SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

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

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

DATE: 03-05-24 TIME: 9 A.M.

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

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

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

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

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

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

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

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

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	23CV410156 Motion: Judgment on Pleadings	ESP/Environmentally Safe Products and Procedures vs Signia Hotel Management LLC et al	The unopposed motion is GRANTED with 30 days from entry of the order for leave to amend. Defendant Signia Hotel Management must submit the final order within 10 days of the hearing date.
LINE 2	23CV423766 Hearing: Demurrer	JANE DOE vs MILPITAS UNIFIED SCHOOL DISTRICT et al	See Tentative Ruling. Court will prepare the final order.
LINE 3	23CV423766 Motion: Strike	JANE DOE vs MILPITAS UNIFIED SCHOOL DISTRICT et al	See Tentative Ruling. Court will prepare the final order.
LINE 4	22CV396928 Hearing: Interlocutory Judgment	ROBERTO HUERTA, Jr. et al vs FRANCISCO HERNANDEZ	See Tentative Ruling. Defendant shall submit the final order.

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LINE 5	17CV314208 Motion: Set Aside	Jianhua Liu et al vs Yan Liang et al	Plaintiff has moved to set aside the dismissal in this case claiming mistake for failing to appear at the hearing in July 2023. While Plaintiff's counsel explains his failure to appear on July 18, 2034, counsel has failed to explain his failure to appear for the December 15, 2022 hearing. Nor has Plaintiff explained why no request for default has been filed since April 2023, much less entered, despite the striking of Defendant Liang's answer in May 2022 and the fact that the default filed in July 2022 was rejected in April 2023. Even as of July 2023 when this Court dismissed the action, the case was almost six years old, long past the five years allowed for bringing a case to trial. See CCP 583.310. The motion is DENIED. The Court will submit the final order.
LINE 6	19CV344163 Motion: Withdraw as attorney	Selina Andrews vs Jialing Wang	Good cause appearing, the Plaintiff's counsel's motion to withdraw is GRANTED. Plaintiff shall submit the final order.
LINE 7	23CV423613 Hearing: Change Venue	DIANA OCHOA et al vs FORD MOTOR COMPANY et al	See Tentative Ruling. Plaintiff shall submit the final order.
LINE 8	23CV425115 Hearing: Change Venue	ARI LAW, PC vs MUSEUM PLAZA, LLC et al	See Tentative Ruling. Plaintiff shall submit the final order.
LINE 9			
LINE 10			

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LINE 11			
LINE 12			
LINE 13			
LINE 14			
LINE 15			
LINE 16			
LINE 17			

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Calendar Lines 2-3
Case Name: *Doe v. Milpitas Unified School District, et al.*
Case No.: 23CV423766

According to the allegations of the complaint, plaintiff Jane Ba Doe ("Plaintiff") was a student attending Milpitas High School ("MHS"), under the care, control and supervision of defendant Milpitas Unified School District ("District") where defendant Daniel McQuigg ("McQuigg") was Plaintiff's teacher. (See complaint, ¶¶ 9, 11-12.) From September 2016 through May 2020, Plaintiff was sexually harassed, abused and molested by McQuigg both on and off the premises of MHS. (See complaint, ¶¶ 16-18.) In August 2023, McQuigg was arrested and charged with sexually abusing and molesting a minor student at MHS. (See complaint, ¶ 26.)

On August 3, 2023, Plaintiff filed a complaint against defendants District, and McQuigg (collectively "Defendants"), asserting causes of action for:

1) Negligence, negligent supervision, negligent hiring and/or retention, negligent failure to warn, train or educate (against all defendants);
2) Constructive fraud (against all defendants);
3) Intentional infliction of emotional distress (against all defendants);
4) Breach of fiduciary duty (against all defendants);
5) Sexual harassment in violation of Civil Code section 51.9 (against McQuigg);
6) Assault (against McQuigg);
7) Sexual battery (against McQuigg); and,
8) Gender violence (against McQuigg).

Defendant District demurs to the second through fourth causes of action on the ground that they fail to state facts sufficient to constitute causes of action against public entity District.

I. DISTRICT'S DEMURRER TO THE SECOND THROUGH FOURTH CAUSES OF ACTION OF THE COMPLAINT

Fourth cause of action for breach of fiduciary duty

District argues that there is no fiduciary relationship between a school district and a student and thus the second cause of action fails to state facts sufficient to constitute a cause of action. (See District's memorandum of points and authorities in support of demurrer ("District's demurrer memo"), p.4:18-28, 5:5-7.)

"There is no common law governmental tort liability in California; and except as otherwise provided by statute, there is no liability on the part of a public entity for any act or omission of itself, a public employee, or any other person." (*Gibson v. City of Pasadena* (1978) 83 Cal.App.3d 651, 655; see also *Becerra v. County of Santa Cruz* (1998) 68 Cal.App.4th 1450, 1457 (stating that "[i]n California, all government tort liability must be based on statute… Government Code section 815 'abolished all common law or judicially declared forms of liability for public entities, except for such liability as may be required by the federal or state Constitution'"); see also *Wright v. State of California* (2004) 122 Cal.App.4th 659, 672 (dismissing cause of action for intentional infliction of emotional distress against State and Department of Corrections based on their immunity from suit as public entities).)

The complaint does not allege the existence of any statute authorizing a cause of action for breach of fiduciary duty against a school district, and a common law breach of fiduciary duty cause of action may not be alleged against a public entity. Regardless, the Court will determine whether a *fiduciary duty* even exists as between a student and a school district.

