SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 10
Honorable Frederick S. Chung

Rachel Tien, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408-882-2210

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

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.

The courthouse is open: Department 10 is now fully open for in-person hearings, as of April 18, 2023. The court strongly prefers **in-person** appearances for all contested law-and-motion matters. For all other hearings (*e.g.*, case management conferences), the court strongly prefers either **in-person or video** appearances. Audio-only appearances are permitted but disfavored, as they cause significant disruptions and delays to the proceedings. Please use telephone-only appearances as a last resort.

Scheduling motion hearings: Please call 408-882-2430 between 8:30 a.m. and 12:30 p.m. (Mon.-Fri.) to reserve a hearing date for your motion *before* you file and serve it. You must then file your motion papers no more than five court days after reserving the hearing date, or else the date will be released to other cases.

CourtCall is no longer available: Department 10 uses Microsoft Teams for remote hearings. Please click on this link if you need to appear remotely, and then scroll down to click the link for Department 10: https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml. Again, the court strongly prefers in-person or video appearances. Telephonic appearances are a sub-optimal relic of a bygone era.

Recording is prohibited: As a reminder, most hearings are open to the public, but state and local court rules prohibit recording of court proceedings without a court order. This prohibition applies to both in-person and remote appearances.

Court reporters: Unfortunately, the court is no longer able to provide official court reporters for civil proceedings (as of July 24, 2017). If any party wishes to have a court reporter, the appropriate form must be submitted. See https://www.scscourt.org/general_info/court_reporters.shtml.

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	18CV323923	Corrie Johnson v. Nordstrom, Inc.	Click on LINE 1 or scroll down for ruling.
LINE 2	22CV405048	Jane Doe v. Mohammadreza Rohaninejad et al.	Click on LINE 2 or scroll down for ruling.
LINE 3	19CV343781	Minh Vo v. Thai Nguyen	Motion to compel compliance with subpoena duces tecum: notice is proper, and the motion is unopposed. Good cause appearing, the court GRANTS the motion to compel. In addition, the court finds that judgment creditor's request for reimbursement of $960 for the expense of bringing this motion is reasonable. The court orders judgment debtor Thai Nguyen to pay this amount within 30 days of the notice of entry of order. Moving party to prepare the formal order for the court's signature.
LINE 4	23CV415304	Wells Fargo Bank, N.A. v. Elaine G. Uribe	Motion to deem RFAs admitted: notice is proper, and the motion is unopposed. Good cause appearing, the court GRANTS the motion. Moving party to prepare formal order for signature.
LINE 5	22CV404567	Brett Thomas Weisel v. David Howard Lichtenger et al.	Click on LINE 5 or scroll down for ruling.

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LINE 6	23CV418036	Alan Kuczer v. Jim Harding et al.	Petition to compel arbitration: notice is proper, and the court has not received a timely opposition. Defendants have made a sufficient showing that the parties' arbitration agreement governs this dispute. Good cause appearing, the court GRANTS the motion. The case is stayed, and the parties are ordered to meet and confer regarding the selection of an arbitrator. The court sets this matter for a case status review on **July 18, 2024** at 10am in Dept. 10.
LINE 7	23CV418966	Jonathan Granados et al v. Qing Lin et al.	Motion to be relieved as counsel: parties to appear.
LINE 8	2014-1-CV-271941	Carol Tran v. Mobile Tummy, Inc. et al.	Motion to be relieved as counsel: parties to appear.
LINE 9	23CV425103	Ella Pinco et al. v. Axiom Learning, LLC	Motion to compel arbitration: parties to appear. Click on LINE 9 or scroll down for specific questions that the court intends to ask counsel.

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Calendar Line 1
Case Name: *Corrie Johnson v. Nordstrom, Inc.*
Case No.: 18CV323923

Plaintiff Corrie Johnson has filed a motion for judgment on the pleadings under Code of Civil Procedure section 438. There are at least two major problems with this motion.

First, it does not appear that notice is proper for the motion, as there is no indication in the file that defendant Nordstrom, Inc. ever received a notice of motion with the correct hearing date. There is no proof of service on Nordstrom. In addition, Johnson did not file her memorandum of points and authorities until January 22, 2024, which is only 15 court days before a February 13, 2024 hearing date. Code of Civil Procedure section 1005, subdivision (b), requires moving papers to be served at least *16 court days* before a hearing. Unsurprisingly, given the lack of notice (much less, timely notice) the court has received no response to the motion from Nordstrom.

