SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 16
(Dept 16 is now hearing cases that were formerly in Dept 2)
Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 03-07-24 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear by video.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.
The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

TO CONTEST THE RULING: Before 4:00 p.m. today you must notify the:

(1) Court by calling (408) 808-6856 and
(2) Other side by phone or email that you plan to appear and contest the ruling
(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

TO APPEAR AT THE HEARING: The Court strongly prefers in person appearances. If you must appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to Department 16.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

TO SET YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. Phone lines are now open for you to call and reserve a date before you file your motion. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Where to call for your hearing date: 408-882-2430 When you can call: Monday to Friday, 8:30 am to 12:30 pm

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

COURT REPORTERS: The Court no longer provides official court reporters. If any party wants a court reporter, the appropriate form must be submitted. See court website for policy and forms.

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	22CV408993 Hearing: Demurrer	JOSEPH DOE 7DC et al vs DOE 1 et al	See Tentative Ruling. Court will prepare the final order.
LINE 2	22CV404787 Motion: Summary Judgment/Adjudication	Marisela Duran et al vs William Stuart et al	See Tentative Ruling. Court will prepare the final order.
LINE 3	19CV343789 Motion: Compel	Richard Pierce et al vs RAINCROSS FUEL & OIL, INC. et al	It appears that this motion is moot, as summary judgment was granted in favor of the moving defendant. If not moot, the motion is GRANTED as it is unopposed, notice was proper and good cause appears. The Court will prepare the final order.
LINE 4	21CV377860 Motion: Compel	George Jones vs Michael Liddle et al	Notice appearing proper and good cause appearing, the unopposed motion to compel is GRANTED. Plaintiff shall prepare the final order.
LINE 5	23CV419244 Hearing: on Mediation	Robert Lindblad vs Yahoo Inc. et al	Off calendar
LINE 6	23CV419244 Motion: Stay	Robert Lindblad vs Yahoo Inc. et al	Off Calendar
LINE 7	23CV419244 Motion: Compel	Robert Lindblad vs Yahoo Inc. et al	Off calendar

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LINE 8	21CV384705 Motion: Sanctions	Varick Partners, LLC vs Rana Rekhi et al	On October 23, 2023, Defendant Mark Gibbs filed a motion for sanctions against Plaintiffs. A default was entered against Defendant Gibbs on Dec. 21, 2021. "After the default was entered, defendant was no longer an active party in the litigation and thus was not entitled to any further notices. 'The clerk's entry of default cuts off the defendant's right to take further affirmative steps such as filing a pleading or motion, and the defendant is not entitled to notices or service of pleadings or papers.'" *Sporn v. Home Depot USA, Inc.*, 126 Cal. App. 4th 1294, 1301 (citation omitted). As such, the motion is DENIED. Plaintiffs shall submit the final order.
LINE 9			
LINE 10			
LINE 11			
LINE 12			
LINE 13			
LINE 14			
LINE 15			
LINE 16			

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

LINE 17			

- oo0oo -

Calendar Line 1
Case Name: *Doe 7DC v. Doe 1, et al.*
Case No.: 22CV408993 (lead case, consolidated with 22CV409017)

This action for damages arises out of a sexual assault purportedly suffered by Joseph Doe 7DC ("Plaintiff") when he was a minor. Pacific Union Conference of Seventh-Day Adventists ("Defendant" or "Doe 2") demurs to the First Amended Complaint ("FAC") filed by Plaintiff.

I. Background

A. Factual

According to the allegations of the FAC, Plaintiff, who is currently over the age of 40, was "enrolled in" Defendant Does 1 through 6-operated religious organizations (collectively, "Doe Church Defendants") in California. (FAC, ¶¶ 1-2, 5, 13.) While a minor, Plaintiff attended religious services at these organizations. (*Id*., ¶¶ 13, 15-16.) The FAC alleges Plaintiff was a minor at the time of the assault, but it neither specifies the age of Plaintiff nor date(s) of the alleged assault. (*Id.,* ¶ 2.) Defendant Doe 7 ("Church Leader"), the alleged abuser, was employed by Doe 1 and acted as an "employee, volunteer, agent, and/or servant" of Doe 1 or was under its "jurisdiction." (*Id.,* ¶ 4.)

Defendant Doe 1 was "owned, operated, and or controlled" by Defendant Doe 2, who also operated a religious organization in California. (FAC, ¶¶ 4-5.) The Church Leader was allegedly under the "jurisdiction and/or control" of Doe 2 as well. (*Ibid.*) In turn, Defendant Does 3 and 4, who also operated religious organizations in California, "owned, operated, and/or controlled" Doe 2. (*Id.,* ¶¶ 6-7.) Defendant Doe 5, a "religious youth services organization" that operated in Santa Clara County, was under the alleged ownership and/or control of Does 1 through 4. (*Id.*, ¶ 8.) The Church Leader allegedly acted as an "employee, volunteer, agent, and/or servant" of Doe 5 or was under its "jurisdiction." (*Ibid.*) Defendant Doe 6 was a private school that operated in Santa Clara County and the Church Leader was acting as an "employee, volunteer, agent, and/or servant" of Doe 6 or was under its "jurisdiction and control." (*Id.,* ¶¶ 10, 15-16.)

Plaintiff alleges that, at the time of enrollment and attendance at religious services and school activities of Defendant Does 1 through 6, Defendants owed a duty of care to Plaintiff, they had a special relationship with Plaintiff, and as a result, had an affirmative duty to take all reasonable steps to protect Plaintiff. (*Id.,* ¶¶ 13, 15, 16.) The FAC asserts Plaintiff's parents expected Doe 2, among other Defendants, "to provide a safe and supervised environment for Plaintiff." (*Ibid.*) Doe 2, among other Defendants, provided its employees "Child Abuse and Neglect Reporting" training, but it was "incomplete and ineffective." (*Ibid.*)

Defendant Doe 2's training deficiencies, included, but were not limited to, both failing to train and provide instruction to "its employees, volunteers, agents, and /or servants" on the following: 1) "how to recognize signs of childhood sexual assault and annoyance on members of its student body by fellow employees, volunteers, agents, and /or servants of DOE CHURCH Defendants; 2) "…the numerous ways child abusers establish, cultivate, and nurture trust relationships with minors and adults before violating and exploiting the child"; and 3)

"the known facts, circumstances and frequency of the Defendants history of its employees, volunteers, agents, and /or servants committing acts of childhood sexual assaults against minors in the care and custody of DOE CHURCH Defendants. (FAC, ¶ 13.)

Plaintiff alleges Doe Church Defendants' "incomplete and ineffective trainings further enabled DOE CHURCH Defendants employees, volunteers, agents, and/or servants, volunteers and or agents to continue to commit acts of childhood sexual assault" of enrolled minors and "endangered those minors (including Plaintiff) in the care and or custody of DOE CHURCH Defendants." (FAC, ¶ 13.)

According to Plaintiff, during Doe Church Defendants' (including Doe 2) "hours of operation" and during their "sanctioned activities," the Church Leader allegedly committed acts of childhood sexual assault against Plaintiff. (FAC, ¶¶ 14-16.) Defendants' "employees, volunteers, and/or agents," were aware that the Church Leader was "repeatedly alone" with minors, including, but not limited to, Plaintiff. (*Ibid*.) Defendants' church staff also knew that the Church Leader "maintained social relationships" with minors after "hours of operation," and also "arranged in overnights" with minors, including Plaintiff. (*Ibid*.) Plaintiff alleges that Doe Church Defendants "were obligated to respond" to such "red flags," but failed to do so. (*Ibid.*) As a result, the Church Leader's misconduct continued. (*Ibid.*)

B. Procedural

Plaintiff filed his original complaint on December 21, 2022. The Court also notes Plaintiff Joseph Doe 7DD ("7DD") filed a near identical complaint in docket 22CV409017 on December 22, 2022. The cases were consolidated.[1] On June 27, 2023, Plaintiff filed his operative pleading, the FAC, alleging four causes of actions:

1) Negligence: Negligent Supervision, Investigation and or Retention of an Employee, Volunteer, Agent, and/or Servant (**against Defendants DOE 1, DOE 2, DOE 3, DOE 4, DOE 5, DOE 6, and DOE 8 through DOE 100);**
2) Negligence: Negligent Supervision of Plaintiff, Then A Minor **(against Defendants DOE 1, DOE 2, DOE 3, DOE 4, DOE 5, DOE 6, and DOE 8 through DOE 100);**
3) Childhood Sexual Abuse **(against Defendant Church Leader);** and
4) Intentional Infliction of Emotional Distress **(against Defendant Church Leader)**

[1] A demurrer was filed on September 27, 2023, in docket 22CV409017 and an opposition was filed on February 23, 2024. Defendant subsequently filed a reply on February 29, 2024. The demurrer to the Complaint listed a hearing date of February 29, 2024. The opposition listed a hearing date of March 7, 2024. In light of the consolidation of docket 22CV409017 into the instant docket, Plaintiffs should file a consolidated amended Complaint, but they have not yet done so. There can only be one operative Complaint in the instant docket, (see *Cohen v. Superior Court of San Francisco* (1966) 244 Cal.App.2d 650, 656 [it is elementary that there can only be one complaint in an action]), and the demurrer to the amended Complaint filed in docket 22CV409017 is moot given the consolidation.