The California Supreme Court has stated that "[b]efore a person can be charged with a fiduciary obligation, he must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law." (*City of Hope National Medical Center v. Genentech, Inc*. (2008) 43 Cal.4th 375, 386; see also *Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 632 (stating that there are "two types of fiduciary duties, i.e., 'those imposed by law and those undertaken by agreement'").) Here, there is no allegation that the parties expressly agreed that District would be Plaintiff's fiduciary; thus, the issue is whether there is a fiduciary duty as a matter of law. "Whether a fiduciary duty exists is generally a question of law." (*Hodges v. County of Placer* (2019) 41 Cal.App.5th 537, 546.) "Fiduciary duties arise as a matter of law 'in certain technical, legal relationships.'" (*Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 632.) The Sixth District stated that these relationships "include relationships between: (1) principal and agent [citation] including real estate broker/agent and client [citation], and stockbroker and customer [citation]; (2) attorney and client [citation]; (3) partners [citations]; (4) joint venturers [citation]; (5) corporate officers and directors, on the one hand, and the corporation and its shareholders, on the other hand [citation]; (6) husband and wife, with respect to the couple's community property [citations]; (7) controlling shareholders and minority shareholders [citation]; (8) trustee and trust beneficiary [citation]; (9) guardian and ward [citations]; (10) pension fund trustee and pensioner beneficiary [citation]; (11) executor and decedent's estate [citation]; and (12) trustee and trust beneficiaries." (*Id*. at pp.632-633.) Absent from the above list in *Oakland Raiders* is a relationship between a student and a school district.

In *Thomas v. Regents of University of California* (2023) 97 Cal.App.5th 587, the court stated that "[i]n rejecting a fiduciary relationship between a school and one of its students, courts have reasoned that schools and school officials owe duties to all students, and fiduciary relationships typically involve a special relationship between the parties which requires the fiduciary to exalt the interests of his or her dependent over the competing interests of others, and to act exclusively on the dependent's behalf." (*Id*. at pp.630-631.) Such a relationship would immediately prove unworkable in the school context… [since i]mposing a fiduciary duty in th[os]e circumstances… would 'create an untenable situation in which a college simultaneously owed a fiduciary duty to students with competing interests, whose interests were not only also separate and distinct from one another's, but also often in conflict with the interests of the college itself.'" (*Id*. at p.631; see also *John R. v. Oakland Unified School Dist*. (1987) 240 Cal.Rptr. 319, 325 (stating that "[t]eachers [are] not fiduciaries… [of] adolescent students"), reversed on other grounds in *John R. v. Oakland Unified School Dist*. (1989) 48 Cal.3d 438, 451-452.).) Here, the same rationale would apply; there is no fiduciary relationship between a student and a school district.

In opposition, Plaintiff cites to *Barbara A. v. John G.* (1983) 145 Cal.App.3d 369, *M. W. v. Panama Buena Vista Union School Dist*. (2003) 110 Cal.App.4th 508, and *C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, all of which note the existence of a *confidential* relationship between a school district and its students. (See Pl.'s opposition to District's demurrer ("Opposition to demurrer"), pp.6:1-28, 7:1-19, citing *M.W*., *supra*, 110

Cal.App. 4th at p.517 and *C.A.*, *supra*, 53 Cal.4th at p.871.) The *Barbara A.* court stated that "'[f]iduciary' and 'confidential' have been used synonymously to describe '... any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party… [and] ordinarily arises where a confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he [or she] voluntarily accepts or assumes to accept the confidence, can take no advantage from his [or her] acts relating to the interest of the other party without the latter's knowledge or consent." (*Barbara A.*, *supra*, 145 Cal.App.3d at p. 382.) However, the next sentence in the *Barbara A.* opinion—not cited by Plaintiff—actually makes clear that the two relationships are in fact distinct: "[t]echnically, a fiduciary relationship is a recognized legal relationship such as guardian and ward, trustee and beneficiary, principal and agent, or attorney and client [citation], whereas a 'confidential relationship' may be founded on a moral, social, domestic, or merely personal relationship as well as on a legal relationship." (*Id.*) Likewise, in *Vai v. Bank of America Nat'l Trust & Sav. Asso.* (1961) 56 Cal.2d 329, the California Supreme Court also distinguished a confidential relationship from a fiduciary relationship:

> This fiduciary relationship arises by virtue of the community property system which gives the husband management and control of such property in order that the assets be more efficiently handled, and exists only as to the community property over which the husband has control. It should be distinguished from the confidential relationship which is presumed to exist between spouses. "A confidential relation exists between two persons when one has gained the confidence of the other and purports to act or advise with the other's interest in mind. A confidential relation may exist although there is no fiduciary relation; it is particularly likely to exist where there is a family relationship or one of friendship or such a relation of confidence as that which arises between physician and patient or priest and penitent." [Citation.]
>
> The confidential relationship and obligations arising out of it are, therefore, dependent upon the existence of confidence and trust, but the husband's fiduciary duties in respect to his wife's interest in the community property continue as long as his control of that property continues, notwithstanding the complete absence of confidence and trust, and the consequent termination of the confidential relationship. The prerequisite of a confidential relationship is the reposing of trust and confidence by one person in another who is cognizant of this fact. The key factor in the existence of a fiduciary relationship lies in control by a person over the property of another. It is evident that while these two relationships may exist simultaneously, they do not necessarily do so.

(*Vai*, *supra*, 56 Cal.2d at pp.337-338.)

