TENTATIVE RULINGS: CIVIL LAW & MOTION

Wednesday, August 16, 2023 at 3:00 p.m.
Courtroom 18 – Hon. Christopher M. Honigsberg
Civil and Family Law Courthouse
3055 Cleveland Avenue
Santa Rosa, California 95403

The Court's Official Court Reporters are "not available" within the meaning of California Rules of Court, Rule 2.956, for court reporting of civil cases.

CourtCall is not permitted for this calendar.

If the tentative ruling does not require appearances, and is accepted, no appearance is necessary.

Any party who wishes to be heard in response or opposition to the Court's tentative ruling **MUST NOTIFY** the Court's Judicial Assistant by telephone at **(707) 521-6723** and **MUST NOTIFY all other parties of their intent to appear, the issue(s) to be addressed or argued and whether the appearance will be in person or by Zoom**. Notifications must be completed **no later than 4:00 p.m**. on the court (business) day immediately before the day of the hearing.

To Join Department 18 "Zoom" Online
Navigate to website:
https://us02web.zoom.us/j/83856098726?pwd=WEI3K1BPRCswSk0ZYSs4VUw1OU5ydz09

Enter Meeting ID: 838-5609-8726
And Password: 000169

To Join Department 18 "Zoom" By Phone:
Call: +1 669 900 6833 US (San Jose)

Enter Meeting ID: 838-5609-8726
And Password: 000169

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. MCV-261310, Bank of America N.A. v. Ahlstrom

Defendant's motion to quash service of summons is DROPPED as MOOT. Plaintiff has represented that it has re-served Defendant with process since the filing of the instant motion. The validity of the subsequent service of process is not before the Court. The motion to quash the original service is moot.

2. SCV-269513, Castro v. Meacham, III

Plaintiff's motion for summary judgment, or alternatively, summary adjudication is DENIED.

Plaintiff's request for judicial notice numbers 3 and 4 are GRANTED. All other requests for judicial notice by Plaintiff are DENIED as the documents are evidence that is subject to dispute. Defendants' counsel shall submit a written order consistent with this tentative ruling and in compliance with Rule 3.1312.

General Overview of Facts:

Plaintiff is a former employee of Defendants. She was hired in January 2021 and worked for Defendants for 11 weeks prior to her termination. (Undisputed Material Fact "UMF," 2, 17.) Upon being hired, Plaintiff signed an Offer Letter which contained an at-will employment provision. (Defendants Undisputed Material Facts "DUMF," 1.) During this 11-week period, Plaintiff was diagnosed with thyroid cancer which required her to undergo a medical procedure which would cause her to miss a few days of work. (UMF, 15, 17.) Plaintiff alleges that this, as well as her being Hispanic, was the reason for her termination from employment. To the contrary, Defendants allege that Plaintiff performed her job poorly by showing up to work unprepared, spending paid work hours charging her car, failing to bring estimate templates to bids, and failing to perform tasks as expected or trained. (DUMF, 2-6.) Defendants represent that Plaintiff was terminated due to her consistent poor performance and failure to put forth effort to adapt to Defendants' practices. (DUMF, 14.) When Defendants terminated Plaintiff's employment, they offered her a different position that she would be better qualified for, which Plaintiff declined. (DUMF, 15-16.)

Analysis:

I. Standard on Summary Judgment

"A plaintiff moving for summary judgment 'bears the burden of persuasion that 'each element of' the 'cause of action' in question has been 'proved,' and hence that 'there is no defense' thereto.'" (*Thompson v. Ioane* (2017) 11 Cal.App.5th 1180, 1195; citing *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) Summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (CCP § 437c(c).) "A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (CCP § 437c(f)(1).)

A moving party does not meet its initial burden if some "reasonable inference" can be drawn from the moving party's own evidence which creates a triable issue of material fact. (*See, e.g. Conn v. National Can Corp*. (1981) 124 Cal.App.3d 630, 637; *Binder v. Aetna Life Ins. Co*. (1999) 75 Cal.App.4th 832, 840.)

If a plaintiff meets its initial burden, the burden shifts to the defendant to provide sufficient evidence to raise a triable issue of fact as to the defense asserted. (CCP § 437c(p)(1).) An issue of fact exists if "the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar*, *supra*, 25 Cal.4th at 845.) If the moving plaintiff does not meet its initial burden, the

defendant has no evidentiary burden. (CCP § 437c(p)(1).)

In employment cases, summary judgment is rarely appropriate because such cases often present issues of intent, motive, and hostile working environments, which are "issues not determinable on paper." (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 286.)

Here, the Plaintiff has not met her burden of establishing the lack of a triable issue of material fact as to any cause of action.

II. First Cause of Action – Breach of Contract

"To prevail on a cause of action for breach of contract, the plaintiff must prove (1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damage to the plaintiff." (*Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1186.)

"Labor Code section 2922 establishes a presumption of at-will employment if the parties have made no express oral or written agreement specifying the length of employment or the grounds for termination." (*Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 677.) "This presumption may, however, be overcome by evidence that despite the absence of a specified term, the parties agreed that the employer's power to terminate would be limited in some way, e.g., by a requirement that termination be based only on 'good cause.'" (*Ibid*.)

"Although the California courts will under some circumstances imply an agreement contrary to the statutorily presumed at-will status, the courts will not imply an agreement if doing so necessarily varies the terms of an express at-will employment agreement signed by the employee." (*Tomlinson v. Qualcomm, Inc.* (2002) 97 Cal.App.4th 934, 944.) "'[E]vidence of an implied agreement [that] contradicts the terms of the written agreement is not admissible.' There cannot be a valid express contract and an implied contract, each embracing the same subject, but requiring different results.'" (*Ibid*.)

In *Slivinsky v. Watkins-Johnson Co.* (1990) 221 Cal.App.3d 799, the plaintiff signed an employment agreement with the defendant which stated "Employee acknowledges that there is no agreement, express or implied, between employee and the Company for any specific period of employment, nor for continuing or long-term employment. Employee and the Company each have the right to termination employment, with or without cause." (*Id*. at 803.) The plaintiff was later terminated from her employment. Plaintiff brought suit alleging that the reasons for her termination were pretextual and in violation of parties express and implied employment agreement. The plaintiff alleged that prior to signing the employment agreement, she was assured that her employment would be permanent and she could only be terminated for cause. The Court found that the written agreement constated an integration of the parties entire agreement and it controlled. (*Id*. at 805-806.) Therefore, both the cause of action for breach of contract as well as the cause of action for breach of duty of good faith and fair dealing failed. (*Id*. at 806.)

Here, Plaintiff signed an offer letter which stated, "Please keep in mind, this employment offer is in no way a legally binding contract, and as an at-will employee, both you and Spurgeon Painting, Inc., are able to terminate employment for any reason at any time." (Meacham Decl., Ex. A.) Plaintiff now claims that Defendants breached the employment agreement by terminating her without warning and without reason. Plaintiff has not produced evidence of any agreement or representation made outside that of the employment agreement regarding the at-will nature of her employment. Plaintiff has not met her burden of proving the existence of a contract requiring cause for termination.

Furthermore, to the extent Plaintiff alleges that other conduct by Defendants breached the employment agreement between the parties, Plaintiff has not established the lack of a triable issue of material fact as to any element of this cause of action.

III. Second Cause of Action – Breach of Duty of Good Faith and Fair Dealing

An at-will employee cannot bring an action for breach of the covenant of good faith and fair dealing based solely on termination of her employment. (*Slivinsky v. Watkins-Johnson Co.* (1990) 221 Cal.App.3d 799, 806.) "[I]nsofar as [authorities cited by Plaintiff] suggest that the implied covenant may impose limits on an employer's termination rights beyond those either expressed or implied in fact in the employment contract itself, they…are therefore disapproved." (*Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 351.)"'[B]ecause the implied covenant protects only the parties' right to receive the benefit of their agreement, and, in an at-will relationship there is no agreement to terminate only for good cause, the implied covenant standing alone cannot be read to impose such a duty.'" (*Id*. at 350; citing *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654.)

Plaintiff alleges that Defendants breached the duty of good faith and fair dealing by terminating her employment. However, the termination alone cannot be the basis for this cause of action. Plaintiff has not established entitlement to judgment in her favor on this cause of action.

IV. Third Cause of Action – Intentional Infliction of Emotional Distress

The elements of the tort of intentional infliction of emotional distress are:

> (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. …'

(*Christensen v. Superior Ct.* (1991) 54 Cal.3d 868, 903.) "Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Ibid*.) "The defendant must have engaged in 'conduct intended to inflict injury or engaged in with the realization that injury will result.'" (*Ibid*.)

Plaintiff alleges that the conduct underlying this cause of action is Defendants' termination of her employment despite their knowledge of her medical condition. Plaintiff has not established that

such conduct constitutes the type of extreme or outrageous conduct required to support this cause of action.

V. Fourth and Fifth Causes of Action – Discrimination on Basis of Race and Disability (FEHA)

First, Defendants argue that Plaintiff's Fourth cause of action for race discrimination under FEHA fails as a matter of law because plaintiff did not allege race discrimination in her administrative complaint, she only alleged disability discrimination. However, "'[w]hen an employee seeks judicial relief for incidents not listed in his original charge to the [Equal Employment Opportunity Commission (EEOC)], the judicial complaint nevertheless may encompass any discrimination *like or reasonably related* to the allegations of the EEOC charge, including new acts occurring during the pendency of the charge before the EEOC.'" (*Okoli v. Lockheed Tech. Operations Co.* (1995) 36 Cal.App.4th 1607, 1614. Italics in original.)

The evidence provided in support of this argument by Defendants (the right to sue letter from DFEH) does not specify that the administrative claims made by Plaintiff only pertained to disability discrimination. (Aqui Decl., Ex. D.) Furthermore, the Court is not convinced that Plaintiffs race discrimination claims are not like or reasonably related to the disability discrimination claims. Therefore, the Court does not agree that the Fourth cause of action fails as a matter of law. However, the Court finds that Plaintiff has not met her burden of proof to establish that summary adjudication of either the Fourth or Fifth cause of action in her favor is warranted.

The Supreme Court has mandated that a three-part analysis take place in cases of workplace discrimination, as follows: (1) the complainant must establish a prima facie case of discrimination; (2) the employer must offer a legitimate reason for its actions; and (3) the complainant must prove that this reason was a pretext to mask an illegal motive. (*McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 ("*McDonnell Douglas*").) In order to make a prima facie case for discriminatory discharge, the complainant must show: "(1) complainant belongs to a protected class; (2) his job performance was satisfactory; (3) he was discharged; and (4) others not in the protected class were retained in similar jobs, and/or his job was filled by an individual of comparable qualifications not in the protected class." (*Mixon v. Fair Emp. & Hous. Com.* (1987) 192 Cal.App.3d 1306, 1318 ("*Mixon*").)

Once the complainant establishes this prima facie case, then the burden shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." (*McDonnell Douglas, supra*, at 802.) "'The defendant need not persuade the court that it was actually motivated by the proffered reasons. [Citations.] It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff.'" (*Mixon*, *supra*, at 1318.)

Finally, the Plaintiff has the ultimate burden of proving that the employer's proffered reason was not the true reason for its action, but it was rather motivated by an intent to discriminate. (*Mixon*, *supra*, at 1318-1319.) "'[He] may succeed in this either directly by persuading the court that a

discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'" (*Ibid*.)

Plaintiff has not made a prima facie showing of discrimination on either the basis of race or disability. Plaintiff has not established that her job performance was satisfactory. The only evidence provided to support this element is her own representation that she received compliments from Thomas Meacham—the content or nature of these compliments is not specified—and a lack of negative writeups over her 11-week employment with Defendants. (UMF, 77.) This is insufficient to establish that her performance was satisfactory, especially considering the deposition testimony of Thomas Meachum submitted by Defendants. Furthermore, there is no evidence that others outside of her protected class (whether it be Hispanic employees or employees with medical conditions), were retained in similar jobs or were hired in her place. Accordingly, Plaintiff has not made a prima facie case of discrimination under FEHA. Even if Plaintiff had met this burden at this stage of the proceedings, triable issues of material fact would still exist as to Defendants' motive and intent for terminating her. Summary adjudication of the Fourth and Fifth causes of action is DENIED.

The Court also notes that, as with the Sixth Cause of action (explained in further detail below), Plaintiff has raised several different allegations under one cause of action in the Fifth Cause of Action. She alleges disability discrimination as well as failure to prevent disability discrimination and wrongful termination under one cause of action. Each separate violation should be alleged as its own cause of action with specific facts to support each cause of action. (Cal. Rules of Court, Rule 2.112.) Discrimination, failure to prevent discrimination, and wrongful termination are three separate causes of action. In any case, even if the Court were to treat these allegations as separately pleaded causes of action triable issues of material fact exist because triable issues exist as to whether Plaintiff was discriminated against.

VI. Sixth Cause of Action – Failure to Accommodate Medical Condition or Disability/Failure to Engage in Interactive Process

Under this single cause of action Plaintiff has made allegations of conduct unlawful under several different Government Code sections. As stated above, each separate violation should be alleged as its own cause of action with specific facts to support each cause of action. (Cal. Rules of Court, Rule 2.112.) However, even if Plaintiff had stated each cause of action separately, she has not met her burden of proving her allegations of failure to accommodate or failure to engage in an interactive process.

Government Code § 12940(m) makes it unlawful for an employer to fail to make reasonable accommodation for the known physical or mental disability of an employee. In order to prove this claim, the plaintiff must establish, (1) Defendant was an employer; (2) Plaintiff was an employee of Defendant; (3) Defendant treated Plaintiff as if he had a physical condition; (4) Defendant knew of Plaintiff's condition; (5) Plaintiff would be able to perform the job duties with reasonable accommodation; (6) Defendant failed to provide reasonable accommodation for Plaintiff's condition; (7) Plaintiff was harmed; and (8) Defendant's failure to provide reasonable

accommodation was a substantial factor in causing Plaintiff's harm. (CACI 2541.)

Government Code § 12945(n) makes it unlawful for an employer to fail to engage in a timely, good faith, interactive process with an employee to determine effective reasonable accommodations "in response to a request for reasonable accommodation." To establish this, Plaintiff must prove, (1) Defendant was an employer; (2) Plaintiff was an employee of Defendant; (3) Plaintiff has a physical condition known to Defendant; (4) Plaintiff requested that Defendant make reasonable accommodation for his physical condition; (5) that Plaintiff was willing to participate in an interactive process to determine whether a reasonable accommodation could be made; (6) that Defendant failed to participate in a timely good-faith interactive process with Plaintiff; (7) Plaintiff was harmed; and (8) Defendant's failure to engage in a good-faith interactive process was a substantial factor in causing Plaintiff's harm. (CACI 2546.)

