TENTATIVE RULINGS
LAW & MOTION CALENDAR
Wednesday, April 17, 2024 3:00 p.m.
Courtroom 19 –Hon. Oscar A. Pardo
3055 Cleveland Avenue, Santa Rosa

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) 521-6602**, 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.

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Department 19 Hearings
MeetingID: 160-421-7577
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1. 23CV01780, McKenney v. Muirwoods MSL, LLC dba Muirwoods Memory Care

Petition to Compel Arbitration and to Stay DENIED in full, as explained below.

I. Facts

Plaintiff, a 93-year elder who was a resident at Defendants' Muirwoods Memory Care assisted-living facility in Santa Rosa, California (the "Facility"), complains that Defendants neglected here and failed to care for her basic needs, causing injuries. She specifies that Defendants failed to provide for her basic hygiene or take known and necessary precautions to prevent her from falling, as a result of which she fell and suffered injuries. Plaintiff's complaint, filed on November 29, 2023, alleges causes of action for (1) negligence and (2) violations of the Elder and Dependent Adult Civil Protection Act (Welf & Instit. Code §15600 et. seq.)

Plaintiff, a 93-year elder who was a resident at Defendants' Muirwoods Memory Care assisted-living facility in Santa Rosa, California (the "Facility"), complains that Defendants neglected here and failed to care for her basic needs, causing injuries. She specifies that Defendants failed to provide for her basic hygiene or take known and necessary precautions to prevent her from

falling, as a result of which she fell and suffered injuries. Plaintiff's complaint, filed on November 29, 2023, alleges causes of action for (1) negligence and (2) violations of the Elder and Dependent Adult Civil Protection Act (Welf & Instit. Code §15600 et. seq.)

II. Petition

Defendants petition the court to compel the dispute to arbitration and to stay this litigation pending arbitration. They contend that Plaintiff signed a document giving her current guardian ad litem, Sheila Santangelo ("Santangelo") a general power of attorney, allowing her to enter into contracts on behalf of Plaintiff, and that Santangelo signed an arbitration agreement (the "Agreement") with Defendants in that capacity. This Agreement, they contend, applies to the causes of action asserted here.

Plaintiff opposes the petition. She argues that Defendants' evidence demonstrates lack of personal knowledge on behalf of the declarants so fails to support their assertions. She also argues that the Agreement is unenforceable and is unconscionable. Defendants have filed reply papers. They reiterate their position, respond to the objections, and assert their own evidentiary objections.

III. Authority Governing Petitions to Compel Arbitration

Code of Civil Procedure §§1281.2 and 1281.4 allow a party to an arbitration agreement to petition the court to compel arbitration and then to stay legal proceedings pending the outcome of the arbitration. *Nathan v. French Am. Bilingual School* (1969) 2 Cal.App.3d 279 states that generally it is "abuse of discretion not to stay proceedings and order arbitration unless record establishes waiver as matter of law." There is a strong public policy favoring arbitration. *Marsch v. Williams* (1994) 23 Cal.App.4th 238; *United Firefighters of Los Angeles* (1991) 231 Cal.App.3d 1576. Quite logically, however, there is no public policy in favor of arbitrating claims that the parties did not agree to arbitrate. *United Public Employees v. City and County of San Francisco* (1997) 53 Cal.App.4th 1021. The party seeking to compel arbitration also has the burden to "plead and prove" that the parties entered into the arbitration agreement. *Mansouri v. Sup.Ct.* (2010) 181 Cal.App.4th 633, 640-641.

An arbitration provision may also cover both contract and tort claims. *Merrick v. Writers' Guild of America West* (1982) 130 Cal.App.3d 212, 217-219; *Vianna v. Doctors' Management Co.* (1994) 27 Cal.App.4th 1186, 1189-1190. Essentially, as long as the language of the arbitration provision is broad enough to go beyond mere contract claims, and the cause of action arises from the contractual relationship, the arbitration provision may apply. Once this court, or another competent court with jurisdiction, has ordered the dispute to be submitted to arbitration, the court shall, upon application or motion, stay the pending litigation until the arbitration proceeding has been concluded. CCP section 1281.4

A. The Federal Arbitration Act

The Federal Arbitration Act ("FAA") is at 9 U.S.C. § 1 et seq. See, e.g., *Yuen v. Sup. Ct*. (2004) 121 Cal.App.4th 1133, at 1135. The FAA applies to any "contract evidencing a transaction involving commerce" which contains an arbitration clause. 9 USC section 2. According to 9 USC section 1, '"commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation....' In short, the FAA "applies to arbitration agreements affecting interstate commerce." *Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 380.

When the FAA applies, it preempts contrary state law. The court in *C.T. Shipping, Ltd. v. DMI (USA) Ltd.* (S.D.N.Y.1991) 774 F.Supp. 146, at 148-149, ruled that a state law governing petitions to confirm arbitration awards did not apply where the FAA was applicable, stating that "the federal statute, when it is applicable, preempts state statutes purporting to create alternative grounds for confirming or vacating arbitration awards." The FAA thus 'creates "a body of federal substantive law of arbitrability," enforceable in both state and federal courts and preempting any state laws or policies to the contrary.' *Cohen v. Wedbush, Noble, Cooke, Inc.* (9th Cir.1988) 841 F.2d 282, 285, citing *Moses H. Com. Mem. Hosp. v. Mercury Const.Corp.* (1983) 460 U.S. 1, 24.

Section 2 of the FAA, though, states that arbitration provisions shall be enforced, "save upon such grounds as exist at law or in equity for the revocation of any contract." The Supreme Court of the United States, addressing section 2, stated in *Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, at 687, that "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2" of the FAA. See also *Capili v. Finish Line, Inc.* (N.D.Cal.2015) 116 F.Supp.3d 1000, at 1003 (quoting and relying on the above statement in *Doctor's Associates*). The court in *Smith v. Pacificare Behavioral Health of California, Inc*. (2001) 93 Cal.App.4th 139 made it clear that such defenses apply in California. The court there relied on and quoted *Doctor's Associates* in affirming a trial court's order denying a motion to compel arbitration which failed to comply with applicable state statutes governing contracts and disclosures at issue in the case. The court explained, at 151, 'a state court may, without violating section 2, refuse to enforce an arbitration clause on the basis of "generally applicable contract defenses, such as fraud, duress, or unconscionability."' More recently, the California Supreme Court reiterated this principle, again quoting Doctor's Associates, in *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, at 246. The Supreme Court again reiterated and relied on this principle in *OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, at 125, when finding an arbitration provision in an employment context to be unenforceable because it was unconscionable.

Section 2 of the FAA, though, states that arbitration provisions shall be enforced, "save upon such grounds as exist at law or in equity for the revocation of any contract." Courts have ruled, therefore, that a state court may, without violating section 2, refuse to enforce an arbitration clause on the basis of "generally applicable contract defenses, such as fraud, duress, or unconscionability." *Smith v. Pacificare Behavioral Health of California, Inc*. (2001) 93 Cal.App.4th 139,151; *Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 687; *Capili v. Finish Line, Inc.* (N.D.Cal.2015) 116 F.Supp.3d 1000.

However, under the FAA, as in California law, ordinarily a party may not be compelled to submit to arbitration pursuant to an arbitration agreement to which it is not a party. *AT & T Technologies, Inc. v. Communications Workers of Am*. (1986) 475 U.S. 643, 648; *Dean Witter Reynolds Inc. v. Byrd* (1985) 470 U.S. 213, 219–220 ("*Byrd*"); *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ*. (1989) 489 U.S. 468, 479; see also, e.g., *U.S. for Use and Benefit of Capital Elec. Const. Co., Inc. v. Pool and Canfield, Inc*. (W.D.Mo.1991) 778 F.Supp. 1088. Arbitration under the FAA "is a matter of consent, not coercion...." *Volt, supra*. The Supreme Court pointed out in *AT & T, supra*, that "'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit.' " This is true, as in *U.S. for Use and Benefit*, even where the party sought to be forced into arbitration has a relationship regarding the subject matter to a party that is a party to the arbitration agreement. As the California Supreme Court stated in *Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, at 384, citing *Byrd* and *Volt*, "the FAA does not force parties to arbitrate when they have not agreed to do so... or require them to do so under any specific set of procedural rules." Parties may, however, agree to specify the contract rules applying to arbitration. *Volt, supra*.

Courts have ruled, therefore, that a state court may, without violating section 2, refuse to enforce an arbitration clause on the basis of "generally applicable contract defenses, such as fraud, duress, or unconscionability." *Smith v. Pacificare Behavioral Health of California, Inc*. (2001) 93 Cal.App.4th 139,151; *Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 687.