Here, Plaintiff conflates a confidential relationship with a fiduciary relationship; however, it is clear that while District has a confidential relationship with its pupils, it does not have a fiduciary relationship. In opposition, Plaintiff fails to show how she can otherwise amend the cause of action. (See *Ferrick v. Santa Clara University* (2014) 231 Cal.App.4th 1337, 1341 (Sixth District stating that "[t]he plaintiff 'must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading'… [t]he plaintiff must clearly and specifically set forth the 'applicable substantive law'… and the legal basis for amendment, i.e., the elements of the cause of action and authority for it… [f]urther, the plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of action… "[t]he burden of showing that a reasonable possibility exists that amendment can cure the defects remains with the plaintiff; neither the trial court nor this court will rewrite a complaint… [w]here the appellant offers no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend"), quoting *Cooper v. Leslie Salt Co.* (1969) 70 Cal.2d 627, 636; see also *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349 (stating same); see also *LeBrun v. CBS Television Studios, Inc*. (2021) 68 Cal.App.5th 199, 207 (also stating that "[t]he burden of proving such reasonable possibility [that the defect can be cured by amendment] is squarely on the plaintiff"); see also *Larson v. UHS of Rancho Springs, Inc*. (2014) 230 Cal.App.4th 336, 343.)

Accordingly, District's demurrer to the fourth cause of action for breach of fiduciary duty is SUSTAINED without leave to amend.

Second cause of action for constructive fraud

The second cause of action is for constructive fraud, citing Civil Code section 1573. District argues that the second cause of action fails to state facts sufficient to constitute a cause of action absent a fiduciary relationship. (See District's demurrer memo, p.5:1-11; see also *Mary Pickford Co. v. Bayly Bros., Inc.* (1939) 12 Cal.2d 501, 525 (stating that "it is essential to the operation of the principle of constructive fraud that there be a fiduciary relation").) In opposition, Plaintiff apparently concedes that the second cause of action for constructive fraud is necessarily dependent on the existence of a fiduciary relationship as she does not make any argument to the contrary. Moreover, Civil Code section 1573, which states the elements of constructive fraud, does not authorize a cause of action for constructive fraud against a public entity. (See *C.A. v. William S. Hart Union High School Dist*. (2010) 189 Cal.App.4th 1166, 1176 (stating that "this statutory language does not authorize the assertion of a claim of constructive fraud against a public entity, as required to find a mandatory duty under section 815.6"), overruled on other grounds in *C.A. v. William S. Hart Union High School Dist*. (2012) 53 Cal.4th 861, 879.) Plaintiff fails to show how she can otherwise amend the cause of action. (See *Ferrick v. Santa Clara University* (2014) 231 Cal.App.4th 1337, 1341 (Sixth District stating that "[t]he plaintiff 'must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading'… [t]he plaintiff must clearly and specifically set forth the 'applicable substantive law'… and the legal basis for amendment, i.e., the elements of the cause of action and authority for it… [f]urther, the plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of action… "[t]he burden of showing that a reasonable possibility exists that amendment can cure the defects remains with the plaintiff; neither the trial court nor this court will rewrite a complaint… [w]here the appellant offers no allegations to support the possibility of amendment and no legal

authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend"), quoting *Cooper v. Leslie Salt Co.* (1969) 70 Cal.2d 627, 636; see also *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349 (stating same); see also *LeBrun v. CBS Television Studios, Inc*. (2021) 68 Cal.App.5th 199, 207 (also stating that "[t]he burden of proving such reasonable possibility [that the defect can be cured by amendment] is squarely on the plaintiff"); see also *Larson v. UHS of Rancho Springs, Inc*. (2014) 230 Cal.App.4th 336, 343.)

Accordingly, District's demurrer to the second cause of action for constructive fraud is SUSTAINED without leave to amend.

Third cause of action for intentional infliction of emotional distress

District demurs to the third cause of action for intentional infliction of emotional distress, arguing that: a public entity may not be sued for IIED; District is not subject to liability for the intentional acts of McQuigg pursuant to an intentional tort theory; and, even if a public entity such as District was liable under an IIED theory, Plaintiff has failed to allege sufficient facts to constitute an IIED cause of action. In opposition, Plaintiff argues that: MUSD may be held liable for IIED; MUSD may be held vicarious liable for the acts of McQuigg; and, Plaintiff alleges sufficient facts to support her claim of IIED.

Here, District is correct that a cause of action for intentional infliction of emotional distress may not be asserted against District as "[t]here is no common law governmental tort liability in California." (*Gibson*, *supra*, 83 Cal.App.3d at p.655; see also *Becerra*, *supra*, 68 Cal.App.4th at p.1457 (stating that "[i]n California, all government tort liability must be based on statute… Government Code section 815 'abolished all common law or judicially declared forms of liability for public entities, except for such liability as may be required by the federal or state Constitution'"); see also *Wright v. State of California* (2004) 122 Cal.App.4th 659, 672 (dismissing cause of action for intentional infliction of emotional distress based on immunity from suit as public entities).) Moreover, the California Supreme Court stated that the goals of preventing future harm of the same nature is "best addressed 'by holding school districts to the exercise of due care' in their administrators' and supervisors' 'selection of [instructional] employees and the close monitoring of their conduct,' rather than by making districts vicariously liable for the intentional sexual misconduct of teachers and other employees." (*C.A.*, *supra*, 53 Cal.4th at p.868; see also *Kimberly M.*, *supra*, 215 Cal.App.3d at pp.548-549 (stating that "under *John R.*, appellant has no cause of action against the District for the alleged sexual molestation of appellant at school by appellant's teacher… [t]he Supreme Court concluded that none of the reasons suggested for imposing liability on an enterprise for the risks incident to the enterprise applied to an instance of sexual molestation by a teacher… the connection between the authority conferred on teachers to carry out their instructional duties and the abuse of that authority to indulge in personal, sexual misconduct is simply too attenuated to deem a sexual assault as falling within the range of risks allocable to a teacher's employer… [i]t is not a cost this particular enterprise should bear, and the consequences of imposing liability are unacceptable").)

