SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 1, Honorable Sunil R. Kulkarni Presiding

Maggie Castellon, Courtroom Clerk
191 North First Street, San Jose, CA95113
Telephone: 408.882.2110

To contest the ruling, call (408) 808-6856 before 4:00 P.M. or email department1@scscourt.org. Please state your case name, case number, the name of the attorney and contact number. It would also be helpful if you could identify the specific portion or portions of the tentative ruling that will be contested. Please also make sure you have notified the other side in a timely fashion that you are contesting the tentative ruling. (See R. Ct. 3.1308(a)(1); Local Rule 8.E.)

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LAW AND MOTION TENTATIVE RULINGS
DATE: DECEMBER 21, 2023 TIME: 1:30 P.M.
PREVAILING PARTY SHALL PREPARE THE ORDER
UNLESS OTHERWISE STATED (SEE RULE OF COURT 3.1312)

LINE #	CASE #	CASE TITLE	RULING
LINE 1	16CV300760	Green v. City of Palo Alto (Lead Case/Consolidated With 18CV336237)	See tentative ruling. The Court will prepare the final order.
LINE 2	22CV395280	Granato, et al. v. Apple Inc. (Class Action)	Rescheduled to January 11, 2024 at 1:30pm.
LINE 3	23CV414401	Lazard v. County of Santa Clara (Class Action/PAGA)	Rescheduled to January 18, 2024 at 1:30pm.
LINE 4	22CV398848	Lane, et al. v. Universal Protection Service, LP, et al.	See tentative ruling. The Court will prepare the final order.
LINE 5	22CV400206	Gil v. Universal Protection L.P., et al.	See tentative ruling. The Court will prepare the final order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 6	22CV400239	Bertolet, et al. v. Universal Protection L.P., et al.	See tentative ruling. The Court will prepare the final order.
LINE 7	22CV399095	Fritch, et al. v. Universal Protection L.P., et al.	See line 4.
LINE 8	22CV399096	Megia, et al. v. Universal Protection Service, LP, et al.	See line 4.
LINE 9	22CV399418	Davallou, et al. v. Universal Protection L.P., et al.	See line 4.
LINE 10	23CV413374	Balleza, et al. v. Universal Protection Service L.P., et al.	See line 4.
LINE 11	19CV343321	Gimbal Capital, Inc vs Troy Zavala [NON-COMPLEX]	After reviewing the parties' submissions, the Court would allow $225 per pay period to be withheld from Mr. Zavala's pay. The Court will prepare and file the final order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 12			
LINE 13			

Calendar Line 1

Case Name: *Miriam Green v. City of Palo Alto*
Case No.: 16CV300760 (consolidated with Case No. 18CV336237)

This is a consolidated class action for writ of mandate, declaratory judgment, and refunds of gas and electric fees imposed by defendant/respondent the City of Palo Alto (the "City") in 2012, 2016, and 2018. The judgement for plaintiff/petitioner Miriam Green ("Plaintiff") was entered on June 25, 2021, along with notice of entry of judgment. On September 21, 2021, the City appealed to the Sixth District Court of Appeal ("Court of Appeal") and Plaintiff later cross-appealed. While the appeal was pending, the parties negotiated a settlement.

Before the Court is Plaintiff's motion for final approval of settlement and motion for attorney's fees, costs and incentive award, both of which are unopposed. For the reasons discussed below, the Court GRANTS the motions.

I. BACKGROUND

In 2016, Plaintiff filed the lead case (the "2016 Action"). In 2017, the parties agreed to stay the matter while *Citizens for Fair REU Rates v. City of Redding* (2018) 6 Cal.5th 1 (*Redding*) was pending before the California Supreme Court. The parties stipulated to certify the 2016 action as a class action, which was granted by the Court. Plaintiff was also appointed as the class representative and her attorneys were appointed as class counsel. In 2018, after the City passed new utility rates, she filed a second action challenging the 2018 gas and electric rates (the "2018 Action"). After the Supreme Court issued its opinion in *Redding* and the stay was lifted, the Court granted the parties' request to consolidate the matters and amended the certified class accordingly (the "Judgment Class"). The parties entered into tolling agreements regarding the 2019, 2020, and 2021 gas rates (the "Tolled Claims").

Over two phases of trial, the Court (Judge Walsh) rejected Plaintiff's challenges to the City's electric rates, but found that its gas rates constituted unapproved taxes in violation of article XIII C of the California Constitution ("Article XIII C"), which pertains to voter approval for local tax levies, "to the extent [the City's General Fund Transfer] and/or market-based rental charges were passed through to ratepayers."[1] The Court found that these improper pass-throughs totaled approximately $12.6 million, which the City must refund to gas ratepayers. The judgement in favor of Plaintiff was entered on June 25, 2021, along with notice of entry of judgment and Plaintiff was awarded a common fund for the gas classes for $12,618,510. On March 25, 2021, class notice was completed. On September 21, 2021, the City appealed to the Court of Appeal and Plaintiff later cross-appealed. The Court of Appeal appointed Bob Blum ("Mr. Blum") to mediate the dispute. On April 13, 2022, while the appeal was pending, the parties successfully mediated the case and reached an agreement in

[1] In 1996, Proposition 218, also known as the "Right to Vote on Taxes Act," passed, adding articles to Article XIII C and XIII D. Proposition 218 prohibited local governments from imposing, extending, or increasing taxes without voter approval. (Art. XIII C, §2, subds. (b) and (d).) However, it did not define "tax". In 2010, Proposition 26 was passed and it amended article XIII C to provide that a "'tax' means any levy, charge, or exaction of any kind imposed by a local government.'" (Art. XIII C, § 1, subd. (e).)

principle and the settlement agreement (the "Settlement" or "Settlement Agreement") was finalized in September 2022.

Plaintiff now seeks an order finally approving the Settlement, decertifying the Judgment Class, certifying the settlement class (the "Settlement Class"), appointing Plaintiff as class representative, appointing Thomas A. Kearney ("Kearney") and Prescott W. Littlefield ("Littlefield") of Kearney Littlefield, LLP and Vincent D. Slavens ("Slavens") of Benink & Slaves, LLP as class counsel; approving Phoenix Class Action Administration Solutions ("Phoenix") as the settlement administrator; directing the Clerk to enter the Order of Final Approval and Judgment and setting a compliance hearing date.

II. LEGAL STANDARDS FOR SETTLEMENT APPROVAL

Generally, "questions whether a [class action] settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court's broad discretion." (*Wershba v. Apple Computer, Inc*. (2001) 91 Cal.App.4th 224, 234–235 (*Wershba*), disapproved of on other grounds by *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260.)

> In determining whether a class settlement is fair, adequate and reasonable, the trial court should consider relevant factors, such as the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.

(*Wershba, supra,* 91 Cal.App.4th at pp. 244–245, internal citations and quotations omitted.)

In general, the most important factor is the strength of the plaintiffs' case on the merits, balanced against the amount offered in settlement. (See *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130 (*Kullar*).) But the trial court is free to engage in a balancing and weighing of relevant factors, depending on the circumstances of each case. (*Wershba, supra*, 91 Cal.App.4th at p. 245.) The trial court must examine the "proposed settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." (*Ibid.*, citation and internal quotation marks omitted.) The trial court also must independently confirm that "the consideration being received for the release of the class members' claims is reasonable in light of the strengths and weaknesses of the claims and the risks of the particular litigation." (*Kullar, supra,* 168 Cal.App.4th at p. 129.) Of course, before performing its analysis the trial court must be "provided with basic information about the nature and magnitude of the claims in question and the basis for concluding that the consideration being paid for the release of those claims represents a reasonable compromise." (*Id.* at pp. 130, 133.)

III. SETTLEMENT CLASS

The Settlement Class includes the following five subclasses of gas utility customers of the City of Palo Alto Utilities whom the City billed for natural gas service:

(1) 2012 Gas Rate Class: all gas utility customers billed between September 23, 2015 and June 30, 2016;
(2) 2016 Gas Rate Class: all gas utility customers billed between June 1, 2016 and June 30, 2018;
(3) 2018 Gas Rate Class: all gas utility customers billed between July 1, 2018 and June 30, 2019;
(4) 2019 Gas Rate Class: all gas utility customers billed between July 1, 2019 and June 30, 2020; and
(5) 2021 Gas Rate Class: all gas utility customers billed between July 1, 2021 and June 30 2022.

Excluded from the Settlement Class are (1) all persons who were excluded from the Judgement Class; (2) all persons who timely elected to be excluded from the Settlement Class; and (3) judge(s) to whom the case is assigned and any immediate family members thereof. Additionally, the parties agree that the gas utility customers of the City billed for natural gas service between June 30, 2020 and July 1, 2021 and after June 30, 2022 are not entitled to any refund, pursuant to the original judgment.

Rule 3.769(d) of the California Rules of Court states that "[t]he court may make an order approving or denying certification of a provisional settlement class after [a] preliminary settlement hearing." California Code of Civil Procedure Section 382 authorizes certification of a class "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court …."

Section 382 requires the plaintiff to demonstrate by a preponderance of the evidence: (1) an ascertainable class and (2) a well-defined community of interest among the class members. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326, 332 (*Sav-On Drug Stores*).) "Other relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) The plaintiff has the burden of establishing that class treatment will yield "substantial benefits" to both "the litigants and to the court." (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385.)

In the settlement context, "the court's evaluation of the certification issues is somewhat different from its consideration of certification issues when the class action has not yet settled." (*Luckey v. Superior Court* (2014) 228 Cal.App.4th 81, 93.) As no trial is anticipated in the settlement-only context, the case management issues inherent in the ascertainable class determination need not be confronted, and the court's review is more lenient in this respect. (*Id.* at pp. 93–94.) But considerations designed to protect absentees by blocking unwarranted or overbroad class definitions require heightened scrutiny in the settlement-only class context, since the court will lack the usual opportunity to adjust the class as proceedings unfold. (*Id.* at p. 94.)

At preliminary approval, the Court provisionally certified the above-described class, determining that Plaintiff had demonstrated by a preponderance of the evidence (1) an ascertainable class, (2) a well-defined community of interest among the class members and (3)

that a class action provides substantial benefits to both litigants and the Court. Consequently, the Court will certify the sub-classes for settlement purposes.

IV. DECERTIFICATION OF JUDGMENT CLASS

"After certification, a trial court retains flexibility to manage the class action, including to decertify a class if the court subsequently discovers that a class action is not appropriate. To prevail on a decertification motion, a party must generally show new law or newly discovered evidence showing changed circumstances. A motion for decertification is not an opportunity for a disgruntled class defendant to seek a do-over of its previously unsuccessful opposition to certification. Modifications of an original class ruling, including decertifications, typically occur in response to a significant change in circumstances, and [i]n the absence of materially changed or clarified circumstances courts should not condone a series of rearguments on the class issues[.] A class should be decertified only where it is clear there exist changed circumstances making continued class action treatment improper.