On November 7, 2023, Defendant Doe 2 demurred to the first and second causes of action in the FAC, making the following arguments: (1) Plaintiff's first and second negligence causes of action fail to state facts sufficient to revive the statute of limitations under Code of Civil Procedure section 340.1[2], subds. (a)(2), (c); (2) Plaintiff's first and second negligence causes of action fail to state facts sufficient to support a legal duty as no special relationship is established by the pleadings; 3) Plaintiff's first and second negligence causes of action are vague and uncertain in that they assert generalized allegations against Doe Church Defendants collectively, making it difficult to determine which causes of action are applicable to which defendant; 4) the first cause of action for negligent supervision, investigation and or retention of an employee, volunteer, agent, and/or servant fails due to failure to state a claim upon which relief can be granted; and 5) the second cause of action for negligent supervision of a minor fails due to failure to state a claim upon which relief can be granted. (Memorandum of Points and Authorities in Support of Demurrer ("Dem."), pp. 2-12.)

Plaintiff opposed the demurrer on February 23, 2024. Defendant filed a reply brief on February 29, 2024.

II. DEMURRER

A. Legal Standard

"In reviewing the sufficiency of a complaint against a general demurer, we are guided by long settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. We also consider matters which may be judicially noticed.'" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 (*Kirwan*).) "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*).)

"… [I]t is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment." (*Gregory v. Albertson's, Inc.* (2002) 104 Cal.App.4th 845, 850, citations and quotation marks omitted.) "It is not the ordinary function of a demurrer to test the truth of the plaintiff's allegations or the accuracy with which he describes the defendant's conduct. … Thus, … the facts alleged in the pleading are deemed to be true, however improbable they may be." (*Align Technology, Inc. v. Tran* (2009) 179 Cal.App.4th 949, 958, internal citations and quotations omitted.)

[2] All further undesignated statutory references are to the Code of Civil Procedure.

B. Merits of the Demurrer to First and Second Causes of Action for Negligence

1. Whether Plaintiff's Claims Fail to State Facts Sufficient to Revive the Statute of Limitations Under Section 340.1

Defendant argues that Plaintiff has failed to demonstrate Defendant's knowledge of sexual misconduct to satisfy the notice requirement of section 340.1, subdivisions (a)(2) and (c), (Dem., pp. 7-8.) Specifically, Defendant contends the allegations in Plaintiff's FAC, paragraph 14, are "insufficient to impute knowledge of any misconduct that creates a risk of childhood sexual assault," under the standard set forth in *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 545-546 (*Doe*).[3] (Dem., p. 7:15-27.) Defendant further argues the "red flags" in the Church Leader's behavior "[do] not" demonstrate that unlawful sexual conduct was "highly probable" or that Defendant should have acted accordingly. Further, Defendant argues that Plaintiff fails to allege any facts demonstrating that it "became aware" of the Church Leader's past misconduct that ultimately created a risk of sexual abuse of Plaintiff. (*Ibid.*) Defendant concludes Plaintiff's statements on Defendant's prior knowledge of sexual misconduct are insufficient to extend the statute of limitations and to revive the first and second causes of action pursuant to section 340.1, subd. (c). (*Ibid*.)

Plaintiff claims he was the victim of sexual abuse by the Church Leader, but he is silent on when the alleged abuse occurred. (FAC, ¶¶ 5, 8, 9, 14.) Nonetheless, the FAC alleges that Plaintiff was born in 1980 and that the abuse occurred when he was a child and the FAC explicitly relies on section 340.1. (FAC, ¶¶ 1, 2.)

In 2022, when Plaintiff filed his initial complaint, Section 340.1, subdivision (a) provided,

> In an action for recovery of damages suffered as a result of childhood sexual assault, the time for commencement of the action shall be within 22 years of the date the plaintiff attains the age of majority or within five years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual assault, whichever period expires later, for any of the following actions:
> **(1)** An action against any person for committing an act of childhood sexual assault.
> **(2)** An action for liability against any person or entity who owed a duty of care to the plaintiff, if a wrongful or negligent act by that person or entity was a legal cause of the childhood sexual assault that resulted in the injury to the plaintiff.
> **(3)** An action for liability against any person or entity if an intentional act by that person or entity was a legal cause of the childhood sexual assault that resulted in the injury to the plaintiff.
>
> (Former section § 340.1, subd. (a).)[4]

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[3] *Doe* interpreted a prior version of section 340.1.

[4] Due to the changes made by Assembly Bill 452 (Reg. Sess. 2022-2023), Section 340.1, subdivision (a), currently provides:

At the time Plaintiff filed the initial complaint, on December 21, 2022, an action by the victim of childhood sexual abuse against persons or entities that may be legally responsible for the perpetrator's acts (e.g., the perpetrator's employer under respondeat superior) "shall not be commenced on or after the plaintiff's 40th birthday unless the person or *entity knew or had reason to know, or was otherwise on notice*, of any misconduct that creates a risk of childhood sexual assault by an employee, volunteer, representative, or agent, or the person or entity failed to take reasonable steps or to implement reasonable safeguards to avoid acts of childhood sexual assault. For purposes of this subdivision, providing or requiring counseling is not sufficient, in and of itself, to constitute a reasonable step or reasonable safeguard. Nothing in this subdivision shall be construed to constitute a substantive change in negligence law." (Former section 340.1, subd. (c), emphasis added.)

As Defendant states in its demurrer, since Plaintiff was over the age of 40 when he filed this action against Defendant, the FAC must *plead*: (1) Defendant Doe 2 knew or had reason to know, or was otherwise on notice, (2) that Church Leader – an employee, volunteer, representative or agent – had engaged in unlawful sexual conduct, and (3) Defendant failed to take reasonable steps to implement safeguards to avoid acts of unlawful sexual conduct in the future by that person, including, but not limited to, preventing or avoiding placement of that person in a function or environment in which contact with children is an inherent part of that function or environment. (See *Doe, supra,* 42 Cal.4th at pp. 545-546 [interpreting prior version of section 340.1 and upholding sustaining of demurrer].) "[A] pleading that [does] no more than assert boilerplate allegations that defendants knew or were on notice of the perpetrator's past unlawful sexual conduct would not be sufficient nor would allegations of information and belief that merely asserted the facts so alleged without alleging such information that 'lead[s] [the plaintiff] to believe that the allegations are true.' [Citation.]" (*Id.* at p. 551, fn. 5.)

Here, Plaintiff is seeking relief from Defendant pursuant to section 340.1 because the Church Leader was allegedly hired by, employed by, and under the supervision and control of Defendant. (FAC, ¶¶ 14, 18-19.) Additionally, Plaintiff alleges Defendant knew that during "its sanctioned activities" and "hours of operation" the Church Leader committed acts of sexual assault against Plaintiff and that it was known by Defendant's church staff that the Church Leader was "repeatedly alone with minors" after hours and arranged for "overnight" stays with minors. (FAC, ¶ 14.)

> There is no time limit for the commencement of any of the following actions for recovery of damages suffered as a result of childhood sexual assault:
> (1) An action against any person for committing an act of childhood sexual assault.
> (2) An action for liability against any person or entity who owed a duty of care to the plaintiff, if a wrongful or negligent act by that person or entity was a legal cause of the childhood sexual assault that resulted in the injury to the plaintiff.
> (3) An action for liability against any person or entity if an intentional act by that person or entity was a legal cause of the childhood sexual assault that resulted in the injury to the plaintiff.

However, Plaintiff filed his initial Complaint in 2022 when the statute read as quoted above.