In opposition, Plaintiff cites to *Lawson v. Super. Ct. (Center Point, Inc.)* (2010) 180 Cal.App.4th 1372, claiming that "the court held that, pursuant to § 815.2, the State can be held vicariously liable for its employees' alleged IIED 'as long as the Complaint adequately pleads the elements of negligence, negligent infliction of emotional distress and [IIED] against

[Defendants], it also adequately pleads the vicarious liability of the State for those causes of action." (Opposition, pp.7:27-28, 8:1-8.) However, this is completely untrue. In *Lawson*, *supra*, plaintiff Denisha Lawson was incarcerated in a correctional facility operated by Center Point, Inc., where she resided with her infant daughter Esperanza. (*Lawson*, *supra*, 180 Cal.App.4th at p.1376.) Lawson filed a complaint against the State and Center Point, alleging that Esperanza suffered physical injury and Lawson experienced emotional distress when defendants failed to obtain medical treatment for Esperanza's serious respiratory infection, asserting causes of action including a fourth cause of action for IIED. (*Id*. at pp. 1376-1379.) The *Lawson* court first noted that "the trial court properly sustained the demurrer as to [] Lawson's causes of action for negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress against the State… [because u]nder… Government Code section 844.6… the State is not liable for any injury to Lawson unless she pleads facts showing that an employee of the State acting within the scope of his employment failed to take action when she was 'in need of immediate medical care' within the meaning of Government Code section 845.6… [and] the allegations of the Complaint do not trigger the liability described in Government Code section 845.6. (*Id*. at pp.1384-1385.) As to Esperanza, the *Lawson* court stated that "none of the enactments identified in the Complaint or the Petition provide a mandatory duty for the State to obtain medical care for Esperanza… [and] the exception to governmental immunity set forth in Government Code section 815.6 does not apply… [a]ccordingly, the Complaint does not state a direct claim against the State under the theory that it breached a mandatory statutory duty to Esperanza." (*Id*. at p.1395.) Further, the *Lawson* court noted that "the Complaint does not plead causes of action for negligent and intentional infliction of emotional distress against Koen and Sanders on behalf of Esperanza… [a]ccordingly, the Complaint also does not adequately allege that the State is vicariously liable to Esperanza for the negligent or intentional infliction of emotional distress by any State employee." (*Id*. at p.1391.) Thus, the *Lawson* court ultimately concluded that "[t]he trial court properly sustained (1) the State's demurrer to (a) the first, third and fourth causes of action brought by Esperanza; [and] (b) the first, second, third and fourth causes of action brought by Lawson…." (*Id*. at p. 1396.)

Plaintiff also cites to *Toney v. State of Cal.* (1976) 54 Cal.App.3d 779, arguing that "the court similarly upheld an IIED cause of action brought by a professor at a state college, stating that it could be held vicariously liable under Government Code § 815.2." (Opposition to demurrer, p.8:5-7.) As Toney indicates, "Section 820.2 [citation] makes the discretionary acts of public employees immune from liability." (*Toney*, *supra*, 54 Cal.App.3d at p.790) However, Plaintiff argues that "MUSD may be held vicariously liable for the acts of McQuigg," citing *C.A. v. William S. Hart Union High School Dist*., *supra*, 53 Cal.4th 861, in what Plaintiff calls "the seminal California case that discusses duties owed by a school and school district to minors that have been sexually abused." (Opposition to demurrer, p.8:18-28, 9:1-9 (also stating that "MUSD, itself… rafif[ied] McQuigg's misconduct… [and] is vicariously liable for its administrators intentional and/or reckless conduct in the handling (or mishandling) of McQuigg").) Unfortunately for Plaintiff, *C.A*., *supra*, does not support her argument.

In *John R. v. Oakland Unified School Dist.* (1989) 48 Cal.3d 438, the plaintiff allegedly was sexually molested by his mathematics teacher while participating in an officially sanctioned, extracurricular program, and the California Supreme Court specifically decided "whether the school district that employed the teacher can be held vicariously liable for the teacher's acts under the doctrine of respondeat superior." (*Id*. at p.441.) The Court stated that

"[w]e hold that the doctrine is not applicable in these circumstances and that while the school district may be liable if its own direct negligence is established, it cannot be held vicariously liable for its employee's torts." (*Id*.) In *C.A. v. William S. Hart Union High School Dist*. (2012) 53 Cal.4th 861, the California Supreme Court again had the opportunity to revisit this issue in which the plaintiff was allegedly subjected to sexual harassment and abuse by the school's head guidance counselor. (*Id*. at p. 866.) The *C.A.* court continued:

> The statutory framework upon which the District's vicarious liability depends is easily set out. Section 815 establishes that public entity tort liability is exclusively statutory: "Except as otherwise provided by statute: [¶] (a) 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." Section 815.2, in turn, provides the statutory basis for liability relied on here: "(a) 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. [¶] (b) Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability." Finally, section 820 delineates the liability of public employees themselves: "(a) Except as otherwise provided by statute (including Section 820.2), a public employee is liable for injury caused by his act or omission to the same extent as a private person. [¶] (b) The liability of a public employee established by this part (commencing with Section 814) is subject to any defenses that would be available to the public employee if he were a private person." In other words, "the general rule is that an employee of a public entity is liable for his torts to the same extent as a private person (§ 820, subd. (a)) and the public entity is vicariously liable for any injury which its employee causes (§ 815.2, subd. (a)) to the same extent as a private employer (§ 815, subd. (b))." (*Societa per Azioni de Navigazione Italia v. City of Los Angeles* (1982) 31 Cal.3d 446, 463 [183 Cal. Rptr. 51, 645 P.2d 102].)

(*C.A*., *supra*, 53 Cal.4th at p.868.)