A party moving for decertification generally has the burden to show that certification is no longer warranted, and courts have broad discretion in ruling on this issue. Trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action and therefore are afforded great discretion in evaluating the relevant factors. However, [d]ecertification resting on improper legal criteria or an incorrect assumption is an abuse of discretion." (*Kight v. CashCall, Inc.* (2014) 231 Cal.App.4th 112, 125-126, internal quotations and citations omitted.)

At preliminary approval, the Court determined that good cause existed to provisionally decertify the Judgment Class because it needed to be expanded to include the new members who are entitled to recover from the settlement of the Tolled Claims. The parties also agreed to the decertification of the Judgment Class pursuant to the Settlement Agreement.

The Court sees no reason to depart form the foregoing determination and therefore decertifies the Judgment Class.

V. TERMS AND ADMINISTRATION OF SETTLEMENT

The Settlement provides a common fund of $17,337,111.00 from which refunds will be paid to the City's gas utility retail customers in three installments over approximately two years. The total is before the deduction of attorneys' fees, costs, and an incentive award.

The amount of the settlement fund after the exclusion of administrative expenses, any service awards, and any attorneys' fees and expenses is the "Net Settlement Fund". The Net Settlement Fund allocation to each gas rate sub-class will be as follows: 26% to the 2012 Sub-Class; 21% to the 2016 Sub-Class; 13% to the 2018 Sub-Class; 23% to the 2019 Sub-Class; and 17% to the 2021 Sub-Class. In reaching the Settlement, the City calculated that the average refund for a class member, if they are a member of all classes is $156.32. Refunds will issued by check or bill credit. Phoenix was preliminarily approved as settlement administrator, and is now finally approved as such, and the Court also approves its administrative fee of $85,000 to be paid from the common settlement fund pursuant to the terms of the Settlement.

In exchange for settlement, class members release:

> [A]ny and all claims, demands, suits, petitions, liabilities, causes of action, rights, and damages of any kind and/or type relating to the subject matter of the Action arising during the period between January 1, 2012 and June 30, 2023, including, but not limited to, compensatory, exemplary, punitive, expert, and/or attorneys' fees, or by multipliers, whether past, present, or future, mature, or not yet mature, known or unknown, suspected or unsuspected, contingent or non-contingent, derivative or direct, asserted or unasserted, whether based on federal, state or local law, statute, ordinance, regulation, code, contract, common law, or any other source, or any claim of any kind related, arising from, connected with, and/or in any way involving the Litigation, that are, or could have been, defined, alleged or described in the Litigation, including, but not limited to, claims that the City's gas and/or electric utility rates during the period of January 1, 2012 to June 30, 2023 Violate Article XIII-C of the California Constitution (commonly known as Proposition 218 or Proposition 26) and claims that the City's transfer of funds from its gas and electric utility enterprise funds to the City's general fund based on article XII, section 2 of the City's Charter violates Article XIII C of the California Constitution.

The notice period has now been completed. On July 20, 2023, settlement administrator Phoenix received the names and contact information for the 48,514 individuals identified as class members. Phoenix conducted a National Change of Address search in an effort to update the list as accurately as possible. On August 3, 2023, Phoenix mailed Notice of the Settlement ("Notice") to members, either via email if such an address was available, or first class mail if one was not.

As of November 29, 2023, the date of the declaration of the Case Manager at Phoenix submitted in support of the instant motion, Kevin Lee, 160 Notice packets have been returned to Phoenix, none of which included a forwarding address. Phoenix attempted to locate current mailing addresses using skip tracing and obtained 87 updated addresses, to which Notice was promptly re-mailed. Seventy-three (73) Notices remain undeliverable. Phoenix has received three requests for exclusion and no objections to the settlement; the deadline to submit either of the foregoing was October 2, 2023.

As discussed in detail on the order preliminarily approving the parties' settlement, the Court found that the proposed settlement provided a fair and reasonable compromise to Plaintiff's claims. It finds no reason to depart from these findings now, especially considering that there are no objections. Thus, the Court finds that the settlement is fair and reasonable for the purposes of final approval.

VI. MOTION FOR ATTORNEY FEES, COSTS AND INCENTIVE AWARD

Plaintiff seeks a fee award of $4,319,720.10, or 24.91% of the common fund.[2] Under the terms of the Settlement, class counsel is entitled to apply for payment of fees in an amount not to exceed 25% of the settlement fund. This award is facially reasonable under the

[2] As Plaintiff notes, the Court previously awarded class counsel attorneys' fees of $3,154,627.50 in a contested fee motion (representing 25% of the judgment amount of $12,618,510, with a 3.68 lodestar cross-check multiplier) in an order dated May 14, 2021.

"common fund" doctrine, which allows a party recovering a fund for the benefit of others to recover attorney fees from the fund itself. Plaintiff also provides a lodestar figure of $1,324,750 (inclusive of both pre-judgment and post-judgment fees), based on 1,645.2 hours spent on the case by counsel with billing rates of $700 to $850 per hour, resulting in a multiplier of 3.26, which is less than the multiplier previously applied by this Court at the time of judgment.. The Court finds that this multiplier is reasonable considering: (1) the great risk Class Counsel took in litigating this case on an entirely contingent basis; (2) the substantial outlay of time; (3) the complex and consistently evolving case law under the claims alleged; (4) the exceptional results; and (5) the long delay in being compensated.

Plaintiff also requests reimbursement of $7,597.65 in litigation costs and $6,960 in judgment class notice costs, which appear to be reasonable based on the materials provided and are approved.

Finally, Plaintiff requests an incentive award of $7,500. To support her request, she submits a declaration describing her efforts in this case. The Court finds that the class representative is entitled to an incentive award and the amount requested is reasonable.

In accordance with the foregoing, Plaintiff's motion for fees, costs and an incentive award is GRANTED.

VII. ORDER AND JUDGMENT

In accordance with the above, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

Plaintiff's motion for final approval and motion for attorneys' fees and costs are GRANTED. The Judgment Class is decertified. The following five subclasses of gas utility customers of the City of Palo Alto Utilities whom the City billed for natural gas service are certified for settlement purposes:

(6) 2012 Gas Rate Class: all gas utility customers billed between September 23, 2015 and June 30, 2016;
(7) 2016 Gas Rate Class: all gas utility customers billed between June 1, 2016 and June 30, 2018;
(8) 2018 Gas Rate Class: all gas utility customers billed between July 1, 2018 and June 30, 2019;
(9) 2019 Gas Rate Class: all gas utility customers billed between July 1, 2019 and June 30, 2020; and
(10) 2021 Gas Rate Class: all gas utility customers billed between July 1, 2021 and June 30 2022.

Excluded from the class are the three individuals who submitted timely requests for exclusion, as well as all persons who were excluded from the Judgement Class and judge(s) to whom the case is assigned and any immediate family members thereof.[3] Additionally, the parties agree that the gas utility customers of the City billed for natural gas service between

[3] Accordingly, the Court (Judge Kulkarni) and its immediate family members are excluded from the class, even though they live in Palo Alto.

June 30, 2020 and July 1, 2021 and after June 30, 2022 are not entitled to any refund, pursuant to the original judgment.

Judgment shall be entered through the filing of this order and judgment. (Code Civ. Proc., § 668.5.) Plaintiff and the members of the class shall take from their complaint only the relief set forth in the settlement agreement and this order and judgment. Pursuant to Rule 3.769(h) of the California Rules of Court, the Court retains jurisdiction over the parties to enforce the terms of the settlement agreement and the final order and judgment.

The Court sets a compliance hearing for **July 1, 2024 at 2:30 P.M.** in Department 1. At least ten court days before the hearing, class counsel and the settlement administrator shall submit a summary accounting of the net settlement fund identifying distributions made as ordered herein; the number and value of any uncashed checks; amounts remitted pursuant to Code of Civil Procedure section 384, subdivision (b); the status of any unresolved issues; and any other matters appropriate to bring to the Court's attention. Counsel shall also submit an amended judgment as described in Code of Civil Procedure section 384, subdivision (b). Counsel may appear at the compliance hearing remotely.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

Parties may appear in person or remotely. Remote appearances must be made through Microsoft Teams, unless otherwise arranged with the Court. Please go to https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml to find the appropriate link.

State and local rules prohibit recording of court proceedings without a court order. These rules apply while in court and also while participating or listening in a hearing remotely. No court order has been issued which would allow recording of any portion of this motion calendar.

The Court does not provide court reporters for proceedings in the complex civil litigation departments. Any party wishing to retain a court reporter to report a hearing may do so in compliance with this Court's October 13, 2020 Policy Regarding Privately Retained Court Reporters. The court reporter can either be in person or appear remotely.

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Calendar Line 2

Case Name:
Case No.:

- oo0oo -

Calendar Line 3

Case Name:
Case No.:

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Calendar Line 4

Case Name: *Terra Fritch, et al. v. Universal Protection Service, LP, et al.*
Case No.: 22CV399095

Case Name: *Avery Megia, et al. v. Universal Protection Service, LP, et al.*
Case No.: 22CV399096

Case Name: *Vickie Lane, et al. v. Universal Protection Service, LP, et al.*
Case No.: 22CV398848

Case Name: *Firoozeh Davallou, et al. v. Universal Protection Service, LP, et al.*
Case No.: 22CV399418

Case Name: *Heather Balleza, et al. v. Universal Protection Service, LP, et al.*
Case No.: 23CV413374

VIII. INTRODUCTION

On May 26, 2021, then-Valley Transit Authority ("VTA") employee Samuel Cassidy shot and killed nine coworkers at a VTA facility in San Jose. Many of the decedents' heirs and estates have sued VTA, Santa Clara County ("the County"), and various security companies.

Currently before the Court are: (1) demurrers filed in each of the above-captioned cases (except for the *Balleza* case) by the County ("County Demurrer"); and (2) demurrers filed in each above-captioned case by the Universal Protection-affiliated Defendants ("Universal Protection Demurrer"). All Plaintiffs oppose the County and Universal Protection Demurrers.

IX. GENERAL BACKGROUND[4]

A. Factual

As alleged in the Second Amended Complaint in *Fritch*, VTA is a public transportation agency that operates bus and light rail services throughout Santa Clara County and employ sabout 2,000 workers. (Second Amended Complaint ("SAC"), ¶ 1.) On May 26, 2021, a VTA employee (Samuel Cassidy) perpetrated a mass shooting and killed a total of nine fellow employees. (*Ibid*.) The shooting took place at VTA's Guadalupe Division facility which is located in the Civic Center neighborhood of San Jose. (*Ibid*.) Among the victims were the loved ones of the plaintiffs in these related cases.