B. Burden

The party seeking to compel arbitration bears the burden of showing a valid, enforceable arbitration agreement. *Flores v. Evergreen At San Diego, LLC* (2007) 148 Cal.App.4th 581, 586; *Garrison v. Superior Court* (2005) 132 Cal.App.4th 253, 263; *Engalla v. Permanente Medical Group, Inc*. (1997) 15 Cal.4th 951, 972.

C. Entering into Arbitration Agreements on Behalf of Principals Regarding Health Care Decisions

As the court stated in *Garrison v. Sup.Ct.* (2005) 132 Cal.App.4th 253, at 266, "[w]hether to admit an aging parent to a particular care facility is a health care decision." Executing an arbitration agreement as part of the process of deciding to enter into an agreement for a skilled nursing facility is "part of the health care decisionmaking process." *Garrison v. Sup.Ct.* (2005) 132 Cal.App.4th 253, 266; see also *Hogan v. Country Villa Health Services* (2007) 148 Cal.App.4th 259, 267-268 (quoting *Garrison*). The *Hogan* court stated,

> when an agent under a health care power of attorney is faced with selecting a long-term health care facility, as part of the health care decisionmaking process (Prob.Code, § 4617), he or she may well be asked to decide whether to sign an arbitration agreement as part of the admissions contracts package. The *Garrison* court was correct in characterizing the execution of the

> arbitration agreements as "part of the health care decisionmaking process." [Citation.]

This is also true for admission to a residential care facility. *Hutcheson v. Eskaton Fountainwood Lodge* (2017) 17 Cal.App.5th 937, 941; see also *Garrison, supra*. The court in *Hutcheson v. Eskaton Fountainwood Lodge* (2017) 17 Cal.App.5th 937, at 941, explained,

> This case turns on whether an attorney-in-fact made a "health care decision" by admitting her principal to a residential care facility for the elderly and, in the process, agreeing to an arbitration clause. If she did, as the trial court found, she acted outside the scope of her authority under the power of attorney, and the arbitration clause this appeal seeks to enforce is void.
> …
> We conclude admission of decedent to the residential care facility for the elderly in this instance was a health care decision, and the attorney-in-fact who admitted her, acting under the PAL [Power of Attorney Law at Prob. Code, § 4000 et seq.], was not authorized to make health care decisions on behalf of the principal.

As a result of this conclusion, we affirm the trial court's denial of a motion by the residential care facility to compel arbitration. Because the attorney-in-fact acting under the PAL did not have authority to make health care decisions for her principal, her execution of the admission agreement and its arbitration clause are void.

Therefore, an agent must have a power of attorney *for health care* in order to bind a principal to an arbitration agreement for admission to a care facility. The courts in both *Garrison v. Sup.Ct.* (2005) 132 Cal.App.4th 253 and *Hogan v. Country Villa Health Services* (2007) 148 Cal.App.4th 259 found that the agents in the cases before them had the authority to enter into the arbitration agreements for their principals, but expressly explained that this was because the agents had a power of attorney for *health care*. In *Hutcheson v. Eskaton Fountainwood Lodge* (2017) 17 Cal.App.5th 937 and *Paparigan v. Libby Care Center, Inc.* (2002) 99 Cal.App.4th 298, by contrast, the court found that the family members lacked authority to make health care decisions even if they had the authority, under, for example, a power of attorney, to make other decisions.

IV. Evidentiary Issues

A. Defendants' Evidence and Objections Thereto

Plaintiff argues that Defendants' evidence is defective due to lack of personal knowledge regarding, or information necessary to authenticate, exhibits attached to the declarations supporting the petition. As explained below, Plaintiff's arguments are in part persuasive, while Defendants' responses are largely unpersuasive. Plaintiff correctly argues that the declaration of Defendants' attorney, Zhara Aziz ("Aziz") clearly lacks personal knowledge and information sufficient to authenticate, or lay a foundation for, the Exhibits 2-4. However, Aziz does have personal knowledge for Exhibit 1, a copy of the complaint in this action, and Exhibit 5, a copy of a letter Aziz purportedly sent to Plaintiff. The court SUSTAINS the objections to the Aziz declaration for Exhibits 2-4. It OVERRULES the objections as to Exhibits 1 and 5.

Plaintiff also contends that Defendants' employee Camille Brown ("Brown") in her declaration (the "Brown Dec.") similarly lacks personal knowledge and fails to present information sufficient to authenticate the documents attached to her declaration. Plaintiff is clearly correct as to Exhibit C, a purported power of attorney which Plaintiff allegedly made years earlier, and the factual assertions related to that at ¶4. Nothing indicates that Brown has personal knowledge of the document or the facts asserted while she also states that this assertion is on information and belief, clearly admitting a lack of personal knowledge. Otherwise, however, the Brown Dec. on its face shows a basis for personal knowledge of the asserted facts and attached documents. The court SUSTAINS the objections to the statements in paragraph 4 and Exhibit C but otherwise OVERRULES the objections.

B. Defendants' Objections to Plaintiff's Evidence

In their reply papers, Defendants also object to some of Plaintiff's evidence, specifically to portions of the Santangelo declaration on the ground that the statements are "irrelevant." Such objections in law-and-motions matters are generally improper and pointless, given that the court is the determiner of what is material and bases its decision on material evidence only. See, e.g., *Cohen v. Kabbalah* (2019) 35 Cal.App.5th 13, 21. If evidence is not material, by definition it does not affect the outcome. The court in *Cohen* addressed improper objections in the context of a motion for summary judgment and what holds true there is at least as valid in other law-and-motion proceedings. Moreover, in contrast to Defendants' claims that the evidence is "irrelevant," much of the information to which they object as irrelevant in fact is relevant, such as the statements that nobody explained to Santangelo what the documents were and gave her a large stack of documents. As discussed below, this information is relevant. Defendants also assets objections for lack of foundation, assuming facts not in evidence, and improper conclusion or opinion, based on, among others, Evidence Code sections 351 and 352. These objections go to Santangelo's statements of fact or what she understood. The objections as asserted are groundless given that she clearly appears to have personal knowledge of the facts asserted and may explain her state of mind or understanding. Moreover, these objections again are largely improper in law-and-motion proceedings outside of trial. See, e.g., *People ex rel. City of Dana Point v. Holistic Health* (2013) 213 Cal.App.4th 1016, 1029. The court in *People ex rel. City of Dana Point explained* that objections based on Evidence Code section 352 are not applicable in motions for summary judgment or adjudication and the principle applies at least as strongly to other law-and-motion proceedings.

The court OVERRULES all of Defendants' objections.

V. Legal Analysis

A. The Alleged Power of Attorney

Defendants demonstrate that Santangelo signed the Agreement, purportedly on behalf of Plaintiff. However, Defendants provide absolutely no evidence to support any contention that Santangelo had authority to enter into the Agreement on behalf of Plaintiff. They base this assertion solely on the purported General Power of Attorney ("GPA") which they allege Plaintiff

signed in 2011 and thereby granted Santangelo the powers set forth in the GPA. The only evidence, however, is the statement in the Brown Dec. "on information and belief" that Plaintiff executed the attached GPA to give Santangelo the stated powers. Brown Dec., ¶4. Unfortunately, Defendant's evidence lacks foundation.

First, the declarant, Brown, an employee of Defendants who was involved in the 2023 transaction admitting Plaintiff to the Facility, provides no explanation as to how she could possibly have personal knowledge of the circumstances leading to the execution of GPA. Second, as noted above, Brown expressly states that her assertion on this point is "on information and belief" which is rather obviously not personal knowledge. Third, Aziz similarly provides absolutely no basis for any personal knowledge or ability to authenticate, or lay a foundation for, the purported GPA. She merely states that it is a copy of the GPA but she gives no indication whatsoever as to how she could possibly know this, or that she was in any way involved in any of the events or transactions.

Finally, and most importantly, the alleged GPA, even if it were properly authenticated, is ineffective to show that Santangelo had authority to enter into the Agreement. As explained above, a mere general power of attorney which is not, or lacks the terms of, a power of attorney for health care, does not provide authorization for one person to enter into such an agreement for the principal. The GPA on which Defendants rely on its face is a mere general power of attorney and it is entirely devoid of any terms which might provide a power of attorney for health care or any authority to make such healthcare decisions and enter into such agreements. See *Garrison v. Sup.Ct.* (2005) 132 Cal.App.4th 253, 266.

Accordingly, Defendants unequivocally fail to meet their burden of showing that Santangelo entered into a binding Agreement on behalf of Plaintiff. The Court DENIES the motion in full on this basis alone.

