SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 20, Honorable Socrates Peter Manoukian, Presiding

Courtroom Clerk: Hien-Trang Tran-Thien

191 North First Street, San Jose, CA 95113

Telephone: 408.882.2320

Department20@scscourt.org

"Every case is important" . . . . . "No case is more important than any other."—United States District Judge Edward Weinfeld (https://www.nytimes.com/1988/01/18/obituaries/judge-edward-weinfeld-86-dies-on-us-bench-nearly-4-decades.html)

"The Opposing Counsel on the Second-Biggest Case of Your Life Will Be the Trial Judge on the Biggest Case of Your Life."—Common Wisdom.

As Shakespeare observed, it is not uncommon for legal adversaries to "strive mightily, but eat and drink as friends." (Shakespeare, The Taming of the Shrew, act I, scene ii.)" (*Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 309.)

Counsel is duty-bound to know the rules of civil procedure. (See *Ten Eyck v. Industrial Forklifts Co.* (1989) 216 Cal.App.3d 540, 545.) The rules of civil procedure must apply equally to parties represented by counsel and those who forgo attorney representation. (*McClain v. Kissler* (2019) 39 Cal.App.5th 399.)

By Standing Order of this Court, all parties appearing in this Court are expected to comply with the Code of Professionalism adopted by the Santa Clara County Bar Association: https://www.sccba.com/code-of-professional-conduct/

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DATE: Thursday, 16 May 2024
TIME: 9:00 A.M.

This Department uses Zoom for Law and Motion and for Case Management Calendars. Please use the Zoom link below.

TO ALL LAWYERS APPEARING IN THIS COURT: Please be on the lookout for announcements concerning "Civil Trials and Civil Motion Practice: Best Practices in Santa Clara County Superior Court." The program is tentatively set for 20 June 2024 at 12:00 PM on the Department 6 Teams Link. The program is available to all lawyers whether or not they are members of Santa Clara County Bar Association.

This Court expects all counsel and litigants to comply with the Tentative Rulings Procedures that are outlined in Local Civil Rule 8(E) and ***California Rules of Court***, rule 3.1308. If the Court has not directed argument, oral argument must be permitted only if a party notifies all other parties and the Court at (408) 808-6856 before 4:00 p.m. on the court day before the hearing of the party's intention to appear. A party must notify all other parties by telephone or in person. A failure to timely notify this Court and/or the opposing parties may result in the tentative ruling being the final order in the matter.

You may use these links for Case Management Conferences and Trial Setting Conferences without Court permission. Informal Discovery Conferences and appearances on Ex Parte applications will be set on Order by the Court.

Join Zoom Meeting
https://scu.zoom.us/j/96144427712?pwd=cW1JYmg5dTdsc3NKNFBpSjlEam5xUT09
Meeting ID: 961 4442 7712
Password: 017350

Join by phone:
+1 (669) 900-6833
Meeting ID: 961 4442 7712

One tap mobile
+16699006833,,961 4442 7712#

By appearing in this Department, whether in-person or by remote video platform, you represent that you have read the protocols of this Department, that you understand them, and that you will comply with them.

APPEARANCES.

Appearances are usually held on the Zoom virtual platform. However, we are currently allowing in-court appearances as well. If you do intend to appear in person, please advise us when you call to contest the tentative ruling so we can give you current instructions as to how to enter the building. If the doors to the Old Courthouse are locked, please see the deputies at the metal detector next door at 191 North First Street.

Whether appearing in person or on a virtual platform, the usual custom and practices of decorum and attire apply. (See ***Jensen v. Superior Court (San Diego)*** (1984) 154 Cal.App.3d 533.). Counsel should use good quality equipment and with sufficient bandwith. Cellphones are very low quality in using a virtual platform. Please use the video function when accessing the Zoom platform. The Court expects to see the faces of the parties appearing on a virtual platform as opposed to listening to a disembodied voice.

For new Rules of Court concerning remote hearings and appearances, please review California ***Rules of Court***, rule 3.672.

"A person's name is to him or her the sweetest and most important sound in any language."—Dale Carnegie. All Courts of California celebrate the diversity of the attorneys and the litigants who appear in our Courts. Do not hesitate to correct the Court or Court Staff concerning the pronunciation of any name or how anyone prefers to be addressed. As this Court is fond of saying, "with a name like mine, I try to be careful how I pronounce the names of others." Please inform the Court how you, or if your client is with you, you and your client prefer to be introduced. The Court encourages the use of diacritical marks, multiple surnames and the like for the names of attorneys, litigants and in court papers. You might also try www.pronouncenames.com but that site mispronounces my name.

Please notify this Court immediately if the matter will not be heard on the scheduled date. ***California Rules of Court***, rule 3.1304(b). If a party fails to appear at a law and motion hearing without having given notice, this Court may take the matter off calendar, to be reset only upon motion, or may rule on the matter. ***California Rules of Court***, rule 3.1304(d). A party may give notice that he or she will not appear at a law and motion hearing and submit the matter without an appearance unless this Court orders otherwise. This Court will rule on the motion as if the party had appeared. California Rules of Court, rule 3.1304(c). Any uncontested matter or matters to which stipulations have been reached can be processed through the Clerk in the usual manner. Please include a proposed order.

All proposed orders and papers should be submitted to this Department's e-filing queue. Do not send documents to the Department email unless directed to do so.

While the Court will still allow physical appearances, all litigants are encouraged to use the Zoom platform for Law & Motion appearances and Case Management Conferences. Use of other virtual platform devices will make it difficult for all parties fully to participate in the hearings. Please note the requirement of entering a password (highlighted above.) As for personal appearances, protocols concerning social distancing and facial coverings in compliance with the directives of the Public Health Officer will be enforced. Currently, facemasks are not required in

all courthouses. If you appear in person and do wear a mask, it will be helpful if you wear a disposable paper mask while using the courtroom microphones so that your voice will not be muffled.

Individuals who wish to access the Courthouse are advised to bring a plastic bag within which to place any personal items that are to go through the metal detector located at the doorway to the courthouse.

Sign-ins will begin at about 8:30 AM. Court staff will assist you when you sign in. If you are using the Zoom virtual platform, it will helpful if you "rename" yourself as follows: in the upper right corner of the screen with your name you will see a blue box with three horizontal dots. Click on that and then click on the "rename" feature. You may type your name as: Line #/name/party. If you are a member of the public who wishes to view the Zoom session and remain anonymous, you may simply sign in as "Public."

CIVILITY.

In the 50 years that this Judge has been involved with the legal profession, the discussion of the decline in civility in the legal profession has always been one of the top topics of continuing education classes.

