TENTATIVE RULINGS: CIVIL LAW & MOTION

Wednesday, May 20, 2026 at 3:00 p.m.
Courtroom 18 – Visiting Judge Rene Chouteausee below for D16's L&M tentative rulings****
Civil and Family Law Courthouse
3055 Cleveland Avenue
Santa Rosa, California 95403

The tentative rulings will become the ruling of the Court unless a party desires to be heard. If you desire to appear and present oral argument, **YOU MUST NOTIFY** the Judge's Judicial Assistant by telephone at **(707) 521-6724**, and all other opposing parties of your intent to appear, **and whether that appearance is in person or via Zoom**, no later 4:00 p.m. the court day immediately preceding the day of the hearing.

If the tentative ruling is accepted, no appearance is necessary unless otherwise indicated.

TO JOIN ZOOM ONLINE:

Department 18:
Meeting ID: **160—739—4368**
Password: **000169**
https://sonomacourtorg.zoomgov.com/j/1607394368?pwd=aW1JTWlIL3NBeE9LVHU2NVVpQlVRUT09

TO JOIN ZOOM BY PHONE:
By Phone (same meeting ID and password as listed for each calendar):
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Unless notification of an appearance has been given as provided above, the tentative ruling shall become the ruling of the Court the day of the hearing at the beginning of the calendar.

1. 26CV01041, Gordon N. Ball, Inc. v. City of Santa Rosa

Petitioner's application for preliminary injunction or alternative writ of mandate is **DENIED**.

Petitioner's petition for writ of mandate is **DENIED**.

The following objections made by the City of Santa Rosa are **SUSTAINED**: 2, 5, 6, 9-13, 15, and 16. The remaining objections are **OVERRULED**.

Respondent City of Santa Rosa's counsel shall submit a written order consistent with this tentative ruling and in compliance with Rule 3.1312.

Analysis:

On November 4, 2025, the Respondent, City of Santa Rosa ("the City" or "Respondent"), issued an invitation for bids ("IFB") requesting bids for a project that would construct a bicycle and pedestrian shared-use overcrossing spanning U.S. 101 to connect Elliot Avenue to Edwards Avenue ("Project"). The bid package included, among other things, a notice to bidders, special provisions, and standard specifications. The Instructions to Bidders required bidders to completely fill out each section of the Bid Proposal and prohibited alterations or modifications to the bid forms. The Bid Documents further required that specified forms be submitted with the bid proposal and provided that non-conforming bids will be rejected.

On November 21, 2025, the City issued Addendum No. 1 revising the "Instructions to Bidders" to require that the bidder submit the Equal Employment Opportunity ("EEO") certifications for itself and all of its subcontractors and further required that the completed certifications be submitted at the time of bid.

The IFB provided that any contract awarded would be awarded to "to the responsible bidder that submitted the lowest responsive bid." It also provided for a bid protest process whereby one bidder could challenge the award to another bidder on the grounds that the selected bidder was not responsible or did not submit the lowest responsive bid.

On January 8, 2026, the City accepted bids for the Project. After opening the bids, Petitioner, Gordon N. Ball, Inc. ("GNB" or "Petitioner") was the apparent low bidder and Real Party in Interest, Ghilotti Construction ("Ghilotti"), was second. GNB submitted the lowest bid, but its bid failed to include the completed EEO Forms for the subcontractors listed in its bid. Ghilotti's bid was the second lowest bid and included the EEO Forms for all of its listed subcontractors.

On January 12, 2026, Ghilotti timely submitted a bid protest asserting that GNB's bid was non-responsive because it failed to submit the required EEO Certifications for each listed subcontractor at the time of bid. On the day following Ghilotti's bid protest, GNB attempted to cure its mistake by submitting the Forms for its subcontractors. However, a complete bid is required to be submitted "with all required forms and attachments, before the deadline." Furthermore, the Instructions to Bidders expressly warn bidders that "[m]aterial submitted after the Response Deadline will not be considered."

On January 30, 2026, the City informed Ghilotti and GNB of the City's decision to award the contract to Ghilotti because GNB failed to comply with the requirements of the bid documents, rendering GNB's bid non-responsive.

The Instructions to Bidders emphasized that the bid protest procedures and time limits "are mandatory and are the bidder's sole and exclusive remedy in the event of a bid protest. A bidder's failure to comply with these procedures will constitute a waiver of any right to further pursue a bid protest, including…initiating of legal proceedings." GNB did not submit a bid protest to Ghilotti's bid.

GNB attempted to challenge Ghilotti's bid in GNB's response to Ghilotti's bid protest. GNB also submitted a public comment on February 6th, for review by the City Counsel. GNB also addressed the City Counsil at the meeting to approve the contract award to Ghilotti. With full knowledge of GNB's concerns and accusations, the City Council voted to award the contract for the Project to Ghilotti. The approved resolution included the finding that "the Council finds that Ghilotti is the lowest responsible and responsive bidder on the Contract."

On February 20, 2026, GNB filed its verified petition for writ of mandate in this action seeking a preemptory writ of mandate compelling the City to reverse its decision to award the contract to Ghilotti and instead award it to GNB as the lowest bidder.

The parties have stipulated that the hearing on GNB's motion for a preliminary injunction will instead be a hearing on the merits of GNB's writ of mandate. Accordingly, GNB's application for preliminary injunction pending the outcome of its petition for writ of mandate is **MOOT**. It is therefore **DENIED**.

I. Standard of Review

The standard of review in a mandamus action under Code of Civil Procedure § 1085 is well established in California law:

> [Code of Civil Procedure § 1085] permits judicial review of ministerial duties as well as quasi-legislative acts of public agencies. Mandamus lies to compel the performance of a clear, present, and ministerial duty where the petitioner has a beneficial right to performance of that duty. Mandamus may issue to correct the exercise of discretionary legislative power, *but only* if the action taken is so palpably unreasonable and arbitrary as to show an abuse of discretion as a matter of law. This is a highly deferential test…"In reviewing such quasi-legislative decisions, the trial court does not inquire whether, if it had power to act in the first instance, it would have taken the action taken by the administrative agency. The authority of the court is limited to determining whether the decision of the agency was arbitrary, capricious, entirely lacking in evidentiary support, or unlawfully or procedurally unfair."

(*Carrancho v. California Air Res. Bd.* (2003) 111 Cal.App.4th 1255, 1264-6, italics in original.)

> Appellate review of the award of a public contract is governed by certain well-established principles. In a mandamus action arising under Code of Civil Procedure section 1085, we limit our review to an examination of the proceedings before the agency to determine whether its findings and actions are supported by substantial evidence.

(*MCM Const., Inc. v. City & County of San Francisco* (1998) 66 Cal.App.4th 359, 368.)

> "Our review is limited to an examination of the proceedings to determine whether the City's actions were arbitrary, capricious, entirely lacking in evidentiary support or inconsistent with proper procedure. There is a presumption that the City's actions were supported by substantial evidence, and [petitioner/plaintiff] has the burden of proving

> otherwise. We may not reweigh the evidence and must view it in the light most favorable to the City's actions, indulging all reasonable inferences in support of those actions. [Citations.] Mandamus is an appropriate remedy to compel the exercise of discretion by a government agency, but does not lie to control the exercise of discretion unless under the facts, discretion can only be exercised in one way.

(*Ibid*.)

"A public entity's 'award of a contract, and all of the acts leading up to the award, are legislative in character.'" (*San Diegans for Open Government v. City of San Diego* (2018) 31 Cal.App.5th 349, 363.) "[B]oth the award of the contracts and the decision to reject the protest should be considered legislative actions." (*Mike Moore's 24-Hour Towing v. City of San Diego* (1996) 45 Cal.App.4th 1294, 1303.)

II. Petitioner Has Failed to Show That the City Abused its Discretion in Deciding Not to Waive the Deviation in Petitioner's Bid

"Responsiveness can be determined from the face of the bid and the bidder at least has some clue at the time of submission that problems might exist. In most cases, the determination of nonresponsiveness will not depend on outside investigation or information…" (*Taylor Bus Service, Inc. v. San Diego Bd. of Education* (1987) 195 Cal.App.3d 1331, 1342.) "Given the predetermination of bid specifications, and given the more apparent and less external nature of the factors demonstrating nonresponsiveness, less due process is reasonably required with that determination than when nonresponsibility is declared." (*Ibid*.)

Here, there can be no dispute that GNB's bid was not responsive. GNB admits that its EEO forms were "tardy." However, GNB asserts that its late submission of the EEO forms "cured" the "inconsequential" deficiencies of its bid; thus, the City should have waived the deviation.

In GNB's reply brief, GNB does not respond to the *MCM Const., Inc. v. City & County of San Francisco* (1998) 66 Cal.App.4th 359 case cited by Ghilotti and the City. The same argument raised by GNB here was raised in *MCM*, where the Court stated,

> MCM argues that assuming these City-imposed bid requirements are valid, the City could and should have waived this deviation from the strict requirements of the bid specifications as the deviation did not affect the amount of MCM's bid and was, consequently, insubstantial…
> As a threshold matter, MCM's argument founders upon its assumption that if the deviation from bid specifications were immaterial and thus could be waived by the City, the City necessarily abused its discretion in refusing to waive the deviation. No case cited by MCM holds that where the City *can* waive a deviation it *must* do so.

(*MCM Const., Inc. v. City & County of San Francisco* (1998) 66 Cal.App.4th 359, 373. Italics in original.) "MCM concedes, as it must, that it did not fully comply with bid specifications. Given that fact, the City was not required to award MCM the bid even if its deviations were immaterial." (*Id*. at 374.)

The same is true here. GNB concedes that it did not fully comply with the bid specifications. Given that fact, the City was not required to award GNB the bid even if its deviation was "inconsequential" or "cured." This is especially so considering that the Instructions for Bidders warned bidders that "[m]aterial submitted after the Response Deadline will not be considered." GNB has not shown that the City's decision to reject the non-responsive bid was arbitrary, capricious, entirely lacking in evidentiary support, or unlawfully or procedurally unfair.

III. Petitioner Has Failed to Show that Ghilotti's Bid was Not Responsive

"A bid is responsive if it promises to do what the bidding instructions require…Usually, whether a bid is responsive can be determined from the face of the bid without outside investigation or information." (*MCM Const., Inc. v. City & County of San Francisco* (1998) 66 Cal.App.4th 359, 368.)

GNB asserts that GNB's bid was non-responsive because GNB reached out to some of the subcontractors listed in GNB's EEO forms and those subcontractors confirmed that they never completed a form for Ghilotti. Therefore, GNB accuses Ghilotti of fabricating the EEO forms submitted with its bid. GNB relies mostly on hearsay evidence to support these accusations. The Court has sustained the City's objections to the hearsay evidence. Aside from hearsay, GNB relies solely on speculation that such fabrication occurred.

On the face of Ghilotti's bid, it appears to be responsive. This outside information that GNB urges the Court to consider does not speak to the responsiveness of the bid. It might speak to the responsibility of Ghilotti, but that is a separate analysis (see below). On its face, Ghilotti's bid was responsive. GNB has failed to show an abuse of discretion in finding Ghilotti's bid to be responsive.

IV. Petitioner Has Failed to Show the City Abused its Discretion in Finding Ghilotti to be Responsible

"A bidder is responsible if it can perform the contract as promised." (*Taylor Bus Service, Inc. v. San Diego Bd. of Education* (1987) 195 Cal.App.3d 1331, 1341–1342.) "A determination that a bidder is responsible is a complex matter dependent, often, on information received outside the bidding process and requiring, in many cases, an application of subtle judgment." (*Ibid*.)

While the term "responsible" "includes the attribute of trustworthiness, it also has reference to the quality, fitness and capacity of the low bidder to satisfactorily perform the proposed work." (*City of Inglewood-L.A. County Civic Center Auth. v. Superior Court* (1972) 7 Cal.3d 861, 867.) "Thus, a contract must be awarded to the lowest bidder unless it is found that he is not responsible, i.e., not qualified to do the particular work under consideration." (*Ibid*.)

Ghilotti was the lowest responsive bidder. Therefore, the contract must have been awarded to Ghilotti unless it was found that Ghilotti is not responsible. GNB never formally protested Ghilotti's bid according to the prescribed procedures. However, GNB attempted to show that Ghilotti is not responsible by commenting on the suspected inauthenticity of Ghilotti's EEO forms in GNB's response to Ghilotti's bid protest, in a public written comment to the City

Counsel, and at the City Counsel meeting. The City was not required to consider GNB's untimely arguments regarding Ghilotti, but it did nonetheless.

While GNB seems to assert that the Court must assume that the City Counsel did not take GNB's comments into consideration, the Court finds the opposite to be true. Dan Hennessey, the Director of Transportation and Public Works for the City, has submitted a declaration stating that GNB's allegations were thoroughly reviewed and considered. He states,

> I considered GNB's allegations about Ghilotti's forms. I concluded that, even if what GNB accused Ghilotti of doing was true, it would not be something that would cause me to recommend rejecting Ghilotti, a contractor with a history of reliable performance for the City, as not being responsible.

(Hennessey Decl. ¶ 26.)

To the extent GNB suggests that the City had a duty to conduct some sort of investigation into the trustworthiness of Ghilotti, such an assertion is not supported by law. The duty imposed upon the City would be one of evaluation. Petitioner has not shown that such an evaluation did not occur. Rather, the record reflects the opposite to be true.

The Court may not substitute its judgment for the judgment of the City Counsel. GNB argues that its accusations regarding Ghilotti's trustworthiness "should have caused Ghilotti to be deemed non-responsible." However, "where reasonable minds may disagree as to the wisdom of the agency's decision, its determination must be upheld." (*Helena F. v. West Contra Costa Unified School Dist.* (1996) 49 Cal.App.4th 1793, 1799.)

GNB has not shown that the City's decision to find Ghilotti responsible was arbitrary, capricious, entirely lacking in evidentiary support, or unlawfully or procedurally unfair to support an abuse of discretion finding. Accordingly, the decision must be upheld.

2. 25CV01716, Smith v. General Motors, LLC.

Defendant's motion for judgment on the pleadings of Plaintiff's Fifth Cause of Action is **GRANTED**. Leave to amend is **GRANTED**. Defendant's request for judicial notice is **GRANTED**.

Defendant's counsel shall submit a written order consistent with this tentative ruling and in compliance with Cal. Rules of Court, Rule 3.1312.

Analysis:

"A motion for judgment on the pleadings performs the same function as a general demurrer...." (*Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 999, 79 Cal.Rptr.2d 544.) "It is axiomatic that a demurrer lies only for defects appearing on the face of the pleadings." (*Harboring Villas Homeowners Assn. v. Superior Court* (1998) 63 Cal.App.4th 426, 429.) "The grounds for motion provided for in this section shall appear on the face of the challenged

pleading or from any matter of which the court is required to take judicial notice." (CCP § 438(d).) "A trial court's determination of a motion for judgment on the pleadings *accepts as true* the factual allegations that the plaintiff makes." (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal. 4th 468, 515. Emphasis added.) "In addition, it gives them a liberal construction." (*Ibid*.)

On March 7, 2025 Plaintiff Ronald Smith filed a complaint against Defendant General Motors, LLC ("GM") arising out of an express warranty agreement relating to Plaintiff's vehicle (Song Beverly Consumer Warranty Act claims). Plaintiff's operative complaint is the First Amended Complaint filed August 22, 2025, which alleges four causes of action for statutory violations and a fifth cause of action for fraudulent inducement-concealment.

Defendant herein seeks judgment on the pleadings solely on Plaintiff's fifth cause of action for fraudulent inducement-concealment. Defendant argues that the cause of action is barred by the applicable statute of limitations. Defendant also argues that Plaintiff has failed to state sufficient fact supporting his fraudulent concealment-inducement claim and that the claim is barred by the economic loss rule. The Court addresses each of these arguments below.

I. It is Not Clear from the Face of the Complaint that Plaintiff's Fifth Cause of Action is Time-Barred

A demurrer on the ground of the bar of the statute of limitations will not lie where the action *may be*, but is not necessarily, barred. (*Childs v. State of California* (1983) 144 Cal.App.3d 155, 161.) "It must appear *affirmatively* that, upon the facts stated, the *right of action is necessarily barred*. (*Ibid.*, citing *Valvo v. University of Southern Cal.* (1977) 67 Cal.App.3d 887, 895. Italics in original.) "[W]e consider the pleading of 'on or about' June 10, 1980, sufficient to withstand a general demurrer, as it reveals only that plaintiff's action *may* be barred." (*Ibid*. See also *Moseley v. Abrams* (1985) 170 Cal.App.3d 355, 359-360 [where Plaintiff broadly alleged "on or about July of 1977", the Court found that a demurrer could not be sustained on the basis of the statute of limitations].)

