SUPERIOR COURT OF CALIFORNIA, CONTRA COSTA COUNTY
MARTINEZ, CA
DEPARTMENT 09
JUDICIAL OFFICER: JOHN P DEVINE
HEARING DATE: 02/10/2025

## ALL APPEARANCES WILL BE BY ZOOM

For matters where an appearance is required, the parties should appear by Zoom unless told to appear by another method. For all other matters, if argument is requested appearances will be by Zoom.

Please email Dept09@contracosta.courts.ca.gov and opposing counsel by 4:00 p.m. if oral argument is requested and include specification to be argued.

### Zoom hearing information

https://contracosta-courts-ca.zoomgov.com/j/1602392251?pwd=WmE4bG5iK0J3WWtTOHpteVBjRlBMQT09

**Law & Motion**

**1. 9:00 AM CASE NUMBER: C23-00019**
**CASE NAME: BRIAN SOUZA VS. MANDAKINI PATEL, M.D.**
**HEARING ON SUMMARY MOTION**
**FILED BY: WEI, M.D., DAVID**
***TENTATIVE RULING:***

Continued to April 14, 2025, at 9:00 a.m. in Department 9.

**2. 9:00 AM CASE NUMBER: C23-01188**
**CASE NAME: PEDRO ARROYO VS. DON GAUBE**
***HEARING ON MOTION IN RE: TO BE RELIEVED AS COUNSEL**
**FILED BY: GAUBE, DON**
***TENTATIVE RULING:***

The motion by Jeremy Roller to be relieved as counsel is granted. Counsel shall provide former client with all future court dates as of February 10, 2025.

**3. 9:00 AM CASE NUMBER: C23-02689**
**CASE NAME: NICHOLAS WARNER VS. CITY OF ANTIOCH**
**HEARING ON DEMURRER TO: 1ST AMENDED COMPLAINT**
**FILED BY: A. TEICHERT & SON, INC., DBA TEICHERT CONSTRUCTION**
***TENTATIVE RULING:***

Before the Court is Defendant A. Teichert & Son, Inc. doing business as Teichert Construction ("Defendant" or "Teichert")'s demurrer to Plaintiff Nicholas Warner ("Plaintiff")'s First Amended Complaint for (1) negligence and (2) dangerous condition of public property. Only the first cause of action is alleged against Teichert.

Defendant demurs pursuant to CCP § 430.10 on several grounds.

For the following reasons, the Demurrer is **overruled**.

Factual Allegations and Procedural Background

This is a personal injury case arising out of a bicycle accident. Plaintiff alleges that:

> On June 20, 2023, at approximately between 10:30 p.m. and 11:00 p.m., PLAINTIFF was lawfully riding his bike and was traveling on a paved/improved path of Nelson Ranch Park, 4700 Wild Horse Road, City of Antioch, County of Contra Costa, State of California (hereinafter "PREMISES"). Defendants, and each of them, had undertaken to pave, improve, and installed gates at the area of Plaintiff's injury. No signs were displayed to warn the cyclists and/or pedestrians of the gate blocking the bike lane (hereinafter "GATE"). Unknown to the danger, as PLAINTIFF was lawfully riding his bike he suddenly collided with the gate blocking the bike lane, and flipped from his bike, causing him to fall. As a result of the fall, PLAINTIFF suffered serious and severe injuries to his knees and legs requiring medical attention.

(FAC at ¶ 11.)

Judicial Notice

Defendant requests that the Court take judicial notice of the Plaintiff's First Amended Complaint, a Court of Appeal Decision that is not attached to the Request, and Vehicle Code §§ 21200(a), 21201, and 22350. The request is **granted-in-part** and **denied-in-part**.

The request is **granted** with respect to the First Amended Complaint. ("A court may take judicial notice of the existence of each document in a court file, but can only take judicial notice of the truth of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments." (*Day v. Sharp* (1975) 50 Cal.App.3d 904, 914, 918; Evid. Code §§452(a), 452(d), 453.) The request is also **granted** with respect to the Vehicle Code. (Evid. Code § 452(a).)

The request is **denied** with respect to the Second District Court of Appeal case B278623, *Dickinson v. Thrifty Payless, Inc*. (2nd Dist. 2017). Defendant did not provide the Court with the order and it does not appear to be a published decision of the Second District Court of Appeal. An unpublished California Court of Appeal decision may not be cited or relied on by a court or a party in any other action except in circumstances which do not apply here. (CRC rule 8.1115(a).)

Legal Standard

"The function of a demurrer is to test the sufficiency of the complaint as a matter of law." (*Holiday Matinee, Inc. v. Rambus, Inc*. (2004) 118 Cal.App.4th 1413, 1420.) A complaint "is sufficient if it alleges ultimate rather than evidentiary facts" (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 550 ("*Doe*")), but the plaintiff must set forth the essential facts of his or her case "with reasonable precision and with particularity sufficient to acquaint [the] defendant with the nature, source and extent" of the

plaintiff's claim. (*Doheny Park Terrace Homeowners Assn., Inc. v. Truck Ins. Exchange* (2005) 132 Cal.App.4th 1076, 1099.) Legal conclusions are insufficient. (*Id*. at 1098–1099; *Doe* at 551, fn. 5.) The Court "assume[s] the truth of the allegations in the complaint, but do[es] not assume the truth of contentions, deductions, or conclusions of law." (*California Logistics, Inc. v. State of California* (2008) 161 Cal.App.4th 242, 247.)

Analysis

The elements of a negligence and premises liability cause of action are the same: duty, breach, causation, and damages. (*Castellon v. U.S. Bancorp* (2013) 220 Cal.App.4th 994, 998.) Those who own, possess, or control property generally have a duty to exercise ordinary care in managing the property in order to avoid exposing others to an unreasonable risk of harm. (*Annocki v. Peterson Enterprises, LLC* (2014) 232 Cal.App.4th 32, 37.) One that owns, possesses, or controls the property can be liable if he knew or by the exercise of reasonable care should have known of the dangerous condition. (*Ortega v. Kmart Corp*. (2001) 26 Cal.4th 1200, 1209.)

To determine the existence and scope of duty, courts consider the foreseeability of harm to the plaintiff, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, and the extent of the burden to the defendant of imposing a duty to exercise care with resulting liability for breach. (*Rowland v. Christian* (1968) 69 Cal.2d 108, 113.)

Here, the alleged duty is between Teichert, a construction company, and Plaintiff, a cyclist. Whether Teichert has a duty to Plaintiff "is a question of law to be resolved by the court." (*Artiglio v. Corning Inc*. (1998) 18 Cal.4th 604, 614 [quoting *Bily v. Arthur Young & Co*. (1992) 3 Cal.4th 370, 397].)

Plaintiff alleges that Teichert (and the other Defendants) negligently controlled the subject premises resulting in an unsafe condition (i.e., the gate blocking the bike lane.) Though not entirely clear, Defendant's argument appears to be that it did not owe a duty to plaintiff because the gate would have been open and obvious to Plaintiff. The latter argument appears premised on an integration of the phrase "lawfully riding his bike" from the FAC with the Vehicle Code that requires a bicycle light at night. Nevertheless, the Court does find Defendant's citation to *Jacobs v. Coldwell Banker Residential Brokerage Co.* (2017) 14 Cal.App.5th 438 instructive. The *Jacobs* court stated:

> Foreseeability of harm is typically absent when a dangerous condition is open and obvious. [Citation.] "Generally, if a danger is so obvious that a person could reasonably be expected to see it, the condition itself serves as a warning, and the landowner is under no further duty to remedy or warn of the condition." [Citation.] In that situation, owners and possessors of land are entitled to assume others will "perceive the obvious" and take action to avoid the dangerous condition. [Citation.]

(*Jacobs*, *supra*, 14 Cal. App. 5th at p. 447.)

However, given the brevity of Plaintiff's allegations, whether the danger of injury from the gate blocking the bike lane was sufficiently obvious to relieve Teichert of its duty to warn Plaintiff of its existence is a question of fact that cannot be resolved on demurrer. (See *Chance v. Lawry's, Inc.* (1962) 58 Cal.2d 368, 374 [whether the danger created by an open planter box in a narrow foyer of a busy restaurant was sufficiently obvious to eliminate the owner's duty to warn "was peculiarly a question of fact to be determined by the jury"]; *Henderson v. McGill* (1963) 222 Cal.App.2d 256, 260 ["'[i]t is ordinarily a question of fact whether in particular circumstances the duty of care owed to invitees was complied with, … whether the particular danger was obvious'"]; see also *Donohue v. San Francisco*

*Housing Authority* (1993) 16 Cal.App.4th 658, 665 ["[T]he 'obvious danger' exception to a landowner's ordinary duty of care is in reality a recharacterization of the former assumption of the risk doctrine, i.e., where the condition is so apparent that the plaintiff must have realized the danger involved, he assumes the risk of injury even if the defendant was negligent. [Citation.] … [T]his type of assumption of the risk has now been merged into comparative negligence"].)