According to dispatch audio, at 6:33 a.m. on the day of the shooting, the San Jose Fire Department received a call to respond to the Guadalupe facility, though the caller did not mention anything about an active shooter. (SAC, ¶ 2.) About a minute later, Santa Clara

[4] For ease of reference, the Court will focus on the allegations in the second amended complaint in *Fritch*, as the allegations in the other cases are similar. The *Lane* Plaintiffs have additional allegations relating to the VTA's liability, though the VTA does not demur to the Plaintiffs' operative Fourth Amended Complaint ("4AC"), as it did to their Third Amended Complaint ("TAC").

County authorities received 911 calls about shots being fired at the facility. (*Ibid*.) Sheriff's deputies and police officers responded from their nearby offices. (*Ibid*.) When they arrived at about 6:35 a.m., they found multiple people shot. (*Ibid*.) The shooting occurred in two separate buildings at the busiest time of the day: a shift change during which employees from the overnight and morning shifts overlapped. (*Ibid*.) According to the Sheriff, over 100 people were at the facility at the time of the shooting. (*Ibid*.)

The shooting began in a conference room in Building B on the western side of the yard during a power crew meeting with the local Amalgamated Transit Union president. (SAC, ¶ 2.) The gunman then walked over to Building A on the eastern side of the facility where he continued firing. (*Ibid*.) At about 6:43 a.m., officers closed in on the gunman as he killed himself on the third floor of Building A between administrative offices and the operations control room. (*Ibid*.) The Sheriff's office established that the gunman fired a total of 39 rounds from three semiautomatic handguns equipped with 32 high-capacity magazines. (*Ibid*.) This was the deadliest mass shooting in the history of the Bay Area. (*Ibid*.)

The gunman had a pattern of insubordination, had verbal altercations with coworkers on at least four separate occasions that were known to VTA management, and previously made death threats to coworkers. (SAC, ¶ 2.) This information allegedly was readily available to each of the defendants by virtue of their relationship with VTA. (*Ibid*.)

The SAC alleges that, in order to provide first rate comprehensive security and risk advisory services to prevent mass shootings, VTA entered into a contract with various Universal Protection entities (collectively "Universal Protection") and the County of Santa Clara (through the Sheriff's Office) for security and protective services (the "Contract"). (SAC, ¶ 3.) The total compensation VTA agreed to pay exceeds $50,000,000. (*Ibid*.) Through this contract, Universal Protection and the County agreed to provide security to the facilities where the shooting occurred, and they assumed "the duty to provide security to protect VTA employees" including *Fritch* Decedents. (*Id*., ¶¶ 4-10.) The *Fritch* plaintiffs allege that "had Defendants carried out proper security screening, proper surveillance, proper risk mitigating measures and complied with security standards and practices including but not limited to the use of weapons detector systems that they were obligated to maintain[,] Defendants would have been able to prevent the shooter" from killing the *Fritch* Decedents. (SAC, ¶¶ 13-14.)

B. Procedural

Based on the foregoing allegations, the *Fritch*, *Davallou*, *Megia*, and *Lane* Plaintiffs initially asserted claims against Universal Protection and the County for wrongful death, among other claims.[5] In *Fritch*, *Davallou*, and *Lane*, the County successfully demurred to the wrongful death claim in March 2023. (See generally, March 10, 2023 Order in *Fritch* and *Davallou* ("March 2023 *Fritch*/*Davallou* Order"); March 10, 2023 Order in Lane ("March 2023 *Lane* Order).) Plaintiffs in those cases were granted leave to amend that claim; they eventually filed amended complaints that amended that claim but also added claims for breach of contract (one against the County and one against Universal Protection).

[5] VTA settled with the *Fritch*, *Davallou*, *Megia*, and *Balleza* plaintiffs and is no longer a defendant in those cases. VTA only is a defendant in the *Lane* case.

In *Balleza*, Plaintiffs initially asserted a wrongful death claim against Universal Protection and similar breach of contract claims as in the other cases. In *Megia*, Plaintiffs initially asserted a wrongful death claim against both the County and Universal Protection and similar breach of contract claims.

In June 2023, the County and Universal Protection each demurred to the breach of contract and wrongful death claims in *Fritch*, *Davallou*, *Megia*, and *Lane*, while Universal Protection demurred to the breach of contract claim in *Balleza*, and the VTA demurred to seven of the eight causes of action asserted in the *Lane* Plaintiffs' TAC. On August 8, 2023, the Court issued its order ruling on the foregoing motions (the "August 2023 Order") as follows:

- Sustaining the County's demurrers to the wrongful death cause of action in *Fritch*, *Davallou*, *Megia*, and *Lane* without leave to amend;
- Sustaining the County and Universal Protection's demurrers to the breach of contract cause of action in *Fritch*, *Davallou*, *Megia*, *Balleza*, and *Lane* with leave to amend;
- Sustaining the VTA's demurrer to the sixth cause for action for violation of the Bane Act in *Lane* without leave to amend;
- Sustaining the VTA's demurrer to the seventh cause of action for fraudulent misrepresentation in *Lane* with leave to amend; and
- Overruling the VTA's demurrer to the remaining claims asserted against it in *Lane*.

X. REQUESTS FOR JUDICIAL NOTICE

A. The County's Request

In connection with its demurrer to the operative pleading in *Megia*, the County requests that the Court take judicial notice of the August 2023 Order. As a court record, this item is a proper subject of judicial notice pursuant to Evidence Code section 452, subdivision (d). Accordingly, the County's request for judicial notice is GRANTED.

B. Universal Protection's Request

In connection with *Lane*, *Fritch*, *Megia* and *Davallou*, Universal Protection requests that the Court take judicial notice of the August 2023 Order. In connection with *Fritch*, *Megia* and *Davallou*, Universal Protection also requests that the Court take judicial notice of the contract between itself and the VTA. Both of these items are proper subjects of judicial notice and therefore Universal Protection's requests are GRANTED. (Evid. Code, § 452, subds. (d) and (h); *Ingram v. Flippo* (1999) 74 Cal.App.4th 1280, 1285 fn. 3 [taking judicial notice of documents that "form the basis of the allegations in the complaint" because "it is essential that [the court] evaluate the complaint by reference to these documents"].)

C. Plaintiffs' Requests

In connection with their opposition to the demurrer in *Lane*, Plaintiffs request that the Court take judicial notice of the August 2023 Order. In connection with their oppositions to the demurrers in *Fritch*, *Megia*, and *Davallou*, Plaintiffs request that the Court take judicial notice of various portions of the Santa Clara County Municipal Code and the Santa Clara VTA Transportation Rule prohibiting the possession of firearms in a transit facility. Each of the

foregoing is a proper subject of judicial notice and therefore Plaintiffs' requests are GRANTED. (Evid. Code, § 452, subds. (b), (d) and (h); see *Madain v. City of Stanton* (2010) 185 Cal.App.4th 1277, 1280, fn. 1 [taking judicial notice of municipal code].)

XI. THE COUNTY AND UNIVERSAL PROTECTION'S DEMURRERS

A. Legal Standard

In ruling on a demurrer, a court treats it "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, 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.) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.)

B. Discussion

In each case, barring *Balleza* (where only Universal Protection has demurred), the County and Universal Protection demur to the remaining claim for breach of contract. Because these demurrers raise similar issues they will, as was done in the August 2023 Order, be discussed together.

Both the County and Universal protection maintain that Plaintiffs' breach of contract claims fail because: (1) Plaintiffs[6] lack standing to sue for breach of contract; (2) the allegations of the SAC cannot contradict the integrated agreement between the VTA and Universal and thus those that do should be disregarded; and (3) Plaintiffs fail to satisfy the *Goonewardene* test. The foregoing are subsumed within the Defendants' overarching argument that the Plaintiffs are not third-party beneficiaries of the subject contracts and thus cannot such for a breach of their terms. The County additionally argues that Plaintiffs' claim sounds in tort and is therefore barred by Government Code section 815 and the economic loss rule.

1. *Standing to Bring Survivor Action*

The County and Universal Protection first assert that Plaintiffs lack standing to sue for breach of contract because such a claim may only be maintained by successors-in-interest to the decedents. The breach of contract claims are predicated on Plaintiffs' decedents allegedly being third-party beneficiaries of the contracts between the County and the VTA and between Universal Protection and the VTA. Thus, the claims "belong" to the decedents.

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[6] The Defendants expressly exclude from this argument the following Plaintiffs: Terra Fritch, Nicole Chang, Gloria Rudometkin and Harmanpreet Kaur (in *Fritch*); Vicki Lane (in *Lane*); Firoozeh Davallou, Jose Hernandez II, Karrey Benbow and Annette Romo (in *Davallou*); and Heather Balleza (in *Balleza*).

Claims that survive an individual's death (see Code Civ. Proc., § 377.20) pass to the decedent's successor-in-interest, and an action may be commenced by that individual (Code Civ. Proc., § 377.30). As the County and Universal Protection maintain, in the operative pleadings in the cases at bench, only Terra Fritch, Nicole Chang, Gloria Rudometkin and Harmanpreet Kaur (in *Fritch*), Vicki Lane (in *Lane*), Firoozeh Davallou, Jose Hernandez II, Karrey Benbow and Annette Romo (in *Davallou*), and Heather Balleza (in *Balleza*) allege that they are successors-in-interest. Therefore, it would appear that all of the remaining Plaintiffs lack standing to bring a survival action on decedents' breach of contract claims.

