SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 10
Honorable Frederick S. Chung

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

DATE: January 23, 2024 TIME: 9:00 A.M.

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

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

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

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

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

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

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	22CV408721	Bret Meek et al. v. Doe 1 et al.	Click on LINE 1 or scroll down for ruling.
LINE 2	23CV415418	McManis Faulkner, APC v. Melvin Cooper	Click on LINE 2 or scroll down for ruling.
LINE 3	23CV413760	Wells Fargo Bank, N.A. v. Viet D. Troung	Motion for summary judgment: notice is proper, and the motion is unopposed. After review of the papers, the court concludes that plaintiff has met its initial burden of showing that there is no triable issue of material fact regarding the causes of action, and that there is no defense to these causes of action. (Code Civ. Proc. § 437c, subd. (p).) The motion is GRANTED. Moving party to prepare the formal order for the court's signature.
LINE 4	22CV396170	Christian Humanitarian Aid v. AM Star Construction, Inc. et al.	Motion to compel responses to requests for production: notice is proper, and the motion is unopposed. The court GRANTS the motion, as Shultz & Associates' responses are extremely tardy. Shultz & Associates shall serve written responses within 20 days of notice of entry of this order. In addition, Shultz & Associates will pay plaintiff monetary sanctions in the amount of **$1,178.75** (3 hours x $350/hour plus $128.75 in filing fees) within 20 days of notice of entry of this order. Moving party to prepare formal order.
LINE 5	22CV398988	Sandman, Inc. v. Andres Hernandez et al.	Motion to compel inspection of property: parties to appear, as notice is apparently not proper. The motion was filed without a hearing date, and there is no amended notice of hearing on file, as required by local rule.

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LINE 6	23CV415489	Jefferson Capital Systems LLC v. Marina Agabekov	Motion to deem RFAs admitted: parties to appear, as notice is apparently not proper. The motion was filed without a hearing date, and there is no amended notice of hearing on file, as required by local rule.
LINE 7	18CV326162	The Santana Row-Deforest Building Residential Condominium Owners Association v. Claude Wilkes et al.	Click on LINE 7 or scroll down for ruling.
LINE 8	19CV354095	Linda S. Lowery v. Hong Nguyen et al.	OFF CALENDAR. Case has settled.
LINE 9	20CV372589	Wells Fargo Bank, N.A. v. Du Nguyen	Claim of exemption: the court DENIES the claim, as Nguyen has not met his burden of showing that the amounts to be withheld are exempt. Nguyen's proposed amount to be withheld from earnings of $0 is unreasonable, given his income. (CCP § 706.123.) The court finds that the judgment creditor's proposed wage garnishment of $320.34 per month ($160.17 per pay period) is reasonable.
LINE 10	21CV390651	Elvira Rodriguez et al. v. Maria Isabel Garcia et al. (and Wayne Whitworth v. Maria Isabel Garcia et al.)	Click on LINE 10 or scroll down for ruling.
LINE 11	22CV407208	Thoits Law v. Jonathan Drake et al.	Click on LINE 11 or scroll down for ruling.
LINE 12	1999-7-CV-386483	Jose Mezzetti v. John Mickey II	Return of civil bench warrant: parties to appear.

- oo0oo -

Calendar Line 1
Case Name: *Bret Meek et al. v. Doe 1 et al.*
Case No.: 22CV408721

I. BACKGROUND

This action arises from alleged childhood sexual assault, filed by Plaintiffs Bret Meek ("Meek") and Scott Rodvold ("Rodvold") (collectively, "Plaintiffs") against a school district in Santa Clara County and a former employee of that district (collectively, "Defendants"), whom Plaintiffs have designated as Doe 1 and Doe 2, respectively.

Plaintiffs filed their original complaint on December 16, 2022. They filed the operative first amended complaint ("FAC") on May 5, 2023. The FAC states causes of action for: (1) Sexual Assault of a Minor (alleged against Doe 2 only, who is referred to as the "Perpetrator"); and (2) Negligence of District and Employees (alleged against Doe 1 only). Plaintiffs allege that the sexual abuse and assaults took place during the 1973-1974 school year and that some of the alleged sexual abuse of Rodvold and all of the alleged abuse of Meek took place off campus. (FAC, ¶¶ 15-30.) The FAC alleges that the lawsuit is exempt from the claim presentation requirements of the Government Claims Act and is timely under Code of Civil Procedure section 340.1. (*Id.* at ¶ 5.)

Currently before the court is a demurrer to the FAC by Doe 1 (hereinafter, the "District"), filed on August 17, 2023. Plaintiffs filed their opposition on January 9, 2024.

II. REQUESTS FOR JUDICIAL NOTICE

Both sides have submitted requests for judicial notice. "Judicial notice may not be taken of any matter unless authorized or required by law." (Evid. Code, § 450.) A precondition to judicial notice in either its permissive or mandatory forms is that the matter to be noticed be relevant to the material issue before the Court. (*Silverado Modjeska Recreation and Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 307, citing *People v. Shamrock Foods Co*. (2000) 24 Cal.4th 415, 422, fn. 2.) It is the court, and not the parties, that determines relevance. Evidence Code section 453, subdivision (b), requires a party seeking notice to "[furnish] the court with sufficient information to enable it to take judicial notice of the matter."

A. Plaintiffs' Request

In support of their opposition to the demurrer, Plaintiffs have submitted a request for judicial notice of three documents, attached as Exhibits A-C.