Although obviousness may negate the duty to warn, there may still be a duty to remedy a dangerous condition if it is foreseeable that the attendant danger might cause injury despite its obvious nature. (*Martinez v. Chippewa Enterprises, Inc*. (2004) 121 Cal.App.4th 1179, 1184-1185; *Osborn v. Mission Ready Mix* (1990) 224 Cal.App.3d 104, 120 [whether landlord acted reasonably with respect to obvious risk and whether plaintiff acted reasonably in encountering obvious risk are fact questions for jury to decide].) Here, the Court cannot conclude as a matter of law Defendant did not have a duty to Plaintiff because the dangerous condition was "open and obvious."

The Demurrer is **overruled**.

**4. 9:00 AM CASE NUMBER: C24-00088**
**CASE NAME: DANIEL CURRID VS. BELA BRUNSHTEYN**
***HEARING ON MOTION FOR DISCOVERY TO COMPEL MIKHAIL BRUNSHTEYN TO PROVIDE FURTHER RESPONSES TO SPECIAL INTERROGATORIES, SET ONE & REQUEST FOR PRODUCTION OF DOCUMENTS, SET ONE**
**FILED BY: CURRID, DANIEL**
****TENTATIVE RULING:****

Stipulation and Order was submitted by all parties to continue today's hearing to February 24, 2025.

**5. 9:00 AM CASE NUMBER: C24-00632**
**CASE NAME: TELSTAR INSTRUMENTS VS. TOSHIBA INTERNATIONAL CORPORATION**
***HEARING ON MOTION IN RE: TO DISMISS FOR FORUM NON-CONVENIENS OR IN THE ALTERNATIVE TO STAY PROCEEDINGS**
**FILED BY: TOSHIBA INTERNATIONAL CORPORATION**
****TENTATIVE RULING:****

Continued to April 14, 2025, at 9:00 a.m. in Department 9.

**6. 9:00 AM CASE NUMBER: C24-01537**
**CASE NAME: CHARLES BUNSTINE, II VS. GREYSTAR CALIFORNIA, INC.**
***HEARING ON MOTION IN RE: FOR ORDER TO STRIKE DEFENDANTS' ANSWER**
**FILED BY: BUNSTINE, CHARLES W., II**
****TENTATIVE RULING:****

Before the Court is a motion by plaintiff Charles Bunstine, II to strike the answer of defendants Greystar California, Inc. and Holly Sowa to plaintiff's second amended complaint. For the reasons set forth, the motion is **denied**.

**Background**

Plaintiff Charles Bunstine, II filed a second amended complaint alleging two causes of action for fraud and discrimination under the Fair Employment and Housing Act, Government Code section 12900 et seq. ("FEHA") arising out of a lease of an apartment unit by plaintiff and his spouse. Plaintiff alleges defendant Greystar California, Inc. manages the property which is located in Hercules and that defendant Holly Sowa is its agent. Defendants filed their answer on October 7, 2024.

**Grounds for the Motion**

Plaintiff's notice of motion and motion cites Code of Civil Procedure sections 435 and 438 as the basis for the motion but alleges the basis for the motion is that the answer fails to state facts " 'sufficient to constitute a defense to the Complaint' " and the affirmative defenses "are not supported by evidence, are not legally sufficient, are immaterial, irrelevant and defamatory." (Not. of Mot. p. 1.) Defendants' opposition raised arguments regarding the ambiguities and uncertainty in plaintiff's moving papers as to the nature of and legal basis for the relief he seeks on the motion. Plaintiff's reply disclaims that the motion is a demurrer to the answer, and plaintiff argues the motion seeks to strike the answer in its entirety. (Reply pp. 3, 4 and 5, ¶¶ 8, 12, 16.) The Court evaluates the motion in light of plaintiff's position.

**Procedural Defects in Initial Memorandum and Reply**

Plaintiff filed a supporting memorandum which attaches five exhibits, including Exhibit 5 which is a 43-page, single-spaced document not set forth as a pleading titled "draft of Plaintiff pro per's supporting memorandum to Notice of Motion to Strike Defendant's Answer." Plaintiff's reply attaches what appears to be the same 43-page document.

California Rule of Court, Rules 2.108, 2.109 and 3.1113 set forth requirements for the form and length of a memorandum in support of a motion. An initial memorandum is generally limited to 15 pages and is subject to the general rules for the format of pleadings, including line-spacing (one and a half spaced or double-spaced), line numbers on the left margin of the page, and page numbering at the bottom of the page. (Cal. R. Ct. Rules 2.108 subd. (1), (4), 2.109, and 3.1113(d).) The Court will not consider the 43-page, single-spaced "draft" supporting memorandum attached to either of plaintiff's pleadings on the motion as its submission violates these rules. Plaintiff is not excused from compliance with applicable law, procedures, and rules merely because he is a self-represented litigant. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985; *Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1284-1285 ["in propria persona litigants are not entitled to special exemptions from the California Rules of Court or Code of Civil Procedure. [Citation omitted.]"].)

**Note on Certain Authorities Cited by Plaintiff**

This action, a California state civil action, is governed by California state procedural statutes and rules (*see, e.g.*, Code Civ. Proc. § 307 *et seq.*), and federal case law is persuasive authority, at best. (*T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 175; *People v. Gonzales and Soliz* (2011) 52

Cal.4th 254, 296.) Plaintiff's reply cites and quotes Code of Civil Procedure section "437c(3)." (Reply p. 3, ll. 13-21.) The quotation is the text of Code of Civil Procedure section 437c(b)(3) applicable only to motions for summary judgment. (Code Civ. Proc. § 437c.)

**Legal Standards for Motion to Strike**

Code of Civil Procedure sections 435, 436, and 437 and California Rule of Court, Rule 3.1322 address motions to strike. The Court "may, upon a motion made pursuant to Section 435, or at any time in its discretion" strike all or a part of a pleading. (Code Civ. Proc. § 436 [emphasis added].) Grounds for striking a pleading are that the pleading has "irrelevant, false or improper matter" or is "not drawn . . . in conformity with the laws of this state." (Code Civ. Proc. § 436(a) and (b).) The grounds for a motion to strike must appear on the face of the pleading or be based on a matter subject to judicial notice under Evidence Code sections 452 and 453. (Code Civ. Proc. § 437(a) and (b).) The Court will "read allegations of a pleading subject to a motion to strike as a whole, all parts in their context, and assume their truth." (*Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253, 1255 [emphasis added].) Whether to grant a motion to strike is in the Court's discretion. (Code Civ. Proc. § 436; *Clements v. T. R. Bechtel Co.* (1954) 43 Cal.2d 227, 242.)

**Legal Standards Governing Motion for Judgment on the Pleadings**

Code of Civil Procedure section 438 permits a plaintiff to move for judgment on the pleadings on the ground that "the complaint states facts sufficient to constitute a cause or causes of action against the defendant and the answer does not state facts sufficient to constitute a defense to the complaint" and may be made with respect to "the entire answer," (Code Civ. Proc. §§ 438(c)(1)(A) and 438(c)(2)(B).) Plaintiff cites these statutes in his motion, though in the text of the memorandum and reply, plaintiff cites no California case authority construing and applying those statutes.

Like a motion to strike, the grounds for a motion for judgment on the pleadings must "appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice." (Code Civ. Proc. § 438(d).) The legal standards for determination of a motion for judgment on the pleadings are generally the same standards for determination of a demurrer. (*Eckler v. Neutrogena Corp.* (2015) 238 Cal.App.4th 433, 439; *County of Orange v. Association of Orange County Deputy Sheriffs* (2011) 192 Cal.App.4th 21, 32 [for review of determination of motion for judgment on the pleadings "we apply the same rules governing the review of an order sustaining a general demurrer. [Citation omitted.]"].)

**Analysis**

When a party challenges a complaint or answer in its entirety without separately challenging individual affirmative defenses, the demurrer, motion to strike, or motion for judgment on the pleadings must be denied if the pleading adequately alleges any of the claims or affirmative defenses included. As the Court explained in addressing a demurrer to an answer in *South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, "[E]ach so-called defense must be considered separately without regard to any other defense. [Citations omitted.] Accordingly, a 'separately stated defense or counterclaim which is sufficient in form and substance when viewed in isolation does not become insufficient when, upon looking at the answer as a whole, that defense or counterclaim appears inconsistent with or repugnant to other parts of the answer.' [Citations omitted.] Therefore, if one of

the defenses or counterclaims is free from the objections urged by demurrer, then a demurrer to the entire answer must be overruled. [Citations omitted.]" (*Id.* at 733-734 [emphasis added].)