Defendant argues that Plaintiff's fifth cause of action is barred by the applicable statutes of limitation because Plaintiff purchased the vehicle on May 9, 2021. Therefore, as argued, Plaintiff would have had to file his claim no later than May 9, 2024. However, Plaintiff has not alleged when he purchased the vehicle. The Court cannot assume when this happened or assign a date based on Defendant's factual representations in its motion. Accordingly, it is not apparent from the face of the complaint that the claims are time-barred. Furthermore, Plaintiff's "on or about" allegations are sufficient to overcome judgment on the pleadings on statute of limitations grounds.

II. Plaintiff Has Failed to Allege Sufficient Facts to Support His Fifth Cause of Action (Fraudulent Inducement-Concealment)

"The required elements for fraudulent concealment are (1) concealment or suppression of a material fact; (2) by a defendant with a duty to disclose the fact; (3) the defendant intended to defraud the plaintiff by intentionally concealing or suppressing the fact; (4) the plaintiff was unaware of the fact and would have acted differently if the concealed or suppressed fact was known; and (5) plaintiff sustained damage as a result of the concealment or suppression of the

material fact." (*Rattagan v. Uber Techs., Inc.* (2024) 17 Cal.5th 1, 40.) "To withstand demurrer, facts constituting every element of fraud must be alleged with particularity." (*Kalnoki v. First American Trustee Servicing Solutions, LLC* (2017) 8 Cal.App.5th 23, 35.) "This particularity requirement necessitates pleading *facts* which 'show how, when, where, to whom, and by what means the representations were tendered.'" (*Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 73.)

> A duty to disclose a material fact can arise if (1) it is imposed by statute; (2) the defendant is acting as plaintiff's fiduciary or is in some other confidential relationship with plaintiff that imposes a disclosure duty under the circumstances; (3) the material facts are known or accessible only to defendant, and defendant knows those facts are not known or reasonably discoverable by plaintiff (i.e., exclusive knowledge); (4) the defendant makes representations but fails to disclose other facts that materially qualify the facts disclosed or render the disclosure misleading (i.e., partial concealment); or (5) defendant actively conceals discovery of material fact from plaintiff (i.e., active concealment).

(*Rattagan*, *supra*, at 40.) "Circumstances (3), (4), and (5) presuppose a preexisting relationship between the parties, such as "between seller and buyer, employer and prospective employee, doctor and patient, or parties entering into any kind of contractual agreement." (*Ibid*.) "All of these relationships are created by transactions between parties from which a duty to disclose facts material to the transaction arises under certain circumstances." (*Ibid*.) "Such a transaction must necessarily arise from direct dealings between the plaintiff and the defendant; it cannot arise between the defendant and the public at large." (*Ibid*.)

A. Duty to Disclose

Plaintiff alleges that Defendant knew or should have known of the engine defects prior to the purchase through its exclusive knowledge of non-public, internal data. He also alleges that Defendant and its agents have actively concealed the engine defect and failed to disclose this defect to Plaintiff at the time of purchase. However, as explained by the *Rattagan* Court, *supra*, circumstances 3, 4, and 5, as listed by the *Rattagan* Court, presuppose a preexisting relationship between the parties, such as buyer and seller. Plaintiff has not sufficiently alleged such a relationship between him and Defendant. Plaintiff does not allege that he purchased the vehicle directly from Defendant nor that the dealership where he purchased the vehicle is the agent of Defendant for purposes of the sale of GM vehicles.

The Court finds *Dhital v. Nissan North America, Inc.* (2022) 84 Cal.App.5th 828 to be instructive. The *Dhital* Court found the *Dhital* plaintiffs' allegations regarding a transactional relationship were sufficient where, "Plaintiffs alleged that they bought the car from a Nissan dealership, that Nissan backed the car with an express warranty, and that Nissan's authorized dealerships are its agents for purposes of the sale of Nissan vehicles to consumers." (*Ibid*.)

Here, while Plaintiff alleges that he purchased the vehicle from GM's authorized retail dealership, Fairfield Chevrolet, Plaintiff does not allege that Fairfield Chevrolet is GM's agent for purposes of the sale of GM vehicles to consumers. Plaintiff has alleged only that GM's dealers are GM's agents for "vehicle repair; dealership repair orders; testing conducted in response to those complaint; and other internal sources of information possessed exclusively by

Defendant GM and its agents." This is insufficient to allege an agency relationship that permits the dealer to enter into sales contracts on behalf of GM in order to allege the requisite transactional relationship. (See *Antonov v. General Motors LLC* (C.D.Cal. Jan. 19, 2024, No. 8:23-cv-01593-FWS-MJR) 2024 WL 217825, *11 [where the plaintiff failed to adequately allege the dealership operated as the manufacturers agent when the plaintiff merely alleged that the dealership he purchased the vehicle from was "an authorized dealer and agent" of the manufacturer.]) Accordingly, Plaintiff has failed to sufficiently allege a transactional relationship that would give rise to a duty to disclose.

Plaintiff argues that a transactional relationship is not required under California Law for a manufacturer to have a duty to disclose since a vendor has a duty to disclose material facts to subsequent purchasers when the vendor has reason to expect that the item will be resold, citing *OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835. The *OCM* case predates *Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, where the Court rejected the same argument herein made by Plaintiff, finding that the general principals of a manufacturer's duty to warn of a product's hazards and faults, which appear in strict liability cases, are not applicable in the fraudulent concealment context. (*Id*. at 312.)

B. Intent to Defraud

As stated above, one of the elements of fraudulent concealment is that the defendant intended to defraud the plaintiff by intentionally concealing or suppressing the fact. Plaintiff alleges that Defendant knew of the engine defects and concealed that information. However, nowhere in Plaintiff's FAC does Plaintiff allege that Defendant intended to defraud Plaintiff. This deficiency is independent grounds for granting judgment on the pleadings.

C. Remaining Elements

Defendant argues that Plaintiff has failed to sufficiently plead the remaining elements of this cause of action, such as Defendant's knowledge of the defects or that Plaintiff would have acted differently had Plaintiff known about the defects. The Court does not agree.

D. Economic Loss Rule

Defendant argues that this cause of action is barred by the economic loss rule ("ELR") because Plaintiffs' fraud claim fails to meet the mandatory conditions expressed in *Rattagan*, *supra*. The *Rattagan* decision involved fraudulent concealment after contract formation, not during. (See *Rattagan v. Uber Technologies, supra*, 17 Cal.5th at fn. 12.) Accordingly, the Court finds the two-part test of *Rattagan* to be inapplicable here. The *Dhital* case, *supra*, offers a test for determining whether a Plaintiff's fraud claim is barred by the ELR that this Court finds to be applicable here.

The *Dhital* Court stated,

> To hold, at the demurrer stage, that plaintiffs' fraud claim is barred by the economic loss rule, we would need to conclude, as Nissan urges us to do, that (1) despite the Supreme Court's statement in *Robinson*, there is no exception to the economic loss rule for

> fraudulent inducement claims (or at least no exception that encompasses the claim plaintiffs allege in the SAC), or (2) plaintiffs have not adequately pleaded a claim for fraudulent inducement under California law.

(*Dhital*, *supra*, 84 Cal.App.5th at 839.)

The *Dhital* Court declined to find that there was no exception to the ELR for fraudulent inducement claims. Furthermore, the Court declined to find the *Dhital* plaintiff's fraud cause of action was barred since the *Dhital* plaintiff had adequately pleaded fraudulent conduct independent of Nissan's alleged warranty breaches.

Accordingly, the test for whether a plaintiff's fraudulent inducement by concealment claim, such as that alleged here, is barred by the ELR is whether the plaintiff has adequately pleaded fraudulent conduct independent of the alleged warranty breach. Plaintiff's cause of action does not adequately plead independent fraudulent conduct.

3. 25CV03775, Samuelsen v. Providence Health System – Southern CA

Plaintiff's unopposed motion for leave to file a First Amended Complaint is **GRANTED**. Plaintiff shall file the proposed First Amended Complaint that is attached as Exhibit A to the Supplemental Declaration of Youssef H. Hammoud within 10 court days of this hearing.

Plaintiff's counsel shall submit a written order consistent with this tentative ruling. Due to the lack of opposition, compliance with Rule 3.1312 is excused.

Analysis:

Judicial policy favors resolution of all disputed matters between the parties in the same lawsuit, and courts are bound to apply a policy of great liberality in permitting amendments to the complaint "at any stage of the proceedings, up to and including trial," absent prejudice to the adverse party. (*Atkinson v. Elk Corp*. (2003) 109 Cal.App.4th 739, 761.) "'Generally, leave to amend must be liberally granted…provided there is no statute of limitations concern, nor any prejudice to the opposing party, such as delay in trial, loss of critical evidence, or added costs of preparation.'" (*Solit v. Tokai Bank, Ltd. New York Branch* (1999) 68 Cal.App.4th 1435, 1448.) As long as the motion is timely and will not prejudice a party, it is normally an abuse of discretion to refuse to allow amendment if the denial will deprive a party of a meritorious claim or defense. (*Morgan v. Sup.Ct.* (1959) 172 Cal.App.2d 527, 530.)

Plaintiff's motion is timely and it has not been opposed. Therefore, no prejudice has been shown. It is therefore granted.

4. SCV-272285, Desforges v. Nessinger

Defendant Earl Adams Tile-Coping & Plastering, Inc. dba Adams Pool Solutions' motion for determination of good faith settlement is **CONTINUED** to May 27, 2026, at 2:30 p.m. in Department 18. This matter is scheduled for a status conference at that time regarding the parties' global settlement.

5. SCV-268721, Russell v. Russell

Plaintiff's motion for attorney's fees and costs pursuant to CCP § 473(b) is **GRANTED** in the amount of $21,306.80, which consists of $21,210.00 in attorney's fees and $96.80 in costs. Counsel Simran Sekhon shall pay Plaintiff $21,306.80 within 30 days of notice of entry of an order on this motion.

Plaintiff's request for judicial notice is **GRANTED**.

Plaintiff's counsel shall submit a written order consistent with this tentative ruling and in compliance with Rule 3.1312.

Analysis:

Plaintiff filed his complaint on June 28, 2021 against Robert J. Russell, an individual, and Robert J. Russell, trustee of the Robert John Russell Trust, for partition of real property and related causes of action. Before any party had answered, Plaintiff filed an amended complaint on July 9, 2021 against Robert J. Russell as trustee of the Robert John Russell Trust, omitting Robert J. Russell, the individual, as a defendant.

Defendant Robert J. Russell, trustee, failed to file a responsive pleading. Therefore, the Court entered his default on August 19, 2021. However, Plaintiff's request for default included Robert J. Russell, the individual. So, default was also entered against him in his individual capacity.

On February 17, 2022, Defendant filed a motion to set aside entry of default based on mistake, inadvertence, surprise, or excusable neglect. The Court denied the motion because the motion was made on grounds of excusable attorney conduct, not based on attorney affidavit of fault, which the evidence did not support. (See July 13, 2022 Minute Order.) The Court stated, "However, should Defendant present a more persuasive explanation or seek to set aside the default based on attorney affidavit of fault, the court may consider such as basis for setting aside the default…" (*Id*.)

Defendant again moved to set aside the default on July 19, 2022. This time, Defendant's motion was based on CCP § 473(d) with Defendant arguing that default was entered as a result of an error of the Court. The Court found,

> As the default is void for lack of jurisdiction over the Defendant in his individual capacity, the default does bear correcting and Defendant is entitled to his relief to that limited degree. Defendant's motion to set aside default under CCP 473(d) is GRANTED to the degree it names Defendant as an individual. Plaintiff shall submit a corrected default correcting the default to name Defendant in only his capacity as trustee, and the

> Court will enter the corrected default nunc pro tunc.

(See January 11, 2023 Minute Order.)

On February 8, 2023, Plaintiff filed a corrected request for entry of default and a new application for entry of a default judgment. On March 3, 2023, Plaintiff filed and electronically served notice of an ex parte application for entry of an order regarding Defendant's motion to set aside the default, a corrected request for default, and an interlocutory (default) judgment.

Also on March 3, 2023, the trial court entered a modified version of Plaintiff's proposed interlocutory judgment against Robert as trustee (March 3 Judgment). On March 13, 2023, the court inadvertently filed the proposed interlocutory judgment a second time (March 13 Judgment). The March 13 Judgment was the same as the March 3 Judgment except that it lacked the court's modifications. As a result, the March 13 Judgment, unlike the March 3 Judgment, awarded punitive damages in an amount to be ascertained, finding that "Defendant acted with fraud or malice" by demanding that Cliff transfer his 10-percent interest or be "immediately disinherited from Defendant's estate."

On May 22, 2023, Robert as trustee appealed from the March 3 Judgment and the March 13 Judgment. While the appeal was pending, Defendant filed another motion for relief from default (on July 21, 2023). This time, Defendant sought mandatory relief based on his attorney's affidavit of fault. The Court continued the hearing on the motion for relief from default because the matter was stayed pending the appeal. Defendant also filed a motion to vacate void judgments (on December 23, 2023), which was denied.

Also while the appeal was pending, Plaintiff filed a motion to correct a clerical error in the interlocutory judgments and a motion for undertaking on appeal. Plaintiff sought to correct the clerical error that occurred when the Court entered the second judgment without the previous modifications. However, since this very issue was before the Court of Appeal for decision, the Court continued the hearing on the motion to correct clerical error pending the appeal, but granted the motion for undertaking on appeal.

The Court of Appeal reversed only as to the issue of punitive damages. The Court stated that it was unclear whether the court intended to amend the March 3 Judgment when it entered the March 13 Judgment or whether the March 13 Judgment was entered inadvertently. Nonetheless, the Court concluded that "to the extent there was an award of punitive damages, we must reverse it." Otherwise, the March 3 and March 13 Judgments were affirmed in all other respects. (November 3, 2025 Remittitur.)

Once the remittitur issued, the Court heard Defendant's CCP § 473(b) motion and ultimately granted it. The Court found the requested relief to be mandatory given that Defendant's counsel submitted an affidavit of fault. Defendant's counsel, Simran Sekhon, attested that he is the attorney of record for Defendant and,

> I accept fault in the failure of filing a timely responsive pleading on Defendant's behalf in this action, that I did not seek a stipulation or longer extension from counsel to stay their

> seeking entry of default, as I believed that a declaration pursuant to § C.C.P. 430.41, served on Plaintiff's Counsel granted me an extension of 30 days to file a responsive pleading. I accept fault that I moved under CCP 473 on a discretionary, rather than mandatory, basis and also erred in the drafting of that motion and declaration, which I believe resulted in the motion being denied. I also accept fault in solely seeking to vacate the entry of default based on it naming Defendant as an individual, rather than also moving under a mandatory CCP 473 motion.

(July 21, 2023 Decl. Simran Sekhon.) The Court set aside the default entered against Defendant as well as the March 3rd and March 13th default judgments. Due to the default judgments being set aside, the Court found Plaintiff's motion to correct clerical error in the judgments to be moot. (December 17, 2025 Minute Order.)

Plaintiff now seeks recovery of attorney's fees pursuant to CCP § 473(b), which provides, "The court shall, whenever relief is granted based on an attorney's affidavit of fault, direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties."

I. Notice

Defendant raises arguments regarding the sufficiency of the notice of this motion. First, the Court finds no prejudice resulting from any deficiency in the notice to Counsel Simran Sekhon. Mr. Sekhon was able to file a substantive opposition to the motion and the Court continued the hearing on the motion to consider the opposition. Therefore, there was no prejudice to Mr. Sekhon.

Mr. Sekhon also argues that notice of the motion is deficient because the listed counsel for Defendant is Sekhon & O'Bryant, A Professional Law Corporation. He argues that both he and Counsel Eurik O'Bryant are listed on documents filed on behalf of Defendant. Therefore, as argued, the motion should have been served upon the law firm and Mr. O'Bryant in addition to himself.

This argument is not persuasive. CCP § 473(b) provides that the attorney who made the affidavit of fault shall be directed to pay the reasonable fees of the opposing party. It is not necessary for the firm or any co-counsel to be served if the firm and co-counsel have not attested to fault and are not the ones being directed to pay the fees. Mr. Sekhon stated clearly in his declaration supporting the motion to set aside that he was the counsel of record for Defendant and that he admits to fault. Serving only Mr. Sekhon with this motion was sufficient.