Based on paragraph 14 of the FAC, Plaintiff argues the FAC adequately alleges Defendant "knew or had reason to know, or was otherwise on notice" of the Church Leader's sexual misconduct. (FAC, ¶ 14; Opp., p. 5:1-20.) Paragraph 14 states:

> ABUSER CHURCH LEADER was a DOE CHURCH Defendants employee, volunteer, agent and / or servant, and was assigned to DOE CHURCH Defendants. During DOE CHURCH Defendants hours of operation and during DOE CHURCH Defendants sanctioned activities, ABUSER CHURCH LEADER committed acts of childhood sexual assault against Plaintiff. It was known by other DOE CHURCH Defendants employees, volunteers and or agents, that ABUSER CHURCH LEADER was repeatedly alone with minors (including but not limited to Plaintiff). It was also known that, after DOE CHURCH Defendants hours of operation that ABUSER CHURCH LEADER engaged in and maintained "social" relationships with minors in the care and custody of DOE CHURCH Defendants, including but not limited to being alone with and transporting DOE CHURCH Defendants minors. It was also known that ABUSER CHURCH LEADER engaged in and arranged in overnights with minors (including Plaintiff) in the care and custody of DOE CHURCH Defendants. Such misconduct is an obvious "red flag" of childhood sexual assault in those environments. DOE CHURCH Defendants were obligated to respond to the known red flag misconduct, failed to respond, and the red flag misconduct continued.

(FAC, ¶ 14.)

In its reply, Defendant reiterates "the lack of details" in the FAC are "fatal" to Plaintiff claims. (Reply, pp. 2-3.) Defendant cites *Deutsch v. Masonic Homes of California, Inc.* (2008) 164 Cal.App.4th 748, 749, for the proposition that "the defendant must have had notice-whether in the form of a formal complaint[-]knowledge of facts from which a reasonable person would have inferred past unlawful sexual conduct, or other actual notice of the perpetrator's conduct," to revive claims under section 340.1 (*Ibid.*) This Court agrees.

Plaintiff's allegations are insufficient, even at the pleading stage, because they are conclusory and "conclusory allegations will not withstand [a] demurrer." (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1324; see also *Kirwan, supra,* 39 Cal.3d at p. 318 [stating that demurrer admits all properly pleaded allegations, but not contentions, deductions, or conclusions of fact or 1aw].) Plaintiff simply states Defendant had knowledge of the Church Leader's misconduct and was aware of "red flags" in his behavior, but nothing more. Notably, Plaintiff is silent on one pertinent fact in determining the revival of statute of limitations under section 340.1, namely, when the alleged abuse occurred. Plaintiff must plead when he was sexually abused by the Church Leader under *Doe, supra,* 42 Cal.4th at pp. 545-546, to demonstrate Defendant Doe 2 "knew or had reason to know," or was otherwise "on notice" of the Church Leader's past sexual misconduct prior to the alleged sexual assault on Plaintiff. (See *Santillan v. Roman Catholic Bishop of Fresno* (2012) 202 Cal.App.4th 708, 717 ["…so long as [plaintiffs] could show the Diocese 'knew or had reason to know, or was otherwise on notice, of any unlawful sexual conduct by an employee … or agent, and failed to

take reasonable steps, and to implement reasonable safeguards, to avoid acts of unlawful sexual conduct in the future by that person …"'], citations omitted.)

Plaintiff argues, in opposition, it is not required to plead evidentiary facts, as opposed to ultimate facts, and may include facts based on information and belief. (Opposition ("Opp."), p. 6:13-19; *Doe v. City of Los Angeles, supra*, 42 Cal.4th at p. 551 ["[T]he complaint ordinarily is sufficient if it alleges ultimate rather than evidentiary facts"].) However, as noted in Defendant's reply, a pleading that does no more than assert boilerplate allegations that Defendant knew or was on notice of the perpetrator's past unlawful sexual conduct is not sufficient. Allegations made on information and belief that merely assert the alleged facts without alleging what information leads Plaintiff to believe that the allegations are true are also insufficient, even at the pleading stage. (*Id.* at p. 551, fn. 5.)

Plaintiff also argues Defendant's discussion of section 340.1 is "needlessly confusing…and conflates three different sections of section 340.1." (Opp., p. 4:19-28.) Plaintiff contends that his initial complaint was timely filed under section 340.1, subdivision (q) to demonstrate he timely filed his Complaint. (*Ibid.*) But, this argument does not counter Defendant's meritorious assertion that the FAC fails to state sufficient facts, as a opposed to conclusory allegations, to plead that Defendant knew or had reason to know of prior conduct on the part of the Church Leader *prior to* the alleged sexual assault of Plaintiff.

Defendants' argument that the first and second causes of action fail to state sufficient facts to revive the statute of limitations under section 340.1 is meritorious. Consequently, Defendant's demurrer to the first and second causes of action on the ground of failure to state a claim is SUSTAINED, WITH 20 DAYS LEAVE TO AMEND. (See *City of Stockton v. Super. Ct.* (2007) 42 Cal.4th 730, 747 [if a plaintiff has not had an opportunity to amend the complaint in response to a demurrer, leave to amend is liberally allowed as a matter of fairness].)

Although the court sustains on this basis, it will address Defendant's remaining arguments as leave to amend has been granted.

2. Failure to Plead a Legal Duty

In its demurrer, Defendant also argues that Plaintiff's first and second causes of action fail due to a lack of sufficient facts demonstrating its legal duty toward Plaintiff or that Defendant was a "legal cause" of the alleged sexual assault. (Dem., p. 7:4-13, p. 8:14-25.) Defendant additionally contends that no "special relationship" is established by the FAC regarding the Church Leader and Defendant itself. (Dem., p. 9:1-10.) Instead, Defendant argues the FAC alleges the Church Leader was an employee/agent of Defendant Doe 1. (*Ibid.*)

As Defendant notes, the elements of negligence are: 1) a duty owed by the defendant to the plaintiff; 2) defendant's breach of that duty; 3) causation; and 4) damages. (See *Bryant v. Glastetter* (1995) 32 Cal.App.4th 770, 777.) The law is settled
that elements of negligence "may be alleged in general terms." (See *Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 747.)

As a general matter, "[t]he issue of whether a legal duty exists is an issue of law, not an issue of fact for the jury." (*Kentucky Fried Chicken of California, Inc. v. Superior Court* (1997)

14 Cal.4th 814, 819.) The existence and scope of a duty of care is a question of law for the court even at the pleading stage. (See *Melton v. Boustred* (2010) 183 Cal.App.4th 521, 531.)

In the first cause of action, Plaintiff claims Defendant negligently supervised, investigated, or retained the Church Leader, as its employee. The FAC further alleges Defendant had a "mandatory duty" to "provide reasonable supervision" and "to use reasonable care" in responding to the Church Leader's "known misconduct." (FAC, ¶¶ 21-28.) Plaintiff claims Defendant breached its duty to properly "train, supervise, investigate, discipline or terminate" the Church Leader, and it failed to "take reasonable measures to prevent further acts" of sexual assault against Plaintiff. (*Ibid.*) In the second cause of action, Plaintiff argues Defendant negligently supervised Plaintiff himself. Specifically, Defendant breached its duty to provide "reasonable supervision" and "care" when Plaintiff was in the "custody" of Doe Church Defendants and failed to "use reasonable care" in "protecting" Plaintiff from the Church Leader's sexual abuse. (FAC, ¶¶ 30-34.)

Defendant argues that it did not owe a duty of care to Plaintiff because no "special relationship" existed between either Plaintiff and Defendant or Defendant and the Church Leader. (Dem., p. 9: 10-16.) Specifically, Defendant argues it "never had custody and care" over Plaintiff, "nor control" over the alleged perpetrator. (*Ibid.*) Defendant concedes Plaintiff's causes of action include allegations of "control" and "custody" against it, collectively, with Doe Church Defendants, but that Plaintiff "fails to assert any specific allegations against Defendant Doe 2" about having "control" over Plaintiff. (*Ibid.*) Defendant provides neither substantive discussion nor authority on "special relationships."

In opposition, Plaintiff argues, based on a website explaining the "church structure and governance," that Defendant Doe 2 had an "authoritative and decision-making role" over Defendant Does 1, 4, and 6. (Opp., pp. 5-6.) First, the mere fact that information is published on a website does not mean that it is not reasonably subject to dispute. (*Huitt v. S. Cal. Gas Co.* (2010) 188 Cal.App.4th 1586, 1604, fn. 10).) Second, Plaintiff's citation to the website is a red herring because a demurrer *only* challenges the sufficiency of the pleadings. As Defendant notes in its reply, extrinsic evidence, which is beyond the allegations of the FAC and facts currently before the Court, cannot be considered for purposes of a demurrer. (See *Committee on Children's Television, supra,* 35 Cal.3d at pp. 213-214; Reply, p. 3:8-13.) As stated above, the FAC must plead facts rather than conclusory allegations to establish the necessary elements of the negligence claims, namely, legal duty.