Though Plaintiff denies he has demurred to the answer, he cites the statute governing motions for judgment on the pleadings as a basis for the motion. Such a motion is generally determined under the standards for ruling on a demurrer. (*Eckler, supra,* 238 Cal.App.4th at 439; *County of Orange, supra,* 192 Cal.App.4th at 32.) Where a motion for judgment on the pleadings challenges the answer in its entirety, therefore, the motion must be denied if any affirmative defense is adequately pleaded and states a defense to the claims alleged. (*Warren v. Atchison, T. & S. F. Ry. Co.* (1971) 19 Cal.App.3d 24, 36; *South Shore Land Co., supra,* 226 Cal.App.2d at 733-734.)

**A. Motion to Strike**

"The determination of the sufficiency of the answer requires an examination of the complaint because its adequacy is with reference to the complaint it purports to answer." (*South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 733.) Like a complaint, the answer is only required to allege ultimate facts. (*See Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 550; *FPI Development Inc., supra,* 231 Cal.App.3d at 384.) Even a defectively pleaded affirmative defense may be allowed if it gives sufficient notice to enable the plaintiff to prepare to meet the defense, in part because un-pled defenses are waived. (*See Harris, supra,* 56 Cal. 4th at 240.)

Accepting the allegations of the answer as true on the motion to strike (*Clauson, supra,* 67 Cal.App.4th at 1255), the answer, among other things, pleads (1) a general denial, which is authorized by statute when responding to an unverified complaint (Code Civ. Proc. § 431.30), and (2) several affirmative defenses that are in the nature of affirmative denials of allegations of the Complaint or elements of causes of action in the complaint, not new matter as to which additional facts in some circumstances are required to be alleged. (*See* Code Civ. Proc. § 431.30(b)(1); Ans. To 2AC, General Denial, and 1st, 11th, 13th, 14th, 15th, 16th, 19th aff. defs.) Other affirmative defenses that raise new matter, specifically the 1st and 17th affirmative defenses, allege sufficient facts to apprise plaintiff of the basis for those defenses. (Code Civ. Proc. § 431.30(b)(2).) A new matter is one on which the defendant has the burden of proof. (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 239.)

Plaintiff's motion does not demonstrate the answer (a) was not filed in conformity with the laws of the state, or (b) in its entirety contains irrelevant or "improper" matter, or (c) should be stricken in its entirety because plaintiff contends some allegations are "false."

**B. Motion for Judgment on the Pleadings**

If construed as a motion for judgment on the pleadings based on plaintiff's citation to that statute, the motion fares no better. Plaintiff has not demonstrated he is entitled to judgment as a matter of law based on the allegations of the second amended complaint and the answer. As set forth above, the answer denies all material allegations of the second amended complaint through the general denial and further alleges that plaintiff cannot establish one or more essential elements of his claims through the 11th, 13th, 14th, 15th, 16th, and 19th affirmative defenses. (*South Shore Land Co., supra,* 226 Cal.App.2d at 733 [though the Court examines the complaint to determine the sufficiency of the answer, "This requirement, however, does not mean that the allegations of the complaint, if denied, are to be taken as true, the rule being that the demurrer to the answer admits all issuable

facts pleaded therein and eliminates all allegations of the complaint denied by the answer. [Citations omitted.]"].) Plaintiff has not demonstrated that the answer in its entirety fails to assert defenses which if proven would preclude plaintiff from recovering on his claims and that he is entitled to relief under Code of Civil Procedure section 438. (*Warren, supra,* 19 Cal.App.3d at 29.)

**Conclusion**

For the reasons stated, plaintiff's motion must be denied. The Court does not need to reach the other grounds raised by defendants for denying the motion. Plaintiff can investigate the denials and affirmative defenses alleged in defendants' answer through, among other things, the Civil Discovery Act, Code of Civil Procedure section 2016.010 *et seq.*

**7. 9:00 AM CASE NUMBER: C24-01973**
**CASE NAME: DAVID WONG VS. JAFFE AND ASHER LLP**
***HEARING ON MOTION IN RE: TO COMPEL ARBITRATION**
**FILED BY: CHARLES SCHWAB & CO. INC.**
****TENTATIVE RULING:****

The Motion of Charles Schwab & Co, Inc. to Compel Arbitration is **continued** to March 3, 2025 at 9:00 a.m. No further briefing on this motion is allowed**.**

**8. 9:00 AM CASE NUMBER: C24-01973**
**CASE NAME: DAVID WONG VS. JAFFE AND ASHER LLP**
**HEARING ON DEMURRER TO: COMPLAINT**
**FILED BY: JAFFE AND ASHER LLP**
****TENTATIVE RULING:****

Defendant Jaffe & Asher, LLP's Demurrer to Plaintiff David Wong's Complaint, Fourth Cause of Action for False Imprisonment, is **sustained with leave to amend**. Plaintiff shall have until February 24, 2025 to serve and file an amended complaint.

Background

Plaintiff David Wong alleges that in January 2021, he was unable to deposit money into his Schwab account to satisfy a margin call and protect his positions. Because he was unable to complete the deposit, Schwab sold off his position to satisfy the margin call. Plaintiff claims the selloff was improper and locked in a significant monetary loss that would have been avoided had Plaintiff been able to complete the deposit and maintain his position. Schwab, on the other hand, contends that Plaintiff owes in excess of $200,000 for failing to satisfy the margin call, and Schwab initiated a FINRA arbitration against Plaintiff to collect the indebtedness. Plaintiff then filed this action to avoid arbitration, claiming the account agreement containing the arbitration clause is void because the account agreement was procured by fraud. Plaintiff also asserts a completely unrelated claim against Schwab and Defendant law firm Jaffe & Asher LLP, claiming that an unidentified process server

retained by one or both of these parties falsely imprisoned Plaintiff by blocking his driveway while serving Schwab's demand for arbitration.

This is Jaffe & Asher's Demurrer to Plaintiff's Fourth Cause of Action for False Imprisonment. Plaintiff opposes.

Standard

A demurrer for sufficiency tests whether the complaint states a cause of action. (*Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 747.) A demurrer tests the pleadings alone and not the evidence or other extrinsic matters. (CCP §§ 430.30, 430.70.) The court "treat[s] the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law …." (*Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 525).)

Analysis/Order

Jaffe & Ascher demurs to the Fourth Cause of Action for False imprisonment, arguing that that Plaintiff has not set forth sufficient facts so state a cause of action. The pertinent allegations are as follows:

> 45. On or about March 3, 2024, Plaintiff was in Martinez, California. At that time and place, Defendant Does 1 and 2 intentionally and unlawfully restrained Plaintiff's freedom of movement by illegally blocking the driveway and Plaintiff's car.
>
> 46. Plaintiff did not consent to being restrained.
>
> 47. As a result of Defendant Does' 1 and 2 conduct, Plaintiff was confined in Martinez, CA on a driveway for less than 10 minutes.
>
> 48. Defendants had no lawful privilege to restrain Plaintiff.
>
> 49. Defendants' conduct constituted false imprisonment of Plaintiff.
>
> 50. As a direct and proximate result of Defendants' conduct, Plaintiff suffered general and special damages including monetary and non-monetary damages.

Jaffe & Asher argues the foregoing allegations are not sufficient to state a cause of action because Plaintiff does not allege, for example, that he could not have walked away as opposed to driving away, and the act of parking a car so as to block another's car does not, without more, constitute false imprisonment.

Jaffe & Asher requests judicial notice of the (1) Statement of Claim (with exhibits omitted) filed on January 4, 2024, in the FINRA arbitration action by Jaffe & Asher on behalf of Charles Schwab & Co., Inc., and against Plaintiff, in Charles Schwab & Co., Inc. v. David D. Wong., No. 24-0036; (2) the proof of service filed March 2024 in the FINRA arbitration; and (3) The Ninth Circuit's March 29, 2023 decision in Chou and Wong v. Charles Schwab & Co., Inc. The request for judicial notice is granted but the Court does not take judicial notice of the truth of the matters recited in the documents. The Court also does

not take judicial notice of the many factual assertions in opening brief that Plaintiff did not allege in the complaint.

Turning to the allegations, the Court agrees that Plaintiff has not alleged sufficient facts to state a cognizable cause of action for false imprisonment. To state a cause of action for false imprisonment a plaintiff must have been "deprived of his liberty or compelled to stay where he does not want to remain, or compelled to go where he does not wish to go." (*Collins v. County of Los Angeles* (1966) 241 Cal.App.3d 451, 460.) Physical restraint is not essential; words or conduct leading to a reasonable apprehension the detained person will not be allowed to leave is sufficient. (*Schanafelt v. Seaboard Finance Co.* (1951) 108 Cal.App.2d 420, 423.)