B. Unconscionability

Plaintiff also contends that the Agreement is not enforceable because it is unconscionable. Under Civil Code ("CC") section 1670.5, the court may refuse to enforce an unconscionable contract or clause. An arbitration clause may only be found invalid upon the grounds for revoking any contract. CCP section 1281.

Unconscionability may be used to invalidate an arbitration agreement under California law, and without contravening the Federal Arbitration Act ("FAA"). *OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 125. "Unconscionability" requires both procedural and substantive unconscionability but they need not be present in the same degree. *Armendariz v. Foundation Health Psychcare Service, Inc.* (2000) 24 Cal.4th 83, 114.

However, in this instance, the Court will not undertake a detailed examination of whether the Agreement suffers from any procedural or substantive unconscionability since Defendants have failed to demonstrate that Plaintiff, or Santangelo on her behalf, had the requisite authority to entered into the Agreement.

Conclusion

The court DENIES the petition in full on this basis. 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. SCV-267833, County of Sonoma v. Manzo

This matter is on calendar for a motion by Plaintiff County of Sonoma ("County" or "Plaintiff") for an order to show cause re: contempt against defendants Lisa Figueroa and Gabriel Manzo (together "Defendants").

The County filed a Case Management Statement on March 29, 2024, requesting the matter be continued 90 days, as Defendants have filed for the necessary permits, and the County wishes to await the result of that permitting process before proceeding. Defendants have made no filing in response to this motion. The matter is therefore CONTINUED to July 31, 2024, at 3:00 pm in Department 19.

3. SCV-270065, Miranda v. Ceja Madrigal

Motion is dropped from calendar in light of Notice of Settlement filed on 4/2/24.

4. SCV-270587, Roundtree v. Stoesser Industries

Plaintiff Huey Roundtree ("Plaintiff") filed the complaint in this action individually and on behalf of all others similarly situated against defendants Stoesser Industries, and Scientific Molding Corporation, LTD (together "Defendants") for wage and hour violations. This matter is on calendar for Plaintiff's unopposed motion for certification of the class and final approval of the class action settlement (the "Motion"), as well as the motion for attorney's fees and class representative enhancements.

The Court issued a tentative ruling on the motion on April 4, 2024, and ordered the parties to appear for oral argument the next day. At the hearing, the Court allowed arguments by Plaintiff's counsel which focused on the Court's modification to the attorney's fees allocation in the settlement. Plaintiff argued the original attorney's fee request was justified but requested additional briefing. No objector appeared to contest the settlement. The Court then granted the request for additional briefing and took the matter UNDER SUBMISSION.

The Court has now reviewed Plaintiffs' additional briefing in the form of declarations from Plaintiff and Plaintiff's counsel, and now determines the Motions are **GRANTED with the modifications below**.

I. The Complaint

The presently operative First Amended Complaint ("Complaint") alleges that Defendant failed to comply with California Labor Code ("LC") provisions during the course of his employment with Defendant, and alleges on information and belief that these policies were also enforced on other employees.

The Complaint contains causes of action for: (i) failure to pay minimum wages; (ii) failure to pay overtime wages; (iii) failure to provide meal periods; (iv) failure permit rest breaks; (v) wage statement violations; (vi) failure to pay timely wages; (vii) failure to pay all wages due upon separate of employment; (viii) violations of Business & Professions Code § 17200 *et seq.*; and (ix) Private Attorney Generals Act ("PAGA") penalties. Plaintiff seeks to collect on a representative basis PAGA civil penalties for themselves and other employees and collect on a class-wide basis missed break wages, unpaid wages, waiting time penalties, and wage statement damages.

II. The Settlement

According to the Motion, Plaintiff asserted multiple causes of action for various Labor Code and Business and Professions Code violations centered around failure to allow for rest and meal periods, and the failure to timely pay wages both during employment and at separation. Defendant contends that Plaintiff is unlikely to obtain class certification and the claims presented were based on individualized damages not easily proven in representative claims. *See generally* Campbell Decl. ¶¶ 12-28.

The Campbell Declaration displays the factors necessary for analysis of the fairness of the establishes that Plaintiff's counsel engaged in informal discovery and investigation. Campbell Decl. ¶¶ 5, 10, 12-27. On December 20, 2022, the parties mediated the matter before Steve G. Pearl, an experienced mediator with extensive wage and hour class action experience. Campbell Decl. ¶ 6. Prior to the mediation, Defendant had provided documents responsive to the informal discovery requests, including payroll information covering the applicable statutory period. (The class is defined in the Class and PAGA Action Settlement Agreement [attached to Campbell Decl., Exhibit 1, hereinafter "Settlement Agreement"] as all current and former non-exempt employees who were employed by Defendants in California at any time from October 7, 2017 through March 18, 2023. Settlement Agreement Article I §§ (c),(f), and (g).) Campbell Decl. ¶¶ 5, 10, 12-27.

Plaintiff undertook a 25% sampling of the data provided by Defendants. Campbell Decl. ¶ 5. Based on that data, Plaintiff's counsel was able to undertake a thorough analysis of potential damages for the claims alleged in the Complaint, including the number of instances and the corresponding monetary claim for each late or missed meal break, each missed rest break, and each resulting wage statement violation. Plaintiff's counsel was able to then extrapolate that information to the entire class. Plaintiff estimates that the maximum amount of potential damages across the class for the alleged underlying violations equals $6,093,051 ($605,447 in waiting time penalties + $74,319 in unpaid wages due to rounding + $841,226 in overtime bonus violations + $1,271,472 in meal-break wages + $1,660,757 in rest-break violations + $812,800 in wage statement penalties + $827,000 in PAGA penalties). The estimated average damage for the

core claims is therefore $17,309.80 per class member ($6,093,051 / 352 class members). Campbell Decl. ¶¶ 8, 12-26. However, the Plaintiff also undertook an analysis through their expert of the merits of the claims in both class certification and at trial, with a probable value of $968,000, plus "heavily discounted" additional penalties whose maximum value was $827,000. Campbell Decl. ¶¶ 12-27. At the mediation, the parties came to an agreement based on the assistance of the mediator. Campbell Decl. ¶¶ 6-8.

Pursuant to the Settlement Agreement, Defendant will pay $1,000,000 as the Gross Settlement Fund. Settlement Agreement Article I § (n), Article III § 3.06 (a). From that amount, the following will be deducted: 1) attorneys' fees of $333,333.33 (which is approximately 1/3 of the Gross Settlement Fund) and up to $25,000 of costs and expenses; 2) an incentive award to the Plaintiff of $10,000; 3) settlement administration costs, not to exceed $15,000; and 4) $50,000 in penalties under PAGA, 75% of which is paid to the California Labor and Workforce Development Agency ($12,500 of which is payable to the Class). See Settlement Agreement Article III § 3.06. If these sums are all approved by the Court, this results in a Net Settlement Fund of $566,666.67 to be distributed to the members of the class. The Net Settlement Fund will be distributed pro rata to the members of the class who do not opt out, based on the number of workweeks worked by such individual as compared to the total number of aggregate number of workweeks by all such individuals during the Class Period. Settlement Agreement Article III § 3.06 (f). This results in an average Class settlement payment of approximately $1,623.69 ($566,666.67 / 349). This also leaves a PAGA settlement for distribution of $12,500. Defendant will pay its share of payroll taxes for settlement funds classified as wages separate from the Gross Settlement Fund. Settlement Agreement Article III § 3.06 (a). The settlement is non-reversionary as any funds will be distributed to Participating Class Members. Settlement Agreement Article I § (n) (a "Participating Class Member" being any Class Member who does not submit a timely opt-out and therefore will receive their share of the Gross Settlement, [see Settlement Agreement Article I § (z)). For tax purposes, 10% is allocated to unpaid wages, and 90% is allocated to interest and penalties classified as miscellaneous income. Settlement Agreement Article III § 3.06 (f). Net settlement payments will be automatically sent to members of the class unless they opt out. See generally, Settlement Agreement Article III § 3.06 (f).