Exhibits A and B are copies of trial court orders from San Joaquin and Alameda counties, which Plaintiffs argue can be noticed pursuant to Evidence Code section 451, subdivision (d), which governs rules "of pleading, practice and procedure prescribed" by federal courts. (See Request at p. 1:14-17.) The court DENIES this request as these two orders are plainly not federal court rules. If notice had been sought under section 452, subdivision (d) (court records), the court would only take judicial notice of the fact that these orders were entered by these courts and the dates on which they were entered, as the court cannot take judicial notice of the correctness of another trial court's interpretation of the law or

its findings of fact. (See *Bolanos v. Superior Court* (2008) 169 Cal.App.4th 744, 761 [a written trial court order has no precedential value]; *In re Marriage of Shaban* (2001) 88 Cal.App.4th 398, 409 [there is no "horizontal stare decisis"]; see also *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1565; *Fowler v. Howell* (1996) 42 Cal.App.4th 1746, 1749; *Kilroy v. State of Calif*. (2004) 119 Cal.App.4th 140, 145-148; *Barri v. Workers' Comp. Appeals Bd*. (2018) 28 Cal.App.5th 428, 437-438.) In the end, the existence of these orders is not relevant to the resolution of this motion.

Exhibit C is a copy of a Senate floor analysis of Assembly Bill 218 ("AB 218") prepared in September 2019. Plaintiffs cite a grab-bag of Evidence Code sections in support of their request, including Evidence Code section 451, subdivision (a) (public statutory law); section 452, subdivision (a) (decisional and statutory law, including resolutions); section 452, subdivision (c) (official acts); and section 452, subdivision (h) (facts and propositions not reasonably subject to dispute and capable of determination by resort to sources of reasonably indisputable accuracy). (See Request at p. 1:18-28.) The court GRANTS judicial notice of Exhibit C pursuant to section 452, subdivision (c), only, as this is the only provision that is actually applicable to the document. Legislative committee reports and bill analyses constitute cognizable legislative history materials for purposes of judicial notice. (See *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 31-37 (*Kaufman*) [discussing categories of documents that constitute cognizable legislative history for purposes of judicial notice].) "Preliminarily, we note that resort to legislative history is appropriate only where statutory language is ambiguous . . . . 'If there is no ambiguity in the language, we presume the Legislature meant what it said, and the plain meaning of the statute governs.'" (*Id.* at p. 29.) *Kaufman* instructs that parties moving for judicial notice of legislative history materials are not required to demonstrate the need to resort to a statute's legislative history at the time of the request. (*Id*. at p. 30.)

B. District's Request

The District has submitted a request for judicial notice of three documents with its reply. These documents are attached as Exhibits B, C, and D. Exhibit B is a copy of legislative comments and votes relating to AB 218, dated August 30, 2019. The District contends that this document can be judicially noticed under Evidence Code section 452, subdivision (c). The court agrees and GRANTS this request. Exhibits C and D are copies of trial court orders from two cases in Contra Costa County. The District fails to state any legal basis for judicial notice of these two orders, and so the court DENIES the request. In any event, even if the request had been properly submitted, the court would only have granted judicial notice the fact that these orders were entered by these courts and the dates on which they were entered, and not as to the correctness of their rulings or the truth of their factual findings. As with Plaintiffs' Exhibits A and B, the existence of these orders is ultimately irrelevant to the court's analysis of this motion.[1]

[1] Neither side has requested judicial notice of *this* trial court's prior ruling on the same constitutional issue, presented in a different case by the same counsel for the District as in the present case.

III. DEMURRER TO THE FAC

A. General Standards

The court, in ruling on a demurrer, treats it "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, 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.) Allegations are not accepted as true on demurrer if they contradict or are inconsistent with facts judicially noticed. (See *Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1474 [rejecting allegation contradicted by judicially noticed facts]; see also Witkin, *California Evidence* (5th Ed., 2012) 2 Judicial Notice §3(3) ["It has long been established in California that allegations in a pleading contrary to judicially noticed facts will be ineffectual; i.e., judicial notice operates against the pleader."].)

B. The Basis for the District's Demurrer

The District demurs "to Plaintiffs' entire complaint on the basis that AB 218 retroactively strips governmental immunity from public entities, in violation of Article XVI, § 6 of the California Constitution, which expressly prohibits gifts of public funds where there is no enforceable claim, even if there is a moral or equitable obligation. To the extent AB 218 is unconstitutional as applied to public entities, the plaintiffs do not have a viable claim against the District." (August 17, 2023 Notice of Demurrer and Demurrer at p. 2:4-9.) As an initial matter, the court notes that the District cannot demur to the "entire complaint," as it has no ability to challenge the first cause of action, which is alleged against only Doe 2.

The District also states that it "separately demurs to the second cause of action because Education Code section 44808 limits a public-school district's liability to on-campus incidents and the two alleged sexual assaults undeniably occurred off campus in a private residence without the authority or knowledge of the District." (Notice of Demurrer and Demurrer at p. 2:10-13.)

In its supporting memorandum, the District attempts to make an additional argument that it did not include in its demurrer: that because Plaintiffs did not comply with the government claim presentation requirement, sovereign immunity bars their claims against the District. (See Memorandum at pp. 4:12-7:15.) Because this was not raised in the notice of demurrer and demurrer, it is not properly before the court. The argument would be unpersuasive even if it had been properly raised, as the amendments introduced by AB 218 to the Code of Civil Procedure and Government Code make it clear that the claim presentation requirement does not apply to claims involving childhood sexual assault, as discussed below. (See Code Civ. Proc.,§ 340.1, subds. (a, q, r, s); Gov. Code, § 905, subds. (m, p).)