Here, Plaintiff's only factual allegation is that his car was blocked by the process server's car. Plaintiff does not allege facts that he was physically restrained or that he believed, based on words or conduct, that he would not be allowed to leave. Plaintiff argues in opposition that there are additional facts he could plead to state a claim. (See 1/29/25 Opp. Decl. of Plf.) "Liberality in permitting amendment is the rule, if a fair opportunity to correct any defect has not been given." (*Angie M. v. Sup. Ct.* (1995) 37 Cal.App.4th 1217, 1227.) Thus, the Court will grant leave to amend for Plaintiff to attempt to plead a cognizable cause of action for false imprisonment against Jaffe & Asher.

The demurrer is sustained with leave to amend. Plaintiff shall have 14 days from written notice of entry of this order by Jaffe & Asher to serve and file an amended complaint. Plaintiff may not add any new causes of action without a court order allowing it.

**9. 9:00 AM CASE NUMBER: L21-06146**
**CASE NAME: CITIBANK, N.A. VS. ARLENE NAVARRO**
***HEARING ON MOTION IN RE: MOTION TO SET ASIDE DISMISSAL/ENTER JUDGMENT UNDER STIP FILED BY PLN ON 10/1/24**
**FILED BY: CITIBANK, N.A.**
****TENTATIVE RULING:****

Plaintiff filed a motion to set aside dismissal and enter judgment, seeking to enforce a stipulated settlement. The parties previously stipulated to a settlement of this case, but provided that in the event of a default in payments the amount in the stipulation would become due.

While defendant made payments in the amount of $2,000, no further payments were made as required by the terms of the settlement agreement. (Wang Decl., p. 4). According to its terms, upon default the defendant would be responsible for the entire balance owed, less any payments made to date. (Req. Jud. Notice, Ex. B. )

The balance now due is the total sum of $1,580.54 (i.e., $3,207.04 [principal] + $373.50 [costs] - $2,000[prior payments]).

All conditions for a judgment pursuant to Code of Civil Procedure section 664.6 have been met.

Consequently, the court will execute and enter judgment for $1,580.54 for plaintiff.

**10. 9:00 AM CASE NUMBER: L23-03430**
**CASE NAME: TALBOT LAW GROUP, P.C., VS. TIFFANY COOPER**
**HEARING ON DEMURRER TO: TO THE 1ST AMENDED CROSS-COMPLAINT**
**FILED BY: TALBOT LAW GROUP, P.C.,**
***TENTATIVE RULING:***

Before the court is a demurrer to the First Amended Cross-Complaint.

In limited civil cases, a general demurrer is allowed, but a special demurrer is not allowed pursuant to Code of Civil Procedure section 92(a). Accordingly, the only grounds for a demurrer are (1) the court has no jurisdiction, and (2) the pleading does not state facts sufficient to constitute a cause of action. (Code of Civil Procedure §430.10(a)(e).) Here, the demurrer is a special demurrer brought pursuant to Code of Civil Procedure section 430.10(f), therefore it is overruled.

**11. 9:00 AM CASE NUMBER: L23-06310**
**CASE NAME: CAVALRY SPV I, LLC AS ASSIGNEE OF CITIBANK, N.A. VS. KEVIN LUPER**
***HEARING ON MOTION IN RE:**
**FILED BY: CAVALRY SPV I, LLC AS ASSIGNEE OF CITIBANK, N.A.**
***TENTATIVE RULING:***

The motion is denied without prejudice for failure to file a proof of service reflecting that notice of the hearing date was provided to the defendant.

**12. 9:00 AM CASE NUMBER: L24-01389**
**CASE NAME: JPMORGAN CHASE BANK N.A. VS. PATRICIA HATELEY**
***HEARING ON MOTION IN RE: FOR ORDER THAT MATTERS IN REQUEST FOR ADMISSION OF TRUTH OF FACTS BE DEEMED ADMITTED**
**FILED BY: JPMORGAN CHASE BANK N.A.**
***TENTATIVE RULING:***

The motion is denied since defendant served responses before the date of the hearing of the motion. (Code of Civil Procedure § 2033.280(c).

**13. 9:00 AM CASE NUMBER: L24-01617**
**CASE NAME: LVNV FUNDING LLC VS. DOUGLAS MENDEZ**
***HEARING ON MOTION FOR DISCOVERY**

**FILED BY: LVNV FUNDING LLC**
***TENTATIVE RULING:***

Plaintiff has moved for an order requesting admissions to be deemed true. Plaintiff served Set One of Request for Admissions on defendant by mail on July 9, 2024. (Kayvon Decl. ¶ 2, Exhibit 1). Defendant failed to serve any responses. (*Id.*, at ¶ 3). A letter sent to the defendant concerning the overdue response to this discovery went unanswered. No opposition to the motion has been filed.

Pursuant to Code of Civil Procedure section 2033.280 subdivision (b), a "party may move for an order that the genuineness of any documents and the truth of any matters specified in the requests be deemed admitted…." The court "***shall***" grant the motion to deem requests for admission admitted unless It finds that the party to whom the requests for admission have been directed has served before the hearing on the motion, a proposed response to the requests for admission that is in substantial compliance with Section 2033.220." (Code Civ. Pro. § 2033 280 subd. (c)).

The motion is granted. The court is required to grant this motion because defendant has not shown that service of substantially code complaint responses to the requests for admission.

All admissions requested in Set One (i.e., requests 1-11) are deemed to be true. (Code Civ. Proc. § 2033.280(b)).

**14. 9:00 AM CASE NUMBER: L24-02633**
**CASE NAME: ABSOLUTE RESOLUTIONS INVESTMENTS LLC VS. ASHLEY QUINONES**
***HEARING ON MOTION FOR DISCOVERY**
**FILED BY: ABSOLUTE RESOLUTIONS INVESTMENTS LLC**
***TENTATIVE RULING:***

The motion is denied without prejudice for failure to file a proof of service reflecting that notice of the hearing date was provided to the defendant.

**15. 9:00 AM CASE NUMBER: MSC20-01066**
**CASE NAME: RHODES VS KRBC**
**HEARING ON SUMMARY MOTION AGAINST KRBC, LLC**
**FILED BY: BLUELINE ENGINEERING INC CALIFORNIA CORPORATION**
***TENTATIVE RULING:***

Before the Court is Defendant Blueline Engineering, Inc.'s Motion for Summary Judgment or in the alternative, Summary Adjudication Against KRCB, LLC.

**General Factual Allegations and Background**

On August 6, 2014, Blueline entered into an agreement with KRBC for "work being performed at 18 Quiet Country Lane, Danville" (the "Property"). (Candau Decl., Ex. A – the "2014 Agreement".) It

indicated that Blueline would be "the general contractor for this project constructing a new single family residence." (*Ibid.*) Under its terms, Blueline was "responsible for the day to day operations of the project, management of the subcontractors, standing inspections, working with the city and utility organizations, and ensuring quality of the product meets current building standards." (*Ibid*.)

Approximately one year later, on August 1, 2015, Blueline and KRCB executed a new contract, which was a Standard Form of Agreement Between Owner and Contractor on form AIA Documents A101 – 2007 ("A101 Contract"). (UMF 12.) This Contract superseded the 2014 Agreement. (*Id.* at Art. 9.) The A101 Contract incorporates the terms of the General Conditions of the Contract for Construction, AIA Document A201™ - 2007 ("A201 Contract"). (*Id.* at Art. 9.1.2.) (Collectively, the A101 and A201 Contracts will be generally referred to as "the Contract.")

While the Cross-Complaint does not specifically identify the A101 Contract as the basis for the breach of contract claim, it does cite to, and quote, "Section 3.7 of the General Conditions" which are part of the A101 Contract. That section is titled: Permits, Fees, Notices and Compliance with Laws and states:

> Unless otherwise provided in the Contract Documents, the Contractor shall secure and pay for the building permits as well as for other permits, fees, licenses, and inspections by government agencies necessary for proper execution and completion of the Work that are customarily secured after execution of the Contract and legally required at the time bids are received or negotiations concluded.

KRCB alleges that Blueline breached this provision by failing to obtain the necessary permits required under the Clean Water Act and did not inform KRCB of the possibility that the Property was subject to the Clean Water Act. (¶ 12.)

**Standard**

Summary judgment is proper if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. (Code Civ. Proc. § 437c(c).) A moving defendant satisfies the initial burden of showing that a cause of action has no merit if he shows that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to the cause of action. (Code Civ. Proc., § 437c (p)(2).)

Once the defendant meets that burden, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto. (*Ibid*.) The plaintiff then has the burden of demonstrating that triable issues of material fact exist. (*Ibid*.)

The party moving for summary judgment has the burden of persuasion to show there is no triable issue of material fact and thus it is entitled to judgment as a matter of law. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850.) Only if the moving party successfully meets this burden does the burden shift to the opposing party to make its own prima facie showing of the existence of a triable issue of material fact. (*Ibid*.; *see also Chern v. Bank of America* (1976) 15 Cal.3d 866, 873.) "In ruling on the motion, the court must consider all of the evidence and all of the inferences reasonably drawn therefrom, and must view such evidence and such inferences, in the light most favorable to the opposing party." (*Aguilar, supra,* 25 Cal.4th at p. 843 (internal citations and quotations omitted); see also, Code of Civ. Proc. §437c(c).)