Plaintiff maintains, that at the pleading stage, he sufficiently alleged a special relationship existed between Plaintiff and Defendant Doe 2, and Defendant owed a duty of care toward Plaintiff. (Opp., p. 6:13-19.) Specifically, he argues that he pled that he "was assaulted while in the care and custody of DOE 1 (church) and DOE 6 (school), both of which Plaintiff believes are owned, operated and / or controlled by Defendant DOE 2. (FAC, ¶¶ 4, 5, 9, 10, 14,16)." (Opp., p. 6:13-17.)

"[A]s a general matter, there is no duty to act to protect others from the conduct of third parties." (*Delgado v. Trax Bar Grill* (2005) 36 Ca1.4th 224, 235 (*Delgado*).) Further, " ' "one owes no duty to control the conduct of another, nor to warn those endangered by such conduct." ' " (*K.G. v. S.B.* (2020) 46 Cal.App.5th 625, 630 (*K.G.*).)

However, "[a] defendant may owe an affirmative duty to protect another from the conduct of third parties if [it] has a 'special relationship' with the other person." (*Delgado, supra,* 36 Ca1.4th at p. 235; see also *K.G., supra*, 46 Cal.App.5th at p. 630 ["a duty to control may arise if the defendant has special relationship with the foreseeably dangerous person that entails an ability to control that person's conduct"]; see also *Lawson v. Superior Court* (2010) 180 Cal.App.4th 1372, 1389, internal citations and quotations omitted ["person is under no duty to protect another person from harm…[a]n affirmative duty to protect another from harm may arise, however, where a special relationship exists"].) Section 340.1, subdivision (a) expressly states that it only applies to "[a]n action for liability against any person or entity who owed a duty of care to the plaintiff." (§ 340.1, subd. (a)(2).)

"A special relationship between the defendant and the victim is one that 'gives the victim a right to expect' protection from the defendant, while a special relationship between the defendant and the dangerous third party is one that 'entails an ability to control [the third party's] conduct.' [Citation.] Relationships between parents and children, colleges and students, employers and employees, common carriers and passengers, and innkeepers and guests, are all examples of special relationships that give rise to an affirmative duty to protect. [Citations.] The existence of such a special relationship puts the defendant in a unique position to protect the plaintiff from injury. The law requires the defendant to use this position accordingly. [Citation.]" (*Brown v. USA Taekwondo* (2011) 11 Cal.5th 204, 209 (*Brown*).)

"The 'common features' of a special relationship include 'an aspect of dependency in which one party relies to some degree on the other for protection' and the other party has 'superior control over the means of protection.' [Citations.]" (*Doe v. Roman Catholic Archbishop of Los Angeles* (2021) 70 Cal.App.5th 657, 670.) "Examples of special relationships that create an affirmative duty to protect include '[r]elationships between parents and children, colleges and students, employers and employees, common carriers and passengers, and innkeepers and guests.' [Citations.]" (*Id*. at pp. 670-671.)

> [C]ourts have found special relationships between a sport's governing body and minor athletes (*Brown*, at p. 222), a school district (including its employees) and the district's students (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 869 []), a church camp and its campers (*Doe v. Superior Court* (2015) 237 Cal.App.4th 239, 246), a church and minor members engaged in church-sponsored 'field service' (*Conti v. Watchtower Bible & Tract Society of New York, Inc.* (2015) 235 Cal.App.4th 1214, 1217, 1235), a police department and teenage 'explorers' participating in a department program (*Doe 1 v. City of Murrieta* (2002) 102 Cal.App.4th 899, 918 [], disapproved on another ground in *Brown*, at p. 222, fn. 9), and a scout organization and its scouts (*Juarez v. Boy Scouts of America, Inc.* (2000) 81 Cal.App.4th 377, 411 [], disapproved on another ground in *Brown*, at p. 222, fn. 9).

(*Doe v. Roman Catholic Archbishop of Los Angeles, supra*, 70 Cal.App.5th at p. 671.)

In this case, the FAC does not contain sufficient facts to allege that Defendant Doe 2 assumed responsibility for the safety of Plaintiff or that it was in a position to protect Plaintiff at Doe Church Defendants-sanctioned activities (See e.g., *Roman Catholic Bishop v. Superior Court* (1996) 42 Cal.App.4th 1556, 1567 (*Roman Catholic Bishop*) [no special relationship between church and its minor parishioners unless church had "actual custody or control" of the

child].) In other words, there are no allegations Defendant acted as a "quasi-parent" to Plaintiff. Moreover, there are likewise no allegations that Defendant was in a position to protect Plaintiff during church-sanctioned activities.

The main portions of the FAC where a special relationship is discussed include paragraphs 13 and 15. In paragraph 13, Plaintiff states, conclusorily, that Church Defendants owed Plaintiff a duty of care because he was a minor. (FAC, ¶ 13.) This is insufficient. In paragraph 15, Plaintiff alleges that he was a student at a school (Doe 6) – a recognized special relationship. (FAC, ¶ 15; see *Doe v. Roman Catholic Archbishop of Los Angeles, supra*, 70 Cal.App.5th at p. 671 [collecting cases finding special relationship and listing relationship between school district and district's students].) Notably, the relationship between Defendant Doe 2 and Defendant Doe 6 is not clearly alleged in the FAC. As noted in *Doe v. Roman Catholic Bishop, supra,* a child's membership in a congregation, without more, is insufficient.

Further, it is not clear from the FAC when or where the alleged sexual assault(s) of Plaintiff occurred. Thus, it is not clear that Defendant Doe 2 would have had the requisite custody or control over Plaintiff or the Church Leader at the time of the alleged assault(s). The FAC's conclusory allegations that the acts of sexual assault occurred during "DOE CHURCH Defendants hours of operation and during DOE CHURCH Defendants sanctioned activities" are insufficient. (FAC, ¶ 14.) As are the allegations that the Church Leader "maintained 'social' relationships with minors under the care and custody of DOE CHURCH Defendants," which included being alone with the minors, transporting them, and having "overnights" with them. (*Ibid.*) To plead negligence, a plaintiff must plead "*facts* showing a duty of care in the defendant". (*Tirpak v. Los Angeles Unified School Dist.* (1986) 187 Cal.App.3d 639, 646, italics added.) Here, Plaintiff pleads only conclusory allegations and fails to plead facts showing a special relationship between Plaintiff and Defendant or Defendant and Church Leader.

Accordingly, Defendant Doe 2's demurrer to the first and second causes of action on this basis is SUSTAINED WITH 20 DAYS LEAVE TO AMEND.

3.Uncertainty – First & Second Causes of Action for Negligence

Defendant alleges that the causes of action for negligence are "vague and uncertain" because Plaintiff asserts "generalized allegations" against Doe Church Defendants collectively, making it difficult to determine which causes of action are applicable to which defendant. (Dem., pp. 9-10). Defendant reasserts that Plaintiff fails to "state the period of time when the abuse occurred, where the abuse occurred, or even describe what abuse occurred." (Dem., p. 10:4-25.) Next, Defendant argues that it is an impossibility for the Plaintiff to be enrolled in, and attending religious services at multiple geographic locations, as stated in the FAC. (Dem., pp. 9-10; FAC, ¶ 13.) To illustrate further, Defendant asserts one Doe Church Defendant organization is in the state of Maryland. (*Ibid.*)

Finally, Defendant argues the alleged conduct described in paragraph 14 of the FAC, "falls short of constituting sexual assault" within the meaning of section 340.1 because it fails to allege Plaintiff was "under the age of 18 years" when the alleged sexual abuse occurred. (Dem., pp. 10-11.) Defendant lists multiple penal code sections involving sex crimes against a minor to demonstrate the age requirement. (*Ibid.*)

In opposition, Plaintiff, maintains, that he is not required to allege "the period of time when the abuse occurred, where the abuse occurred, or even describe what abuse occurred." (Opp., p. 7: 1-21.) Plaintiff argues he is only required to allege facts sufficient to give notice of Plaintiff's claim such that a defendant can reasonably respond:

> "Here, Plaintiff alleged that Defendant DOE 7 committed acts of sexual assault against Plaintiff while Plaintiff was a minor, while under the care and custody of DOE CHURCH Defendants (including DOE 2), during DOE CHURCH Defendants (including DOE 2) hours of operation and during DOE CHURCH Defendants sanctioned activities. (FAC ¶ 4,5,9,10,14, 16). The information Defendant DOE 2 seeks can be obtained through civil written discovery."

(Opp., p. 6: 1-9.)

