff's argument that the Premise was made dangerous because it lacked these appropriate security measures improperly presupposes the dangerousness of the Premise. Plaintiff's citation to *Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799 illustrates the fallacy of his position. In *Peterson* a dangerous condition was created by untrimmed foliage around a campus parking lot and stairway that facilitated the perpetration of an attempted rape. Here, the complaint lacks any allegations that an existing defective/dangerous physical condition on the Premise facilitated Mr. Garcia's criminal act.

Fourth, while Plaintiff alleges there have been other similar incidents at the Premise, the complaint does not reference any, thus Plaintiff's allegation that these other similar incidents should have put Government Defendants on notice is conclusory and insufficient.

Finally, Plaintiff alleges that Government Defendants are vicariously liable for their employees/independent contractors whose negligent performance of their duties created a dangerous condition on the Premises. The law was settled by *Van Kempen v. Hayward Area Park Etc. District* (1972) 23 Cal.App.3d 822, that public entity liability for property defects is not governed by the general rule of vicarious liability provided in §§ 815.2 and 815.4, but rather by the provisions in §§ 830 to 835.4 of the Government Code. A public employee is not liable for injuries caused by a condition of public property where such condition exists because of any act or omission of such employee within the scope of his employment. (Gov. Code, § 840.) This is specifically what Plaintiff alleges. However, since the employee/independent contractor is immune, the Government Defendants cannot be held liable.

Accordingly, Government Defendants' demurrer to the sixth cause of action for dangerous condition of public property is SUSTAINED WITH LEAVE TO AMEND within 20 days from the service date of the final order.

C. Santa Clara Police Department, a non-legal entity

Government Defendants contend the Santa Clara Police Department ("SCPD") is not separate entity, and therefore any cause of action against the SCPD must fail. Plaintiffs' silence on this issue may be considered a concession.

SCPD cannot sue or be sued because it does not exist separate and apart from the City of Santa Clara, nor does the SCPD have its own legal identity. (*See Alcala* v. *City of Corcoran*, (2007) 147 Cal. App. 4th 666, 669-70.) Therefore, a suit against the SCPD is tantamount to a suit against the City of Santa Clara. However, naming the police agencies as defendants is basically the same thing as misnaming a party. A complaint that names a party by the wrong name is not subject to a demurrer on that ground. Rather, the wrongly named party may respond and set forth its true name, and the pleading may later be amended to set forth the true name. So long as the head of the department (*i.e.,* the chief of police or sheriff) who has authority for carrying out the policies established by the political entity (*i.e.,* the city or county or the state) is named a party, the court has complete jurisdiction to decide the case and to make appropriate orders. Misnaming an entity is not subject to demurre.

Therefore, Government Defendants' demurrer on the ground that the SCPD is improperly named as a defendant in this case is OVERRULED.