SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 6
Honorable Evette D. Pennypacker, Presiding

David Criswell, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2160

October 31, 2024
9:00 A.M.

RECORDING COURT PROCEEDINGS IS PROHIBITED

ORAL ARGUMENT

Before 4:00 PM today you must notify the:

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

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

If you fail to so notify the court or opposing side, the Court will not hear argument, and the tentative ruling will be adopted.

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

APPEARANCES

The Court strongly prefers in-person appearances.

If you must appear virtually, you must use video. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 6:
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

COURT REPORTERS

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

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	22CV394516	Facchino/LaBarbera Tenant Station LLC vs Amir Sadat	This matter is off calendar per the moving party.
2	22CV398781	Shilpa Mehta vs Jumoke Oyedele	The Court was unable to locate a proof of service for this order of examination. If the assignee of judgment did properly serve the order of examination, such proof of service must be brought to the hearing. Otherwise, this hearing will come off calendar.
3	2005-1-CV-034521	Columbia Credit Vs Negus	Parties are ordered to appear for the debtor's examination.
4	23CV424824	Steven Castro vs Allstate Insurance Company et al	Allstate Insurance Company's demurrer is SUSTAINED WITH 20 DAYS LEAVE TO AMEND. Scroll to line 4 for complete ruling. Court to prepare formal order. As Plaintiff is self-represented, the parties are ordered to appear for the hearing to ensure all can be heard.
5	24CV443177	Jake Pauer vs SANTA CLARA COUNTY ELECTRICAL JOINT APPRENTICESHIP AND TRAINING TRUST dba ELECTRICAL TRAINING ALLIANCE OF SILICON VALLEY	Robert Chon's demurrer is SUSTAINED WITHOUT LEAVE TO AMEND. Scroll to line 5 for complete ruling. Court to prepare formal order.
6	20CV363612	Jai Kumar vs Jade Global, Inc.	Jade Global's motion for summary adjudication is GRANTED, IN PART. Scroll to line 6 for complete ruling. Court to prepare formal order.
7	22CV402493	2040 Services v SVI LLC	Plaintiff 2040 Services dba 2040 Builders' motion to compel further discovery responses from Defendant Continental Casualty Company and for monetary sanctions is DENIED. The Court agrees that Defendant's responses are code compliant and that, given this Defendant's role in this case is limited to the provision of a mechanics lien release bond, this Defendant credibly does not possess documents or facts regarding Plaintiff's work on the project. Plainly, other parties or non-parties would have this information, and Plaintiff can pursue further discovery from those parties. These parties are cautioned, however, that a responding party's failure to produce discovery in the party's possession, custody, or control when requested before trial can result in exclusion of such evidence at trial. (See *Peat, Marwick, Mitchel & Co. v. Superior Court* (1988) 200 Cal.App.3d 272, 288; *Deeter v. Angus* (1986) 179 Cal.App.3d 241; *Castaline v. City of Los Angeles* (1975) 47 Cal.App.3d 580; *Thoren v. Johnston & Washer* (1972) 29 Cal.App.3d 270.) And a party that denies a request for admission without a reasonable basis can be ordered to pay the propounding party the reasonable expenses incurred, including attorney's fees and costs, in proving the matter covered by the request. (See Code Civ. Pro. §2033.420(a); *Spahn v. Richards* (2021) 72 Cal.App.5th 208, 216; *Association for Los Angeles Deputy Sheriffs v. Macias* (2021) 63 Cal.App.5th 1007, 1024; *Karton v. Ari Design & Constr., Inc.* (2021) 61 Cal.App.5th 734, 750.) Such costs of proof can only be imposed against the responding party, not the responding party's attorney. (See *City of Glendale v. Marcus Cable Assocs., LLC* (2015) 235 Cal.App.4th 344, 354.) Court to prepare formal order.

8	23CV412791	Microland Electronics, Inc. vs Jason Hu	Study of the papers reveals to this Court that the parties did not adequately meet and confer before this motion was filed. Plainly, with more discussion, at least some of the issues would have been resolved because they were. And while Hu asserts in reply that some issues remain even after supplementation, it is unclear whether Microland has had an opportunity to confer about these purported issues, and it certainly could not have had an opportunity to respond to issues raised for the first time on reply. Accordingly, the parties are ordered to meet and confer by Zoom or some other similar platform – phone, email, and/or letters is not sufficient meet and confer, identify any issues they cannot resolve informally, and submit a joint statement to the Court on or before November 22, 2024. The joint statement shall be filed, served, and emailed to Department6@scscourt.org. The Court will then hold a hearing, if necessary, on December 5, 2024 at 9 a.m. in Department 6. These orders will be reflected in the minutes.
9	24CV431799	Citibank N.a. vs Miriam Lozano-Gomez	Citibank, N.A.'s for an order that matters in requests for admission of truth of facts be deemed admitted is GRANTED. A notice of motion with this hearing date was served on Defendant by regular mail on July 30, 2024. Defendant failed to file an opposition. "[T]he failure to file an opposition creates an inference that the motion [] is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) There is also good cause to grant this motion. Plaintiff served requests for admission on Defendant by mail on April 30, 2024. Plaintiff followed up with a letter dated June 19, 2024 after receiving no responses. To date, Defendant served no responses. A party served with requests for admission must serve a response within 30 days. (Code of Civ. Pro. §2033.250.) When a party fails to respond—even in the face of a motion to have the matters in the requests for admission deemed admitted—as Defendant has done here, the Court must order the requests for admission deemed admitted. (Code of Civ. Pro. §2033.280(c); *St. Mary v. Superior Court* (2014) 223 Cal.App.4th 762, 775-776.) Such a "deemed admitted" order establishes that the nonresponding party has responded to the requests for admission by admitting the truth of the matters contained in the requests. (*Id.*) Accordingly, Plaintiff's motion is granted, and the matters set forth in Plaintiff's requests for admission are deemed admitted. Court to prepare formal order.
10	24CV447782	Daxa Makwana vs Rita Patel et al	There is no proof of service in the file demonstrating that either the complaint or the motion "to stop harassment" was served. The Code of Civil Procedure, Rules of Court and Civil Local Rules require that the moving party serve a written notice of motion with the hearing date and time. (See Code Civ. Proc. §§1005(a), 1010.) A court lacks jurisdiction to hear a motion that has not been properly served, even if the non-moving party had some type of advanced notice. (See *Diaz v. Professional Community Mgmt.* (2017) 16 Cal.App.5th 1190, 1204-1205; *Five-O-Drill Co. v. Superior Court of Los Angeles County* (1930) 105 Cal. App. 232.) Thus, the Court cannot consider the motion and it is off calendar.
11-16	24CV439241	Priscilla Garcia vs Jorge Ayala	The minor's compromises are approved; Court will use proposed orders on file.
17	19CV348023	Phillip Erkenbrack vs Teresa Trinh	The parties reached an agreement during the September 12, 2024 hearing wherein judgment debtor would pay judgment creditor $18,000 within 30 days of that hearing date. The debtor's examination was continued to ensure that payment had been made. The parties appeared, and Defendant presented documentation that she had sent payment by certified mail. Plaintiff requested a continuance to confirm payment and Defendant's representations regarding her bank accounts. Defendant objected to the continuance and to Plaintiff's representation that he would not accept the settlement if Defendant was found to have funds in a certain bank account. The Court made no comment or finding regarding that aspect of the parties' dispute but granted a continuance to October 31. If Plaintiff has received the payment and is satisfied, this matter may be taken off calendar.
18	23CV411799	Margarita Hernandez vs Kimberly Salazar	Plaintiff's motion to quash is DENIED. Scroll to line 18 for complete ruling. Court to prepare formal order. Plaintiff is ordered to retrieve the two boxes of documents at the hearing; otherwise, they will be destroyed.

Calendar Line 4
Steven Castro v. Allstate Insurance Company, et. al. Case No. 23CV424824

Before the Court is Defendant, Allstate Insurance Company's demurrer to Plaintiff's complaint. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Alleged Facts

According to the complaint, on October 29, 2021, Plaintiff injured his left arm and neck in an auto accident. Daniel Van Chu was the driver, Thuy V. Nguyen was the owner, and Allstate Insurance Company was the insurer. (Complaint pp. 1, 2.)

II. Legal Standard

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

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

Defendant demurrers to the entirety of the complaint on the grounds that it fails to state viable claims.

III. Analysis

Plaintiff does not properly respond to Defendant's demurrer and his opposition improperly contains factual allegations that were not included in the complaint. California Rules of Court, Rule 3.1113(a) requires a memorandum that "contain[s] a statement of facts, a concise statement of the law, evidence and arguments relied on, and a discussion of the statutes, cases, and textbooks cited in support of the position advanced." (California Rules of Court, Rule 3.1113(b).) Rule 3.1113 rests on a policy-based allocation of resources, preventing the trial court from being cast as a tacit advocate for the opposing party's theories by freeing it from any obligation to comb the record and the law for factual and legal support that a party has failed to identify or provide. (*Quantum Cooking Concepts, Inc. v. LV Associates, Inc.* (2011) 197 Cal.App.4th 927, 934, [trial court was justified in denying post-trial motions for failure to provide adequate memorandum].) "[T]he failure to file an opposition creates an inference that the motion or demurrer is meritorious." (*Sexton v. Super Ct*. (1997) 58 Cal.App.4th 1403, 1410.)