Plaintiff concludes that "demurrers for uncertainty are disfavored." (Opp., p. 6: 20-28.) "A demurrer for uncertainty is strictly construed, even where complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures." (*Khoury v. Maly's of California, Inc*. (1993) 14 Cal.App.4th 612, 616; see also *Lickiss v. Financial Industry Regulatory Authority* (2012) 208 Cal.App.4th 1125, 1135 ["demurrers for uncertainty are disfavored and are granted only if the pleading is so incomprehensible that defendant cannot reasonably respond"].) "Uncertainty is a disfavored ground for demurrer; it is typically sustained only where the pleading is so unintelligible and uncertain that the responding party cannot reasonably respond to or recognize the claims alleged against it." (*Khoury, supra*, 14 Cal.App.4th at p. 616.)

"[U]nder our liberal pleading rules, where the complaint contains substantive factual allegations sufficiently apprising defendant of the issues it is being asked to meet, a demurrer for uncertainty should be overruled or plaintiff given leave to amend. (*Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 139, fn. 2.)

Although not directly on point, the court finds the following authority illustrative. "While a demurrer based on statute of limitations lies where the dates in question are shown on the face of the complaint, if those dates are missing, there is no ground for a general demurrer." (*United Western Medical Centers v. Superior Court* (1996) 42 Cal.App.4th 500, 505, citations omitted.) "[Defendant's] remedy is to ascertain the factual basis of the contentions through discovery and, if necessary, file a motion for summary judgment to eliminate that cause of action should the facts reveal the claim is time-barred." (*Ibid.*)

In its reply, Defendant reasserts Plaintiff fails to state "when, where, and how" the alleged abuse occurred. (Reply, p. 3.) Defendant argues that Plaintiff fails to plead the cause of action against each defendant, so that each party can properly respond. (*Id.*, p. 4.) Consequently, Defendant asserts it is "unable to properly demur" the FAC allegations because of "the lack of individual assertions." (*Ibid.*)

Defendant's argument that Plaintiff fails to match each cause of action to the appropriate defendant, rendering the FAC uncertain, is not well taken. Defendant provides little in the way of legal authority and explanation as to how the FAC is uncertain. The argument is

therefore undeveloped, and this Court need not consider it. (See *Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52 ["We are not required to examine undeveloped claims or to supply arguments for the litigants"].) Lack of clarity does not always result in "incomprehensible" pleadings especially in this instance where Defendant was able to file a substantive demurrer addressing each of Plaintiff's cause of action. Further, the Court has already sustained on Plaintiff's failure to state his claims, to some extent, due to these deficiencies in the pleading.

Accordingly, Defendant's demurrer to the first and second causes of action on the ground that the pleading is uncertain (Code Civ. Proc., § 430.10, subd. (f)) is OVERRULED.

4. Failure to State a Claim - First Cause of Action (Negligent Supervision, Investigation and or Retention of an Employee, Volunteer, Agent, and/or Servant)

In addition to its argument that the FAC fails to state sufficient facts to revive the claim stated in the first cause of action under section 340.1, Defendant separately contends Plaintiff failed to plead that Defendant had knowledge of the Church Leader's propensity for sexual misconduct. (Dem., p.11:15-22.) Defendant argues that the FAC pleads that only Defendant Doe 6 (a religious school), was an employer of the Church Leader, and thus only Doe 6 had "control" and authority over him. (*Ibid.*) Defendant relies on *Delfino v. Agilent Technologies, Inc*. (2006) 145 Cal.App.4th 790, 815 ["Liability for negligent supervision and/or retention of an employee is one of direct liability for negligence, not vicarious liability"] and *Z.V. v. County of Riverside* (2015) 238 Cal.App.4th 889, 902 ["To establish negligent supervision, a plaintiff must show that a person in a supervisorial position over the actor had prior knowledge of the actor's propensity to do the bad act"].)

Defendant's arguments regarding its lack of "knowledge" of the Church Leader's propensity for sexual misconduct are nearly identical to its argument that the FAC fails to state sufficient facts to revive the claim under section 340.1, *supra*. Given that the Court has already found the allegations of the FAC insufficient on this point, the demurrer to the first cause of action is SUSTAINED WITH 20 DAYS LEAVE TO AMEND on the ground of failure to state a claim.

5. Failure to State a Claim - Second Cause of Action - Negligent Supervision of Plaintiff, Then Minor

Defendant, again, argues that it is a religious organization that exhibits "no control over employees or minors in Seventh-day Adventist schools." (Dem., p. 12.) Defendant also maintains there was no legal duty towards Plaintiff because no "special relationship" was established between them. Defendant concludes: "Plaintiff's bare bones allegations of agency and control between legally separate organizations should be dismissed by the Court, as should this cause of action as Defendant DOE 2 is not a church or school and did not employ the alleged perpetrator." (*Id.*, at p. 12:4-8.)

The Court has already addressed the insufficiency of Plaintiff's allegations regarding both Defendant's legal duty and special relationships. Any further discussion is unnecessary as the demurrer is already sustained on this basis. Accordingly, the demurrer to the second cause

of action is SUSTAINED WITH 20 DAYS LEAVE TO AMEND on the ground of failure to state a claim.

III. Conclusion

Defendant's demurrer to the FAC is SUSTAINED, in its entirety, WITH 20 DAYS LEAVE TO AMEND.

Should Plaintiff choose to amend, the 22CV408993 Plaintiff and the 22CV409017 Plaintiff shall file a consolidated Complaint under docket 22CV408993.

The Court will prepare the final order.

- oo0oo -

Calendar Line 2
Case Name: *Duran, et al. v. Milestone Financial LLC, et al.*
Case No.: 22CV404787

According to the allegations of the first amended complaint ("FAC"), in 2001, plaintiffs Modesto and Marisela Duran (collectively, "Plaintiffs") purchased a home at 2633 Glen Farm Court in San Jose. (See FAC, ¶ 30.) In July 2019, Plaintiffs agreed to borrow $540,000 from defendant Milestone Financial LLC dba MERS LINK 4 ("MF") in exchange for Plaintiffs' promise to pay monthly, interest only payments. (See FAC, ¶ 34.) On the date of the signing of the loan agreement, Modesto Duran was in the hospital recovering from COVID; however, Zoe Hamilton, MF's representative, pressured Marisela to forge Modesto's signatures on the loan agreement. (See FAC, ¶ 35.) Defendants forced Plaintiffs to execute a promissory note—secured by a deed of trust to the home and Plaintiffs' commercial property at 373 South Twenty-Fourth Street in San Jose ("Commercial Property") for Plaintiffs' auto repair business. (See FAC, ¶ 36.) The deed of trust was recorded on July 12, 2019, and Plaintiffs began making monthly payments pursuant to the promissory note. (See FAC, ¶ 37.) The COVID-19 pandemic hit and caused Plaintiffs personal and financial hardship as Modesto became sick and was unable to work at his auto repair shop, and Plaintiffs lost clients and tenants. (See FAC, ¶¶ 38-39.) As a result, Plaintiffs were unable to make the mortgage payment in January 2020. (See FAC, ¶ 40.) On February 14, 2020, MF recorded the first notice of default without contacting Plaintiffs prior to its recording. (See FAC, ¶¶ 41-42.) Except for a sentence indicating that there is a summary of the information attached, the first notice of default ("First NOD") is written entirely in English, and there was no attachment to the first notice. (See FAC, ¶¶ 43-44.) The First NOD states that the default amount was $18,779.07 as of 2/12/2020. (See FAC, ¶ 45.) However, the default amount is incorrect because Plaintiffs' monthly payment was $4,954.72 and they were allegedly in default for one month, and any late fee of 10% of the monthly payment would be $495.57, making the total default amount as $5,450.19—rather than $18,779.07. (See FAC, ¶ 46.) A default rate of 19.973% was also imposed. (See FAC, ¶ 47.) Plaintiffs were not provided an accounting of the default amount and never received the certified mail of the First NOD at their home despite the declaration of beneficiary pursuant to Civil Code § 2923.59(b) listed the property address as "373-377 S. 24th Street and 2633 Glen Farm Court, San Jose, CA 95116." (See FAC, ¶¶ 48-49) Plaintiffs contacted MF and was informed that they were in default and needed to agree to add the default amount into the new loan balance. (See FAC, ¶ 50.) On April 24, 2020, Plaintiffs signed a Settlement Agreement, Indemnification and First Amendment to Promissory Note Secured by Deed of Trust ("Amended DOT"). (See FAC, ¶ 51.) The Amended DOT asserts that, as of February 12, 2020, the default amount was $18,779.07, and that "Borrower has not made any payments toward the Loan since January, 2020." (See FAC, ¶¶ 52-53.) MF did not record the Amended DOT, and no bilingual forms were provided to Plaintiffs for review and signature. (See FAC, ¶ 54.) Plaintiffs began making monthly payments; however, in December 2021, Modesto became critically sick and was hospitalized several times, resulting in Modesto being unable to work and affecting Plaintiffs' financial condition. (See FAC, ¶ 55.) On December 14, 2021, a second notice of default ("Second NOD") was recorded; Plaintiffs did not receive any communication prior to the recording of the second NOD. (See FAC, ¶¶ 56-57.) As with the First NOD, except for a sentence indicating that there is a summary of the information attached, the Second NOD is written entirely in English, and there was no attachment to the first notice. (See FAC, ¶¶ 58-59.) Additionally, Plaintiffs never received the certified mail of the Second NOD at their home despite the declaration of beneficiary pursuant to Civil Code § 2923.59(b) listed the property address as "373-377 S. 24th