C. The Merits of the District's Demurrer

1. The Claim Presentation Requirement, AB 218, and Code of Civil Procedure Section 340.1

Under the Government Claims 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.) 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.)

There are a number of exceptions to the presentation requirement, set forth in Government Code section 905, including an exception for claims for damages from childhood sexual abuse brought under Code of Civil Procedure section 340.1. (See Gov. Code § 905, subd. (m).) Before the passage of AB 218, Code of Civil Procedure section 340.1 permitted such claims to be brought "within eight years of the date the plaintiff attains the age of majority or within three years of the date the plaintiff discovers or reasonably should have discovered that psychological injury of illness occurring after the age of majority was caused by the sexual abuse, whichever period expires later." The Legislature significantly changed this in October 2019 with AB 218. Among other things, AB 218 lengthened the time within which an action for damages resulting from "childhood sexual assault" could be brought from *eight years to 22 years* from the date the plaintiff attains the age of majority or from *three years to five years* from the date the plaintiff "discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual assault." (Code Civ. Proc., § 340.1, subd. (a).) AB 218 also amended Government Code section 905 by deleting from subdivision (m) the language that provided an exception only for claims arising from conduct occurring on or after January 1, 2009—instead allowing the exception to the claim presentation requirement to apply without any date restriction—and adding Government Code section 905, subdivision (p), which made this change retroactive.

Code of Civil Procedure section 340.1(q) now states: "Notwithstanding any other law, any claim for damages described in paragraphs (1) through (3), inclusive, of subdivision (a) that has not been litigated to finality and that would otherwise be barred as of January 1, 2020, because the applicable statute of limitations, claim presentation deadline, or any other time limit had expired, is revived, and these claims may be commenced within three years of January 1, 2020. A plaintiff shall have the later of the three-year time period under this subdivision or the time period under subdivision (a) as amended by the act that added this subdivision."

Code of Civil Procedure section 340.1(r) now states: "The changes made to the time period under subdivision (a) as amended by the act that amended this subdivision in 2019 [AB 218] apply to and revive any action commenced on or after the date of enactment of that act, and to any action filed before the date of enactment, and still pending on that date, including any action or causes of action that would have been barred by the laws in effect before the date of enactment."

Section 340.1(s) now states: "Notwithstanding any other law, including Chapter 1 of Part 3 of Division 3.6 of Title 1 of the Government Code (commencing with Section 900) and Chapter 2 of Part 3 of Division 3.6 of Title 1 of the Government Code (commencing with Section 910), a claim for damages described in paragraphs (1) through (3), inclusive, of subdivision (a), is not required to be presented to any governmental entity prior to the commencement of an action."

Government Code section 905, subdivision (m), now exempts "[c]laims made pursuant to Section 340.1 of the Code of Civil Procedure for the recovery of damages suffered as a result of childhood sexual assault" from the presentation requirements under the Government Code. Government Code section 905, subdivision (p), now states: "The changes made to this section by the act that added this subdivision are retroactive and apply to any action commenced on or after the date of enactment of that act, and to any action filed before the date of enactment and still pending on that date, including any action or causes of action that would have been barred by the laws in effect before the date of enactment."

These statutes are all presumed constitutional. "'The courts will presume a statute is constitutional unless its unconstitutionality clearly, positively, and unmistakably appears; all presumptions and intendments favor its validity.' The party arguing unconstitutionality has the burden of proof." (*Donorovich-Odonnell v. Harris* (2015) 241 Cal.App.4th 1118, 1134-1135, internal citation omitted.)

The amended language of these statutes makes very clear the Legislature's determination that claims such as the FAC's second cause of action are not subject to claim presentation requirements and cannot reasonably be considered barred by any sovereign immunity associated with such requirements. Even if the court were to accept the District's argument that the claim presentation requirement constitutes an "immunity"—rather than just another iteration of a prescriptive period that limits the timeframe in which claims may be brought, like a statute of limitations—the District has failed to present any authority for the proposition that the Legislature may not modify any "immunity" under the Tort Claims Act whenever it wants to. The Tort Claims Act, after all, is simply another legislative act, just like AB 218, and there is nothing about amending it that is of constitutional dimension.

In *Coats v. New Haven Unified School Dist.* (2020) 46 Cal.App.5th 415, the Court of Appeal noted (in a different context involving claims made by a foster mother) that it was aware of "no reason the Legislature should be any less able to revive claims in this context as it expressly did in Assembly Bill 218." (*Coats*, 46 Cal.App.5th at 428.) The Court of Appeal also confirmed the retroactive application of the AB 218 amendments. "In the face of a revival provision expressly and unequivocally encompassing claims of childhood sexual abuse previously barred for failure to present a timely government claim, it is clear we must reverse the trial court's judgment and remand for further proceedings on appellants' complaint." (*Id*. at pp. 430-431.)

2. AB 218 and the Gift Clause

Article XVI, § 6 of the California Constitution, colloquially referred to as the "gift clause," prohibits the Legislature from making "any gift or authoriz[ing] the making of any gift, or any public money or thing of value to any individual, municipal or other

corporation . . . ." The term "gift" is defined as including "all appropriations of public money for which there is no authority or enforceable claim," even if there is a moral or equitable obligation. (*Jordan v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 431, 450, (*Jordan*).) Thus, "[a]n appropriation of money by the legislature for the relief of one who has no legal claim . . . must be regarded as the gift within the meaning of that term, as used in this section, and it is none the less a gift that a sufficient motive appears for its appropriation, if the motive does not rest upon a valid consideration." (*Ibid*.)

a) AB 218 is Not an "Appropriation"