While Plaintiff is self-represented, self-represented litigants are entitled to the same, but no greater, consideration than other litigants and attorneys. (*County of Orange v. Smith* (2005) 132 Cal.App.4th 1434, 1444.) Self-represented litigants "are held to the same standards as attorneys" and must comply with the rules of civil procedure. (*Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 543; see also *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985. This means Plaintiff must follow the Code of Civil Procedure, California Rules of Court, and the Civil Local Rules. If Plaintiff has access to a computer, the Court encourages Plaintiff to consult https://selfhelp.courts.ca.gov/, which has plain language explanations for may court processes.

Defendant's points regarding the complaint are well taken; Plaintiff's complaint fails to plead proper causes of action and fails to allege sufficient facts surrounding the accident and Defendant's purported liability.

Accordingly, Defendant's demurrer is SUSTAINED WITH 20 DAYS LEAVE TO AMEND.

Calendar Line 5
Jake Pauer v. Santa Clara County Electrical Joint Apprenticeship and Training Trust,
Case No. 24CV443177

Before the Court is Defendant, Robert Chon's demurrer to the Plaintiff's complaint. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Alleged Facts

This action arises from an employer's alleged disability discrimination. According to the complaint, on January 7, 2019, Plaintiff signed an Apprentice Agreement and began the Inside Wireman Apprenticeship Program with Defendant Santa Clara County Electrical Joint Apprenticeship and Training Trust ("JATT"). The program was for 60 months, and Plaintiff was expected to complete it in June 2024. (Complaint, ¶ 8.)

On March 15, 2021, Plaintiff notified his supervisor and JATT management agent Robert Chon about an upcoming surgery for his non work related torn labrum, which required 4-5 weeks of recovery and 4-5 months of light duty. Plaintiff informed Chon he would return to work on July 26, 2021. (Complaint, ¶¶ 4, 9.)

On July 26, 2021, CBF, Inc. hired Plaintiff as an apprentice. However, on April 14, 2022, CBF terminated Plaintiff's employment due to attendance issues. JATT subsequently summoned Plaintiff to a meeting to address his attendance and Plaintiff was allowed to continue the program under "zero tolerance". (Complaint, ¶¶ 12, 13.)

Later in December of 2022, Plaintiff was put on light duty due to his neck pain. Approximately two months later, Plaintiff informed Chon of his grandmother's passing and that he would be missing two days of class to attend her funeral in Austria. Plaintiff was in Austria from February 2 to February 12, 2023, and missed his February 10, 2023, class which was recoded as unexcused. (Complaint, ¶ 16.)

On February 27, 2023, Plaintiff sought medical attention for his neck pain and the doctor recommended an epidural injection, which was scheduled for June 14, 2023. Plaintiff missed his appointment due to the zero tolerance policy JATT had imposed. (Complaint, ¶ 18.)

On July 7, 2023, a second doctor placed Plaintiff off work until October 7, 2023 due to Plaintiff's chronic medical condition. On July 10, 2023, Plaintiff informed his then employer, Decker Electrical, of his condition. Plaintiff was fired the following day. (Complaint, ¶¶ 19, 20.)

On July 17, 2023, Plaintiff was summoned to appear before JATT's board and was cited for attendance issues. On July 28, 2023, JATT informed Plaintiff of its decision to cancel his Apprenticeship Agreement. Plaintiff's appeal was unsuccessful. (Complaint, ¶¶ 21-23.)

Plaintiff initiated this action on July 16, 2024, alleging (1) disability discrimination, (2) failure to accommodate disability, (3) failure to engage in the interactive process, (4) failure to prevent discrimination, (5) wrongful discharge in violation of public policy, (6) retaliation, (7) defamation, (8) Cal. Labor Code § 1050, and (9) intentional infliction of emotion distress.

II. Legal Standard

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

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

found in exhibits attached to complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

III. Analysis

A. First, Second, Third, Fourth and Sixth Causes of Action

The complaint contains five causes of action, against all defendants, for various violations of the Fair Employment and Housing Act ("FEHA"): Disability Discrimination in violation of Cal. Gov. Code § 12940(a); Disability Discrimination in violation of Cal. Gov. Code § 12940(m) – failure to provide reasonable accommodation; Disability Discrimination in violation of Cal. Gov. Code § 12940(n) – failure to engage in the interactive process; Retaliation in violation of Cal. Gov. Code § 12940(h); Failure to prevent discrimination in violation of Cal. Gov. Code § 12940(k).

Chon contends these causes of action fail as a matter of law as to him because managerial employees and supervisors are not individually liable for discrimination and retaliation arising under FEHA. In opposition, Plaintiff argues, (1) Defendant's role as a managing agent subjects him to personal liability for directing/implementing discriminatory decisions, and (2) individual supervisors can be held liable for retaliation and harassment against employees.

First, there is a clear distinction between discrimination and harassment claims. Unlike FEHA discrimination claims, which address only *explicit* changes in the "terms, conditions, or privileges of employment" (§ 12940, subd. (a)), harassment claims focus on "situations in which the *social environment* of the workplace becomes intolerable because the harassment (whether verbal, physical, or visual) communicates an offensive message to the harassed employee." (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 706 (*Roby*).) In other words, "discrimination refers to bias in the exercise of official actions on behalf of the employer" whereas "harassment refers to bias that is expressed or communicated through interpersonal relations in the workplace." (*Id.* at p. 707.) "Because a harasser need not exercise delegated power on behalf of the employer to communicate an offensive message," harassment claims may be predicated on conduct by supervisors and coworkers alike. (*Id.* at pp. 706–707; See also, *Bailey v. San Francisco Dist.*

Attorney's Office, (2024) 16 Cal. 5th 611, 627-628.) Here, the complaint's claims and factual allegations against Mr. Chon plead discrimination, not harassment claims.

Second, "individuals who do not themselves qualify as employers may not be sued under the FEHA for alleged discriminatory acts." (See, *Jones, supra*, 42 Cal.4th 1158 p. 1167 quoting *Reno v. Baird* (1998) 18 Cal. 4th 640, 663.) Similarly, individuals cannot be personally liable under FEHA for the derivative claim of failure to prevent discrimination by others. (See, *Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1326.) Courts have also rejected the contention that individual supervisory employees are at risk of personal liability for discrimination on the theory that individual supervisory employees are agents of employers, and thus are themselves "employers." (See, e.g., *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 66 (*Janken*).)

Plaintiff relies on *Fitzsimons v. California Emergency Physicians Medical Group* (2012) 205 Cal.App.4th 1423 (*Fitzsimons*) and asserts Chon can be held personally liable where his managerial conduct contributed to a discriminatory environment. Plaintiff's reliance on *Fitzsimons* is displaced. The plaintiff in Fitzsimons was a partner in a medical partnership. She sued the partnership for retaliating against her for reports she made about sexual harassment of female employees. The Court of Appeal concluded that the FEHA supports a claim for retaliation by a partner against her partnership for opposing sexual harassment of an employee because the partner is the employer in a partnership. (*Id*. at p. 1425.)

Third, supervisors and coworkers are not personally liable for their roles in retaliation. (see, *Jones, supra,* 42 Cal.4th 1158, at 1173) The elements of the claim for retaliation are: (1) the plaintiff engaged in a protected activity; (2) the plaintiff's employer subjected her to an adverse employment action; and (3) a causal link. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1065-1066.) A person engages in a "protected activity" under FEHA when the employee opposes a practice forbidden by FEHA or complains of or assists in an investigation of a practice forbidden by FEHA. (Gov. Code, § 12940(h); *Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 247.) In other words, retaliation in violation of FEHA only applies to complaints made in good faith belief to a violation of FEHA, i.e., discrimination, harassment,

failure to accommodate, etc. Since Plaintiff's FEHA discrimination claims are deficient as a matter of law, his derivative claim of retaliation is likewise subject to demurrer.

Given the above analysis, the Court sees no way for Plaintiff to amend these claims to overcome Chon's demurrer. Accordingly, Chon's demurrer to the first, second, third, fourth, and sixth causes of action is SUSTAINED WITHOUT LEAVE TO AMEND

B. Defamation

The complaint alleges, "Chon on a number of occasions made defamatory statements about Plaintiff to other apprentices and employers. Defendant Chon threatened Plaintiff being not eligible for rehire, telling people, including Plaintiff, that he is 'the worse apprentice ever', 'has poor performance', 'poor attendance', etc." (Complaint, ¶ 25.) Chon argues these purported statements constitute nonactionable opinion.

"The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage." (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1369.) The court is to determine "whether a statement is actionable as a statement of fact susceptible of a defamatory meaning, versus a nonactionable statement of opinion privileged under the First Amendment." (*John Doe 2 v. Superior Court* (2016) 1 Cal.App.5th 1300, 1312.) To be actionable, an allegedly defamatory statement must make an assertion of fact that is provably false. "The question is whether the statement is provably false in a court of law." (*Weller v. American Broadcasting Companies, Inc.* (1991) 232 Cal.App.3d 991, 1006.)