II. Reasonableness of Fee Request

Plaintiff seeks $65,024.99 in fees and costs incurred since the entry of default, which Plaintiff argues he would not have incurred had Defendant's counsel admitted fault from the beginning. Plaintiff seeks fees and costs for work on the following:

- Entry of default filed 8/19/21
- Interlocutory (Default) Judgment

- Defendant's Motion to Set Aside #1 (2/17/22)
- Defendant's Motion to Set Aside #2 (7/19/22)
- Appeal
- Plaintiff's Motion for Undertaking on Appeal
- Defendant's Motion to Set Aside #3 (7/21/23)
- Plaintiff's Motion to Correct Clerical Mistake
- Defendant's Motion to Vacate Void Judgments
- Plaintiff's Motion for Attorney's Fees (this motion)

The Court finds Plaintiff's request to be unreasonable. CCP § 473(b) is not a fee shifting statute. It is very clear that fees shall be granted only to compensate for opposing motions made under the statute. The statute cannot be construed as reaching so far as to award fees for ancillary motions that may have been filed subsequent to a default being taken.

Counsel Sekhon acknowledged in his affidavit of fault that it was his error to move for discretionary relief, rather than mandatory relief. The Court finds that it is reasonable to compensate Plaintiff for having to oppose three motions to set aside default and for filing the instant motion. However, the Court finds no basis for awarding Plaintiff attorney's fees and costs for any ancillary motions or proceedings that were not brought under the statute.

Plaintiff seeks the following amounts for the three motions to set aside default:

- Defendant's Motion to Set Aside #1 (2/17/22): $7,335.00 in fees and $60.18 in costs
- Defendant's Motion to Set Aside #2 (7/19/22): $2,835.00 in fees, no costs
- Defendant's Motion to Set Aside #3 (7/21/23): $14,100.00 in fees, $36.62 in costs
- Plaintiff's Motion for Attorney's Fees: $5,200.00, no costs

Plaintiff's request is based on hourly rates of $450 until June of 2023, then $500 per hour afterward. Fees are also requested at the rate of $250 for a paralegal. The Court finds that a reasonable hourly rate for Plaintiff's counsel is $450 per hour for the entire time period in question. The Court also finds a reasonable hourly rate for the paralegal to be $200 per hour.

Furthermore, the Court finds the number of hours requested for the third motion to set aside to be unreasonable. The Court sees no reason why the motion would have required over $14,000 in fees when the first motion only required $7,335. The fact that the third motion was pending for a while awaiting the appeal is not material. The hearing continuances during that time did not require briefing or appearances. The Court will award the same number of hours for the third motion to set aside as are granted for the first motion to set aside.

The following amounts are awarded:

- Defendant's Motion to Set Aside #1 (2/17/22): $6,860.00 in fees and $60.18 in costs
- Defendant's Motion to Set Aside #2 (7/19/22): $2,835.00 in fees, no costs

- Defendant's Motion to Set Aside #3 (7/21/23): $6,860.00 in fees, $36.62 in costs
- Plaintiff's Motion for Attorney's Fees: $4,655.00, no costs

The total award to Plaintiff shall be $21,306.80, which consists of $21,210.00 in attorney's fees and $96.80 in costs.

Finally, the Court notes that the November 3, 2025 Remitter states that Respondent (Plaintiff) shall recover costs on appeal. The motion before this court is not for costs on appeal. It is for a fee award against Defendant's counsel under CCP § 473(b). Nowhere in the remittitur does it state that Defendant's counsel shall be responsible for Plaintiff's costs on appeal. Therefore, while Plaintiff is entitled to those costs on appeal from Defendant, he is not entitled to recover them from Defendant's counsel. The Court will not herein address the issue of costs on appeal from Defendant because it is not properly before the Court at this time.

BELOW ARE D16'S TENTATIVE RULINGS:

1. 23CV01351, Pierce v. WNJT Homes, LLC

Motion for Final Approval of Class Action Settlement And Final Certification of Settlement Class GRANTED.

Facts

On November 1, 2023, Plaintiff filed her class action complaint against Defendant WJNT Homes, LLC, dba Monte Verde Home ("Defendant") for failure to pay overtime; failure to provide timely and accurate itemized wage statements; and for unlawful business practices. The complaint alleges Defendant has employed Plaintiff as a Psychiatric Technician since approximately March 2019. Plaintiff alleges Defendant paid its employees the same hourly rate for all hours worked, including those worked over 8 hours in a workday and 40 hours in a workweek. Plaintiff alleges that her overtime hours are paid to her in a second paycheck to mask that these hours should be paid at an overtime rate.

Settlement

Plaintiff filed a motion for preliminary approval of class action settlement (the "Settlement"). This court granted the motion, preliminarily finding the Settlement to be fair and reasonable, and finding the class notice (the "Notice") to be sufficient. The court set the matter for a final approval hearing.

As set forth in the court's order granting preliminary approval of the Settlement, the parties agreed to settle this lawsuit for a Gross Settlement Amount ("GSA") of $225,000.00. The court found in the preliminary approval that, based on the information from Plaintiff's counsel, this represents 29.27% of the estimated $768,793 calculated for the unpaid overtime/double time wage damages under the best case scenario. The GSA represents approximately 23.61% of the

total estimated maximum exposure including both unpaid wage damages and statutory penalties. In the preliminary approval, the court found the Net Settlement Amount ("NSA") to be approximately $121,732.09 and the average recovery from the NSA to be approximately $2,536 per Class Member. The "Class" means 48 current and former employees in California, who were allegedly not paid overtime during the relevant time period. Plaintiff's attorney fee request is $75,000.00, equal to one-third of the GSA. The court found expenses to be $15,092.91 and settlement administration expenses to be about $5,675.00. Plaintiff requested a service award in the amount of $7,500. The court also found that Plaintiff had established that extensive discovery was obtained, the parties settled at a full day mediation session held before mediator Jason Marsili, and counsel is experienced in this type of action.

The court set a final approval hearing for January 2026 but the parties sought a continuance in December 2025 in order to allow additional time to complete the notice process. The court granted the continuance and set the final hearing for May 20, 2026, with the class notice to include that hearing date.

Motion

This matter is now on calendar for the Motion for Final Approval of Class Action Settlement And Final Certification of Settlement Class. Plaintiff demonstrates the notice process and asserts compliance with the requirements of this court's preliminary approval.

There is no opposition.

Applicable Authority

Settlement of a class action requires court approval after a hearing. California Rule of Court ("CRC") 3.769(a). The Court ultimately must determine that the settlement is fair, adequate and reasonable. CRC 3.769(g); *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801; see also Fed. Rule of Civ. Proc., Rule 23(e). The trial court has broad powers to do so. *Mallick v. Superior Court* (1979) 89 Cal. App. 3d 434.

Court approval of a class action settlement is a two-step process. CRC 3.769; *Reed v. United Teachers Los Angeles* (2012) 208 Cal.App.4th 322, 336. After preliminary approval, the Court determines whether the settlement is fair, adequate and reasonable in a final hearing, often referred to as a "fairness hearing." CRC 3.769(g); *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801;. *See Officers for Justice v. Civil Service Com.* (9th Cir. 1982) 688 F. 2d 615, 625; Fed. Rule of Civ. Proc., Rule 23(e). The trial court has broad powers to determine whether the settlement is fair. *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801; *Mallick v. Superior Court* (1979) 89 Cal. App. 3d 434. The purpose of this requirement is "the protection of those class members, including the named plaintiffs, whose rights may not have been given due regard by the negotiating parties." *Officers for Justice v. Civil Service Com.,* supra, 688 F. 2d at 624. The court should, according to *Dunk, supra,* 48 Cal.App.4th, at 1801,

> consider relevant factors, such as the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a

> governmental participant, and the reaction of the class members to the proposed settlement.

However, the list is not fixed and the factors which the court considers must be tailored to each case. *Dunk, supra,* 48 Cal.App.4th1801. Ultimately, "the inquiry 'must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.' [Citation.]" *Ibid*. The determination is in the end '"an amalgam of delicate balancing, gross approximations and rough justice."[Citation].' *Officers for Justice v. Civil Service Com.* (9th Cir.1982) 688 F.2d 615, 625; see also *Dunk, supra,* 48 Cal.App.4th1801, quoting *Officers for Justice*.

As explained in *Reed v. United Teachers Los Angeles* (2012) 208 Cal.App.4th 322, at 336-337,

> The trial court has broad discretion to determine whether a class action settlement is fair. It should consider factors such as the strength of plaintiffs' case; the risk, expense, complexity and likely duration of further litigation; the risk of maintaining class action status through trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement. [Citations.] But the "list of factors is not exclusive and the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case. [Citation.]" [Citation.] In sum, the trial court must determine that the settlement was not the product of fraud, overreaching or collusion, and that the settlement is fair, reasonable and adequate to all concerned.

The *Reed* court added, at 337, that the party seeking settlement approval has the burden of showing the settlement to be "fair and reasonable" but that nevertheless "there is a presumption of fairness when: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the trial court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small." See also *Chavez v. Netflix, Inc*. (2008) 162 Cal.App.4th 43; *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801

Discussion

The court, as noted, has already granted preliminary approval, finding the Settlement to be fair and reasonable, and finding it and proposed class notice to comply with the applicable standards. The court's findings on all of the issues and factors for determining the Settlement to be fair and reasonable are set forth in this court's order granting preliminary approval.

At this stage, therefore, the issues remaining for the court to address are any final outstanding fairness issues, compliance with the notice requirements and the other terms of the court order granting preliminary approval, and consideration of the number of class members who have objected or opted out.

Plaintiff provides declarations of attorney Andrew Dunlap ("Dunlap") and of Shari Lynne Grayson ("Grayson"), Project Manager for the settlement administrator, Analytics Consulting, LLC ("Analytics"). These detail the notice process and demonstrate that this has been completed according to the court's order. Grayson details the assembly of the class list, distribution of the approved class notice, responses from the class members, and specific plan for distributing the settlement funds following approval. She states, among other things, that after Analytics mailed the class notice to 53 members on December 29, 2025, it received a supplemental list from Defendant with e-mails for 31 members, and therefore e-mailed those notices on February 6, 2026. She explains that Analytics updated the mailing addresses of the members using the National Change of Address Database, Analytics received only four notices returned from the USPS as undeliverable and performed an advanced search for those, obtaining an updated address for one. It mailed a new notice to that updated address and of the other three, Analytics confirmed that 2 members had successfully received the notice via e-mail, leaving only one undeliverable. She notes that of the 31 members noticed by e-mailed, only once bounced back as undeliverable but Analytics determined that that one member had received notice by mail. As a result, only one of the 53 members could not be notified. Grayson also explains that no member has submitted an objection or a dispute of the computation for hours and settlement allocation.

The court finds that settlement notice has been completed according to the court's order and no member has objected to the settlement or disputed the calculations. There are no other outstanding issues, based on this court's prior findings resolving all other issues for fairness and compliance with applicable authority.

The court GRANTS the motion. The prevailing party shall prepare and serve a proposed order consistent with this tentative ruling within five days of the date set for argument of this matter. Opposing party shall inform the preparing party of objections as to form, if any, or whether the form of order is approved, within five days of receipt of the proposed order. The preparing party shall submit the proposed order and any objections to the court in accordance with California Rules of Court, Rule 3.1312.

2. 458 SEB AVE, LLC. v. Anderson

Motion for Issue Sanctions, Evidentiary Sanctions, and Additional Monetary Sanctions GRANTED in full.

Facts

Plaintiff filed this action for declaratory relief, accounting, breach of fiduciary duty, conversion, waste, and injunctive relief against Defendants with respect to the operation of Plaintiff, a limited liability company ("LLC"). According to the complaint, Defendant Eric Gustav Anderson ("Anderson") executed the Operating Agreement (the "Agreement") with Andreas Pfanner ("Pfanner") to create and operate Plaintiff on about August 14, 2015, with Pfanner a 75% member, Defendant EA X Family Limited Partnership ("EA") a 25% member, and Anderson the manager. Plaintiffs add that Pfanner and Anderson entered into several amendments to the Agreement which resulted in Pfanner eventually becoming 100% owner and manager by June 9, 2023. Plaintiff complains that Anderson has refused to relinquish control of Plaintiff, provide an

accounting of Plaintiff, or acknowledge Pfanner's management role and ownership, while continuing to represent himself to others as the manager. It also complains that Anderson breached duties as manager, including failing to pay required taxes.

Discovery

Plaintiff filed two discovery motions. One sought to compel Anderson to appear for deposition in compliance with a deposition notice (the "Deposition Motion"). The other sought an order to compel Defendsants to provide further responses to requests for admissions ("RFAs"), requests for production of documents ("RFPs"), and form and special interrogatories (the "Written Discovery Motion"). The Written Discovery Motion specifically sought further responses to form interrogatories 50.2-50.5, special interrogatories 10, 14-19, and 21-33, RFPs 6 and 8-32, and RFAs 22 and 23. The court issued an order granting the Deposition Motion (the "Deposition Order")after a hearing on October 8, 2025 and issued an order granting the Written Discovery Motion (the "Written Discovery Order") after a hearing on October 15, 2025 (hereinafter, the Deposition Order and Written Discovery Order are collectively referred to as the "Discovery Orders"). The Written Discovery Order required Defendants to provide further responses within 30 days of service of the order. The Deposition Order required Defendant Anderson to appear for deposition within 60 days of the order. The court in both orders imposed monetary sanctions against Anderson. On October 31, 2025, Plaintiff filed notice of entry of the Deposition Order and proof of service for that order, showing service on Defendant's then attorney taking place that same day. On November 25, 2025, Plaintiff filed notice of entry of the Written Discovery Order and proof of service for that order, showing service on both Defendant Anderson himself and Defendant's then attorney, who was by then seeking to withdraw, taking place that same day.

On December 18, 2025, the court granted the motion of Defendants' attorney to withdraw from the action. Defendants are currently not represented by counsel.

Motion

In its Motion for Issue Sanctions, Evidentiary Sanctions, and Additional Monetary Sanctions, Plaintiff moves the court to impose numerous sanctions against Anderson for failing to comply with the Discovery Orders. Plaintiff seeks a range of specific, detailed issue and evidentiary sanctions as set forth in the notice of motion and motion. These include sanctions specifically barring Defendants from proffering evidence or documents responsive to the specific written discovery items at issue in the Written Discovery Order, as well as the following specified factual findings:

1. That Andreas Pfanner is and has been the manager and 100% member of Plaintiff since the execution of the Second Amendment on June 9, 2023.
2. That during his tenure as Plaintiff's manager between August 14, 2015, and June 9, 2023, Defendant Anderson was obligated to maintain Plaintiff's books and records and render an account to Plaintiff and its members.
3. That Defendant Anderson failed to provide an accounting of Plaintiff to Plaintiff and its members.

4. That Defendant Anderson improperly diverted Plaintiff's capital and revenue to himself, to Defendant EA X, and to other entities owned/controlled by Defendant Anderson.
5. That Defendant Anderson failed to pay real property taxes on behalf of Plaintiff.

Plaintiff also seeks additional monetary sanctions of $3,403, along with an order to pay the outstanding unpaid sanctions of $3,100 from the Discovery Orders.

There is no opposition and the deadline for submitted opposition has passed. The court will not consider any late-filed opposition papers.

Applicable Authority

Where a party "fails to obey" a court order compelling discovery responses, the party commits a misuse of the discovery process and the moving party may seek a number of sanctions. CCP §§2025.450(h), 2030.290, 2031.300, 2023.010, 2023.030. The sanctions include issue sanctions establishing certain facts, evidentiary sanctions regarding parties' evidence, terminating (or "doomsday") sanctions striking pleadings, staying or dismissing actions, or entering defaults, and monetary sanctions for the expenses incurred in the motion and as a result of the failure to obey. CCP §§2025.450(h), 2030.290, 2031.300, 2033.290, 2023.010, 2023.030. Monetary sanctions are limited to the reasonable expenses of the motion. CCP section 2023.020; *Ghanooni v. Super Shuttle of Los Angeles* (1993) 20 Cal.App.4th 256, 262.

The court has discretion to impose any sanctions as may be just and may impose none or any combination of sanctions that seems warranted. CCP §§2025.450(h), 2030.290, 2031.300, 2033.290, 2023.010, 2023.030. This decision is subject to review only for abuse of discretion. *Sauer v. Sup.Ct.* (1987) 195 Cal.App.3d 213, 228. Specifically regarding requests for admission ("RFAs"), where a party fails to obey a court order compelling further responses to the RFAs, the court may order that the matters in the RFAs be deemed admitted, may order monetary sanctions, or both. CCP section 2033.290(e).

The court should consider a variety of factors as set forth in *Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 796. These include the time elapsed since the discovery was served; whether there were any extensions; the number propounded; the importance of the information; whether the responding party was aware of the duty to respond and had the ability to do so; the amount unanswered; whether responses which were provided were evasive or incomplete; whether the information was difficult to obtain, whether there were prior court orders that the party was unable to obey, whether more time would enable the responding party to reply, and whether less drastic sanctions are sufficient in the circumstances.