The court rejects the District's constitutional challenge for at least two reasons. First and foremost, AB 218 is not a "gift" because it is not an "appropriation of money." (*Jordan, supra,* 100 Cal.App.4th at p. 450.) AB 218 does not allocate any public money to anyone—it merely removes a time bar that previously existed for claims of childhood sexual abuse. The claimant must still prove liability for that abuse in a court of law. As a result, the present situation is entirely distinguishable from the situations described in the cases cited by the District—*Bourn v. Hart* (1892) 93 Cal. 321,326-328 (*Bourn*); *Conlin v. Board of Supervisors of the City and County of San Francisco* (1893) 99 Cal. 17, 21 (*Conlin*); *Powell v. Phelan* (1903) 138 Cal. 271; and *Jordan, supra,* 100 Cal.App.4th at p. 441—all of which involved an appropriation of specific sums of money, or an identification of a specific fund, for specific recipients.[2] In contrast to those cases, there is no "appropriation" here—there is no sum of money or fund set aside of designated for a specific use—and so there is no "gift."

As Plaintiffs point out (Opposition at pp. 7:21-24; 10:19-11:13), AB 218 did not create a new tort liability that never existed before. It merely removed a procedural barrier (previously enacted by the very same California Legislature) against bringing those claims in court. Thus, the case of *Chapman v. State* (1894) 104 Cal. 690, 696, though ancient, is directly on point. In *Chapman*, the California Supreme Court held that the Legislature's provision of a judicial remedy for claims that could previously only be brought before the State Board of Examiners was not a violation of the gift clause because it did not create any *new liability*:

> We are entirely satisfied that plaintiff's cause of action, as alleged in the complaint, arises upon contract, and that the liability of the state accrued at the time of its breach; that is, when the coal was lost through the negligence of the officers in charge of the state's wharf, although there was then no law giving to the plaintiff's assignors the right to sue the state therefor. At that time the only remedy given the citizen to enforce the contract liabilities of the state, was to present the claim arising thereon to the state board of examiners for allowance, or to appeal to the legislature for an appropriation to pay the same; but the right to sue the state has since been given by the act of February 28, 1893, and in so far as that act gives the right to sue the state upon its contracts, the legislature did not create any liability or cause of action against the state where none existed before. The state was always liable upon its contracts, and the act just referred to merely gave an additional remedy for the enforcement of such liability, and it is not, even as applied to prior contracts, in conflict with any provision of the constitution.

[2] The District also cites dictum from *Heron v. Riley* (1930) 209 Cal. 507, which has no application here.

(*Ibid*.) For this reason alone, the demurrer on the ground that AB 218 is unconstitutional must be overruled.

b) AB 218 serves a Public Purpose

Second, even if AB 218 could somehow be construed to provide for an "appropriation," the court finds that its amendments to Code of Civil Procedure section 340.1 and Government Code section 905 are directed to a public purpose. "It is well settled that the primary question to be considered in determining whether an appropriation of public funds is to be considered a gift is whether the funds are to be used for a public or private purpose. If they are to be used for a public purpose, they are not a gift within the meaning of this constitutional prohibition. [Citations omitted]." (*California Teachers Assn. v. Board of Trustees* (1978) 82 Cal.App.3d 249, 257; see also *Teachers' Retirement Bd. v. Genest* (2007) 154 Cal.App.4th 1012, 1036.) "The benefit to the state from an expenditure for a 'public purpose' is in the nature of consideration and the funds expended are therefore not a gift even though private persons are benefited therefrom. The determination of what constitutes a public purpose is primarily a matter for legislative discretion, which is not to be disturbed by the courts so long as it has a reasonable basis." (*County of Alameda v. Janssen* (1940) 16 Cal.2d 276, 281, internal citations omitted; see also *Paulson v. Abdelnour* (2006) 145 Cal.App.4th 400, 419.)

Here, in the event that Plaintiffs prevail on their second cause of action (the only one alleged against the District), the benefits of such a result would not be limited to Plaintiffs. The stated purpose of AB 218, in addition to allowing more victims of childhood sexual abuse to be compensated for their injuries, is to "help prevent future assaults by raising the costs for [harm caused by childhood sexual abuse]" and to serve "as an effective deterrent against individuals and entities who have chosen to protect perpetrators of sexual assault over victims." (See *X.M. v. Superior Court* (2021) 68 Cal.App.5th 1014, 1027, quoting Off. Of Assem. Floor Analyses, Analysis of Assem. Bill No. 218 (2019-2020 Reg. Sess.), as amended Aug. 30, 2019, p. 2.) The prevention of future assaults on students in public schools by school employees is a benefit to the public as a whole, which contrasts sharply with the narrow scope of benefits conferred in the gift clause cases cited by the District. Therefore, any liability that may ultimately result from this case or similar cases involving childhood sexual assault serves a public purpose and does not qualify as a gift within the meaning of the "gift clause" of Article XVI, section 6 of the California Constitution.

The District's demurrer "on the basis that AB 218 retroactively strips governmental immunity from public entities, in violation of Article XVI, § 6 of the California Constitution," is OVERRULED.

3. Public Entity Liability and Education Code Section 44808

"Except as otherwise provided by statute . . . [a] public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." (Gov. Code, § 815, subd. (a).) Under Government Code section 815.2, a public entity *is* liable for injury "proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative." (Gov. Code § 815.2, subd. (a).) "In the context of public schools, the Legislature has established different liability rules for injuries occurring during required

school-sponsored, off-premises activities, on the one hand (Ed. Code, § 44808), and field trips or excursions on the other hand (Ed. Code, § 35330)." (*Myricks v. Lynwood Unified Sch. Dist*. (1999) 74 Cal.App.4th 231, 238.)