"The crucial question of whether challenged statements convey the requisite factual imputation is ordinarily a question of law for the court. Only once the court has determined that a statement is reasonably susceptible to such a defamatory interpretation does it become a question for the trier of fact whether or not it was so understood. The question is whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact." (*Dickinson v. Cosby* (2017) 17 Cal.App.5th 655, 686 (internal quotation marks and citations omitted).) To determine whether a statement is reasonably susceptible of a defamatory interpretation, "courts use a totality of the circumstances test. [A] court must put

itself in the place of an average reader and determine the natural and probable effect of the statement ...." (*ZL Technologies, Inc. v. Does 1-7* (2017) 13 Cal.App.5th 603, 624 (internal quotation marks and citations omitted).)

The Court of Appeal has warned that "[c]ourts should be reluctant to hold comments concerning the professional abilities of an individual actionable." (*Ferlauto v. Hamsher* (1999) 74 Cal.App.4th 1934, 1402, citations omitted [calling lawyer "Kmart Johnnie Cochran" and a "loser wannabe lawyer" were nonactionable statements of opinion]; see also *Jensen v. Hewlett Packard Co*. (1993) 14 Cal.App.4th, 958, 966 (statements that employee "had been the subject of some third party complaints, was not carrying his weight, had a negative attitude in dealing with others, evidenced a lack of direction in his project activities and was unwilling to take responsibility for the projects he oversaw" were nonactionable opinions).) Thus, "'rhetorical hyperbole,' 'vigorous epithet[s],' 'lusty and imaginative expression[s] of contempt,' and language used 'in a loose, figurative sense' have all been accorded constitutional protection." (*Seelig v. Infinity Broadcasting Corp*. (2002) 97 Cal. App. 4th 798, 809.) "Consequently, courts have frequently found the type of name calling, exaggeration, and ridicule … to be nonactionable speech." (*Summit Bank v. Rogers* (2012) 206 Cal.App.4th 669, 699.)

Here, in line with the holding in *Ferlauto*, the Court finds Chon's alleged statements about Plaintiff's poor performance, poor attendance, and that he was the "worst apprentice ever" are opinions of his professional abilities and are not reasonably susceptible to a defamatory interpretation.

Accordingly, Chon's demurrer to the seventh cause of action for defamation is SUSTAINED WITHOUT LEAVE TO AMEND.

C. California Labor Code § 1050

"Any person, or agent or officer thereof, who, after having discharged an employee from the service of such person or after an employee has voluntarily left such service, by any misrepresentation prevents or attempts to prevent the former employee from obtaining employment, is guilty of a misdemeanor." (Lab. Code, § 1050.) Labor Code §1054 allows a private cause of action for violation of §1050:

> In addition to and apart from the criminal penalty provided any person or agent or officer thereof, who violates any provision of sections 1050 to 1052, inclusive, [*6] is liable to the party aggrieved, in a civil action, for treble damages. Such civil action may be brought by such aggrieved person or his assigns, or successors in interest, without first establishing any criminal liability under this article.

"Labor Code section 1050 applies only to misrepresentations made to prospective employers other than the defendant." (*Kelly v. General Telephone Co.* (1982) 136 Cal.App.3d 278, 288.) The Court of Appeals has determined that "It is apparent that the Legislature intended that Labor Code § 1050 would apply only to misstatements to other potential employers, not to misstatements made internally by employees of the party to be charged." (*Id.* at p. 289.)

To state a claim for violation of Labor Code § 1050 Plaintiff must allege: (1) after Plaintiff's employment with Defendant ended, Defendant made representation(s) to a prospective employer about Plaintiff; (2) Defendant's representations were not true; (3) Defendant knew the representations were not true when he made them; (4) Defendant made the representations with the intent of preventing Plaintiff from obtaining employment; (5) Plaintiff was harmed; and (6) Defendant's conduct was a substantial factor in causing Plaintiff's harm. (CACI No. 2711.)

Here, Plaintiff alleges:

> Defendant Chon on a few occasions made defamatory statements about Plaintiff to other apprentices and employers… telling people, including Plaintiff that he is the worse apprentice ever, had poor performance, and poor attendance. (Complaint, ¶ 25.)

> Defendants knew or could reasonably foresee that he would be forced to republish wrongful allegations of improper professional conduct to each and every prospective employer he would seek employment and

> such compelled disclosure would prevent him from gaining employment. (Complaint, ¶ 90.)

These allegations are insufficient to defeat a demurrer. Plaintiff does not allege facts showing (1) Chon made the purported representations to any particular prospective employer, (2) Chon intended to prevent Plaintiff from being hired, (3) Plaintiff was harmed, and (4) Chon's representations were a substantial factor in causing Plaintiff harm. Instead, Plaintiff alleges Chon's made these statements to other apprentices and Plaintiff himself. Plaintiff also fails to allege a viable claim for defamation against Chon, as a matter of law.

Accordingly, Chon's demurrer to the eighth cause of action for violation of Labor Code § 1050 is SUSTAINED WITHOUT LEAVE TO AMEND.

D. Intentional Infliction of Emotional Distress

The elements of the tort of intentional infliction of emotional distress ("IIED") are "(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Wilson v. Hynek*, (2012) 207 Cal.App.4th 999, 1009, quoting *Cervantez v. J.C. Penney Co.*, (1979) 24 Cal.3d 579, 593.)

Here, the Complaint alleges:

> Defendants terminated Plaintiff unfairly, disregarding his disability and request for accommodations, which caused him to lose more than a school year needed to complete the program. If not for the Defendants' actions, Plaintiff undoubtedly would have graduated from the program and would have been allowed to sit for the certification exam, achieving his lifelong dream of becoming an electrician.
>
> Defendants acted with the intent to cause Plaintiff severe emotional distress.

> Defendants had actual and constructive knowledge of the outrageous conducts and ratified and participated in such acts.
>
> As a result, Plaintiff has suffered mental distress and anguish as well as loss of earnings, stock options, employment benefits, and job opportunities. (Complaint, ¶¶ 94-97.)

Chon contends (1) these conclusory allegations are insufficient to state a viable cause of action, and (2) the claim is barred by the exclusivity rule of the Worker's Compensation Act.

Plaintiff's IIED cause of action is founded on Defendants' alleged FEHA discriminatory actions of. The Worker's Compensation Act does not bar unlawful and discriminatory conduct. Thus, a claim for emotional and psychological damage, arising out of employment, is not barred where the distress is engendered by an employer's illegal discriminatory practices. (See, *Watson v. Department of Rehabilitation*, (1989) 212 Cal.App.3d 1271, 1285-1286.) However, since a defendant supervisor cannot be personally liable for discrimination-based employment claims, "it follows he cannot be held liable for the emotional distress claims either". (*Smith v. International Brotherhood of Electrical Workers* (2003) 109 Cal.App.4th 1637, 1658.)

Furthermore, liability for intentional infliction of emotional distress "does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." (*Hughes v. Pair*, (2009) 46 Cal. 4th 1035, 1051. quoting reference omitted.) Ordinary employment decisions, like terminating an employee, generally do not rise to the level of "outrageous" conduct, even when motivated by discriminatory animus. (*See, e.g., Shoemaker v. Myers*, (1990) 52 Cal.3d 1, 25 ["The kinds of conduct at issue (e.g., discipline or criticism) are a normal part of the employment relationship."]; *Janken v. GM Hughes Elecs.*, (1996) 46 Cal. App. 4th 55, 80, ["If personnel management decisions are improperly motivated, the remedy is a suit against the employer for discrimination."].)

Plaintiff cites *Light v. Dept. of Parks & Recreation* (2017) 14 Cal.App.5th 75 for the proposition that personnel actions committed by an individual employee can be used as the

basis for an emotional distress claim against said individual, if such personnel actions by that employee rises to the extreme and outrageous standard. This case is distinguishable. In *Light*, there was one supervisor, who ostracized the plaintiff in the workplace, encouraged her to lie to investigators and pursued her at home and at work to confirm she did so, and verbally and physically attacked the plaintiff after she disobeyed the order that she lie to investigators. (*Light, supra*, 14 Cal.App.5th at pp 82-84,102.) Those facts are not present here.

Accordingly, Chon's demurrer to the nineth cause of action for intentional infliction of emotional distress is SUSTAINED WITHOUT LEAVE TO AMEND.

Calendar Line 6
Jai Kumar v. Jade Global, Inc. Case No. 20CV363612

Before the Court is defendant Jade Global, Inc.'s ("Jade Global") motion for summary judgment, or in the alternative, summary adjudication against plaintiff Jai Kumar. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Alleged Facts

According to the second amended complaint ("SAC"), this is a representative action under the Private Attorney General Act of 2004 ("PAGA") for civil penalties and various Labor Code violations purportedly committed by Jade Global, which is an information technology services company headquartered in San Jose. (SAC, ¶ 10.) Plaintiff was hired in November 2013, and he held various positions in the company over the next six years until he was terminated in December 2019. (SAC, ¶¶ 11-12.) Plaintiff alleges Jade Global demanded that he not discuss his compensation with other employees on the grounds that doing so would be in violation of company policy. (SAC, ¶ 15.)