The Settlement Agreement and proposed notice to the Class (the "Proposed Notice") (Settlement Agreement, Ex. A) also set forth the procedure and timeline for providing notice to the class members (which will be sent by the administrator via first class mail), which includes a detailed explanation of the claims and defenses, terms of the settlement, opt out and objection procedures, an estimate of the individual class member's settlement payment and a description of how it was calculated, and that all participating members of the class will be paid without the need to submit a claim. The Class Members who did not opt-out of the settlement release Defendant from "any and all claims, rights, demands, liabilities and causes of action of any nature or description, including any such claims, whether known or unknown, that were litigated in the Action against Defendant or could have been litigated based on the facts and circumstances alleged in the entire Action against Defendant, arising under the Operative Complaint, including but not limited to, all claims under the California Labor Code, Wage Orders, and related orders of the California Industrial Commission and Business and Professions Code section 17200, et seq. alleged in the Action or which could have been alleged based on the facts alleged in the Action, including all of the following claims for relief: (1) failure to pay minimum wages (2) failure to pay overtime

wages (3) failure to provide meal periods (4) failure to authorize or permit rest periods (5) failure to provide accurate itemized wage statements (6) failure to pay wages timely during employment (7) failure to pay wages upon separation of employment and within the required time and (8) violation of California Business and Professions Code §§17200, *et seq.*, based on the preceding claims. The claims released under this paragraph shall include, but not necessarily be limited to, claims for: meal period violations and failure to pay compensation in lieu thereof; rest break violations and failure to pay compensation in lieu thereof; failure to pay minimum wages, regular wages, overtime and double time wages; all theories related to unpaid wages (including but not limited to off-the-clock work, time shaving, time rounding, on-call time, working through meal periods, regular rate claims, on-duty meal period violations, or any other claims giving rise to minimum and/or overtime violations); unpaid meal period penalties; unpaid rest period penalties; wage statement violations; failure to reimburse business expenses; failure to pay wages upon separation from employment; late payment of wages; waiting time penalties; any penalties or wages owed or derivative of violations of the Unfair Competition Law, the Labor Code, including Labor Code section 2699, et seq., as well as any damages, restitution, disgorgement, civil penalties, statutory penalties, taxes, interest or attorneys' fees or costs resulting therefrom" during the Class Period. Settlement Agreement Article V § 5.01.

Additionally, aggrieved employees under the PAGA claims agree to release "all causes of action and claims for civil penalties under the California Labor Code Private Attorneys General Act of 2004 that were alleged in the Action, in Plaintiff's LWDA Notice, or reasonably could have been alleged based on the facts and legal theories contained in the Action, including claims for civil penalties based on the following: (1) failure to pay minimum wages (2) failure to pay overtime wages (3) failure to provide meal periods (4) failure to authorize or permit rest periods (5) failure to provide accurate itemized wage statements (6) failure to pay wages timely during employment (7) failure to pay wages upon separation of employment and within the required time. This release will only release such claims during the PAGA Period. PAGA Employees cannot exclude themselves from the PAGA release contained in this paragraph" during the PAGA period. Settlement Agreement Article V § 5.02. The PAGA claims are not subject to any option to opt out.

Notice to the class was distributed after the Court entered preliminary approval on November 8, 2023. ILYM has entered a declaration regarding the administration of the settlement to this point in support of final approval. See generally, Fowler Decl. Of the class members disclosed by Defendants pursuant to the agreement (352 class members), 6 of the notices were undeliverable. The opt out phone line was available 24/7. No members of the class contacted the administrator to opt out either by phone or by written notice.

III. Final Approval

After preliminary approval, the Court determines whether a class action settlement is fair, adequate and reasonable in a final hearing, often referred to as a "fairness hearing." Cal. R. Ct. 3.769(g); *see also Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801. 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" and to "prevent fraud, collusion or unfairness to the class…" *Dunk,* 48 Cal.App.4th at 1800-01, citing *Malibu*

Outrigger Bd. of Governors v. Superior Court (1980) 103 Cal.App.3d 573, 578-79; *see also Marcarelli v. Cabell* (1976) 58 Cal.App.3d 51, 55.

"The trial court has broad discretion to determine whether a class action settlement is fair and reasonable." *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 52. "Due regard should be given to what is otherwise a private consensual agreement between the parties" and "the court's 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." *Dunk,* 48 Cal.App.4th at 1801 (internal citations omitted). "When the following facts are established in the record, a class action settlement is presumed to be fair: '(1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small.'" *Chavez,* 162 Cal.App.4th at 52 *quoting Dunk,* 48 Cal.App.4th at 1802.

There are 352 eligible class members. Fowler Declaration ¶ 7. Based on a calculation that assumes that the requested attorneys' fees, costs, and incentive fee awards are approved (*i.e.* a $573,366.67 net settlement fund) the highest individual settlement payment to be paid is approximately $4,234.55 and an average of approximately $1,628.88 Fowler Decl. ¶ 13-14. PAGA payments will average $55.07 per claimant. Fowler Declaration ¶ 15.

There are several adjustments to these initial figures presented in the Preliminary Approval, each of which appear to increase the amount available for the settlement fund. Counsel's litigation expenses did not reach the $25,000 amount estimated, instead coming to $13,909.95, adding $11,090.05 to the settlement fund. Already included above is the adjustment of the class administrator reflecting that their actual fees were $8,300, not the $15,000 which received preliminary approval.

In examining the total settlement amount, and whether it is reasonable, the Court notes that Plaintiff based their settlement on an expert opinion (though only conveyed through the declaration of counsel), and the total settlement amount was roughly reflective of the probable recovery. Therefore, the settlement appears to be the result of arm's length bargaining. Substantial discovery appears to have occurred. There were no objectors to the settlement during the notice period.

Based on the foregoing, because the factors articulated in *Dunk* are met; because there is no indication of fraud, collusion or unfairness; and because the terms of the settlement appear to be fair and reasonable; and based on the lack of opposition or objection, Plaintiffs' motion for final approval of the terms of the settlement is approved.

IV. Final Approval of the Attorneys' Fees and Cost Award and Class Representative Enhancement.

In this case, the underlying Settlement Agreement established a gross settlement fund fixed at $1,000,000, without any reversion to Defendants and with all settlement proceeds, net of specified fees and costs and $50,000 in PAGA penalties, going to pay claims for class members

who did not opt out of the settlement (and none did). Plaintiffs' counsel requests an award of $333,333.33. which is one third (33.33%) of the common fund.

Class Counsel Campbell (who has thirteen years of experience) has provided information regarding the time billed in this case and the relative rates of each individual who performed work for Plaintiff. Percentage recovery focuses on results achieved whereas the lodestar focuses on time spent. Here, the Court finds the lodestar method appropriate.

The "lodestar" is the number of hours reasonably expended multiplied by the reasonable hourly rate prevailing in the community for similar services by an attorney with similar skill and experience. *See, e.g. PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095; *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132. The trial court may adjust the lodestar amount based on various factors specific to the case to fix the attorney fees at fair market value for the services provided, including: "(1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, [and] (4) the contingent nature of the fee award." *Ketchum*, 24 Cal.4th at 1132. *See also Gorman v. Tassajara Dev. Corp.* (2009) 178 Cal.App.4th 44, 92 ("The first step involves the lodestar figure—a calculation based on the number of hours reasonably expended multiplied by the lawyer's hourly rate. 'The lodestar figure may then be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided.'…The factors to be considered include the nature and difficulty of the litigation, the amount involved, the skill required and employed to handle the case, the attention given, the success or failure, and other circumstances in the case." (internal citations omitted).

The Court finds that the 261.2 hours expended is likely reasonable, but notes that there is no evidentiary support attached to the Campbell Declaration sufficient for the Court to determine the specific reasonableness of the hours. What is apparent is that the hourly rate requested for each attorney far exceeds the expected rates for counsel in the county of Sonoma. "The reasonable hourly rate is that prevailing *in the community* for similar work." *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095 (emphasis added). Plaintiff has cited the reasonableness of their fees as related to their locale within Southern California. This case was filed and is based on Plaintiff's employment within the county of Sonoma, and that is the appropriate locale to consider when determining fees within this venue. The court may consider various other factors when determining a reasonable hourly rate, including the attorney's skill and experience, the nature of the work performed, the relevant area of expertise and the attorney's customary billing rates. *See, e.g. Flannery v. California Highway Patrol* (1998) 61 Cal.App.4th 629, 632-633; *Stratton v. Beck* (2017) 9 Cal.App.5th 483, 496. The Court does not, however, find that these factors justify paying Plaintiff's counsel market rate fees for the Southern California area. It is only where a plaintiff has made a good faith but unsuccessful effort to find local counsel that out-of-town counsel is not limited to fees determined at local hourly rates. *See, e.g. Horsford v. Board of Trustees of Calif. State Univ.* (2005) 132 Cal.App.4th 359, 398-399 (hiring local counsel was attempted numerous times and deemed to be impracticable); *Center For Biological Diversity v. County of San Bernardino* (2010) 188 Cal.App.4th 603, 608, 614-615 (trial court erred in setting lodestar based on local hourly rates, rather than rates of competent attorneys outside local market, where evidence showed local counsel was unavailable for appellate work).