Second, even if notice were proper, there would be no basis for the court to grant the motion, because a judgment has already been entered in this case, and the case is closed. The correct way for a party to address an already-entered judgment is to file a motion to set aside that judgment, not to file a motion for judgment on the pleadings. A motion for judgment on the pleadings is only proper *before* a judgment has been entered. In this case, Johnson has previously attempted to file five or six separate motions to set aside the judgment, all of which have been denied. (See, e.g., July 13, 2023 Order at pp. 2:1-9 & 3:3-5.)[1] In the present motion for judgment on the pleadings, she repeats many of the same arguments as before—including the allegation that "the final judgment in this case is void." (Johnson's Memorandum at p. 1:25.) There is simply no legal basis for the court to accept these serial, untimely motions to undo a judgment that was entered in 2020, approximately four years ago. (See July 13, 2023 Order at p. 2:11-20.)[2]

Accordingly, there is no reason for the court to continue the motion in order to provide Nordstrom with notice. The motion for judgment on the pleadings is DENIED.

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[1] The court takes judicial notice of its July 13, 2023 Order on its own motion, pursuant to Evidence Code section 452, subdivision (d).

[2] Even if it were possible to consider the motion on the merits, the court would deny it, as Johnson's contention that the answer does not sufficiently set forth the affirmative defenses is incorrect. Nordstrom prevailed on a collateral estoppel defense, and "a party is not required to specially allege collateral estoppel as a defense." (*Hulsey v. Koehler* (1990) 218 Cal.App.3d 1150, 1156, citing *Dakins v. Board of Pension Commissioners* (1982) 134 Cal.App.3d 374, 387.)

Calendar Line 2
Case Name: *Jane Doe v. Mohammadreza Rohaninejad et al.*
Case No.: 22CV405048

I. BACKGROUND

This is a lawsuit arising from the alleged sexual assault of plaintiff Jane Doe by defendant Mohammadreza Rohaninejad, M.D. The County of Santa Clara (the "County"), originally sued as O'Connor Hospital, is also a defendant.

The original complaint, filed on October 3, 2022, stated 13 causes of action against O'Connor Hospital, O'Connor Hospital Foundation, and Rohaninejad. After the court granted Doe relief from the government claim filing requirements (Government Code section 945.4), Doe filed the operative first amended complaint ("FAC") on July 21, 2023. The FAC states causes of action for: (1) Gender Violence (Civ. Code, § 52.4); (2) Sexual Harassment (Civ. Code, §§ 51.9, 52); (3) Sexual Assault (Code Civ. Proc., § 340.16); (4) Sexual Battery (Civ. Code, § 1708.5); (5) Intentional Infliction of Emotional Distress (Code Civ. Proc., § 340.16, subd. (b)(2)); (6) Negligence (Code Civ. Proc., § 340.16, subdivision (b)(2)); (7) Fraudulent Concealment (Code Civ. Proc., § 340.16, subdivision (b)(2)); and (8) Breach of Mandatory Duty (Gov. Code, § 815.6, subd. (b)(2).).

Doe alleges that Rohaninejad sexually assaulted her while she was a patient at O'Connor Hospital from July 13 to July 14, 2021, after she was admitted for emergency gallbladder surgery. (FAC, ¶¶ 17-18.) The County owns and operates O'Connor Hospital, which is one of the medical facilities where Rohaninejad worked. (*Id*. at ¶ 1.) The FAC further alleges that Rohaninejad acted as an apparent or ostensible agent of the County, and that he shares an alter-ego relationship with the County. (*Id*. at ¶¶ 11, 14.)

Currently before the court is a demurrer to the FAC, filed by the County on September 13, 2023.

II. LEGAL STANDARDS

The court, in ruling on a demurrer, treats it "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688 (*Piccinini*) [citing Blank v. Kirwan (1985) 39 Cal.3d 311, 318].) "Because a demurrer tests only the legal sufficiency of the pleading, the facts alleged in the pleading are deemed to be true." (*Nasrawi v. Buck Consultants LLC* (2014) 231 Cal.App.4th 328, 337 [citing *Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1034].) "To survive a demurrer, the complaint need only allege facts sufficient to state a cause of action; each evidentiary fact that might eventually form part of the plaintiff's proof need not be alleged." (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 872 [citing *Golceff v. Sugarman* (1950) 36 Cal.2d 152, 154].)