Education Code section 44808 "renders a school district not 'responsible or in any way liable for the . . . safety of any pupil . . . at any time when such pupil is not on school property' unless the district has 'undertaken to provide transportation for such pupil to and from the school premises,' 'undertaken a school-sponsored activity off the premises,' 'otherwise specifically assumed responsibility or liability' or 'failed to exercise reasonable care under the circumstances.'" (*Wolfe v. Dublin Unified School Dist.* (1997) 56 Cal.App.4th 126, 129.) In other words, section 44808 "grants a district immunity unless a student was (or should have been) directly supervised during a specified undertaking." (*Ibid*.) For the purposes of section 44808, "a school-sponsored activity" is defined as an activity "that requires attendance and for which attendance credit may be given." (*Castro v. Los Angeles Bd. of Education* (1976) 54 Cal.App.3d 232, 236, fn. 1.) In the event that one of the foregoing circumstances is found, the school district "'shall be liable or responsible for the conduct or safety of any pupil only while such pupil is or should be under the immediate and direct supervision of an employee of such district or board.'" (*Cerna v. City of Oakland* (2008) 161 Cal.App.4th 1340, 1353 (*Cerna*) [quoting section 44808].)

The District contends that section 44808 provides it complete immunity from the FAC's second cause of action because the alleged sexual assaults took place away from school and did not occur during any school-sponsored off-campus activity.

As the opposition points out, this argument fails as to plaintiff Rodvold, because the FAC alleges that some of the acts constituting sexual assaults against Rodvold took place on school grounds. (FAC, ¶ 21.) "[A] general demurrer may not be sustained, nor a motion for judgment on the pleadings granted, as to a portion of a cause of action. (*Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1167, overruled in part on other grounds in *Sheen v. Wells Fargo Bank, N.A.* (2022) 12 Cal.5th 905; see also *Fire Ins. Exchange v. Superior Court* (2004) 116 Cal.App.4th 446, 452; *Kong v. City of Hawaiian Gardens Redevelop. Agency* (2003) 108 Cal App 4th 1028, 1046; *PH II v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682 ["A demurrer does not lie to a portion of a cause of action."].)

Accordingly, the court OVERRULES the District's demurrer to the second cause of action as alleged by Rodvold.

It appears, however, that section 44808 does apply to the second cause of action as alleged by Meek, as the only alleged sexual assault on him took place at Doe 2's residence. (See FAC, ¶¶ 28-30.) There are no allegations that Meek's presence at Doe 2's residence was part of a school-sponsored activity or any other circumstance under which the school would have specifically assumed responsibility or liability.

Contrary to the opposition's argument, allegations of negligence that may have occurred on school premises (*e.g.*, the District's alleged *negligent supervision* of Doe 2) do not

bar the application of immunity under section 44808.[3] The opposition's reliance on *Hoyem v. Manhattan Beach City Sch. District* (1978) 22 Cal.3d 508 (*Hoyem*) in support of this argument is misplaced. Section 44808 "has been interpreted as imposing liability on school districts for a student's off campus injury only when 'the student is involved in activities supervised or undertaken by the school.'" (*LeRoy v. Yarboi* (2021) 71 Cal.App.5th 737, 743 (*LeRoy*), internal citation omitted.) "In fact, the 'consensus of decisions from the Court of Appeal is that 'section 44808 limits the liability of schools for after-hours, off-campus activity, absent a specific undertaking'' by the school during which a student is injured." (*Ibid*., quoting *Cerna*, *supra*, 161 Cal.App.4th at p. 1356.) "Thus, with one exception, every court since *Hoyem* . . . 'has interpreted section 44808 to provide that school districts are not responsible for the safety of students outside school property absent a specific undertaking by the school district and direct supervision by a district employee.'" (*Ibid.*, internal citation omitted.) The Court of Appeal in *LeRoy* ultimately concluded: "We agree with the great weight of authority that section 44808 'grants a district [and its employees] immunity [for a student's injuries] unless [the] student was (or should have been) directly supervised during a specified undertaking.' [Citations.] We in turn agree that '[t]he portion of section 44808 that refers to failing to exercise reasonable care' that the LeRoys rely on 'does not create a common law form of general negligence; it refers to the failure to exercise reasonable care during one of the [three] mentioned undertakings' in section 44808." (*Id.* at pp. 743-744, internal citations omitted.)

Based on the foregoing authority, the court SUSTAINS the District's demurrer to the second cause of action as alleged by Meek, based on Education Code section 44808.

4. Leave to Amend

A plaintiff bears the burden of demonstrating that an amendment would cure the defect identified on demurrer. (See *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081; see also *Shaeffer v. Califia Farms, LLC* (2020) 44 Cal.App.5th 1125, 1145 ["The onus is on the plaintiff to articulate the 'specifi[c] ways' to cure the identified defect, and absent such an articulation, a trial or appellate court may grant leave to amend 'only if a potentially effective amendment [is] both apparent and consistent with the plaintiff's theory of the case. [Citation.]'"].)

Plaintiffs have not met their burden here, as the opposition does not request leave to amend, much less explain how an amendment would address the defect. The opposition instead argues only that the court should "deny" the District's demurrer in its entirety. (See Opposition at p. 18:12-13.) Nevertheless, given that this is the first pleading challenge in this case, the court grants Plaintiffs 10 DAYS' LEAVE TO AMEND.