On June 25, 2019, Jade Global emailed a document titled, "Jade Global FY20 LOB & Practice Leaders Variable Compensation Plan ("VCP") to Plaintiff and other employees, and it required they sign it by the week of July 5, 2019. (SAC, ¶¶ 16-17.) Jade Global's sales personnel were also sent a contract with the same provisions and required to sign it (the "SCP"). (SAC, ¶ 18.) The VCP prohibits employees from speaking about their variable compensation with other employees. (SAC, ¶ 22.) The VCP also required the employees to forfeit and waive any right to variable compensation earned but not paid prior to the date of termination of his or her employment in violations of Labor Code sections 201, 202, 203, 206.5, and 432.5. (SAC, ¶¶ 27-32.) Plaintiff alleges the VCP further violates Labor Code section 432.5 by establishing Jade Global as the conclusive arbiter of disputes relating to variable compensation. (SAC, ¶ 33-37.)

In February 2018, Jade Global presented Plaintiff with the Confidential Information and Invention Assignment Agreement ("ECIIAA") and required him to sign it. (SAC, ¶ 38.) The ECIIAA prohibits Plaintiff from soliciting any of Jade Global's customers for a period of 12 months after the termination of employment. (SAC, ¶ 39.) Plaintiff alleges Jade Global required

current and former employees to sign employment agreements materially identical to the ECIIAA and the prohibition of soliciting customers after termination is an unlawful contractual restriction in violation of Lanor Code section 432.5 and Business and Professions Code section 16600. (SAC, ¶¶ 40-44.) Plaintiff alleges the ECIIAA unlawfully prohibits employees from engaging in any outside business activities or employment without Jade Global's prior written approval. (FAC, ¶¶ 51-57.)

Plaintiff filed the Complaint on February 13, 2020 and filed the FAC on May 5, 2020 asserting a single claim for civil penalties under PAGA for violations of Labor Code section 201, 202, 203, 206.5, 432.5, and 1197.5. On May 28, 2024, Plaintiff filed the SAC, asserting a single claim asserting for civil penalties under PAGA for violations of Labor Code sections 96, subdivision (k), 98.6, 201, 202, 203, 206.5, 432.5, and 1197.5. On August 16, 2024, Jade Global filed the instant motion which Plaintiff opposes.

II. Request for Judicial Notice

Plaintiff requests judicial notice of the following two items:

(1) Assembly Bill No. 1076, effective January 1, 2024: Exhibit A;

(2) Senate Bill No. 699, effective January 1, 2024: Exhibit B.

The Court may take judicial notice of committee reports, floor analyses, and other legislative records. (See *Hutnick v. USF&G* (1998) 47 cal.3d 456, 465, fn. 7; *In re Jesusa V.* (2004) 32 Cal.4th 588, 650.) Thus, Plaintiff's request for judicial notice is GRANTED.

III. Evidentiary Objections

A. Plaintiff's Objections

Plaintiff's objections do not need to be ruled upon because they do not comply with Rule of Court 3.1354 ("Rule 3.1354"). Rule 3.1354 requires two documents to be submitted when evidentiary objections are made: the objections and a separate proposed order on the objections, both of which must be in one of the two approved formats set forth in the rule. (See *Vineyard Spring Estates v. Super. Ct.* (2004) 120 Cal.App.4th 633, 642 (*Vineyard*) [trial courts only have duty to rule on evidentiary objections presented in the proper format]; *Hodjat v. State Farm Mutual Automobile Ins. Co.* (2012) 211 Cal.App.4th 1 (*Hodjat*) [trial court not required to rule on

objections that do not comply with Rule of Court 3.1354 and not required to give objecting party a second chance at filing properly formatted papers].) Plaintiff submitted only one document with the objections, in violation of Rule 3.1354. Consequently, the Court declines to rule on the evidentiary objections. Objections that are not ruled on are preserved for appellate review. (See Code of Civ. Proc., § 437c, subd. (q).

IV. Legal Standard

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

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

If the moving party makes the necessary initial showing, the burden of production shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. (Code of Civ. Proc., 437c, subd. (c); *Aguilar, supra*, 25 Cal.4th at p. 850.) A triable issue of material fact exists "if, and only if, the evidence would allow of reasonable trier of fact to find the underlying facts in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra*, 25 Cal.4th at p. 850, fn. omitted.) If the party opposing summary judgment presents evidence demonstrating the existence of a disputed material fact, the motion must be denied. (*Id*. at p. 843.)

"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)." (*Aguilar, supra,* 25 Cal.4th at pp. 854-855.) "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." (*Ibid.*)

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

Pursuant to Code of Civil Procedure section 437c, Jade Global moves for summary judgment against Plaintiff, or in the alternative, summary adjudication of the PAGA claim under Business & Professions Code section 16600 and Labor Code sections 96, subdivision (k), 98.6, 201-203, 206.5, 432.5, and 1197.5. The Court can summarily adjudicate a PAGA claim based on multiple theories/Labor Code violations as to each violation. (See *Rojas-Cifuentes v. Superior Court* (2020) 58 Cal.App.5th 1051, 1061 (*Rojas-Cifuentes*) [this type of PAGA claim "can be regarded as multiple causes of action for purposes of summary adjudication].)

V. Analysis

Jade Global's undisputed material facts are as follows: It hired Plaintiff of November 11, 2013 and he was terminated on December 3, 2019. (Jade Global's Undisputed Material Facts ("UMF"), Nos. 3-4.) Plaintiff filed the instant matter on February 13, 2020. (Jade Global's UMF, No. 5.) The parties settled Plaintiff's individual PAGA claims, and the Court approved the settlement on November 14, 2023. (*Ibid*.) In 2017, Plaintiff and other Jade Global employees were presented with the ECIIAA. (Jade Global's UMF, No. 6.) Despite various requests for his signature from Jade Global, Plaintiff never signed the ECIIAA. (Jade Global's UMF, No. 7.) During the PAGA timeframe, forty-four employees that were provided with the ECIIAA and signed it. (Jade Global's UMF, No. 8.) In mid-2019, Jade Global presented eleven practice leaders with different IT service offerings, including Plaintiff, with a Variable Compensation Plan ("VCP"), which set forth the terms for the employees' bonuses for the period of April 1, 2019 through March 21, 2020. (Jade Global's UMF, No. 9.)

Shortly after distributing the VCP to the eleven employees, on July 11, 2019, Jade Global sent follow up emails to the practice leaders requesting they sign the VCP and clarified that signing the VCP was voluntary. (Jade Global's UMF, No. 10.) Of the eleven employees offered the VCP, only two employees based in California signed the VCP. (Jade Global's UMF, No. 11.) Plaintiff did not sign the VCP and those who did not sign were not subjected to any adverse employment action. (Jade Global's UMF, Nos. 12-13.) The nine employees who did not sign the VCP either left the company for independent reasons or are still employed at Jade Global. (Jade Global's UMF, No. 14.) Although the VCP set forth the terms of the commission plan for the eleven employees, it did not tell them that signing the VCP was a condition of the employees' continued employment nor was it a condition. (Jade Global's UMF, No.15.)

The Chief Executive Officer Karan Yaramada ("Yaramada") was not involved in writing the VCP and ECIIAA but he gave the final approval before they were sent to Jade Global employees. (Jade Global's UMF, No. 16.) Yaramada has a business, not legal background. (Jade Global's UMF, No. 17.) He completed an executive management program from Harvard Business School. (Jade Global's UMF, No. 18.) He did not have knowledge of any provisions in the agreements would be interpreted as "unlawful" at the time they were drafted. (Jade Global's UMF, No. 19.) He was never advised or understood that any provisions of the agreement were unlawful, "prohibited by law," or could be interpreted as "prohibited by law" in California. (Jade Global's UMF, No. 20.) Jade Global's human resources department developed a draft ECIIAA, which was submitted to Yaramada for his approval. (Jade Global's UMF, No. 21.)

The Chief Financial Officer Rama Karanam ("Karanam") drafted the VCP. (Jade Global's UMF, No. 22.) Karanam has a business, not legal background. (Jade Global's UMF, No. 23.) He received his education in finance and accounting in India. (Jade Global's UMF, No. 24.) He is not a resident of California, and he performs works in the Pennsylvania office. (Jade Global's UMF, No. 25.) In drafting the VCP, Karanam used a template from his previous company, which he believed was vetted by legal counsel hired by his previous company. (Jade Global's UMF, No. 26.) He also used the same template to draft the SCP, which was sent to the sales commission employees. (Jade Global's UMF, No. 27.) Karanam did not have knowledge that any provisions

would be interpreted as "unlawful" at the time they were drafted. (Jade Global's UMF, No. 28.) He was never advised or understood that any provisions of the agreement were unlawful, "prohibited by law," or could be interpreted as "prohibited by law" in California. (Jade Global's UMF, No. 29.) Yaramada never made or directed anyone else to make statements about prohibiting Plaintiff or any other Jade Global employees from discussing concerns about compensation with other employees. (Jade Global's UMF, No. 30.) Karanam never told employees of Jade Global not to discuss their compensation. (Jade Global's UMF, No. 31.) To date, neither Yaramada nor Karanam is aware of anyone at Jade Global who tried to prohibit employees from discussing concerns about compensation with other employees. (Jade Global's UMF, Nos. 32-33.)