This Court is aware of a study being undertaken led by Justice Brian Currey and involving various lawyer groups to redefine rules of civility. This Judge has told Justice Currey that the lack of civility is due more to the inability or unwillingness of judicial officers to enforce the existing rules.

The parties are forewarned that this Court may consider the imposition of sanctions against the party or attorney who engages in disruptive and discourteous behavior during the pendency of this litigation.

COURT REPORTERS.

This session will not be recorded. No electronic recordings, video, still photography or audio capture of this live stream is allowed without the expressed, written permission of the Superior Court of California, County of Santa Clara. State and Local Court rules prohibit photographing or recording of court proceedings whether in the courtroom or while listening on the Public Access Line or other virtual platform, without a Court Order. See Local General Rule 2(A) and 2(B); ***California Rules of Court***, rule 1.150.

This Court no longer provides for Court Reporters in civil actions except in limited circumstances. If you wish to arrange for a court reporter, please use Local Form #CV-5100. All reporters are encouraged to work from a remote location. Please inform this Court if any reporter wishes to work in the courtroom. This Court will approve all requests to bring a court reporter. Counsel should meet and confer on the use of a court reporter so that only one reporter appears and serves as the official reporter for that hearing.

PROTOCOLS DURING THE HEARINGS.

During the calling of any hearing, this Court has found that the Zoom video platform works very well. But whether using Zoom or any telephone, it is preferable to use a landline if possible. IT IS ABSOLUTELY NECESSARY FOR ALL INDIVIDUALS TO SPEAK SLOWLY. Plaintiff should speak first, followed by any other person. All persons should spell their names for the benefit of Court Staff. Please do not use any hands-free mode if at all possible. Headsets or earbuds of good quality will be of great assistance to minimize feedback and distortion.

The Court will prepare the Final Order unless stated otherwise below or at the hearing. Counsel are to comply with ***California Rules of Court***, rule 3.1312.

TROUBLESHOOTING TENTATIVE RULINGS.

To access a tentative ruling, move your cursor over the line number, hold down the "Control" key and click. If you see last week's tentative rulings, you have checked prior to the posting of the current week's tentative rulings.

You will need to either "REFRESH" or "QUIT" your browser and reopen it. Another suggestion is to "clean the cache" of your browser. Finally, you may have to switch browsers. If you fail to do any of these, your browser may pull up old information from old cookies even after the tentative rulings have been posted.

This Court's tentative ruling is just that—tentative. Trial courts are not bound by their tentative rulings, which are superseded by the final order. (See *Faulkinbury v. Boyd & Associates, Inc.* (2010) 185 Cal.App.4th 1363, 1374-1375.) The tentative ruling allows a party to focus his or her arguments at a subsequent hearing and to attempt to convince the Court the tentative should or should not become the Court's final order. (*Cowan v. Krayzman* (2011) 196 Cal.App.4th 907, 917.) If you wish to challenge a tentative ruling, please refer to a specific portion of the tentative ruling to which you disagree.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 1	23CV421216	Philips Medical Capital, Inc. vs Mark Ryvola	**Order of Examination.** Has Wells Fargo Bank been served? The file reflects that the plaintiffs' "Application and Order for Appearance and Examination" was executed by this Court and properly filed. There are no minutes for 30 November 2023, the date on which this OEX was originally calendared However, there does not appear to be the filing of a proof of service of the examination. Unless the parties agree otherwise, both parties are to appear in Department 20 at 9:00 AM via the Zoom virtual platform. The appropriate oath will be administered by the Court and the parties may conduct the examination off-line and report back to the Court. The parties may meet and confer on how to conduct the examination remotely. NO FORMAL TENTATIVE RULING. By appearing on a contested tentative ruling, you will be presumed to have read the Bannerhead at the top of this Tentative Ruling Page and the paragraph on "Civility."
LINE 2	22CV404624	Jane Doe D.L. vs John Doe 1 et al	**Motion of Defendant for Judgment on the Pleadings.** Defendant School District's motion for judgment on the pleadings as to Plaintiff's complaint is DENIED. SEE ATTACHED TENTATIVE RULING. By appearing on a contested tentative ruling, you will be presumed to have read the Bannerhead at the top of this Tentative Ruling Page and the paragraph on "Civility."

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 3	22CV404624	Jane Doe D.L. vs John Doe 1 et al	**Motion of Defendant for Stay of Proceedings.** This Court is reluctant to stay this case in the absence of any certainty as to when other Courts of Appeal will conclude their matters. NO TENTATIVE RULING. By appearing on a contested tentative ruling, you will be presumed to have read the Bannerhead at the top of this Tentative Ruling Page and the paragraph on "Civility."
LINE 4	20CV373332	Benito Hernandez et al vs Robert Bortolotto et al	**Motion of All Defendants for Summary Judgment.** Defendants McKim, Bortolotto, Orozco, Maria Ramirez, and Ricardo Ramirez's motion for summary judgment or, alternatively, summary adjudication against plaintiffs Benito Hernandez and Monica Hernandez is DENIED. SEE ATTACHED TENTATIVE RULING. By appearing on a contested tentative ruling, you will be presumed to have read the Bannerhead at the top of this Tentative Ruling Page and the paragraph on "Civility."
LINE 5	21CV387145	Myoung Hwang vs Subdream Studios, Inc.; Jikhan Jung.	**Motion of Plaintiff to Compel Defendant Jikhan Jung to Provide Further Responses to Form Interrogatories, Set Two, and for Sanctions.** Responding party Jikhan Jung filed late token opposition to the motion in question. The motion is GRANTED in its entirety. Defendant is compelled to provide code-compliant responses within 30 days of the filing and service of this Order. The request of plaintiff for monetary sanctions is GRANTED. Defendant shall pay to counsel for plaintiff the sum of $5000.00 within 30 days of the filing and service of this Order. Counsel for plaintiff is to serve notice of entry of this Order. NO FORMAL TENTATIVE RULING. By appearing on a contested tentative ruling, you will be presumed to have read the Bannerhead at the top of this Tentative Ruling Page and the paragraph on "Civility."