However, in their oppositions, the remaining plaintiffs insist that they have standing to assert claims for breach under Code of Civil Procedure section 377.60, which establishes a wrongful death cause of action, because their "contract cause of action seeks the same relief as a tort claim for wrongful death." (Opp. at 10.) But not only do Plaintiffs cite no authority for this seemingly novel proposition, they completely ignore the Court's August 2023 Order, which sustained the County's demurrer to their wrongful death claim *without leave to amend* based on its conclusion that the County was immune from liability for this cause of action based on Government Code sections 815 and 845.[7]

Plaintiffs next argue that their breach of contract claim can proceed as a contract claim *or* a tort claim because the tort damages they seek for wrong death are available to them under California's primary rights doctrine. They cite to what they characterize as a "legion of authorities" for the proposition that "[a] breach of contract to perform services such as a contract to provide security and protection entitles the person harmed by that breach to sue both under the law of contract and the law of tort and to pursue tort remedies." (Opp. at 9.) This argument is also unavailing. As explained in *Crowley v. Katleman* (1994) 8 Cal.4th 666:

> The primary right theory is a theory of code pleading that has long been followed in California. It provides that a "cause of action" is comprised of a "primary right" of the plaintiff, a corresponding "primary duty" of the defendant, and a wrongful act by the defendant constituting a breach of that duty. The most salient characteristic of a primary is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action. A pleading that states the violation of one primary right in two causes of action

[7] In their oppositions, Plaintiffs contend that the Court should reconsider its dismissal of the wrongful death claim because it "did not consider the statutory liability stated in Government Code section 815.6." This request is wholly improper and not properly before the Court. If Plaintiffs wished for the Court to reconsider its ruling, the onus was on them to do so through the proper procedure. As such, the Court will not consider Plaintiffs' arguments involving: this code section, a mandatory duty on the part of the County and breach of that duty, and the propriety of a wrongful death cause of action. As an aside, the Court expresses doubt that Plaintiffs could state a claim based on Government Code section 815.6, as this code section requires the existence of a mandatory duty imposed by an "enactment," and the agreement between the County and the VTA upon which such a claim would depend given the allegations of the operative pleadings does not so qualify as that term is defined in the statute. (See Gov. Code, § 810.5 [stating that the term means "a constitutional provision, charter provision, ordinance or regulation]; also see *Tuthill v. City of San Buenaventura* (2014) 223 Cal.App.4th 1081, 1091-1092 ["A contract cannot give rise to a mandatory duty imposed by an enactment."].)

> contravenes the rule against "splitting" a cause of action. As far as its content is concerned, the primary right is simply the plaintiff's right to be free from the particular injury suffered …. The primary right theory has a fairly narrow field of application.

(*Crowley,* 8 Cal. 4th at 681, internal citations omitted.)

The theory is "invoked most often when a plaintiff attempts to divide a primary right and enforce it in two suits" and "prevents this result by either of two means: (1) if the first suit is still pending when the second is filed, the defendant in the second suit may plead that fact in abatement [Code of Civil Procedure § 430.10, subd. (c)]; or (2) if the first suit has terminated in a judgment on the merits adverse to the plaintiff, the defendant in the second suit may set up that judgment as a bar under the principles of res judicata." (*South Sutter, LLC v. LJ Sutter Partners, L.P.,* (2011) 193 Cal.App.4th 634, 660 [internal citations omitted].)

Neither of the foregoing situations is applicable here, and the theory in no way grants Plaintiffs the ability to re-cast a claim for wrongful death, which the Court previously held they could not state against the County, as one for breach of contract. Critically, a party "may not circumvent a doctrine barring a tort action by pleading it as one for breach of contract." (*Austin v. Regents of Univ. of California* (1979) 89 Cal.App.3d 854, 858.) These are two different *legal theories* based on the same harm suffered but each theory stands and falls on its own based on whether Plaintiffs (if the claim is not otherwise barred) have adequately pleaded the necessary elements. Finally, the theory says nothing about tort damages applying to multiple causes of action in the same complaint. In short, the primary rights theory does not enable Plaintiffs to pursue a breach of contract claim as a tort claim.

Because the decedents' breach of contract claims, assuming that they exist, belong only to their successors-in-interest, the remaining Plaintiffs in *Lane*, *Fritch*, *Megia*, *Davallou* and *Balleza* cannot state claims for breach of contract against the County and the Universal Defendants and therefore must be dismissed from these actions.

2. *Government Code § 815 and the Economic Loss Rule*

Next, the County asserts that Plaintiffs' breach of contract claim against is in fact a thinly disguised non-statutory tort claim and therefore is barred by Government Code section 815 ("Section 815") and the economic loss rule. The Court is not so persuaded.

While the County correctly notes that "[w]hether an action is based on contract or tort depends on the nature of the right sued upon, not the form of the pleading or relief demanded" (Memo. at 8:19-21, quoting *Roe v. State of California* (2001) 94 Cal.App.4th 64, 69), it is not true, as it argues, that this Court has previously opined that the breach of contracts are in fact tort claims. The language of the August 2023 Order that they cite at 10:24-26, "[t]his claim is fundamentally a tort claim, not a contract claim, and seeks tort damages, not contract damages," was made in the context of the Court's discussion concerning Plaintiffs' wrongful death claim, with the "this" in "this claim" explicitly referring to it. In any event, the Court does not believe that the breach of contract claim is in fact a tort claim in disguise, with the cases cited by the County distinguishable from the instant actions. As such, it also need not

consider the merits of the County's argument concerning the economic loss rule as a barrier to Plaintiffs' breach of contract claim.

3. *Third-Party Beneficiary Status*

In the preceding demurrers that were the subject of the August 2023 Order, and relying primarily on the California Supreme Court's decision in *Goonewardene v. ADP, LLC* (2019) 6 Cal.5th 817, Defendants argued that Plaintiffs' decedents were not third-party beneficiaries of the contracts between the County and the VTA and between Universal Protection and the VTA. In addressing the veracity of this argument, the Court first cited and quoted Civil Code section 1559 ("Section 1559"), which provides that a third party for whom a contract was expressly made to benefit has standing to enforce it, and then quoted the following portion of *Goonewardene*:

> [U]nder California's third party beneficiary doctrine, a third party-that is, an individual or entity that is not a party to a contract-may bring a breach of contract action against a party to a contract only if the third party establishes not only (1) that it is likely to benefit from the contract, but also (2) that a motivating purpose of the contracting parties is to provide a benefit to the third party, and further (3) that permitting the third party to bring its own breach of contract action against a contracting party is consistent with the objectives of the contract and the reasonable expectations of the contracting parties.

(*Goonewardene*, 6 Cal.5th at 821.)

The Court then proceeded to evaluate whether Plaintiffs had pleaded facts establishing all of the elements necessary to establish their status as third-party beneficiaries of the subject agreements, and concluded that the answer was "yes" with respect to the first two elements. However, the Court found that the third element was not met because the Plaintiffs did not sufficiently plead under *Goonewardene* how allowing them to sue on these agreements comported with both their purposes and the contracting parties' expectations.

In the instant motions, despite the conclusions made by the Court in the August 2023 Order, the County and Universal Protection insist that Plaintiffs fail to establish *all three* of the elements articulated in *Goonewardene*. The Court ultimately does not believe it is necessary to re-visit its conclusions on first two elements because Plaintiffs have not corrected their failure to adequately plead the third.

In *Goonewardene*, an employee sued her employer and the independent payroll company that the employer had hired to take over all payroll tasks, alleging that she had not been paid all wages due to her. After the trial court dismissed the action against the payroll company without to leave to amend, the Court of Appeal reversed as to claims for, among others things, breach of contract. The California Supreme Court then reversed that ruling after concluding that the employee could not state a cause of action for breach of contract under the third-party beneficiary doctrine because providing a benefit to employees is ordinarily *not* among the motivating purposes of a contract between an employer and a payroll company, and because it would be inconsistent with the objectives of the contract and the reasonable expectations of the contracting parties to permit the employees to sue the payroll company for an alleged breach of its contract with the employer.

In reaching the foregoing conclusion, the Court undertook a deep dive into the history of Section 1559 and the common law third party beneficiary doctrine, observing that courts have historically "struggled … to formulate useful, general principles to identity those circumstances in which a third party should be permitted to maintain an action for an alleged breach of contract to which it is not a contracting party." (*Goonewardene, supra,* 6 Cal.5th 828.) After reviewing the third party beneficiary doctrine "as reflected in the current governing California decisions," and listing the three necessary elements, the court explained that "the third element does not focus upon whether the parties specifically intended third party enforcement" and "calls for a judgment regarding the potential effect that permitting third party enforcement would have on the parties' contracting goals, rather than a determination whether the parties actually anticipated third party enforcement at the time the contract was entered into." (*Id* at 828, 830-831.) As for the requirement in the third element that third party enforcement be consistent with the "objective of the contract," the court opined that it is "comparable to the inquiry … regarding whether third party enforcement will effectuate the contracting parties' performance objectives, namely those of objectives of the *enterprise* embodied in the contract, read in light of the surrounding circumstances …." (*Ibid.,* citations and quotations omitted, emphasis in original.)

With the foregoing in mind, the court then turned to the allegations of the employee's complaint and, based solely on these allegations, as it did not have before it the specific terms of the actual agreement between the employer and the payroll company, concluded that employee not state claim for breach of contract under the third party beneficiary doctrine. The court explained that interpreting the contract to allow employees to sue the payroll company "would clearly impose substantial additional costs on the payroll company" which would likely lead it "to pass these additional litigation costs on to the employer through a higher price for its payroll services, an increased cost that an employer would typically prefer to avoid." (*Id*., at p. 836.)

Defendants persuasively argue that allowing VTA employees and their families to enforce the contracts would bring with it consequences similar to those described above in *Goonewardene* and such a result is not consistent with their reasonable expectations, particularly given the language (or absence of language) in the agreements. As relevant to the County, a case cited in *Goonewardene*, *Martinez v. Sacoma Companies, Inc.* (1974) 11 Cal.3d 394 (*Sacoma*)- a contract case- is particularly instructive. In *Socoma*, the contractors agreed to lease space and train and employ residents. (*Socoma, supra,* 11 Cal.3d at 398.) When the contactors failed to provide the services, residents sued the contractors, claiming they were third-party beneficiaries of the public contracts. (*Id.*, at 399.) Acknowledging that the plaintiffs "were among those whom the Government intended to benefit through defendants' performance of the contracts" (*id.*, at p. 401), the Supreme Court nevertheless affirmed dismissal of the litigation at the pleading stage, explaining that:

> A promisor bound to the United States or to a State or municipality by contract to do an act or render a service to some or all of the members of the public, is subject to no duty under the contract to such members to give compensation for the injurious consequences of performing or attempting to perform it, or of failing to do so, unless . . . *an intention is manifested in the contract*, as interpreted in the light of the circumstances surrounding its formation, *that the*

> *promisor shall compensate members of the public for such injurious consequences*[.]

(*Socoma*, 11 Cal.3d at 402-402, emphasis in original.)

Here, as the County argues, because the agreement between itself and the VTA does not contain a provision stating that the County would compensate third parties for injurious conduct, allowing a third-party claim would be inconsistent with the objectives of the agreement or the reasonable expectations of the contracting parties. (See *Socoma*, *supra*; see also *Violante v. Communities Sw. Dev. & Constr. Co.* (2006) 138 Cal.App.4th 972, 981-982; *Dateline Builders, Inc. v. City of San Rosa* (1983) 146 Cal.App.3d 520, 527.) Further, the agreement includes an administrative process that does not contemplate third-party beneficiary claims, and the County and the VTA negotiated indemnity and insurance provisions that altered the ordinary scheme established by Government Code section 895.6.[8] Additionally, as in *Goonewardene*, there is no need to permit third-party enforcement of the agreement because the VTA itself is capable of addressing any potential breaches by the County. Finally, there is nothing pleaded which suggests that the County has any reason to expect that it will be subject to third-party claims for alleged violations of the agreement.