The court should also not "stack" sanctions. This means that the court cannot justify a severe sanction for a relatively minor violation by pointing to the offending party's prior "history of delay and avoidance." *Motown Record Corp. v. Sup.Ct.* (1984) 155 Cal.App.3d 482, 491. This is especially true where the offending party has already been sanctioned for the earlier violation. *Id.*

Discussion

Application of the Factors Warranting Sanctions

The time since the discovery was first served is more than a year. Plaintiff served the discovery in February 2025 and it is now late May 2026. Plaintiff also filed the underlying discovery motions by June 2025 and the court issued the orders in mid-October 2025. The notices of entry of the orders were served in October and November 2025, so at least 6 months have passed since then. By both dates, the delay has been long and the orders required compliance several months ago as well. This factor supports the requested sanctions.

The information which is the subject of the Discovery Orders is fundamentally important and very broad. The Written Discovery Order dealt with a broad range of basic, critical information such as all documents relating to certain contentions; an admission that Anderson failed to pay required taxes for Plaintiff's business operations; whether any performance by Defendants was excused; any evidence supporting such a contention; whether any alleged agreement was terminated and evidence in support of such a contention; and more. Moreover, the deposition of Anderson could potentially have covered the full range of issues and contentions in this lawsuit.

Defendants appear to have known of the Discovery Orders. The court and the evidence presented in this motion show that Plaintiff properly served the orders, and notices of entry of the orders, on Defendants. Plaintiff also sent meet-and-confer communications to Defendants' then-counsel following the hearings and Defendants' then-counsel responded on part of the issues, paying part of the sanctions on Defendants' behalf.

Defendants have made no effort to comply and according to Plaintiff, Defendants' prior counsel indicated that Defendants had stopped taking part in the litigation or communicating with counsel.

There is no indication that the information or documents would be difficult to obtain. The record shows that much of this simply seeks Defendants' contentions or matters within Anderson's knowledge, as well as his own testimony at deposition.

The court GRANTS the motion with respect to the right of Plaintiff to obtain issue, evidentiary, and monetary sanctions

Propriety of the Sanctions Sought

As noted above, Plaintiff seeks a broad range of evidentiary and issue sanctions. It does not seek wholesale terminating sanctions or automatic adjudication which could result with terminating sanctions. Moreover, must of the sanctions are specifically tailored, and limited, to the evidence responsive to the specific written discovery items. The others, listed above, are directly based on the information forming the subject of the discovery. Therefore, while the sanctions sought are broad, they are very carefully and narrowly tailored to the discovery at issue. They do not go beyond what Plaintiff could have obtained had Defendants provided responses and had the discovery responses been in Plaintiff's favor.

The court GRANTS these sanctions in full.

Amount of Monetary Sanctions

Plaintiff seeks reasonable monetary sanctions for 8.3 hours spent at $410 an hour. Descamps Dec., ¶16. The court GRANTS the motion in this amount.

Conclusion

The court GRANTS the motion in full. The prevailing party shall prepare and serve a proposed order consistent with this tentative ruling within five days of the date set for argument of this matter. Opposing party shall inform the preparing party of objections as to form, if any, or whether the form of order is approved, within five days of receipt of the proposed order. The preparing party shall submit the proposed order and any objections to the court in accordance with California Rules of Court, Rule 3.1312.

3. 25CV06228, Cupp v. Preciado

Demurrer to First Amended Cross Complaint OVERRULED.

Motion to Strike First Amended Cross Complaint DENIED.

Plaintiff and Cross-Defendant Ronald Cupp is required to answer within 10 days of service of the notice of entry of the order. California Rule of Court ("CRC") 3.1320(g). Cross-Complainant is to serve the notice of entry of this order within 5 days of entry of this order. CRC 3.1320(g).

Facts

Plaintiff filed this action for declaratory relief, judicial foreclosure, breach of contract, unjust enrichment, and quiet title regarding his alleged beneficial interest in a Deed of Trust ("DOT") and Promissory Note ("Note") secured against the real property of Defendant Melissa Michelle Preciado ("Melissa") at 1654 Guerneville Road, Santa Rosa (the "Property"). He contends that Melissa borrowed money pursuant to the Note from one Esteban Diaz ("Diaz"), with the debt secured against the Property, and that Diaz assigned all of his rights and interests in the Note and DOT to Plaintiff. He alleges that Defendant Jaime Preciado ("Jaime") and Melissa (collectively, "the Preciados") reside on the Property and Defendant Peter Churchill ("Churchill") is Melissa's attorney. Melissa, he complains, defaulted on the Note and DOT and has failed to pay the debt owed. He also alleges that an attorney sent him a demand letter on behalf of Melissa, threatening to sue him for fraud and demanding removal of the DOT.

Melissa filed a cross-complaint against Plaintiff, Diaz, Diaz Marble Tile & Stone LLC ("Diaz LLC"), and several other cross-defendants (collectively, Diaz, Diaz LLC and the other cross-defendants excluding Plaintiff are the "Sale Cross-Defendants"). After Plaintiff filed a demurrer and motion to strike, Melissa filed a first amended cross complaint ("FACC"). This FACC asserts causes of action for fraud, constructive fraud, breach of fiduciary duty, rescission, removal of cloud on title, tort of another, declaratory relief, and injunctive relief. The causes of action directed to Plaintiff are 4) rescission, 5) removal of cloud on title, 7) declaratory relief, and 8) injunctive relief. These causes of action are based on the facts and claims underlying the other causes of action by which Melissa Contends that the Sale Cross-Defendants, i.e., those other than Plaintiff, committed

conspiracy and fraud in obtaining Melissa's signature on the DOT as part of escrow documents during Melissa's purchase of the Property, and in claiming that Melissa entered into the Note. She alleges that the Note never existed, she never signed it and was never aware of it. She also alleges that the Sale Cross-Defendants conspired together to obtain her signature on the DOT among escrow documents she had to sign even though it was not part of the agreed documents for the sale, they had originally provided her a packet of escrow materials for her to consider which did not include the DOT, and she was not aware of the DOT. She alleges that Plaintiff, although not a part of the sale, specifically knew of the transaction and the Sale Cross-Defendants' conduct, and was involved in them secretly, as an example of a pattern of similar fraudulent conduct and transactions of which he has been a part. She adds that Plaintiff and Defendant have been engaged in similar criminal conduct and conspiracies to defraud people. Accordingly, she contends, Plaintiff is not a good-faith holder in due course of the Note or DOT. She adds that because cross-defendants concealed their conduct, the Note, and the DOT, she had no knowledge of the wrongful conduct or the DOT's existence until about February 23, 2023, when Diaz came to her home and demanded payment under the DOT and the Note. FACC, ¶¶34, 69, 80.

Motion

Plaintiff demurs to the FACC and each cause of action therein on the grounds that it fails to state facts sufficient to constitute a cause of action and is uncertain. He argues that Melissa fails to plead delayed discovery with particularity, making the claim for fraud untimely, and there is no relationship which would support the cause of action for fraud, breach of fiduciary duty, and tort of another against him. He also argues that Melissa cannot prevail because she has not alleged tender of the payment owed.

Melissa opposes the demurrer. She argues that she has pleaded delayed discovery due to concealment which makes the FACC timely, and that she had properly pleaded the causes of action.

Plaintiff also moves to strike portions of the FACC, specifically references to his alleged criminal history, requests for criminal referrals and records, punitive damages, attorneys' fees, conspiracy allegations, and fraudulent transfer allegations.

Melissa also opposes the motion to strike. She contends that the motion is defective, Plaintiff failed to meet and confer, the allegations of criminal conduct are relevant, and she has sufficiently alleged fraud and conspiracy.

Plaintiff has filed a reply to the opposition papers, reiterating his arguments.

Demurrer

A demurrer can only challenge a defect appearing on the *face* of the complaint, exhibits thereto, and judicially noticeable matters. Code of Civil Procedure ("CCP") section 430.30; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318. The grounds for a demurrer are set forth in CCP section 430.10. The grounds, as alphabetically identified in the statute, include (e) the pleading fails to state facts sufficient to constitute a cause of action and (f) uncertainty.

If a demurrer is to the entire complaint, and any cause of action is valid, the court must overrule the entire demurrer if any cause of action is valid. *Warren v. Atchison, Topeka & Santa Fe Ry.Co.* (1971) 19 Cal.App.3d 24, 36.
Demurrer for failure to state facts sufficient to constitute a cause of action is a general demurrer, which must fail if there is *any* valid cause of action. CCP §430.10(e); *Quelimane Co., Inc. v. Steward Title Guar. Co.* (1998) 19 Cal.4th 26, 38-39; *Fox v. JAMDAT Mobile, Inc*. (2010) 185 Cal.App.4th 1068, 1078 ("as long as a complaint consisting of a single cause of action contains any well-pleaded cause of action, a demurrer must be overruled even if a deficiently pleaded claim is lurking in that cause of action as well"). For example, if a party directs a general demurrer against a cause of action labelled "fraud" based on failure to state that cause of action, the demurrer will fail if the complaint sets forth a valid cause of action for malpractice. *Saunders v. Cariss* (1990) 224 Cal.App.3d 905, 908.

The demurrer for uncertainty is not favored and will only be sustained if the responding party cannot reasonably comprehend what allegations are made against him and thus respond. *Khoury v. Maly's of Calif., Inc.* (1993) 14 Cal.App.4th 612, 616.

A demurrer for uncertainty must specify precisely how, why, and where the complaint is uncertain. See *Fenton v. Groveland Community Services Dist.* (1982) 135 Cal.App.3d 797, 809. Failure to do so is thus improper and impairs a party's ability to defend against the demurrer and the court's ability to understand exactly what to consider or what its ruling will be.

Authority Governing Civil Conspiracy

Strictly speaking there is no separate cause of action for civil conspiracy. See 5 Witkin, Summary of Cal. Law (11th Ed.2021, May 2025 Update) Torts, section 151. 'A civil conspiracy is simply a corrupt agreement; it is "... a combination of two or more persons to accomplish an evil or unlawful purpose." [citation].' *117 Sales Corp. v. Olsen* (1978) 80 Cal.App.3d 645, 649. It is essentially merely a device for holding each member liable for the wrong even if they did not directly take part in it. *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 511; *Richard B. LeVine v. Higashi* (2005) 131 Cal.App.4th 566, 574-575; see 5 Witkin, Summary of Cal. Law (11th Ed.2021, May 2025 Update) Torts, section 151.

The Supreme Court stated in *Unruh v. Truck Ins. Exchange* (1972) 7 Cal.3d 616, at 631, that a civil conspiracy is actionable only if a civil wrong is committed resulting in injury. The complaint must plead facts showing the formation and conduct of the conspiracy, the wrongful act of any conspirators, and the resulting injury. *Unruh, supra*, 631; *117 Sales Corp., supra*.

However, in alleging the actual agreement to conspire, a party may simply generally allege the elements, and need not allege specific facts showing how the parties conspired. *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 47. Essentially, a complaint need merely state 1) the formation and operation of a conspiracy; 2) the wrongful acts pursuant thereto; and 3) the resulting damage. *Ibid*. For example, stating that parties have engaged in a general and concerted refusal to sell insurance, coupled with the allegations showing the wrongful acts, is sufficient. Ibid. The key is really whether the underlying unlawful acts are sufficiently alleged, and a general allegation of agreement is really all that is necessary. *Ibid*. Explaining the basic rationale behind allowing general pleading of the agreement to conspire, the Supreme Court pointed out, citing a prior decision, that "conspirators rarely make such agreement in the open or document their illicit

agreements. Rather, it is usually the situation that such agreements are made covertly, thereby making it difficult for a plaintiff to allege the full details of such… agreement…." *Id*., 48. Thus, a conspiracy may still be inferred from the nature of the acts, the relations of the parties, the supposed conspirators' interests, and other circumstances. *117 Sales, supra*, 649. This makes sense considering that Plaintiffs are unlikely to be privy to the specific conspiratorial goings-on at the pleading stage. This is similar to fraud elements that they need not plead due to obvious ignorance. See *Committee on Children's Television, Inc., supra,* 35 Cal.3d 216-221 (an exception to the strict pleading requirements applies when the opposing party is more likely to possess better knowledge than is the pleading party).

As explained in *Klistoff v. Sup. Ct.* (2007) 157 Cal.App.4th 469, at 479, "[t]he existence of a civil conspiracy makes each participant in the wrongful act responsible as a joint tortfeasor for all damages resulting from the wrong, whether or not a participant was a direct actor and regardless of the degree of his activity."

According to Civil Code ("CC") section 1709, one who willfully deceives another with intent to induce him or her to alter position to his or her detriment is liable for any damage resulting. CC section 1710 defines 4 types of deceit within the meaning of CCP section 1709. These are a false factual "suggestion... by one who does not believe it to be true"; a false factual "assertion... by one who has no reasonable ground for believing it to be true"; concealment, or the "suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact"; and a "promise, made without any intention of performing it."

Authority Governing Clams for Fraud

The elements of fraud are 1) misrepresentation, concealment, or false promise; 2) of a material fact; 3) knowledge of falsity or scienter; 4) intent to defraud, or induce reliance; 5) justifiable reliance; and 6) damage. *Seeger v. Odell* (1941) 18 Cal.2d 409, 414; 5 Witkin, Summary of Cal. Law (11th Ed.2017, May 2024 Update) Torts, section 890; 5 Witkin, Summary of Cal. Law (9th Ed.1988) Torts, section 676; *California Causes of Action*, section.V.1:20; see also CC section 1709. This claim requires that the parties actually rely on the misrepresentation. See *Conrad v. Bank of America* (1996) 45 Cal.App.4th 133, 157; *Richard P. v. Vista Del Mar Child Care Serv.* (1980) 106 Cal.App.3d 860.

Section 1709 states that there must be some duty to disclose in order for a party to be liable for concealment. This often requires a fiduciary relationship or other duty to disclose. See *LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 336; *Mesmer v. White* (1953) 121 Cal.App.2d 665, 670. However, this duty to disclose also arises absent a confidential relationship where the defendant alone has knowledge of material facts of which the plaintiff is ignorant. *Sime v. Malouf* (1949) 95 Cal.App.2d 82, 100; see also 5 Witkin, supra, section 796. Moreover, active concealment is more egregious and legally equivalent to affirmative misrepresentation. See *Outboard Marine Corp. v. Sup.Ct.* (1975) 52 Cal.App.3d 30, 37; *Sime v. Malouf* (1949) 95 Cal.App.2d 82, 99; see also 5 Witkin, supra, section 798.

Courts have long held that plaintiffs must plead fraud with particularity. See 5 Witkin, Cal.Proc. (6th Ed. 2021, March 2026 Update), Pleading, section 707. Plaintiffs thus must allege not simply the legal conclusion of "fraud," but the facts constituting it and they must plead every element factually and specifically. See, e.g., *Hills Transportation Co. v. Southwest Forest Ind., Inc.* (1968)

266 Cal.App.2d 702, 707; *Scafidi v. Western Loan & Bldg. Co.* (1946) 72 Cal.App.2d 550, 558; *Woodson v. Winchester* (1911) 16 Cal.App.472, 473.
However, courts still owe a duty to construe the pleadings liberally and not be too strict or technical in applying the requirement of pleading fraud with particularity. See, e.g., *Wilson v. Houston Funeral Home* (1996) 42 Cal.App.4th 1124, 1139; *Nevin v. Gary* (1909) 12 Cal.App.1, 5 (court upheld inferential pleading of element of causation, that the fraud induced the action); 5 Witkin, Cal.Proc. (6th Ed. 2021, March 2026 Update), Pleading, section 710.

Claims of fraud are subject to a 3-year statute of limitations under CCP section 338(d). Claims for rescission and breach of fiduciary duty are 4 years. CCP section 337(3); *McCowan v. First Interstate Bank* (1987) 194 Cal.App.3d 1225, 1228.

Claims based on fraud may be tolled or may not accrue until discovery. CCP section 338(d) states that fraud claims accrue on the date of discovery. 3 Witkin, Cal.Proc. (6th Ed.2021, March 2026 Update) Actions, section 543. The tolling lasts until the time the plaintiff or complainant discovered, or, acting with reasonable diligence, should have discovered, the facts constituting the fraud. *Fuller v. Tucker* (2000) 84 Cal.App.4th 1163, 1171.

Entire FACC

Plaintiff first argues that the entire FACC fails to state facts sufficient to constitute cause of action against him, and is uncertain because the allegations of conspiracy lack specificity and involve conduct predating the assignment to him.