On August 8, 2019, while still employed at Jade Global, Plaintiff filed a PAGA Notice with the California Labor & Workforce Development Agency ("LWDA") asserting the agreements contained unlawful provisions. (Jade Global's UMF, No. 34.) Prior to filing the PAGA Notice, Plaintiff did not complain about the agreements when offered to him. (Jade Global's UMF, No. 35.) Upon receipt of the PAGA Notice, it became clear to Jade Global that Plaintiff, at least, had concerns about the ECIIAA and VCP and was potentially misinterpreting Jade Global's intent or that there were potentially problematic provisions in the agreement. (Jade Global's UMF, No. 36.)

On August 23, 2019, Karanam advised the eleven employees that Jade Global would revise the VCP to clarify any ambiguities therein. (Jade Global's UMF, No. 37.) Around September 25, 2019, Jade Global revised the VCP to eliminate any purported violations or ambiguities, supersede the initial VCP, and control the compensation terms of the 2020 fiscal year ("Revised VCP"). (Jade Global's UMF, No. 38.) The Revised VCP eliminated all the terms that Plaintiff claimed were "unlawful." (Jade Global's UMF, No. 39.) Jade Global distributed the Revised VCP to the same practice leaders. (Jade Global's UMF, No. 40.) Employees who received the Revised VCP were not required to sign it and their participation was voluntary. (Jade Global's UMF, No. 41.) Although he was still employed by Jade Global, Plaintiff did not sign the Revised VCP. (Jade Global's UMF, No. 42.) Around February 2020, Jade Global revised the

ECIIAA ("Revised ECIIAA") to modify all terms that Plaintiff interpreted as unlawful. (Jade Global's UMF, No. 43.) The Revised ECIIAA was circulated after May 11, 2020, through the present and does not contain the provisions Plaintiff challenges. (Jade Global's UMF, No. 44.) Jade Global distributed to all new hires and existing employees who signed the ECIIAA at issue. (Jade Global's UMF, No. 45.)

In August 2019, while still employed at Jade Global, Plaintiff began working for NuVision AutoGlass, LLC. (Jade Global's UMF, No. 46.) Jade Global terminated Plaintiff's employment in December 2019, for reasons unrelated to the VCP or the ECIIAA including his failure to sign either. (Jade Global's UMF, No. 47.) Plaintiff submitted his individual claims to arbitration, which included a claim of retaliation on the ground Plaintiff claimed he was terminated in part, because he submitted a PAGA notice alleging the violations in this action. (Jade Global's UMF, No. 48.) The arbitrator ruled in Jade Global's favor that there was no retaliation. (*Ibid*.)

Plaintiff's facts are as follows: around July 11, 2019, Jade Global sent follow-up emails regarding the VCP and did not clarify that signing the VCP was not required or that it was voluntary, rather the emails continued to "request" employee signatures by certain dates or "at the earliest." (Plaintiff's Separate Statement in Opposition ("Plaintiff's AMF"), No. 10.) On June 25, 2019, Karanam sent an email regarding the VCP which stated, "you are *required* to sign the plan document and submit a copy to the Company. A copy of the plan counter signed by the Company will be sent to you for your records—we expect this to be completed by the end of the week…" (Plaintiff's AMF, No. 15.) The ECIIAA was suddenly and intentionally revised in 2017 to include illegal anti-competitive provisions to prevent employees from taking jobs with Jade Global's customers. (Plaintiff's AMF, No. 19.) Plaintiff was instructed by Jade Global's HR of a company-wide policy against employee discussion or compensation. (Plaintiff's AMF, No. 30.) Moreover, Yaramada sent Kumar emails demanding that he didn't discuss the concerns he had about his variable compensation with others. (*Ibid*.) The VCP and ECIIAA contained unlawful provisions such as sections relating to "Service for Others" and "non-solicitation." (Plaintiff's AMF, No. 36.) After receiving the PAGA notice, Jade Global acknowledged that it was aware that the VCP and ECIIAA contained provisions prohibited by law. (*Ibid*.)

A. Labor Code section 432.5

Labor Code section 432.5, provides,

> No employer, or agent, manager, superintended, or officer, thereof shall require any employee or applicant for employment to agree, in writing, to any terms or condition which is known by such employer, or agent, manager, superintendent, or officer thereof to be prohibited by law.

(Lab. Code, § 432.5.)

Jade Global contends Plaintiff cannot establish the necessary elements for a Section 432.5 claim because the challenged terms are not prohibited by law and, even if they were, Plaintiff cannot demonstrate Jade Global knew that. It appears Jade Global concedes there is a dispute regarding whether employees were "required" to sign the agreements. (See MPA, p. 9, fn. 7.)

1. Whether Jade Global had knowledge

Jade Global relies on Yaramada who states he was not involved in the drafting of either agreement and at the time the agreements were presented to the employees, he had no knowledge that any of the agreements' provisions would be interpreted as "unlawful." (Yaramada Decl., ¶¶ 12- 13.) Jade Global also relies on Karanam who states he was involved in drafting the VCP but he was never advised and never understood that any provisions of the agreements were unlawful or could be interpreted as "prohibited by law" in California. (Karanam Decl., ¶¶ 3-5.) This is sufficient to meet Jade Global's burden.

In opposition, Plaintiff contends evidence of Jade Global's knowledge is shown by the fact that Karanam drafted the VCP, the ECIIAA was drafted by Jade Global's HR department with the assistance of outside counsel, and both agreements were reviewed and approved by Yaramada. (See Karanam Decl., ¶ 3; Yaramada Decl., ¶ 12.) Plaintiff also argues the ECIIAA had been a routine onboarding document presented by Jade Global to new hires since the company's inception, but it was suddenly modified and redistributed to all existing employees and new hires starting in 2017. (Plaintiff's Decl., ¶ 7.) Plaintiff also provides Yaramada's deposition, where he was asked why Jade Global presented a new version of the ECIIAA to employees in 2017:

Q. Okay. And why did Jade Global present this new version of this document to Mr. Kumar and other employees?

A. It could be several reasons.

Q. What are they?

A. One is, every few years, the law changes, Code changes. We enhance the agreements to stay within legal.

Two, around that time, some of our employees went and joined our customers. To limit that, we did update, I believe, that provision.

(Yaramada Depo., p. 42:24-43:1.)

Plaintiff also relies on the testimony of Elizabeth Geiser Olson ("Geiser") who was the head of Human Resources at the time. Geiser testified that she recalled a time they reviewed all of the onboarding documents, but she did not specifically recall working on or reviewing the ECIIA. (Geiser Depo., p. 23:16-22.) However, Geiser was not involved in drafting the ECIIA; it was already in place when she started. (See Geiser Depo., p. 22:17-25.) Plaintiff contends her testimony is at odds with Yaramada's testimony that the ECIIAA was deliberately modified in 2017 to add a non-compete provision. (Opp., p. 13:12-14.) But, the portion of Geiser's testimony that Plaintiff relies on does not create a triable issue of material fact as to whether Jade Global knew the alleged provisions were unlawful.

Plaintiff argues Jade Global required new hires to sign the ECIIAA from August 8, 2019, the date of Plaintiff's LWDA letter, through May 11, 2020. He further argues it admitted that around 20 to 30 employees were given the ECIIAA, which contained the allegedly unlawful provisions. (Plaintiff's Exh. C, p. 188:19-189:14.) Yaramada states he "was never advised or understood that any provisions of [the agreements] were illegal, unlawful, 'prohibited by law,' or could be interpreted as 'prohibited by law' in California *until [Plaintiff] raised the issue*." (Yaramada Decl., ¶ 13 [emphasis added].) However, even after Plaintiff raised the issue, Jade Global continued to have employees sign the agreements until it sent out a revised document. Therefore, there is a triable issue of material fact regarding whether Jade Global had knowledge and summary adjudication cannot be granted on this basis.

2. Whether the Alleged Provisions in the VCP or ECIIA were "Prohibited by Law"[1]

Jade Global argues the alleged provisions are not "prohibited by law," and at most, they are void. (MPA, p. 13:12-16.)

i. Business and Professions Code § 16600

Business and Professions Code section 16600 ("Section 16600"), provides, as relevant, "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." (Bus. & Prof. Code, § 16600.) By recent amendment, the statute directs that the prohibition "shall be read broadly, in accordance with *Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, to void the application of a noncompete agreement in an employment context, or any noncompete clause in an employment contract, no matter how narrowly tailored, that does not satisfy an exception in this chapter." (Bus. & Prof. Code, § 16600, subd. (b)(1).)

Relying on *Fleming v. Matco Tools Corp.* (N.D. Cal. July 9, 2021) U.S. Dist. LEXIS 207080, Jade Global argues Section 16600 does not prohibit or forbid employers and employees from entering non-competes. (MPA, p. 12:9-11.) *Fleming* involved an employee's Section 432.5 claim against his employer because it required their employees to sign non-compete clauses in violation of Section 16600.[2] (*Id*. at p. 11.) Jade Global advances the same argument made by the defendant, which is that Section 16600 renders the non-compete clause void but it is not "prohibited by law" and thus, cannot result in a Section 432.5 violation. (*Ibid*.) The court wrote,

> [Defendant] Matco argues that it is entitled to judgment on the pleadings because the California statute prohibiting non-compete clauses renders them void but not "prohibited by law," so they cannot result in Section 432.5 penalties. See Mot. 14. The few courts to have examined this issue or an analogous one have agreed with

[1] Plaintiff asserts Labor Code sections 96, subd. (k), 98.6, 201-203, 206.5, and 1197.5 as separate causes of action, in addition to grounds for his claim under Section 432.5. Thus, the court will address them within the context of Section 432.5 in this section and the separately below.