While the *C.A.* court noted that "[u]nder section 815.2, the school district is liable for the administrator's negligence" (*id*. at p.874), it reiterated "the undesirable consequences that could flow from imposing vicarious liability on public school districts for sexual misconduct by teachers, including 'the diversion of needed funds from the classroom to cover claims' and the likelihood districts would be deterred 'from encouraging, or even authorizing, extracurricular and/or one-on-one contacts between teachers and students.'" (*Id*. at p.878, quoting *John R*., *supra*, 48 Cal.3d at p.451.) The California Supreme Court then stated that it was following *John R*.'s suggestion that the goals of preventing future harm of the same nature is "best addressed 'by holding school districts to the exercise of due care' in their

administrators' and supervisors' 'selection of [instructional] employees and the close monitoring of their conduct,' rather than by making districts vicariously liable for the intentional sexual misconduct of teachers and other employees." (*Id*.; see also *Kimberly M. v. L.A. Unified Sch. Dist*. (1989) 215 Cal.App.3d 545, 548-549 (affirming sustaining of demurrer to cause of action against school district under the doctrine of respondeat superior for sexual molestation without leave to amend, stating that "under *John R*., appellant has no cause of action against the District for the alleged sexual molestation of appellant at school by appellant's teacher… the principal justification for the application of the doctrine of respondeat superior is to spread through insurance the risk for losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise… [t]he Supreme Court concluded that none of the reasons suggested for imposing liability on an enterprise for the risks incident to the enterprise applied to an instance of sexual molestation by a teacher… the connection between the authority conferred on teachers to carry out their instructional duties and the abuse of that authority to indulge in personal, sexual misconduct is simply too attenuated to deem a sexual assault as falling within the range of risks allocable to a teacher's employer… [i]t is not a cost this particular enterprise should bear, and the consequences of imposing liability are unacceptable").) Therefore, Plaintiff's own cited case states that while District may be vicariously liable for negligence, it is not vicariously liable for the intentional sexual misconduct of its teachers.

As with the second and fourth causes of action, it is clear that the third cause of action for IIED cannot state facts sufficient to constitute causes of action against District, and Plaintiffs have not otherwise shown how they may amend the causes of action. (See *Ferrick v. Santa Clara University* (2014) 231 Cal.App.4th 1337, 1341 (Sixth District stating that "[t]he plaintiff 'must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading'… [t]he plaintiff must clearly and specifically set forth the 'applicable substantive law'… and the legal basis for amendment, i.e., the elements of the cause of action and authority for it… [f]urther, the plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of action… "[t]he burden of showing that a reasonable possibility exists that amendment can cure the defects remains with the plaintiff; neither the trial court nor this court will rewrite a complaint… [w]here the appellant offers no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend"), quoting *Cooper v. Leslie Salt Co.* (1969) 70 Cal.2d 627, 636; see also *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349 (stating same); see also *LeBrun v. CBS Television Studios, Inc*. (2021) 68 Cal.App.5th 199, 207 (also stating that "[t]he burden of proving such reasonable possibility [that the defect can be cured by amendment] is squarely on the plaintiff"); see also *Larson v. UHS of Rancho Springs, Inc*. (2014) 230 Cal.App.4th 336, 343.) District's demurrer to the second through fourth causes of action of the complaint on the ground that they fail to state facts sufficient to constitute a cause of action is SUSTAINED without leave to amend.

II. DISTRICT'S MOTION TO STRIKE TO THE SECOND THROUGH FOURTH CAUSES OF ACTION OF THE COMPLAINT

District moves to strike the following from the complaint:

- References to an alleged failure to warn, train, or educate in paragraphs 78-81;

- References to a fiduciary relationship in paragraphs 13, 14, 32, 33, 57, 93, 94, 95, 126 and 129; and,
- Paragraph 6 of the prayer seeking attorney's fees against District.

References to a fiduciary relationship

In light of the above ruling regarding the demurrer to the second through fourth causes of action, District's motion to strike references to a fiduciary relationship in paragraphs 93-95, 126 and 129 is MOOT.

For reasons stated above regarding the demurrer to the second and fourth causes of action, District's motion to strike references to a fiduciary relationship in paragraphs 13, 14, 32, 33 and 57 is GRANTED without leave to amend. Accordingly, the words "fiduciary relationship," on line 23, page 4 in paragraph 13, "fiduciary," on line 6, page 5 in paragraph 14, "fiduciary relationship," on line 18, page 8 in paragraph 32, "fiduciary," on line 1, page 9 in paragraph 33, and ", and fiduciary" on lines 19-20 on page 15 in paragraph 57 of the complaint are hereby stricken.

References to an alleged failure to warn, educate and train

District moves to strike certain references to the alleged failure to warn, train or educate, arguing that the "duty to warn, educate and train" is a common law duty, as enunciated in *Juarez v. Boy Scouts of America, Inc.* (2000) 81 Cal.App.4th 377, overruled in part by *Brown v. USA Taekwondo* (2021) 11 Cal.5th 204, 222, fn. 9.

Here, it is clear that the alleged duty to warn, educate and train is, in fact, a common law duty; Plaintiff does not dispute this. The *Juarez* court specifically details its reasoning as to its conclusion with regards to a duty of care owed by the Scouts to Juarez. (See *Juarez*, *supra*, 81 Cal.App.4th at pp.397-411.) The California Supreme Court also disapproved of the Juarez court's application of the Rowland factors as an alternative source of duty where the Scouts did not create the risk that resulted in the plaintiff's injuries. (See *Brown*, *supra*, 11 Cal.5th at p.222, fn.9.) As previously stated, the complaint must allege the violation of a statutory duty. (See *Gibson*, *supra*, 83 Cal.App.3d at p.655 ((stating that "[t]here is no common law governmental tort liability in California"); see also *Becerra*, *supra*, 68 Cal.App.4th at p.1457 (stating that "[i]n California, all government tort liability must be based on statute… Government Code section 815 'abolished all common law or judicially declared forms of liability for public entities, except for such liability as may be required by the federal or state Constitution'"); see also *Wright v. State of California* (2004) 122 Cal.App.4th 659, 672 (dismissing cause of action for intentional infliction of emotional distress based on immunity from suit as public entities).) Moreover, the California Supreme Court has stated that "we have weighed in this case the value of negligence actions in providing compensation to injured parties and preventing future harm of the same nature, and have followed *John R.*'s suggestion that these remedial goals are best addressed 'by holding school districts to the exercise of due care' in their administrators' and supervisors' 'selection of [instructional] employees and the close monitoring of their conduct,' rather than by making districts vicariously liable for the intentional sexual misconduct of teachers and other employees." (*C.A.*, *supra*, 53 Cal.4th 861, 878.) Ultimately, the *C.A.* court stated: "we conclude a public school district may be vicariously liable under section 815.2 for the negligence of administrators or supervisors in