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 6	21CV387145	Myoung Hwang vs Subdream Studios, Inc.; Jikhan Jung.	**Motion of Plaintiff to Compel Defendant Jikhan Jung to Provide Further Responses to Deposition Testimony and Request for Production of Documents and for Sanctions.** Responding party Jikhan Jung filed late token opposition to the motion in question. The motion is GRANTED in its entirety. Defendant is compelled to appear and answer questions that a continued deposition which shall take place in a code compliant location and manner within 30 days of the filing and service of this Order. The request of plaintiff for monetary sanctions is GRANTED. Defendant shall pay to counsel for plaintiff the sum of $5000.00 within 30 days of the filing and service of this Order. Counsel for plaintiff is to serve notice of entry of this Order. NO FORMAL TENTATIVE RULING. By appearing on a contested tentative ruling, you will be presumed to have read the Bannerhead at the top of this Tentative Ruling Page and the paragraph on "Civility."
LINE 7	21CV387145	Myoung Hwang vs Subdream Studios, Inc.; Jikhan Jung.	**Motion of Plaintiff for Sanctions for Spoliation of Evidence.** This Court is inclined to STRIKE the answer of defendants. However, the Court will continue this motion for 60 days to 27 June 2024 at 9:00 AM in this Department to learn the outcome of the other discovery motions. NO FORMAL TENTATIVE RULING. By appearing on a contested tentative ruling, you will be presumed to have read the Bannerhead at the top of this Tentative Ruling Page and the paragraph on "Civility."

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 8	23CV419273	Christopher Minasi vs Hyundai Motor America, a California Corporation et al	**Motion of Plaintiff to Compel Defendant DGDG 12 d.b.a. Capitol Hyundai to Produce its Person Most Knowledgeable for Deposition.** The motion is GRANTED. Defendant is to produce its PMK and documents on the subjects designated at a code compliant location and manner within 30 days of the filing and service of this Order. If there is an objection to any of the subjects in question, defendant may seek a protective order. The subject of the ex parte application to advance the petition to compel arbitration will be discussed at the hearing. NO FORMAL TENTATIVE RULING. The parties are to use the tentative ruling protocol to advise this Court if they wish to appear on the merits and argue the motion. By appearing on a contested tentative ruling, you will be presumed to have read the Bannerhead at the top of this Tentative Ruling Page and the paragraph on "Civility."
LINE #9	23CV419273	Christopher Minasi vs Hyundai Motor America, a California Corporation et al	**Motion of Plaintiff to Compel Defendant DGDG 12 d.b.a. Capitol Hyundai to Produce its Person Most Knowledgeable for Deposition.** SEE LINE #8. By appearing on a contested tentative ruling, you will be presumed to have read the Bannerhead at the top of this Tentative Ruling Page and the paragraph on "Civility."

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 10	23CV426305	JPMorgan Chase Bank N.A. vs Demany Nouanesy	**Motion of Plaintiff to Deem the Requests for Admissions to Be Admitted.** No party filed opposition to this motion. On 22 January 2024, plaintiff served requests for admissions upon defendant who never responded. ***Code of Civil Procedure***, § 2033.280(b) provides that the requesting party may move for an order that the truth of any facts specified in the requests be deemed admitted. The Court shall make this order unless it finds that the party to whom the requests for admission have been direct and has served, before the hearing on the motion, a proposed response to the request for admissions that is in substantial compliance with ***Code of Civil Procedure***, §§ Sections 2033.210, 2033.220, and 2033.230. (***Code of Civil Procedure***, § 2033.280(c).) The motion is GRANTED and the requests are deemed ADMITTED. NO FORMAL TENTATIVE RULING. By appearing on a contested tentative ruling, you will be presumed to have read the Bannerhead at the top of this Tentative Ruling Page and the paragraph on "Civility."
LINE 11	23CV417150	Yelena Kolodji et al vs David Dietrich	**Motion of Plaintiff for Trial Preference.** The parties should use the Tentative Ruling Protocol to advise this Court that they will appear to answer questions by the Court. NO TENTATIVE RULING. By appearing on a contested tentative ruling, you will be presumed to have read the Bannerhead at the top of this Tentative Ruling Page and the paragraph on "Civility."
LINE 12	24CV433621	Sedigheh Hajizadeh vs Magic Mountain, LLC	**Motion of Defendant Magic Mountain LLC for Change of Venue to the County of Los Angeles.** The motion is GRANTED pursuant to ***Code of Civil Procedure***, §§ 395, 395.5, 396b(a) and 397 on the grounds that actions for personal injury are to be filed where the injury occurred, or in the county in which the defendant corporation or association has its principal place of business. Additionally, the proper and more convenient venue for all parties is in Los Angeles County. Defense counsel is to prepare the appropriate paperwork and any fees for the transfer. The matter will be placed on the Dismissal Review Calendar for 15 August 2024 at 10:00 AM in this Department.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 13	21CV387145	Myoung Hwang vs Subdream Studios, Inc.; Jikhan Jung.	**Motion of Plaintiff to Deem Requests for Admissions to Be Admitted/Compel Further Responses And Request For Monetary Sanctions.** Responding party Jikhan Jung filed late token opposition to the motion in question. The motion is GRANTED in its entirety. Defendant is to provide code compliant responses within 30 days of the filing and service of this Order. The request of plaintiff for monetary sanctions is GRANTED. Defendant shall pay to counsel for plaintiff the sum of $5000.00 within 30 days of the filing and service of this Order. Counsel for plaintiff is to serve notice of entry of this Order. NO FORMAL TENTATIVE RULING. By appearing on a contested tentative ruling, you will be presumed to have read the Bannerhead at the top of this Tentative Ruling Page and the paragraph on "Civility."
LINE 14			SEE ATTACHED TENTATIVE RULING. By appearing on a contested tentative ruling, you will be presumed to have read the Bannerhead at the top of this Tentative Ruling Page and the paragraph on "Civility."
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LINE 19			SEE ATTACHED TENTATIVE RULING. By appearing on a contested tentative ruling, you will be presumed to have read the Bannerhead at the top of this Tentative Ruling Page and the paragraph on "Civility."
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LINE 27			SEE ATTACHED TENTATIVE RULING. By appearing on a contested tentative ruling, you will be presumed to have read the Bannerhead at the top of this Tentative Ruling Page and the paragraph on "Civility."
LINE 28			SEE ATTACHED TENTATIVE RULING. By appearing on a contested tentative ruling, you will be presumed to have read the Bannerhead at the top of this Tentative Ruling Page and the paragraph on "Civility."
LINE 29			SEE ATTACHED TENTATIVE RULING. By appearing on a contested tentative ruling, you will be presumed to have read the Bannerhead at the top of this Tentative Ruling Page and the paragraph on "Civility."
LINE 30			SEE ATTACHED TENTATIVE RULING. By appearing on a contested tentative ruling, you will be presumed to have read the Bannerhead at the top of this Tentative Ruling Page and the paragraph on "Civility."