Even if the Court were to analyze these allegations as two separate causes of action, Plaintiff has not established the lack of a triable issue as to either one.

VII. Seventh Cause of Action – Wrongful Termination in violation of Public Policy

The elements for a claim of wrongful termination in violation of public policy are: (1) Plaintiff's employment was terminated; (2) in violation of a policy delineated in either constitutional or statutory provisions, public in the sense that it inures to the benefit of the public, well established at the time of the discharge, and substantial and fundamental. (*Barbee v. Household Automotive Finance Corp*. (2003) 113 Cal.App.4th 525, 533; *Holmes v. General Dynamics Corp.* (1993) 17 Cal.App.4th 1418, 1426.) A plaintiff must allege a fundamental policy "delineated in constitutional or statutory provisions." (*Galeotti v. Int'l Union of Operating Engineers Loc. No. 3* (2020) 48 Cal.App.5th 850, 856-857 [it is essential that a plaintiff "identify a fundamental public policy based on a statutory, constitutional, or regulatory provision."], citing *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 78-82.) Policies are not public (and thus do not give rise to a common law tort claim) when they are derived from statutes that "simply regulate conduct between private individuals or impose requirements whose fulfilment does not implicate fundamental public policy concerns." (*Diego v. Pilgrim United Church of Christ* (2014) 231 Cal.App.4th 913, 926.)

Because there are triable issues of material fact as to the discrimination causes of action, there are triable issues of material fact as to this cause of action.

VIII. Eighth Cause of Action – Unfair Business Practices (B&P 17200, et seq.)

As explained above, triable issues of material fact exist as to the unlawful conduct underlying this cause of action, therefore triable issues of fact exist as to this cause of action.

3. SCV-269707, Pomeroy v. The County of Sonoma

This matter came on for oral argument on May 10, 2023. After hearing argument from the

parties, the Court continued the hearing for further briefing and issued an order after the hearing which outlined the Court's tentative ruling, inviting further argument from the parties on the any point made within the tentative. The Court has reviewed the supplemental briefing submitted by the parties and issues the following tentative ruling.

Defendant County of Sonoma's Motion for Summary Judgment is GRANTED. Defendant's request for judicial notice is DENIED as to request numbers 8 and 9 and GRANTED as to the rest. Plaintiffs' objections to Defendant's evidence are OVERRULED. Defendant's objections to Plaintiff's evidence are OVERRULED.

Counsel for Defendant shall prepare a written order consistent with this tentative ruling and in compliance with Rule 3.1312.

Underlying Facts:

Plaintiffs Gina Pomeroy, Renee Rednour, and Ray Carrillo are the adult children of the decedent, Raymond Carrillo, claiming damages for Mr. Carrillo's wrongful death against the County of Sonoma and Alejandro Arellano. (Undisputed Material Fact UMF," 1-2.) Mr. Carrillo died after being hit by Defendant Alejandro Arellano's vehicle while Mr. Carrillo was crossing the street at the crosswalk on Verano Avenue in Sonoma, California. (UMF, 19-31.)

Plaintiffs allege in their Second Amended Complaint a single cause of action against the County of Sonoma for dangerous condition of public property based on Government Code § 835. (Plaintiffs' Second Amended Complaint "SAC", p. 5.) Plaintiffs allege that there existed a dangerous condition at the location of the Verano Avenue and Main Street intersection due to "roadway grade, elevation variance, physical and visual obstructions, lighting conditions, signage conditions, roadway markings, traffic control devices, or lack thereof..." (SAC, ¶ 23.)

The area in question is a two-lane roadway, one lane in each direction. (UMF, 3.) The crosswalk in question is located about ¼ mile before the intersection on the west side for crossing Verano Avenue. (UMF, 4.) The crosswalk has a sign posted next to it to indicate pedestrians walking. (UMF, 4.) Defendant submits that the road is relatively flat with no observable uphill or downhill grade and with no obstructions to visibility. (UMF, 5.) Plaintiffs submit in opposition that there is an observable roadway grade and vertical crest. (Response to UMF, 5.)

At the time of the accident, there were pedestrian crosswalks across Verano on both the west and east side of Main Street. (UMF, 6.) The lines demarking the crosswalks were recently painted since they were added as part of a paving project in about October 2019. (UMF, 7.) There was a yellow sign on the southeast corner of the intersection, denoting a separate pedestrian crosswalk on the east side of the intersection. (UMF, 8.) The crosswalks are approximately 84 feet in length and were delineated by two parallel white lines. (Plaintiffs' Additional Material Facts "PAMF," 6.)

Located in the southwest corner of the intersection is a single streetlight that is angled to light the eastbound traffic on Verano Avenue. (UMF, 9.) This streetlight was determined to be working at

the time of the accident. (UMF, 11.) On the northwest corner of the crosswalk was a single streetlamp that was inoperable at the time of the incident. (PAMF, 10.) On the northeast side of the intersection is a McDonald's Restaurant that has lights for the parking lot. (UMF, 10.) There were no further artificial lights present that illuminated the roadway or intersection. (PAMF, 11.)

A Pavement Preservation project was authorized by the County of Sonoma Board of Supervisors on May 21, 2019 for Verano Avenue from Sonoma Creek to Main Street. (UMF, 12.) The project was designed by the County of Sonoma Department of Transportation and Public Works. It was performed by Ghilotti Construction Company, Inc. (UMF, 13.) Construction management was performed by Coastland Civil Engineering, Inc. (UMF, 14.) The 2019 paving project included the entire intersection of Verano and Main, with re-striping of the crosswalk at the intersection and addition of curb ramps for ADA access at each corner. Paving and restriping stopped several feet east of the intersection. There was no engineering requirement to upgrade or change the signals, lighting, or striping at the intersection. (UMF, 15.) Neither Ghilotti Construction, nor Coastland Civil Engineering recommended that additional warning signs, streetlights, or pavement markings be added to the work performed at the intersection. (UMF, 18.) Subsequent to the completion of this project, the County has not provided "as-built" plans that identifies the alignment of the road as it was originally designed. (PAMF, 32.)

Accident reports for county-maintained roads are received by the County from CHP in either hard copy or electronic form. (UMF, 16.) Prior to the underlying accident, on November 13, 2020, there was an accident involving a motor vehicle hitting a pedestrian at the same intersection during the daytime when the vehicle was making a left turn. (Response to UMF, 17; Decl. Michael King, ¶ 5.)

The accident in the present matter took place on November 24, 2020, at approximately 6:22 a.m. (UMF, 19.) Defendant Arellano was traveling eastbound on Verano Avenue approaching Main Street at approximately 45 miles per hour. (UMF, 19, 21.) The speed limit in that area was 35 miles per hour. (UMF, 21.) As Defendant Arellano approached the intersection, he took his eyes off the road and looked at his passenger to try to wake him up. (UMF, 24-25.) He did not slow his vehicle when he did this. (UMF, 25.) When he looked back at the road, the decedent, Mr. Carrillo, was right in front of Defendant Arellano's vehicle. (UMF, 25.) Defendant Arellano hit his brakes upon seeing Mr. Carrillo, but the vehicle still made impact. (Response to UMF, 22.)

CHP Officers took measurements of the area, inspected the scene, and created visual diagrams. (UMF, 28.) There were no skid marks caused by Defendant Arellano's vehicle. (UMF, 28.) CHP determined that Mr. Carrillo was likely in or very near the crosswalk on the east side of the intersection, walking southbound toward Maxwell Park at the time of the incident. (UMF, 30.) CHP also determined that Defendant Arellano violated Vehicle Code § 21950(a). (UMF, 32.)

According to the opinion the Plaintiffs' expert, Christian Engelmann, the Verano Avenue roadway approaching from the east has a reversing curve from its intersection with Highway 12. (PAMF, 13.) It also has a slight grade with a vertical crest at the west side of the Main Street intersection, which reduces visibility of pavement markings on the east side of the intersection.

(PAMF, 14.) According to a 2018 County of Sonoma speed survey, Verano Avenue including the location of the intersection, as an ADT of approximately 9924 vehicles per day. (PAMF, 21.)

Analysis:

I. Standards on Summary Judgment

A party moving for summary judgment must show that there is no triable issue as to any material fact and the moving party is entitled to a judgment as a matter of law. (CCP § 437c(c).) A party moving for summary adjudication of a cause of action must prove that the cause of action has no merit and summary adjudication may only be granted if it completely disposes of the cause of action. (CCP § 437c(f)(1).) "A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if the party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to the cause of action." (CCP § 437c(p)(2).) "Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto." (*Ibid*.)

"From commencement to conclusion," the moving party bears the burden of persuasion and production to make a prima facie showing that there are no triable issues of material fact. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal. 4th 826, 850.) "There is no obligation on the opposing party…to establish anything by affidavit unless and until the moving party has by affidavit stated facts establishing every element…necessary to sustain a judgment in his favor." (*Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal. App. 4th 454, 468.) Defendants can meet their burden by showing a cause of action has no merit by showing that one or more elements of the cause of action "cannot be established." (See CCP § 437c(p)(2).) Once the defendant has met that burden, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or defense. (*Aguilar, supra*, 25 Cal.4th at p. 849.)

II. Defendant County of Sonoma Has Met Its Burden on this Motion and Plaintiffs Have Not Met the Shifted Burden of Proving a Dangerous Condition Existed.

Government Code § 835 provides,

> Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:
>
> > (a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or
> >
> > (b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to

protect against the dangerous condition.

A "dangerous condition" means "a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used." (Gov. Code, § 830.) "A public entity had actual notice of a dangerous condition within the meaning of subdivision (b) of Section 835 if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character." (Gov. Code, § 835.2(a).) "A public entity had constructive notice of a dangerous condition within the meaning of subdivision (b) of Section 835 only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character." (Gov. Code, § 835.2(b).) Admissible evidence on the issue of due care includes, but is not limited to, (1) whether the existence of the condition and its dangerous character would have been discovered by an inspection system, and (2) whether the public entity maintained and operated such an inspection system with due care and did not discover the condition. (Gov. Code § 835.2(b)(1) & (2).)

"A public entity is not liable under subdivision (a) of Section 835 for injury caused by a condition of its property if the public entity establishes that the act or omission that created the condition was reasonable." (Gov. Code, § 835.4(a).)

> The reasonableness of the act or omission that created the condition shall be determined by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of taking alternative action that would not create the risk of injury or of protecting against the risk of injury.

(*Ibid*.) "A public entity is not liable under subdivision (b) of Section 835 for injury caused by a dangerous condition of its property if the public entity establishes that the action it took to protect against the risk of injury created by the condition or its failure to take such action was reasonable." (Gov. Code, § 835.4(b).)

> The reasonableness of the action or inaction of the public entity shall be determined by taking into consideration the time and opportunity it had to take action and by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of protecting against the risk of such injury.

(*Ibid*.)

A. There Was No Dangerous Condition at the Intersection.

Defendant has cited to a number of cases in support of its position that the intersection did not constitute a dangerous condition. Those cases are *Mittenhuber v. City of Redondo Beach* (1983)

142 Cal.App.3d 1 ("*Mittenhuber*"); *Antenor v. City of Los Angeles* (1985) 174 Cal.App.3d 477 ("*Antenor*"); C*howdhury v. City of Los Angeles* (1995) 38 Cal.App.4th 1187 ("*Chowdhury*"); *Cerna v. City of Oakland* (2008) 161 Cal.App.4th 1340 ("*Cerna*"); *Sun v. City of Oakland* (2008) 166 Cal.App.4th 1177 ("*Sun*"); and *Brenner v. City of El Cajon* (2003) 113 Cal.App.4th 434 ("*Brenner*"). Defendant also cites to Government Code §§ 830.4 and 830.8. The parties also cited to, *Thimon v. City of Newark* (2020) 44 Cal.App.5th 745, *Moritz v. City of Santa Clara* (1970) 8 Cal.App.3d 573, and *Hilts v. County of Solano* (1968) 265 Cal.App.2d 161.

In *Thimon v. City of Newark* (2020) 44 Cal.App.5th 745, the court stated, "'The manifest intent of the Tort Claims Act is to impose liability only when there is a substantial danger which is not apparent to those using the property in a reasonably foreseeable manner with due care." (*Id*. at 761.) Therefore, there was no dangerous condition where the danger complained of by the plaintiff was not hidden from pedestrians, but could rather be observed by a pedestrian using due care. (*Ibid*.) The Court further stated, "We also note that the overwhelming weight of authority, including from our own court, strongly suggests that an intersection with a crosswalk but no signals, whether marked or unmarked, is not a dangerous condition within the meaning of the Government Claims Act even when it is located on a high-speed, high-traffic road, particularly in the absence of a history of other collisions." (*Id*. at 762.)

Plaintiff cites *Hilts v. Solano County* (1968) 265 Cal.App.2d 161, for the proposition that once an entity undertakes to install street signs at an intersection, it could be liable if such signs are inadequate. This is an overgeneralization of the holding. The *Hilts* Court explained, "Section 830.4 states that a condition is not a dangerous condition *merely* because of the failure to provide regulatory traffic control signals, stop signs, yield right-of-way signs, speed restitution signs, or distinctive roadway markings." (*Id*. at 174. Italics in original.) "Section 830.8 prevents the imposition of liability *solely* on the basis of the failure to provide traffic regulatory or warning signals or devices of a type not listed in section 830.4." (*Ibid*. Italics in original.) "Section 830.8 does, however, impose liability for failure to provide such a signal or device where the condition constitutes a trap to a person using the street or highway with due care." (Ibid.) "Further, where the public entity undertakes to install signs and such signs themselves create a dangerous condition, liability may be predicated on this basis." (Ibid.) Accordingly, a dangerous factor *in addition to* inadequate signage must be shown for liability to attach.

Government Code § 830.4 provides, "A condition is not a dangerous condition within the meaning of this chapter merely because of the failure to provide regulatory traffic control signals, stop signs, yield right-of-way signs, or speed restriction signs, as described by the Vehicle Code, or distinctive roadway markings as described in Section 21460 of the Vehicle Code." Government Code § 830.8 provides, "Neither a public entity nor a public employee is liable under this chapter for an injury caused by the failure to provide traffic or warning signals, signs, markings or devices described in the Vehicle Code." It also states, "Nothing in this section exonerates a public entity or public employee from liability for injury proximately caused by such failure if a signal, sign, marking or device (other than one described in Section 830.4) was necessary to warn of a dangerous condition which endangered the safe movement of traffic and

which would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care."