hiring, supervising and retaining a school employee who sexually harasses and abuses a student." (*Id*. at p.879.) Moreover, with regards to the duty to educate, in *Chevlin v. L.A. Community College Dist.* (1989) 212 Cal.App.3d 382, the court has noted that "[f]or policy reasons… the law refuses to hold a public school system liable to a student who claims [s]he was inadequately educated." (*Id*. at p.399; see also *Campaign for Quality Education v. State of California* (2016) 246 Cal.App.4th 896, 903, 915 (affirming the sustaining of demurrer, stating that "the difficult and policy-lade questions associated with education adequacy and funding [are best left] to the legislative branch").) In opposition, Plaintiff cites to *Phyllis P. v. Super. Ct. (Claremont Unified School Dist.)* (1986) 183 Cal.App.3d 1193; however, there, the alleged duties were statutory as they were "alleged to have arisen under numerous provisions of the Education Code [and] the Penal Code…." (*Id*. at p.1195.) Plaintiff has not identified a statute upon which to base the alleged duty to warn, educate and train in either her complaint nor in her opposition.

As Plaintiff apparently concedes that no such statutory duty exists, and that the alleged duty to warn, educate and train is a common law duty, District's motion to strike the references to the alleged duty to warn, educate and train is GRANTED without leave to amend. Accordingly, paragraphs 78-81 of the complaint concerning the alleged duty to warn, educate and train are hereby stricken.

Attorney's fees

District seeks to strike the prayer's request for attorney's fees pursuant to Code of Civil Procedure sections 1021.5, 52 and 52.4. As a preliminary matter, Plaintiff presumably refers to Civil Code section 52 and 52.4 as Code of Civil Procedure sections 52 and 52.4 do not currently exist.

As to Civil Code section 52.4, in opposition, Plaintiff concedes that such a request for attorney's fees pursuant to section 52.4 is improper and withdraws such a request. (See Pl.'s opposition to District's motion to strike ("Opposition to strike"), p.10:10-13.) Accordingly, District's motion to strike Civil Code 52.4 from paragraph 6 of the prayer as to it is GRANTED.

As to Civil Code section 52, that section provides for attorney's fees for the violation of Civil Code sections 51, 51.5, 51.6, 51.7 and 51.9. (See Civ. Code § 52, subds. (a)-(b).) The complaint includes a fifth cause of action for sexual harassment in violation of Civil Code section 51.9 against McQuigg. In opposition, Plaintiff argues that "Plaintiff alleges that MUSD violated C.C. § 51.9 based on the allegations of sexual harassment." (Opposition to strike, p.10:7-8, citing complaint, ¶¶ 132-140.) However, those paragraphs of the complaint actually allege that *McQuigg* violated section 51.9. Accordingly, District's motion to strike Civil Code 52 from paragraph 6 of the prayer as to it is GRANTED without leave to amend as to District.

Lastly, as to Code of Civil Procedure section 1021.5, it states:

> Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary

> or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any.

(Code Civ. Proc. § 1021.5.)

District argues that "Plaintiff's pecuniary interest is significantly greater than any benefit conferred upon the public" and that thus the request for attorney's fees pursuant to section 1021.5 is improper. (See District's memorandum of points and authorities in support of motion to strike ("District's strike memo"), pp. 6:9-28, 7:1-14.) In opposition, Plaintiff argues that "[w]hile it is true that if Plaintiff is successful in this litigation she will receive a pecuniary benefit, that is not of import." (Opposition to strike, p.9:24-25.) "What is important is that a benefit will be instilled upon society—chiefly, the unveiling of dangerous, wholly unavoidable conditions created by Defendants like MUSD." (*Id*. at p.9:25-27.) "The present litigation transcends the interests of a single litigant, ideally penalizing and dissuading future indifference to children's safety and well-being." (*Id*. at p.9:27-28.)

"The private attorney general theory recognizes citizens frequently have common interests of significant societal importance, but which do not involve any individual's financial interests to the extent necessary to encourage private litigation to enforce the right." (*Beach Colony II v. California Coastal Com.* (1985) 166 Cal.App.3d 106, 114.) "To encourage such suits, attorneys['] fees are awarded when a significant public benefit is conferred through litigation pursued by one whose personal stake is insufficient to otherwise encourage the action." (*Id*.) "Section 1021.5 was not designed as a method for rewarding litigants motivated by their own pecuniary interests who only coincidentally protect the public interest." (*Id*.) Here, the fact that Plaintiff seeks to penalize District underscores the impropriety of her request. (See *Friends of Spring Street v. Nevada City* (2019) 33 Cal.App.5th 1092, 1107 (stating that "[t]he intent of section 1021.5 fees is not 'to punish those who violate the law but rather to ensure that those who have acted to protect public interest will not be forced to shoulder the cost of litigation'").) Moreover, in *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, the court indicated that "Code of Civil Procedure section 1021.5 does not authorize an award of fees in cases such as this [for sexual discrimination and sexual harassment].... The notoriety of this case may have brought the issue of sexual harassment in employment into the public eye, and the verdict may have sent the message that sexual harassment in the workplace will not be tolerated; however, this action was brought not to benefit the public, but as a means of vindicating Weeks's own personal rights and economic interest." (*Id*. at pp.1170-1171.) As District notes, the pecuniary interest of Plaintiff is significantly greater than any benefit conferred upon the public and the complaint is devoid of any allegations supporting Plaintiff's assertion of the existence of any public benefit achieved through the instant litigation. District's motion to strike paragraph 6 of the prayer as to District is GRANTED without leave to amend, and paragraph 6 of the prayer regarding attorney's fees is hereby stricken as against defendant District.