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Calendar Line 1

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Calendar Line 2.

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 20

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(For Clerk's Use Only)

CASE NO.: 22CV404624 **Jane Doe D.L. v. John Doe 1, et al.**
DATE: 16 May 2024 **TIME: 9:00 am** **LINE NUMBER: 02**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 15 May 2024. Please specify the issue to be contested when calling the Court and Counsel.

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Order On Defendant John Doe 1's
Motion For Judgment On The Pleadings

I. Statement of Facts.

In approximately 1977, plaintiff Jane Doe D.L. ("Plaintiff") was enrolled as a ninth grade student at Oak Grove High School operated by defendant John Doe 1 ("School District") in San Jose. (Complaint, ¶¶4 and 19.) Defendant John Doe 2 ("Teacher") was Plaintiff's biology teacher during her ninth-grade year. (*Id.*)

Plaintiff interacted with defendant Teacher on a daily basis and believed he was a trustworthy adult. (Complaint, ¶20.) On one occasion while Plaintiff was a freshman, Plaintiff went to defendant Teacher's classroom after class to ask a question about the lesson from the day. (*Id.*) The door to the classroom was closed and Plaintiff was alone with defendant Teacher. (*Id.*)

During this interaction, defendant Teacher unzipped his pants and coerced Plaintiff to orally copulate his penis. (*Id.*) Plaintiff was frightened and tried to lift her head up during the assault but defendant Teacher held Plaintiff's head down until he ejaculated in her mouth. (*Id.*) After the assault, defendant Teacher told Plaintiff she was special and not to tell anyone what happened. (*Id.*) Plaintiff left the classroom and was afraid and upset. (*Id.*)

Over the course of Plaintiff's freshman and sophomore years in high school, defendant Teacher isolated Plaintiff in his classroom and supply closet and groped and touched her breasts and vagina multiple times. (Complaint, ¶21.) Defendant Teacher exerted control and influence over Plaintiff as an authority figure. (Complaint, ¶¶22 – 23.) Defendant School District's teachers and administrators failed to protect young female students like Plaintiff from the control, influence, and sexual abuse perpetrated by defendant Teacher. (*Id.*)

Defendant Teacher's sexual assault caused Plaintiff to feel embarrassed and ashamed. (Complaint, ¶24.) Plaintiff did not disclose defendant Teacher's abuse because she was afraid and ashamed and did not think anyone would believe her. (*Id.*)

Defendant School District knew or should have known that defendant Teacher was abusing his authority and position and was engaging in sexual misconduct with minor students. (Complaint, ¶25.) Defendant Teacher's pursuit, manipulation, and assault of Plaintiff occurred on school grounds in classrooms and other public spaces. (*Id.*) Plaintiff's behavior should have been observed by staff and administrators at the school but was ignored. (*Id.*) Defendant School District negligently failed to take reasonable steps to address and/or prevent defendant Teacher's

conduct and/or to implement reasonable safeguards to protect Plaintiff and others from the acts of childhood sexual abuse perpetrated by defendant Teacher. (Complaint, ¶¶25 – 26.)

On 22 September 2022[1], Plaintiff filed the instant complaint against defendants School District and Teacher asserting causes of action for:

(1) Negligent Hiring, Retention, and Supervision [against defendant School District]

(2) Sexual Harassment (Civil Code §§51.9 and 52.) [against all defendants]

(3) Negligent Failure to Warn, Train, or Educate [against defendant School District]

(4) Negligent Supervision of a Minor [against defendant School District]

(5) Battery [against defendant Teacher]

(6) Assault [against defendant Teacher]

On 5 January 2023, defendant School District filed a demurrer to the second and third causes of action asserted in Plaintiff's complaint. On 12 September 2023, the court issued an order sustaining defendant School District's demurrer to the second and third causes of action without leave to amend.

On 14 December 2023, defendant School District filed an answer to Plaintiff's complaint.

On 20 March 2024, defendant School District filed the motion now before the court, a motion for judgment on the pleadings.

II. Motions for Judgment on the Pleadings.

Judgment on the pleadings may be granted upon the motion of either party or by the Court on its own motion. (*Code of Civil Procedure*, §§ 438(b)(1)-(2); *Schabarum v. California Legislature* (1998) 60 Cal.App.4th 1205, 1216 *Sheehan v. San Francisco 49ers, Ltd.* (2009) 45 Cal.4th 992, 998..)

To that end, "[a] motion for judgment on the pleadings performs the same function as a general demurrer, and hence attacks only defects disclosed on the face of the pleadings or by matters that can be judicially noticed." (*Cloud v. Northrup Grumman Corp.* (1998) 67 Cal.App.4th 995, 999.) All properly pleaded operative facts are accepted as true. (*Lehto v. City of Oxnard* (1985) 171 Cal.App.3d 285, 287.)

Essentially, "[m]otions by a plaintiff for judgment on the pleadings are the equivalent of a demurrer to an answer." (*Sebago, Inc. v. City of Alameda* (1989) 211 Cal.App.3d 1372, 1379.) Thus, the movant contends that the adversary's pleading, on its face, "fails to state a cause of action." (*Sofias* v. *Bank of America* (1985) 172 Cal.App.3d 583, 586.) The pleader's allegations must be accepted as true and liberally construed in his favor. (*Higgins v. Del Faro* (1981) 123 Cal.App.3d 558, 565.)

Like a demurrer, a motion for judgment on the pleadings may be addressed to the pleading as a whole or to separate counts. If addressed to the pleading as a whole, the motion must be denied if even one count is good. (See *Lord* v. *Garland* (1946) 27 Cal.2d 840, 850.) If addressed to separate counts, the motion may be granted as to some counts and denied as to others. (See *Steiner* v. *Rowley* (1950) 35 Cal.2d 713, 720.)

"The standard for granting a motion for judgment on the pleadings is essentially the same as that applicable to a general demurrer, that is, under the state of the pleadings, together with matters that may be judicially noticed, it

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[1] This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (**Government Code**, §§ 68600–68620). The California Rules of Cou rt state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (Ca. St. Civil **Rules of Court**, Rule 3.714(b)(1)(C) and (b)(2)(C).)

appears that a party is entitled to judgment as a matter of law." (*Schabarum v. California Legislature*, supra, 60 Cal.App.4th 1205, 1216.)