"[I]t is for the court to determine whether, as a matter of law, a given defect is not dangerous. This is to guarantee that cities do not become insurers against the injuries arising from trivial defects." (*Fielder v. City of Glendale* (1977) 71 Cal.App.3d 719, 734.)

In *Mittenhuber*, *supra*, the plaintiff argued that the city was liable for his injuries after being struck by a vehicle while riding his bicycle in an intersection. Similar to the plaintiffs in the case at bar, the *Mittenhuber* plaintiff argued that there existed a dangerous condition at the intersection because,

1) Lack of visibility for drivers of motor vehicles of pedestrians and bicyclists;
2) The intersection is a heavily used throughfare for vehicles and bicycles;
3) Vehicles and bicycles approaching the intersection from the north travel downhill, often resulting in excessive speed;
4) The city installed stop signs on one of the intersecting streets in such a manner as to invite reliance on them by motorists travelling in the opposite direction in the intersection;
5) The intersection had inadequate markings, traffic controls or warnings.

(*Mittenhuber*, *supra*, 142 Cal.App.3d at 4.)

In response to the plaintiff's arguments that the intersection was a blind intersection, the *Mittenhuber* Court opined that "[a] city is under no affirmative duty to erect stop signs at such an intersection." (*Id*. at 6, citing Gov. Code, §§ 830.4 and 830.8.) The Court also stated, "'It has been repeatedly held that a city is not an insurer of the safety of travelers; it is required only to exercise ordinary care to maintain its streets in a reasonably safe condition for those using them.'" (*Ibid*., citing *Perry v. City of Santa Monica* (1955) 130 Cal.App.2d 370.)

In response to the plaintiff's arguments regarding the downhill slope of one of the intersecting roads leading into the intersection, the Court said,

> The mere fact that a road slopes downhill does not mean that it is dangerous. To hold the defendant liable for the natural topography of the land would be to impose strict liability on the defendant as an insurer of the safety of its streets…An ordinary, natural topographical condition is not a dangerous condition of property within the meaning of the governmental tort liability law. It is such, and requires a warning sign, only when it constitutes a deceptive condition or trap for even those who use the property with due care.

(*Id*. at 7.) Finally, in response to Plaintiff's argument that the intersection had inadequate markings, traffic controls, or warnings, the Court found "This is a mere conclusion and does not come into play until existence of the dangerous condition, within the statutory definition, is first shown" given the language of Government Code § 830.8. (*Id*. at 12.)

As stated above, Government Code § 830.8 provides that that there is no government liability for failure to provide traffic or warning signals, markings, devices or signs. Only if a dangerous condition is shown—independent of the lack of warning signals—will the second sentence of the statute come into play, which provides that government entities are not immune from liability if a signal was *necessary* to warn of a dangerous condition. (See Gov. Code, § 830.8; *Pfeifer v. San Joaquin County* (1967) 67 Cal.2d 177, 184.)

In the *Antenor* case, *supra*, the plaintiffs were struck by a vehicle while they were crossing the street in an unmarked crosswalk. (*Antenor*, *supra*, 174 Cal.App.3d at 479.) The plaintiffs, similarly to the plaintiffs in the present case, alleged that the lack of pedestrian and traffic control, inadequate lighting, high traffic volume and the "geometrics" of one of the intersecting streets combined to create a dangerous condition. (*Ibid*.) The intersection in *Antenor* was 54 feet wide with two lanes in each direction. (*Ibid*.) There were no painted pedestrian crosswalks, no signs warning of pedestrian traffic, and no signs prohibiting pedestrians from crossing. (*Ibid*.) The line of sight from one of the streets slopes downward to the crossing street by 6 or 7 percent, which was referred to by the plaintiffs' expert as the "geometrics" of the road, and its "vertical curve." (*Id*. at 480.) The plaintiffs' expert further provides measurements of the light intensities at the four corners of the intersection. (*Ibid*.) This Court does note that there was no record of past pedestrian versus vehicle accidents at the intersection in *Antenor*. (*Ibid*.)

The Court found that though the plaintiffs' expert had shown that the lighting in the intersection was below American national and State standards, the plaintiffs had failed to cite to any authority that required the city to light its streets in the first instance. (*Id*. at 483.) "'In the absence of a statutory or charter provision to the contrary, it is generally held that a municipality is under no duty to light its streets even though it is given the power to do so, and hence, that its failure to light them is not actionable negligence, and will not render it liable in damages to a traveler who is injured solely by reason thereof.'" (*Ibid*., citing 9 American Jurisprudence Second, Highways, Streets and Bridges, section 405.) Furthermore, regarding the plaintiffs' arguments that it was a high traffic intersection, the Court found this factor irrelevant because there was no allegation that there were other cars around at the time of the accident. (*Id*. at 484.) Finally, regarding the "geometrics" of the road, or the "vertical curvature" that affected the line of sight, the Court noted that there was no indication that such a factor alone was dangerous. (*Ibid*.) Therefore, in response to plaintiffs' argument that the physical characteristics combined created a dangerous condition, the Court said that if each of the factors alone have a "zero danger factor" then they cannot be said to create a danger when combined. (*Ibid*.) The *Antenor* Court ultimately found,

> From a review of the entire record, we find as a matter of law that the risks, if any there were, existing at the Third Street/Grammercy intersection were of such a minor, trivial or insignificant nature that no reasonable person would conclude that there existed a substantial risk of injury. It is our opinion from all of the evidence that the cause of this tragic occurrence must be laid solely upon a grossly inattentive Buick driver and two equally inattentive plaintiffs.

(*Id*. at 484-485.)

The Court in *Chowdhury*, *supra*, where the plaintiffs alleged that an inoperative traffic signal constituted a dangerous condition, the Court stated,

> [A]ny property can be dangerous if used in a sufficiently improper manner. For this reason, a public entity is only required to provide roads that are safe for reasonably foreseeable careful use. [Citation.] "If [ ] it can be shown that the property is safe when used with due care and that a risk of harm is created only when foreseeable users fail to exercise due care, then such property is not 'dangerous' within the meaning of section 830, subdivision (a)." [Citation.]

(*Chowdhury*, *supra*, 38 Cal.App.4th at 1196.) The Court found that the extinguished traffic signal created a four-way stop and a four-way stop at an intersection is not inherently dangerous when used with due care. (*Ibid*.)

In *Cerna*, *supra*, a motorist struck six pedestrians as they walked in a marked crosswalk at an intersection. (*Cerna*, *supra*, 161 Cal.App.4th at 1344.) The plaintiffs in *Chowdhury* identified seven features that allegedly made the intersection dangerous:

> (1) the crosswalk was painted white, not yellow; (2) there was no sign painted in the approaching roadway with the words "SLOW—SCHOOL XING"; (3) there was no traffic signal; (4) there were no crossing guards; (5) signs warning of the presence of student pedestrians were either missing or in an incorrect position; (6) the crosswalk was not painted with diagonal or longitudinal lines; and (7) there were no blinking lights in the pavement along the parallel painted lines of the crosswalk.

(*Id*. at 1348.) The trial court granted summary judgment in favor of the city finding that "after viewing the evidence most favorably to plaintiffs…the risk created by the identified features of the intersection was of such a minor, trivial, or insignificant nature that no reasonable person would conclude that the condition created a substantial risk of injury." (*Ibid*.) The Court of Appeal found that the trial court was correct. (*Ibid*.)

In *Sun*, *supra*, the decedent was struck by a vehicle while walking in an unmarked crosswalk at an intersection. (*Sun*, *supra*, 166 Cal.App.4th 1177, 1180.) The crosswalk had been marked with painted stripes in the past, but it was unmarked at the time of the accident. (*Id*. at 1181.) The plaintiffs alleged that the lack of marking for the crosswalk created a dangerous condition. (*Ibid*.) The trial court granted summary judgment in favor of the city finding no dangerous condition. (*Id*. at 1182.) The Court of Appeal affirmed, even though the plaintiffs produced evidence that the intersection was ranked third among all intersections in Oakland in the number of pedestrian-involved accidents. (*Id*. at 1188.) The Court noted, "there is no information as to (1) the ratio of pedestrian-involved accidents to successful pedestrian crossings at this intersection during this same time period, (2) whether the pedestrians were utilizing the marked crosswalks when they were struck, or (3) whether pedestrians were hit by vehicles that were proceeding along 7th Avenue as opposed to along International Boulevard." (*Id*. at 1187-1188.) "Accordingly, while the study supports an inference that pedestrian accidents could occur at this intersection, it does

not support a reasonable inference that the removal of the painted markings increased the risk of such accidents." (*Id*. at 1188.) The *Sun* Court found, "Here, the only risk of harm was from a motorist who failed to exercise due care by not obeying the Vehicle Code provisions requiring him both to yield to a pedestrian and to refrain from passing around a vehicle that had stopped for a pedestrian." (*Id*. at 1190.)

Finally, in *Brenner, supra,* the plaintiff alleged the following, which is substantially similar to the allegations made by the plaintiffs in this matter,

> City knew or should have known that, because of the attraction created by two bus stops, a park, a convenience store and a middle school at or near the Chase/Estes intersection, many pedestrians would be attracted to the area and would use the intersection to cross Chase Avenue. Brenner alleged that City was aware of the high number of pedestrians using the street and intersection, as well as the increased volume and speed of cars traveling on Chase Avenue and physical changes made to Chase Avenue that posed risks to pedestrians; however, City did not take steps to make the intersection safe for pedestrians because it "failed to install traffic [regulatory] devices, traffic safety devices, traffic control devices, signs or traffic signs, or take any steps to manage, control, or reduce the automobile traffic flow or speed on Chase Avenue and/or ... failed to take steps to prevent increased risk of harm and injury to the pedestrians...."

(*Id*. at 437-438.) The trial court sustained the city's demurrer without leave to amend because the plaintiff failed to allege that any condition of the property itself, independent of traffic safety or control devices, was dangerous. (*Id*. at 438.) The Court of Appeal affirmed.

The *Brenner* Court found that high volume and speed of traffic cannot establish a dangerous condition absent dangerous physical characteristics creating a substantial risk of harm. (*Id*. at 440.) Furthermore, the existence of a park, store, school, and two bus stops near the intersection which increase pedestrian traffic does not create a dangerous condition absent evidence of a dangerous physical condition of the property. (*Ibid*.) Finally, the Court the factor that the city did not install traffic regulation or safety devices "has been legislatively excluded as a basis for finding a dangerous condition." (*Id*. at 442.)

The *Brenner* Court also discussed the case of *Bonanno v. Central Contra Costa Transit Auth.* (2003) 30 Cal.4th 139, a case relied upon by the Plaintiffs in the present matter. The *Brenner* Court found the *Bonanno* decision to be distinguished because,

> …*Bonanno* assumed the crossing was a dangerous condition; the precise question here is *whether* the Chase Avenue crossing was a dangerous condition. Indeed, the issue decided in *Bonanno* is the *obverse* of the issue raised by Brenner: *Bonanno* addressed whether a bus stop was dangerous because of the routes necessarily traveled by its patrons, and in contrast Brenner's complaint addresses whether the route traveled by patrons was dangerous because of the bus stop. Because *Bonanno* did not address the issue raised by Brenner, and instead assumed the existence of a dangerous

crosswalk, *Bonanno* does not illuminate the issues in this case.

This Court also finds the *Bonanno* case to be distinguished for the same reasons. The Plaintiffs have not cited to any authority that is on point to the facts at hand.

Here, Plaintiffs have alleged the following factors as creating a dangerous condition when combined:

1) The length of the crosswalk;
2) Inadequate roadway marking;
3) Lack of adequate lighting;
4) Lack of advanced notice of the crosswalk;
5) Lack of ladder striping on the crosswalk;
6) The fading of the parallel white lines delineating the crosswalk;
7) Increased pedestrian and vehicle traffic at the intersection due to the surrounding establishments; and
8) The "vertical crest" of the road.

The authority cited by Defendant and outlined above have made it clear that lack of lighting does not factor into the existence of a dangerous condition of public property because there is no duty to provide lighting unless a "peculiar condition" of the property makes is such that lighting is "necessary." (*Antenor*, *supra*, 174 Cal.App.3d at 483.) Plaintiffs argue that the length of the crosswalk being 84 feet creates a "peculiar condition rendering lighting necessary." However, Plaintiffs have not established that the length of the crosswalk was peculiar nor that such a "peculiar condition" would necessitate lighting, nor how much lighting such a crosswalk would necessitate to establish that the lighting that existed at the time was insufficient. The Court finds that there is no indication of a "peculiar condition" of the property to impose liability on the County for failure to provide adequate lighting. Furthermore, as many of the cases cited above set forth, increased pedestrian and vehicular traffic as well as increased speed at the intersection do not establish a dangerous condition.

Plaintiffs further argue that there were insufficient signs warning drivers of the pedestrian crosswalks and that the signs that existed were not far back enough from the intersection to allow adequate notice, which created a "trap." However, this argument is not supported by the record. The photographs taken by CHP immediately after the accident depict bright yellow pedestrian crossing signs at the intersection facing oncoming traffic. Notwithstanding this, as pointed out by the *Brenner* Court, *supra*, the insufficiency or lack of traffic regulation or safety signs has been legislatively excluded as a basis for finding a dangerous condition by Government Code § 830.4. As stated above, even if it can be proven that the accident was caused by the failure to provide such traffic or warning signs, a dangerous condition of the physical characteristics of the property, independent of the signage, must be shown before liability will attach for failure to post a sign where necessary. (Gov. Code, § 830.8.) This same analysis can be applied to Plaintiffs' arguments that there should have been ladder striping on the crosswalk and that the lines delineating the crosswalk were faded. The Court notes that the photographs of the crosswalk during the daytime indicate solid white parallel lines demarking the crosswalks on all four sides

of the intersection with some light, but not extensive nor abnormal, fading.

Plaintiffs argue that the "slight grade with a vertical crest" observed by their expert, Christian Engelmann, that is alleged to exist at the west side of the intersection on Verano Avenue reduces visibility of pavement markings on the east side of the intersection. However, the expert's opinion does not provide the measurements for this slight grade, nor clearly specify for whom visibility is reduced (pedestrians or vehicles), how much visibility is reduced, nor any comparison of this grade to stopping sight distance standards, nor an ultimate opinion regarding the dangerousness of this grade and vertical crest. There is nothing in the record to distinguish this grade from the "vertical curvature" that affected the line of sight from one of the intersecting streets that was discussed in *Antenor*, *supra*, at page 484. There is nothing to suggest that such vertical crest was dangerous.