The Court will prepare the Order.

Calendar line 4
Case Name: Huerta et al v. Hernandez
Case No.: 22CV396928

Defendant moves for interlocutory judgment and appointment of a partition referee. Plaintiffs oppose the motion claiming it is untimely because (1) notice was improper; and (2) it seeks "premature judgment" without substantial discovery. Plaintiffs further object to the referee proposed by Defendant contending that the proposed referee has ties to defense counsel.

Plaintiffs brought a complaint for partition of the property by sale on April 11, 2022. Both sides agree that each party to this action owns an undivided one-third interest in the property. Each side wants the property partitioned by sale. The complaint asks for a determination that plaintiffs and defendant are the co-owners of the property, for a determination that no other persons have any interest in the property, for an order and judgment that the property be sold and that from the proceeds of the sale any encumbrances be paid, together with the costs and expenses of this action and the sale, and that the net proceeds be divided among the parties in accordance with their respective interests. See Complaint.

Given that all parties agree to the above, it is difficult to understand what Plaintiff is objecting to with respect to the request for entry of an interlocutory judgment to determine "the interest of the parties in the property" and to "order[] the partition of the property", pursuant to CCP section 872.720(a). In their complaint, the Plaintiffs request what is being requested here by defendant.

Plaintiffs first object that the motion was not properly noticed, citing CCP section 437c(2) , the statute regarding summary judgment, and 1010.6. Those provisions are not applicable. Plaintiffs cite nothing to support their claim that a motion for interlocutory judgment should be governed by the rules applicable to summary judgment motions. The court finds that the motion was timely served.

Plaintiffs next object that the motion is premature because only a plaintiff can move for interlocutory judgment under CCP section 872.720 because the statute requires the court to find that a "plaintiff" rather than a defendant is entitled to partition. But the statute is silent as to whom can make the motion. It instead prescribes the circumstances when the court can make such a judgment – only after it determines that the plaintiff is entitled to partition. Here, there is no dispute that the plaintiffs are entitled to partition. All parties agree that plaintiffs are entitled to partition, all parties agree that each party is entitled to an undivided one-third share of the property, and all agree that the property should be subject to partition by sale.

Plaintiffs next contend that the motion should be continued to allow for discovery. First, in so arguing, plaintiffs rely on section 437c, which the court finds is not applicable to this case. But even so, the discovery sought relates to how the proceeds of the sale of the property should be divided, not whether the property should be partitioned or what share of the property each party is entitled to. Plaintiffs have not presented persuasive cause for why this motion cannot be granted prior to the resolution of issues of contribution or reimbursement or how the proceeds of the sale should be divided.

The court therefore GRANTS the motion for an interlocutory judgment finding that plaintiffs are entitled to partition, that each party owns an undivided one-third interest, and that the property shall be partitioned by sale. Defendant's request for appointment of Amy Harrington as referee is DENIED.

The court further orders the following schedule to move forward the resolution of this case. The parties shall:

1. provide discovery to the opposing side relating to any requested accounting, or claims for reimbursement or contribution, no later than April 22, 2024;
2. Defendant must allow Plaintiffs to make an inspection of the property no later than March 25, 2024;
3. Plaintiffs shall propose 3 referees to Defendant and Defendant shall chose one of the three, or the parties can agree to a referee, no later than April 1, 2024, at which point the parties will submit a stipulation and order to the Court no later than April 15, 2024 so that the Court can appoint the agreed upon referee.

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Calendar Line 7
Case Name: Diana Ochoa et al v. Ford Motor Company et al
Case No.: 23CV423613

Defendants bring a motion to transfer venue to Contra Costa County. "'It is a long established rule that a motion for change of venue must satisfy two requirements: (1) It must be shown the action is proper in the county to which the movant seeks transfer; and (2) it must be shown the county in which the action was filed was improper under any applicable theory (Citation).'" *Easton v. Superior Court* (1970) 12 Cal.App.3d 243, 245-246. A plaintiff's choice of venue is "presumptively correct." *Id*. At 247. The burden of proof is on defendant.

Defendants first claim that venue must be transferred because it is not proper pursuant to CCP section 395.5. Under 395.5, a plaintiff must bring its case where the contract was made or performed, where the obligation or liability arose or where the breach occurred, or in the county where the principal place of business of such corporation is situated. CCP section 395.5.

Plaintiff argues that venue is proper in Santa Clara County because it is the principal place of business within California for Ford Motor Company. In support of this claim, Plaintiff cites to its Request for Judicial Notice, Ex. 1. But Plaintiff has not in fact filed a request for judicial notice. Instead, Plaintiff has simply attached a declaration to its opposition stating that it has attached Ford's "most recent Statement of Information Corporation Form" attached as Exhibit 1. Even if Plaintiff had made a request for judicial notice, exhibit 1 is not subject to judicial notice and the request would be DENIED. Exhibit 1 is a hearsay document and does not come under the provisions of Evidence Code section 452. Accordingly, Plaintiff has failed to demonstrate that Ford's principal place of business within California is in Santa Clara County and fails to show that venue is proper on this basis under CCP section 395.5.