Turning to the contract between the VTA and Universal Protection, in addition to the imposition of increased costs on Universal Protection (and consequently the VTA) if the agreement was found to support claims for its breach by third parties, such a finding being contrary to the parties' reasonable expectations and inconsistent with agreement's objective is further supported by its explicit statement that Universal shall not indemnify VTA when a "loss, injury, or damage is caused by the negligence or willful misconduct of personnel employed by VTA." Further, as with the contract between the VTA and the County, if there were any breaches by Universal Protection, the VTA is available and capable of addressing them, and thus third-party enforcement is unnecessary.

As they did previously, Plaintiffs insist that *Goonewardene* is factually distinguishable and therefore does not apply to the cases at bench because here they are seeking non-economic losses as well as economic losses whereas that case involved only the latter, but continue that even if that case applies, they have adequately pleaded all of the elements necessary to establish that the decedents were third-party beneficiaries of the subject agreements. The Court disagrees.

First, the nature of the damages being sought in *Goonewardene* had no bearing on the court's analysis of and conclusion as to whether the three elements necessary to establish third-party beneficiary status to enforce the agreement at issue were met, and therefore its analysis is still instructive. Second, Plaintiffs plead no *facts* demonstrating that permitting the third parties to bring their own breach of contract actions against the County and Universal Protection is consistent with the objectives of the contract and the reasonable expectations of these contracting parties, instead pleading bare legal conclusions. (See SAC, ¶¶ 60, 74.) Nor do they specially address the points raised by the defendants in their papers with regard to the reasonable expectations of the parties or the objectives of the contracts.

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[8] Plaintiffs' allegation that the required insurance was "for third party claims as made here" (SAC, ¶ 60) is a bare legal conclusion unsupported by facts and thus is disregarded by the Court.

Consequently, the Court finds that the operative pleadings in *Lane*, *Fritch*, *Megia*, *Davallou* and *Balleza* still fail to adequately plead the third element of the *Goonewardene* test. As such, the Court concludes that (the remaining) Plaintiffs have not established that their decedents were third-party beneficiaries of the subject agreements within the meaning of Section 1559. Therefore, the County and Universal Protection's demurrers to the breach of contract claim on the ground of failure to state facts sufficient to constitute a cause of action are SUSTAINED WITHOUT LEAVE TO AMEND.

XII. CONCLUSION

The County demurrers to the operative pleadings in each of the above-captioned cases are SUSTAINED WITHOUT LEAVE TO AMEND (except in the *Balleza* case, where the County is not a party).

The Universal Protection demurrers to the operative pleadings in each of the above-captioned cases are SUSTAINED WITHOUT LEAVE TO AMEND.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

Parties may appear in person or remotely. Remote appearances must be made through Microsoft Teams, unless otherwise arranged with the Court. Please go to https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml to find the appropriate link.

State and local rules prohibit recording of court proceedings without a court order. These rules apply while in court and also while participating or listening in a hearing remotely. No court order has been issued which would allow recording of any portion of this motion calendar.

The Court does not provide court reporters for proceedings in the complex civil litigation departments. Any party wishing to retain a court reporter to report a hearing may do so in compliance with this Court's October 13, 2020 Policy Regarding Privately Retained Court Reporters. The court reporter can either be in person or appear remotely.

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Calendar Line 5

Case Name: *Sylvia Gil v. Universal Protection Service, L.P., et al.*
Case No.: 22CV400206

This action arises from a tragic mass shooting at a Santa Clara Valley Transportation Authority ("VTA") facility on May 26, 2021. Plaintiff Sylvia Gil was present at the facility and in close proximity to the shooting, resulting in severe emotional distress, illness and injury including posttraumatic stress disorder.

Before the Court are separate demurrers to the operative Second Amended Complaint ("SAC") filed by (1) the County of Santa Clara (the "County"), (2) the Universal Protection-affiliated Defendants, and (3) the VTA, all of which are opposed by Ms. Gil. As discussed below, the County and Universal Protection's demurrers to the SAC are SUSTAINED WITHOUT LEAVE TO AMEND and the VTA's demurrer is SUSTAINED WITHOUT LEAVE TO AMEND as to the fourth cause of action and SUSTAINED WITH 30 DAYS' LEAVE TO AMEND as to the first, second and third causes of action.

XIII. BACKGROUND

A. Factual

As alleges in the SAC, nine of Ms. Gil's coworkers were killed in a mass shooting perpetrated by a fellow employee of VTA on May 26, 2021. (SAC, ¶ 8.) The shooting took place at VTA's Guadalupe Division facility which is located in the Civic Center neighborhood of San Jose. (*Ibid*.)

According to dispatch audio, at 6:33 a.m. on the day of the shooting, the San Jose Fire Department received a call to respond to the Guadalupe facility, though the caller did not mention anything about an active shooter. (SAC, ¶ 10.) About a minute later, Santa Clara County authorities received 911 calls about shots being fired at the facility. (*Ibid*.) Sheriff's deputies and police officers responded from their nearby offices. (*Ibid*.) When they arrived at about 6:35 a.m., they found multiple people shot. (*Ibid*.) The shooting occurred in two separate buildings at the busiest time of the day: a shift change during which employees from the overnight and morning shifts overlapped. (*Ibid*.) According to the Sheriff, over 100 people were at the facility at the time of the shooting. (*Ibid*.)

The shooting began in a conference room in Building B on the western side of the yard during a power crew meeting with the local Amalgamated Transit Union president. (SAC, ¶ 10.) The gunman then walked over to Building A on the eastern side of the facility where he continued firing. (*Ibid*.) At about 6:43 a.m., officers closed in on the gunman as he killed himself on the third floor of Building A between administrative offices and the operations control room. (*Ibid*.) The Sheriff's office established that the gunman fired a total of 39 rounds from three semiautomatic handguns equipped with 32 high-capacity magazines. (*Id.*, ¶ 11.) This was the deadliest mass shooting in the history of the Bay Area. (*Id*., ¶ 15.)

The gunman had a pattern of insubordination, had verbal altercations with coworkers on at least four separate occasions that were known to VTA management, and previously made death threats to coworkers. (SAC, ¶¶ 16-18.) This information allegedly was readily available

to each of the defendants by virtue of their relationship with VTA. (*Ibid*.) Plaintiff alleges that the VTA, through its failure to discipline, censure, criticize or discharge Mr. Cassidy prior to the shooting, authorized, adopted, and ratified his conduct.

The SAC alleges that, in order to provide first rate comprehensive security and risk advisory services to prevent mass shootings, VTA entered into a contract with various Universal Protection entities (collectively "Universal Protection") and the County of Santa Clara (through the Sheriff's Office) for security and protective services (the "Contract"). (SAC, ¶ 24.) The total compensation VTA agreed to pay exceeds $50,000,000. (*Ibid*.) Through this contract, Universal Protection and the County agreed to provide security to the facilities where the shooting occurred, and they assumed the duty to provide security to protect VTA employees. Plaintiff alleges that the defendants failed to comply with all applicable security standards and that had they done so, the subject incident would have been prevented. (*Id*., ¶ 32.)

B. Procedural

Based on the foregoing, Plaintiff initiated this action with filing of the Complaint, asserting single claims for negligence against the defendants. In March 2023, the VTA demurred to the Complaint in its entirety, arguing that the Workers' Compensation Act ("WCA") provides the exclusive remedy available to Plaintiff. In its order dated March 13, 2023 (the "March 2023 *Gil* Order"), the Court sustained the demurrer with leave to amend.[9]

Plaintiff filed the First Amended Complaint ("FAC") on August 23, 2023 asserting the same claims as the Complaint, followed by the operative SAC on September 18, 2023 asserting the following causes of action: (1) assault (against the VTA); (2) battery (against the VTA); (3) false imprisonment (against the VTA); (4) negligent hiring, retention, or supervision (against the VTA); (5) breach of contract (against the County); and (6) breach of contract (against Universal Protection). The VTA demurs to the SAC and each of the four causes of action asserted against it, while the County and Universal Protection each demur to the single breach of contract claims asserted against them.[10]

XIV. THE COUNTY AND UNIVERSAL PROTECTION'S DEMURRER

A. Legal Standard

In ruling on a demurrer, a court treats it "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, 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*

[9] The demurrer was unopposed by Plaintiff, who was self-represented at the time. Plaintiff has since retained counsel.

[10] The County and the VTA's requests for judicial notice of the Court's order on demurrers filed in other cases pertaining to the shooting dated March 10, 2023 and August 3, 2023 are GRANTED. (Evid. Code, § 452, subd. (d).)

Corp. (1983) 35 Cal.3d 197, 213-214.) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.)

B. Discussion

The County and Universal Protection demur to the sole claims asserted against each of them for breach of contract. Because these demurrers raise similar issues, they will be discussed together.

Both the County and Universal protection maintain that Plaintiff's breach of contract claims fail because: (1) the allegations of the SAC cannot contradict the integrated agreement between the VTA and Universal and thus those that do should be disregarded; and (2) Plaintiff fails to satisfy the *Goonewardene* test. The County additionally argues that Plaintiff's claim sounds in tort and is therefore barred by Government Code section 815 and the economic loss rule.

4. *Government Code § 815 and the Economic Loss Rule*

The County first asserts that Plaintiff's breach of contract claim against is in fact a thinly disguised non-statutory tort claim and therefore is barred by Government Code section 815 ("Section 815") and the economic loss rule. Court does not believe that the breach of contract claim is in fact a tort claim in disguise as the cases cited by the County for this proposition are distinguishable from the instant action. As such, it also need not consider the merits of the County's argument concerning the economic loss rule as a barrier to Plaintiff's breach of contract claim.

5. *Third-Party Beneficiary Status*

Section 1559 of the Civil Code provides, "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." Both demurrers also rely on *Goonewardene v. ADP, LLC* (2019) 6 Cal.5th 817, 821 (*Goonewardene*), in which the California Supreme Court explained:

> [U]nder California's third party beneficiary doctrine, a third party-that is, an individual or entity that is not a party to a contract-may bring a breach of contract action against a party to a contract only if the third party establishes not only (1) that it is likely to benefit from the contract, but also (2) that a motivating purpose of the contracting parties is to provide a benefit to the third party, and further (3) that permitting the third party to bring its own breach of contract action against a contracting party is consistent with the objectives of the contract and the reasonable expectations of the contracting parties.

(*Goonewardene*, 6 Cal.5th at 821.)