At oral argument on May 10, 2023, Plaintiff cited *Stack v. City of Lemoore* 2023 WL 322091 8. *Stack* involved a defect in a sidewalk, not an intersection. The sidewalk defect was a minimum of a one-and three-quarter-inch height differential. The court in *Stack* found the height differential of the first defect weighs heavily against finding the sidewalk condition trivial as a matter of law. The height is nearly double the one-inch threshold where courts grow reluctant to take the issue from the jury." (*Id*. at 5.) Thus, although the *Stack* court analyzed additional factors, the mere height differential of the defect itself *nearly* created a triable issue as a matter of law. "Thus, although we proceed to consider additional factors regarding the condition, the height of this defect will require a strong showing of other circumstances that made it *not* dangerous despite its height." (*Id*. at 5. Emphasis in original) The consideration of other factors by the court in *Stack* does not make those factors particularly persuasive in the instant case of an alleged defect in an intersection as the sidewalk defect itself was dangerous.

Plaintiffs provided further argument regarding the *Stack* case in their supplemental briefing in support of their position that evidence of a prior incident occurring at the intersection is sufficient to create a triable issue of fact regarding the existence of a dangerous condition. Plaintiffs argue that the existence of a prior incident occurring on November 13, 2020 is sufficient on its own to create a triable issue of fact. Defendant has provided evidence that establishes that the November 13, 2020 incident was the only other pedestrian-involved accident at that intersection in the past 10 years. Furthermore, the information in the record regarding the previous incident is the date and time it occurred (daytime), that it occurred at the same intersection while the pedestrian was using the crosswalk and the driver was making a left turn, that the pedestrian was 80 years old while the driver was 69 years old and that the pedestrian sustained minor injuries. The Court previously indicated and continues to believe that the existence of this single incident, without there being evidence of any physical conditions of the property that make it dangerous, does not create a triable issue regarding dangerousness.

Plaintiffs have cited *Lane v. City of Sacramento* (2010) 183 Cal.App.4th 1337 ("*Lane*"), which stated the following, "[T]he city cites no authority for the proposition that the absence of other similar accidents is *dispositive* of whether a condition is dangerous, or that it compels a finding of nondangerousness absent other evidence." (*Id*. at 1346. Italics in original.) The *Lane* Court

found that the absence of previous incidents alone did not preclude a reasonable trier of fact from finding a dangerous condition. (*Ibid*.) The present analysis is the opposite of the one in *Lane*. Plaintiff seeks a determination that the *existence* of one previous incident—which differs in fact from the underlying incident—is sufficient on its own to create a triable issue of material fact as to the existence of a dangerous condition. Plaintiff has not provided any authority which supports this position, and the Court is aware of none. Rather, the Court points the parties to the case of *Sun v. City of Oakland, supra,* 166 Cal.App.4th 1177, where the Court of Appeal affirmed the grant of summary judgment even where the plaintiffs produced evidence that the intersection was ranked third among all intersections in Oakland in the number of pedestrian-involved accidents. (*Id*. at 1188.)

Plaintiff Ray Carrillo also cites to *De La Rosa v. City of San Bernadino* (1971) 16 Cal.App.3d 739 where there was evidence of numerous accidents at the same intersection. However, in that case there was evidence independent of the existence of previous accidents which also went toward establishing the existence of a dangerous condition.

> "[I]t is well-settled that before evidence of previous accidents may be admitted to prove the existence of a dangerous condition, it must first be shown that the conditions under which the alleged previous accidents occurred were the same or substantially similar to the one in question."…Moreover, "[w]hile there must be substantial similarity to offer other accident evidence for any purpose, a stricter degree of substantial similarity is required when other accident evidence is offered to show a dangerous condition; ' "the other accident must be connected in some way with that thing ....

(*Mixon v. Pac. Gas & Elec. Co.* (2012) 207 Cal.App.4th 124, 138.) Plaintiffs have not made such a showing.

Defendant has shown that there is no triable issue of material fact as to the existence of a dangerous condition. Plaintiffs have not met the shifted burden to prove otherwise. Plaintiffs have not established that any of the individual factors complained of are dangerous on their own, thus the argument that they created a dangerous condition when grouped together is unavailing. Plaintiffs' argument that the existence of a single prior vehicle-on-pedestrian accident at the intersection is sufficient evidence on its own to create a triable issue regarding the existence of a dangerous condition is not persuasive. Rather, the Court finds that there was no dangerous condition. In light of this finding, the remaining arguments made by Defendant regarding the remaining elements for proving the cause of action and regarding design immunity need not be analyzed.

4. SCV-270992, Herrera v. Lola's Market, Inc., et al.

Defendant's motion to compel arbitration and stay proceedings is DENIED. Plaintiff's objection number 4 is SUSTAINED to the extent that the declaration states, "This is not true." Plaintiff's objection number 5 is SUSTAINED. The remainder of Plaintiff's objections are OVERRULED. Plaintiff shall prepare the order pursuant to CRC 3.1312.

Analysis:

This matter arises out of an employment relationship between the parties. Defendant operates Mexican-inspired grocery stores and bakeries. Plaintiff, a native Spanish speaker, worked for Defendant from approximately August 2019 to May 2022, first as a cashier and then as a manager. Plaintiff alleges that, starting in January 2021, store manager Martin Perez started harassing her. Plaintiff alleges that, after Perez made comments to her, she complained to management multiple times. Plaintiff also alleges a pattern of retaliation after she first started complaining about Perez.

Plaintiff alleges eight causes of action against all Defendants in this case: Whistleblower Retaliation; Gender Discrimination; Gender Harassment; Retaliation; Failure to Take Steps Necessary to Prevent Gender Discrimination, Harassment, or Retaliation; Negligent Hiring, Supervision, and/or Retention; Intentional Infliction of Emotional Distress; and Constructive Discharge in Violation of Public Policy. The term Defendant in the singular herein refers to Lola's Market, Inc.; the plural Defendants refers to all defendants in this case: Lola's Market, Inc., Martin Perez, and David Ortega.

After the parties' unsuccessful mediation on December 6, 2022, and after Plaintiff refused to stipulate to arbitration on February 14, 2023, Defendant brings this motion to compel arbitration, seeking to enforce the arbitration agreement (the Agreement) signed by Plaintiff during her onboarding with one of Defendant's human resources employees.

Notably, the Agreement was in English. In pertinent part, the Agreement states: "I hereby accept new or continued employment with Lola's Market, Inc. ("Employer") in exchange for my agreement to resolve any dispute relating in any way to my employment, including all claims for discrimination based on statutorily protected status, which we have not otherwise been able to resolve informally, by mandatory binding arbitration…"

In her opposition to the motion to compel arbitration, Plaintiff argues that (1) the Agreement is procedurally and substantively unconscionable; (2) fraud invalidates the Agreement; (3) and the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (EFAA) applies. The Court disagrees with Plaintiff's first two arguments. However, the Court agrees that the EFAA applies, which requires the Court to deny the motion to compel arbitration. .

A party seeking to compel arbitration pursuant to CCP § 1281.2 must "plead and prove a prior demand for arbitration under the parties' arbitration agreement and a refusal to arbitrate under the agreement." (*Mansouri v. Sup. Ct*. (2010) 181 Cal.App.4th 633, 640–641.) "The party seeking to compel arbitration has the initial burden to plead and prove the existence of a valid arbitration agreement that applies to the dispute. Once that burden is satisfied, the party opposing arbitration must prove any defense to the agreement's enforcement, such as unconscionability." (*Dennison v. Rosland Cap. LLC* (2020) 47 Cal.App.5th 204, 209.) "[W]hen the allocation of a matter to arbitration or the courts is uncertain, we resolve all doubts in favor of arbitration." (*Ngyuen v. Applied Medical Resources Corp.* (2016) 4 Cal.App.5th 232, 260.)

I. ***Unconscionability***

A. Unconscionability Standards

Unconscionability is a judicially created doctrine and involves a highly context-dependent analysis. (*Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 911.) Unconscionability has two elements: procedural and substantive. Well-established California law requires that both elements be present for an unconscionability defense to succeed. The two elements, however, need not be present to the same degree and are evaluated on a sliding scale. "[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114.)

Procedural unconscionability concerns how the contract was negotiated and the surrounding circumstances at the time of signing. The analysis first examines whether the contract is adhesive. An adhesive contract is standardized, generally on a preprinted form, and offered on a take-it-or-leave-it basis by the party with superior bargaining power. (*OTO, L.L.C v. Kho* (2019), 8 Cal.5th 111, 126.)

The analysis then examines two relevant factors: oppression and surprise. Oppression means unequal bargaining power between the parties and a lack of negotiation or meaningful choice by the weaker party. "The circumstances relevant to establishing oppression include, but are not limited to (1) the amount of time the party is given to consider the proposed contract; (2) the amount and type of pressure exerted on the party to sign the proposed contract; (3) the length of the proposed contract and the length and complexity of the challenged provision; (4) the education and experience of the party; and (5) whether the party's review of the proposed contract was aided by an attorney." (*Id.* at 126–127, quoting *Grand Prospect Partners, L.P. v. Ross Dress for Less Inc.* (2015) 232 Cal.App.4th 1332, 1348.)

Surprise arises when the challenged terms are hidden in a prolix printed form drafted by the parties seeking to enforce them. When a weaker party to a contract has a language barrier, failure to translate a contract alone is not sufficient to find procedural unconscionability (See *Penilla v. Westmont Corp* (2016) 3 Cal.App.5th 205, 216–218.) Other factors that pressure or deceive the weaker party with the language barrier are typically present to demonstrate procedural unconscionability. (*Samaniego v. Empire Today, LLC* (2012) 205 Cal.App.4th 1138, 1145–1146; *Carmona v. Lincoln Millenium Car Wash Inc.* (2014) 226 Cal.App.4th 74, 80.)

Substantive unconscionability focuses on the terms of the agreement and occurs when challenged terms are so one-sided as to shock the conscience. A wide variety of attributes may affect the determination of substantive unconscionability, but the paramount consideration is mutuality—agreements to arbitrate must contain at least a modicum of bilaterality. When only the weaker party's claims are subject to arbitration, and there is no reasonable justification for the asymmetry based on business realities, the agreement lacks the requisite degree of mutuality. (*Carmona v. Lincoln Millennium Car Wash, Inc.* (2014) 226 Cal.App.4th 74, 85–86.)

The Agreement is contained in Exhibit B of the Declaration of Evelyn Padilla in support of Defendant's motion. In the interest of brevity, the Court will not recite the entire Agreement in this ruling but will direct the parties to that exhibit.

B. Procedural Unconscionability

Plaintiff provides four arguments for procedural unconscionability, while addressing various aspects of the oppression and surprise factors. First, Plaintiff argues that the Agreement is

procedurally unconscionable because it is an adhesive contract. The Court finds that adhesive contracts are not *per se* procedurally unconscionable. Whether a contract is adhesive is, however, a factor that is strongly considered in determining whether an arbitration agreement is unfairly one-sided. (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1244.) Case law supports finding that the Agreement in this matter is one of adhesion. (See *OTO, L.L.C, supra,* at 126.)

Second, Plaintiff contends that Defendant offered Plaintiff a contract in English even though Defendant allegedly knew that Plaintiff only read, spoke, and understood Spanish. The parties dispute Plaintiff's English language ability. In her June 14, 2023, declaration, Plaintiff states that she can only understand and speak some simple English phrases. Defendant provides countering evidence that Plaintiff is more proficient in English.

Even if Plaintiff required a Spanish translation of the Agreement and Defendant failed to provide one, there is no evidence that Defendant pressured or deceived Plaintiff into signing the Agreement. For instance, Plaintiff does not indicate that the human resources employee rushed her into signing the Agreement. Absent coercive tactics, completing paperwork in the workplace with customers present does not amount to procedural unconscionability. Furthermore, there is no evidence that Plaintiff requested a Spanish version of the agreement, or requested help translating the English version, and was denied that opportunity.

Third, Plaintiff asserts that she did not receive a copy of the Agreement in Spanish or English to take home prior to signing. However, Defendant contends that, since January 2013, its ordinary business practice is to provide and make Spanish and English arbitration agreements readily available to all new hires. Before Defendant hired Plaintiff, Plaintiff retrieved an employment application in late July 2019 and took it home to complete. Exhibit A of the Declaration of Evelyn Padilla in support of Defendant's motion contains Plaintiff's employment application. Plaintiff appears to have signed the employment application sometime on July 20 or 29, 2019 (the handwritten date is not clear). Page 3 of Plaintiff's employment application contains Plaintiff's initialed acknowledgements. Though Plaintiff contends that she was not given a copy of the arbitration agreement to take home prior to signing, Defendant has submitted evidence to establish that the employment application packet that Plaintiff took home and purportedly had translated by her husband contained the following acknowledgement, which Plaintiff returned initialed by her:

> I understand and agree that, if I am hired by Employer, any controversy or claim arising out of my employment with Employer which is not resolved informally shall be settled by mandatory binding arbitration in accordance with the Employment Dispute Resolution Rules of the American Arbitration Association. If hired, I agree to sign a written arbitration agreement consistent with the above.

Plaintiff's employment application also contains a stamp that it was received on August 1, 2019. Because she brought the employment application home, Plaintiff had time to review its content, ask her English-speaking husband to translate it, was put on notice that the Agreement would be forthcoming if hired, and had time to ask Defendant clarifying questions. Plaintiff states that she was not interviewed until around August 9 or 10, 2019. These facts combined factor against a finding of procedural unconscionability because there was time to translate or clarify the arbitration provision in the employment application and the forthcoming Agreement.

Moreover, Plaintiff argues that the human resources employee who presented Plaintiff documents for onboarding failed to explain the Agreement's terms. "Where the contract is one of adhesion, conspicuousness and clarity of language alone may not be enough to satisfy the requirement of awareness. Where a contractual provision would defeat the 'strong' expectation of the weaker party, it may also be necessary to call his attention to the language of the provision." (*Penilla, supra,* 3 Cal.App.5th at 217.) A weaker party's "strong" expectations includes, but is not limited to, an agreement limiting discovery or requiring that the employee pay unreasonable costs or arbitrators fees. (See *Armendariz, supra,* 24 Cal.4th at 102.) Here, there are no provisions of the agreement that defeat the strong expectation of Plaintiff, such that independent explanation by Defendant was necessary.