Plaintiff fails to demonstrate how the FACC is in any way uncertain. It is clear what Melissa contends cross-defendants did and that Plaintiff is involved through a secret conspiracy to defraud Melissa. Her allegations set forth in the FACC are very specific about what cross-defendants allegedly did, how they allegedly worked together, and how she has been injured. The FACC does not indicate that the alleged fraudulent activity occurred before the Note and DOT were possibly assigned to Plaintiff and, even if it had, that would not in of itself affect possible liability as a matter of law. If Plaintiff were involved in the alleged fraud as a conspirator, for example, he could still potentially be liable even if the fraud occurred before the official assignment to him of the Note and DOT. Plaintiff fails to provide any authority or analysis supporting his argument that he cannot be liable for conduct occurring before the assignment to him.

Causes of Action Not Asserted Against Plaintiff

Plaintiff demurs to each of the causes of action not asserted against him, i.e., 1) fraud, 2) constructive fraud, 3) breach of fiduciary duty, and 5) tort of another. He demurs to them on the ground that they fail to state facts sufficient to constitute any cause of action and on the ground that he cannot be liable because he was not involved in the conduct.

The court notes that because Melissa does not assert these against Plaintiff, his arguments as to his personal liability are unnecessary and irrelevant. Melissa only relies on these as grounds for the claims she does assert against Plaintiff, those for rescission, removal of cloud on title, and declaratory and injunctive relief. All of the latter go solely to Plaintiff's claims for recovery of debt or interest in the Property. Accordingly, there is no cause of action for Plaintiff to demur to with

respect to causes of action 1) fraud, 2) constructive fraud, 3) breach of fiduciary duty, and 5) tort of another.
That said, Plaintiff may appropriately argue that Melissa has no valid cause of action for these in order to dispose of the conduct underlying those claims which she does assert against him. Plaintiff is nonetheless still unpersuasive. Melissa sets forth the alleged fraud, reliance, and damages in detail. She explains that before buying the Property, she resided on it as tenant of Diaz, she relied on Diaz's promises as her landlord and the Property seller when buying the Property, the packet of documents provided to her prior to signing did not include the DOT or Note, she never knowingly signed the DOT or Note, Diaz used the fear of Covid at that time to tell her that she just needed to come in to sign the documents quickly and leave, the DOT at issue is not the same as the DOT document of which she was aware, and other details. She specifies the date, May 15, 2020, and the location, the Chicago Title Company office. She also sets forth detailed allegations showing how the parties were involved in a conspiracy.

Timeliness

Plaintiff contends that the FACC is untimely but the FACC is timely on its face. Melissa alleges that she was not aware of the alleged wrongful conduct before about February 23, 2023, when Diaz came to her home and demanded payment under the DOT and the Note. FACC, ¶¶34, 69, 80. She also alleges that cross-defendants kept everything secret from her. She filed the original cross complaint on October 17, 2025, less than 3 years after the alleged first date of knowledge.

Rescission

Plaintiff contends that Melissa cannot prevail on the rescission claim because she has not alleged tender of payment of the money owed. This is not necessary since she alleges that she does not owe the money in the first place.

Plaintiff's Other Arguments

Finally, Plaintiff argues vaguely and generally, without further explanation or authority, that the foreclosure is lawful, the request to void the DOT is improper, criminal matters are for prosecutors instead of civil proceedings, and monetary damages would suffice so injunctive relief is not necessary. These arguments are groundless and the face of the FACC does not support them. The court notes that for the claim of injunctive relief, real property is generally considered unique so that damages cannot readily make up for any loss or injury. See Civil Code section 3387.

Conclusion: Demurrer

The court OVERRULES the demurrer in full.

Motion to Strike

A motion to strike may attack any "irrelevant, false, or improper matter" in any pleading, or to strike a pleading that is "not drawn or filed in conformity with the laws of this state." CCP §436. As with demurrers, the defect must appear on the face of the pleading or in matters judicially noticeable. CCP §437. Again, the policy is to construe pleadings liberally "with a view to substantial justice." CCP §452.

Plaintiff moves to strike allegations of his criminal conduct and requests for criminal information and records. He contends that these are irrelevant and not proper for a civil proceeding. The argument is unpersuasive. The allegations, although perhaps not necessary, are relevant to the claims that Plaintiff and the others have engaged in a history of such fraudulent conduct as part of demonstrating that they have done so in this instance.

Plaintiff moves to strike allegations of punitive damages because no allegations show his involvement in the underlying fraudulent conduct. As discussed above, Melissa has alleged that he was part of a conspiracy and thus may be liable for the damages related to that fraudulent conduct. In any case, once again, Melissa does not assert against Plaintiff those causes of action for she seeks punitive damages. She therefore is not seeking such damages against him.
Plaintiff seeks to strike the request for attorney's fees, arguing that these must be based on contract or statute, but he ignores the nature and basis for the request. Melissa seeks the recovery of fees as damages based on the theory of tort of another. According to the Supreme Court in *Prentice v. No. American Title Guaranty Corp.* (1963) 59 Cal.2d 618, at 620, the "tort-of-another" doctrine can support attorneys' fees and costs. The idea behind allowing attorneys' fees under this doctrine is that Plaintiffs may seek the fees of litigating an action against someone *from the "other" person whose tort led to the lawsuit*. See, e.g., *Prentice, supra*, 620-621. This is basically enshrined in CCP section 1021.6. This states, in full and with emphasis added,

> Upon motion, a court after reviewing the evidence in the principal case *may award attorney's fees to a person who prevails* on a claim for implied indemnity *if the court finds (a) that the indemnitee* through the tort of the indemnitor *has been required to act in the protection of the indemnitee's interest by bringing an action against or defending an action by a third person* and (b) if that indemnitor was properly notified of the demand to bring the action or provide the defense and did not avail itself of the opportunity to do so, and (c) that the trier of fact determined that the indemnitee was without fault in the principal case which is the basis for the action in indemnity or that the indemnitee had a final judgment entered in his or her favor granting a summary judgment, a nonsuit, or a directed verdict.

In any case, Melissa does not assert this cause of action against Plaintiff, so Plaintiff has nothing here to strike.

Plaintiff argues that the court must strike the "conclusory" conspiracy allegations but this is unpersuasive as well. As noted above, Melissa sets forth a detailed allegation of conspiracy and, to the extent that it is conclusory, the authority clearly allows conclusory allegations. This is logical given that at the pleading stage a plaintiff is unlikely to be privy to all of the specific details, such as knowledge or intent, of a hidden conspiracy.

Plaintiff also moves to strike the allegations of fraudulent transfer on the basis that no facts show that Diaz was insolvent at the time of assignment to Plaintiff, or Plaintiff's knowledge of this. Melissa, however, alleges that the parties knowingly entered into an agreement to transfer the account to Plaintiff in order to avoid a $160,000 judgment against Diaz. She alleges that Plaintiff knew all about it. She need not allege specific facts showing Plaintiff's knowledge or intent.

Conclusion: Motion to Strike

The court DENIES the motion to strike in full.

Conclusion

The court OVERRULES the demurrer and DENIES the motion to strike. The prevailing party shall prepare and serve a proposed order consistent with this tentative ruling within five days of the date set for argument of this matter. Opposing party shall inform the preparing party of objections as to form, if any, or whether the form of order is approved, within five days of receipt of the proposed order. The preparing party shall submit the proposed order and any objections to the court in accordance with California Rules of Court, Rule 3.1312.

4. SCV-272340, Doe #1 J.B. v. Roe 1

This matter is on calendar for the motions of defendants National Council of Young Men's Christian Associations of the United States of America ("Y-USA"), Sonoma County Family Young Men's Christian Association ("Sonoma County YMCA"), and Santa Rosa Department of Parks & Recreation dba Camp Wa-Tam Day ("Camp Wa-Tam")(altogether "Defendants") for summary judgment or, in the alternative, summary adjudication of each cause of action alleged by Plaintiff John Doe #1 J.B. ("Plaintiff") in the first amended complaint ("FAC") filed on April 11, 2024.

1. FAC

Plaintiff alleges seven causes of action against Defendants: 1) Sexual Abuse of a Minor; 2) Intentional Infliction of Emotional Distress; 3) Sexual Harassment (Civ. Code §§51.9 & 52); 4) Negligence; 5) Negligent Supervision; 6) Violation of Civil Rights; and, 7) Battery.

Plaintiff alleges he was a victim of childhood sexual assault in or around 1980 to 1982 while in the custody and care of Defendants and that each knew of the abuse and failed to prevent it.

2. Retroactive Application of Statutes

This court notes that two of the statutes used by Plaintiff as a basis for liability were not enacted until after the alleged abuse occurred in this case. Plaintiff testified the abuse occurred in 1980 through 1982. Civil Code section 51.9 was added to the Unruh Civil Rights Act in 1994. Civil Code section 52.1, the Tom Bane Civil Rights Act was enacted in 1987. Generally, no part of code provisions are retroactive unless expressly so declared. (Civ. Code section 3.) While none of the Defendants have raised this issue, this court questions whether Plaintiff's causes of action based upon these statutes are valid. However, these causes of action fail on other grounds.

3. Motions

a. Y-USA

When Plaintiff was a minor, he would visit a YMCA located in Santa Rosa, California ("YMCA Santa Rosa") and Camp Wa-Tam. (Y-USA's Undisputed Material Fact ["UMF"] No. 2.) In or around 1980 to 1982, Plaintiff, then a minor, alleges he was a victim of sexual abuse and/or inappropriate sexual contact by his swim coach and boxing coach identified as "Steve" and "John" ("Alleged Perpetrators"). (UMF Nos. 3, 4.) The alleged sexual assaults occurred in the indoor swimming pool, locker room, office, and closet (the "Incidents") at the YMCA Santa Rosa and during his enrollment in Camp Wa-Tam. (UMF No. 5.)

i. First Cause of Action – Sexual Abuse of a Minor; Second Cause of Action – Intentional Infliction of Emotional Distress; Third Cause of

Action – Sexual Harassment (Civil Code sections 51.9, 52); Sixth Cause of Action – Violation of Civil Rights; Seventh Cause of Action - Battery

a. Vicarious Liability

Y-USA argues that Plaintiff's first cause of action for sexual abuse of a minor, second cause of action for intentional infliction of emotional distress, third cause of action for sexual harassment, sixth cause of action for violation of civil rights and seventh cause of action for battery fail as a matter of law because they are based upon a theory of vicarious liability which Plaintiff cannot establish against it.

In opposition, Plaintiff argues he is not alleging causes of action based upon the theory of respondeat superior; rather, he is alleging direct liability. Plaintiff cites CCP section 340.1(a)(2). CCP section 340.1 establishes that there is no time limit for the commencement of various actions for recovery of damages suffered as a result of childhood sexual assault. This includes: "An action for liability against any person or entity who owed a duty of care to the plaintiff, if a wrongful or negligent act by that person or entity was a legal cause of the childhood sexual assault that resulted in the injury to the plaintiff." (CCP section 340.1(a)(2).)

CCP section 340.1 allows an action to be brought against a person or entity. The allegations fail or survive based upon the legal and evidentiary requirements for each cause of action.

b. Employer-Employee Relationship

An entity cannot act but through its officers, directors, and employees. Plaintiff's theory of liability against Y-USA is that it had a duty to Plaintiff as a minor at one of Y-USA's local affiliates to make sure the local YMCAs had proper procedures in place to prevent child sexual assault. This theory is one of negligence, as discussed below. There is no basis for Plaintiff's causes of action for intentional conduct by the Alleged Perpetrators against an entity unless the perpetrator was an employee or agent of the entity. (See *Brown v. USA Taekwondo* (2019) 40 Cal.App.5th 1077 (*Brown I*).)

Under the respondeat superior doctrine, an *employer* may be held vicariously liable for torts committed by an employee. (*Brown I, supra,* at p. 1107.) Under certain circumstances, the employer may even be subject to this form of vicarious liability for an employee's willful, malicious, and criminal conduct. (*Ibid*.) However, liability only attaches if the employee was acting within the scope of employment. (*Ibid*.)

Y-USA has established neither of the Alleged Perpetrators were employees of Y-USA. (UMF Nos. 24-50.) Plaintiff has provided no evidence otherwise. As such, because there is no employer-employee relationship between Y-USA and the Alleged Perpetrators, Y-USA cannot be liable for the Alleged Perpetrator's conduct, including based upon a cause of action for sexual assault.

ii. Second Cause of Action - Intentional Infliction of Emotional Distress

The elements of a cause of action for intentional infliction of emotional distress are well settled. A plaintiff must allege that (1) the defendant engaged in extreme and outrageous conduct with the intention of causing, or reckless disregard of the probability of causing, severe emotional distress to the plaintiff; (2) the plaintiff actually suffered severe or extreme emotional distress; and (3) the outrageous conduct was the actual and proximate cause of the emotional distress. (*Ross v. Creel Printing & Publishing Co.* (2002) 100 Cal.App.4th 736, 744–745.)

As to Plaintiff's cause of action for intentional infliction of emotional distress, Y-USA argues Plaintiff cannot establish all the elements of the cause of action because there is no evidence

that Y-USA engaged in extreme and outrageous conduct with the intention of causing, or reckless disregard of the probability of causing, severe emotional distress to Plaintiff.

The evidence establishes that Y-USA no knowledge or notice of Plaintiff or the Alleged Perpetrator(s). (UMF Nos. 52-54.) Y-USA is an Illinois not-for-profit corporation; it is separate and independent from all local YMCAs; it is not involved in local programs; and does not hire local staff. (See UMF Nos. 24-52.) Y-USA has not received any reports of inappropriate conduct by the Alleged Perpetrators towards Plaintiff. (UMF No. 53.) Y-USA representative Samuel Frisby states: "Y-USA never provided youth and education instruction to Plaintiff. Plaintiff was never entrusted under the care of Y-USA. Y-USA never assumed the responsibility of caring for Plaintiff or ever actually cared for Plaintiff. Plaintiff was never a member of Y-USA. Y-USA never came into contact with Plaintiff or inflict any violence or threat of violence upon Plaintiff." (UMF No. 54.) Plaintiff has never even spoken to anyone at the Y-USA. (UMF No. 14.) There is no evidence that Y-USA took any action toward Plaintiff in any way. As such, Plaintiff cannot establish that any *intentional* conduct by Y-USA led to his emotional distress.

In addition, as discussed above, under the respondeat superior doctrine, an employer is liable for the torts of its employees committed within the scope of their employment. (*Crouch v. Trinity Christian Center of Santa Ana, Inc.* (2019) 39 Cal.App.5th 995, 1015.) The evidence establishes that local YMCA's—not Y-USA—hired its own employees. Therefore, Y-USA is not liable for IIED based upon the conduct of the Alleged Perpetrators.

In opposition, Plaintiff appears to argue negligence, citing to the *Rowland* factors, duties of care, and Civil Code section 1714 ["Responsibility for willful acts and negligence; furnishing alcoholic beverages; legislative intent; liability of social hosts; liability of parents, guardians, or adults who furnish alcoholic beverages to minors"]. Plaintiff then concludes that, based upon Y-USA's negligence, a jury could conclude Y-USA's conduct was extreme and outrageous. IIED is an intentional tort—not negligence. Plaintiff has not provided any evidence that Y-USA's employees committed an intentional tort within the scope of their employment.

iii. Third Cause of Action – Violation of Civil Code section 51.9 and 52

One element of a cause of action for sexual harassment under Civil Code section 51.9 is the existence of "a business, service, or professional relationship between the plaintiff and defendant or the defendant holds himself or herself out as being able to help the plaintiff establish a business, service, or professional relationship with the defendant or a third party." (Civil Code section 51.9(a)(1).) Based upon the same facts as discussed above, there was no "business, service, or professional relationship" between Y-USA and Plaintiff. Neither was even aware of the other.

Plaintiff does not provide any factual or legal authority in opposition that would support liability against Y-USA for sexual harassment under Civil Code section 51.9.

iv. Sixth Cause of Action – Violation of Civil Rights (Civ. Code section 52.1 [Tom Banes Civil Rights Act])

Civil Code section 52.1(b) provides: "If a person or persons, whether or not acting under color of law, interferes by threat, intimidation, or coercion, or attempts to interfere by threat, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state, the Attorney General, or any district attorney or city attorney may bring a civil action for injunctive and other appropriate equitable relief in the name of the people of the State of California, in order to protect the peaceable exercise or enjoyment of the right or rights secured. An action brought by the Attorney General, any district attorney, or any city attorney may also seek a civil penalty of twenty-five thousand dollars ($25,000). If this civil penalty is requested, it shall be

assessed individually against each person who is determined to have violated this section and the penalty shall be awarded to each individual whose rights under this section are determined to have been violated."