> "A plaintiff may test the sufficiency of an answer by a motion for judgment on the pleadings, and may thereby recover judgment, without the introduction of any evidence, if his complaint states facts sufficient to constitute a cause of action, and the answer, as interposed by the defendant neither raises any material issue nor states a defense, i.e., where the answer expressly or substantially admits or does not sufficiently deny all the material allegations of the complaint, and sets up no new matter which is sufficient to bar or defeat the action. Thus a judgment may be rendered on the pleadings if the answer is evasive, frivolous or sham." (*Adjustment Corp. v. Hollywood Hardware & Paint Co.* (1939) 35 Cal.App.2d 566, 569.) (internal citations omitted.)

Leave to Amend

When judgment on the pleadings is granted on the grounds that the complaint does not state a cause of action, leave to amend a complaint should generally be granted if there is a reasonable possibility that the defect can be cured. (See, e.g., *Carney v. Simmonds* (1957) 49 Cal. 2d 84, 97; Smiley v. Citibank (S.D.), N.A. (1995) 11 Cal.4th 138, 164, fn. 18.)

III. Analysis.

A. Defendant School District's request for judicial notice is GRANTED.

In support of its motion for judgment on the pleadings, defendant School District requests judicial notice of the California Assembly's Floor Analysis of AB 218 as amended 30 August 2019 pursuant to Evidence Code section 452, subdivision (c) which authorizes the court to take judicial notice of "[o]fficial acts of the legislative … departments of … any state of the United States."

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.) There being no opposition or objection, defendant School District's request for judicial notice of the California Assembly's Floor Analysis of AB 218 as amended 30 August 2019 is GRANTED.

In addition, defendant School District requests judicial notice of two orders issued by Contra Costa County Superior Court and one order issued by Monterey County Superior Court. Evidence Code section 452, subdivision (d) states that the court may take judicial notice of "[r]ecords of any court of this state." Evidence Code section 452 and 453 permit the trial court to "take judicial notice of the existence of judicial opinions and court documents, along with the truth of the results reached—in the documents such as orders, statements of decision, and judgments—but [the court] cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact." (*People v. Woodell* (1998) 17 Cal.4th 448, 455.)

Defendant School District's request for judicial notice of the two orders issued by Contra Costa County Superior Court and the one order issued by Monterey County Superior Court is GRANTED but only insofar as the court takes notice of their existence. Even so, "A written trial court ruling has no precedential value." (*Santa Ana Hospital Med. Ctr. v. Belshe* (1997) 56 Cal.App.4th 819, 831.)

B. Defendant School District's motion for judgment on the pleadings is DENIED.

Defendant School District moves for judgment on the pleadings as to the remaining first and fourth causes of action of Plaintiff's complaint on the basis that "these causes of action were brought exclusively under the revival portion of [Code of Civil Procedure s]ection 340.1 created through AB 218 [which] retroactively strips statutory 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 that AB 218 is unconstitutional as applied to public entities, Plaintiff has no viable causes of action."[2]

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 8 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." (See Code Civ. Proc., § 340.1(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(p), which made this change retroactive.

Code of Civil Procedure section 340.11, subdivision (q) [for childhood sexual assault that occurred before 1 January 2024] now states: "Notwithstanding any other law, any claim for damages described in subparagraphs (Ato (C), inclusive, of paragraph (1) 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 340.11, subdivision (r) now states: "The changes made to the time period under subdivision (a) of Section 340.1 by Chapter 861 of the Statutes of 2019 [AB 218] apply to and revive any action commenced on or after 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."

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

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[2] See page 1, line 28 through page 2, line 5 of the Notice of Motion and Motion of Defendant John Doe 1's Motion for Judgment on the Pleadings.

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.)

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 defendant School 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; *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. 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 Plaintiff points out in her opposition, 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.

(*Ibid.*)

This is sufficient reason by itself to deny defendant School District's motion for judgment on the pleadings on the ground that AB 218 is unconstitutional because it somehow violates the gift clause.

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 Plaintiff prevails in her lawsuit, the benefits of such a result would not be limited to Plaintiff herself. The stated purpose of AB 218 is, in addition to allowing more victims of childhood sexual abuse to be compensated for their injuries, 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.)

Clearly, the prevention of future assaults on students in public schools by school employees is a benefit to the public as a whole. Therefore, any expenditure resulting from this case and similar ones serves a public purpose and does not qualify as a gift within the meaning of the "gift clause" of Article XVI, § 6 of the California Constitution.

Accordingly, defendant School District's motion for judgment on the pleadings as to Plaintiff's complaint is DENIED.

IV. Tentative Ruling.

The tentative ruling was duly posted.

V. Case Management.

All trial dates will remain as set.

On Line #3, defendant is asking for a stay of proceeding due to the pendency of several cases in various Courts of Appeal where trial courts have come down with different conclusions. There is no expectation that the courts will come to any conclusion prior to the trial date of this case. This Court will entertain further discussion at the hearing on these motions as this Court expects the ruling on the motion for judgment on the pleadings will merit further discussion.

VI. Order.

Defendant School District's motion for judgment on the pleadings as to Plaintiff's complaint is DENIED.

DATED:	**HON. SOCRATES PETER MANOUKIAN** ***Judge of the Superior Court*** ***County of Santa Clara***

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Calendar Line 3

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Calendar Line 4

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
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(For Clerk's Use Only)

CASE NO.: 20CV373332 **Benito Hernandez, et al. v. McKim Corporation, et al.**
DATE: 16 May 2024 **TIME: 9:00 am** **LINE NUMBER: 06**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 15 May 2024. Please specify the issue to be contested when calling the Court and Counsel.

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Order On Motion For Summary Judgment Or, Alternatively, Summary Adjudication, Against Plaintiffs Benito Hernandez And Monica Hernandez

I. Statement of Facts.

Plaintiffs Benito Hernandez, Monica Hernandez, and Esteban Gabriel Hernandez (collectively, "Plaintiffs") are construction workers who worked for defendant McKim Corporation ("McKim"). (Complaint, ¶6.) Defendant McKim performs on site construction and repair, specifically in the concrete and asphalt paving industry. (Complaint, ¶¶7 and 14.) Defendants Robert Anthony Bortolotto ("Bortolotto") and Santino Ricardo Orozco ("Orozco") are managers, corporate officers, and/or responsible individuals for purposes of licensing with the California State License Board ("CSLB"). (Complaint, ¶8.)

Defendant Ricardo Ramirez is the owner of defendant McKim. (Complaint, ¶10.) Defendants Bortolotto, Orozco, Ricardo Ramirez, and Maria Ramirez are responsible for implementing and carrying out the unlawful labor, employment, and payroll policies and overseeing the day to day activities of the corporation. (Complaint, ¶¶8 – 10 and 16.)