[2] "A written trial court ruling has no precedential value." (*Santa Ana Hospital Med. Ctr. v. Belshe* (1997) 56 Cal.App.4th 819, 831.) Furthermore, "we are not bound by decisions of the lower federal courts, even on federal questions. (*People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn. 3.)

Matco. See *Hamilton v. Juul Labs, Inc.*, No. 20-CV-03710-EMC, 2020 U.S. Dist. LEXIS 166718, 2020 WL 5500377, at *7 (N.D. Cal. Sept. 11, 2020) ("Section 16600 cannot be the predicate for a Labor Code section 432.5 violation because Section 16600 makes the provision void rather than prohibited by law."); *Beebe v. Mobility, Inc.*, 2008 U.S. Dist. LEXIS 12400, 2008 WL 474391, at *3 (S.D. Cal. Feb. 20, 2008) ("The Court agrees with Defendant's argument that Plaintiff is not entitled to relief under Labor Code § 432.5 which proscribes only agreements that are 'prohibited by law' rather than those that are void."). Cf. *Edwards v. Arthur Andersen LLP*, 142 Cal. App. 4th 603, 47 Cal. Rptr. 3d 788, 809 n.10 (Ct. App.), as modified (Sept. 26, 2006), review granted and opinion superseded on other grounds, 147 P.3d 1013 (Cal. 2006), and aff'd in part, rev'd in part on other grounds, 44 Cal. 4th 937, 81 Cal. Rptr. 3d 282, 189 P.3d 285 (2008) (holding that analogously worded statute did not qualify).

In *Edwards, supra,* the California Supreme Court held that Section 16600 "prohibits employee noncompetition agreements unless the agreement falls within a statutory agreement." (*Edwards, supra,* 44 Cal.4th at p. 942.) The court explained that California "courts have consistently affirmed that [Section 16600] evinces a settled legislative policy in favor of open competition and employee mobility." (*Id*. at p. 946.) "The law protects Californians and ensures 'that every citizen shall retain the right to pursue any lawful employment and enterprise of their choice.'" (*Ibid*.) Thus, apart from those exceptions enumerated in the statute, covenants not to compete are void in California. (*Id*. at p. 945.) *Edwards* is the controlling authority on this matter. However, contrary to Plaintiff's assertions, *Edwards* did not hold that non-compete agreements were unlawful. Moreover, Business & Professions Code sections 16600.1 and 16600.5, which both went into effect on January 1, 2024, explicitly prohibit non-compete agreements unless specific exceptions are met. However, neither statute contains any provisions regarding retroactive application. Given the newly enacted statutes, which explicitly prohibit non-compete agreements, the Court cannot read Section 16600 as prohibiting them, as opposed to rendering them void when they do not satisfy an exception. Based on the foregoing,

Section 16600 cannot support Plaintiff's Section 432.5 claim as it does not prohibit any conduct by law. Thus, Jade Global's motion for summary adjudication as to Section 16600 is GRANTED.[3]

ii. Labor Code sections 201, 202, 203

Labor Code section 201 requires an employer to pay all wages earned and unpaid at the time of discharge when it terminates an employee. (Lab. Code, § 201, subd. (a).) If an employee quits, all wages earned and unpaid are due and payable no later than 72 hours after quitting, unless the employee has given 72 hours notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting. (Lab. Code, § 202, subd. (a).) If an employer violates Labor Code sections 201 or 202, the employee may recover a penalty of up to 30 days of additional wages. (Lab. Code, § 203, subd. (a).)

The VCP, Section 6 ("Section 6"), states,

> "Upon termination of employment with Jade Global, the employee forfeits all variable compensation earned but not yet paid for prior quarters, regardless of whether the variable compensation earned are for the current and/or future quarters."

(Karanam Decl., Exh. B (VCP), § 6.)

The Court is not persuaded by Jade Global's argument that it is necessary for Section 6 to discuss the timing of payment for all final wages because the plain language of the term states that even if commission was earned at the time of termination, if it was unpaid then it would be forfeited, and thus, not paid any time in violation of Labor Code sections 201 and 203. Thus, Jade Global's motion for summary adjudication as to Sections 201-203 as they relate to Section 432.5 is DENIED.

iii. Labor Code section 206.5

Labor Code section 206.5 ("Section 206.5"), provides,

> An employer shall not require the execution of a release of a claim or right on account of wages due, or to become due, or made as an advance on wages to be earned, unless payment of those wages has been made. A release required or

[3] Plaintiff does not assert a separate Section 16600 claim nor do the parties offer argument as to one.

executed in violation of the provisions of this section shall be *null and void* as between the employer and employee. *Violation of this section by the employer is a misdemeanor.*

(Lab. Code, § 206.5, subd. (a) [emphasis added].)

Jade Global argues a violation of this section simply renders the contractual provision "null and void." (MPA, p. 15:19-22.) However, Section 206.5 specifically states violation of the section is a misdemeanor. It is unclear how this could mean anything other than the inclusion of such a provision is prohibited by law. Jade Global fails to cite any authority to the contrary. Thus, Jade Global's motion for summary adjudication of Section 206.5 as it relates to Section 432.5 is DENIED.

iv. Labor Code section 1197.5

Labor Code section 1197.5 ("Section 1197.5"), provides,

An employer shall not discharge, or in any manner discriminate or retaliate against, any employee by reason of any action taken by the employee to invoke or assist in any manner the enforcement of this section. If an employer engages in any action prohibited by this section within 90 days of the protected activity specified in this section, there shall be a rebuttable presumption in favor of the employee's claim. *An employer shall not prohibit an employee from disclosing the employee's own wages, discussing the wages of others, inquiring about another employee's wages, or aiding or encouraging any other employee to exercise their rights under this section.* Nothing in this section creates an obligation to disclose wages.

(Lab. Code, § 1197.5, subd. (k)(1) [emphasis added].)

Section 9.2 of the VCP, provides, "No participant may share any part of this compensation with any person, partner, or customer." (See VCP, Section 9.2.) Section 1197.5 explicitly prohibits an employer from prohibiting an employee from discussing their wages. The Court is not persuaded by Jade Global's argument, without citation to authority, that the plain language of "shall not," does not equate to a prohibition by law. (See *People v. Dougherty, supra,* 138

Cal.App.3d at p. 282 [points asserted without supporting authority are waived].) Thus, Jade Global's motion for summary adjudication of Section 1197.5 as it relates to Section 432.5 is DENIED.

B. Labor Code section 206.5

Jade Global argues Plaintiff cannot provide any evidence that it required any employee to release wages in violation of Section 206.5

The VCP, Section 6 ("Section 6"), states,

> "Upon termination of employment with Jade Global, the employee forfeits all variable compensation earned but not yet paid for prior quarters, regardless of whether the variable compensation earned are for the current and/or future quarters."

(VCP, § 6.)

Section 206.5 is to be read along with Section 206, "which states that in wage disputes, 'the employer shall pay…all wages, or parts thereof, conceded by him to be due, leaving to the employee all remedies he might otherwise be entitled to as to any balance claimed." (Lab. Code, § 206, subd. (a).) Together, the statutes "prohibit [] employers from coercing settlements by withholding wages concededly due. Wages are not considered 'due' and unreleasable under Labor Code section 206.5 unless they are required to be paid under Labor Code section 206. When a bona fide dispute exists, the disputed amounts are not 'due,' and the bona fide dispute can be voluntarily settled with a release and a payment—even if the payment is for an amount less than the total wages claimed by the employee." (*Watkins v. Wachovia Corp.,* (2009) 172 Cal.App.4th 1576, 1586-1587.) In other words, "[w]ages are not 'due' if there is a good faith dispute as to whether they are owed." (*Chindarah v. Pick up Stix Inc.* (2009) 171 Cal.App.4th 796, 802.)

Jade Global contends under the VCP, the commission is not earned until all conditions precedent are met. (MPA, p. 18:28-19:1.) Jade Global argues in order for commission to be "earned," (1) there must be an executed contract between Jade Global and the client, approved by the legal department, (2) the employee must meet the revenue qualifier of 80% achievement,

(3) meet the gross margin qualifier of 80% achievement, and (4) must be employed by the Company on the date of payment to be eligible for receipt of the Variable compensation earned. (VCP, §§ 8.1, 8.3, 8.4.2.) Jade Global argues if an employee no longer worked there at the time of payment then the conditions were not met and as a result, there was a bona fide dispute as to the earnings. However, the VCP specifically states,

> 40% of the Variable compensation Earned as per the terms of the Plan for H1 shall be paid approximately 60 days from the end of the 6 month period and remaining 60% shall be paid approximately 60 days from the end of the fiscal year, along with the full year variable compensation earnings. The LOB & Practice Leader must be employed by the Company on the date of payment to *be eligible for receipt* of the Variable compensation earned.