**Analysis**

**Breach of Contract**

Blueline argues that a proper reading of the Contract demonstrates that KRBC cannot prove its cause of action as a matter of law. Blueline walks through the different provisions of the Contract which support its position. First, with respect to Section 3.7 stated above, Blueline emphasizes that it indicates that Blueline is only responsible for "obtaining the building permit and other permits and inspection 'that are customarily secured *after* the execution of the Contract[.]]'" (MSJ at 6:24-26.)

Along with Section 3.7, Blueline cites to Section 2.2.2, which states:

> Except for permits and fees that are the responsibility of the Contractor under the Contract Documents, including those required under Section 3.7.1, the Owner shall secure and pay for necessary approvals, easements, assessments and charges required for construction, use or occupancy of permanent structures or for permanent changes in existing facilities.

According to Blueline, Section 2.2.2 differentiates between the permits Blueline must obtain and those KRBC must obtain. "Reading the provisions together, Blueline must obtain the building permit and other permits customarily secured after the execution of the contract, and KRBC must obtain necessary permits prior to the execution of the contract." (MSJ at 7:6-8.) Blueline contends that Section 2.2.3 confirms this division of responsibility. Section 2.2.3 states:

> The Owner shall furnish surveys describing physical characteristics, legal limitations and utility locations for the site of the Project, and a legal description of the site. The Contractor shall be entitled to rely on the accuracy of information furnished by the Owner but shall exercise proper precautions relating to the safe performance of the Work.

Blueline emphasizes that Section 2.2.3 puts the burden on the Owner to provide "surveys describing … legal limitations…" applicable to the Project.

Blueline also cites Article 6, which allows for the hiring of other contractors, each of which can have their own separate scope of work. It is undisputed that KRBC hired Humann to prepare the grading and drainage plan and hired Crouse to perform all the grading according to the plans. These separate engagements were allowed under Section 6. Blueline maintains that it was not involved in the development or implementation of the grading plan.

**Discussion**

Initially, while there are some references to the 2014 Agreement, the Cross-Complaint does not rely upon that Agreement. Instead, it specifically references Sections and provisions of the AIA Contracts. As such, the Court will focus on the claims as they relate to those Contracts, and not any terms related to the 2014 Agreement. (See e.g. *Nieto v. Blue Shield of California Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 74. ["It is well established that the pleadings determine the scope of relevant issues on a summary judgment motion."]) The 2014 Agreement is not relevant to the analysis of the AIA Contracts as it is undisputed that the AIA Contracts are integrated and do not include the 2014 Agreement.

Blueline's arguments come down to what the scope was of the "Work" they were supposed to perform under the Contract. Its arguments also rely solely on a reading of the AIA Contracts and not

any additional outside evidence to explain what the Parties meant by the terms therein.

KRBC argues that Blueline was the "general contractor" for the project and was "responsible for all aspects of the project" including "all of the grading work." (Opp. at 14:16-18.) Blueline argues that its "responsibility was to supervise and manage the construction of the residence [only], including obtaining the building permit for the new single family home." (MSJ at 8:11-12; Reply at 3:7-8.)

As noted above, the Contract at issue are the AIA Contracts. Article 2 of the AIA 101 Contract is titled "The Work of This Contract" and states:

> The Contractor shall fully execute the Work described in the Contract Documents, except as specifically indicated in the Contract Documents to be the responsibility of others.

While the term "Work" is capitalized, it is not defined but for reference to being described in the Contract Documents. The term "Work" is used several additional times in the AIA 101 Contract, but not in any way that helps explain what specific action, performance, or labor is supposed to be provided by Blueline.

In the Basic Definitions section of the AIA 201 Contract is Section 1.1.3 which is titled: "The Work." It states:

> The term "Work" means the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations. The Work may constitute the whole or a part of the Project.

Again, there is no description of what specific action, performance, or labor is supposed to be provided by Blueline included in this definition. The AIA 201 Contract also has a definition for "Project," which states:

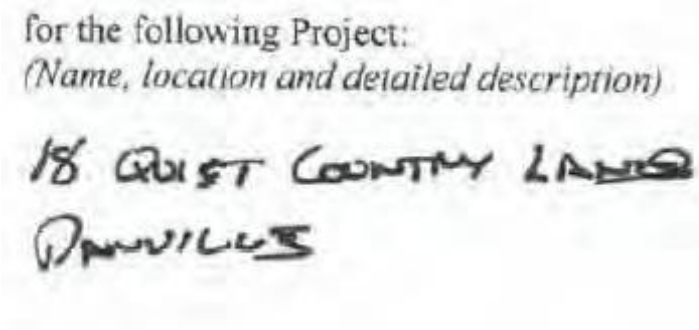
> The Project is the total construction of which the Work performed under the Contract Documents may be the whole or a part and which may include construction by the Owner and by separate contractors.

None of this helps explain what the actual scope of Work was for Blueline with relation to the Project. In particular, there is nothing in the above to show that Blueline's scope of Work was limited to the house/residence on the Property.

The only other reference for defining the Project in the Contract appears to be in the AIA 101 Contract. On the front page, there is a section to be filled in by the parties to the Contract to identify and describe the "Project" (capitalized). It states that the agreement is made:

> "for the following Project:
> *(Name, location and detailed description)*"

The italics appears to be instructions to the Parties using the form contract to insert the relevant information. There is then a space where the parties can insert that information. Here, the AIA 101 Contract states: 18 Quiet Country Lane (¶) Danville. Below is the excerpt from the Contract:


for the following Project:
*(Name, location and detailed description)*

18 QUIET COUNTRY LANE
DANVILLE

The above appears to be the only description of what the Project was – i.e. it was work related to the Property.

Related to what work Blueline was to perform on the Project, it disputes that it was acting as a General Contractor – noting that the August 2014 Agreement which used that phrase was superseded by the AIA Contract. It is true that the term "General Contractor" is not used in the AIA Contract Documents. The only indication as to what services were to be performed are in Article 4 – Contract Sum. There, it is noted that Blueline will be paid $60,000, and that the:

> "Contract sum is the amount over cost paid to Blueline for supervision and management."

Under "Unit price," the "Item" is listed as: "Project Oversight," with 10 Units set for $6,000 each. Thus, by the terms of the Contracts, Blueline was to perform "supervision and management" as well as "Project oversight" for the Project – which is described as 18 Quiet Country Lane, Danville.

In its papers, Blueline repeatedly argues that its scope of work was limited to the residence on the Property. As outlined above, however, there is no indication in the Contract that Blueline's work was so limited. The Project is described as "18 Quiet Country Lane, Danville," which appears to refer to the entire property and not just the residence on the property. At the very least, that is a reasonable interpretation of the language of the Contract.

Blueline refers to the sections of the Contract which allows for KRCB to hire other contractors to perform work at the Project, and which thereby (they contend) limit the scope of work of other contractors, such as themselves. First, the actual contracts for Humann and Crause are not in evidence. As such, there is no way to determine what the scope of those contracts were and/or if they would limit the scope of Blueline's work. Second, to the extent that Humann was to provide the design and plans for the grading work, and Crause was to perform the actual physical work in the area in dispute – neither of those jobs relate to "supervision and management" or "Project oversight," which is what Blueline was to do according to the Contract Documents. As such, it does not appear that those contracts would interfere with or limit Blueline's duties.

As to what party was responsible for obtaining the permits for the work in the area in dispute, there is nothing in the Contract Documents that specifies who should obtain those permits. Blueline argues that permits from the Army Corp of Engineers do not fall within the scope of its work. As outlined above, they argue that they are only responsible for obtaining permits that "are customarily secured after the execution of the Contract." Blueline presents no evidence, however, to establish that the types of permits at issue – from the Army Corp of Engineers required under the Clean Water Act – fall within that definition.

In fact, there is no evidence discussing this issue one way or the other. There is no way for the Court to determine, as a matter of law, which entity was required to determine that such a permit was needed and/or was required to obtain such a permit. Is it the party that made the original design plans? Or the party that did the actual digging and alteration of the area at issue? Or would it be the responsibility of the party that was tasked with supervising and managing the Project, or possibly the owner of the Property? There is no evidence supporting any such determination.

As noted by KRCB's opposition, "Blueline fails to carry its burden because it offers no expert testimony or other evidence regarding whether grading permits are 'customarily secured after execution of the Contract." (Opp. at 13:1-3.) Blueline does not address this point in its Reply.