In the instant motions, the County and Universal Protection insist that Plaintiff fails to establish *all three* of the elements articulated in *Goonewardene*. In the August 2023 Order, the Court determined that the plaintiffs in the related proceedings satisfied the first and second elements, but found that the third element was not met because the plaintiffs did not sufficiently plead under *Goonewardene* how allowing them to sue on these agreements

comported with both their purposes and the contracting parties' expectations. Here, the Court believes that the first and second elements are similarly adequately pleaded, but the third is not.

In *Goonewardene*, an employee sued her employer and the independent payroll company that the employer had hired to take over all payroll tasks, alleging that she had not been paid all wages due to her. After the trial court dismissed the action against the payroll company without to leave to amend, the Court of Appeal reversed as to claims for, among others things, breach of contract. The California Supreme Court then reversed that ruling after concluding that the employee could not state a cause of action for breach of contract under the third-party beneficiary doctrine because providing a benefit to employees is ordinarily *not* among the motivating purposes of a contract between an employer and a payroll company, and because it would be inconsistent with the objectives of the contract and the reasonable expectations of the contracting parties to permit the employees to sue the payroll company for an alleged breach of its contract with the employer.

In reaching the foregoing conclusion, the Court undertook a deep dive into the history of Section 1559 and the common law third party beneficiary doctrine, observing that courts have historically "struggled … to formulate useful, general principles to identity those circumstances in which a third party should be permitted to maintain an action for an alleged breach of contract to which it is not a contracting party." (*Goonewardene, supra,* 6 Cal.5th 828.) After reviewing the third party beneficiary doctrine "as reflected in the current governing California decisions," and listing the three necessary elements, the court explained that "the third element does not focus upon whether the parties specifically intended third party enforcement" and "calls for a judgment regarding the potential effect that permitting third party enforcement would have on the parties' contracting goals, rather than a determination whether the parties actually anticipated third party enforcement at the time the contract was entered into." (*Id* at 828, 830-831.) As for the requirement in the third element that third party enforcement be consistent with the "objective of the contract," the court opined that it is "comparable to the inquiry … regarding whether third party enforcement will effectuate the contracting parties' performance objectives, namely those of objectives of the *enterprise* embodied in the contract, read in light of the surrounding circumstances …." (*Ibid.*, citations and quotations omitted, emphasis in original.)

With the foregoing in mind, the court then turned to the allegations of the employee's complaint and, based solely on these allegations, as it did not have before it the specific terms of the actual agreement between the employer and the payroll company, concluded that employee not state claim for breach of contract under the third party beneficiary doctrine. The court explained that interpreting the contract to allow employees to sue the payroll company "would clearly impose substantial additional costs on the payroll company" which would likely lead it "to pass these additional litigation costs on to the employer through a higher price for its payroll services, an increased cost that an employer would typically prefer to avoid." (*Id.*, at p. 836.)

Defendants' persuasively argue that allowing VTA employees like Plaintiff to enforce the contracts would bring with it consequences similar to those described above in *Goonewardene* and such a result is not consistent with their reasonable expectations, particularly given the language (or absence of language) in the agreements. As relevant to the County, a case cited in *Goonewardene, Martinez v. Sacoma Companies, Inc.* (1974) 11 Cal.3d 394 (*Sacoma*)- a contract case- is particularly instructive. In *Socoma*, the contractors agreed to

lease space and train and employ residents. (*Socoma, supra,* 11 Cal.3d at 398.) When the contactors failed to provide the services, residents sued the contractors, claiming they were third-party beneficiaries of the public contracts. (*Id.*, at 399.) Acknowledging that the plaintiffs "were among those whom the Government intended to benefit through defendants' performance of the contracts" (*id.*, at p. 401), the Supreme Court nevertheless affirmed dismissal of the litigation at the pleading stage, explaining that:

> A promisor bound to the United States or to a State or municipality by contract to do an act or render a service to some or all of the members of the public, is subject to no duty under the contract to such members to give compensation for the injurious consequences of performing or attempting to perform it, or of failing to do so, unless . . . *an intention is manifested in the contract*, as interpreted in the light of the circumstances surrounding its formation, *that the promisor shall compensate members of the public for such injurious consequences*[.]

(*Socoma*, 11 Cal.3d at 402-402, emphasis in original.)

Here, as the County argues, because the agreement between itself and the VTA does not contain a provision stating that the County would compensate third parties for injurious conduct, allowing a third-party claim would be inconsistent with the objectives of the agreement or the reasonable expectations of the contracting parties. (See *Socoma, supra*; see also *Violante v. Communities Sw. Dev. & Constr. Co.* (2006) 138 Cal.App.4th 972, 981-982; *Dateline Builders, Inc. v. City of San Rosa* (1983) 146 Cal.App.3d 520, 527.) Further, the agreement includes an administrative process that does not contemplate third-party beneficiary claims, and the County and the VTA negotiated indemnity and insurance provisions that altered the ordinary scheme established by Government Code section 895.6. Additionally, as in *Goonewardene*, there is no need to permit third-party enforcement of the agreement because the VTA itself is capable of addressing any potential breaches by the County. Finally, there is nothing pleaded which suggests that the County has any reason to expect that it will be subject to third-party claims for alleged violations of the agreement.

Turning to the contract between the VTA and Universal Protection, in addition to the imposition of increased costs on Universal Protection (and consequently the VTA) if the agreement was found to support claims for its breach by third parties, such a finding being contrary to the parties' reasonable expectations and inconsistent with agreement's objective is further supported by its explicit statement that Universal shall not indemnify VTA when a "loss, injury, or damage is caused by the negligence or willful misconduct of personnel employed by VTA." Further, as with the contract between the VTA and the County, if there were any breaches by Universal Protection, the VTA is available and capable of addressing them, and thus third-party enforcement is unnecessary.

Plaintiff insists that she has adequately pleaded all of the elements necessary to establish that the decedents were third-party beneficiaries of the subject agreements based on the indemnification and insurance provisions and the fact that as the contracts were to provide safety services to her and her co-workers, a claim for breach arising out of a failure to provide those services is not "an unforeseen circumstances." The Court disagrees.

First, Plaintiff pleads no *facts* demonstrating that permitting the third parties such as herself to bring their own breach of contract actions against the County and Universal Protection is consistent with the objectives of the contract and the reasonable expectations of these contracting parties, instead pleading bare legal conclusions. (See SAC, ¶¶ 60, 74.) The mere fact that a claim for breach might be foreseeable does not equate to being consistent with the objectives of the contracts or the reasonable expectations of the parties. As the defendants note, the *Goonewardene* court stressed that "[t]here is an important analytical distinction between *contracting for a benefit* to an outsider and *granting a right* to sue for breach to that outsider." (*Goonewardene*, 6 Cal.5th at 836.) Further, Plaintiff's argument does not address the "potential effect that permitting third party enforcement would have on the parties' contracting goals" which, as stated above, which is a "judgment" called for by the third element. (*Id*. at 831.) Finally, as for the indemnity and insurance provisions, as explained above, they alter the ordinary scheme established by Government Code section 895.6 and are part of administrative dispute process recognized by *Socoma* that does not contemplate third party involvement.

Consequently, the Court finds Plaintiff has not established that she is a third-party beneficiary of the subject agreements within the meaning of Section 1559. Therefore, the County and Universal Protection's demurrers to the breach of contract claim on the ground of failure to state facts sufficient to constitute a cause of action are SUSTAINED WITHOUT LEAVE TO AMEND.

XV. THE VTA'S DEMURRER

As it did previously, the VTA demurs to the entirety of the operative pleading on the ground that the Workers' Compensation Act ("WCA") provides the exclusive remedy available to Plaintiff. The VTA additionally demurs to the first, second and third causes of action on the ground that Plaintiff has not pleaded the facts necessary to state each cause of action.

A. Workers' Compensation Exclusivity

The Court previously sustained the VTA's demurrer to the FAC on this ground after concluding that Plaintiffs failed to adequately plead ratification of Mr. Cassidy's actions by the VTA which would take their claims outside the scope of the WCA. The VTA maintains that the SAC still suffers from this defect, while Plaintiffs counter that they pleaded sufficient facts to correct it.

As the Court explained in its prior order, "[a]s a general rule, an employee who sustains an industrial injury 'arising out of and in the course of the employment' is limited to recovery under the workers' compensation system." (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1001 (*Torres*), quoting Lab. Code, § 3600, subd. (a).) For workers' compensation exclusivity to apply, there must be: (1) an injury within the scope of the exclusive remedy provisions, including an injury "collateral to or derivative of" an injury compensable by the exclusive remedies of the WCA; and (2) a finding that the alleged acts and motives underlying the claim are within the risks encompassed by the compensation bargain and do not violate fundamental public policy. (*Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 81 1—813 (*Vacanti*).) In addition, certain "exceptions to the rule" are expressly "enumerated in the statute." (*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 719 (*Fermino*); see also id. at p. 720 [explaining, however, that these express exceptions are not exhaustive].)

Labor Code sections 3601 ("Section 3601") and 3602 ("Section 3602") establish the aforementioned exceptions to workers' compensation exclusivity for intentional assaults by a coworker or employer. As explained in the Court's preceding order, Section 3601 is inapplicable to this action because it "insulates the employer from common law vicarious liability to an employee for the acts of another employee." (*Fretland v. County of Humboldt* (1999) 69 Cal.App.4th 1478, 1487 (*Fretland*), internal citations and quotations omitted.)

However, an employee or his or her dependents may sue based on direct liability, where the injury is proximately caused by a "willful physical assault by *the employer*." (Lab. Code, § 3602, subd. (b)(l), italics added.) Critically, "liability under section 3602, subdivision (b)(l), must be based on positive misconduct *by the employer*." (*Fretland, supra,* 69 Cal.App.4th at 1487.) This includes situations "when the employer 'ratified' the tortious conduct of its employee and thereby became 'liable for the employee's wrongful conduct as a joint participant." (*Id*. at 1489.) Thus, as the Court explained, the key issue here is ratification, which was described in *Fretland* thusly:

> Ratification is the voluntary election by a person to adopt in some manner as his own an act which was purportedly done on his behalf by another person, the effect of which, as to some or all persons, is to treat the act as if originally authorized by him. A purported agent's act may be adopted expressly or it may be adopted by implication based on conduct of the purported principal from which an intention to consent to or adopt the act may be fairly inferred, including conduct which is inconsistent with any reasonable intention on his part, other than that he intended approving and adopting it.

(*Fretland*, 69 Cal.App.4th at 1490-1491, internal citations, quotations marks, and other notations omitted.) With regard to the employment context specifically, recent authorities provide:

> An employer may be liable for an employee's act where the employer either authorized the tortious act or subsequently ratified an originally unauthorized tort. The failure to discharge an employee who has committed misconduct may be evidence of ratification. The theory of ratification is generally applied where an employer fails to investigate or respond to charges that an employee committed an intentional tort, such as assault or battery. Whether an employer has ratified an employee's conduct is generally a factual question.