This code section is completely inapplicable to Y-USA. The "person" acting in this case is the Alleged Perpetrators. As vicarious liability does not apply, it is not clear any theory could impose liability on Y-USA under this statute.

In opposition, Plaintiff argues this cause of action is based upon coercion and threats Plaintiff received by the Alleged Perpetrators, who Plaintiff labels as "Defendant's representative." (Oppo. 21:26.) No legal or factual authority is cited in to support Plaintiff's position that the Alleged Perpetrators hired by a local YMCA are the "representatives" of Y-USA.

v. Seventh Cause of Action – Battery

This cause of action also fails because the Alleged Perpetrators were not Y-USA's employees.

vi. Fourth Cause of Action – Negligence – Special Relationship

To support a claim for negligence, a plaintiff must allege facts showing a legal duty to use due care, breach of the duty, causation, and damages. (*Brown I*, *supra,* 40 Cal.App.5th at p. 1091.) In general, each person has a duty to act with reasonable care under the circumstances. (*Ibid*.) The general duty of each person is to exercise, in his or her activities, reasonable care for the safety of others. (*Ibid*.)

Because the Alleged Perpetrators were not Y-USA's employees, a cause of action for negligence must be based upon Y-USA's direct liability based upon the breach of its own duty of care. However, as a general matter, there is no duty to act to protect others from the conduct of third parties. (*Ibid*.) An exception to this is when there exists a special relationship between the dangerous third party or with the potential victim. (*Ibid*.) "Although every person generally "has a duty to exercise reasonable care to avoid causing injury to others" [citation], "as a general matter, there is no duty to act to protect others from the conduct of third parties." [Citation.] There are, however, a few recognized exceptions to this general "no-duty-to-protect rule ...." [Citation.] One such exception is the " 'special relationship' " doctrine. (*Ibid.*) Under this doctrine, "[a] defendant may owe a duty to protect the plaintiff from third party conduct if the defendant has a special relationship with either the plaintiff or the third party." (*Barenborg v. Sigma Alpha Epsilon Fraternity* (2019) 33 Cal.App.5th 70, 76.)

Y-USA argues there is no special relationship between Plaintiff or the Alleged Perpetrators. Therefore, it has no liability for negligence as Y-USA owed no duty of care to Plaintiff.

A duty to control may arise if the defendant has a special relationship with the foreseeably dangerous person that entails an ability to control that person's conduct. (*Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, 619.) Similarly, a duty to warn or protect may be found if the defendant has a special relationship with the potential victim that gives the victim a right to expect protection. (*Ibid*.)

Relationships that have been recognized as "special" share a few common features. Generally, the relationship has an aspect of dependency in which one party relies to some degree on the other for protection. (*Regents of University of California v. Superior Court*, *supra,* 4 Cal.5th at p. 621.) "The corollary of dependence in a special relationship is control. Whereas one party is dependent, the other has superior control over the means of protection. "[A] typical setting for the recognition of a special relationship is where 'the plaintiff is particularly vulnerable and dependent upon the defendant who, correspondingly, has some control over the plaintiff's welfare.' [Citation.]:

(*Ibid*.) Special relationships also have defined boundaries; they create a duty of care owed to a limited community, not the public at large. (*Ibid*.) And, although relationships often have advantages for both participants, many special relationships especially benefit the party charged with a duty of care." (*Ibid*.)

As discussed in *Brown I*, *supra*, 40 Cal. App. 5th at pp. 1093-1094, a number of Courts of Appeal have considered whether organizations owe a duty of care toward a minor where an adult under the control of the organization sexually abused the minor. In *Doe v. United States Youth Soccer Assn., Inc.* (2017) 8 Cal.App.5th 1118, 1130-1131, the court concluded the national youth soccer association had a special relationship with the 12-year-old plaintiff who was sexually abused by her coach. The court reasoned there was a special relationship because the plaintiff was a member of the association, she played on a team that was a local affiliate of the association, the team was required to comply with the association's policies and rules, and the association established the standards under which coaches were hired. (*Id*. at p. 1131.) The court explained, "[P]arents entrusted their children to [the association and other] defendants with the expectation that they would be kept physically safe and protected from sexual predators while they participated in soccer activities." (*Id*. at p. 1130.)

Similarly, in *Juarez v. Boy Scouts of America, Inc*. (2000) 81 Cal.App.4th 377, 404, the Court of Appeal concluded the Boy Scouts of America had a duty to protect a 12-year-old scout who was sexually molested by his scoutmaster during officially sanctioned scouting events, including overnight campouts. In its review of the record on summary judgment, the court observed the Boy Scouts had identified the protection of youth from sexual abuse as a priority of the organization. (*Id*. at p. 398.) The Boy Scouts had developed a "Youth Protection Program" to educate adult volunteers, parents, and scouts on how to detect and prevent sexual abuse, but it had failed to provide information to the plaintiff and his parents in their native language on how to protect the plaintiff from sexual abuse. (*Id*. at pp. 398-399.) On these facts the court concluded the Boy Scouts had a special relationship with the plaintiff "giving rise to a duty to protect him from harm caused by the criminal conduct of third parties." (*Id*. at p. 411.)

Other courts have similarly found a special relationship between an organization and the minor or tortfeasor. (See *Conti v. Watchtower Bible & Tract Society of New York, Inc.* (2015) 235 Cal.App.4th 1214, 1235 [church elders' control over church-sponsored field service placed the church and its elders in a special relationship with plaintiff and the church member who sexually molested plaintiff]; *Doe 1 v. City of Murrieta* (2002) 102 Cal.App.4th 899, 918 [police department that sponsored "explorer program" was in special relationship with the teenage explorers and owed them "a duty of care to protect them from foreseeable harm," including from sexual relationship with police officer who served as adviser during ride-alongs at night]. In contrast: *Barenborg v. Sigma Alpha Epsilon Fraternity* (2019) 33 Cal.App.5th 70, 75 [a national fraternity did not have special relationship with its local chapter and therefore had no duty to protect a student who was injured at party held by local chapter, despite national fraternity's adoption of policies governing local chapter and ability to discipline chapter for policy violations because it had no ability to prevent injury].)

In *Brown I,* the Court of Appeals determined the complaint alleged sufficient facts to show the existence of a special relationship between the plaintiff and USA Taekwondo ("USAT"). "To compete at the Olympic games, taekwondo athletes must be members of USAT and train under USAT-registered coaches. USAT registered Gitelman (the perpetrator) as a coach, and he remained registered until USAT banned him from coaching. USAT had control over Gitelman's conduct through its policies and procedures. As the national governing body of taekwondo, 'USAT is responsible for the conduct and administration of taekwondo in the United States.' Further, USAT

formulates the rules, implements the policies and procedures, and enforces the code of ethics for taekwondo in the United States. However, there was no special relationship with USOC because USOC did not have the ability to control the specific coach's conduct nor was it in the best position to protect plaintiffs from the coach's sexual abuse." (*Brown I, supra,* at p. 1102.)

Here, Y-USA is an independent charitable organization from all local YMCAs. (UMF No. 25.) Its constitution provides criteria for local associations to qualify for membership in the National Council of Y-USA. (UMF No. 26.) It has never governed, owned, operated, overseen, or controlled the YMCA Santa Rosa or Camp Wa-Tam. (Frisby Dec., ¶¶7, 11-15, 21-22, 25; Exhibit A (Y-USA's 1979 Constitution and By-Laws, in effect in 1979), Art. II.) The Local YMCA Associations pay an annual support fee to maintain their membership which includes access to licensing rights from Y-USA to use the trademarks and service marks that Y-USA owns. (UMF No. 30.) Other than receipt of annual dues to use YMCA's trademark, Y-USA does not have any pecuniary interest in any Local Associations, including the YMCA Santa Rosa. (UMF No. 32.) Y-USA does not fund the operations of the Local Associations, including the YMCA Santa Rosa, and does not provide the Local Associations with financial support for operation of their local programs and facilities, from 1980 to 1982 or any other time thereafter. (UMF No. 33.) The National Council Governance and Membership Qualifications Committee, which is made up of CEOs from the Local Associations and volunteers, meet periodically to discuss various topics, including any necessary changes to the Policy Manual. (Frisby Dec., ¶8.) At these meetings, representatives from various Local Associations express the Local Association's needs and vote on new or amended criteria for their Local Association's membership in Y-USA. (*Id.,* ¶9.) Y-USA does not make the decisions as to what the membership criteria of the Local Association will be. (*Id.,* ¶10.) Each Local Association, including the YMCA Santa Rosa, is an autonomous, independent organization, with its own corporate charter, by-laws, Governing Board, branches, executives, staff, buildings, assets and other resources. (*Id.,* ¶11.) Y-USA did not hire or control any employees or volunteers, or control the premises or operations of the Local Associations, including YMCA Santa Rosa. (*Id.,* at ¶¶17-21, 25-28.)

Similar to USOC in *Brown I,* while Y-USA may have been in a position to dictate policies and procedures of local associations to meet membership requirements, this indirect control over the Alleged Perpetrators is also too remote to create a special relationship.

In opposition, Plaintiff argues that Y-USA neglects to address various sections of its Constitution and Bylaws stating the functions of the National Council as it related to the local associations are, e.g., to "[m]ake available counsel and services to the Associations to enable them to meet the need of their communities more effectively and to fulfill the purposes of the Movement; and to "[p]rovide leadership for the Movement and formulate national standards, goals of work, and policies for its own activities and for assistance to Associations." (Oppo. 12:17-26.) Plaintiff argues these functions provide direct involvement and oversight from Y-USA to the local associations.

Plaintiff also argues Article II, section 1's requirement that the local "chief employed officer" must meet certain qualifications for listing in the Official Roster of employed officers as determined by Y-USA and the local associations' duty to annually certify that their policies and practices provide eligibility for membership raise triable issues regarding Y-USA's influence and decision making in the hiring process for positions as the local associations.

The additional facts presented by Plaintiff do not appear to be disputed. Plaintiff states Y-USA's PMQ, Samuel Frisby, testified that Y-USA is an entity developed and designed to support local YMCAs. (SSMF ¶10). Plaintiff argues that while the Constitution gave the Y-USA the authority to dictate requirements for "employed staff positions" with in the local Associations, Y-USA did not take any action to determine whether the staff at its local Associations were

appropriately vetted or investigated before working with the children at the local facility. (SSMF ¶6, 21). Additionally, Plaintiff argues that while the Constitution provides that the Y-USA required annual certification and reporting from the local Associations for the policies and practices required in the Constitution, Mr. Frisby testified that Y-USA neglected to require any reporting of childhood sexual assault from its chartered organizations. (SSMF ¶9, 14). Mr. Frisby speculated that had Y-USA received a report of childhood sexual assault that occurred on the premises of a local YMCA and where a staff member or a volunteer of the local organization was the perpetrator, Y-USA would not have investigated the matter or been involved in enforcing any disciplinary action. (SSMF ¶17.)

Plaintiff relies heavily on *Safechuck v. MJJ Productions, Inc.* (2023) 94 Cal.App.5th 675, which bears little relationship to this case. The issue in that case was whether two corporations, wholly owned by the late entertainer Michael Jackson, had a legal duty to protect plaintiffs from sexual abuse Jackson is alleged to have inflicted on them for many years while they were children. The Court of Appeals concluded a corporation that facilitates the sexual abuse of children by one of its employees is not excused from an affirmative duty to protect those children merely because it is solely owned by the perpetrator of the abuse. (*Id.* at 680.) *Safechuck* involved a demurrer and a motion for summary judgment. The complaint alleged and evidence was presented that the subject corporations were designed for the dual purpose of creating and distributing the multimedia entertainment of Michael Jackson and to attract and lure children to facilitate sexual abuse by Jackson. (*Id.,* at pp. 680-691.) The Court of Appeal determined that the circumstances of that case created a "special relationship" that gave rise to an affirmative duty of the corporations to protect the minor plaintiffs from sexual abuse the corporations knew or suspected was occurring, and that the *Rowland* factors did not limit the corporations duty. (*Id.,* at p. 691.)

In *Brown I, supra,* the Court of Appeal determined that despite USOC's mandating that national governing bodies, including USAT, adopt a safe sport program to prevent sexual abuse of athletes and that plaintiff's sexual abuse occurred at competitions sanctions by USOC, USOC still did not have the ability to control coach Gitelman's conduct. The same is true here. There is no evidence that Y-USA had any control over the Alleged Perpetrators. "Absent an ability to monitor the day-to-day operations of local chapters, the authority to discipline generally will not afford a national fraternity sufficient ability to prevent the harm and thus will not place it in a unique position to protect against the risk of harm." (*Brown I, supra,* at p. 1102 *citing Barenborg, supra*, 33 Cal.App.5th at p. 80.)

Nor does the evidence in this case demonstrate a more involved role as was the case in *United States Youth Soccer, supra,* 8 Cal. App. 5th at p. 112-1126, wherein the national association set requirements for the hiring of coaches by its state associations and regional affiliates; required state associations and their affiliates to collect and screen criminal conviction information on their coaches; had authority to deny certification to coaches with criminal convictions; distributed monthly reports showing which coaches had been disqualified from coaching because of their convictions; and, the plaintiff was a member of the national association and played on a team that was a local affiliate of the national association.

vii. Y-USA's motion - Conclusion and Order

Y-USA has established it is not vicariously liable for the conduct of the Alleged Perpetrators because no employment relationship existed between it and the Alleged Perpetrators. It has also established there was no special relationship between it and Plaintiff or the Alleged Perpetrators which would create a duty for it to protect Plaintiff from the Alleged Perpetrators. Plaintiff has not shown the existence of a triable issue of material fact. Summary judgment is GRANTED.

Y-USA's counsel is directed to submit a written order to the court consistent with this ruling and in compliance with Cal. Rules of Court, Rule 3.1312.

b. Sonoma County YMCA

i. Sonoma County YMCA's Objections to Plaintiff's Evidence

Objection numbers 8 (as to the statement regarding paid positions), 9-12, and 32 are sustained. The remaining objections are overruled.

ii. Vicarious Liability

Plaintiff alleges the Alleged Perpetrators were the agents, servants, employees, joint venturers, ostensible agents and/or contractors of Defendants and were acting within the course and scope of such agency, servants, employment, contracts, and/or joint venture. (FAC, ¶15.) The evidence is such that, based upon Plaintiff's testimony, the Alleged Perpetrators were employees of Sonoma County YMCA. (Sonoma County YMCA's Undisputed Material Facts ["UMF"] Nos. 1-4, 7-10.)

The rule of respondeat superior states an employer is vicariously liable for the torts of its employees committed within the scope of the employment. (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 296.) For an employer to be held liable for an assault or other intentional tort, it must have a causal nexus to the employee's work. (*Id.* at p. 297.) "That the employment brought tortfeasor and victim together in time and place is not enough … [T]he incident leading to injury must be an outgrowth of the employment … [or] the risk of tortious injury must be inherent in the working environment." (*Id.* at p. 298. See also *Perry v. County of Fresno* (2013) 215 Cal. App. 4th 94, 102 [employee's motivation must be generated by, or an outgrowth of, workplace responsibilities, conditions or events ("mere fact that an employee has an opportunity to abuse facilities or authority necessary to the performance of that employee's duties does not render the employer vicariously liable")].) The employment, in other words, must be such as predictably to create the risk employees will commit intentional torts of the type for which liability is sought." (*Lisa M., supra,* at p. 299.) Stated another way, the tortious occurrence must be "a generally foreseeable consequence of the activity." (*Ibid*.)

"Ordinarily, the determination whether an employee has acted within the scope of employment presents a question of fact; it becomes a question of law, however, when 'the facts are undisputed and no conflicting inferences are possible.' " (*Ibid*.)

ii. First Cause of Action – Sexual Abuse of a Minor

Plaintiff's first cause of action for sexual abuse of a minor alleges that Defendants ratified the Alleged Perpetrators' sexual abuse of Plaintiff because Defendants had actual knowledge that the Alleged Perpetrators had sexually harassed and abused minors. (FAC, ¶38.)

There are few employer-employee relationships which courts have determined sexual assault are "typical of or broadly incidental to" or "a generally foreseeable consequence of" the enterprise. (See, e.g., *Lisa M., supra*, at p. 294 [technician's sexual molestation of patient during ultrasound not within scope of employment]; *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 997 [deputy sheriff's sexual harassment of other deputy sheriffs working at county jail outside scope of employment]; *John R. v. Oakland Unified School Dist*. (1989) 48 Cal.3d 438, 441, 447–452 [teacher's sexual molestation of student at teacher's apartment during sanctioned extracurricular program not within scope of employment]; *Z.V. v. County of Riverside* (2015) 238 Cal.App.4th 889, 891, 896–897 [social worker's sexual assault of minor outside of work hours and at social worker's apartment not within scope of employment]; *John Y. v. Chaparral Treatment Center, Inc.* (2002) 101 Cal.App.4th 565, 576–577[counselor's sexual molestation of minor living in residential facility not within scope of employment]; *Alma M. v. Oakland Unified School Dist.*

(1981) 123 Cal.App.3d 133, 139–140 [school janitor's rape of student in janitor's office not within scope of employment]; but see *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 206–207 ["unique" case of on-duty police officer's misuse of official authority to rape woman he detained falls within scope of employment].)