(See VCP, § 8.3 [emphasis added].)

When reading section 8.3 in context, it discusses the timing of payment and receipt already earned compensation, not a requirement to earn it. In comparison, Section 8.4.2, provides, "[t]he employee must have a minimum revenue achievement and gross margin achievement of 80% against the targets in order to be eligible for variable compensation earnings under this plan. *If the employee has not achieved the minimum threshold of 80%, he will be deemed ineligible for any payments, as applicable*." (VCP, § 8.4.2 [emphasis added].) Section 8.4.2. discusses conditions to earn the variable compensation. Therefore, the Court is not persuaded by Jade Global's assertion that the compensation was disputed under Section 6. Jade Global further argues that Yaramada testified that compensation was never forfeited in practice, however, Section 206.5 pertains to execution of a release regarding the wages, not whether the compensation was actually forfeited. Thus, Jade Global fails to meet its burden and as a result, its motion for summary adjudication of Plaintiff's PAGA claim as to Section 206.5 is DENIED.

C. Labor Code sections 201, 202, 203

Jade Global contends Plaintiff has not shown that it did not pay any wages that were due upon termination. On that basis, Jade Global contends Plaintiff fails to establish an actual violation of the Labor Code sections, which means that claims under the statutes cannot be

established. This is sufficient for Jade Global to meet its burden. (See *Arias v. Superior Court* (2009) 46 Cal.4th 969, 987 ["Recovery of civil penalties under [PAGA] requires proof of a Labor Code violation"] (*Arias*).) In response, Plaintiff argues Jade Global fails to provide any evidence that it paid all employees all compensation due at the time of termination. However, Plaintiff fails to provide any evidence of employees who were not paid compensation owed at the time of termination or any evidence to support a triable issue of material fact as to any of the statutes. Thus, Jade Global's motion for summary adjudication of Plaintiff's PAGA claim as to Labor Code sections 201-203 is GRANTED.

D. Labor Code section 1197.5

Plaintiff bases this claim on the VCP's unlawful limitation on an employee's right to discuss compensation and the fact that he was told not to discuss his compensation. Section 9.2 of the VCP, provides, "No participant may share any part of this compensation with any person, partner, or customer." (See VCP, Section 9.2.)

> "Where the meaning of the words used in a contract is disputed, the trial court must provisionally receive any proffered extrinsic evidence which is relevant to show whether the contract is reasonably susceptible of a particular meaning. (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 39–40 [69 Cal. Rptr. 561, 442 P.2d 641]; *Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal. App. 3d 1113, 1140–1141 [234 Cal. Rptr. 630].) Indeed, it is reversible error for a trial court to refuse to consider such extrinsic evidence on the basis of the trial court's own conclusion that the language of the contract appears to be clear and unambiguous on its face. Even if a contract appears unambiguous on its face, a latent ambiguity may be exposed by extrinsic evidence which reveals more than one possible meaning to which the language of the contract is yet reasonably susceptible. (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.*, *supra*, 69 Cal.2d at p. 40 & fn. 8; *Pacific Gas & Electric Co. v. Zuckerman*, *supra*, 189 Cal. App. 3d at pp. 1140–1141.)" [Footnote omitted.]

The interpretation of a contract involves "a two-step process: 'First the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine "ambiguity," i.e., whether the language is "reasonably susceptible" to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is "reasonably susceptible" to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step—interpreting the contract. [Citation.]' (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165 [6 Cal. Rptr. 2d 554].) The trial court's determination of whether an ambiguity exists is a question of law, subject to independent review on appeal. (*Ibid.*) *The trial court's resolution of an ambiguity is also a question of law if no parol evidence is admitted or if the parol evidence is not in conflict. However, where the parol evidence is in conflict, the trial court's resolution of that conflict is a question of fact and must be upheld if supported by substantial evidence.* (*Id.* at p. 1166.) *Furthermore, '[w]hen two equally plausible interpretations of the language of a contract may be made ... parol evidence is admissible to aid in interpreting the agreement, thereby presenting a question of fact which precludes summary judgment if the evidence is contradictory.'* (*Walter E. Heller Western, Inc. v. Tecrim Corp.* (1987) 196 Cal. App. 3d 149, 158 [241 Cal. Rptr. 677].)" [Footnote omitted.]

...

The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties." [Footnote omitted.] "The mutual intention to which the courts give effect is determined by objective manifestations of the parties' intent, including the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent conduct of the parties. (Civ. Code, §§ 1635–1656; Code Civ. Proc., §§ 1859–1861, 1864; *Hernandez v. Badger Construction*

Equipment Co. (1994) 28 Cal.App.4th 1791, 1814 [34 Cal. Rptr. 2d 732]; 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, §§ 688–689, pp. 621–623.)" [Footnote omitted.]

(*Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1350-1351, 1356-1357 [emphasis added.)

Jade Global contends the provision refers to splitting their wages with someone else as a kickback for the business. (MPA, p. 17:13-15.) The VCP does not define the term "share" or "partner." Nor does the term reference kickbacks. Jade Global asks the Court to read Section 9.2 together with Sections 9.1 and 9.3 to demonstrate that the use of "share," should be interpreted as in the context of "using" or "experiencing."

Section 9.1 provides,

> No participant may make unauthorized verbal or written commitments and/or otherwise alter Jade Global standard contract forms by making unauthorized verbal or written communications without prior legal and finance management approval. Such commitment and alterations may affect the variable compensation calculation under Section 8 of the plan. Specifically, all correspondence with a Customer must be made freely available to Jade Global. Under no circumstances may a LOB & Practice Leader make agreements with Customers in the form of so-called "Side Letters."

(VCP, § 9.1.)

Section 9.3, provides,

> Each Plan participant shall submit such reports and documents as are required by Jade Global.

(VCP, § 9.3.)

Jade Global's interpretation of the provision is supported by reading the provisions together because, in context, it appears to reference splitting or changing variable compensation calculation, as opposed to discussing it with anyone else.

Plaintiff contends the only interpretation is that the provision prevented employees from telling anyone about the details of the plan. (Opp., p. 10:17-18.) He also contends the provision cannot pertain to sharing with another person because it precludes sharing with the employee's family.

Plaintiff relies on his declaration and his communications with Yaramada:

> (1) Throughout the term of my employment at Jade Global, it was my understanding that it was Jade Global's policy that employees were not to discuss their compensation, or concerns relating to their compensation, with each other. This was communicated to me verbally by representatives of Jade Global's HR Department, as well by Jade Global's CEO Karan Yaramada on various occasions.

(Plaintiff's Decl., ¶ 9.)

> (2) "You report to Harmeet and he reports to me. Elizabeth is your HR contact. I ask you not to broach the subject with anyone else other than these 3 people." (Plaintiff's Decl., Exh. D, March 13, 2019, email)
>
> (3) "As I warned you already, you appear to be itching to spread the news far and wide." (Plaintiff's Decl., Exh. E)
>
> (4) "Jai, I said this many times since yesterday to keep the conversation within this (3) group and within your chain of command." (Plaintiff's Decl., Exh. E, March 13, 2019, email)
>
> (5) "But as I emphasize again, please to not share or discuss with anyone within Jade." (Plaintiff's Decl., Exh. F.)

However, it appears the emails relied on by Plaintiff pertain to his legal notice,

> Jai here are a few points that I suggest,
>
> 1. I assure you that only 3 people in Jade know about the legal notice that you sent. No one else has a clue about it and I guarantee that unless you went around [and] told people, we will not disclose outside these 3.

2. You will let me know by end of today whether we should deal with your legal or you. We will then follow the timeline indicated in the legal notice.
3. You report to Harmeet and he reports to me. Elizabeth is your HR contact. I ask you not broach this subject with anyone else other than these 3 people. There are a few reasons why I ask you that, one is only we 3 can address your concern and the other strong reason is we still need to run business and when you go around and talk with others, it is distracting and damaging to our business.
4. As an employee, we expect you to follow certain code of conduct. There will be issues in any business but management at Jade is committed to solve those issues. Now that you escalated to me, I am personally trying to get to the bottom of the issue. Since we agreed on a timeline, I suggest you be patient and follow the timeline.

(Plaintiff's Decl., Exh. D (March 13, 2019 email sent at 9:38 a.m.).)

This is also supported by Yaramada's email the following day (March 14, 2019), in which he stated, in relevant part,

> I had to debrief your manager, Harmeet about the situation yesterday because we need some details from him to respond to your legal notice. But as I emphasize again, please do not share or discuss with anyone within Jade. This will stay between Elizabeth, Harmeet, and I from our side.

(Plaintiff's Decl., Exh. F.)

The communications with Yaramada do not support Plaintiff's interpretation of the provision. Moreover, Plaintiff fails to provide any other evidence that he was prohibited from disclosing his wages, discussing the wages of others, inquiring about another employee's wages or help another employee exercise their rights under Section 1197.5. (See Lab. Code, § 1197.5, subd. (k)(1) [emphasis added].) Additionally, Plaintiff fails to provide any evidence that any other employees were prohibited from disclosing or discussing their wages. Thus, the motion for summary adjudication Plaintiff's PAGA claim as to Section 1197.5 is GRANTED.