Fourth, Plaintiff argues that the Agreement's silence on the disadvantages of arbitration and Defendant's failure to explain the Plaintiff's rights creates an unacceptable risk of surprise. However, the Agreement is not lengthy and dedicates a short paragraph to waiving a jury trial, a disadvantage of arbitration identified by Plaintiff.

Finally, Plaintiff claims that the Agreement contains small-spaced font. Plaintiff mistakenly uses that argument to support substantive unconscionability instead of procedural unconscionability. (See *OTO, L.L.C, supra,* 8 Cal.5th 111 at 125–129.) The Court addresses Plaintiff's argument under procedural unconscionability. The Agreement is visually easy to read and is not buried in long boilerplate language. The Court does recognize that the record is unclear on how many papers Plaintiff signed in a stack when she onboarded. However, the Agreement is on one page, titled "Arbitration Agreement" in bold font, has white space in between paragraphs, uses a reasonable font size, and contains plain language. This is to be distinguished from the language of the agreement in *OTO, L.L.C, supra*, about which the California Supreme court stated: "The agreement is a paragon of prolixity, only slightly more than a page long but written in an extremely small font [the defendant and plaintiff asserted that the agreement was in 7 type font and 8.5 type font, respectively]. The single dense paragraph covering arbitration requires 51 lines." (*Id.* at 128.).

Based on all of the factors considered above, the arguments presented, and case law, the Court finds low procedural unconscionability is present here. However, as will be explained below, the Court finds no substantive unconscionability. Since both procedural and substantive unconscionability must be found to invalidate an arbitration agreement, Defendant's motion to compel arbitration cannot be denied based on unconscionability.

C. Substantive Unconscionability

Plaintiff next argues that the Agreement is substantively unconscionable because it includes small-spaced font and lacks mutuality. First, as addressed above, the Agreement's format is a factor to be considered under a procedural unconscionability analysis, rather than a substantive unconscionability analysis.

Second, the Agreement does not lack mutuality. The first paragraph of the Agreement states "[b]ut any resulting civil action initiated by me *or the Employer* is covered by this mandatory binding arbitration agreement" (emphasis added). The Agreement does not produce a one-sided result where the employer is exempt from arbitration. In addition, Plaintiff does not contest any substantive provision in the Agreement or the arbitration rules referenced in the Agreement.

Accordingly, the Court finds low procedural unconscionability and no substantive unconscionability. For an unconscionability defense to succeed, both procedural and substantive unconscionability must be present, on a sliding scale. Defendant's motion to compel arbitration cannot be denied based on unconscionability.

II. Fraud

Plaintiff argues that there was no mutual assent to enter into the Agreement on the basis of fraud. However, there is no indication in the record of any existence of fraud or any other factors to support such an argument.

III. The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021

(Due to the limited case law on the EFAA and issues specific to this motion, the parties and cited to lower court decisions for persuasive authority. The Court cites to some of those decisions in this ruling.)

On March 3, 2022, President Biden signed the EFAA into law, and the EFAA took effect on that date. (EFAA, Pub. L. 117-90, 136 Stat. 26 (2022).) The EFAA directly amended the Federal Arbitration Act and, upon their election, allows people alleging sexual assault or sexual harassment disputes to forgo arbitration. The Court continued the June 28, 2023, hearing for the parties to brief the sole issue on whether the EFAA applies to the present case. Plaintiff argues that the EFAA applies, and Defendant argues that it does not.

> The EFAA states in pertinent part:
>
> Notwithstanding any other provision of this title, at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute . . . no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.

(9. U.S.C. § 402(a).)

The EFAA defines a sexual harassment dispute as "[a] dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law." (9 U.S.C. §401(4).) A historical note in the EFAA states: "This Act, and the amendments made by this Act, shall apply with respect to any dispute or claim that arises or accrues on or after the date of enactment of this Act." (9 U.S.C. § 401 (codified note thereto), Pub. L. No. 117-90, March 3, 2022, 136 Stat. 26, 28.)

California's Fair Employment and Housing Act (FEHA) makes it an "unlawful employment practice" for an employer to harass an employee because of the employee's "sex, gender, gender identity, gender expression, . . . [or] sexual orientation . . . ." (Gov. Code §12940, subd. (j)(1).) "The prohibition against sexual harassment includes protection from a broad range of conduct, [including the creation of a work environment that is hostile or abusive on the basis of sex.]" (*Atalla v. Rite Aid Corp.* (2023) 89 Cal. App. 5th 294, 308. Quoting *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 277.) "To plead a cause of action for [hostile work environment] sexual harassment, it is only necessary to show that gender is a substantial factor in the discrimination, and that if the plaintiff 'had been a man she would not have been

treated in the same manner.'" (*Lyle*, *supra*, at p. 280. Quoting *Accardi v. Superior Court* 17 Cal.App.4th 341, 248.) "Accordingly, it is the disparate treatment of an employee on the basis of sex . . . that is the essence of a sexual harassment claim." (*Ibid.*) Prohibited harassment includes "verbal, physical, and visual harassment, as well as unwanted sexual advances [including] even when the harassing conduct was not motivated by sexual desire." (Cal. Code Regs., tit. 2 § 11034, subd. (f).) "In this regard, verbal harassment may include epithets, derogatory comments, or slurs on the basis of sex." (*Lyle*, *supra*, at p. 280.)

Even though Plaintiff alleged a gender harassment cause of action in her Complaint, the Court finds that the Plaintiff alleged facts for an actionable claim of sexual harassment based on a hostile work environment. (See *Miller v. Department of* Corrections (2005) 36 Cal.4th 446, 461–463.) For instance, in January 2021, Plaintiff's supervisor, Perez, asked Plaintiff, "Who did you sleep with to get the manager position?" (Complaint ¶ 10(a).) The Court directs the parties to page 4 of Plaintiff's Complaint for other instances of alleged harassment.

Defendant's supplemental brief at page 3 states that "[t]here is no authority to suggest that the Act applies to claims for gender harassment as alleged in this matter (as opposed to sexual harassment or sexual assault)." Parsing the words of gender harassment and sexual harassment goes against Congress's intent in enacting the EFAA. Accordingly, Plaintiff's 3rd cause of action for gender harassment describes sexual harassment and qualifies as a "sexual harassment dispute" under 9 U.S.C. §401(4). For consistency, unless referring to the third cause of action in the Complaint, the Court will use the term sexual harassment herein to refer to the allegations that Plaintiff describes as gender harassment.

Congress defined a "sexual harassment dispute" broadly in the EFAA as a "dispute *relating to* conduct that is alleged to constitute sexual harassment . . . ." (9 U.S.C. §401(4). Emphasis added); see *Olivieri v. Stifel* (2023) 2023 WL 2740846 at 5-7.) Due to the EFAA's broad definition of "sexual harassment dispute," causes of action that relate to the underlying sexual harassment claims also qualify as sexual harassment disputes under the EFAA. (See *Olivieri*, *supra*, at 6.) Accordingly, in addition to the Plaintiff's third cause of action for gender harassment (which forms the basis of the EFAA's applicability), the following causes of action also qualify as "sexual harassment disputes" because they stem from the alleged sexual harassment: 2nd cause of action for gender discrimination; 4th cause of action for FEHA retaliation; 5th cause of action for failure to take all reasonable steps necessary to prevent gender discrimination, harassment, or retaliation; 6th cause of action for negligent hiring, supervision, and/or retention; 7th cause of action for intentional infliction of emotional distress; and 8th cause of action for constructive discharge in violation of public policy. The only cause of action in Plaintiff's complaint that does not qualify as a "sexual harassment dispute" under the EFAA is Plaintiff's 1st cause of action for whistleblower retaliation because that one relates to the alleged retaliation that occurred after Plaintiff reported rat infestation at the workplace.

The Court recognizes that, given its recent enactment, EFAA case law is still developing. What is clear from case law is that the EFAA is not retroactive. (E.g., *Johnson v. Everyrealm, Inc.* (N.Y.S.D. 2023) 2023 WL 2216173 1, 10.) In addition, courts appear to agree that a claim under the EFAA accrues when there is "a complete and present cause of action," the same standard used for determining the statute of limitations. (See *Rotkiske v. Klemm* (2019) 140 S.Ct. 355, 360; *Walters v. Starbucks Corp.* (S.D.N.Y. 2022) 623 F.Supp.3d 333, 338.)

As explained below, the Court finds that Plaintiff's FEHA retaliation claim, a claim related to the underlying sexual harassment allegations, accrued after March 3, 2022, the EFAA's enactment date.

A. Retaliation Claim

The FEHA makes it an "unlawful employment practice" for "an employer . . . to discharge, expel, *or otherwise discriminate* against any person because the person *has opposed any practices forbidden under this part* or because the person has filed a complaint, testified, or assisted in any proceeding under this part." (Gov. Code §12940, subd. (h). Emphasis added.) In other words, and relevant to the present dispute, an employer is prohibited from retaliating against an employee when that employee opposes what the employee perceives as sexual harassment in the workplace.

To establish a prima facie case of retaliation under the FEHA (and federal law), "a plaintiff must show (1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042; see *Reynaga v. Roseburg Forest Prods* (2017) 847 F.3d 678, 693.) The second element (addressed in subsection (b)) is key to this Court's analysis in concluding that the EFAA applies to the present case and renders the Agreement unenforceable.

i. Protected Activity & Causation

To determine whether an employee's conduct qualifies as protected activity under the FEHA, "The relevant question … is not whether a formal accusation of discrimination is made but whether the employee's communications to the employer sufficiently convey the employee's reasonable concerns that the employer has acted or is acting in an unlawful discriminatory manner.'" (*Yanowitz*, *supra*, 36 Cal.4th at 1047.) The FEHA need not actually prohibit the conduct of which the employee complains. (*Miller*, *supra*, 36 Cal.4th at 473.) "An employee is protected against retaliation if the employee reasonably and in good faith believed that what he or she was opposing constituted unlawful employer conduct such as sexual harassment . . . ." (*Id.* at 474.) An employee's belief that he or she is complaining about prohibited conduct "may be inferred from the nature and content of their repeated complaints." (*Ibid.*) Here, over a one-year timeframe (January 2021 – January 2022), Plaintiff complained about Perez's alleged sexual harassment seven times: five times to her immediate supervisor and Defendant's general manager (Mario Lozano), once to the human resources manager, and once to the owner.

Plaintiff plausibly alleged a causal link between Plaintiff's protected activity and the retaliation incidents (explained in more detail in the next section). Plaintiff alleged that the retaliation started once she complained about Perez's behavior. The timing of the incidents detailed in the Complaint support Plaintiff's contention.

ii. Adverse Employment Action

An adverse employment action "materially affect[s] the terms, conditions, or privileges of employment." (*Yanowitz*, *supra*, at 1052; see also *Campbell v. State Dep't of Educ*. (9th Cir. 2018) 892 F.3d 1105, 1012.) "[T]he phrase 'terms, conditions, or privileges' of employment must be interpreted liberally and with a reasonable appreciation of the realities of the workplace in order to afford employees the appropriate and generous protection against employment

discrimination that the FEHA was intended to provide." (*Yanowitz*, *supra*, at p. 1054.) The FEHA not only protects against "so-called ultimate employment actions such as termination or demotion, but also the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement." (*Ibid.*)

"[I]n determining whether an employee has been subjected to treatment that materially affects the terms and conditions of employment, it is appropriate to consider the totality of the circumstances and to apply the 'continuing violation' doctrine . . . ." (*Id.* at 1036.) The continuing violation doctrine holds an employer liable for actions that occur outside the statute of limitations period if those actions are "sufficiently linked to unlawful conduct that occurred within the limitations period." (*Yanowitz*, *supra*, at p. 1056.) In the EFAA context, when a plaintiff alleges a "continuing violation of civil rights laws the latest date for accrual [of a claim under the EFAA] is either the adverse employment action, such as the termination of employment, or the plaintiff's injury." (*Barnes v. Festival Fun Parks, LLC* (2023) 2023 WL 4209745 at 33.)

Plaintiff argues that the continuing violation doctrine applies, and the Court agrees. Here, Plaintiff describes a continuing course of retaliatory conduct that started after Plaintiff first complained about Perez's sexual harassment in January 2021. While the Court will not recite all the instances of alleged retaliation, the Court directs the parties to page 5 of the Complaint. The alleged retaliation includes, but is not limited to, denying Plaintiff work resources, giving her disciplinary write-ups (one of which was done in front of the owner), and accusing her of harassing Perez and other employees. In addition, on or about January 17, 2022, Plaintiff met with Owner David Ortega, HR Manager Claudia Olvira, and General Manager Mario Lozano to discuss Plaintiff's complaints against Perez; after the meeting, Olvira told her that Defendants were going to investigate how she managed the store and keep a close eye on her.

In her Complaint, Plaintiff details a meeting with managers that occurred on or about March 7 and 8, 2022, after the EFAA's enactment. After the meeting, Olvira publicly announced to all attendees that Plaintiff's store was experiencing fraud and that Plaintiff was hindering Defendants' investigation into the matter because Plaintiff refused to allow Olvira to go through her phone. Olvira suggested that Plaintiff had something to do with the fraud and criticized her work performance. Given the events that unfolded at the meeting, application of the continuing violation doctrine here shows that the adverse employment occurred until at least as late as the March 7 or 8 meeting (or even until Plaintiff was constructively discharged on May 25, 2022). Because the adverse employment action occurred after the EFAA's enactment, Plaintiff's 4th cause of action falls within the EFAA's statutory period.

Defendant contends that *Olivieri v. Stifel, supra,* and *Yanowitz v. L'Oreal USA, Inc., supra,* are inapplicable because those cases concern retaliation claims. The Court disagrees because Plaintiff's retaliation claim is relevant to the resolution of the motion to compel arbitration. *Olivieri* is applicable because the court in that case applied the continuing violation for incidents that occurred before and after the EFAA's enactment—the situation that this Court faces in the present dispute. (*Olivieri, supra,* at 10–14.) *Yanowitz* is also applicable because the retaliatory acts, which the California Supreme Court found constituted adverse employment action, are similar to the acts alleged in the present dispute. (*Yanowitz, supra,* at 1039–1040.)

Even though Plaintiff does not allege that any sexual harassment incidents occurred after the EFAA's enactment (and Plaintiff's counsel so conceded at the June 28, 2023, hearing), Plaintiff's retaliation claim accrued after the EFAA's enactment and is not time barred under the EFAA. The FEHA retaliation cause of action is related to the sexual harassment allegations and qualifies as a "sexual harassment dispute." Accordingly, the Court agrees with Plaintiff that the EFAA applies to the present dispute.