There is no such evidence here. Rather, Plaintiff chose to retain a lawyer from outside the community; that is their right, but it does not make the fees incurred "reasonable" for purposes of the fee award.

At the initial hearing, Plaintiff's counsel appeared and requested the opportunity to provide supplementary briefing to address the Court's concerns. The Court has reviewed the supplementary materials and finds them unpersuasive. First, these materials should have been included initially, as it is counsel's burden to show their requested fees are appropriate. Second, to the substance, Plaintiff submitted a declaration that he spoke with other law firms, but the declaration provides no specifics. The declaration does not aver that Plaintiff sought *local* counsel, just that he spoke with attorneys. Plaintiff's only averment that he sought attorney's locally is immediately undercut by Plaintiff's statement that he was otherwise occupied by medical concerns during this period. Plaintiff chose not to retain the attorneys he eventually did speak with for various reasons, including that they "charged too much". No specifics are provided on what Plaintiff means by this. Weighing this against the hourly rates of the fees requested, any attorney who charged too much would not have been local counsel, and the supplemental briefing fails to show that local counsel is unavailable or unable to undertake the suit. Therefore, the Court's initial finding on appropriate local fees remains proper.

The Court finds that with the qualifications and experience set forth in the Campbell Declaration, fees in line with similarly qualified attorneys in the Sonoma County community are $550 as to Mr. Wong, $500 as to Ms. Campbell, $400 as to Mr. McNicholl, and $375 as to Ms. Robles based on their years of experience and time practicing law.

Plaintiff also argues for a multiplier of 1.6. Only a multiplier of 1.2 appears appropriate here. The obvious factor which merits application is that for the contingent nature of the case. However, Class Counsel has not particularly displayed that the work precluded them from taking other cases, as they only expended 261.2 hours over an 18-month period. Neither the time expended, or the duration of the case lend themselves to this argument. Class Counsel's qualifications neither fall short of, or exceed, the counsel which normally appear in these types of cases. As is covered below, the Court does not find the recovery exceptional.

Based on these adjustments, the Court comes to base fees of $126,565, which after application of a 1.2 multiplier, comes to a lodestar of $151,878.

Even if the Court were to undertake the analysis under the percentage of recovery test, the request for fees appears high. The recovery here appears reasonable for approval, but low when considering the fees requested. Given the maximum recovery of $6,093,051[1], the settlement fund of $1,000,000, and the recovery after attorney's fees of $584,456.72 represents a recovery of less than 10% of the maximum amount. In the Court's experience, this represents below average recovery as related to the maximum value of the case. This is further reinforced by the estimation of the case's value, and the applicable attorneys' fee statutes. The value the Plaintiff assigned to the case including the probability of prevailing was $968,000, plus "heavily discounted"

[1] The Court notes that between preliminary approval and final approval, 5 additional class members were identified, but there were no updates to the damage estimates. As the settlement is approved, the damage estimates do not create adequate material difference to address further.

additional penalties whose maximum value was $827,000. Civ. Code § 218.5, Labor Code § 1194, and CCP § 1021.5 all allow Plaintiff to recover attorneys' fees for a variety of the claims at issue in this case. This means that the probable value of Plaintiff's claims were higher if he proceeded to trial. As such, the percentage of recovery method does not necessarily support Plaintiff's request for fees.

Plaintiff has also provided supplementary briefing on this issue. Again, it is unpersuasive. Plaintiff avers that the recent publication of *Naranjo v. Spectrum Security Services, Inc.* (2023) 88 Cal.App.5th 937, 951, directly before the mediation substantially delayed this case. Again, Plaintiff should have made this showing in the moving papers. Plaintiff provided an expert analysis in coming to the value estimated above. Plaintiff now attempts to re-write their narrative saying the case was only valued at $3,889,154. No rebuttal of expert analysis is provided. It also overstates the *Naranjo* holding, which was predicated on the trial court's finding of good faith defense, but subsequent finding that knowing and intentional penalties under Labor Code §§ 203 & 226 were appropriate. *Ibid*. While it is possible this impacted Plaintiff's valuation of the case, it highlights the question why this valuation was not presented to the Court in the moving papers.

Despite this, the Court's decision remains couched in the lodestar method.

Plaintiff's counsel also seeks $13,909.95 litigation-related costs and attaches a cost report substantiating that sum. Campell Decl. ¶ 47 & Ex. B.

Based on the foregoing, Plaintiffs' request for attorneys' fees and costs is granted in the amount of $151,878. for fees and $13,909.95 in costs. The amounts of the attorney's fees not approved will revert to the gross settlement fund, per the terms of the settlement agreement. Settlement Agreement, Section 3.06 (b).

Plaintiffs also seek a service award in the amount of $10,000 for Plaintiff. "'[C]riteria courts may consider in determining whether to make an incentive award include: 1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation and; 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation.' [citation] These 'incentive awards' to class representatives must not be disproportionate to the amount of time and energy expended in pursuit of the lawsuit." *See Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1394-95. *See also Ridgeway v. Wal-Mart Stores Inc*. (N.D. Cal. 2017) 269 F. Supp. 3d 975, 1003 (citing *Bellinghausen v. Tractor Supply Co*. (N.D. Cal. 2015) 306 F.R.D. 245, 266-67, which in turn collected cases and explained that a $5,000 incentive award is presumptively reasonable in that district and that awards typically range from $2,000–$10,000).

Plaintiff argues that this award is reasonable in light of their role as representatives of the class. In particular, Plaintiff cites his role in providing substantive information and documents to counsel and reviewing documents and the Settlement Agreement and the risks taken professionally, personally, and monetarily (for costs), in that he subjected himself to potential reprisal from other potential employers. Declaration of Huey Roundtree. Plaintiff filed a declaration generally describing his participation and establishing that he participated as the class

representative and estimated that he spent 70-80 hours conferring with counsel on the case and performing his responsibilities as class representative. *Ibid.*

Based on the time expended, the exposure and risk, and the duration of the litigation, the request is for the reasonable award of $10,000 under the factors described in *Cellphone Termination*, 186 Cal.App.4th at 1394-95. The Court finds the award, despite being on the high end of the normal range, reasonable.

Plaintiff's request for a personal representative enhancement award is approved in the amount of $10,000 to Plaintiff.

Therefore, the Court calculates the total gross settlement fund for the class action as $765,912.05. Payments to class members should be adjusted accordingly.

V. Conclusion

Based on the foregoing:

1. The Court, for purposes of this Order, adopts all defined terms and conditions as set forth in the Settlement Agreement filed in this case.

2. The Court has jurisdiction over the subject matter of this litigation and the Class Representatives, the other members of the Class, and Defendants.

3. The Court finds that the dissemination of the Class Notice as disseminated to the Class Members, constituted the best notice practicable under the circumstances to all persons within the definition of the Class, and fully met the requirements of California law and due process under the United States Constitution.

4. The Court approves the Settlement of the above-captioned action, as set forth in the Settlement Agreement, as fair, just, reasonable, and adequate as to the Settling Parties. The Settling Parties are directed to perform in accordance with the terms set forth in the Settlement Agreement.

5. Except as otherwise provided in the Settlement Agreement, the Settling Parties are to bear their own costs and attorneys' fees.
6. The Court hereby certifies the following Class for settlement purposes only: all current and former non-exempt employees employed by Defendant in a California facility at any time from October 7, 2017, through March 18, 2023. The Court approves the class of Aggrieved Employees under the PAGA claims as all current and former non-exempt employees who worked at least one shift for Defendant in California from October 7, 2021, through January 27, 2023.

7. With respect to the Class and for purposes of approving the settlement only and for no other purpose, this Court finds and concludes that: (a) the members of the Class are ascertainable and so numerous that joinder of all members is impracticable; (b) there are

questions of law or fact common to the Class, and there is a well-defined community of interest among members of the Class with respect to the subject matter of the claims in this litigation; (c) the claims of Class Representative is typical of the claims of the members of the Class; (d) the Class Representative has fairly and adequately protected the interests of the members of the Class; (e) a class action is superior to other available methods for an efficient adjudication of this controversy; and (f) the counsel of record for the Class Representative, i.e., Class Counsel, are qualified to serve as counsel for the Plaintiff in his individual and representative capacity and for the Class.

8. Defendant shall fund **$1,000,000.00** of the total Gross Settlement Fund pursuant to the terms of the Settlement Agreement. This amount includes all costs in ¶ 10 below.

9. The Court approves the Individual Settlement Payment amounts, which shall be distributed pursuant to the terms of the Settlement Agreement.