III. DISCUSSION

As an threshold matter, the county SUSTAINS the County's demurrer to the eighth cause of action. Doe's opposition does not address the deficiencies highlighted by the County

regarding the identification of a "mandatory duty," and instead, she states that "will dismiss" this cause of action. (Opposition at p. 1, fn. 1.)

The County also demurs to the second, third, fourth, fifth, sixth, and seventh causes of action, arguing that the Government Claims Act bars each of the claims. (Code Civ. Proc., § 430.10, subd. (e).) The Act, codified at Government Code section 810 *et seq.*, is a "comprehensive statutory scheme that sets forth the liabilities and immunities of public entities and public employees for torts." (*Cordova v. City of Los Angeles* (2015) 61 Cal.4th 1099, 1104-1105.)

A. Public Entity Liability Under the Government Claims Act

The County argues that because the second through seventh causes of action are either based on common law theories or liability or based on statutes that do establish any tort liability of a public entity, Government Code section 815, subdivision (a), bars these claims. That subdivision provides: "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).) The California Supreme Court has consistently confirmed that the purpose and effect of this statute is consistent with the County's position in this case. (See, e.g., *Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 347; *Guzman v. County of Monterey* (2009) 46 Cal.4th 887, 897 ["there is no common law tort liability for public entities in California"]; *Miklosy v. Regents of University of California* (2008) 44 Cal4th 876, 899 ["our own decisions confirm that section 815 abolishes common law tort liability for public entities."]; *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1127-1128 [reaffirming intent of Act to "confine potential governmental liability to rigidly delineated circumstances"].)

1. Common Law Claims and Code of Civil Procedure Section 340.16

The County argues that the demurrer is proper as to the third, fifth, sixth, and seventh causes of action because they all allege common law claims. In addition, the County argues that Doe improperly relies on Code of Civil Procedure section 340.16 as the statutory basis for public entity liability when this code section merely sets forth the statute of limitations for sexual assault claims. Code of Civil Procedure section 340.16, subdivision (a), establishes the deadlines—10 years from the last act or three years from actual or constructive discovery—for bringing "any civil action for recovery of damages suffered as a result of sexual assault," and section 340.16, subdivision (b)(2), states that it "does not limit the availability of causes of action . . . against persons or entities other than the alleged person who committed the crime." According to the County, these provisions say "nothing about whether a cause of action deriving from an alleged sexual assault may be brought against a public entity." (Demurrer at p. 11:8-11.)

In opposition, Doe cites *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920 and *Levine v. City of Los Angeles* (1977) 68 Cal.App.3d 481 for the proposition that a public entity may still be liable for a common law tort "if a statute defines the tort in general terms." (See *Levine,* 68 Cal.App.3d at p. 487 [citing *Nestle,* 6 Cal.3d at p. 933].) In *Nestle,* the California Supreme Court determined that a public entity could be liable for nuisance because Civil Code section 3479 provided a statutory definition of nuisance:

> Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

While Doe is correct that *Nestle* and *Levine* are still "good law," she misapplies that law here. In contrast to Civil Code section 3479, which provided a substantive definition of the nuisance cause of action, Code of Civil Procedure section 340.16 does not provide any substantive definition of sexual assault or even "define the tort in general terms." (*Levine,* 68 Cal.App.3d at p. 487; *Nestle*, 6 Cal.3d at p. 933.) In addition, it does not provide any affirmative basis for a claim against a public entity. The County is correct that section 340.16 is a statute of limitations

The present action is more analogous to *Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, where the California Supreme Court determined that a plaintiff could not rely on Civil Code section 1714 as the statutory basis for public entity liability, given that the statute did not define the common law tort of negligence. (See *id.*, 31 Cal.4th at p. 1179.) Similarly, Code of Civil Procedure section 340.16 contains no language defining sexual assault, intentional infliction of emotional distress, negligence, or fraudulent concealment.

Finally, Doe suggests in a footnote to her opposition that because Code of Civil Procedure section 430.16, subdivision (c)(2)(C) *prohibits* the revival of claims against public entities, the Legislature necessarily authorized public entity liability *affirmatively* in the other parts of the statute. The court disagrees with this strained reading of the statutory language. In addition, this argument still fails to address the fact that section 340.16 does not define any of the common law tort causes of actions for which Doe seeks relief.