(*Ventura v. ABM Industries Inc.* (2012) 212 Cal.App.4th 258, 272 (*Ventura*), internal citations and quotations omitted.)

In the Complaint, Plaintiffs alleged that the gunman had a pattern of insubordination, and had verbal altercations with coworkers on at least four separate occasions, including death threats to co-employees. (Complaint, ¶ 2.) The Court opined that these allegations were a "far cry" from those at issue in various decisions where ratification was found to be sufficiently pleaded and concluded that the allegations "foreclose[d], as a matter of law, a showing that VTA ratified the shooter's conduct" because they only pertained to conduct that *preceded* the shooting and not after. The Court noted that "[a]n employer may be liable for an employee's act where the employer either authorized the tortious act or subsequently ratified an originally

unauthorized tort" (*Ventura*, *supra*, 212 Cal.App.4th at 272, italics added), but as there were no allegations that the VTA authorized shooting beforehand nor sufficient allegations that established ratification by implication,[11] Plaintiffs had failed to establish that its claims against the VTA implicated the exception to workers' compensation exclusivity provided by Section 3602.

Plaintiffs insist that they have pleaded sufficient facts to proceed with their claims against the VTA by alleging that ratification occurred when it engaged in a sham allegation after the shooting designed to cover up its authorization and/or ratification of Mr. Cassidy's conduct and that the decision in *C.R. v. Tenet Healthcare Corp.* (2009) 169 Cal.App.4th 1094 (*Tenet*) supports such a conclusion. In *Tenet*, the Court of Appeal found the allegations of ratification sufficient where:

> The first amended complaint alleges: Mr. Gaspar was an agent and employee of defendant; Mr. Gaspar was acting at all times on behalf of defendant; all acts or omissions alleged in the first amended complaint were ratified by defendant; during a two-to-three-year period, several of defendant's 'managing agents and supervisors' knew Mr. Gaspar was sexually abusing patients and 'refused to take any action'; the managing agents and supervisors 'hid' this information so Mr. Gaspar could continue to work for it; while this was occurring, Mr. Gaspar sexually assaulted a female employee and the information was 'hid' so he could continue his employment; with knowledge of Mr. Gaspar's sexual misconduct, no disciplinary action was taken and he was allowed to be alone with women who were patients; and defendant intentionally or negligently "spoiled evidence" including destroying documents concerning other sexual assaults in order to conceal them from plaintiff. The foregoing allegations that defendant, with knowledge of Mr. Gaspar's misconduct, continued to employ him and destroyed documents was sufficient to state a claim that it ratified his sexual misconduct.

Similarly, the SAC here alleges that the VTA was aware of a threat made by Mr. Cassidy to one of the victims that he would "put a bullet" in his head, that employees feared that Mr. Cassidy would "go postal", and that VTA did nothing to investigate threats by Cassidy or to discipline him or protect his fellow employees. (SAC, ¶ 18 (a) & (b).) These allegations, coupled with the allegation that VTA engaged in a sham investigation to cover up its authorization and/or ratification of Cassidy's actions (see SAC, ¶ 21), are sufficient to plead ratification and defeat a demurrer based on workers' compensation exclusivity.

B. Failure to State Sufficient Facts

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[11] The Court explained that per *Fretland*, an employer's failure to take action concerning one type of misconduct does not establish ratification of a subsequent, substantially different type of misconduct and thus allegations that Mr. Cassidy had a pattern of insubordination, and had verbal altercations with coworkers on at least four separate occasions, including death threats to co-employees and the VTA failed to adequately respond to them did not support "fair[] infer[ence]" of "an intention to consent to or adopt the act" of mass murder. (*Fretland*, *supra*, 69 Cal.App.4th at 1491.) These allegations would instead evidence negligence rather than an intentional tort.

1. *First, Second and Third Causes of Action: Assault, Battery and False Imprisonment*

The VTA next argues that Plaintiff has not stated claims for assault, battery and false imprisonment because there are no *facts* setting forth the requirements elements of each of these causes of action. The Court agrees. Plaintiff has merely pleaded these elements in the most general, conclusory terms and has not set forth facts establishing Ms. Gil's apprehension of immediate harmful conduct (assault), physical contact against her person by the defendant that she did not consent to (battery) and the defendant's intentional confinement of her without her consent (false imprisonment). (See *So v. Shin* (2013) 212 Cal.App.4th 652, 668-669 [stating elements of claims for battery and assault); see *Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 715 [stating elements of claim for false imprisonment].) There are no allegations concerning where Ms. Gil was at the time of the shooting and the circumstances of her alleged false imprisonment, assault and battery. As such, the VTA's demurrer to the first, second and third causes of action on the ground of failure to state facts sufficient to constitute a cause of action is SUSTAINED WITH 30 DAYS' LEAVE TO AMEND.

2. *Fourth Cause of Action: Negligent Hiring, Retention, or Supervision*

Next, the VTA maintains that Plaintiff has not and cannot state her negligence-based claim because it falls outside the scope of the employer assault exception to workers' compensation exclusivity provided by Section 3602, which requires willful, i.e., affirmative and not merely negligent, conduct. (See Lab. Code, § 3602, subd. (b)(1) [explaining that an employee may bring an action for damages against the employer "[w]here the employee's injury or death is proximately caused by a *willful* physical assault by the employer."].) The Court agrees and Plaintiff impliedly concedes the merits of the VTA's argument by failing to address it in her opposition. Accordingly, the VTA's demurrer to the fourth cause of action on the ground of failure to state facts sufficient to constitute a cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

XVI. CONCLUSION

The County and Universal Protections' demurrers to the SAC are SUSTAINED WITHOUT LEAVE TO AMEND.

The VTA's demurrer to the SAC is SUSTAINED WITHOUT LEAVE TO AMEND as to the fourth cause of action and SUSTAINED WITH 30 DAYS' LEAVE TO AMEND as to the first, second and third causes of action.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

Parties may appear in person or remotely. Remote appearances must be made through Microsoft Teams, unless otherwise arranged with the Court. Please go to https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml to find the appropriate link.

State and local rules prohibit recording of court proceedings without a court order. These rules apply while in court and also while participating or listening in a hearing remotely. No court order has been issued which would allow recording of any portion of this motion calendar.

The Court does not provide court reporters for proceedings in the complex civil litigation departments. Any party wishing to retain a court reporter to report a hearing may do so in compliance with this Court's October 13, 2020 Policy Regarding Privately Retained Court Reporters. The court reporter can either be in person or appear remotely.

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Calendar Line 6

Case Name: *Kirk Bertolet, et al. v. Universal Protection L.P., et al.*
Case No.: 22CV400239

This action arises from a tragic mass shooting at a Santa Clara Valley Transportation Authority ("VTA") facility on May 26, 2021. Plaintiff Kirk Bertolet was present at the facility and in close proximity to the shooting, resulting in severe emotional distress, illness and injury including posttraumatic stress disorder.

Before the Court is Defendant VTA's demurrer to the Second Amended Complaint ("SAC"), which is opposed by Plaintiff. As discussed below, the Court SUSTAINS the motion, in part with leave to amend and in part without leave to amend.

XVII. BACKGROUND

A. Factual

As alleged in the SAC, nine of Mr. Bertolet's coworkers were killed in a mass shooting perpetrated by a fellow employee of the VTA on May 26, 2021. (SAC, ¶ 8.) The shooting took place at the VTA's Guadalupe Division facility which is located in the Civic Center neighborhood of San Jose. (*Ibid*.)

According to dispatch audio, at 6:33 a.m. on the day of the shooting, the San Jose Fire Department received a call to respond to the Guadalupe facility, though the caller did not mention anything about an active shooter. (SAC, ¶ 10.) About a minute later, Santa Clara County authorities received 911 calls about shots being fired at the facility. (*Ibid*.) Sheriff's deputies and police officers responded from their nearby offices. (*Ibid*.) When they arrived at about 6:35 a.m., they found multiple people shot. (*Ibid*.) The shooting occurred in two separate buildings at the busiest time of the day: a shift change during which employees from the overnight and morning shifts overlapped. (*Ibid*.) According to the Sheriff, over 100 people were at the facility at the time of the shooting. (*Ibid*.)

The shooting began in a conference room in Building B on the western side of the yard during a power crew meeting with the local Amalgamated Transit Union president. (SAC, ¶ 10.) The gunman then walked over to Building A on the eastern side of the facility where he continued firing. (*Ibid*.) At about 6:43 a.m., officers closed in on the gunman as he killed himself on the third floor of Building A between administrative offices and the operations control room. (*Ibid*.) The Sheriff's office established that the gunman fired a total of 39 rounds from three semiautomatic handguns equipped with 32 high-capacity magazines. (*Id.*, ¶ 11.) This was the deadliest mass shooting in the history of the Bay Area. (*Id*., ¶ 15.)

The gunman had a pattern of insubordination, had verbal altercations with coworkers on at least four separate occasions that were known to VTA management, and previously made death threats to coworkers. (SAC, ¶¶ 16-18.) This information allegedly was readily available to each of the defendants by virtue of their relationship with VTA. (*Ibid*.) Plaintiffs allege that the VTA, through its failure to discipline, censure, criticize or discharge Mr. Cassidy prior to the shooting, authorized, adopted, and ratified his conduct.

B. Procedural

Based on the foregoing, Plaintiffs initiated this action with filing of the Complaint, asserting claims for negligence and loss of consortium. In March 2023, the VTA demurred to the Complaint in its entirety, arguing that the Workers' Compensation Act ("WCA") provides the exclusive remedy available to Plaintiffs. In its order dated March 13, 2023 (the "March 2023 *Bertolet* Order"), the Court sustained the demurrer with leave to amend.[12]

Plaintiffs filed the First Amended Complaint ("FAC") on August 23, 2023 asserting the same claims as the Complaint, followed by the operative SAC on September 18, 2023 asserting the following causes of action: (1) assault; (2) battery; (3) false imprisonment; (4) negligent hiring, retention, or supervision; and (5) loss of consortium. The VTA demurs to the SAC in its entirety and each of the claims asserted therein on the ground of failure to state facts sufficient to constitute a cause of action.[13] (Code Civ. Proc., § 430.10, subd. (e).)

XVIII. VTA'S DEMURRER

C. Legal Standard

In ruling on a demurrer, a court treats it "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, 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.) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.)

D. Discussion

As it did previously, the VTA demurs to the entirety of the operative pleading on the ground that the Workers' Compensation Act ("WCA") provides the exclusive remedy available to Plaintiffs. The VTA additionally demurs to the first, second and third causes of action on the ground that Plaintiffs have not pleaded the facts necessary to state each cause of action. Finally, the VTA asserts that Ms. Bertolet cannot state a claim for loss of consortium because it was not presented as required by the Government Claims Act.