Plaintiffs worked as laborers, operating engineers, and teamsters for defendants on multiple public works construction projects subject to the payment of prevailing wages. (Complaint, ¶15.)

Plaintiff Benito Hernandez was typically paid 32 hours a week despite routinely working 45 – 55 hours per week, five to six days per week. (Complaint, ¶17.) In summer when there was a push to finish school construction in a tight construction schedule, plaintiff Benito Hernandez could work seven days a week and over 55 hours a week. (*Id.*)

Plaintiff Monica Hernandez was never put on payroll and made substantially less than any recognizable prevailing wage to primarily drive a semitruck on both public work and private construction. (Complaint, ¶18.) Plaintiff Monica Hernandez would be paid by the hour without payroll deductions and without payment of overtime or prevailing wages when due and owing. (*Id.*)

Plaintiff Esteban Gabriel Hernandez was never put on payroll and made substantially less than any recognizable prevailing wage as a laborer in the summers and at times on weekends on both public work and private

construction. (Complaint, ¶19.) Plaintiff Monica Hernandez would be paid by the hour without payroll deductions and without payment of overtime or prevailing wages when due and owing. (*Id.*)

Plaintiffs were not paid the correct prevailing wage for the work they discharged. (Complaint, ¶20.) The fringe benefits owed as part of various prevailing wage obligations were not properly funded to a third party fringe benefit trust fund based on prevailing wage laws of California. (*Id.*) The only fringe benefits funded were 32 hours for plaintiff Benito Hernandez. (*Id.*)

Defendants' failure to timely pay overtime wages in excess of eight (8) hours per day or forty (40) hours per week, or wages for all hours worked, was willful, intentional, and deliberate. (Complaint, ¶23.)

During their employment with defendants, only plaintiff Benito Hernandez received wage statements and those statements did not list all hours worked. (Complaint, ¶24.) The other plaintiffs did not receive any wage statements. (*Id.*)

At the end of their employment with defendants, Plaintiffs were not paid all wages in a timely manner and more than 30 days have passed since their separation from employment. (Complaint, ¶25.)

On 10 November 2020[3], Plaintiffs filed a complaint against defendants McKim, Bortolotto, Orozco, Maria Ramirez, and Ricardo Ramirez asserting causes of action for:

(1) Violation of California Labor Code sections 218.5, 1194, 1194.2, 1771, 1774

(2) Violation of California Labor Code section 226 – Failure to Provide an Itemized Wage Statement (against all defendants except Bartolotto)

(3) Violation of California Labor Code section 203 – Waiting Time Penalties

(4) Failure to Pay Minimum Wages, California Labor Code sections 1194 et seq.

(5) Failure to Pay Overtime Compensation (Labor Code sections 510 and 1194)

(6) Unfair Business Practices (Business and Professions Code sections 17200 et seq.)

On 5 March 2021, defendants McKim, Bortolotto, Orozco, Maria Ramirez, and Ricardo Ramirez jointly filed an answer to the Plaintiffs' complaint.

On 11 May 2023, Plaintiffs filed an amendment to the complaint substituting McKim Inc. for Doe defendant 1 and substituting S and R Materials Handling LLC ("SRMH") for Doe defendant 2.

On 26 June 2023, defendant SRMH filed an answer to Plaintiffs' complaint.

On 8 February 2024, defendants McKim, Bortolotto, Orozco, Maria Ramirez, and Ricardo Ramirez ("Moving Defendants") filed the motion now before the court, a motion for summary judgment/ adjudication of the complaint against plaintiffs Benito Hernandez and Monica Hernandez.

II. Motions For Summary Judgment In General.

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

[3] This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (**Government Code**, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (Ca. St. Civil **Rules of Court**, Rule 3.714(b)(1)(C) and (b)(2)(C).)

procedure is "to cut through the parties' pleadings" to determine whether trial is necessary to resolve the dispute. (*Aguilar, supra,* at p. 843.)

The "party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact…" (*Aguilar, supra,* 25 Cal.4th at p. 850; see *Evidence Code*, § 110.) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Aguilar, supra,* at p. 851.) A defendant moving for summary judgment may satisfy its initial burden either by producing evidence of a complete defense or by showing the plaintiff's inability to establish a required element of the case. (*Code of Civil Procedure*, § 437c, subd. (p)(2); *Aguilar, supra,* at p. 853.) *supra,* at p. 853.) Allegations in the complaint alone are not enough to defeat a motion for summary judgment. (*Coyme v. Krempels* (1950) 36 Cal.2d 257.)

If a moving defendant makes the necessary initial showing, the burden of production shifts to the plaintiff to make a prima facie showing of the existence of a triable issue of material fact. (Code of Civil Procedure, § 437c, subd. (p)(2); see *Aguilar, supra,* 25 Cal.4th at p. 850.) A triable issue of material fact exists "if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra,* at p. 850, fn. omitted.) If the plaintiff opposing summary judgment presents evidence demonstrating the existence of a disputed material fact, the motion must be denied. (*Id.* at p. 856.)

"An issue of fact can only be created by a conflict of evidence. It is not created by speculation, conjecture, imagination or guess work. Further, an issue of fact is not raised by cryptic, broadly phrased, and conclusory assertions, or mere possibilities that or by allegations in the complaint." (*Lyons v. Security Pacific National Bank* (1995) 40 Cal.App.4th 1001, 1014) (internal citations omitted, punctuation modified.)

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

Similarly, "[a] party may seek summary adjudication on whether a cause of action, affirmative defense, or punitive damages claim has merit or whether a defendant owed a duty to a plaintiff. A motion for summary adjudication…shall proceed in all procedural respects as a motion for summary judgment." (*California Bank & Trust v. Lawlor* (2013) 222 Cal.App.4th 625, 630, internal citations and quotation marks omitted.)

In addition to the facts provided by a moving defendant, the burden of production on summary judgment can shift to the plaintiff upon a showing that the plaintiff cannot factually support his claim. (See, e.g., *Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283.) Indeed, a defendant can satisfy its initial burden to show an absence of evidence through discovery responses that are factually devoid. (Id. at 1302.)

Thereafter, the plaintiff must present evidence supporting the challenged claim.