B. The Arbitration Agreement is Invalidated for All Causes of Action

All eight causes of action will be adjudicated in this Court. In *Johnson v. Everyrealm, Inc.*, *supra*, the court held that "where a claim in a case alleges 'conduct constituting a sexual harassment dispute' as defined, the EFAA, at the election of the party making such an allegation, makes pre-dispute arbitration agreements unenforceable with respect to the entire case relating to that dispute." (*Id.* at 19.) The *Johnson* court reasoned in part:

> [T]he EFAA amended the [Federal Arbitration Agreement] directly (rather than, for example, amending a separate statute, such as Title VII, to bar the arbitration of certain claims arising under it). That reinforces Congress's intent to override—in the sexual harassment context—the FAA's background principle that, in cases involving both arbitrable and non-arbitrable claims, "the former must be sent to arbitration even if this will lead to piecemeal litigation." [internal citation omitted]

(*Id.* at 18.) This Court finds the reasoning in *Johnson* persuasive. Plaintiff's claims for all eight causes of action will be adjudicated in this Court and are not compelled to arbitration. (See also CCP § 1281.2(d).)

Based on the Court's determination above, the Court need not decide whether the date a party files a Complaint determines whether the EFAA applies.

5-6. SCV-271045, Castagnola v. Pittman, et al.

I. Plaintiff's Motion to Vacate Order Sustaining Demurrer

Plaintiff's motion to vacate the Court's April 17, 2023 order is DENIED. Defendants' counsel shall submit a written order consistent with this tentative ruling and in compliance with Rule 3.1312.

Plaintiff moves for an order vacating the Court's April 17, 2023 order sustaining Defendants' demurrer to Plaintiff's First Amended Complaint without leave to amend. Plaintiff has not cited a legal basis for vacating the order. There is no legal basis for doing so. To the extent Plaintiff is requesting that the Court reconsider its order sustaining the demurrer without leave to amend, Plaintiff has not established a basis for doing so.

Pursuant to CCP § 1008, "No application to reconsider any order or for the renewal of a previous motion may be considered by any judge or court unless made according to this section." (CCP § 1008(e).) A motion for reconsideration of a previous order of the Court must be "based upon new or different fact, circumstances, or law…" Furthermore, "The party making the application

shall state by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown." An affidavit later filed is insufficient. (*Branner v. Regents of Univ. of Calif.* (2009) 175 Cal.App.4th 1043, 1048.)

Plaintiff has not submitted an affidavit as required by the statute. This alone is sufficient reason for denying the motion. Notwithstanding, Plaintiff has also failed to identify any "new" or "different" facts or circumstances in his moving papers that would warrant this court to reconsider its previous ruling. Nor has the Plaintiff identified any "new" or "different" law that would warrant reconsideration. The Plaintiff's motion largely re-argues facts and law presented to the Court earlier or identities facts which were known to Plaintiff prior to issuance of the order. The motion is DENIED.

II. Plaintiff's Motion to Disqualify Defendants' Counsel

Plaintiff's motion to disqualify Diana Gomez, Robert Pittman, and Michael King is DENIED. Defendants' counsel shall submit a written order consistent with this tentative ruling and in compliance with Rule 3.1312.

Plaintiff moves to disqualify individual Deputy County Counsel from representing the County based on conflict of interest because County Counsel represents the interests of the community, of which Plaintiff is a member. Therefore, Plaintiff argues the Deputy County Counsel are engaged in simultaneous opposing representation. The Court notes that Diana Gomez and Robert Pittman are not representing the County in this matter, they are parties to the matter and are being represented by Michael King who is a Deputy County Counsel.

A party may only seek to disqualify an opponent's counsel if the party has standing to do so. (*Great Lakes Const., Inc v. Burman* (2010) 186 Cal.App.4th 1347; *Blue Water Sunset, LLC v. Markowitz* (2011) 192 Cal.App.4th 477, 485; *Dino v. Pelayo* (2006) 145 Cal.App.4th 347, 352.) "A 'standing' requirement is implicit in disqualification motions. Generally, before the disqualification of an attorney is proper, the complaining party must have or must have had an attorney-client relationship with that attorney.' (*Great Lakes Const*., *supra*, at 1356.)

In a number of cases addressing disqualification based on an alleged conflict of interest, courts have held that non-clients seeking attorney disqualification "must meet stringent standing requirements" by demonstrating "harm arising from a legally cognizable interest which is concrete and particularized, not hypothetical." (*Great Lakes Construction, Inc., supra*, 186 Cal.App.4th at 1358.) "[A]bsent an attorney-client relationship, the moving party must have an expectation of confidentiality. (*Id*. at 1356.) "For purposes of a disqualification motion, '[s]tanding arises from a breach of the duty of confidentiality owed to the complaining party, regardless of whether a lawyer-client relationship existed.'…Thus, some sort of confidential or fiduciary relationship must exist or have existed before a party may disqualify an attorney predicated on the actual or potential disclosure of confidential information." (*Ibid*.)

Here, Plaintiff has not established that there has ever existed an attorney client relationship with

the defendants' counsel. Furthermore, Plaintiff has not established that he is owed a duty of confidentiality by the defendants' counsel. Accordingly, Plaintiff has not established that he has standing to seek to disqualify the defendants' counsel. The motion is DENIED.

7-8. SCV-272176, D.A., an Individual v. Doe 1, a New York Corporation

Defendant DOE 1's, a New York Corporation, ("DOE 1") demurrer to Plaintiff D.A.'s, an individual, ("Plaintiff") entire complaint is OVERRULED.

Defendant's concurrently filed motion to strike is GRANTED, only as to the last sentence regarding treble damages in paragraph 71 and prayer for relief 3 for treble damages in the Complaint, with leave to amend. The motion to strike is DENIED as to all else.

Procedural History

Plaintiff commenced this action to cover damages on behalf of an adult, who is using a fictitious name to protect his privacy and was a victim of childhood sexual assault per Code of Civil Procedure ("C.C.P.") section 340.1. (See generally, Complaint.)

As alleged in the Complaint, DOE 3, an individual, sexually assaulted or abused by Plaintiff on multiple occasions in Sonoma County around 1970 to 1971 when Plaintiff was then seven or eight years old and was a participant in Defendants' religious group and Sebastopol Congregation. (Complaint, ¶¶ 4-8.) At the time, DOE 3 was an employee, agent, servant, member, or volunteer of DOE 1, a religious non-profit corporation organized and existing under the laws of the State of New York, and DOE 2, a non-profit California corporation having its principal place of business in Sonoma County. (Complaint, ¶¶ 6, 11, 17.) Plaintiff did not include the true names of the fictitiously designated victims at the time of filing the complaint, but intends to amend the Complaint with leave of court to assert true names, identities, and capacities once they are ascertained. (Complaint, ¶¶ 18.)

At the time, Plaintiff believes that DOE 3 was able to accomplish the sexual assault by use of the trust, position, and authority he held as a fellow member, agent, and leader of Defendants' Sebastopol Congregation. (Complaint, ¶ 24.) Plaintiff alleges DOE 3 on at least four or five separate occasions followed Plaintiff into a single-person bathroom and sexually assaulted, abused, molested, and raped him, and that other members of the Sebastopol Congregation likely saw or should have seen DOE 3 following Plaintiff into the bathroom. (Complaint, ¶¶ 26-28.) Plaintiff's mother reported DOE 3's sexual assault, abuse, and molestation to Defendants, who failed to investigate or report DOE 3 and did not terminate his employment at the agency. (Complaint, ¶ 30.) DOE 3 was also not removed from supervision of minor children, including Plaintiff, even after the report of abuse and assault allowing his continued abuse. (*Ibid*.) Furthermore, Plaintiff claims that Defendants were made aware of DOE 3's sexual assault and abuse of other children as well as Plaintiff while they were under his supervision and authority, but they failed to act on it or notify any of the parents, students, or law enforcement. (*Id.* at ¶ 32.)

For DOE 3's sexual assault and abuse of Plaintiff and DOE 1 and DOE 2 failure to act to prevent, stop, and report the unlawful and inappropriate misconduct, Plaintiff brings five separate causes of action against all Defendants. (*Id*. at ¶¶ 34-41.) The causes of action include:

1. Sexual Assault of a Minor, against DOE 3. (Complaint, ¶¶ 43-50.)

2. Intentional Infliction of Emotional Distress, against DOE 3. (*Id.* at ¶¶ 51-60.)

3. Negligent Hiring, Supervision, and Retention, against DOE 1, DOE 2, and DOES 4 through 60 inclusive. (*Id*. at ¶¶ 61-71.)

4. Negligent Supervision of a Minor, against DOE 1, DOE 2, and DOES 4 through 60 inclusive. (*Id*. at ¶¶ 72-81.)
5. Negligence, against DOES 4 through 60 Only. (Complaint, ¶¶ 82-88.)

Plaintiff prays for relief of past, present, and future general and special damages, for treble damages against Defendants DOE 1, DOE 2, and DOES 4 through 60 inclusive, for punitive and exemplary damages against DOE 3, and other costs. (Complaint, Prayer for Relief, ¶¶ 1-7.)

A proof of service of summons has been filed as to DOE 1 and DOE 2, but not DOE 3. DOE 1 has demurred to the Complaint and filed a motion to strike portions of the Complaint.

DOE 1's Demurrer to the Complaint

Legal Standard

A demurrer can be used only to challenge defects that appear on the face of the pleading under attack or from matters outside the pleading that are judicially noticeable. (C.C.P. § 430.30(a).) At demurrer, 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.) Conclusory pleadings are permissible and appropriate where supported by properly pleaded facts. (*Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6.) "The distinction between conclusions of law and ultimate facts is not at all clear and involves at most a matter of degree." (*Burks v. Poppy Const. Co.* (1962) 57 Cal.2d 463, 473.) Leave to amend should generally be granted liberally where there is some reasonable possibility that a party may cure the defect through amendment. (*The Swahn Group, Inc. v. Segal* (2010) 183 Cal.App.4th 831, 852; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

DOE 1's Demurrer and Opposition

DOE 1 demurs to Plaintiff's entire complaint per C.C.P. sections 430.10 and 430.40(a) for uncertainty and failure to state a claim upon which relief can be granted against DOE 1 and claims that post-date all alleged sexual abuse are time-barred by the applicable statute of limitation. (Demurrer, 1:4-8.) DOE 1 demurs to the third cause of action for negligent hiring, supervision, and retention and the fourth cause of action for negligent supervision of a minor for failure to state a claim and uncertainty because notice to DOE 1 occurred after the allege assault occurred and because DOE 1 did not have a special relationship with Plaintiff from which a duty of care arose. (*Id*. at 2:10-28, 3:1-11.) C.C.P. section 340.1 allows a few exceptions to the statute of limitations, including for "an action for liability against any person or entity who owed a duty of care to the plaintiff, if a wrongful act 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." DOE 1 argues Plaintiff has not plead sufficiently how DOE 1 had a special relationship with Plaintiff or owed Plaintiff a duty, but pleads "in conclusory fashion" that a special relationship was formed and was the basis of the duty of care to Plaintiff. (*Id*. at 7:24-28, 8:1-7.) DOE 1 relies upon the cases *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531 ("*Doe*") and *Santillan v. Roman Cath. Bishop of Fresno* (2012) 202 Cal.App.4th 708 ("*Santillan*"). DOE 1 argues that the *Doe* case has ruled that failure to show actual or constructive notice prior to the childhood sexual assault is fatal to claims made based on this exception to section 340.1. (Demurrer, 8:5-7.) In the *Doe* case, the Supreme Court ruled that, "construing the subdivision as a whole, the knowledge or notice requirement refers to knowledge or notice of past unlawful sexual conduct by the individual currently accused of other unlawful sexual conduct." (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 549.) In *Santillan*, the Court of Appeal affirmed the lower court decision to deny a motion for a new trial following an entry of summary judgment against the plaintiff and ruled that "notice" required in this section comes from knowledge of unlawful sexual conduct by the perpetrator either before the plaintiff was molested, or after the molestation began, so knowledge after an agent has stopped abusing a plaintiff does not amount to notice under section 340.1. (*Santillan v. Roman Cath. Bishop of Fresno* (2012) 202 Cal.App.4th 708, 733.)

In opposition, Plaintiff points out that section 340.1 was amended as of January 1, 2020, after both *Doe* and *Santillan* were decided, and it includes now these two bases for liability for an entity defendants: "the person or entity knew or had reason to know, or was otherwise on notice, of any misconduct that creates a risk of childhood sexual assault by an employee, volunteer, representative, or agent, or the person or entity failed to take reasonable steps or to implement reasonable safeguards to avoid acts of childhood sexual assault." (Opposition to Demurrer, 2:3-21.) Thus, the standard which used to require entity defendant's prior knowledge of unlawful misconduct as well as failure to implement or take reasonable safeguards to prevent future childhood assaults, is now instead requires that an entity defendant had prior knowledge of just misconduct that creates a risk of childhood sexual assault or failure to take or implement reasonable safeguards. (*Ibid*.) As such, Plaintiff argues that neither *Doe* nor *Santillan* are applicable here. Plaintiff specifically states that even after Plaintiff's mother reported DOE 3's sexual assault of Plaintiff, DOE 1 continued to permit DOE 3 to supervise minor children, including Plaintiff, which allowed Plaintiff's abuse to and the abuse of other children at the Sebastopol Congregation to continue. (Opposition to Demurrer, 4:18-28, 4:1-5.) Plaintiff also disagrees that there did not exist any special relationship between Plaintiff and DOE 1 as is argued in the motion. (*Id*. at 5:15-21.) Plaintiff notes that while generally an actor who has not created a risk of harm has no duty of care to others, but a special relationship between the defendant victim is one where the victim has a right to expect protection from defendant and depends on defendant to protect the victim. (*Id*. at 11:4-22; *Brown v. USA Taekwondo* (2021) 11

Cal.5th 204, 214-216; *Regents of Univ. of California v. Sup. Ct.* (2018) 4 Cal.5th 607, 620.) As DOE 1 required Plaintiff to attend church activities and allowed DOE 3, its employee and agent, to isolate Plaintiff during said church activities on DOE 1's premises without any supervision for extended periods of time including inside a single-person bathroom at the church, DOE 1 created the risk of childhood sexual assault for Plaintiff and other minors that attended such services under DOE 3's supervision. (*Ibid*.) Plaintiff further argues that a duty arises where a defendant has created a risk of harm and also if the defendant is responsible for making the plaintiff's position worse, or has an affirmative duty to plaintiff from the hands of a third party even if the risk of harm is not of defendant's making when it comes to preventing sexual abuse to minor children. (Opposition to Demurrer, 11:4-22; *Doe v. Lawndale Elementary School Distr.* (2021) 72 Cal.App.5th 113, 125; *Brown v. USA Taekwondo* (2021) 11 Cal.5th 204, 214.)