1. *Workers' Compensation Exclusivity*

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[12] The demurrer was unopposed by Plaintiffs, who were self-represented at the time. Plaintiffs have since retained counsel.

[13] VTA's request for judicial notice of the Court's August and March 2023 orders on its demurrers to the Third Amended Complaint and the Second Amended Complaint, respectively, in *Lane v. Universal Protection Service, LP* (Case No. 22CV398848) and Mr. Bertolet's Government Tort Claim is GRANTED. (Evid. Code, § 452, subds. (c) and (d).)

The Court previously sustained the VTA's demurrer to the FAC on this ground after concluding that Plaintiffs failed to adequately plead ratification of Mr. Cassidy's actions by the VTA which would take their claims outside the scope of the WCA. The VTA maintains that the SAC still suffers from this defect, while Plaintiffs counter that they have pleaded sufficient facts to correct it.

As the Court explained in its prior order, "[a]s a general rule, an employee who sustains an industrial injury 'arising out of and in the course of the employment' is limited to recovery under the workers' compensation system." (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1001 (*Torres*), quoting Lab. Code, § 3600, subd. (a).) For workers' compensation exclusivity to apply, there must be: (1) an injury within the scope of the exclusive remedy provisions, including an injury "collateral to or derivative of" an injury compensable by the exclusive remedies of the WCA; and (2) a finding that the alleged acts and motives underlying the claim are within the risks encompassed by the compensation bargain and do not violate fundamental public policy. (*Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 81 1—813 (*Vacanti*).) In addition, certain "exceptions to the rule" are expressly "enumerated in the statute." (*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 719 (*Fermino*); see also id. at p. 720 [explaining, however, that these express exceptions are not exhaustive].)

Labor Code sections 3601 ("Section 3601") and 3602 ("Section 3602") establish the aforementioned exceptions to workers' compensation exclusivity for intentional assaults by a coworker or employer. As explained in the Court's preceding order, Section 3601 is inapplicable to this action because it "insulates the employer from common law vicarious liability to an employee for the acts of another employee." (*Fretland v. County of Humboldt* (1999) 69 Cal.App.4th 1478, 1487 (*Fretland*), internal citations and quotations omitted.)

However, an employee or his or her dependents may sue based on direct liability, where the injury is proximately caused by a "willful physical assault by *the employer*." (Lab. Code, § 3602, subd. (b)(l), italics added.) Critically, "liability under section 3602, subdivision (b)(l), must be based on positive misconduct *by the employer*." (*Fretland*, *supra*, 69 Cal.App.4th at 1487.) This includes situations "when the employer 'ratified' the tortious conduct of its employee and thereby became 'liable for the employee's wrongful conduct as a joint participant." (*Id*. at 1489.) Thus, as the Court explained, the key issue here is ratification, which was described in *Fretland* thusly:

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(*Fretland*, 69 Cal.App.4th at 1490-1491, internal citations, quotations marks, and other notations omitted.) With regard to the employment context specifically, recent authorities provide:

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In the Complaint, Plaintiffs alleged that the gunman had a pattern of insubordination, and had verbal altercations with coworkers on at least four separate occasions, including death threats to co-employees. (Complaint, ¶ 2.) The Court opined that these allegations were a "far cry" from those at issue in various decisions where ratification was found to be sufficiently pleaded and concluded that the allegations "foreclose[d], as a matter of law, a showing that VTA ratified the shooter's conduct" because they only pertained to conduct that *preceded* the shooting and not after. The Court noted that "[a]n employer may be liable for an employee's act where the employer either authorized the tortious act or *subsequently* ratified an originally unauthorized tort" (*Ventura*, *supra*, 212 Cal.App.4th at 272, italics added), but as there were no allegations that the VTA authorized the shooting beforehand nor sufficient allegations that established ratification by implication,[14] Plaintiffs had failed to establish that its claims against the VTA implicated the exception to workers' compensation exclusivity provided by Section 3602.

Plaintiffs insist that they have pleaded sufficient facts to proceed with their claims against the VTA by alleging that ratification occurred when it engaged in a sham allegation after the shooting designed to cover up its authorization and/or ratification of Mr. Cassidy's conduct and that the decision in *C.R. v. Tenet Healthcare Corp.* (2009) 169 Cal.App.4th 1094 (*Tenet*) supports such a conclusion. In *Tenet*, the Court of Appeal found the allegations of ratification sufficient where:

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[14] The Court explained that per *Fretland*, an employer's failure to take action concerning one type of misconduct does not establish ratification of a subsequent, substantially different type of misconduct and thus allegations that Mr. Cassidy had a pattern of insubordination, and had verbal altercations with coworkers on at least four separate occasions, including death threats to co-employees, and the VTA failed to adequately respond to them did not support "fair[] infer[ence]" of "an intention to consent to or adopt the act" of mass murder. (*Fretland*, *supra*, 69 Cal.App.4th at 1491.) These allegations would instead evidence negligence rather than an intentional tort.

> continue his employment; with knowledge of Mr. Gaspar's sexual misconduct, no disciplinary action was taken and he was allowed to be alone with women who were patients; and defendant intentionally or negligently "spoiled evidence" including destroying documents concerning other sexual assaults in order to conceal them from plaintiff. The foregoing allegations that defendant, with knowledge of Mr. Gaspar's misconduct, continued to employ him and destroyed documents was sufficient to state a claim that it ratified his sexual misconduct.

Similarly, the SAC here alleges that the VTA was aware of a threat made by Mr. Cassidy to one of the victims that he would "put a bullet" in his head, that employees feared that Mr. Cassidy would "go postal", and that the VTA did nothing to investigate threats by Cassidy or to discipline him or protect his fellow employees. (SAC, ¶ 18 (a) & (b).) These allegations, coupled with the allegation that VTA engaged in a sham investigation to cover up its authorization and/or ratification of Cassidy's actions (see SAC, ¶ 21), are sufficient to plead ratification and defeat a demurrer based on workers' compensation exclusivity.

2. *Failure to State Sufficient Facts*

a. First, Second and Third Causes of Action: Assault, Battery and False Imprisonment

The VTA next argues that Plaintiffs have not stated claims for assault, battery and false imprisonment because there are no *facts* setting forth the required elements of each of these causes of action. The Court agrees. Plaintiffs have merely pleaded these elements in the most general, conclusory terms and have not set forth facts establishing Mr. Bertolet's apprehension of immediate harmful conduct (assault), physical contact against his person by the defendant that he did not consent to (battery) and the defendant's intentional confinement of him without his consent (false imprisonment). (See *So v. Shin* (2013) 212 Cal.App.4th 652, 668-669 [stating elements of claims for battery and assault); see *Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 715 [stating elements of claim for false imprisonment].) There are no allegations concerning where Mr. Bertolet was at the time of the shooting and the circumstances of his alleged false imprisonment, assault and battery. As such, the VTA's demurrer to the first, second and third causes of action on the ground of failure to state facts sufficient to constitute a cause of action is SUSTAINED WITH 30 DAYS' LEAVE TO AMEND.

b. Fourth Cause of Action: Negligent Hiring, Retention, or Supervision

Next, the VTA maintains that Plaintiffs have not and cannot state their negligence-based claim because it falls outside the scope of the employer assault exception to workers' compensation exclusivity provided by Section 3602, which requires willful, i.e., affirmative and not merely negligent, conduct. (See Lab. Code, § 3602, subd. (b)(1) [explaining that an employee may bring an action for damages against the employer "[w]here the employee's injury or death is proximately caused by a *willful* physical assault by the employer."].) The Court agrees and Plaintiffs impliedly conceded the merits of the VTA's argument by failing to address it in their opposition. Accordingly, the VTA's demurrer to the fourth cause of action on the ground of failure to state facts sufficient to constitute a cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

c. Fifth Cause of Action: Loss of Consortium

Lastly, the VTA argues that Ms. Bertolet cannot maintain her claim for loss of consortium because she failed to satisfy the claims presentation requirement of the Government Claims Act (the "Act"). "Under the Act, no person may sue a public entity or public employee for 'money or damages' unless a timely written claim has been presented to and denied by the public entity." (*County of Los Angeles v. Superior Court* (2005) 127 Cal.App.4th 1263, 1267.) In order to be timely, the claim generally must be presented to the particular entity within six months of accrual of the injury. (*A.M. v. Ventura Unified School Dist.* (2016) 3 Cal.App.5th 1252, 1257.) Absent an applicable exception, "failure to timely present a claim for money or damages to a public entity bars a plaintiff from filing suit against that entity bars a plaintiff from filing a lawsuit against that entity." (*State of California v. Superior Court* (2004) 32 Cal.4th 1234, 1239.)

Compliance with the claims presentation requirement must be alleged. (*Kline v. San Francisco Unified School Dist.* (1940) 40 Cal.App.2d 174, 177.) The factual circumstances articulated in the written claim must conform to the facts alleged in the complaint; if not, the complaint is subject to demurrer if it alleges a factual basis for recovery not fairly reflected in the written claim. (See, e.g., *Connelly v. California* (1970) 3 Cal.App.3d 744, 753.)

Here, the Court has taken judicial notice Mr. Bertolet's claim filed to fulfill the requirements of the Act and it does not notice a claim for loss of consortium. Nor is there any allegation in the SAC that Ms. Bertolet filed such a claim. Plaintiffs do not respond to this argument, and therefore impliedly concede its merits. Given this, she cannot maintain her claim and the VTA's demurrer to the fifth cause of action is SUSTAINED WITHOUT LEAVE TO AMEND. (See *Shelton v. Superior Court* (1976) 56 Cal.App.3d 66, 82–83 [holding that a public entity must be provided notice of a loss of consortium claim even if it already has knowledge of the underlying circumstance].)

XIX. CONCLUSION

The VTA's demurrer to the SAC and the claims asserted therein is SUSTAINED WITHOUT LEAVE TO AMEND to the fourth and fifth causes of action and SUSTAINED WITH 30 DAYS' LEAVE TO AMEND as to the first, second and third causes of action.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

Parties may appear in person or remotely. Remote appearances must be made through Microsoft Teams, unless otherwise arranged with the Court. Please go to https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml to find the appropriate link.

State and local rules prohibit recording of court proceedings without a court order. These rules apply while in court and also while participating or listening in a hearing remotely.

No court order has been issued which would allow recording of any portion of this motion calendar.

The Court does not provide court reporters for proceedings in the complex civil litigation departments. Any party wishing to retain a court reporter to report a hearing may do so in compliance with this Court's October 13, 2020 Policy Regarding Privately Retained Court Reporters. The court reporter can either be in person or appear remotely.

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