Street and 2633 Glen Farm Court, San Jose, CA 95116." (See FAC, ¶ 60.) The Second NOD states that the default amount was $158,214.11 as of 12/14/2021; however, this amount is incorrect as it is based on the incorrect amount from the First NOD and included an unconscionable default rate of 19.973%. (See FAC, ¶¶ 61-62.) On March 20, 2022, Plaintiffs spoke on the phone with Hamilton as representative for MF to request time to refinance the properties and to pay Defendants the past due balance. (See FAC, ¶ 64.) On March 21, 2022, Mortgage Lender Services, Inc. ("MLS"), acting as the alleged foreclosing trustee under the amended DOT, recorded a Notice of Trustee's Sale. (See FAC, ¶ 65.) MF never posted a copy of the Notice of Trustee's Sale at Plaintiffs' home and Plaintiffs never received the certified mail of the Notice of Trustee's Sale at their home despite the declaration of beneficiary pursuant to Civil Code § 2923.59(b) listed the property address as "373-377 S. 24th Street and 2633 Glen Farm Court, San Jose, CA 95116." (See FAC, ¶¶ 66-67.) The Notice of Trustee's Sale stated that the sale was scheduled for April 18, 2022 and that the default amount was estimated to be $795,893.65; however, the default amount of $795,893.65 is incorrect and based on the incorrect amounts from the First NOD and the Second NOD and the unconscionable default rate of 19.973%. (See FAC, ¶¶ 68-70.) On March 30, 2022, Plaintiffs and their real estate agent, Derek Deaston, went to MF's and William R. Stuart's ("Stuart") (collectively, "Defendants") office and spoke with Hamilton and Defendants, and Defendants verbally agreed to stop the foreclosure process if the Commercial Property was appraised at more than $1.3 million. (See FAC, ¶¶ 71-72.) Immediately thereafter, Plaintiffs contacted Jeremy Salamera, their loan officer, to quickly start the refinance process and get the appraisal of the Commercial Property; however, Defendants never had the intention of giving Plaintiffs reasonable time to reappraise their properties and sent postponement letters to Plaintiffs that extended the foreclosure date by several weeks with a motive to prevent Plaintiffs from seeking bankruptcy protection and staying the foreclosure. (See FAC, ¶¶ 73-77.) On April 19, 2022, Defendants, through MLS, mailed a Notice to Borrower of Postponement of Trustee's Sale ("First Postponement Notice") indicating that the trustee's sale was postponed to May 5, 2022; this notice was not recorded. (See FAC, ¶¶ 78-79.) On May 3, 2022, MLS mailed another Notice to Borrower of Postponement of Trustee's Sale ("Second Postponement Notice")--which was again not recorded--and the notice stated that the trustee's sale was postponed to May 23, 2022. (See FAC, ¶¶ 80-81.) On May 3, 2022, the Commercial Property was appraised "as is" for $1,800,000, and Defendants were notified of the appraisal amount. (See FAC, ¶¶ 82-83.) On June 24, 2022, Defendants sold Plaintiff's home at public auction; Defendants were the foreclosing beneficiary and the buyer. (See FAC, ¶ 84.) Plaintiffs never received any notice of the public auction for June 24, 2022. (See FAC, ¶ 86.) The refinancing was subsequently approved and on July 27, 2022, Plaintiffs were ready to sign the refinance agreement, and Salamera called Hamilton and stated that the loan was approved and that Plaintiffs were ready to pay Defendants the balance due. (See FAC, ¶¶ 87-88.) Hamilton said that it was fine and that she would let Stuart know. (See FAC, ¶ 89.) Thirty minutes later, Hamilton called Salamera and told him that Defendants had sold the Commercial Property and Plaintiffs' home. (See FAC, ¶ 90.) Salamera relayed the information to Plaintiffs and on September 9, 2022, Defendants, through their attorney, served Plaintiffs a Three-Day Notice to Quit. (See FAC, ¶¶ 91-92.)

On December 14, 2022, Plaintiffs filed the FAC against Defendants, asserting causes of action for:

1) Violation of Civil Code § 2923.3 (against all defendants);
2) Violation of Civil Code § 2924b (against all defendants);
3) Violation of Civil Code § 2924f (against all defendants);

4) Violation of Civil Code § 2924h, subdivision (g) (against all defendants);
5) Violation of Civil Code § 1632 (against all defendants);
6) Wrongful foreclosure (against all defendants);
7) Fraudulent misrepresentation (against all defendants);
8) Negligent misrepresentation (against all defendants);
9) Unfair business practices (against all defendants); and,
10) Unjust enrichment (against all defendants).

On April 20, 2020, Plaintiffs filed the complaint against Defendants, asserting causes of action for:

1) Professional negligence;
2) Breach of fiduciary duty; and,
3) Breach of contract.

Defendants move for summary adjudication of the first through fifth causes of action on the ground that they lack merit.

I. DEFENDANTS' MOTION FOR SUMMARY ADJUDICATION

Defendants' burden on summary adjudication

"A defendant seeking summary judgment must show that at least one element of the plaintiff's cause of action cannot be established, or that there is a complete defense to the cause of action. … The burden then shifts to the plaintiff to show there is a triable issue of material fact on that issue." (*Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72; internal citations omitted; emphasis added.)

"The 'tried and true' way for defendants to meet their burden of proof on summary judgment motions is to present affirmative evidence (declarations, etc.) negating, as a matter of law, an essential element of plaintiff's claim." (Weil et al., Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2007) ¶ 10:241, p.10-91, *citing Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 334; emphasis original.) "The moving party's declarations and evidence will be strictly construed in determining whether they negate (disprove) an essential element of plaintiff's claim 'in order to avoid unjustly depriving the plaintiff of a trial.'" (*Id*. at § 10:241.20, p.10-91, *citing Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107.)

"Another way for a defendant to obtain summary judgment is to 'show' that an essential element of plaintiff's claim cannot be established. Defendant does so by presenting evidence that plaintiff 'does not possess and cannot reasonably obtain, needed evidence' (because plaintiff must be allowed a reasonable opportunity to oppose the motion.) Such evidence usually consists of admissions by plaintiff following extensive discovery to the effect that he or she has discovered nothing to support an essential element of the cause of action." (*Id*. at ¶ 10:242, p.10-92, *citing Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854-855.)

Defendants' request for judicial notice

In support of their motion, Defendants request judicial notice of the following documents:

1) The Notice of Default and Election to Sell under Deed of Trust, recorded with the Santa Clara County Recorder's Office on February 14, 2020 (attached as Exhibit 1);
2) The Notice of Default and Election to Sell under Deed of Trust, recorded with the Santa Clara County Recorder's Office on December 14, 2021, as instrument number 252194528 (attached as Exhibit 2);
3) The Notice of Trustee's Sale, recorded with the Santa Clara County Recorder's Office on March 21, 2022 as instrument number 25265201 (attached as Exhibit 3);
4) The Trustee's Deed Upon Sale, recorded with the Santa Clara County Recorder's Office on July 29, 2022, as instrument number 25350645 (attached as Exhibit 4); and,
5) The Trustee's Deed Upon Sale, recorded with the Santa Clara County Recorder's Office on August 10, 2022, as instrument number 25356086 (attached as Exhibit 5).

Defendants' request for judicial notice is GRANTED as to their existence, but not as to the truth of the facts stated therein. (See *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924, fn. 1 (stating that trial court properly took judicial notice of the recorded deed of trust, notices of default and of trustee's sale and trustee's deed upon sale).)