Consistent with the vast weight of authority, the alleged sexual assaults against Plaintiff by the hands of the Alleged Perpetrators fell outside his scope of their employment with Sonoma County YMCA.

Plaintiff argues the alleged liability is based upon direct liability—not on vicarious liability. Plaintiff miscites Civil Code section 340.1(a)(2), which currently indicates there is no statute of limitations for a cause of action for child sexual assault. Plaintiff argues that Sonoma County YMCA is liable because of its own wrongful act; i.e., ratification of the sexual assault.

"As an alternate theory to respondeat superior, an employer may be liable for an employee's act where the employer either authorized the tortious act or subsequently ratified an originally unauthorized tort. [Citations.] The failure to discharge an employee who has committed misconduct may be evidence of ratification. [Citations.] The theory of ratification is generally applied where an employer fails to investigate or respond to charges that an employee committed an intentional tort, such as assault or battery." (*C.R. v. Tenet Healthcare Corp.* (2009) 169 Cal.App.4th 1094, 1110.) The failure to investigate or respond to charges that an employee has committed an intentional tort or the failure to discharge the employee may be evidence of ratification. (*Ibid*.)

However, no evidence of ratification exists. The evidence establishes that only Plaintiff's mother and the Alleged Perpetrators had any knowledge of the alleged sexual assault. (UMF Nos. 15-20, 23-32.) Thus, there can be nothing to investigate.

Plaintiff mischaracterizes the testimony of Michelle Head and concludes that Plaintiff's mother's discussion with the Alleged Perpetrators constitutes a report to Sonoma County YMCA. Ms. Head testified that there are no records from the relative time frame. She speculated that Sonoma County YMCA had child safety standards but she could not say what those were as she did not work for Sonoma County YMCA at that time and had no records from which to make that determination.

Sonoma County YMCA has met its burden to establish it is not vicariously liable for the alleged conduct. Nor is there any evidence of ratification. Plaintiff has not raised any triable issue of material fact. The issue argued in the opposition—whether Sonoma County YMCA had a duty to create stronger safeguards—pertains to a cause of action for negligence. The motion as to this cause of action is granted.

iii. Second Cause of Action - IIED

Sonoma County YMCA has established that any sexual assault suffered by Plaintiff at the hands of the Alleged Perpetrators was not an outgrowth of the Alleged Perpetrators' employment. Therefore, Sonoma County YMCA is not liable for IIED based upon this conduct.

In opposition, Plaintiff again argues direct liability citing CCP section 340.1, the statute eliminating the statute of limitations for child sexual assault. However, Plaintiff goes on to discuss standards of negligence; i.e., "duty of care" and the "special relationship." Thereafter, Plaintiff concludes that there remain triable issues of material fact with respect to Sonoma County YMCA's reckless disregard of the abuse within the YMCA program. However, an employer is only liable for intentional torts within the scope of employment or if it ratified the conduct. There is no such evidence in this case. The motion as to this cause of action is granted.

iii. Third Cause of Action – Sexual Harassment (Civ. Code section 51.9 and 52

In argument for and against this cause of action, the parties cite outdated instances of the statute. Presumably, they intended to cite the language of the statute that was in effect at the time of the occurrences alleged herein. Plaintiff attended the Sonoma County YMCA from 1979 to 1982. (UMF No. 2.) However, section 51.9 did not become law until 1994. (1994 Cal. Legis. Serv. Ch. 710 (S.B. 612).) Regardless, there is no evidence of knowledge or ratification of the Alleged Perpetrator's conduct.

In opposition, Plaintiff again refers to negligence standards arguing that it was Sonoma County YMCA's "lack of action" (oppo., 14:17) that allowed Plaintiff to be sexually harassed. He has not provided any legal or factual support to rebut Sonoma County YMCA's showing. The motion as to this cause of action is granted.

iv. Sixth Cause of Action – Civil Code section 52.1 (Tom Bankes Civil Rights Act)

Civil Code section 52.1(b) provides: "If a person or persons, whether or not acting under color of law, interferes by threat, intimidation, or coercion, or attempts to interfere by threat, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state, the Attorney General, or any district attorney or city attorney may bring a civil action for injunctive and other appropriate equitable relief in the name of the people of the State of California, in order to protect the peaceable exercise or enjoyment of the right or rights secured. An action brought by the Attorney General, any district attorney, or any city attorney may also seek a civil penalty of twenty-five thousand dollars ($25,000). If this civil penalty is requested, it shall be assessed individually against each person who is determined to have violated this section and the penalty shall be awarded to each individual whose rights under this section are determined to have been violated."

Sonoma County YMCA has established no employee acted within the scope of their employment when they alleged abused the Plaintiff. It has also established the lack of evidence of ratification. Plaintiff has not identified any triable issue of material facts. The motion as to this cause of action is granted.

v. Seventh Cause of Action – Battery

Again, based upon the evidence presented, the only liability Sonoma County YMCA could have for the alleged battery committed by the Alleged Perpetrators is based upon vicarious liability or ratification. The alleged sexual assault is outside of the scope of employment. In addition to sexual assault, Plaintiff alleges his boxing coach beat him to the point where he felt his ribs were broken. (UMF Nos. 12-13.) This alleged conduct too is so shocking that it cannot be said to be inherent in the working environment or typical of or broadly incidental to the enterprise the employer has undertaken. Nor is there any evidence of ratification. The motion as to this cause of action is granted.

vi. Fourth Cause of Action – Negligence; Fifth Cause of Action – Negligent Supervision

Plaintiff's FAC alleges Defendants failed to adequately and properly investigate, hire, train, and supervise its employees. (FAC, ¶¶57, 67.) He alleges that Defendants knew of serious complaints of sexual misconduct by their employees and failed to investigate those complaints. (FAC, ¶¶58-61.) Plaintiff also alleges Defendants negligently failed to adequately implement or enforce any procedures or polices that were aimed at preventing, detecting, or deterring the sexual

harassment or abuse of minors who were entrusted with their care. (FAC, ¶62.) Plaintiff alleges: "Defendants, including their employees or agents, and each of them breached their duty to properly and adequately supervise, monitor and protect Plaintiffs by, in part, ignoring clear and obvious signs that Perpetrator(s) engaged in repeated inappropriate and harassing sexual relationships with several minors affiliated with Defendants; allowing Plaintiff to spend
unsupervised one-on-one time with Perpetrator(s); and allowing Perpetrator(s) to repeatedly sexually harass and abuse Plaintiff on Defendants' premises and at other locations on events sponsored by Defendants." (FAC, ¶68.)

An employer may be liable for negligent hiring, retention, or supervision; or, it may be liable for the breach of a duty owed to potential victim as a result of a special relationship. (See *C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861; *Roman Catholic Bishop v. Superior Court* (1996) 42 Cal.App.4th 1556, 1564.)

Sonoma County YMCA argues it did not have any duty to protect Plaintiff from the Alleged Perpetrators because the conduct alleged in this case was not foreseeable because there is no evidence that Sonoma County YMCA had any prior knowledge of the propensity of the Alleged Perpetrators to commit sexual assault.

Relying upon *Romero v. Superior Court* (2001) 89 Cal.App.4th 1068, Sonoma County argues the only way to show foreseeability would be to show it had actual prior knowledge of the propensity of the bad actors to commit sexual abuse or if it found out while the Alleged Perpetrators were employed with it.

Romero applied the rule from *Chaney v. Superior Court* (1995) 39 Cal.App.4th 152. In *Chaney*, a 23–year–old woman alleged that a close personal family friend sexually assaulted her while she was in his home over many years, beginning when she was 10 years old. The woman filed suit against her alleged assailant and joined the assailant's wife on the theory that she caused the woman to suffer damages by negligently supervising her while she was in the home. (*Id*. at pp. 154–155.) In addressing the extent of a wife's duty to her minor invitees to prevent sexual assaults perpetrated by her husband, the court held: "[P]ublic policy requires that where a child is sexually assaulted in the defendant wife's home by her husband, the wife's duty of reasonable care to the injured child depends on whether her husband's behavior was reasonably foreseeable. Without knowledge of her husband's deviant propensities, a wife will not be able to foresee that he poses a danger and thus will not have a duty to take measures to prevent the assault." (*Id*. at p. 157.)

The *Chaney* rule was applied in *Romero*, where a 16–year–old boy assaulted a 13–year–old girl while the two were visiting a friend's home. The girl's mother had indicated her desire to the friend's parents that they supervise the teenagers, and the assault occurred when the parents left home for an hour. (*Romero v. Superior Court, supra*, 89 Cal.App.4th at pp. 1073–1075.)

"Prior to the incident, [the 16–year–old boy] had a long history of school misconduct, including sexual harassment of female students, fighting, and other misbehavior that resulted in numerous detentions and suspensions. He had been arrested and charged with vandalism and violating curfew. [One of the friend's parents] was aware of [the boy's] curfew violations, but there [was] no evidence the [parents] knew about the arrests and [the boy's] misconduct in school." (*Id.* at p. 1074.)

However, because the parents had no knowledge of the boy's propensity "to inflict violence on female minors," and they did not know about the existence of his school disciplinary record, they were not liable for negligent supervision. (*Id.* at p. 1081.) It determined that sound public policy requires that where one invitee minor sexually assaults another in the defendant's home, the question of whether the defendant owed a duty of reasonable care to the injured minor depends on

whether the assailant minor's conduct was reasonably foreseeable, but that conduct will be deemed to have been reasonably foreseeable only if the defendant had actual knowledge of the assaultive propensities of the teenage assailant. (*Romero v. Superior Court* (2001) 89 Cal.App.4th 1068, 1081.)

"The rule of direct employer liability under the Restatement Second of Agency section 213 is: "A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless ... [¶] ... [¶] (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others ....' As explained in comment d: 'The principal may be negligent because he has reason to know that the ... agent, because of his qualities, is likely to harm others in view of the work or instrumentalities entrusted to him. If the dangerous quality of the agent causes harm, the principal may be liable under the rule that one initiating conduct having an undue tendency to cause harm is liable therefor.... [¶] ... An agent ... may be incompetent because of his reckless or vicious disposition, and if a principal, without exercising due care in selection, employs a vicious person to do an act which necessarily brings him in contact with others while in the performance of a duty, he is subject to liability for harm caused by the vicious propensity.... [¶] One who employs another to act for him is not liable ... merely because the one employed is incompetent, vicious, or careless. If liability results it is because, under the circumstances, the employer has not taken the care which a prudent man would take in selecting the person for the business in hand.... [¶] Liability results ... not because of the relation of the parties, *but because the employer antecedently had reason to believe that an undue risk of harm would exist because of the employment*....' (Rest.2d Agency, *supra*, § 213, com. d., italics added.)" (*Roman Catholic Bishop, supra,* at p. 1565.)

In *Roman Catholic Bishop,* the court determined there was noting in the records to indicate the perpetrator had a criminal history or had been previously implicated in sexual abuse of a minor. (*Ibid*.) Thus, it could not have had antecedent knowledge of the perpetrator's criminal dangerousness. Moreover, the plaintiff in that case did not dispute that the church did not have any actual knowledge of the perpetrator's sexual activity with that plaintiff or anyone else until it heard that plaintiff's mother's report and the perpetrator's purported admissions. (*Ibid*.) If prior knowledge was determined to have existed, the employer could be liable for negligent hiring. (*Id.* at p. 1566.) However, because there was no special relationship creating a heightened duty of care based upon a priest/parishioner relationship and there were no allegations or facts that the church placed that plaintiff in the perpetrator's custody and control, the church was not liable for negligent supervision. (*Id.,* at pp. 1567-1568.)

Sonoma County YMCA argues there is absolutely nothing in the swim or boxing coaches' background or any reports to the Sonoma County YMCA during their employment which could be deemed a specific warning that the Alleged Perpetrators posed an unreasonable risk to minors. Here, there is no evidence presented that anyone other than Plaintiff, his mother, or the Alleged Perpetrators were aware of the alleged abuse.

"[T]he theory of negligent hiring here encompasses the *particular risk of molestation by an employee* with a history of this specific conduct." (*Id.* at p. 837.) Furthermore, there can be no liability for negligent supervision "in the absence of knowledge by the principal that the agent or servant was a person who could not be trusted to act properly without being supervised." (*Juarez v. Boy Scouts of America, Inc.* (2000) 81 Cal.App.4th 377, 395.)

Based upon these facts, Sonoma County YMCA cannot be liable for negligent hiring, supervision, or retention.

a. Youth Programs

Distinct from liability based upon Sonoma County YMCA's alleged negligence in selecting, supervising, and retaining the Alleged Perpetrators, Plaintiff also alleges a failure to take reasonable protective measures and a failure to protect him from third-party criminal conduct based upon a special relationship. These are negligence standards and rely upon an application the *Rowland* factors. (See *Juarez, supra,* at p. 397-413.)

In certain circumstances, a special relationship creates liability for third party criminal acts. Here, Sonoma County YMCA's position with Plaintiff is similar to that of a student and school or a scout and a scoutmaster, which creates a special relationship. (*M. W. v. Panama Buena Vista Union School Dist.* (2003) 110 Cal.App.4th 508, 517; *Juarez, supra¸* at 410-411.) A special relationship is formed between a school district and its students resulting in the imposition of an affirmative duty on the school district to take all reasonable steps to protect its students. (*M.W., supra,* at p. 517.) This includes a duty to protect a child under one's supervision from third party criminal conduct. (*Juarez, supra,* at p. 411-412.)

Generally, a greater degree of care is owed to children because of their lack of capacity to appreciate risks and avoid danger. (*Juarez v. Boy Scouts of America, Inc.*, supra, 81 Cal.App.4th at p. 410.) Consequently, California courts have frequently recognized special relationships between children and their adult caregivers that give rise to a duty to prevent harms caused by the intentional or criminal conduct of third parties. (*Ibid*.)

It is reasonably foreseeable that sexual predators are drawn to youth organizations in order to exploit children. (*Doe v. United States Youth Soccer Assn., Inc.* (2017) 8 Cal.App.5th 1118.) An organization has duty to take affirmative action to control the wrongful acts of a third party where such conduct can be reasonably anticipated. (*Id.,* at p. 1131.) In *Juarez,* the Scouts had no information that the scoutmaster had previously molested a child or had a propensity to do so. (*Juarez, supra*, 81 Cal.App.4th at p. 386.) Despite this, because it is foreseeable that pedophiles are drawn to youth organizations, the court in *Juarez* determined it was foreseeable to the Scouts that a child participating in their program might be sexually molested by an adult volunteer. (*Juarez, supra,* at pp. 403-404.)

It is the province of the jury, as trier of fact, to determine whether an unreasonable risk of harm was foreseeable under the particular facts of a given case; however, the trial court decides as a matter of law whether there was a duty in the first place, even if that determination includes a consideration of foreseeability. (*Romero v. Superior Court* (2001) 89 Cal.App.4th 1068, 1078.) Here, Sonoma County YMCA did owe Plaintiff a duty of care based upon its special relationship with Plaintiff.

In opposition, Plaintiff argues that he testified at deposition that his mother informed the Sonoma County YMCA of the abuse. At his deposition, Plaintiff testified that when his mother did not believe what Plaintiff told her about the abuse, she took him to the Sonoma County YMCA and told the coaches what Plaintiff had said and that she did not believe Plaintiff. (UMF No. 15-19, 24, 26; Plaintiff's depo., 55:20-24.) Besides Plaintiff's mother, Plaintiff did not tell anybody about the abuse during the time it was occurring. (*Ibid*; Plaintiff's depo.*,* 56:7-24.) Plaintiff does not know whether his mother reported the abuse to anyone else. (UMF Nos. 20, 28, 29.)

Plaintiff states that his late friend, John Helzer, was a minor who was also abused by the swim coach at the Santa Rosa YMCA, and that other minors were abused, but that they did not talk about it at the time. (Defendant's Exhibit 6, Plaintiff's responses to Defendant's Form Interrogatory Nos. 12, 12.1; Plaintiff's Depo., 49:24-50:22; Plaintiff's Add'l Material Facts, Numbers 35, 36.)