10. Defendant shall pay (a) to Class Counsel attorneys' fees in the amount of **$151,878** and reimbursement of litigation costs in the amount of **$13,909.95**; (b) enhancement payment to the Class Representative Huey Roundtree in the amount of **$10,000.00**; (c) the sum of **$37,500.00** to be paid to the LWDA for PAGA Penalties; and (d) **$8,300.00** to the Claims Administrator, ILYM, for the costs relating to the claims administration process in this matter. The Court finds that these amounts are fair and reasonable. Defendant is directed to make such payments from the Gross Settlement Amount and in accordance with the terms of the Settlement Agreement.

11. The Court will enter final judgment in this case in accordance with the terms of the Settlement, Preliminary Approval Order, and this Order. Without affecting the finality of the Settlement or judgment, this Court shall retain exclusive and continuing jurisdiction over the action and the Parties, including all Class Members, for purposes of enforcing and interpreting this Order and the Settlement.

Plaintiff's counsel shall submit a written order to the court consistent with this tentative ruling and in compliance with Rule of Court 3.1312(a) and (b), and a [proposed] judgment.

5-6. <u>SCV-272161, Jane Doe K.B. v. Cotati Rohnert Park Unified School District</u>

Plaintiff Jane Doe K.B. (hereinafter "Plaintiff"), filed the complaint (the "Complaint") against defendants Cotati Rohnert Park Unified School District ("Defendant", formerly Doe 1) with causes of action arising out of sexual abuse which occurred in 1990 while Plaintiff attended school in Defendant's district.

This matter is on calendar for the motion by Defendant pursuant to Code of Civil Procedure § 438 granting judgment on the pleadings on the ground that the Complaint fails to state sufficient facts to constitute causes of action in this matter. **The motion is DENIED.**

I. <u>Governing Law</u>

A. <u>Judgment on the Pleadings</u>

A motion for judgment on the pleadings may only be made on the grounds specified in the statute. CCP section 438(c)(1). If the moving party is a defendant, the motion may be made on the grounds that the complaint does not state facts sufficient to constitute a cause or causes of action against the defendant. CCP § 438(c)(1)(B). A motion for judgment on the pleadings may be targeted to the entire complaint, or to any of the causes of action therein. CCP § 438 (c)(2)(A). "The fundamental question for the *reviewing court* is whether any cause of action is framed by the facts alleged in the complaint." *Surina v. Lucey* (1985) 168 Cal.App.3d 539, 541, emphasis added; cited by *Guild Mortgage Co. v. Heller* (1987) 193 Cal.App.3d 1505, 1508 ("Our primary task is to determine whether the facts alleged provide the basis for a cause of action against defendants under any theory."). As with a demurrer, the challenged pleading must be "liberally construed, with a view to substantial justice between the parties" and the court should give the pleading "a reasonable interpretation, reading it as a whole and its parts in their context." Code Civ. Proc. §452; see also, *Perez v. Golden Empire Transit Dist*. (2012) 209 Cal.App.4th 1228, 1238 (where allegations are subject to different reasonable interpretations, court must draw "inferences favorable to the plaintiff, not the defendant.").

The grounds for a motion for judgment on the pleadings must appear on the face of the challenged pleading or be based on facts which the court may judicially notice, and not upon other extrinsic evidence. CCP § 438 (d). Where the motion is based on matters the court may judicially notice (under Evidence Code §§ 452, 453), such matters must be specified in the notice of motion or supporting points and authorities. CCP § 438(d); compare *Saltarelli & Steponovich v. Douglas* (1995) 40 Cal. App. 4th 1, 5.

At judgment on the pleadings, all facts properly pleaded are treated as admitted, but contentions, deductions and conclusions of fact or law are disregarded. *Serrano v. Priest* (1971) 5 Cal.3d 584, 591. Similarly, opinions, speculation, or allegations contrary to law or facts which are judicially noticed are also disregarded. *Coshow v. City of Escondido* (2005) 132 Cal.App.4th 687, 702. Generally, the pleadings "must allege the ultimate facts necessary to the statement of an actionable claim. It is both improper and insufficient for a plaintiff to simply plead the evidence by which he hopes to prove such ultimate facts." *Careau & Co. v. Security Pac. Business Credit, Inc.* (1990) 222 Cal. App. 3d 1371, 1390; *FPI Develop., Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 384. Each evidentiary fact that might eventually form part of a party's proof does not need to be alleged. *C.A. v. William S. Hart Union High School Dist*. (2012) 53 Cal.4th 861, 872.

If the motion for judgment on the pleadings is granted, it may be granted with or without leave to amend. (CCP § 438(h)(1).) In ruling on the motion, the trial court should, ordinarily, permit the party whose pleadings are attacked to amend if it so desires. *Hardy v. Admiral Oil Co*. (1961) 56 Cal.2d 836, 841–842. Leave to amend should generally be granted liberally where there is some reasonable possibility that a party may cure the defect through amendment. *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.

B. Government Claims Act

The Government Code requires that "[a] claim relating to a cause of action for death or for injury to person or to personal property…shall be presented as provided in Article 2 (commencing with Section 915) not later than six months after the accrual of the cause of action. A claim relating to any other cause of action shall be presented as provided in Article 2 (commencing with Section 915) not later than one year after the accrual of the cause of action." Gov. Code §911.2(a).

The "accrual date" is "the date upon which the cause of action would be deemed to have accrued within the meaning of the statute of limitations which would be applicable" if the action were between private litigants and it marks the starting point for calculating the claims presentation period. Gov. Code §901; see also, *Rubenstein v. Doe No. 1* (2017) 3 Cal.5th 903; *Mosesian v. County of Fresno* (1972) 28 Cal.App.3d 493, 500. This statutory time limit is mandatory and is an essential element of a cause of action against a public entity. See, *Wood v. Riverside General Hospital* (1994) 25 Cal.App.4th 1113, 1119; see also, *Briggs v. Lawrence* (1991) 230 Cal.App.3d 605, 613. "Timely claim presentation is not merely a procedural requirement," but is a condition precedent to the claimant's ability to maintain an action against the public entity. *Shirk v. Vista Unified Sch. Dist.* (2007) 42 Cal.4th 201, 209. Thus, timely presentation is "an element of the plaintiff's cause of action." *Ibid.* "Only after the public entity's board has acted upon or is deemed to have rejected the claim may the injured person bring a lawsuit alleging a cause of action in tort against the public entity." *Ibid*. The failure to bring a timely claim bars the plaintiff from bringing suit against that entity. Gov. Code §945.4; see also, *State of California v. Superior Court* (2004) 32 Cal.4th 1234, 1237.

As of January 1, 2020, claims under CCP § 340.1 are exempt from the claims presentation requirement. Govt. Code § 905 (m); 2019 Cal. Legis. Serv. Ch. 861 (A.B. 218) ("AB 218"). Prior to the amendment of AB 218, Govt. Code § 905 exempted "(c)laims made pursuant to [CCP § 340.1] for the recovery of damages suffered as a result of childhood sexual abuse" but applied "only to claims arising out of conduct occurring on or after January 1, 2009." Former Gov. Code, § 905 (m).

C. Gifts of Public Funds

Any gift of public funds by the Legislature is prohibited by Article XVI, § 6 of the California Constitution.

> "The Legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the State, or of any county, city and county, city, township or other political corporation or subdivision of the State now existing, or that may be hereafter established, in aid of or to any person, association, or corporation, whether municipal or otherwise, or to pledge the credit thereof, in any manner whatever, for the payment of the liabilities of any individual, association, municipal or other corporation whatever; nor shall it have power to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever…"

Cal. Const., art. XVI, § 6

"The 'gift' which the legislature is prohibited from making is not limited to a mere voluntary transfer of personal property, without consideration, which the Civil Code, § 1146, gives as the definition of a 'gift;' but the term, as used in the constitution, includes all appropriations of public money, for which there is no authority or enforceable claim, or which rest upon some moral or equitable obligation, which, in the mind of a generous, or even a just, individual, dealing with his own moneys, might prompt him to recognize as worthy of some reward." *Conlin v. Board of Sup'rs of City and County of San Francisco* (1893) 99 Cal. 17, 21–22 ("*Conlin*"). "An appropriation of money by the legislature for the relief of one who has no legal claim therefor must be regarded as a 'gift,' within the meaning of that term, as used in this section; and it is none the less a gift that a sufficient motive appears for its appropriation, if the motive does not rest upon a valid consideration." *Ibid*.