First cause of action for violation of Civil Code § 2923.3

The first cause of action alleges that "Defendants did not provide Plaintiffs with Spanish-translation of the English statement in the First NOD, the Second NOD, and the NTS… [and b]ecause Defendants failed to provide the necessary statements in Spanish in the notices of default, they have violated California Civil Code § 2923.3." (FAC, ¶¶ 105-106.) Section 2923.3 states that "`a mortgagee, trustee, beneficiary, or authorized agent shall provide to the mortgagor or trustor a copy of the recorded notice of default with an attached separate summary document of the notice of default in English and the languages described in Section 1632, as set forth in subdivision (c), and a copy of the recorded notice of sale with an attached separate summary document of the information required to be contained in the notice of sale in English and the languages described in Section 1632…." (Civ. Code § 2923.3, subd. (a).)

Defendants present The Notice of Default and Election to Sell under Deed of Trust with the required language translations that was mailed to Plaintiffs, including the declaration of mailing by Jacob Smith. (See Defs.' appendix of evidence in support of motion for summary adjudication ("Appendix"), exhs. 17-18.) Defendants also present The Notice of Trustee's Sale which also includes the declaration of mailing by Jacob Smith. (*Id*. at exhs. 19-20.) Defendants also present the declaration of MF managing member Stuart who provides a history of Plaintiff's obligations, the recorded notices and the fact that MF did not send any of its employees to attend the foreclosure sale. (See Stuart decl. in support of motion for summary adjudication ("Stuart decl."), ¶¶ 1-9.) Defendants also present the declaration of chief financial officer of loan trustee Mortgage Lender Services, Inc., Martha Townsend, who provides a history of the recorded notices and the foreclosure, and the mailing of the documents in multiple languages. (See Townsend decl. in support of motion for summary adjudication ("Townsend decl."), ¶¶ 1-23.) Defendants also present the posting certificates and photos demonstrating that the Notice of Trustee's Sale was in fact posted at Plaintiffs' residence. (See Appendix, exh.24.) Additionally, the affidavits of mailing of William Pappoe indicating that

the Notices were sent by certified mail are also presented by Defendants. (See Appendix, exhs. 11, 13, 15.) Defendants meet their initial burden to demonstrate that they did not violate Civil Code section 2923.3, as alleged by the first cause of action.

Plaintiffs' objections to Defendants' evidence, numbers 1-10 to the Townsend declaration, and numbers 1-7 to the Stuart declaration are OVERRULED.

In opposition, Plaintiffs present the declaration of plaintiff Marisela Duran who states that "Modesto and I never received the certified mail of the First [or Second] NOD [or the NTS] at their Home." (Marisela's decl. in opposition to motion for summary adjudication ("Marisela's decl."), ¶¶ 21, 36, 42.) Plaintiffs, in their opposing separate statement, additionally state that "Defendants did not mail the NODs by certified mail." (See Pls.' separate statement of undisputed material facts in opposition to motion for summary adjudication, nos. ("UMFs") 6, 7.) Plaintiffs argue that "Defendants did not provide the NODs in compliance with section 2924." (Pls.' opposition to motion for summary adjudication ("Opposition"), p.8:6-7.) As far as the production of copies of the certified mail, the declarations of Pappoe, Smith and Townsend state that the Notices of Default were sent by certified mail. Further, neither Civil Code section 2923.3 nor Civil Code section 2924 require a notice of default to be sent by certified mail. Apparently, Plaintiffs mean to have cited Civil Code section 2924b, subdivision (1) ("[t]he mortgagee, trustee, or other person authorized to record the notice of default or the notice of sale shall… [w]ithin 10 business days following recordation of the notice of default, deposit or cause to be deposited in the United States mail an envelope, sent by registered or certified mail with postage prepaid, containing a copy of the notice with the recording date shown thereon"); however, in *Knapp v. Doherty* (2004) 123 Cal.App.4th 76, the court stated that "Civil Code sections 2924–2924h, inclusive, do not require actual receipt by a trustor of a notice of default or notice of sale…. They simply mandate certain procedural requirements reasonably calculated to inform those who may be affected by a foreclosure sale and who have requested notice in the statutory manner that a default has occurred and a foreclosure sale is imminent." (*Id*. at pp. 88-89 (also stating that, with regards to Civil Code section 2924b, subdivision (2), "[t]he trustor need not receive actual notice of the trustee's sale so long as notice is provided to the trustor that is in compliance with the statute").) Plaintiffs then contend that *Knapp* is distinguishable because "Defendants have failed to produce any copies of the certified mail." (Opposition, p.8:6-7.) However, in *Knapp, supra,* there was no production of any copies of the certified mail in support of the motion for summary judgment. Rather, to establish that the Notice "was served on Borrowers on November 28, 2001, by certified or registered mail and by first class mail at the Property," the court cited to the affidavit of mailing—just as here. (*Knapp, supra,* 123 Cal.App.4th at pp.87-88, fn. 5 (stating that "[t]he affidavit of mailing attached to the Sale Notice reflected a total of 10 mailings to Borrowers, collectively: (a) to 156 Las Colinas Drive, Watsonville, CA 95076-0192 (four mailings [two by first class mail, two by certified or registered mail]); (b) to 156 Las Colinas Drive, Corralitos, CA 95076-0215 (four mailings [two by first class mail, two by certified or registered mail]); and (c) to 168 Madrona Rd., Boulder Creek, CA 95006-9616 (two mailings to Johnn Knapp only [one by first class mail, one by certified or registered mail]").) *Knapp* is not distinguishable; Plaintiffs fail to demonstrate the existence of a triable issue of material fact as to the first cause of action.

Accordingly, Defendants' motion for summary adjudication of the first cause of action for violation of Civil Code section 2923.3 is GRANTED.

Second cause of action for violation of Civil Code §2924b

The second cause of action alleges that "Defendants did not mail Plaintiffs a copy of the recorded NOD—either by registered mail, certified mail or otherwise," apparently in violation of Civil Code section 2924b, subdivision (1). (FAC, ¶ 111.) Here, the arguments and evidence relied upon are essentially identical to that of the first cause of action. Accordingly, for identical reasons, Defendants' motion for summary adjudication of the second cause of action for violation of Civil Code section 2924b, subdivision (1) is GRANTED.

Third cause of action for violation of Civil Code §2924f

The third cause of action alleges that "Defendants did not post any NTS at Plaintiffs' Home" in violation of Civil Code sections 2924f, subdivision (b). (FAC, ¶¶ 115-117.) Defendants present the posting certificates of Will Riddick who also provides photos indicating that the Notices of Trustee's Sale were in fact posted at the property. (See Appendix, exh, 24; see also Rich decl. in support of Defs.' motion for summary adjudication ("Rich decl."), ¶ 3.)

In opposition, Plaintiffs only argue that the evidence is not admissible. (See Opposition, pp.9:12-23, 10:1-4.) However, Plaintiffs have not filed any objections to the Rich declaration nor the Riddick posting certificate. Any objection to the Rich declaration or the Riddick posting certificate fails to comply with Rule of Court 3.1354. Accordingly, Defendants meet their initial burden to demonstrate that the cause of action lacks merit and in opposition, Plaintiffs fail to demonstrate the existence of a triable issue of material fact, and Defendants' motion for summary adjudication of the third cause of action is GRANTED.

Fourth cause of action for violation of Civil Code §2924h, subdivision (g)

Civil Code section 2924h, subdivision (g) states:

> It shall be unlawful for any person, acting alone or in concert with others, (1) to offer to accept or accept from another, any consideration of any type not to bid, or (2) to fix or restrain bidding in any manner, at a sale of property conducted pursuant to a power of sale in a deed of trust or mortgage. However, it shall not be unlawful for any person, including a trustee, to state that a property subject to a recorded notice of default or subject to a sale conducted pursuant to this chapter is being sold in an "as-is" condition.

(Civ. Code, § 2924h, subd. (g).)

The FAC alleges that "Defendants postponed the public auction several times to prevent potential bidders from competing to purchase the Commercial Property and the Home... [and b]y postponing the public auction several times, Defendants wanted to reduce the pool of bidders who would become frustrated with the continuing postponement." (FAC, ¶¶ 123-124.) "The objectives of the bid rigging scheme were to divert money that would have gone to Plaintiffs, by fraudulently acquiring title to the properties at a non-competitive price and then selling it at a higher price." (FAC, ¶ 125.)