2. Causes of Action Under Civil Code Sections 51.9, 52, and 1708.5

As for the second and fourth causes of action (for sexual harassment and battery), the County argues that even thought these claims are expressly based on statutes (Civil Code sections 51.9, 52, and 1708.5), these code sections still do not support public entity liability because they do not define a "person" to include public entities.

Civil Code section 51.9 provides a cause of action for sexual harassment against a "person" with a "business, service, or professional relationship" with the plaintiff. (Civ. Code, § 51.9, subd. (a)(1).) The statute identifies a non-exhaustive list of "persons," including a physician. (Civ. Code, § 51.9, subd. (a)(1)(A).) Civil Code section 52 provides for damages and other relief for the denial of a right to pursue a cause of action under Civil Code section 51.9. (Civ. Code, § 52, subd. (b).) Civil Code section 1708.5 provides a cause of action for sexual battery against a "person" who "[a]cts with the intent to cause a harmful or offensive contact with an intimate part of another, and a sexually offensive contact with that person directly or indirectly results," among others.

In support of its argument, the County cites *K.M. v. Grossmont Union High School Dist.* (2022) 84 Cal.App.5th 717 (*Grossmont*), where the Court of Appeal held that a public school district (and public entity) is not a "person" under Civil Code section 51.9. In reaching

this holding, the Court reviewed the language and purpose of the statutory scheme and concluded that Civil Code section 14 defines a person as a natural person and a corporation, but does not include a public entity in the definition. (*Grossmont, supra,* 84 Cal.App.5th at p. 751.) The *Grossmont* Court noted that Civil Code section 51.9 was intended to "expand liability in recognition that 'sexual harassment occurs not only in the workplace'" but declined to extend the application to public school districts because "there *are* other laws and legal theories besides Civil Code section 51.9 that encourage harassment victims to come forward, and let them obtain compensation when they do, including the Education Code." (*Id*. at pp. 753-54 [quoting *C.R. v. Tenet Healthcare Corp.* (2009) 169 Cal.App.4th 1094, 1105 (*Tenet*); italics in original].)

In her opposition, Doe does not address these arguments and instead claims broadly that the second through seventh causes of action should survive demurrer because the County "ratified" Rohaninejad's actions. Doe contends that ratification "is an additional theory of liability under which an entity can be liable for sexual misconduct by subsequently ratifying an unauthorized tort." (Opposition at p. 5:14-16 [citing *Tenet, supra,* 169 Cal.App.4th at pp. 1110-12.]) Doe's citation to *Tenet* is unhelpful to her cause in two respects. First, as *Grossmont* pointed out, *Tenet* involved a private employer, rather than a public entity. (See *Grossmont, supra,* 84 Cal.App.5th at p. 757.) Thus, in *Tenet*, the court merely determined that a private corporation could be liable for the employee's actions under a "ratification" theory. Second, *Tenet* only supported a ratification theory for causes of action under Civil Code section 51.9, which means that even if it applied here to public entities, it would apply only to the second cause of action and not the third through seventh cause. In any event, Doe cites no statutory or decisional authority to support the application of a ratification theory to public entities.

B. Vicarious Liability Under Government Code Section 815.2

The County argues that the second, third, fourth, fifth, sixth, and seventh causes of action are also barred because any sexual assault(s) by Rohaninejad occurred outside the scope of his alleged employment, and so the assaults could not be a basis for vicarious liability under Section 815.2.

Government Code section 815.2, subdivision (a), provides as follows:

> 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.

"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* (*Perez*) (1986) 41 Cal.3d 962, 967.) "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.'" (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 213 [quoting *Perez, supra,* 41 Cal.3d at p. 968].) For purposes of this demurrer, the County does not dispute that Rohaninejad was an employee rather than an independent contractor; thus, this court may determine whether Rohaninejad acted within the scope of his alleged employment. (Demurrer at p. 8, fn. 1.)

The County contends that although Rohaninejad allegedly assaulted Doe during working hours, employers are generally not liable for their employees' sexual misconduct. (See *Farmers Insurance Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1004-1005 ["an employer will not be held vicariously liable for an employee's malicious or tortious conduct if the employee *substantially* deviates from the employment duties for personal purposes"; emphasis in original].)