"A defendant moving for summary judgment bears the initial burden to show the plaintiff's action has no merit." ("*Carlsen v. Koivumaki* (2014) 227 Cal.App.4th 879, 889.) "The defendant can meet that burden by either showing the plaintiff cannot establish one or more elements of his or her cause of action or there is a complete defense to the claim." (*Ibid.*) "In ruling on the motion, the court must consider all of the evidence and all of the inferences reasonably drawn therefrom, and must view such evidence and such inferences, in the light most favorable to the opposing party." (*Aguilar, supra,* 25 Cal.4th at p. 843 (internal citations and quotations omitted); see also, Code of Civ. Proc. §437c(c).)

Blueline has failed to meet its initial burden to show that KRCB's breach of contract cause of action has no merit. Blueline has failed to show that its interpretation of the Contracts is the only reasonable reading. Blueline has also failed to establish that, under the terms of the Contract, it was not required to obtain the permit at issue.

Based on the above, Blueline's motion for summary adjudication as to the first cause of action for breach of contract is **denied**.

**Contractual Indemnity**

The Contract contains an indemnification provision (Section 3.18.1) which reads:

> To the fullest extent permitted by law the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is ***attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself)***, but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity that would otherwise exist as to a party or person described in this Section 3.18. (emphasis added.)

Both parties agree that they key phrase at issue is that highlighted above, i.e. that the claim must be "attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself)[.]" It is undisputed that there are no claims related to bodily injury, sickness, disease or death. As such, the key determination is whether the claim at issue relates to "injury to or destruction of property (other than the Work itself)".

In looking at the Third Amended Complaint overall, Plaintiff is asserting several causes of action related to the work performed by KRCB and the entities hired by it to develop the property located at 18 Quiet Country Lane. Specifically, regarding the grading and drainage work in the back area of the Property where the Corp of Engineers determined there was a stream which fell within its jurisdiction.

The Notice of Violation indicates that there was 'unauthorized discharge of dredge or fill material' into that stream. That work arguably 'injured the tangible property' by damaging the natural environment and the stream that was running through the Property. One repeated aspect of the damages alleged by Plaintiff in the TAC is for "costs associated with restoration and remediation of the Property to conform to applicable law." (¶¶ 58, 66, 71, Prayer ¶ 2.) In other words, Plaintiff is seeking costs associated with 'fixing' the Property which was damaged by Defendant's actions in grading and filling areas associated with the stream which is subject to the Corp of Engineers jurisdiction.

As to the argument relating to the scope of the term 'tangible property,' that terms "has been defined in its plain and ordinary sense as limited to property having physical substance apparent to the senses, including real estate." (*Borg v. Transamerica Ins. Co.* (1996) 47 Cal.App.4th 448, 457 citations omitted; see also *Kazi v. State Farm Fire & Casualty Co.* (2001) 24 Cal.4th 871, 882 ["Understood in its plain and ordinary sense, 'tangible property' means 'property (as real estate) having physical substance apparent to the senses.'" citations omitted.) The development of the property in the area of the stream can be considered 'destruction of tangible property.'

Based on the above, Blueline has failed to meet its burden to show that KRCB's claims for contractual indemnity has no merit. As such, its motion for summary adjudication is **denied** as to this cause of action.

**Equitable Indemnity**

As cited by Blueline, "[w]here parties expressly contract with respect to the duty to indemnify, the extent of that duty must be determined from the contract and not by reliance on the independent doctrine of equitable indemnity." (*Maryland Casualty Co. v. Bailey & Sons* (1995) 35 Cal.App.4th 856, 873 citations omitted.) As the Contract has an express indemnity provision (see above), Blueline contends that RKCB cannot rely upon a claim of equitable indemnity.

As noted above, the Contract was entered into on August 1, 2015. It appears, however, that Blueline started work on the Project about one year prior, at least as of when it signed the 2014 Agreement. The 2014 Agreement does not have any contractual indemnity provision. As such, *Maryland Casualty* does not apply to that timeframe.

Blueline argues that the "facts KRBC raises do not show the existence of a triable issue of material fact that Blueline engaged in conduct prior to August 1, 2015 that is the subject of Plaintiff's claims. Hence, KRBC has not met its summary judgment burden," citing *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 845.) (Reply at 7:16-20.)

*Aguilar*, however, makes clear that the "party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact." (*Id.* at 850.) A moving defendant satisfies the initial burden of showing that a cause of action has no merit if he shows that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to the cause of action. (Code Civ. Proc., § 437c (p)(2).)

Blueline offers no evidence or argument on this point in its papers. Boiled down to the bear minimum,

the Complaint is alleging claims based on the Defendants' failure to secure the proper permit from the Army Corp of Engineers before the work was performed in the area of the stream on the Property. There is no evidence indicating what party should have obtained that permit or at what point during the development of the Property it should have been obtained. As such, it is possible that it could have been within Blueline's scope of work during the August 2014 to August 2015 timeframe. At least at this point in time, Blueline has failed to meet its burden as the moving party to establish that there is no triable issue of fact relating to that issue.

Additionally, if Blueline is correct in establishing that the contractual indemnity provision does not actually apply to the instant situation, KRCB can attempt to prove equitable indemnity applies. (See e.g. *E.L. White, Inc. v. Huntington Beach* (1978) 21 Cal.3d 497, 508 ["When, however, the duty established by contract is by the terms and conditions of its creation inapplicable to the particular factual setting before the court, the equitable principles of implied indemnity may indeed come into play."])

As such, Blueline's motion for summary adjudication as to the third cause of action for equitable indemnity is **denied**.

**Conclusion**

Based on the above, Blueline's motion for summary judgment is **denied**. In addition, Blueline's request for summary adjudication as to each of the three separate causes of action are **denied**.

**Evidentiary Objections**

The Court needs to only rule on those objections to evidence that were material to the disposition of the MSJ/MSA. (See CCP § 437c(q).)

**Blueline's Objections:**

Objection 1: Sustained
Objection 2: Sustained
Objection 3: Sustained (Evid. Code § 1523.)
Objection 4: Overruled
Objection 5: Overruled
Objection 6: Sustained (Evid. Code § 702.)
Objection 7: Sustained (Evid. Code § 1200.)
Objection 8: Overruled
Objection 9: Sustained (Evid. Code § 403, 702.)

**16. 9:00 AM CASE NUMBER: MSC21-02276**
**CASE NAME: RAYMOND HILL VS. AIRBNB, INC. A CORPORATION**
***HEARING ON MOTION IN RE: BE RELIEVED AS COUNSEL RE: CYNTHIA LYNETTE TAYLOR**
**FILED BY: TAYLOR, CYNTHIA LYNETTE**
****TENTATIVE RULING:****

The motion to be relieved as counsel is granted.

**17. 9:00 AM CASE NUMBER: MSC21-02276**
**CASE NAME: RAYMOND HILL VS. AIRBNB, INC. A CORPORATION**
***HEARING ON MOTION IN RE: BE RELIEVED AS COUNSEL RE: RAYMOND HILL**
**FILED BY: HILL, RAYMOND**
****TENTATIVE RULING:****

The motion to be relieved as counsel is granted.

**18. 9:00 AM CASE NUMBER: MSL21-00016**
**CASE NAME: DISCOVER VS. BISI**
***HEARING ON MOTION IN RE: VACATE JUDGMENT AND ENTER DISMISSAL**
**FILED BY: DISCOVER BANK**
****TENTATIVE RULING:****

The motion is denied without prejudice for failure to file a proof of service reflecting that the motion was served and notice of the hearing date was provided to the defendant.

**19. 9:00 AM CASE NUMBER: MSL21-02252**
**CASE NAME: BANK OF AMERICA, N.A. VS. BERNARDO PEREZ**
***HEARING ON MOTION IN RE: NOTICE OF AND MOTION FOR ORDER SETTING ASIDE AND VACATING ITS PRIOR ORDER OF DISMISSAL AND FOR ENTRY OF JUDGMENT PURSUANT TO STIPULATION OF THE PARTIES**
**FILED BY: BANK OF AMERICA, N.A.**
****TENTATIVE RULING:****

The motion is denied without prejudice for failure to file a proof of service reflecting that notice of the hearing date was provided to the defendant.

**20. 9:00 AM CASE NUMBER: N23-1150**
**CASE NAME: RICHMOND POLICE OFFICERS' ASSOCIATION VS. SHASA CURL**
***HEARING ON MOTION IN RE: TO AUGMENT ADMINISTRATIVE RECORD WITH DECLARATION OF JACK HUGHES**
**FILED BY: CURL, SHASA**
****TENTATIVE RULING:****

Respondent Shasa Curl and Real Party in Interest City of Richmond [Respondents] bring this Motin to Augment the Record to include the Declaration of Jack Hughes in Opposition to Writ of Mandate and

its attachments [Motion]. The Motion is opposed by Petitioner Richmond Police Officers' Association [Petitioner].