D. Public Purpose

"(T)he primary question to be considered in determining whether an appropriation of public funds is to be considered a gift is whether the funds are to be used for a public or private purpose. If they are to be used for a public purpose, they are not a gift within the meaning of this constitutional prohibition." *Alameda County v. Janssen* (1940) 16 Cal.2d 276, 281; see also *Page v. MiraCosta Community College Dist.* (2009) 180 Cal.App.4th 471, 495. "The determination of what constitutes a public purpose is primarily a matter for the Legislature and will not be disturbed as long as it has a reasonable basis." *Community Memorial Hospital v. County of Ventura* (1996) 50 Cal.App.4th 199, 207.

E. Discretionary Stay

California courts maintain the inherent power to stay proceedings in the interests of justice and to promote judicial efficiency. *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Ca1.4th 739, 758; *Freiberg v. City of Mission Viejo* (1995) 33 Cal.App.4th 1484, 1488.

II. Request for Judicial Notice

Both parties have filed requests for judicial notice of several matters. Judicial notice of official acts and court records is statutorily appropriate. See Cal. Evid. Code § 452(c) and (d). Yet since judicial notice is a substitute for proof, it "is always confined to those matters which are relevant to the issue at hand." *Gbur v. Cohen* (1979) 93 Cal.App.3d 296, 301. Courts may take notice of public records, but not take notice of the truth of their contents. *Herrera v. Deutsche Bank National Trust Co.* (2011) 196 Cal.App.4th 1366, 1375, as modified (June 28, 2011). Factual findings found within a prior judicial opinion are not an appropriate subject of judicial notice. *Kilroy v. State* (2004) 119 Cal.App.4th 140, 148.

The Court finds that the trial court records presented by both sides are irrelevant, as they do not hinge on facts which are in any way before this Court. Additionally, the decisions have no precedential value, and lack adequate relevance to the instant matter. Therefore, Defendant's requests for judicial notice as to Exhibits B, C, and D with the moving papers, and Exhibit A on Reply, are DENIED. Plaintiff's requests for judicial notice included as Exhibits 1-10 with the Opposition are DENIED.

Legislative history appears proper for judicial notice, in that it provides the materials to the Court in lieu of citation. Defendant's requests for judicial notice as to Exhibit A with the moving papers is GRANTED. Plaintiff's requests for judicial notice included as Exhibits 11-15 with the Opposition are GRANTED.

III. Analysis

A. Stay

First, to Defendant's request for a discretionary stay under CCP § 128, the Court is not persuaded that a stay is necessary or proper. In judicially noticing the docket in the cases on appeal, the Court notes that briefing is not completed, and no hearing date is set. To ask that the Court to stay this case based on similar issues pending on appeal, where none of the same parties are involved in the case on appeal, is unpersuasive. To issue the stay pending these appeals would deprive Plaintiff of any opportunity to timely adjudicate her claims, while awaiting the efforts of parties who may not share Plaintiff's interests. This is to say nothing of the reasonable probability that the matter may thereafter be reviewed by the California Supreme Court. There is inadequate basis to stay the case based on these considerations. Therefore, the request for stay is DENIED.

B. Judgment on the Pleadings

Defendant argues that the Plaintiff's claims rest on the amendment of Govt. Code § 905 (m) through AB 218, which served to eliminate the Government Claims Act presentation requirements for claims of childhood sexual assault against public entities. Defendant avers that these provisions of AB 218 violate Cal. Const., art. XVI, § 6 as an improper gift of public funds, in that they revive claims against public entities which had lapsed without consideration. This case, and the similar progeny submitted by both sides from across the state, clearly sits on the cusp of an issue of constitutional interpretation.

At the time AB 218 was passed, Plaintiff had no colorable claim against Defendant due to the failure to file a timely governmental claim under Govt. Code § 905. The Legislature amended Govt. Code § 905 to allow persons in the position of Plaintiff to file minor sexual abuse claims against public entities regardless of when they occurred by retrospectively eliminating the claim requirement.

Generally, the legislature's finding that something constitutes a public purpose should be left undisturbed as long as it has a reasonable basis. *Community Memorial Hospital v. County of Ventura* (1996) 50 Cal.App.4th 199, 207. However, here the Court must examine whether the opening of the Government Claims Act can constitute a public purpose as a *matter of law*. Defendant makes several arguments to the contrary. Plaintiff avers that the public purpose is "protection of children, the punishment of pedophiles, and the deterrence of future abuse". Plaintiff's Opposition, pg. 7:18-19. The Court finds Plaintiff's repeated reference to punishment of perpetrators of childhood sexual abuse unavailing and unpersuasive as particularly applied to the constitutionality of the amendment to Govt. Code § 905. Defendant, a public entity, is the

only defendant. Defendant did not perpetrate the sexual abuse, as the allegations are for Defendant's negligent failure to prevent the abuse perpetrated by an employee. Plaintiff does not request punitive damages, nor can she, as punitive damages against public entities are generally not recoverable. *Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 328. The Court does not find Plaintiff's averment as to what the Legislature's purpose was either persuasive, or to be properly supported by the amendments. Future abuse is already deterred by the forward facing amendment made to Govt. Code § 905 in 2013. The same can be said for the protection of children. Plaintiff displays no public purpose in the "punishment" of public entities.

The purpose of the legislature's amendment cannot be to punish Defendant, but rather to allow Plaintiff compensation from damages suffered. See, e.g., *A.M. v. Ventura Unified School Dist.* (2016) 3 Cal.App.5th 1252, 1264 (prior amendment of Gov. Code § 905 was "to ensure that victims severely damaged by childhood sexual abuse are **able to seek compensation from those responsible**, whether those responsible are private or public entities," quoting Assem. Com. on Judiciary, Analysis of Sen. Bill No. 640 [2007–2008 Reg. Sess.] at p. 3.). Whether this is adequate to state a public purpose when it implicates the revival of claims is another matter.

Similarly, Plaintiff's citation and reliance on *Coats v. New Haven Unified School District* (2020) 46 Cal.App.5th 415, 426 is inapposite and unpersuasive. *Coats* provides obvious parallels in that it deals with revived claims of sexual assault filed against a public entity because of the amendment of AB 218. However, as a key distinction, that court undertakes **no** analysis of Article XVI § 6. "(C)ases are not authority for propositions not considered." *Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 127 (internal quotations omitted). Given that the only legal issue here was not before that court, it does not provide guidance on this decision.

Despite this, Plaintiff is persuasive that the cases cited by Defendant, *Orange County Foundation v. Irvine Co.* (1983) 139 Cal.App.3d 195, 200, and *Jordan v. California Dept. of Motor Vehicles* (2002) 100 Cal.App.4th 431, 451, both determined that *case specific* impositions of liability is the only context in which a payment beyond maximum exposure has been found to be lacking in public purpose. Any citation to these cases as applied to a wide range of plaintiffs appears to be application of the law beyond those particular facts. In each case, the court found that the result of the case exceeded the possible liability, and therefore constituted a gift of public funds. In *Jordan,* the parties had litigated a predecessor case to judgment in the amount of $18 million. *Id.* at 439. The state appealed, but during the pendency of the appeal, the parties submitted the matter to an arbitration panel. *Id.* at 439-440. The arbitration panel instead granted $88 million dollars as fees and expenses. *Id.* at 441. The Court of Appeal overturned the arbitration panel's decision, finding that the judgment acted as a cap of the damages under Rev. & Tax. Code, § 6909. *Id.* at 450-451. The panel had no authority to grant damages exceeding the $18 million judgment, and the excess was an unconstitutional gift. *Id.* at 451.

Orange County turned on similarly distinguishable facts. There, the State had settled a prior dispute by making payments to a private company for the company to relinquish claims to tidelands. *Orange County, supra,* 139 Cal.App.3d at 200. A taxpayer interest group sued the private company, seeking to set aside the settlement because the company's claims were entirely meritless, and therefore the state's settlement of those claims was an impermissible gift of public funds under Article XVI, § 6. *Ibid*. The court there agreed with plaintiff's arguments, finding that

the settlement of a "wholly invalid" claim cannot be consideration, and therefore cannot support any monetary settlement. *Id*. at 201. These cases are determinations that based on applicable facts of a specific interaction with government entities with private individuals, those particular grants of specific dollar amounts are impermissible gifts. Similar considerations apply to *Conlin*. There is no particular amount at issue here. No particular individual for whom the Legislature has proscribed compensation without consideration. Rather, AB 218 opens possible claims to a group of plaintiffs.