E. Labor Code sections 96, subdivision (k) and 98.6

Labor Code section 96, subdivision (k), provides "The Labor Commissioner and the deputies and representatives authorized by the commissioner in writing shall, upon the filing of a claim therefor by an employee, or an employee representative authorized in writing by an employee, with the Labor Commissioner, take assignments of: claims for *loss of wages* as the result of demotion, suspension, or discharge from employment for lawful conduct occurring during *nonworking hours away* from the employer's premises. (Lab. Code, § 96, subd. (k) [emphasis added].)

Labor Code section 98.6, provides, in relevant part,

> A person shall not discharge an employee or in any manner discriminate, retaliate, or take any adverse action against any employee or applicant for employment because the employee or applicant engaged in any conduct delineated in this chapter, including the conduct described in subdivision (k) of Section 96.

(Lab. Code, § 98.6, subd. (a).)

"The phrase 'any rights' refers to rights provided under the Labor Code." (*Garcia-Brower v. Premier Auto. Imports of CA, LLC* (2020) 55 Cal.App.5th 961, 972, internal citations omitted. (*Garcia-Brower*).) To establish a prima facie case of a Labor Code §98.6 violation it must be shown that the employee engaged in protected activity, that the employer subjected the employer to an adverse employment action, and that the employee's protected activity substantially motivated the employer's adverse employment action. The retaliatory motive in a wrongful discharge case is proved by showing that plaintiff engaged in protected activities, that the employer was aware of the protected activities, and that the adverse action followed within a relatively short time thereafter. *The causal link may be established by an inference derived from circumstantial evidence, such as the employer's knowledge that the employee engaged in protected activities and the proximity in time between the protected action and allegedly retaliatory employment decision*. Essential to a causal link is evidence that the employer was aware that the plaintiff had engaged in the protected activity. (*Garcia-Brower*, *supra*, at pp. 977-978, emphasis added.)

The ECIIAA contains a provision titled, Service for Others, which provides,

> I agree that, during the term of my employment with the Company, I will devote my full business time and attention to the business of the Company, and I will not perform services for any business other than the Company, whether as an employee, consultant, independent contractor or advisor, without the prior written consent of the President of the Company, nor will I engage in any other activities that conflict with my obligations to the Company.

(ECIIAA, p. 2.)

Jade Global argues the provision does not violate the statutes, there are no additional substantive rights, and even if there were, it did not violate the statutes.

Jade Global relies on *Barbee v. Household Automotive Finance Corp.* (2003) 113 Cal.App.4th 525 (*Barbee*), to argue Plaintiff must allege a constitutional restriction to support a claim under Section 96, subdivision (k). In *Barbee*, the plaintiff brought suit for wrongful termination in violation of public policy under the California Constitution and Section 96, subdivision (k). (*Id*. at p. 528.) The court held "Section 96, subdivision (k), did not set forth an independent policy that provides employees with any substantive rights, but rather, merely establishes a procedure by which the Labor Commissioner may assert, on behalf of employees, recognized constitutional rights." (*Id*. at p. 533.) Therefore, to prevail on his claim, the plaintiff had to show he was terminated because he asserted civil rights guaranteed under the California Constitution. (*Id.* at pp. 533-534.)

In *Grinzi v. San Diego Hospice Corp.* (2004) 120 Cal.App.4th 72, 77 (*Grinzi*), the plaintiff brought suit against her former employer for wrongful termination in violation of public policy under the First Amendment of the United States Constitution and Labor Codes sections 96, subdivision (k), and 98.6. The Court of Appeal relied on *Barbee, supra,* and further stated, "neither section 96, subsection (k) nor section 98.6 adequately supports a public policy against a private employer's termination of an employee for the employee's unlawful conduct, *otherwise unprotected by the Labor Code*, occurring during nonworking hours away from the employer's premises." (*Id*. at p. 88.) *Barbee* and *Grinzi* analyzed the statute under the context of wrongful

termination in violation of public policy, not PAGA, therefore the Court is not persuaded that Plaintiff needs to assert a constitutional right. Moreover, it appears a violation of Section 96, subdivision (k) can be a predicate for a violation of Section 98.6.

Jade Global argues this claim fails because Plaintiff does not allege any discrimination, retaliation, or adverse employment action, let alone provide any evidence in support. As a result, Plaintiff fails to state a violation under Section 98.6. (See *Arias, supra,* 46 Cal.4th at p. 987.) In response, Plaintiff argues the Service of Others provision itself violates Sections 96, subdivision (k), and 98.6 because it restricts employees from engaging in lawful business activities when not working for Jade Global without pre-approval. However, Plaintiff fails to cite any authority in support. (*People v. Dougherty, supra,*138 Cal.App.3d at p. 282 [points asserted without supporting authority are waived].) Moreover, he fails to provide any evidence of discrimination, retaliation, adverse action, or loss of wages based on lawful conduct during nonworking hours away from Jade Global's premises. In fact, Plaintiff states "there is no evidence that Jade Global knew about any such outside activities by [Plaintiff] during the term of his employment." (Plaintiff's AMF, No. 46.) Therefore, it appears Plaintiff cannot produce evidence to support this claim. Thus, Jade Global's motion for summary adjudication Plaintiff's PAGA claim based on Sections 96, subdivision (k), and 98.6 is GRANTED.

Calendar Line 18
Margarita Hernandez vs Kimberly Salazar, Case No. 23CV411799

Before the Court is Plaintiff's motion to quash. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

Plaintiff alleges on May 28, 2021 she was a "negligence-free pedestrian crossing the marked crosswalk of southbound Snell Avenue at the intersection of Baroni Avenue along the west curb line" when Defendant failed to yield while turning and collided with Plaintiff. Plaintiff thus filed this case on February 17, 2023, alleging general negligence and seeking compensation for wage loss, medical expenses, and loss of earnings.

Defendant alleges Plaintiff "had been drinking with a friend whose name she could not recall[, and w]hile walking she came into contact with a slowing or stopped vehicle and fell to the ground. At the scene of the accident, she complained of pain to her tailbone. Later, in discovery responses, she alleged injuries to her mid back, low back radiating to her right thigh, bilateral lower extremity pain, right wrist pain, tailbone pain and head pain."

Defendant subpoenaed medical records from Kaiser Permanente Hospital (KFH)(PMG) SAN JOSE ("Kaiser"), and the parties agreed to a "first-look" process under *Britt v. Superior Court* (1978) 20 Cal.3d 844, 849 wherein Plaintiff would obtain the medical records, redact information containing information unrelated to the body parts and conditions alleged in this case, then produce the redacted documents with a privilege log.

Defendant was not satisfied with the production, issued a new subpoena for medical records to Kaiser, which Plaintiff moved to quash. That motion first came on for hearing before the Court on October 10, 2024. The Court issued the following tentative ruling:

The Court will review the subject documents *in camera* before ruling on Plaintiff's motion to quash. Plaintiff is ordered to provide the Court with a binder that contains copies of (a) the unredacted documents Defendant requests and (b) the redacted versions of the documents Defendant received. The binder shall be delivered to Department 6 no later than 4 p.m. Tuesday, October 15. The hearing on Plaintiff's motion to quash is continued to Thursday, October 31, 2024 at 9 a.m. in Department 6.

The Court has now received and reviewed the documents and denies the motion to quash.

Rights to privacy under the California constitution are broad, but they are not absolute. (*Davis v. Superior Court* (1992) 7 Cal.App.4th 1008, 1020; *Fett v. Medical Bd. Of Cal.* (2016) 245 Cal.App.4th 211, 221.) A compelling or competing interest may justify invasion of the medical right to privacy. (Id.; see also *Medical Bd. Of Cal. v. Chiarottino* (2014) 225 CalApp.4th 623, 631-632.) While Plaintiff is correct that the mere filing of a personal injury lawsuit does not alone necessarily open Plaintiff's entire medical history to discovery, the Court finds the documents here relevant to Plaintiff's injury claims, and a sufficient competing interest to compel production of these documents. (*Vinson v. Superior Court* (1987) 43 Cal.3d. 833, 841-842.)

The documents relate to hospital visits that post-date the alleged collision and provide insight into Plaintiff's general physical condition, which physical condition does relate to the injuries she claims to suffer from as a result of the collision. In other words, these documents are likely to lead to the discovery of admissible evidence, including the source of Plaintiff's alleged pain, ability to perceive, and alleged lasting impact of the collision. While the Court understands the sensitivity of these documents, the Court also finds Defendant would be prejudiced if these documents were not produced in unredacted form.

However, there are photographs in the documents that should be redacted. They are extremely invasive of Plaintiff's privacy and are not necessary to understand the scope of Plaintiff's hospital visits. Thus, the Court orders the photographs of Plaintiff's body be redacted.

The Court further orders that these documents be treated with the utmost confidentiality. The Court will enter the standing protective order when it issues the final order on this motion, and these documents shall be produced as confidential under that order. The documents shall not be filed in the public record. If the documents are used in depositions, they shall be used in accordance with the terms of the protective order.

Plaintiff is ordered to produce the documents within 10 days after service of this final order and the protective order.