The County primarily analogizes this case to *Lisa M. v. Henry Mayo Newhall Memorial Hosp.* (*Lisa M.*) (1995) 12 Cal.4th 291, 298. There, the California Supreme Court determined that an ultrasound technician's sexual misconduct during a patient's examination was not "engendered" by his employment, and so the hospital could not be held vicariously liable for his actions. The technician was tasked with conducting a diagnostic examination and preparing a report, which "provided no occasion for a work-related dispute or any other work-related emotional involvement with the patient." (*Id.,* 12 Cal.4th at 301 ["a sexual tort will not be considered engendered by the employment unless its motivating emotions were fairly attributable to work-related events or conditions"].) The Court noted that 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." (*Ibid*. [emphasis in original].) The Court reached the same conclusion after analyzing foreseeability. It held that employer liability could only be established where the employment predictably creates "the risk employees will commit intentional torts of the type for which liability is sought." (*Id*. at p. 302.) In *Lisa M.*, those circumstances were absent. In reaching this decision, the Court noted: "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." (*Id.* at 302.)

Here, just as in *Lisa M.*, Rohaninejad was tasked with examining Doe before and after her emergency gallbladder surgery, a task that required physical contact but "was not of a type that would be expected to, or actually did, give rise to intense emotions on either side." (*Id.* at p. 303.) The FAC does not plead additional facts of "emotional involvement, either mutual or unilateral, arising from the medical relationship" that would indicate that Rohaninejad did anything but take "advantage of solitude, access and superior knowledge to commit a sexual assault." (*Id.* at p. 302-03.)

In opposition, Doe argues that the question of whether Rohaninejad acted within the scope of employment is a question of fact. The court is not persuaded by this argument. Because the vicarious liability allegations in the FAC consist entirely of generic boilerplate (see, e.g., FAC, ¶ 109), they are insufficient to identify any "factual" issues that may exist. Indeed, as noted above, the County has already stipulated away a key factual issue—whether Rohaninejad was an employee or independent contractor of O'Connor Hospital—by accepting Rohaninejad's employment status for purposes of this demurrer. Doe fails to identify any other *facts* that may be subject to dispute. Her generic allegations are therefore insufficient to survive a demurrer. (*Piccinini, supra,* 226 Cal.App.4th at p. 688 [prohibiting consideration of "contentions, deductions or conclusions of fact or law" on demurrer].)

Finally, Doe responds that the demurrer should be overruled because the County does not address her separate vicarious liability allegations based on the assumption that Rohaninejad worked for the County as independent contractor, under Government Code

section 815.4. The problem with this contention is that Doe's boilerplate allegations are (again) entirely insufficient to set forth any basis for analyzing her claims under section 815.4 any differently from her claims under section 815.2. Indeed, section 815.4 expressly provides: "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 [emphasis added].) In other words, the vicarious liability analysis for independent contractors is exactly the same as the vicarious liability analysis for employees. In light of the court's determination that the FAC does not sufficiently plead vicarious liability for Rohaninejad's conduct as an alleged *employee*, Doe's status as an alleged *independent contractor* adds nothing to the viability of the causes of action.

IV. CONCLUSION

The court SUSTAINS the demurrer to the second through seventh causes of action on the ground that they are insufficiently pled. (Code Civ. Proc., § 430.10, subd. (e).) Because this is the first substantive pleading challenge, the court does so with 10 days' leave to amend.

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Calendar Line 5
Case Name: *Brett Thomas Weisel v. David Howard Lichtenger et al.*
Case No.: 22CV404567

This is a motion for an award of attorney's fees, following the court's ruling granting defendants' motion for summary judgment.[3] Although the general rule is that a court may not award attorney's fees to a prevailing party unless such fees are provided by statute, contract, or a specified nonstatutory theory of law (see Code Civ. Proc. § 1033.5, subd. (a)(10)), defendants argue here that there are contractual attorney's fees provisions in two different agreements that apply to this case. Having reviewed these provisions closely, as well as the cited case law, the court disagrees and now denies the motion.

1. The MOU

First, defendants rely on a memorandum of understanding ("MOU") between plaintiff Brett Weisel and defendant David Lichtenger that was "attached and incorporated into the LLC Operating Agreement" for Integrity Homes, LLC, which was the general partner of Integrity Homes LP (which, in turn, was the general partner of CA Residential Opportunity Fund III LP ("CROF III")). (See August 10, 2023 Order at p. 2:1-10.) That MOU states, in relevant part:

> 8. In the event of any unresolved dispute, Brett and David shall attempt to jointly state the issue in writing and then solicit advice and counsel of a neutral third party, but if not possible or able to resolve same in that manner, will mediate the matter, and if that is unsuccessful, desire to resolve by AAA Arbitration rules adopting the rule by which the arbitrator can decide if there is a prevailing party and award that party legal fees and costs.