Regarding treble damages, Plaintiff has agreed to strike its request and prayer for treble damages against all Defendants. (Opposition to Demurrer, 14:23-25.)

DOE 1 has submitted a reply brief arguing that Plaintiff is misreading section 340.1 and ignoring the statute's core tenets, prerequisites, and plain language, which require that for there to be any misconduct of DOE 1 that is susceptible to potential liability under its provisions, it must be the legal cause of Plaintiff's sexual assault and not anyone else's, otherwise the allegations are beyond the scope of the section. (Reply to Demurrer Opposition, 2:4-15.) DOE 1 also reaffirms the argument that the Complaint is not pleaded sufficiently because it was not alleged when the mother reported the sexual assault to entity defendants and what occurred afterwards, making the Complaint unclear. (3:6-14.) For that reason, DOE 1 argues that under the Complaint, DOE 1 did not have prior knowledge required under case law.

Plaintiff's Request for Judicial Notice in Opposition to Demurrer

Evidence Code § 452(a) allows judicial notice of "the decisional, constitutional, and statutory law of any state of the United States and the resolutions and private acts of the Congress of the United States and of the Legislature of this state." The Court may take judicial notice of official acts of the legislative, executive, and judicial departments of the United States and of any state in the United States. (Evid. Code § 452(c).) Courts may take judicial notice of the existence and legal effect of legally operative documents. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 754.) 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.)

Plaintiff requests judicial notice of the following documents:

1. The prior version of C.C.P. section 340.1 which was effective between January 1, 2003, and December 31, 2018.

2. The version of C.C.P. section 340.1 which was effective between January 1, 2020, and December 31, 2022.

Plaintiff's request for judicial notice on the above-listed items is GRANTED.

Application

Here, Plaintiff has clearly pleaded in the Complaint that despite notifying DOE 1's Elders about the sexual abuse and assault that had already occurred to Plaintiff, that there was nothing done to remove DOE 3 from his position, to report him to the authorities, or to investigate the abuse. Plaintiff has further pleaded that lack of action on DOE 1's part resulted in further and *continued* abuse to Plaintiff and potentially other minors who were under DOE 3's supervision. Furthermore, DOE 1 required minor children to attend church activities unsupervised with adults that they were not related to on DOE 1's premises and allowed them to be in isolated areas with these adults, specifically bathrooms. The Court finds that if these allegations are taken as true, then due to these factors, it is reasonable that DOE 1 did have a special relationship with these minor children and duty to prevent unlawful misconduct that could potentially harm to them minor children on DOE 1's premises during those church activities by adults that DOE 1 employed. Thus, the Court does not find that Plaintiff has failed to sufficiently state a claim upon which relief may be granted.

DOE 1's Motion to Strike Portions of the Complaint

Legal Standard

Motion to Strike

The court may, "upon a motion made pursuant to Section 435, or at any time in its discretion, and upon terms it deems proper: (a) Strike out any irrelevant, false, or improper matter inserted in any pleading. (b) Strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court." (C.C.P. §§ 435, 436.) Any party may serve and file a notice of motion to strike the whole or any part of a pleading within the time allowed to respond to the pleading, within the notice specifying the hearing date on a motion to strike the complaint. (*Id*. at § 435(a)-(b).)

Motion to Strike and Opposition

DOE 1 moves to strike the following portions of Plaintiff's Complaint:

1. This portion of paragraph 30: "… Entity Defendants' Elders failed to investigate, report, or terminate DOE 3's employment and/or agency with Entity Defendants. Instead, Entity Defendants failed to remove DOE 3 from supervision of minor children, including Plaintiff, after Plaintiff's report of his sexual assault, abuse, and molestation of Plaintiff."

2. Paragraph 33: "Notwithstanding their confirmed actual knowledge of DOE 3's sexual assault and/or sexual abuse, and molestation of Plaintiff and other minor children, Entity Defendants intentionally and purposely failed to notify or warn other students, parents of children active in the congregation, or any other persons of the possible risk of further childhood sexual abuse by DOE 3, limit or supervise DOE 3's access to children, including Plaintiff, and notify law enforcement and other appropriate agencies of the known sexual assault and/or sexual abuse, and molestation of Plaintiff."

3. Paragraph 34: “Further, Entity Defendants’ failure and/or refusal to report the sexual assault and/or sexual abuse of Plaintiff by their Elder, Ministerial Servant, employee, and/or agent DOE 3, created a foreseeable risk of continued sexual assault and/or abuse of Plaintiff by DOE 3.

4. Paragraph 35: “As a direct result of Entity Defendants’ failure and/or refuse to timely and adequately act to prevent, stop, and report DOE 3’s unlawful and inappropriate misconduct, DOE 3 was able to continue his sexual assaults and/or sexual abuse, and molestation of Plaintiff.

5. Portion (c) of paragraph 36: “…Negligently and/or intentionally failed to report the known and/or reasonably suspected sexual assaults and/or sexual abuse, and molestation of Plaintiff to law enforcement.”

6. Portion (c) of paragraph 37: “Failing to inform, or concealing from law enforcement officials of the fact that Plaintiff and others were or may have been sexually assaulted after Entity Defendants knew or should have known, reasonably suspected, or were otherwise on notice, that DOE 3 had, and/or was, engaged in the sexual assault of Plaintiff, thereby creating the circumstance where Plaintiff and others were less likely to receive medical/mental health care and treatment, thus exacerbating the harm to Plaintiff.”

7. Paragraph 38: “Entity Defendants, and each of them, negligently, intentionally, maliciously and/or willfully refused to, and/or did not act reasonably to stop, inhibit, and/or report DOE 3 to law enforcement prior to, during, and/or after his sexual assault and/or sexual abuse, and molestation of Plaintiff, thereby allowing the assault to occur and to continue unabated.”

8. Paragraph 39: “Plaintiff is informed, believes, and thereupon alleges, that Entity Defendants’ failure and/or refusal to satisfy their duties to Plaintiff was a part of Entity Defendants’ intended plan and arrangement to conceal wrongful acts, to avoid and inhibit detection, to block public disclosure, to avoid scandal, to avoid the disclosure of their tolerance of child sexual molestation and assault, to preserve a false appearance of propriety, and to avoid investigation and action by public authority, including law enforcement.”

9. Paragraph 40: “Plaintiff is informed and believes, and on that basis alleges, that such actions were motivated by a desire to protect the reputation of Entity Defendants and each of them, and to protect the monetary support of Entity Defendants while fostering an environment where such assault could continue to occur.”

10. Paragraph 6: "Entity Defendants were further negligent in failing to notify law enforcement and other appropriate authority that Plaintiff was and/or continued to be a victim of child abuse/assault by DOE 3 when they learned of this fact. Entity Defendants' failure to report the known and/or reasonably suspected child abuse of Plaintiff perpetuated and facilitated DOE 3's continued sexual abuse and/or sexual assault, and molestation of Plaintiff."

11. This portion of paragraph 65: "…including reporting the sexual assault and/or sexual abuse, and molestation to law enforcement…"

12. This portion of paragraph 67: "…but failed and/or refused to take any affirmative action, including but not limited to not notifying law enforcement."

13. Paragraph 71: "Plaintiff is informed, believes, and thereupon alleges that Entity Defendants' failure to respond, investigate, terminate DOE 3's employment, report, or take any other action following Plaintiff and other minor children's reports of sexual assault and/or abuse by DOE 3 was part of Entity Defendants' concerted effort to cover up and/or hide evidence related to childhood sexual assault of minor children, including Plaintiff. Plaintiff's damages as a result of DOE 3's sexual assault, abuse, and molestation of Plaintiff was a direct result of Entity Defendants' concealment and cover-up. As such, Plaintiff is entitled to treble damages against Entity Defendants pursuant to Code of Civil Procedure section 340.1(b)(2)."

14. This portion of paragraph 3 in the Prayer for Relief: "… For treble damages against Defendants DOE 1, DOE 2, and DOES 4 through 60, inclusive in an amount to be determined at trial."

(Motion to Strike, 2:4-28, 3:1-7.)

DOE 1 bases the Motion to Strike on the same grounds as the Demurrer for uncertainty and failure to state a claim upon which relief can be granted against DOE 1 and because claims that post-date all alleged sexual abuse are time-barred by the applicable statute of limitation. (Motion to Strike, 1:4-8.) The Motion seeks to strike paragraphs in the complaint supporting the third and fourth causes of action alleged against DOE 1 again claiming that DOE 1 did not have a special relationship with Plaintiff from which a duty of care arose. (*Id*. at 13:21-26; 14:1-3.) DOE 1 argues Plaintiff pleads "in conclusory fashion" that a special relationship was formed and was the basis of the duty of care to Plaintiff and that DOE 1 knew or should have known about the facts alleged in the Complaint, but does not plead how DOE 1 was on notice regarding past incidents of DOE 3's unlawful sexual conduct that would have triggered a duty to take preventative action. (*Id*. at 13:21-26.) DOE 1 relies upon *Doe* and *Santillon* for the same reasons as argued in the demurrer.

DOE 1 finds issue with the treble damages requested in the Complaint as it violates C.C.P. section 425.14 which provides a separate mechanism for prospective plaintiffs to move the court to allow the filing of an amended pleading claiming punitive or exemplary damages on a

showing that on the basis of the supporting and opposing affidavits presented, that the plaintiff has established evidence which substantiates that plaintiff will meet the clear and convincing standard of proof under section 3294 of the Civil Code. (Motion to Strike, 9:7-11.) DOE 1 claims that as Plaintiff has not yet first petitioned the court separately per C.C.P. section 425.14 for punitive damages, that Plaintiff has violated this section and is seeking more than what would make Plaintiff whole again.

Plaintiff opposes and requests the court to deny the Motion to Strike in its entirety for the same reasons as stated in the opposition to the demurrer. Plaintiff argues that *Doe* and *Santillan* do not apply as section 340.1 has been amended. (Opposition to Motion to Strike, 7:7-15.) Plaintiff argues that the allegations are sufficient to support the causes of action alleged against DOE 1 because, as stated above, DOE 1 had a responsibility to protect minor adults while they were on DOE 1's premises for a required church activity, especially since an unrelated male accompanied Plaintiff to a single-person bathroom for extended periods of time without supervision or any plausible explanation multiple times. (*Id*. at 7:17-26.) Although Plaintiff's mother reported the abuse to DOE 1's Elders, Plaintiff believes and alleges that DOE 1 failed to investigate or report to law enforcement what occurred, and as a result Plaintiff continued to suffer abuse from DOE 3. (*Ibid*.)

Plaintiff agrees to strike the prayer for treble damages against all Defendants at pages 13:27-28 and prayer 3 at page 16:13-14. (*Id*. at 9:19-21.)

In reply, DOE 1 reaffirms the arguments made in the Motion to Strike and asserts that the requirements of code section 340.1 have not changed with the legislative amendment.

Application

For the same reasons stated above regarding the demurrer, the Court finds it reasonable that DOE 1 did have a special relationship with Plaintiff and did owe a duty of care to preventing harm to Plaintiff from unlawful misconduct by an adult employed by DOE 1 left unsupervised with Plaintiff on DOE 1's own premises. However, the Court finds that the request for treble damages are not warranted per the arguments made by DOE 1 and per Plaintiff's agreement to strike them from the Complaint. Thus the following language will be struck from the Complaint:

1. Paragraph 71: "…As such, Plaintiff is entitled to treble damages against Entity Defendants pursuant to Code of Civil Procedure section 340.1(b)(2)."

2. This portion of paragraph 3 in the Prayer for Relief: "… For treble damages against Defendants DOE 1, DOE 2, and DOES 4 through 60, inclusive in an amount to be determined at trial."

Conclusion

Based on the foregoing, DOE 1's demurrer is OVERRULED**.**

The motion to strike is GRANTED in part, with leave to amend, only as to the last sentence in paragraph 71 relating to treble damages and paragraph 3 in the prayer for relief requesting treble damages against all defendants. The motion is DENIED as to all else.

DOE 1 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).

9. SCV-272228, Institute of Imaginal Studies v. Doe 1

Defendant's CCP § 425.16 Anti-SLAPP motion to strike all of the causes of action against him is DENIED. Neither party objected to the opposing party's proffered evidence. Plaintiffs' request for sanctions is DENIED. Plaintiffs' counsel shall submit a written order consistent with this tentative ruling and in compliance with Rule 3.1312.

I. Background

Plaintiffs allege in their First Amended Complaint that Defendant Asher Lyman published an internet website by the name of www.meridianuniversityabuse.org which contains defamatory and false statements regarding the university and its faculty and which is open to the public for viewing. The allegedly defamatory and false statements implicate the Plaintiffs' reputations, community standing and business. Plaintiffs assert that the statements made on the website are verifiably false and have resulted in millions of dollars of damages to the university in the form of student withdrawals and decreased application rates. In opposition to this motion, Plaintiffs explain that Defendant Asher Lyman is a former student of the university who was expelled from the university prior to the website being published.

Based on excerpts of the website submitted by the parties, the website contains several allegations regarding the university's accreditation, ethical practices, administrative practices as well as specific allegations of misconduct by faculty members.

II. Analysis

A. Burdens on an Anti-SLAPP Motion

CCP § 425.16(b)(1) provides that a cause of action against a person "arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue" shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

A defendant has the initial burden to make a prima facie showing that the complaint "arises from" her exercise of free speech or petition rights. (*Equilon Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 61; *Governor Gray Davis Committee v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449 at 458-59.) "At the first step of the analysis, the defendant must make two related showings. Comparing its statements and conduct against the statute, it

must demonstrate activity qualifying for protection. (See § 425.16, subd. (e).) And comparing that protected activity against the complaint, it must also demonstrate that the activity supplies one or more elements of a plaintiff's claims." (*Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, 887.) If defendant meets that initial burden, the burden shifts to the plaintiff to establish a "probability" that he will prevail on the claims which are based on protected activity. (CCP § 425.16(b).)