For the following reasons, the Motion is **granted**.

**Background**

Petitioner's pending Petition for Writ of Mandate [Writ Petition] requests review of an administrative decision by Respondents denying Petitioner's grievance seeking additional compensation under a 2016 – 2022 Memorandum of Understanding [2016 MOU]. Respondents' Motion requests to augment the record on the Writ to include materials that were not available at the administrative hearing on this matter and which provide necessary information for decision on this matter.

Particularly, Respondents seek to introduce the Memorandum of Understanding that was adopted on October 18, 2022 and has a term of July 1, 2022 to June 30, 2025 [2022 MOU]. (Declaration of [Dec.] J. Hughes, ¶ 4, Ex. B.) The hearing was held February 2022 and April 2022, the hearing record closed on June 13, 2022, and the Personnel Board deliberated in closed session and announced its decision to deny the Union's grievance on June 23, 2022. (Writ Petition, ¶¶ 11-12; Dec. Hughes, ¶ 3; see also Answer to Verified Petition [Answer], ¶¶ 11-12.) As such, the evidence shows that the 2022 MOU was not adopted when the hearing record closed on June 13, 2022. (Dec. Hughes, ¶ 4.)

Respondents argue that the Declaration of Jack Hughes and the accompanying 2022 MOU are relevant to determine the applicable salary increase for Petitioner's members for the period beginning January 1, 2023 that is at issue in the Writ Petition.

**Standard**

Code of Civil Procedure §1094.5(e) which provides:

Where the court finds that there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced … at the hearing before respondent, it may enter judgment as provided in subdivision (f) remanding the case to be reconsidered in the light of that evidence; or, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit the evidence at the hearing on the writ without remanding the case.

As such, Code of Civil Procedure §1094.5(e) permits an administrative record to be augmented with relevant evidence that could not have been produced at the time of the hearing. Relevant evidence is broadly defined as any evidence having a tendency to prove or disprove a disputed fact that is of consequence. Evid. Code §210.

**Analysis**

The Declaration of Jack Hughes provides the foundation and context for the 2022 MOU, and Respondent demonstrates that the 2022 MOU pertains to salary increases for Petitioner for the relevant period beginning January 1, 2023. These materials are relevant to this court's review of the

issues raised in Petitioner's Writ and interpretation of the 2016 MOU at issue, particularly regarding Respondents' obligations to Petitioner for salary increases beginning January 1, 2023.

Petitioner argues that this information should have been raised at the hearing or made part of the record for the administrative hearing. However, the evidence demonstrates that the 2022 MOU was still under negotiations at such time and was not adopted until October 18, 2022. As such, the evidence shows that Respondent could not have introduced the 2022 MOU before the hearing record closed on June 13, 2022. The Personnel Board deliberated in closed session and announced its decision to deny the Union's grievance on June 23, 2022. Petitioner argues that the records should have been augmented thereafter, but cites no basis or authority that would allow or require Respondent to do so. Similarly, Petitioner's argument that the 2022 MOU is of no consequence is not well taken, as the 2022 MOU is on point to the salary issue in the Writ.

Accordingly, because the 2022 MOU is relevant to the matters at issue in the Writ and was not available to be included in the administrative record, the court grants Respondent's Motion and will consider the Declaration of Jack Hughes and the attachments thereto, including the 2022 MOU, in review of the Writ.

**21. 9:00 AM CASE NUMBER: N23-1150**
**CASE NAME: RICHMOND POLICE OFFICERS' ASSOCIATION VS. SHASA CURL**
**HEARING IN RE: WRIT**
**FILED BY:**
***TENTATIVE RULING:***

Petitioner Richmond Police Officers' Association [Petitioner or RPOA] bring this Petition for Writ of Ordinary and Administrative Mandate [Writ Petition]. The Writ Petition is opposed by Respondent Shasa Curl and Real Party in Interest City of Richmond [Respondents]. The Writ Petition requests that this court issue a peremptory writ of mandate commanding Respondents to set aside the final administrative decision denying Petitioner's grievance, and further commanding that Respondents pay each of Petitioner's members of an additional $3,800 lump sum payment and a 26% increase in wages.

For the following reasons, the Writ Petition is **denied**.

**Background**

Respondents were parties to a Memorandum of Understanding for the period of July l, 2016 through June 30, 2021 [2016 MOU], after its terms were duly adopted by the City of Richmond [City]. (Writ Petition, ¶ 3; Answer ¶ 3.) A side letter agreement dated October 1, 2020 extended the expiration of the 2016 MOU to June 30, 2022. (Writ Petition, ¶ 6; Answer, ¶ 6.) Thereafter, as discussed in regards to Respondents' Motion to Augment the record, the parties entered into a new Memorandum of Understanding that was adopted on October 18, 2022 and has a term of July 1, 2022 to June 30, 2025

[2022 MOU] that included a 20% salary increase for Petitioner's members which began January 1, 2023. (Declaration of J. Hughes, ¶ 4, Ex. B.)

Section 32.1 (Additional Compensation) of Article 32 (Salaries) provides, in relevant part [Section 32.1]:

> Additional Compensation: RPOA members will receive additional compensation in the amount equal to any new compensation provided to any other bargaining unit, including but not limited to I.A.F.F. Local 188, Richmond Fire Management Association (RFMA), SEIU Local 1021, IFPTE Local 21, and Richmond Police Management Association (RPMA), during the term of this MOU (including but not limited to salary increases, uniform allowance, longevity, medical benefits, payment for unused sick leave etc.). … If any current MOU is extended beyond the current term and during the term of this MOU, members of RPOA will receive any additional compensation received by members of other bargaining units.

(Writ Petition, ¶ 5; Answer, ¶ 5.)

During the term of the 2016 MOU, the CITY agreed to provide a $3,800 lump sum payment and 13% increase in wages to members of at least two bargaining units; the salary increase was incremental and began January 1, 2023. (Writ Petition, ¶ 7; Answer, ¶ 9; AR 0127, 0493, 0561.) Petitioner argues, based on its interpretation of the language in the 2016 MOU, that its members were entitled to a $7,600 lump sum payment and a 26% salary increase, essentially double recovery, on the basis that the bargain was reached with at least two units. The evidence indicates that three units, rather than two, received this same bargain. (AR 0127.) The City found that Petitioner's members were entitled to a single $3,800 lump sum payment under MOU Section 32.1, because the bargain was for a $3,800 lump sum payment during the period of the 2016 MOU and the 13% increase was for the period outside the 2016 MOU; the City's determination was upheld by the Personnel Board after hearing. (Writ Petition, ¶¶ 9, 12; Answer, ¶¶ 9, 12; AR 0621-624,0625-626.) Respondent advises that the payment of $3,800 was made on or about December 16, 2021. (Answer, ¶ 9.) Petitioner now seeks payment of an additional $3,800 lump sum payment and a 26% salary increase based on its interpretation of Section 32.1 of the 2016 MOU. (Writ Petition, Prayer for Relief, ¶ 2.)

Petitioner brings this Writ Petition under Code of Civ. Proc. §§ 1085 and 1094.5 on the basis that Respondents abused their discretion when they found Petitioner's members were not entitled to payment of an additional $3,800 lump sum payment and a 26% salary increase.

**Standard**

*Administrative Mandamus (Code Civ. Proc. § 1094.5)*

Here, a hearing was required by law, evidence was required to be taken at the administrative hearing, and discretion was vested in the administrative decision-maker. (CCP §1094.5(a); *Lafayette Bollinger Dev. LLC v Town of Moraga* (2023) 93 Cal.App.5th 752, 767.) Under Code of Civ. Proc. § 1094.5, the inquiry is whether the respondent has proceeded without, or in excess of, jurisdiction; whether there

was a fair trial; and whether there was any prejudicial abuse of discretion." (Code Civ. Proc. § 1094.5(b).) An abuse of discretion is established if the respondent (1) "has not proceeded in the manner required by law," (2) "the order or decision is not supported by the findings," or (3) "the findings are not supported by the evidence." (*Ibid*.)

The Court must apply the independent judgment test when the administrative decision substantially affects a fundamental vested right. (*Bixby v. Pierno* (1971) 4 Cal.3d 130.) A right is fundamental based on its economic aspect and its importance to the people impacted. (*Interstate Brands v Unemployment Ins. Appeals Bd.* (1980) 26 Cal.3d 770, 780.) However, "as a general rule, when a case involves or affects purely economic interests, courts are far less likely to find a right to be of the fundamental vested character." (*Antelope Valley Press v. Poizner* (2008) 162 Cal.App.4th 839, 850.) "[R]arely, if ever, will a board determination be disturbed unless the petitioner is able to show a jurisdictional excess, a serious error of law, or an abuse of discretion on the facts." (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 814.)