Defendant provides no authority where a court rules on the facts of legislatively established governmental liability to a group of possible litigants. Plaintiff is persuasive that the context of each of these cases is the abridgement of due process through legislative action as applied to particular facts, where here the legislature has established a method for liability through the judicial process. It does not preclude due process, it is not a grant of particular funds to a particular individual, it is anything but a certainty. There is no case defining this particular exercise of the Legislature's power as a gift. The citation to *Heron v. Riley* (1930) 209 Cal. 507, 517, is to a portion of the decision which is dicta, as the issue of creation of liability to a class of persons for incidents which predate the legislation was not before that court. The language of the section relied on is sufficiently ambiguous as to whether the *Heron* court in referring to the legislature attempting "to create a liability against the state for any past acts of negligence" is in reference to facts similar to *Conlin* dealing with a particular creation of liability, or facts such as those before this Court. See *Heron, supra,* 209 Cal. at 517.

As the moving party, the burden is on Defendant to show that Plaintiff's claims are barred as a matter of law. Defendant fails to overcome their burden. As such, the motion for judgment on the pleadings is DENIED.

III. Conclusion

For the reasons stated above, the motion is DENIED.

Plaintiff's counsel shall submit a written order to the court consistent with this ruling and in compliance with California Rules of Court, Rule 3.1312.

7. SCV-272679, Veronese v. Sonoma-Marin Veterinary Service

Plaintiff Angela Alioto Veronese ("Plaintiff"), filed the currently operative first amended complaint (the "FAC") against defendants Sonoma-Marin Veterinary Service ("SMVS"), Sean E. Hardcastle, DVM ("Hardcastle", together with SMVS, "Defendants"), along with Does 1-10, arising out of alleged injuries suffered by Plaintiff's horse. This matter is on calendar for the motion by Plaintiff pursuant to Cal. Code Civ. Proc. ("CCP") § 473 for leave to amend the FAC. **The motion is DENIED.**

I. Legal Standards

The California Code of Civil Procedure provides that a court "may in the furtherance of justice, and on any terms as may be proper" allow a party to amend any pleading to correct a mistake.

CCP § 473(a)(1). Likewise, the court may "in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading or proceeding in other particulars". CCP § 473(a)(1). "Any judge, at any time before or after commencement of trial, in the furtherance of justice, and upon such terms as may be proper, may allow the amendment of any pleading or pretrial conference order." CCP § 576. The general rule is "liberal allowance of amendments." *Nestle v. Santa Monica* (1972) 6 Cal.3d 920, 939; see *Lincoln Property Co., Inc. v. Travelers Indemnity Co.* (2006) 137 Cal.App.4th 905, 916. The "policy of great liberality" applies to amendments "at any stage of the proceedings, up to and including trial." *Magpali v. Farmers Group* (1996) 48 Cal.App.4th 471, 487. "Absent a showing of prejudice to the adverse party, the rule of great liberality in allowing amendment of pleadings will prevail." *Board of Trustees v. Superior Court* (2007) 149 Cal.App.4th 1154, 1163.

Absent a showing of prejudice, delay alone is not a basis for denial of leave to amend. *Higgins v. Del Faro* (1981) 123 Cal.App.3d 558, 563. "(I)t is irrelevant that new legal theories are introduced as long as the proposed amendments relate to the same general set of facts." *Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1048 [internal citations omitted].

> The cases on amending pleadings during trial suggest trial courts should be guided by two general principles: (1) whether facts or legal theories are being changed and (2) whether the opposing party will be prejudiced by the proposed amendment. Frequently, each principle represents a different side of the same coin: If new facts are being alleged, prejudice may easily result because of the inability of the other party to investigate the validity of the factual allegations while engaged in trial or to call rebuttal witnesses. If the same set of facts supports merely a different theory [then] no prejudice can result.

McMillin v. Eare (2021) 70 Cal.App.5th 893, 910, quoting *City of Stanton v. Cox* (1989) 207 Cal.App.3d 1557, 1563.

Great liberality applies to amendment unless the amendment raises new and substantially different issues from those already pleaded. *McMillin v. Eare, supra*, 70 Cal.App.5th at 1379. In exercising its discretion over amendment, the court will consider whether there is a reasonable excuse for the delay, whether the change relates to facts or legal theories, and whether the opposing party will be prejudiced by the amendment. *Duchrow v. Forrest* (2013) 215 Cal.App.4th 1359, 1378. The underlying merits of the proposed cause of action amendments are not relevant to determining whether amendment is appropriate, as long as they relate to the same general set of facts, as the amended pleadings may be attacked by demurrer, motion for judgment on the pleadings, or other similar proceedings. *Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1048. Denying leave to amend due to failure to sufficiently plead a cause of action would be most appropriate where the defect cannot be cured by further amendment. *California Casualty Gen. Ins. Co. v. Superior Court* (1985) 173 Cal.App.3d 274, 280–281; disapproved of on different grounds by *Kransco v. American Empire Surplus Lines Ins. Co.* (2000) 23 Cal.4th 390. The exception would lie where a plaintiff makes contradictory pleadings. "As a general rule a party will not be allowed to file an amendment contradicting an admission made in his original pleadings. If it be proper in any case, it must be upon very

satisfactory evidence that the party has been deceived or misled, or that his pleading was put in under a clear mistake as to the facts." *Brown v. Aguilar* (1927) 202 Cal. 143, 149.

All moving and supporting papers must be served and filed at least 16 court days before the hearing. CCP § 1005 (b). Motions to amend a pleading must contain a copy of the proposed amended pleading, what allegations will be changed, and where the changes are located, by page, paragraph, and line number. Cal. Rules of Court ("CROC"), rule 3.1324 (a).

While motions to amend a pleading are generally within the discretion of the court, it does require that some showing be made which justifies the court's exercise of discretionary power. *Baxter v. Riverside Portland Cement Co.* (1913) 22 Cal.App. 199, 201. Though there is no statute requiring the filing of an affidavit, it is the burden of the moving party to place before the court such material to evidence that the ends of justice will be served through granting the motion. *Plummer v. Superior Court for Los Angeles County* (1963) 212 Cal.App.2d 841, 844. Any motion to amend must be accompanied by a supporting declaration stating the effect of the amendment, why the amendment is necessary and proper, when the changed facts were discovered, and the reasons why amendment was not made earlier. CROC, rule 3.1324 (b). An affidavit of the merits is a necessary prerequisite to a motion for leave to amend under CCP § 473. *Citizens' Committee for Old Age Pensions v. Board of Sup'rs of Los Angeles County* (1949) 91 Cal.App.2d 658, 661. Failure to file an affidavit is grounds for denying leave to amend. *Id.*

II. Analysis

Plaintiff has failed to produce any of the requirements under Rule 3.1324 beyond a list of the revisions. It is deleterious to Plaintiff's motion to have not included a copy of the proposed pleading as required under Rule 3.1324 (a). However, more fatally, Plaintiff has failed to file the required declaration as to why the amendment is necessary and proper, and the reasons why amendment was not made earlier. As such, there is no evidentiary support for the motion. Motions for leave to amend require some showing to justify the Court's discretionary power. *Baxter v. Riverside Portland Cement Co.* (1913) 22 Cal. App. 199, 201. Lack of evidentiary support, and particularly failure to file an affidavit, is a fatal defect sufficient for the court to deny leave to amend a pleading. *Citizens' Committee for Old Age Pensions v. Board of Sup'rs of Los Angeles County* (1949) 91 Cal.App.2d 658, 661. Plaintiff has failed to serve or file any evidence supporting the motion and the accompany declaration only establishes that meet and confer efforts were undertaken prior to filing the motion.

Second, while the substance of the amendment is not typically strongly weighted in determining whether amendment is proper, there are elements here that raise concern. Plaintiff's proposed amendment requests to amend and add "Exemplary damages pursuant to Civil Code Section 3349." See Declaration of Steven L. Robinson, ¶ 2. There is no Civil Code § 3349. While this may have been a mere typographical error in the Declaration, this further supports the reasoning why the procedural requirements in requesting to amend are so detailed. A complaint is Plaintiff's statement of the case, her idyllic conveyance of ultimate facts by which she seeks to prove her claims, and the relief which she hopes to recover as a result. There is generally no requirement that there be a citation to legal authority within a complaint. Where the amendment only offers the change of a single line of text, the accuracy of that text is something beyond mere

salience. For the proposed amendment to contain a mis-citation of law is a problematic and unnecessary error.

To summarize, Plaintiff seeks to amend her complaint (including in that amendment citation to a statute that does not exist), undertaking none of the procedural requirements to meet her burden in doing so. Plaintiff has not met her burden to show some reason why amendment is proper. This is a procedural defect not dealing with the substantive merit of the motion.

Therefore, the motion for leave to amend is **DENIED without prejudice**.

III. Conclusion

The motion for leave to amend is **DENIED without prejudice**.

Defendants' counsel shall submit a written order to the court consistent with this ruling and in compliance with California Rules of Court, Rule 3.1312.

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