Here, aside from the default amount, the material facts are undisputed pursuant to the Plaintiffs' separate statement of undisputed material facts in opposition to the motion for summary adjudication: MF loaned Plaintiffs funds secured by their commercial property at S.24th St. in San Jose and cross-collateralized by their property at 2633 Glen Farm Court in San Jose (UMF 22); the loan was evidenced by a written promissory note signed by Plaintiffs on July 2, 2019 (UMF 23); the loan was secured by a deed of trust recorded with the County Recorder's Office on July 12, 2019 (UMF 24); Stuart was not a lender, trustee, or beneficiary of the obligation of Plaintiffs and was not responsible for the preparation, mailing or posting of any notices concerning the foreclosure on the deed of trust in favor of MF (UMF 25); a Notice of Trustee's Sale was recorded originally setting the foreclosure sale of the commercial property and the Glen Farm Court property for April 18, 2022 (UMF 26); the foreclosure sale was originally set for April 18, 2022 in the Notice of Trustee's Sale but a sale was not held on that date as the foreclosure sale of the 24th St. commercial property was held on July 15, 2022 and the foreclosure sale of the Glen Farm Court property was held on June 24, 2022 (UMF 27); neither Stuart nor anyone else from MF attended the actual foreclosure sale of either property (UMF 28); neither Stuart nor anyone else from MF attended any scheduled dates for the foreclosure sale of either property, whether on April 18, 2022 or any other date (UMF 29); Stuart never knew and to this day does not know who, if anyone, attended the first scheduled date for the foreclosure sale of the properties on April 18, 2022, or any date thereafter, other than by reading the Trustee's Deed Upon Sale that names Infinity K. Plan as the purchaser of the 24th St. property at the foreclosure sale of that property and MF did not bid over its credit bid (UMF 30); prior to reading the Trustee's Deed Upon Sale, Stuart had never heard of Infinity K. Plan (UMF 31); neither Stuart nor MF ever had any business or other relationship with Infinity K. Plan (UMF 32); neither Stuart nor MF offered to accept or accepted from any person or entity, any consideration of any type to bid or not bid at the foreclosure sale of either the 24th St. property or the Glen Farm Court property (UMF 33); neither Stuart nor MF fixed or restrained any bidding in any manner for either the 24th St. property or the Glen Farm Court property at or prior to the foreclosure sales (UMF 34); and, the only reason the sales were continued from the original sale date was based on Stuart's decision that perhaps one of the borrowers would refinance the MF loan with another lender, but that did not happen and ultimately, Stuart decided to have the foreclosure sales proceed (UMF 35). These material facts establish that Defendants did not "postpone the public auction several times to prevent potential bidders from competing to purchase the Commercial Property and the Home" or that "Defendants wanted to reduce the pool of bidders who would become frustrated with the continuing postponement" as alleged by the fourth cause of action. Moreover, these material facts establish that Defendants did not have any objective to divert money and did not accept any consideration from any person to bid or not bid at the foreclosure sales or that the properties were acquired at non-competitive prices. Defendants meet their initial burden to establish that the fourth cause of action lacks merit.

In opposition, Plaintiffs argue that "Defendants have not produced sufficient evidence to conclusively negate Plaintiffs' bid-rigging claim" as "Defendants produce self-serving declaration of Stuart declaring that Defendants did not have any business relationship with Infinity K Plan, the entity that purchased the Commercial Property, and that the bid was competitive because the Commercial Property was sold above the debt amount." (Opposition, pp. 10:19-25, 11:1.) However, as indicated by the opposing separate statement, the material facts are undisputed. Plaintiffs also argue that "[t]he fact that the purchase price was a little over the debt amount is tantamount to 'bid-rigging'." (Opposition, p.11:1-2.) However, Plaintiffs cite to no authority to support such an argument, and in their separate statement in

opposition, Plaintiffs do not cite to any evidence to support the statement. Plaintiffs fail to demonstrate the existence of a triable material fact.

Accordingly, Defendants' motion for summary adjudication of the fourth cause of action is GRANTED.

Fifth cause of action for violation of Civil Code § 1632

The fifth cause of action alleges that Defendants violated Civil Code section 1632, subdivision (b) when they "did not provide Plaintiffs with Spanish language translations for the following documents: (i) the loan agreement; (ii) the promissory note; (iii) the DOT; (iv) the Amended DOT; (v) the First NOD; (vi) the Second NOD; (vii) the NTS; (viii) the First Postponement Notice; and, (ix) the Second Postponement Notice." (FAC, ¶ 134.)

Civil Code section 1632 states:

> Any person engaged in a trade or business who negotiates primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean, orally or in writing, in the course of entering into any of the following, shall deliver to the other party to the contract or agreement, and any other person who will be signing the contract or agreement, and before the execution thereof, a translation of the contract or agreement in the language in which the contract or agreement was negotiated, that includes a translation of every term and condition in that contract or agreement:
>
> …
>
> (2) A loan or extension of credit secured other than by real property, or unsecured, for use primarily for personal, family, or household purposes.
>
> …
>
> (4) Notwithstanding paragraph (2), a loan or extension of credit for use primarily for personal, family, or household purposes in which the loan or extension of credit is subject to the provisions of Article 7 (commencing with Section 10240) of Chapter 3 of Part 1 of Division 4 of the Business and Professions Code, or Division 7 (commencing with Section 18000), or Division 9 (commencing with Section 22000) of the Financial Code.

(Civ. Code § 1632, subds. (2), (4).)

Defendants argue that MF does not "primarily negotiate" in any language other than English, and thus, this transaction is not covered by Civil Code section 1632. In support of their assertion, Defendants present the declarations of Stuart and Zoe Hamilton who demonstrate that Stuart and Hamilton were the only two people at MF who worked on the subject loan and that neither of them speak any language other than English. (See Stuart decl., ¶¶ 1-7, 16-18; see also Hamilton decl. in support of motion for summary adjudication ("Hamilton decl."), ¶¶ 1-3.) It is undisputed that the only language Stuart and Hamilton speak is English and that Stuart and Hamilton were the only two MF employees who worked on the

subject loan. (See UMF 39.) Stuart and Hamilton also state that all negotiations were in English and were with Plaintiffs' broker, Jing Qin of Telos Mortgage, who spoke English to Stuart and Hamilton. (See Stuart decl., ¶¶ 17-18; see also Hamilton decl., ¶¶ 2-3; see also UMF 40.) Defendants meet their initial burden to demonstrate that section 1632 does not apply to them since they did not "negotiate primarily in Spanish" in the course of entering into the subject loan.

Defendants also argue that since Plaintiffs' broker, Qin, negotiated with Defendants wholly in English, section 1632 does not apply since subdivision (h) excepts such a negotiation where the loan is negotiated through a party's interpreter.

Further, Defendants also argue that the subject loan was a non-consumer purpose loan and thus is not a "loan… for use primarily for personal, family, or household purposes" as required for the applicability of section 1632. In support of this argument, Defendants present the Conditional Loan Quote, the notarized Affidavit Regarding Business/Commercial/Investment Loan Purpose, the Promissory Note, Handwritten Business or Investment Purpose Letter, Lender-Broker-Borrower Release and Arbitration Agreement, Disclosures and Agreement to Additional Loan Obligations, and Settlement Agreement, Indemnity and First Amendment to Promissory Note Secured by Deed of Trust, each indicating that the loan was not a consumer loan. (See Stuart decl., ¶¶ 20-26; see also Appendix, exhs. 25-31.) Defendants also meet their initial burden to establish that the subject loan was not one to which Civil Code section 1632 applied as it was not a loan for use primarily for personal, family, or household purposes.

In opposition, Plaintiffs rely on the declaration of Marisela who states that "The negotiations were conducted primarily in English with no-bilingual forms (much less Spanish only) for review and signature." (Marisela decl., ¶ 7.) However, this statement does not demonstrate that Defendants "primarily negotiate in Spanish," as is required for section 1632 to apply. Plaintiffs do not cite to any authority that suggests that section 1632 applies to situations beyond where a person "negotiates primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean" or if the negotiation is "conducted primarily in English." Thus, the statement from Marisela's declaration does not demonstrate the existence of a triable issue of material fact as to the applicability of Civil Code section 1632. Plaintiffs' separate statement in opposition also cites to paragraphs 60-61 of Marisela's declaration to demonstrate that they did not "knowingly and voluntarily" sign any of the documents. However, paragraph 60 does not reference any lack of knowledge or volunteering, or any documents that were signed, and there is no paragraph 61. Thus, Plaintiffs also fail to demonstrate the existence of any triable issue of material fact as to the applicability of Civil Code section 1632, subdivisions (2) or (4) since those subdivisions apply only to loans "for use primarily for personal, family, or household purposes."

As Plaintiffs fail to demonstrate the existence of a triable issue of material fact, Defendants' motion for summary adjudication of the fifth cause of action is GRANTED.

II. CONCLUSION

The motion for summary adjudication on causes of action one through five of the FAC is GRANTED. The Court will prepare the Order.

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