Plaintiffs are reminded that when a demurrer is sustained with leave to amend, the leave must be construed as permission to the pleader to amend the causes of action to which the demurrer has been sustained, not to add entirely new causes of action. (*Patrick v. Alacer Corp.* (2008) 167 Cal.App.4th 995, 1015.) To raise claims entirely unrelated to those originally alleged requires either a new lawsuit or a noticed motion for leave to amend. Absent prior leave of court, an amended complaint raising entirely new and different causes of action may

[3] The opposition's reliance on an unpublished appellate decision is improper under Rule of Court 8.1115. The court has not considered this unreported case.

be subject to a motion to strike. (*Zakk v. Diesel* (2019) 33 Cal.App.5th 431, 456, citing *Harris v. Wachovia Mortgage, FSB* (2010) 185 Cal.App.4th 1018, 1023.)

IT IS SO ORDERED.

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Calendar Line 2
Case Name: *McManis Faulkner, APC v. Melvin Cooper*
Case No.: 23CV415418

I. BACKGROUND

This is an action for allegedly unpaid attorney's fees. Plaintiff McManis Faulkner, APC ("Plaintiff" or "McManis") represented defendant Melvin Cooper ("Defendant" or "Cooper") in a family court case in Santa Cruz County. McManis alleges that Cooper owes over $200,000 for legal services, and it alleges that Cooper concealed an award of attorney's fees that he obtained in the family court case, after he replaced McManis with other counsel.

The original and still-operative complaint, filed on May 4, 2023, states three causes of action: (1) Conversion; (2) Fraud; and (3) Breach of Fiduciary Duty. Cooper filed an answer to the complaint on June 20, 2023. Now before the court is Cooper's motion to strike the complaint, filed on August 16, 2023, nearly two months after his answer. Plaintiff opposes the motion.[4]

II. MOTION TO STRIKE THE COMPLAINT

A. General Legal Standards

Under Code of Civil Procedure section 436, a court may strike out any irrelevant, false, or improper matter inserted into any "pleading" (as defined in section 435, subdivision (a)), or strike out all or part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court. (Code Civ. Proc., § 436.) In ruling on a motion to strike, the court reads the pleading under attack (complaint, cross-complaint, answer, etc.) as a whole, all parts in their context, and assumes the truth of all well-pleaded allegations. (See *Turman v. Turning Point of Central California, Inc.* (2010) 191 Cal.App.4th 53, 63, citing *Clauson v. Super. Ct.* (1998) 67 Cal.App.4th 1253, 1255.) The grounds for a motion to strike must appear on the face of the challenged pleading or from matters of which the court may take judicial notice. (Code Civ. Proc., § 437(a).)

In ruling on a motion to strike, the court may not consider extrinsic evidence. Accordingly, the court has not considered the declaration of Cooper's counsel, Lawrence Silver, the attached exhibits, or any arguments based on such extrinsic evidence. Similarly, the court has not considered the declaration submitted by McManis's counsel, Tyler Atkinson, the attached exhibits, or any arguments in the opposition based on this extrinsic evidence.

B. The Grounds for Cooper's Motion

Cooper "moves the Court to strike Complaint, order Plaintiff and Plaintiff's Counsel to Return Certain Documents to Defendant and Defendant's Counsel, and Issue an Injunction Enjoining Plaintiff and Plaintiff's Counsel from Making Disclosure of the Content of Certain Documents." (August 15, 2023 Notice of Motion and Motion.) The court interprets this as a motion to strike the *entire complaint*, as no specific portion of the pleading is identified in the

[4] After filing a timely opposition on January 9, 2024, McManis filed an "amended" opposition two days later. The court has not considered the latter brief, which was tardy and filed without leave of court.

notice of motion, contrary to the requirements of Rule 3.1322(a) of the California Rules of Court. The notice of motion and motion fails to cite any authority for the novel relief requested. The only authority cited in the supporting memorandum is Family Code section 7643, which does not make any provision for the striking of any pleading, for the "return" of any documents, or for the issuance of any injunction, much less any injunction that purports to restrict the content of counsel's communications.[5]

C. Discussion

Defendant's motion to strike the entire complaint is DENIED for the reasons that follow.

First, as noted in the opposition, the motion is exceedingly untimely. A party may move to strike a pleading "within the time to respond to [that] pleading." (Code Civ. Proc., § 435(b)(1); see also Cal. Rules of Court, rule 3.1322(b).) The "time to respond" to a pleading is 30 days after service of the pleading in question. (Code Civ. Proc., § 430.40(a).) Any timely motion to strike the complaint by Cooper would have had to have been filed at approximately the same time as Defendant's answer. The current motion is nearly two months too late.

Second, even if the motion were timely, the court would deny it. As noted above, the only authority cited for the motion is Family Code section 7643. This section states, in its entirety:

> (a) Notwithstanding any other law concerning public hearings and records, a hearing or trial held under this part may be held in closed court without admittance of any person other than those necessary to the action or proceeding. Except as provided in subdivision (b), all papers and records, other than the final judgment, pertaining to the action or proceeding, whether part of the permanent record of the court or of a file in a public agency or elsewhere, are subject to inspection and copying only in exceptional cases upon an order of the court for good cause shown.
>
> (b)(1) Papers and records pertaining to the action or proceeding that are part of the permanent record of the court are subject to inspection and copying by the parties to the action, their attorneys, and by agents acting pursuant to written authorization from the parties to the action or their attorneys. An attorney shall obtain the consent of the party to the action before authorizing an agent to inspect and copy the permanent record. An attorney shall also state on the written authorization that the attorney has obtained the consent of the party to authorize an agent to inspect and copy the permanent record.
>
> (2) For purposes of establishing parentage and establishing and enforcing child support orders, papers and records pertaining to the action or proceeding that are part of the permanent record of the court are subject to inspection and copying by any local child support agency, as defined in subdivision (h) of Section 17000.