III. Analysis.

A. Moving Defendants' motion for summary judgment of the complaint against plaintiff Benito Hernandez is DENIED.

Moving Defendants argue initially that all of the claims asserted by plaintiff Benito Hernandez in the complaint fail because he failed to exhaust the mandatory grievance procedure under a collective bargaining agreement ("CBA"). Moving Defendants rely on *Soremekun v. Thrifty Payless, Inc.* (9th Cir. 2007) 509 F.3d 978, 985-986, where the court wrote:

> Prior to bringing suit, an employee seeking to vindicate personal rights under a collective bargaining agreement must first attempt to exhaust any mandatory or exclusive grievance procedures provided in the agreement. See *United Paperworkers Int'l. Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 37, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987) ("The courts have jurisdiction to enforce collective bargaining contracts; but where the contract provides grievance and arbitration

> procedures, those procedures must first be exhausted and courts must order resort to the private settlement mechanisms without dealing with the merits of the dispute"); *Del Costello*, *supra*, 462 U.S. at 163 ("Ordinarily, however, an employee is required to attempt to exhaust any grievance or arbitration remedies provided in the collective bargaining agreement. Subject to very limited judicial review, he will be bound by the result according to the finality provisions of the agreement" (citations omitted)). [Footnote.] Thus, in the ordinary case, an employee's failure to exhaust contractually mandated procedures precludes judicial relief for breach of the collective bargaining agreement and related claims.

Moving Defendants proffer the following facts to support this argument: The CBAs in effect during Benito Hernandez's employment by McKim Corporation included specific grievance procedures applicable to the employment claims of Benito Hernandez.[4]

The grievance procedures set forth in the CBAs to which Benito Hernandez was bound include the requirement that written notice of a grievance be provided to the employer and/or the union within ten days of the event triggering the grievance.[5] Benito Hernandez failed to provide such 10-day notice in regard to any of the claims made in this lawsuit.[6]

The underlying evidence to support these factual assertions is a declaration by defendant Ricardo Ramirez. Specifically, Moving Defendants cite to paragraphs 3 and 5 – 13 of defendant Ricardo Ramirez's declaration. However, the declaration of Ricardo Ramirez filed in conjunction with this motion for summary judgment is incomplete and consists only of paragraphs 1 – 5 and a portion of paragraph 6. As pointed out by Plaintiffs in opposition, the declaration lacks a signature and the requisite elements.[7]

Paragraphs 3, 5, and the portion of paragraph 6 are not enough to support the factual assertions made by Moving Defendants. As such, Moving Defendants have not met their initial burden "of showing that a cause of action has no merit if the [Moving Defendants have] shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to the cause of action." (Code Civ. Proc., §437c, subd. (p)(2).)

B. Moving Defendants' motion for summary adjudication of the first cause of action [violation of California Labor Code section 218.5, 1194, 1194.2, 1771, 1774] of the complaint against plaintiffs Benito Hernandez and Monica Hernandez is DENIED.

In relevant part, the first cause of action alleges, "defendants, and each of them, violated Labor Code §§ 218.5, 1194, 1194.2, 1771 and 1774, specifically by failing and refusing to comply with the statutory duty to pay Plaintiffs prevailing wages as required by the contracts and by statute, or ensure that Plaintiffs was [sic] paid prevailing wages as required by the contracts and by statute. …Plaintiffs earned but were not paid wages." (Complaint, ¶¶31 – 32.)

In moving for summary adjudication of this first cause of action, Moving Defendants proffer the following facts to support their argument: Benito Hernandez was paid in full for all work he performed.[8] Benito Hernandez was

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[4] See Separate Statement Supporting Motion for Summary Judgment or, Alternatively, for Summary Adjudication ("Moving Defendants' SS"), Fact No. 10.

[5] See Moving Defendants' SS, Fact No. 11.

[6] See Moving Defendants' SS, Fact No. 12.

[7] (See *Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601, 610 – 611—"four elements for a proper declaration under Code of Civil Procedure section 2015.5: "(1) a certification or declaration that it is 'true under penalty of perjury,' (2) the 'subscription' of the declarant, (3) a statement of the 'date of execution,' and (4) a statement that such certification or declaration occurs 'under the laws of the State of California.'" (Internal citations and punctuation omitted.)

[8] See Moving Defendants' SS, Fact No. 1.

paid wages as set forth in the CBA governing his employment.[9] The wages paid to Benito Hernandez exceeded the prevailing wage otherwise required for his category of work.[10] Monica Hernandez was paid in full for all work she performed.[11] Monica Hernandez was not entitled to any of the wages set forth in any CBA as she was not a member of the union.[12] As Monica Hernandez's duties involved only delivery and no on-site labor, she was never entitled to be paid any "prevailing wage."[13][14]

In opposition, plaintiffs Benito Hernandez and Monica Hernandez proffer evidence disputing the facts asserted by the Moving Defendants. As an example, Benito Hernandez and Monica Hernandez both assert that they worked more hours than what they were paid for.[15] As such, a triable issue of material fact exists which precludes summary adjudication.

C. Moving Defendants' motion for summary adjudication of the second cause of action [violation of California Labor Code section 226 – failure to provide itemized wage statement] of the complaint against plaintiffs Benito Hernandez and Monica Hernandez is DENIED.

A claim for damages under Labor Code section 226, subdivision (e) requires a showing of three elements: (1) a violation of Labor Code section 226, subdivision (a); (2) that is "knowing and intentional;" and (3) a resulting injury. (*Willner v. Manpower Inc.*, 35 F. Supp. 3d 1116, 1128 (N.D. Cal. 2014); *Price v. Starbucks, Inc.* (2011) 192 Cal. App. 4th 1136, 1142 (*Price*).)

Preliminarily, Moving Defendants contend the second cause of action is defective because Plaintiffs have not alleged a resulting injury. (See *American Airlines, Inc. v. County of San Mateo* (1996) 12 Cal.4th 1110, 1117–1118—"A defendant's motion for summary judgment necessarily includes a test of the sufficiency of the complaint. [Citation omitted.] When a motion for summary judgment is used to test whether the complaint states a cause of action, the court will apply the rule applicable to demurrers and accept the allegations of the complaint as true. [Citations omitted.]") Moving Defendants rely on *Price*, *supra*, 192 Cal.App.4th at pp. 1142-1143 where the court wrote:

> The injury requirement in section 226, subdivision (e), cannot be satisfied simply because one of the nine itemized requirements in section 226, subdivision (a) is missing from a wage statement. (See *Jaimez v. Daiohs USA, Inc.* (2010) 181 Cal.App.4th 1286, 1306 [105 Cal. Rptr. 3d 443]; see also *Elliot v. Spherion Pacific Work, LLC* (C.D.Cal. 2008) 572 F.Supp.2d 1169, 1181.) By employing the term " 'suffering injury,' " the statute requires that an employee may not recover for violations of section 226, subdivision (a) unless he or she demonstrates an injury arising from the missing information. (*Jaimez v. Daiohs USA, Inc.*, *supra*, at pp. 1306–1307.) Thus, the deprivation of that information, standing alone, is not a cognizable injury. [Footnote.] (*Jaimez*, at pp. 1306–1307.)