To establish a "probability" of prevailing on the merits, the plaintiff must demonstrate that the claim is both legally sufficient and supported by a prima facie showing of facts sufficient to support a favorable judgment if the evidence submitted by the plaintiff is credited. (*Navelier v. Sletten* (2002) 29 Cal.4th 82, 89.) The court does not weigh credibility or comparative strength of the evidence in making this summary judgment-like determination. (*See, e.g. Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291.) But to demonstrate a probability of prevailing on the merits, the plaintiff must produce admissible evidence sufficient to overcome any privilege or defense that the defendant has asserted to the claim. (*See, e.g. Flatley v. Mauro* (2006) 39 Cal.4th 299, 323.) In making its determination, the Court considers the pleadings, as well as supporting and opposing affidavits. (CCP § 425.16(b).) The court considers defendant's evidence only to determine if it defeats plaintiff's showing *as a matter of law.* (*Soukup v. Law Offices of Herbert Hafif*, *supra*, at 291.) The court must accept as true the evidence favorable to *plaintiff.* (*Ibid.)*

<u>B. Some, But Not All of Defendant's Statements Could be Said to Be in Connection with a Public Issue.</u>

Subdivision (e) sets forth the different types of activity which fall within the ambit of section 425.16. It states, in full,

> As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

The alleged wrongful conduct must itself have been protected activity, and the anti-SLAPP statute does not apply merely because the allegations refer to or in some manner tangentially touch on events that include protected activity. (*Old Republic Construction v. The Boccardo Law Firm* (2014) 230 Cal.App.4th 859, 867-868.)

"Although matters of public interest include legislative and governmental activities, they may also include activities that involve private persons and entities, especially when a large, powerful organization may impact the lives of many individuals." (*Macias v. Hartwell* (1997) 55 Cal.App.4th 669, 674.)

> The definition of "public interest" within the meaning of the anti-SLAPP statute has been broadly construed to include not only governmental matters, but also private conduct that impacts a broad segment of society and/or that affects a community in a manner similar to that of a governmental entity. [Citations.] " '[M]atters of public interest ... include activities that involve private persons and entities, especially when a large, powerful organization may impact the lives of many individuals.' " [Citation.]

(*Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 479.) A statement is of "public interest" if it falls within three categories:

> 1. The first category is when the statement or conduct concerns a person or entity *in the public eye.*
>
> 2. The second category is when the case involves conduct that could *directly* affect a large number of people beyond the direct participants.
>
> 3. The third category is when the case involves *a topic of widespread public interest*.

(*Jeppson v. Ley* (2020) 44 Cal.App.5th 845, 850–51. Italics in original.)

> [S]ection 425.16 "does not provide a definition for 'an issue of public interest,' and it is doubtful an all-encompassing definition could be provided. However, the statute requires that there be some attributes of the issue which make it one of public, rather than merely private, interest. A few guiding principles may be derived from decisional authorities. First, 'public interest' does not equate with mere curiosity. [Citations.] Second, a matter of public interest should be something of concern to a substantial number of people. [Citation.] Thus, a matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest. [Citation.] Third, there should be some degree of closeness between the challenged statements and the asserted public interest [citation]; the assertion of a broad and amorphous public interest is not sufficient [citation]. Fourth, the focus of the speaker's conduct should be the public interest rather than a mere effort 'to gather ammunition for another round of [private] controversy....' [Citation.] Finally, 'those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.' [Citation.] A person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people.

(*Terry v. Davis Cmty. Church* (2005) 131 Cal.App.4th 1534, 1546–47.) "Almost any statement, no matter how specific, can be construed to relate to some broader topic." (*Dual Diagnosis Treatment Ctr., Inc. v. Buschel* (2016) 6 Cal.App.5th 1098, 1106.) In *Dual Diagnosis*, eBulletin

statements about a rehabilitation facility's license status were not a matter of public interest because they did not "concern treatment and rehabilitation facilities, in general, or even all of [Plaintiff's] facilities." (*Ibid*.)

> In articulating what constitutes a matter of public interest, courts look to certain specific considerations, such as whether the subject of the speech or activity "was a person or entity in the public eye" or "could affect large numbers of people beyond the direct participants" [citation]; and whether the activity "occur[red] in the context of an ongoing controversy, dispute or discussion" [citation], or "affect[ed] a community in a manner similar to that of a governmental entity" [citation].

(*FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133, 145–46.) "'[I]t is not enough that the statement refer to a subject of widespread public interest; the statement must in some manner itself contribute to the public debate.'" (*Id*. at 150.) "[T]he inquiry of whether a statement contributes to the public debate is one a court can hardly undertake without incorporating considerations of context—including audience, speaker, and purpose. (*Id*. at 151-152.)

In the present matter, Defendant argues that the statements written on the website he created and published constitute protected speech because they concern matters of public interest—specifically, higher education, abuse of students, and the quality of educational services by universities. Defendant also argues that the statements made on the website were his own personal opinion, rather than statements of fact. The Court does not agree that the statements complained of can be construed as statements of Defendant's opinion. The subheading for the "Open Letter of Sexual & Emotional Abuse in Meridian University" that is attached by Defendant in support of this motion explains that it the letter is "professional investigative work done by a coalition of psychologists, professors, members, & associates of the Meridian Community." The statements complained of make specific factual allegations regarding the university's accreditation status, administrative practices, legal practices, fraudulent identification of faculty, violations of student privacy, and a specific reference to a review of 15 student document accounts of bullying. The statements cannot be construed as mere opinions alone.

Furthermore, while the Court agrees that some of Defendant's statements are matters in which the public could be concerned, such as harassment allegations and implications for higher education, it cannot be definitively said that all the statements made on the website concern matters of public interest. The Court also takes into consideration the context in which this website was created, who is alleged to have created it, the audience of such a website, and the purpose. As analyzed below, however, assuming the speech is protected as being in the public forum and concerning a public interest, Plaintiffs meet the shifted burden of making prima facie showing of the probability of their success on the merits.

C. Plaintiffs Have Met Their Burden of Proving Probability of Success on the Merits.

"(T)he plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88–89, internal quotations omitted.) Conclusory allegations will not protect insufficient claims from anti-SLAPP remedies. (*Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1423.) Plaintiff is charged with producing "competent and admissible evidence" to meet this burden. (*Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1236.) The court must "accept as true all evidence favorable to the plaintiff and assess the defendant's evidence only to determine if it defeats the plaintiff's submission as a matter of law." (*Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 Cal.App.4th 688, 699–700.)

i. First Cause of Action for Libel and Libel Per Se

The tort of defamation "involves (a) a publication that is (b) false, (c) defamatory, and (d) unprivileged, and that (e) has a natural tendency to injure or that causes special damage." (*Taus v. Loftus* (2007) 40 Cal.4th 683, 720.) "'Defamation is an invasion of the interest in reputation. The tort involves the intentional publication of a statement of fact which is false, unprivileged, and has a natural tendency to injure or which causes special damage.'" (*Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 27.) "'There can be no recovery for defamation without a falsehood…Thus, to state a defamation claim that survives a First Amendment challenge, plaintiff must present evidence of a statement of fact that is provably false." (*Ibid*.)

> Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.

(Civil Code, § 45.) If the defamation is defamatory without explanatory matter, it is libel per se and actionable even if the plaintiff cannot prove special damages. (Civil Code, § 45a; *Manguso v. Oceanside Unified Sch. Dist.* (1984) 153 Cal.App.3d 574, 583.)

"To determine whether a statement is actionable fact or nonactionable opinion, courts use a totality of the circumstances test of whether the statement in question communicates or implies a provably false statement of fact. [Citation] Under the totality of the circumstances test, '[f]irst, the language of the statement is examined. For words to be defamatory, they must be understood in a defamatory sense…Next, the context in which the statement was made must be considered. [citations]'" (*McGarry v. University of San Diego* (2007) 154 Cal. App.4th 97 at 113.)

The Court believes that the defendant's website contains statements of fact rather than opinion. First, the website begins with the large, bolded statement "PROFESSIONAL INVESTIGATIVE WORK DONE BY A COALITION OF PSYCHOLOGISTS, PROFESSORS, MEMBERS & ASSOCIATES OF THE MERIDIAN COMMUNITY." By referring to the content of the website as a professional investigation by a "coalition" of groups, the website has an aura of fact rather than opinion. By the defendant prefacing his website with this statement he differentiated

it from a posting on Yelp, Craigslist or a social media website which is inherently a forum for individual opinions and the public knows that before even reading the post.

Similarly, on Ex. A page 4 of 177, under the heading Overview, a sentence in the middle of the paragraph states, "[a] robust 2-year investigation that included consultation with 50 members of the Meridian community…" This sentence reinforces the context of the statements as factually accurate rather than solely opinion.

In their opposition, plaintiffs list alleged statements of fact on defendant's website and provide corresponding evidence to show a prima facie case that those statements are, in fact, false. (Pl. oppo p.4-6, list a-k.) The Court does not need to analyze each individual alleged statement of fact as certain statements, in the context of the website generally, are clearly statements of fact. Even if the Court were to find certain statements—such as those in item a, that students were sued into bankruptcy, item c, that Meridian maintains a "month-long" wait for replies to emails or item i, that plaintiffs ignore meeting requests "for years"—to be hyperbolic opinion, other statements are more clearly statements of fact.

Regarding, item b, a portion of the statement that the university was unaccredited may be subject to interpretation of what constitutes "accreditation" but "to avoid administrative oversight" coupled with the opening statements of the website bring this statement into one of fact. Similarly, item d, that students who speak up to oppose bullying face retaliation may pass as opinion, but when concluded with "including suspension from school" the Court finds this also to be a statement of fact.

Examples of the items the Court finds to clearly be statements of fact are, item f, that plaintiff's write defamatory letters and forge signatures; item j, that plaintiff's monitor student emails; and item k, that a review of 15 students' documented accounts show students who speak up to oppose bullying face academic suspensions.

Defendant relies on *Chaker v. Mateo* (2012) 209 Cal.App.4th 1138, for the premise that his internet postings are nonactionable opinions rather than statements of fact. However, the Court finds *Chaker* to be distinguishable from the instant case. First, the statements in *Chaker* were posted on websites specifically created for the exchange of comments and opinions unlike defendant's website that was created based on a "robust 2-year investigation" and a "coalition of investigative work done by a coalition…" Second, in *Chaker*, the court found "the statements about Chaker were made in the context of the paternity and child support litigation…and all were made on Internet Web sites which plainly invited the sort of exaggerated and insulting criticisms of businesses and individuals which occurred here. The overall thrust of the comments attributed is that Chaker is a dishonest and scary person."

The *Chaker* case may be contrasted with *Wong v. Jing*, (2010) 189 Cal.App.4th 1354. In *Wong*, the defendant posted certain statements about the plaintiff. Despite those statements being made on Yelp, a website specifically designed for business reviews, the court found defendant's statements were statements of fact. The statements include that plaintiff "had failed to tell

[defendants that their] son's filling contained mercury," that plaintiff "mis-diagnosed the case" and that plaintiff "used a General Anesthetic" which was "outside the scope of her practice, and she could lose her license for putting a patient under a general anesthetic." (*Id*. at 1370.) Similarly, the Court believes statements that plaintiffs "forge signatures," "monitor student emails," "suspend students who oppose bullying" and that "15 documented accounts showed students who opposed bullying received a letter of suspension" are statements of fact.

Through the declarations submitted in support of Plaintiffs' opposition to this motion Plaintiffs have made a prima facie showing of the likelihood of their success in establishing each element of this cause of action.

ii. Second Cause of Action for False Light Publicity

"'False light is a species of invasion of privacy, based on publicity that places a plaintiff before the public in a false light that would be highly offensive to a reasonable person, and where the defendant knew or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed.'" (*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1264.) "'A 'false light' claim, like libel, exposes a person to hatred, contempt, ridicule, or obloquy and assumes the audience will recognize it as such.'" (*Ibid*.) "'A 'false light' cause of action is in substance equivalent to a libel claim, and should meet the same requirements of the libel claim, including proof of malice [where malice is required for the libel claim].'" (*Ibid*.) "In order to be actionable, the false light in which the plaintiff is placed must be highly offensive to a reasonable person…Although it is not necessary that the plaintiff be defamed, publicity placing one in a highly offensive false light will in most cases be defamatory as well." (*Fellows v. Nat'l Enquirer, Inc.* (1986) 42 Cal.3d 234, 238–39.)

As with the first cause of action for libel and libel per se, Plaintiffs have made prima facie showing of their likelihood of success on this cause of action. Prima facie showing has been made that the content of the website would place Plaintiffs in a highly offensive false light.

iii. Third Cause of Action for Trade Libel

"Trade libel is generally defined as 'an intentional disparagement of the quality of property, which results in pecuniary damage to plaintiff.'" (*Muddy Waters, LLC v. Superior Ct.* (2021) 62 Cal.App.5th 905, 925.) "While a cause of action for trade libel 'resembles that for defamation…[it] differs from it materially in the greater burden of proof resting on the plaintiff, and the necessity for special damage in all cases…[T]he plaintiff must prove in all cases that the publication has played a material and substantial part in inducing others not to deal with him, and that as a result he has suffered special damages.'" (*Ibid*.) "At a minimum, a trade libel cause of action requires: (1) a publication; (2) which induces others not to deal with plaintiff; and (3) special damages.'" (*Ibid*.) "Thus, unlike a claim for defamation, trade libel requires as an essential element that the plaintiff suffered direct financial harm because someone else acted in reliance on the defendant's statement." (*Ibid*.) "To establish this element, ' is not enough to show a general decline in [plaintiff's] business resulting from the falsehood, even where no other cause

for it is apparent…it is only the loss of specific sales that can be recovered.'" (*Ibid*.) "'This means, in the usual case, that the plaintiff must identify the particular purchasers who have refrained from dealing with him, and specify the transactions of which he claims to have been deprived.'" (*Ibid*.)

Here, Plaintiffs have stated specifically that there are 19 students who started the program within four months of the launch of the website who have withdrawn from the university after the website was specifically targeted to first year students. This is sufficient for prima facie showing of specific transactions effected by the defamatory statements. Plaintiffs have made prima facie showing of their likelihood of success on the merits of this cause of action.

D. Plaintiffs' Request for Sanctions

Plaintiffs request they be awarded sanctions against Defendant pursuant to CCP 425.16(c)(1), which states that the Court shall award costs and attorney's fees to a plaintiff prevailing on an Anti-SLAPP motion which the Court finds to be frivolous or solely intended to cause unnecessary delay. The Court does not make such a finding; therefore, Plaintiffs' request for sanctions is DENIED.