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[5] In his reply, Cooper attempts to recast the motion as requesting, in the alternative, a protective order. This is improper on reply, particularly given that nothing in the notice of motion and motion can logically be construed as articulating a motion for protective order.

(c) This section applies only to actions filed before January 1, 2023.

As this court recently noted in a prior order, "Family Code section 7643 applies only to records that were actually introduced into the record in family court; it does not apply to any documents—such as documents evidencing payments of attorney's fees by Click to Cooper—that were never filed in the family court case." (December 19, 2023 Order at p. 2:14-17.) Here, the court has no information about what documents were supposedly improperly obtained by McManis from Cooper and whether they were actually a part of the court files in the family court case, because this information is not apparent from the face of the complaint or any other matter subject to judicial notice. The grounds for a motion to strike must appear on the face of the challenged pleading or from matters of which the court may take judicial notice. (Code Civ. Proc., § 437(a).) While the complaint here mentions documents related to a "fee request" that were "produced" by Cooper (Complaint, ¶ 22), there is no indication that any of these documents necessarily fall under Family Code section 7643. Indeed, McManis argues in its opposition that it has not sought to access any court records (Opposition at p. 4:20-21), and Cooper fails to address this argument on reply.

Finally, as the court held in its December 19, 2023 order, "to the extent that documents from the family court record are in fact necessary in order to show 'payments of an award, settlement, or any other recover' to Cooper in that case, the court finds good cause for their production here under section 7643, subdivision (a)." (December 19, 2023 Order at p. 2:18-3:2.) Thus, even if section 7643 applied, the court would have no basis for finding a discovery violation, ordering the "return" of documents, or "enjoining" McManis from using the documents as part of the litigation.

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Calendar Line 7
Case Name: *The Santana Row-Deforest Building Residential Condominium Owners Association v. Claude Wilkes et al.*
Case No.: 18CV326162

Plaintiff moves to set aside a dismissal signed by the court on February 7, 2023, after plaintiff failed to appear for a February 2, 2023 hearing on an order to show cause regarding a prior failure to appear on September 27, 2022. Plaintiff's counsel has submitted a timely declaration indicating that the February 2, 2023 non-appearance was the result of a calendaring mistake by his office. Thus, plaintiff argues that the mandatory provisions of Code of Civil Procedure section 473, subdivision (b), should apply and the dismissal be set aside. Although plaintiff originally made this request in an ex parte application on February 23, 2023, the court ordered that plaintiff present it as noticed motion, given defendant's apparent opposition to the application. Plaintiff filed the present motion on March 9, 2023. For some unknown reason, it is only being heard now, more than 10 months later.

The court ultimately finds that the February 2, 2023 failure to appear was the result of "mistake," "inadvertence," and "neglect" by counsel and that the dismissal must (and should) be set aside under section 473(b). Although defendant is technically correct that counsel's declaration does not explicitly address the September 27, 2022 failure to appear, the court does not agree with defendant that this renders the declaration "not credible." In addition, the court has no reason to doubt plaintiff's counsel's claim that he missed a notification of the September 27, 2022 hearing. The court notes that *neither side* appeared for the September 27, 2022 case management conference *or* the February 2, 2023 OSC hearing.

Defendant requests monetary sanctions of $2,250 against plaintiff, arguing that he expended hundreds of dollars in fees and costs opposing plaintiff's ex parte application, and over $1,500 in fees and costs opposing this motion. The court does not understand why defendant has expended so much time and energy in opposing plaintiff's efforts to set aside the dismissal, given the clear language of section 473(b) and given the court's clear language in its February 24, 2023 order on the ex parte application that it would "likely" grant a noticed motion. Such an expenditure appears to be a complete waste. The court resolves any doubts on a motion to vacate or set aside in the moving party's favor, as there is a strong public policy in California that favors deciding cases on the merits. (*Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681, 685.) That is particularly the case where, as here, it appears that the fault lies solely with plaintiff's counsel, rather than anything to do with the client.

The motion to set aside is GRANTED. The request for monetary sanctions is DENIED. The court sets this matter for a case management conference on **March 19, 2024 at 10:00 a.m.** in Department 10.

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Calendar Line 10
Case Name: *Elvira Rodriguez et al. v. Maria Isabel Garcia et al. (*and *Wayne Whitworth v. Maria Isabel Garcia et al.)*
Case No.: 21CV390651 (consolidated with 21CV392475)

In this consolidated case, plaintiff Wayne Whitworth moves for leave to file an amended complaint in this case, but he fails to attach a copy of his proposed amended pleading with his motion. In addition, the exact nature of his amendments is extremely unclear from his moving papers. As a result, the motion must be DENIED.

Whitworth describes his proposed amendments as follows:

> (1) addition of Doe Defendant 1 Gilberto Garcia, who is being added since defendant ("Maria Garcia") signed an Interspousal Grant Deed transferring her entire interest in her property to this individual ("Gilberto Garcia"), (2) An addition of a cause of action, expanding to clarify existing cause of actions, based on facts that have already been pleaded (3) Additions to Plaintiffs prayer based on the proposed clarification of causes of actions, to substantively clarify all the allegations in the Complaint, in addition the nature thereof as well, the text of those proposed amendments is provided in the Appendix filed as part of this Motion.

(Memorandum at p. 6:2-9.) Despite Whitworth's claim that the text of the proposed amendments is provided in an "Appendix," it is not. The Memorandum does contain an "Appendix of Proposed Changes" (pages 10-11), but this appendix does not set forth the new text, nor does it describe exactly what the new "cause of action" is. In addition, the "Appendix" does not adequately describe the new relief sought in the prayer.