However, the *Price* court acknowledged "an injury [may] aris[e] from inaccurate or incomplete wage statements, which required those plaintiffs to engage in discovery and mathematical computations to reconstruct time records to determine if they were correctly paid." (*Price*, *supra*, 192 Cal.App.4th at p. 1143.) The complaint here alleges the wage statements were inaccurate in that they "did not list all hours worked" and "do not accurately reflect

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[9] See Moving Defendants' SS, Fact No. 2.

[10] See Moving Defendants' SS, Fact No. 3.

[11] See Moving Defendants' SS, Fact No. 13.

[12] See Moving Defendants' SS, Fact No. 14.

[13] See Moving Defendants' SS, Fact No. 15.

[14] See Plaintiffs' CRC 3.3150 Responses to Separate Statements and Supporting Evidence, [Additional] Material Disputed Facts Raising Triable Issues ("Plaintiff's AMDF"), Fact Nos. 1 – 12 and 16 – 22.

[15] See Plaintiffs' AMDF, Fact Nos. 12 and 22.

the actual hours worked." (Complaint, ¶¶24 and 29.) The court finds it reasonable to infer from such allegations that plaintiffs were required to engage in discovery and mathematical computations to reconstruct time records to determine if they were correctly paid and plaintiffs would not have filed this complaint if they had been correctly paid.

Apart from the sufficiency of the complaint, Moving Defendants contend they are entitled to summary adjudication of this second cause of action against plaintiffs Benito Hernandez and Monica Hernandez because there was no violation of Labor Code section 226, subdivision (a). To support his argument, Moving Defendants proffer the following facts: With each payroll check by which he was paid by the defendants, Benito Hernandez also received a written "Earnings Statement" which set forth all information required by Labor Code section 226.[16] With each payroll check by which she was paid by the defendants, Monica Hernandez also received a written "Earnings Statement" which set forth all information required by Labor Code section 226.[17]

In opposition, both Benito Hernandez and Monica Hernandez dispute the accuracy of the information provided in the earnings statements they received.[18] As such, a triable issue of material fact exists with regard to whether plaintiffs Benito Hernandez and Monica Hernandez received earnings statements in compliance with Labor Code section 226, subdivision (a).

D. Moving Defendants' motion for summary adjudication of the third cause of action [violation of California Labor Code section 203 – waiting time Penalties] of the complaint against plaintiffs Benito Hernandez and Monica Hernandez is DENIED.

As with the first cause of action, Moving Defendants contend plaintiffs Benito Hernandez and Monica Hernandez were paid in full and on a timely basis.[19] However, as noted above, plaintiffs proffer evidence to dispute Moving Defendants' factual assertion of full and timely payment.[20] Accordingly, a triable issue of material fact exists.

E. Moving Defendants' motion for summary adjudication of the fourth cause of action [failure to pay minimum wages, California Labor Code sections 1194 et seq.] of the complaint against plaintiffs Benito Hernandez and Monica Hernandez is DENIED.

Moving Defendants contend they are entitled to summary adjudication of this fourth cause of action based upon the declaration of defendant Maria Ramirez who declares, "Both Benito Hernandez and Monica Hernandez were paid significantly more than the 'minimum wage' in effect during their periods of employment."[21] The court finds such a statement to be entirely conclusory. As such, Moving Defendants have not met their initial burden "of showing that a cause of action has no merit if the [Moving Defendants have] shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to the cause of action." (Code Civ. Proc., §437c, subd. (p)(2).)

F. Moving Defendants' motion for summary adjudication of the fifth cause of action [failure to pay overtime compensation (Labor Code sections 510 and 1194)] of the complaint against plaintiffs Benito Hernandez and Monica Hernandez is DENIED.

Moving Defendants contend plaintiffs Benito Hernandez and Monica Hernandez were paid for any and all overtime.[22] In opposition, plaintiffs proffer evidence to dispute Moving Defendants' factual assertion of payment for any and all overtime.[23] Accordingly, a triable issue of material fact exists.

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[16] See Moving Defendants' SS, Fact No. 5.

[17] See Moving Defendants' SS, Fact No. 17.

[18] See Plaintiffs' CRC 3.3150 Responses to Separate Statements and Supporting Evidence, Fact Nos. 5 and 17.

[19] See Moving Defendants' SS, Fact Nos. 6 and 18.

[20] See Plaintiffs' CRC 3.3150 Responses to Separate Statements and Supporting Evidence, Fact Nos. 6 and 18.

[21] See Moving Defendants' SS, Fact Nos. 7 and 19.

[22] See Moving Defendants' SS, Fact Nos. 8 and 20.

G. Moving Defendants' motion for summary adjudication of the sixth cause of action [unfair business practices] of the complaint against plaintiffs Benito Hernandez and Monica Hernandez is DENIED.

Plaintiffs' sixth cause of action is a claim for violation of Business and Professions Code section 17200, otherwise known as the Unfair Competition Law ("UCL") which "prohibits unfair competition, including unlawful, unfair, and fraudulent business acts." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1143 (*Korea*).) "The UCL covers a wide range of conduct. It embraces anything that can properly be called a business practice and that at the same time is forbidden by law." (*Korea*, *supra*, 29 Cal.4th at p. 1143, internal quotations omitted.) "Section 17200 'borrows' violations from other laws by making them independently actionable as unfair competitive practices. In addition, under section 17200, a practice may be deemed unfair even if not specifically proscribed by some other law." (*Id.*, internal quotations and citations omitted.)

Moving Defendants seek summary adjudication of the sixth cause of action by arguing that it is dependent upon the preceding claims and since the first five causes of action fail, then so too does the sixth cause of action. However, in light of the court's rulings above, the sixth cause of action also remains.

IV. Tentative Ruling.

The tentative ruling was duly posted.

V. Case Management.

The future trial dates shall REMAIN AS SET.

VI. Order.

Defendants McKim, Bortolotto, Orozco, Maria Ramirez, and Ricardo Ramirez's motion for summary judgment or, alternatively, summary adjudication against plaintiffs Benito Hernandez and Monica Hernandez is DENIED.

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DATED:

HON. SOCRATES PETER MANOUKIAN
Judge of the Superior Court
County of Santa Clara

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[23] See Plaintiffs' CRC 3.3150 Responses to Separate Statements and Supporting Evidence, Fact Nos. 8 and 20.

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