(Declaration of David Howard Lichtenger ("Lichtenger Decl."), Exhibit A, ¶ 8.)

This dispute resolution provision is inapplicable to this case, because the MOU of which it is a part governed the operations of Integrity Homes, LLC. By contrast, the dispute in this case focused on the operations of CROF III, a completely different entity. In the present case, Weisel alleged that Lichtenger "conducted a 'corporate coup d'état'" of CROF III, mismanaging CROF III and misappropriating its funds. (August 10, 2023 Order at p. 2:11-14.) Although Weisel attempted to argue that his MOU with Lichtenger established that he was a limited partner of CROF III, the court found otherwise, concluding that, at best, the MOU confirmed that *Integrity Homes, LP* was a limited partner of CROF III, not Weisel. (*Id.* at pp. 8:12-9:4.) Indeed, in their summary judgment motion, defendants argued that the Limited Partnership Agreement for CROF III (the "LPA") was the *sole controlling authority of the partnership*. (*Id.* at p. 6:12-13.) The court relied on this argument, observing that "[t]he LPA is a fully integrated agreement that contains 'all of the agreements, understandings, representations, conditions, warranties and covenants made between and amount the parties [thereto].'" (*Id.* at p. 6:17-19.) Having made and benefited from this argument in obtaining summary judgment, defendants cannot now turn around and claim that the MOU is suddenly relevant to the question of whether they are entitled to attorney's fees against Weisel.

[3] The court, on its own motion, takes judicial notice of its Order Re: Motion for Summary Judgment, dated August 10, 2023. (Evid. Code, § 452, subd. (d).)

Again, the *entire basis* of defendants' summary judgment motion was that the distinctions between corporate entities is fundamental and important, and that *Weisel the individual* is not the same as *Integrity Homes, LLC the company*, which is not the same as *Integrity Homes, LP the limited partnership*, which is not the same as *CROF III the limited partnership*. Defendants cannot now blur the distinctions between the entities to argue that the MOU for Integrity Homes, LLC suddenly applies.

Moreover, even if the MOU did apply to this case, the court would find that it does not provide for an award of attorney's fees to a prevailing party *in litigation*. Paragraph 8 expressly provides that disputes should be informally resolved if possible, then mediated if necessary, then arbitrated with an AAA arbitrator, and then the arbitrator "can decide if there is a prevailing party" for an award of fees and costs. None of those steps were followed in this case. Defendants argue that "it is clear [from the MOU] that the parties . . . intended the prevailing party *in any dispute* to be awarded attorney's fees and costs," but they offer no legal or factual support whatsoever for this conclusory statement. (Memorandum at pp. 6:28-7:3 [emphasis added].) The court divines no such "clear" intent from the plain language of this provision. The dispute resolution provision does not mention litigation at all; on the contrary, it mentions three other dispute resolution mechanisms that are *not* litigation.

2. The LPA

Second, defendants rely on the LPA for CROF III to argue that the parties agreed that a prevailing party in litigation should be awarded attorney's fees. The relevant language of the LPA is as follows:

> J. **Mediation/Arbitration**: If any dispute, controversy or claim develops between the parties with respect to any matter arising out of or relating to this Agreement, the formation or validity of this Agreement, performance hereunder or the breach of this Agreement, which the parties do not promptly adjust and determine, said controversy shall be first submitted to mediation, but if mediation is not successful to resolve the matter, then the parties can seek other procedures and other remedies, including possibly arbitration administered and under such rules as the parties may mutually agree upon. If arbitration is utilized, an award rendered by the arbitrator may be entered as a judgment in a court having jurisdiction thereof, and the award shall be considered by the court to be final and binding upon the parties, and the arbitrator shall have the authority to determine which of the parties to the arbitration shall be considered a prevailing party and whether a prevailing party shall be entitled to fees, costs and/or attorney's fees incurred for the arbitration.

(Lichtenger Decl., Exhibit B at p. 44, ¶ 12.J.)

This provision is even more long-windedly tied to "**Mediation/Arbitration**" than the provision from the MOU. Once again, this paragraph says nothing about litigation. Once again, defendants cite no authority for the proposition that an attorney's fees provision in an alternative dispute resolution clause means that the parties intended that attorney's fees be awarded more generally in litigation. If the parties really intended for attorney's fees to be awarded in "all" disputes, they could have said so, and they did not. The court interprets the foregoing language as providing for attorney's fees only as awarded by an arbitrator.