Here, the facts alleged are that Sonoma County YMCA put Plaintiff into the care and custory of the Alleged Perpetrators because it hired them to instruct minors. However, as noted by

Sonoma County YMCA, based upon the discovery conducted in this case and the testimony of Sonoma County YMCA's PMQ, there is no evidence available to show what policies and procedures were in place at the time. Sonoma County YMCA cites *Steven F. v. Anaheim Union High School Dist.* (2003) 112 Cal.App.4th 904, 910 for the proposition that summary judgment is appropriate where no evidence exists to support finding negligent supervision. However, the court in that case presumed negligence: "For purposes of this opinion, we will assume, for sake of argument, that the Anaheim Union High School District negligently supervised the teacher, and the negligent supervision allowed the sexual relationship between the teacher to begin." (*Ibid*.) The court went on to discuss a different issue. Here, there is *some* evidence—Plaintiff's testimony of what occurred.

Summary judgment law requires a defendant moving for summary judgment to present evidence, and not simply *point out* that the plaintiff does not possess, and cannot reasonably obtain, needed evidence. *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854–855.) The defendant must present *evidence* that the plaintiff does not possess, and cannot reasonably obtain, needed evidence—as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing. (*Id.* at p. 855.)

Sonoma County YMCA has both the burden of production of evidence and the burden of persuasion on this motion. Based upon the presentation made in its papers, Sonoma County YMCA has not met that burden on the issue of negligence based upon a special relationship. In addition, all inferences must be construed in Plaintiff's favor.

vii. Conclusion and Order

Sonoma County has established it is not vicariously liable for the acts of its employees because they were not acting within the scope of their employment. However, it argues, but does not establish, it had no duty to Plaintiff based upon a special relationship. It has therefore not met its burden on this issue. Regarding its policies and procedures, any argument or evidence on this issue would be speculative. Sonoma County YMCA's motion for summary adjudication of Plaintiff's cause of action for negligence based upon a special relationship is DENIED. The motion as to the remaining issues is GRANTED.

Sonoma County YMCA's counsel is directed to submit a written order to the court consistent with this ruling and in compliance with Cal. Rules of Court, Rule 3.1312.

c. <u>Camp Wa-Tam's Motion</u>

Plaintiff's case against Camp Wa-Tam is based upon alleged assault by the YMCA swim instructor ("the Counselor") while the latter was a counselor at Camp Wa-Tam. Plaintiff alleges he was subjected to sexual assault by the Counselor on two occasions at Camp Wa-Tam, once in the summer of 1980 and once in the summer of 1981. (Undisputed Material Fact ["UMF"] No. 5.)

i. Public Entity Liability – Intentional Torts - Scope of Employment

Camp Wa-Tam, located at Howarth Park, is one of the City of Santa Rosa Recreation & Parks' summer programs. (UMF No. 19.) This court takes judicial notice that the City of Santa Rosa is a public entity.

"A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative." (Gov. Code, § 815.2(a).)

Camp Wa-Tam argues it cannot be liable for sexual misconduct of a camp counselor because sexual assault is not within the scope of one's employment as a camp counselor. Camp Wa-Tam argues it can only be liable based upon its own negligence in hiring, supervising, or retaining the employee.

In opposition, Plaintiff concedes the issue of liability based upon the theory of respondeat superior and acknowledges the Plaintiff's claims are based upon Wa-Tam's direct *negligence*. (Oppo., 12:1-3; 13:4-6; 14:1-2.) However, Plaintiff then appears to argue that *negligence* extends to vicarious liability for intentional torts. Liability for sexual abuse and other intentional torts is not imputed to the employer; i.e., an employer is not vicariously liable, unless it is committed within the scope of employment. If outside the scope of employment, an employer may be liable for its own negligence in hiring, supervising, or retaining the employee, or based upon a special relationship. (See *Doe v. Lawndale Elementary School Dist.* (2021) 72 Cal.App.5th 113.)

Here, the only allegations with respect to Camp Wa-Tam are that Plaintiff was sexually assaulted during an overnight camp experience once in 1980 and once in 1981. As acknowledged by Plaintiff, sexual assault is not within the scope of one's employment as a camp counselor. However, this is not the end of the analysis. But, that analysis continues under a negligence theory.

Outside of Plaintiff's testimony regarding the Counselor, there is no evidence of any intentional conduct by Camp Wa-Tam. (UMF Nos. 38-59.)

In addition, Civil Code section 51.9 applies to a "person" in a professional relationship with the plaintiff. (Civ. Code, § 51.9, subd. (a)(1).) "Although Civil Code section 14 states 'the word person includes a corporation as well as a natural person,' it does not state the word includes government entities." (*K.M. v. Grossmont Union High School Dist.* (2022) 84 Cal.App.5th 717, 751.) As such, a public entity such as Camp Wa-Tam is not liable under the Act.

The motion as to Plaintiff's causes of action based upon intentional conduct—Plaintiff's first, second, third, sixth, and seventh causes of action—is granted.

ii. Negligence

"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." (*C.A. v. William S. Hart Union High School Dist*. (2012) 53 Cal.4th 861, 868 [citing Gov. Code section 815.2].)

In *C.A. v. William S. Hart,* the court noted that California law has long imposed on school authorities a duty to " 'supervise at all times the conduct of the children on the school grounds and to enforce those rules and regulations necessary to their protection. [Citations.]' [Citations.] The standard of care imposed upon school personnel in carrying out this duty to supervise is identical to that required in the performance of their other duties. This uniform standard to which they are held is that degree of care 'which a person of ordinary prudence, charged with [comparable] duties, would exercise under the same circumstances.' [Citations.] Either a total lack of supervision [citation] or ineffective supervision [citation] may constitute a lack of ordinary care on the part of those responsible for student supervision. Under section 815.2, subdivision (a) of the Government Code, a school district is vicariously liable for injuries proximately caused by such negligence." (*Id.,* at p. 869.)

The standard here is the same. If those responsible for hiring and/or supervising counselors at Camp Wa-Tam knew or should have known of the Counselor's prior sexual misconduct toward

children, and thus, that he posed a reasonably foreseeable risk of harm to children under his supervision, the employer owed a duty to protect the students from such harm. (See *C.A. v. William S. Hart Union High School Dist*. (2012) 53 Cal.4th 861, 870.) Thus, under section 815.2 a public entity may be liable for the negligence of administrators or supervisors in hiring, supervising and retaining an employee who sexually harasses and abuses a student. (*Id.* at p. 879.) However, inherent in that duty is the requirement that the administrator or supervisors have some knowledge of the propensity of the employee to commit abuse.

Here, Camp Wa-Tam has shown no evidence exists that it had knowledge of the Counselor's unfitness to serve as a camp counselor. (UMF Nos. 38-59.) Plaintiff's evidence presented in opposition does not contradict the lack of evidence.

Plaintiff provides his testimony that his mother took him to the YMCA to tell the Alleged Perpetrators that she did not believe Plaintiff's claims. (Response to UMF No. 38.) Sonoma County YMCA and Camp Wa-Tam are separate and distinct entities. (UMF No. 31.) Informing the Alleged Perpetrators does not equate to informing Camp Wa-Tam.

Plaintiff's attempt to conflate Camp Wa-Tam with Sonoma County YMCA does not help his case. Plaintiff states that the City of Santa Rosa worked in collaboration with the YMCA to provide the camp to members, and people who worked at YMCA were at Camp Wa-Tam. (AMF No. 22.) This statement is based upon Plaintiff's testimony: "I don't know how it worked. I know it was a city camp collaborative with the YMCA or – I just know that coaches from – swim coaches from the YMCA and other volunteers, or people who worked there, were at Camp Wa-Tam." (Plaintiff's depo., 83:1-5.) While this statement indicates there may have been some overlap between employees and volunteers, it does not support finding collaboration between the two entities. Plaintiff's testimony that he saw "people" wearing YMCA shirts is also insufficient to determine there was official collaboration between Camp Wa-Tam and YMCA. (*Id.,* 169:14-22.)

Plaintiff also complains that Camp Wa-Tam has not produced any records. (Response to UMF Nos. 39-57, 59; Plaintiff's Add'l Material Facts ["AMF"] No. 9.) Plaintiff's Request for Production, Number 9 sought: "All DOCUMENTS that list and/or identify employees, agents, and/or volunteers who worked at or provided services to SANTA ROSA DEPARTMENT OF PARKS & RECREATION dba CAMP WA-TAM DAY from 1975 to 1985, including John, Steve or Stephen." (Plaintiff's Exhibit 2.) Camp Wa-Tam objected to the request on the grounds that it was overbroad, burdensome, and oppressive in that it seeks documents that are forty to fifty years old. (*Ibid*.) Camp Wa-Tam indicated in its response that although certain records must be permanently retained, these would not include any of the documents requested. (*Ibid*.) In other words, Camp Wa-Tam suggested it did not have any responsive records.

However, as part of Camp Wa-Tam's evidence in support of this motion, Camp Wa-Tam provides the declaration of Irene Carranza Medina, who states that she was tasked with searching for all full and part-time employees with the City's Recreation & Park's Department between 1980 and 1981. (Defendant's Exhibit I, ¶4.) She states she has full access to employment databases including Corodata Retention List of employee records dating as far back as 1973. (*Id.,* ¶3.) In her search of the records, she did not find any employee named "John" or "Steve." (*Id.,* ¶5.) While this is troubling and Camp Wa-Tam should not be allowed to introduce evidence it did not produce in response to Plaintiff's discovery requests, it does not change the outcome. Even if there are records that Camp Wa-Tam hired a "Steve" or a "John," the pertinent evidence pertains to whether Camp Wa-Tam breached its duty to hire, supervise, or retain said "John" or "Steve." This would occur only if Camp Wa-Tam had some reason to suspect "John" or "Steve" had a propensity to molest children. No such evidence exists.

Camp Wa-Tam also presents evidence that the camp did not have any cabins or tents as testified to by the Plaintiff. However, the court does not weigh evidence on a motion for summary judgment. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal. 4th 826, 856.) Plaintiff testified the sexual assaults occurred in the swim coach's "tent." (UMF No. 7.) This court must view the evidence in Plaintiff's favor. (*Id.,* at p. 843.)

Other evidence presented by Plaintiff is testimony from Amy Rocklewitz who was produced as Camp Wa-Tam's PMQ. (AMF No. 1.) In about 1980, Ms. Rocklewitz was hired by the City of Santa Rosa Recreation & Parks Department as a lifeguard for the Lake Ralphine boat rental lessons facility located in Howarth Park. (Rocklewitz depo; 15:3-17.) In about 1991 to about 2023, Ms. Rocklewitz worked as the recreation coordinator for the City of Santa Rosa Recreation & Parks Department for about five years until she was promoted to supervisor. (*Id.,* 15:17-16:2.) She was responsible for overseeing Howarth Park and Camp Wa-Tam. (*Ibid*.) Part of her duties as the recreation coordinator involved hiring staff and coordinating volunteers, including seasonal volunteers. (AMF No. 3.)

As part of his additional material facts, Plaintiff states during the time frame of the abuse at issue Camp Wa-Tam did not do any audits of child safety (AMF No. 11); that Camp Wa-Tam did not have any policies and procedures in place regarding childhood sexual misconduct (AMF No. 12); did not have any policies, procedures, guidelines, manuals, or standards that relate to childhood safety or childhood sexual assault (AMF No. 16); and did not provide any training on sexual misconduct or childhood sexual assault (AMF No. 17.) These statements mischaracterize the testimony of Ms. Rocklewitz.

Ms. Rocklewitz testified that to her knowledge there have not been any reports of sexual assault or childhood sexual misconduct that occurred at Camp Wa-Tam. (Rocklewitz depo., 35:11-14.) In response to the question of whether there were any complaints about sexual misconduct by any employees, agents, or volunteers between 1975 and 1990, Ms. Rocklewitz responded that she became a permanent employee in 1991 so she would not be privy to that information; but that, once she became a permanent employee should would have become familiar with any such documents—they would have been brought to her attention. (*Id.,* 35:15-36:25.) She states there were no such documents. (*Id.,* 36:1-3.) She testified she could not remember the exact nature of the policies—whether they were general code-of-conduct documents or something more. (*Id.,* 37:2-21.)

When asked if there were any internal investigations regarding any inappropriate behavior at the camp, she responded there would be no reason to investigate if there were no complaints. (*Id.,* 36:4-9.) When asked if there were any audits of child safety, she stated she was not aware of any. (*Id.,* 36:10-12.) Ms. Rocklewitz could not speak to policies and procedures prior to 1991 but speculates they would have been similar. (*Id.,* 36:13-20.) She states that from 1991 onwards, if there had been any allegations, they would have been reported to the City Attorney's Office, the police department, and the City's human resources department, from which Camp Wa-Tam would have sought guidance. (*Id.,* 36:20-24.) She reiterated that she was not aware of policies that existed regarding child safety or childhood sexual assault from 1979 to 1982 because she did not work as a recreational coordinator or supervisor at that time. (*Id.,* 37:7-18.)

Plaintiff's opposition is full of statements and standards of law unsupported by citation. Plaintiff's opposition states the following facts are in dispute: "Defendant's reckless disregard of the safety and foreseeability of childhood sexual assault within their program" (oppo., 15:12-13); "whether Camp Wa-Tam retained sufficient control over the program and personnel interacting with campers to support liability" (oppo., 18:12-13); "agency, control, ratification, and discriminatory conduct" (oppo., 18:23); "whether Camp Wa-Tam functioned as a business establishment, whether a qualifying service relationship existed, whether the perpetrator acted as

Defendant's agent, and whether Defendant aided or ratified the harassment" (oppo., 19:7-9); "Defendant's complete failure to adopt protective measures" (oppo., 21:1-2); Defendant's inconsistency in stating employment records did not exist in contradiction of the declaration of Irene Carranza Medina (ippo., 21-23:26); "[w]hether Camp Wa-Tam retained control over camp activities and permitted YMCA personnel to interact with campers" (ippo., 22:9-10); "regarding duty, breach, foreseeability, and causation" (oppo., 22:24-25; 24:16) "undisputed testimony alone creates a triable issue of fact as to breach" (oppo., 23:18) "the lack of records raises a credibility *issue*" (oppo., 23:24-25 [italics added]; absence of evidence that Camp Wa-Tamp employed a "John" or "Steve" (oppo., 26:3-4); "[*i*]*ssues* of intent, credibility, and the effect of coercion on a minor victim" (oppo., 16:12-13 [Italics added]); "Camp Wa-Tam's conduct was a substantial factor in causing that harm" (oppo., 27:7); "[*i*]*ssues* of causation, foreseeability, and whether Defendant's conduct substantially contributed to the harm" (oppo., 28:22-23 [italics added]); and, "whether Camp Wa-Tam's own conduct created or increased the risk of harm and was a substantial factor in causing Plaintiff's injuries (oppo., 29:2-3). These are all statements of issues—not facts.

The only identified disputed *fact* is immaterial: whether John Helzer is deceased. (Oppo., 23:26-3; 28:6-8.)

Throughout Plaintiff's opposition, he repeats his primary argument: the absence of certain evidence may be construed in his favor—as an absence of safety measures. In essence, he argues Camp Wa-Tam's inability to establish it had reasonable safety measures in its youth camp—because records from so long ago no longer exist, witnesses are deceased or unable to be located—supports finding its liability. Implicit in this argument is that the alleged abuse could not have occurred if Camp Wa-Tam had reasonable safety precautions in place; and, because Plaintiff said it did, this establishes Camp Wa-Tam's failure provide reasonable supervision and safety protocols.

As noted in Camp Wa-Tam's reply, there were at least some protocols already in place by the time Ms. Rocklewitz became a permanent employee in 1991. By that time the Recreation & Parks Department were already fingerprinting new employees. (See, Rocklewitz depo at 43:15-16; 21-23). Ms. Rocklewitz does not know when the fingerprinting started and whether it dated back to the late 1970s or early 1980s. (See, Rocklewitz depo at 43:3-14). And, as discussed above, Ms. Rocklewitz testified that any allegations would have been reported to the City Attorney, police department, and HR.

Ms. Rocklewitz has established there were never any allegations of abuse by Camp Wa-Tam staff or volunteers such that Camp Wa-Tam's administrators and supervising staff could have no reason to know that the Counselor had a propensity to commit sexual abuse such that they negligently hired, supervised, or retained him. Plaintiff has not raised a triable issue of material fact. Accordingly, summary adjudication of this cause of action is granted.

d. Conclusion and Order

Camp Wa-Tam's motion for summary judgment is GRANTED. Camp Wa-Tam's counsel is directed to submit a written order to the court consistent with this ruling and in compliance with Cal. Rules of Court, Rule 3.1312.

*****This is the end of the Tentative Rulings*****