The court also notes that "Gilbert Garcia" is already a defendant in this case, and the motion does not attempt to explain or clarify whether "Gilberto Garcia" is the same person. If so, then the correct amendment would be to name "Gilberto" as an alias of "Gilbert," rather than add an entirely new defendant as "Doe 1."

Although Whitworth attempts to remedy his original errors by submitting the proposed first amended complaint ("FAC") in an "amended" motion *filed with his reply brief*, that is far too late. Defendants' opposition responds to the motion by addressing the new "fraud cause of action," but the proposed FAC submitted with the reply does not actually contain a fraud cause of action—instead, it alleges a second cause of action for "general negligence" (in addition to the first cause of action for "motor vehicle negligence") and then purports to seek punitive damages, based on a claim that the negligence was the product of oppression, fraud, and malice.

Because the motion does not comply with Rule 3.1324 of the California Rules of Court, the court denies it without prejudice. If Whitworth ultimately decides to try again, he must clearly set forth his amendments *at the outset*, so that defendants have a sufficient opportunity to respond to the amendments, and the court then has a sufficient opportunity to evaluate them. Although the court will generally not consider the sufficiency of allegations in a proposed amended pleading on a motion for leave to amend—that is the function of a demurrer or motion to strike—the court must nevertheless consider whether a proposed amendment would

clearly be improper or futile. The court is unable to do so here, based on the lack of clarity in the briefing.

IT IS SO ORDERED.

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Calendar Line 11
Case Name: *Thoits Law v. Jonathan Drake et al.*
Case No.: 22CV407208

This is a petition to confirm an attorney-client fee arbitration award, filed by plaintiff Thoits Law ("Thoits") against its former clients, Jonathan Drake and Scott Larson ("Defendants"). The parties disagree over whether Defendants were timely in filing a rejection of the award and request for trial. Although the court finds that both sides have made meritorious and non-meritorious arguments on this petition, it ultimately concludes that the rejection was timely and therefore DENIES the petition. The court sets this matter for a trial setting conference on **April 23, 2024 at 11:00 a.m.** in Department 10. The parties must meet and confer before then to propose trial dates that are approximately eight months from that trial setting conference date.

The Mandatory Fee Arbitration Act ("MFAA"), which appears at sections 6200 to 6206 of the California Business and Professions Code, provides for the arbitration of attorney-client fee disputes. Under the MFAA, an arbitration award becomes binding "upon the passage of 30 days after service of notice of the award, unless a party has, within the 30 days, sought a trial after arbitration pursuant to Section 6204." (Bus. & Prof. Code, § 6203, subd. (b).) In this case, a three-arbitrator panel from the Santa Clara County Bar Association issued an award of $154,124.70 in favor of Thoits on October 12, 2023. The award was served by mail on the parties at their addresses of record on October 13, 2023, and then Defendants attempted to file a "Rejection of Award and Request for Trial" on November 13, 2023 (*i.e.*, 31 days later). But because this filing contained multiple defects, including a missing substitution of counsel form, another missing page, and a missing filing fee, the court clerk's office rejected the filing on November 27, 2023. On December 7, 2023, Defendants attempted to refile their documents but again failed to include the filing fee. Upon a third try with the filing fee, Defendants were finally successful later that day, 55 days after service of the award.

Although Defendants recognize that the 30-day deadline is jurisdictional, they argue that the case law holds that "jurisdictional deadlines are met with documents that are 'timely presented but defective in form.'" (Opposition at p. 8:3-4 [quoting *United Farm Workers of America v. Agricultural Labor Relations Board* (1985) 37 Cal.3d 912, 917 (*UFW*).) Having now reviewed *UFW* and *Litzmann v. Worker's Compensation Appeals Board* (1968) 266 Cal.App.2d 203 (*Litzmann*), upon which the *UFW* Court relied, the court agrees. In this case, because the arbitration award was served by mail on October 13, 2023, Code of Civil Procedure section 1013 added five calendar days for Defendants to file their response, making November 17, 2023 their deadline. Because they presented their papers to the court clerk's office on November 13, they met this deadline. In addition, even though their filing was defective (in multiple ways), there was no jurisdictional bar under the Supreme Court's holding in *UFW*, as well as the Court of Appeal's prior holding in *Litzmann*.

Thoits argues that under *Maynard v. Brandon* (2005) 36 Cal.4th 364, 379 (*Maynard*), an untimely filing is not eligible for relief under Code of Civil Procedure section 473, subdivision (b), because the deadlines for requesting a trial under the MFAA are jurisdictional in nature. While this proposition of law is generally true, it does not apply here, because in *Maynard*, the request for trial was presented to the Riverside County Superior Court *after* the jurisdictional time limit had already expired. Therefore, the relief afforded by *UFW* and *Litzmann*, *supra*, was unavailable in that case, and the defendants had no other choice but to

claim "mistake, inadvertence, surprise, or excusable neglect" under section 473(b). Here, by contrast, Defendants are entitled to relief under *UFW* and *Litzmann*, rather than under section 473(b), and so the holding in *Maynard* is inapplicable.

As a separate matter, Defendants have requested an award of attorney's fees of $6,500 for having had to oppose this petition. The court DENIES that request, finding that both sides have presented specious arguments to the court, and finding that this entire disagreement could have been avoided if Defendants had not waited until the last minute to file their rejection of the arbitration award and then had not so thoroughly bungled the filing multiple times.

IT IS SO ORDERED.

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