Additionally, another critical reason that the LPA does not apply here is that Weisel was not a signatory or a party to the LPA. The quoted language above is limited to "any dispute, controversy[,] or claim . . . *between the parties*." The parties to the LPA were Integrity Homes, LP (general partner) and David Lichtenger (limited partner). Defendants argue that even a non-signatory like Weisel can be liable for attorney's fees when they sue on behalf of the corporate entity (or "stand[] in the shoes of a party to the contract") under an agreement that provides for attorney's fees. (Memorandum at p. 6:5-23 [citing *Brusso v. Running Springs Country Club, Inc.* (1991) 228 Cal.App.3d 92, 109-110 (*Brusso*) and *Apex LLC v. Korusfood.com* (2013) 222 Cal.App.4th 1010, 1017-1018 (*Apex*)].) What defendants fail to acknowledge, however, is that the non-prevailing parties in *Brusso* and *Apex actually had standing* to bring a derivative action on behalf of the corporation (*Brusso*) or otherwise to act on behalf of a contracting party (*Apex*). By contrast, in this case, Weisel failed to prevail on summary judgment precisely because he did not have standing to bring a claim on behalf of CROF III. In other words, the reason why defendants prevailed on summary judgment in this case is exactly the same reason why they cannot prevail on this motion for attorney's fees: Weisel never stood "in the shoes of a party to the contract" to begin with. (*Apex, supra,* 222 Cal.App.4th at 1017-1018.) Weisel was neither a party *nor entitled to act as a party* to the LPA—thus, he could not enforce the LPA in his individual capacity, and the LPA cannot be enforced against him in his individual capacity.

In short, there are multiple reasons why each of the MOU and the LPA do not provide for an award of attorney's fees to the prevailing party in litigation—in this case, defendants. The motion is DENIED.

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Calendar Line 9
Case Name: *Ella Pinco et al. v. Axiom Learning, LLC*
Case No.: 23CV425103

In this motion to compel arbitration, defendant Axiom Learning, LLC's opening brief and tardy reply brief do not even mention the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act ("EFAA"). Plaintiffs Ella Pinco, Rebecca Thompson, and Dusten Conlon filed a "joint" opposition brief that raises the EFAA but blurs the material differences that may exist between each of them and also leaves some unanswered questions. This brief was also tardy.[4] The court would like the parties to address the following questions at the hearing:

1. Plaintiffs argue that the Federal Arbitration Act ("FAA") does not apply in this case, because "[t]here is no indication . . . that AXIOM engaged in any interstate commerce or that the agreement is intended to encompass such activity at all." (Opposition at pp. 3:28-4:2.) If the court ultimately agrees and concludes that the California Arbitration Act applies instead of the FAA, do the parties agree that the EFAA does not apply to this case, given that the EFAA is an amended provision *within* the FAA?

2. What facts exist to support the allegations that Axiom Learning, LLC *does, or does not,* engage in interstate commerce? The court has not received sufficient information about Axiom and needs more to evaluate these allegations.

3. What authority exists for the proposition that the EFAA applies to Thompson and Conlon's retaliation claim against Axiom (the sole cause of action alleged by Thompson and Conlon)? The court understands that the EFAA was designed to encompass an alleged victim's claims of sexual harassment or sexual assault—including a claim of retaliation related to that sexual harassment or sexual assault—but does it also encompass the claims of *third-party witnesses or "whistleblowers"* who corroborate that sexual harassment or assault? Even if the EFAA applies to Pinco's claim, does it necessarily apply to Thompson and Conlon's claim, too? What language in the statute or relevant case law supports such a proposition?

4. Plaintiffs assert that the arbitration agreement "requires all three Plaintiffs to waive their rights wholesale under FEHA, the Labor Code, before the EEOC, before the Labor Commissioner and DLSE and as to any PAGA claims." (Opposition at p. 7:23-25.) No explanation is given for this conclusory statement, and no factual or legal citation is provided in the opposition brief. Please elaborate as to how Plaintiffs' *FEHA*, *Labor Code*, and *PAGA* claims would be "waived" or cannot be arbitrated.

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[4] The opposition brief was due on January 30, 2024, because February 12, 2024 is a court holiday throughout the State of California. Plaintiffs filed their brief on January 31, 2024. Axiom's reply brief was also filed a day late.