Plaintiff next claims that venue is proper here because Defendants have failed to establish where Ford's principal place of business is within California, and that therefore, "as a foreign corporation . . . it may be sued in any county in the state." *Easton*, 12 Cal.App.3d at 246-247. Defendants do not counter this argument other than to say it believes Contra Costa is the more appropriate venue. Because Defendants fail to show that the action is improperly filed in Santa Clara County, they are not entitled to transfer venue under 395.5. Nor is venue improper because Defendant Michael Stead's Hilltop Ford Kia resides in Contra Costa County. "[S]o long as the plaintiff chooses a venue that is proper as to one defendant, the entire case may be tried there, regardless of whether venue would be improper with respect to other defendants if the causes of action against them were analyzed separately." *K.R.L. Partnership v. Superior Court* (2004) 120 Cal. App. 4th 490, 504.

Defendants next argue that under the discretionary venue rules, venue should be transferred for the convenience of witnesses and ends of justice, citing CCP section 397(c). A change of venue made pursuant to this section lies essentially within the sound discretion of the trial judge and her ruling will not be disturbed unless it is made to appear as a matter of law that there has been an abuse of that discretion. *J. C. Millett Co. v. Latchford-Marble Glass Co.* (1959)167 Cal. App. 2d 218, 224. Defendants assert that the conduct and the witnesses are all in Contra Costa County such that the case should be there, not in Santa Clara County, where not even the Plaintiff lives. However, Defendants do not provide a sufficient factual basis to support such claims. While they provide evidence showing that the car was purchased and repairs attempted in Contra Costa County (see Decl.of Guzman, Exhibits B and C), the declaration

provides no facts as to where the prospective witnesses are. Rather, the declaration states "on information and belief, [I] understand these witnesses *will likely reside* in and around Contra Costa County." (Emphasis added.) This is insufficient to support a finding that moving the trial to Contra Costa county will be more convenient for the witnesses. See *J.C. Millett Co.*, 167 Cal.App. 2d at 225 (an affidavit devoid of the probative facts is insufficient). Because a plaintiff's choice of venue is presumptively correct and because Defendants have failed to establish that venue in Santa Clara County will be inconvenient for the witnesses, as opposed to likely to be inconvenient for them, Defendants have failed to meet their burden and the motion is DENIED and as such the request for fees is also denied.

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Calendar Line 8
Case Neme: Ari Law v. Museum Plaza et al.
Case No.: 23CV425115

Defendants bring a motion to transfer venue to San Francisco County. "'It is a long established rule that a motion for change of venue must satisfy two requirements: (1) It must be shown the action is proper in the county to which the movant seeks transfer; and (2) it must be shown the county in which the action was filed was improper under any applicable theory (Citation).'" *Easton v. Superior Court* (1970) 12 Cal.App.3d 243, 245-246. A plaintiff's choice of venue is "presumptively correct." *Id.* At 247. The burden of proof is on defendant.

Plaintiff requests judicial notice of court filings in a different case but with the same parties. The Court DENIES the request for judicial notice of these documents because they are not helpful or relevant to resolving issues raised by the instant demurrer. See *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 748, fn. 6 (a court need not take judicial notice of a matter unless it "is necessary, helpful, or relevant").

Defendants first claim that under CCP section 395, venue is properly brought in SF County. But the controlling statute is 395.5 because each of the defendants, other than Walid Mando, is an LLC. While no California case specifically holds that an LLC is an association for purposes of CCP 395.5, California has considered a law partnership as such (see *Buran Equip. Co. v. Sup. Ct.* (1987) 190 CalApp.3d 1662, 1665-1666) and various Federal cases have so held in the context of jurisdiction, rather than venue. See *Ferrell v. Express Check Advance of SC LLC* (4th Cir. 2010) 591 F.3d 698, 702-03; *Siloam Springs Hotel, LLC v. Century Sur. Co.* (10th Cir. 2015) 781 F.3d 1233, 1234; *Zambelli Fireworks Mfg. Co. v. Wood* (3rd Cir. 2010) 592 F.3d 412, 419-420. Though not controlling, those cases are persuasive for the proposition that LLCs should be treated as incorporated associations, such that section 395.5 controls.

Under 395.5, a plaintiff must bring its case where the contract was made or performed, where the obligation or liability arose or where the breach occurred, or in the county where the principal place of business of such corporation is situated. CCP section 395.5. Here, the Plaintiff has established that the obligation arose and the breach occurred in Palo Alto, as it claims that at the time Defendants failed to pay the attorney fees owed, it had relocated to Palo Alto. See Decl. of Aalaei, paras. 5 and 6. That the contract was initially formed in San Francisco or that much of the contract was performed in San Francisco is of no moment since by the time the breach occurred, Plaintiff was in Santa Clara County.

Defendants next argue that even if 395.5 were the proper statute, venue would still be improper because "it is well recognized that when a plaintiff brings an action against several defendants, both individual and corporate, in a county in which none of the defendants reside, an individual defendant has the right to change venue to the county of his or her residence. This is true even though the action was initially brought in a county where the corporate defendants may be sued under Code of Civil Procedure section 395.5," citing *Brown v Superior Court*, 37 Cal. 3d 477, 482 n.6 (1984) (emphasis added). But Defendants ignore the effect of the alter ego allegations of the complaint. Such allegations place "the individual in the same position as the corporation, as a party to the contract. Venue is then proper where the action could be laid for breach of contract against an individual or corporate defendant." *Lebastchi v. Superior Court* (1995) 33 Cal.App.4th 1465, 1467. Accordingly, venue is proper

in Santa Clara County. As such, Defendants have failed to meet their burden to entitle them to transfer venue.

The motion is denied, as is Defendants' request for attorney fees. The Court also denies Plaintiff's request for attorney's fees.

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