When applying the independent judgment test, the trial court must reweigh the evidence in the administrative record. (*Amerco Real Estate Company v. City of West Sacramento* (2014) 224 Cal.App.4th 778.) If the findings are not supported by the weight of the evidence, the court must find that the administrative agency abused its discretion. (*Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 44.) Also, for questions of law a "de novo" or independent standard of review is applied. (*Lozada v. City and County of San Francisco* (2006) 145 Cal.App.4th 1139, 1148-49.)

*Traditional Mandamus (Code Civ. Proc. § 1085)*

A writ of ordinary mandate is appropriate where the respondent has a clear, present, and ministerial duty, and the petitioner has a clear, present, and beneficial right to the performance of that duty. (Code of Civ. Proc. § 1085; *City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 868.) When these two requirements are satisfied "mandamus provides an appropriate remedy." (*City of Dinuba*, *supra*, 41 Cal.4th at 868.) A writ of mandate will issue where there is no plain, speedy and adequate remedy at law. (Code of Civ. Proc. § 1086.) "Case law permits a party to pursue a writ of mandate under [CCP §1085] as a means to compel a public agency to take nondiscretionary action necessary to comply with a contractual obligation." (*San Diego City Firefighters, Local 145 v Board of Admin. of San Diego City Employees' Retirement Sys.* (2012) 206 Cal.App.4th 594, 613, n15.)

*Contract Interpretation*

"All modern California decisions treat labor-management agreements whether in public employment or private as enforceable contracts… which should be interpreted to execute the mutual intent and purpose of the parties." (*Glendale City Employees Association v. City of Glendale* (1975) 15 Cal.3d 328, 339; .) "Such intent is to be determined, if possible, solely from the written provisions of the contract. The clear and explicit meaning of the contractual provisions, interpreted in their "ordinary and popular sense," unless "used by the parties in a technical sense or a special meaning is given to them by usage" [citation], controls the interpretation." (*County of Fresno v. Fresno Deputy Sheriff's Assn.*

(2020) 51 Cal.App.5th 282, 292; *City of El Cajon v. El Cajon Police Officers' Assn* (1996) 49 Cal.App.4th 64, 71.)

The clear and explicit meaning of the terms used, in their ordinary and popular sense, controls judicial interpretation. (*Orange Cove Ir. Dist. v. Los Molinos Mutual Water Co.* (2018) 30 Cal.App.5th 1, 12; *City of El Cajon*, supra, 49 Cal.App.4th at 71.) Where the language of a contract is clear and not absurd, it will be followed. (Civil Code §1638.) An interpretation that would make the instrument extraordinary, harsh, unjust, inequitable, or which would result in absurdity, must be avoided. City of El Cajon v. El Cajon Police Officers' Assn., 49 Cal.App.4th 64, 71-72 (1996); Civil Code §1643.) Where a contract expresses that it is final and complete expression of the parties' agreement, it cannot be contradicted by extrinsic, or parol, evidence. (Code of Civ. Proc. §1856.) However, if the terms of a promise are ambiguous or uncertain, testimony may be submitted by the promisor or his or her authorized agent as to the promisor's belief. (*Kusmark v. Montgomery Ward & Co.* (1967) 249 Cal.App.2d 585, 591.)

**Analysis**

Petitioner contends that administrative mandate and traditional mandate are appropriate in this case to correct Respondents' abuse of discretion in their interpretation of Section 32.1. The question is whether Section 32.1 of the 2016 MOU required (1) Respondents to make two lump sum payments of $3,800 each to Petitioner's members based on two bargaining units reaching agreements for such payment during the term of the 2016 MOU, and (2) Respondents to provide Petitioner's members one or two salary increases of 13% each, where the 2016 MOU did not cover the period for which the salary increase applied in that the period began January 1, 2023 and the 2016 MOU ended June 30, 2022.

This case involves a question of contract interpretation. "It is a judicial function to interpret a contract or written document unless the interpretation turns upon the credibility of extrinsic evidence." (*County of Fresno v. Fresno Deputy Sheriff's Assn.* (2020) 51 Cal.App.5th 282, 288.) A question of law is reviewed on a "de novo" basis. (*Lozada v. City and County of San Francisco* (2006) 145 Cal.App.4th 1139, 1148-49.)

Petitioner asks the court to look at testimony of the persons that negotiated the 2016 MOU, and Respondent asks the court to look at the clear meaning of the language in Section 32.1.

California precedent is clear that "[i]f contractual language is clear and explicit, it governs," and "[the parties'] intent is to be inferred, if possible, solely from the written provisions of the contract." (*Orange Cove Ir. Dist. v. Los Molinos Mutual Water Co.* (2018) 30 Cal.App.5th 1, 12, citations and internal quotes omitted.) The clear and explicit meaning of the terms used, in their ordinary and popular sense, controls judicial interpretation. (*Ibid.*) The court looks to extrinsic evidence only where the "terms of a promise are in any respect ambiguous or uncertain." (*Ibid*.) Furthermore, "[t]he court shall avoid an interpretation which will make a contract extraordinary, harsh, unjust, inequitable or which would result in absurdity.") (*Id.* at 18; County of Marin v. Assessment Appeals Bd. (1976) 64 Cal.App.3d 319, 325; Civ. Code § 1638.)

Here, the contract provision, in relevant part, states that "RPOA members will receive additional compensation in the amount equal to any new compensation provided to any other bargaining unit will receive additional compensation in the amount equal to any new compensation provided to any other bargaining unit …," and "If any current MOU is extended beyond the current term and during the term of this MOU, members of RPOA will receive any additional compensation received by members of other bargaining units."

With respect to the request for two payments of $3,800, the key term is "equal to" and "any other bargaining unit." These terms require this court to look at the compensation provided to each of the other bargaining units and determine whether Petitioner's members received an "equal" amount." This court finds that because the other units were entitled to $3,800 each during the term of the 2016 MOU, that Petitioner's members are entitled to, at most, one $3,800 lump sum, which was paid to them. Section 32.1 does not contain any language to indicate or signal that this provision is cumulative. If this court were to adopt Petitioner's interpretation of the contract provision, Petitioner's members would not receive compensation "equal to" that which was provided to the other bargaining units but, instead, would receive up to three times as much compensation as the each of the other bargaining units. (AR 0127.) Such would be an absurd result, and extraordinarily harsh to Respondents, as well as the other bargaining units, particularly since there is an absence of any terms to indicate or provide notice that Section 32.1 could be interpreted to be cumulative in nature. The subject language is not ambiguous, as Petitioner contends, and, thus, there is no basis to look to extrinsic evidence to interpret the provision.

With respect to the request for Petitioner's members to receive two 13% increases in their salary, as discussed above, the language does not support interpreting this term to require cumulative compensation, and, as discussed herein, the language does not support a finding that Petitioner's members are entitled to a salary increase for a period that is outside the term of the 2016 MOU. The relevant language for this inquiry is "If any current MOU is extended beyond the current term and during the term of this MOU," and "received by members of other bargaining units." This language makes clear that Section 32.1 of the 2016 MOU pertains only to additional compensation that is received by members of other bargaining units during the term of the 2016 MOU, being either the original term or the extended term. This interpretation is further supported by the fact that the 2022 MOU provides a 20% salary increase for Petitioner's members for the same relevant period, beginning January 1, 2023.

If this court were to adopt Petitioner's interpretation of the contract provision, Petitioner's members would receive a 46% salary increase and could arguably receive up to 59% salary increase being that it appears that three units received the 13% increase. (AR 0127.) This would be more than three (or four) times the amount received by the other bargaining units. Such would be an absurd result, and extraordinarily harsh to Respondents, as well as the other bargaining units, particularly since there is an absence of any terms to indicate that this provision could be interpreted as cumulative or to apply to compensation payable after expiration of the 2016 MOU. The subject language is not ambiguous, as Petitioner contends, and, thus, there is no basis to look to extrinsic evidence to interpret the provision.

Accordingly, the court finds that (1) Respondents d did not abuse their discretion in interpreting the 2016 MOU, and (2) Respondents have complied with their contractual obligations under the 2016 MOU. For these reasons, the court denies Petitioner's Writ Petition under Code of Civ. Proc. §§ 1085 and 1094.5

**22. 9:00 AM CASE NUMBER: N24-1875**
**CASE NAME: VAL SENAVSKY VS. BEN WINKLEBLACK**
***HEARING ON MOTION IN RE: FOR LEAVE TO SUBMIT LATE FILING FOR GOOD CAUSE**
**FILED BY: SENAVSKY, VAL STEPHEN**
****TENTATIVE RULING:****

**Introduction**

Before the Court is Petitioner's requests the Court grant leave to resubmit all rejected filings, which were initially submitted electronically on December 1, 2024, and marked as received by the Court on December 2, 2024, but rejected on December 5, 2024, due to a clerical error. Petitioner further requests that the Court deem the resubmitted documents timely filed and permit the case to proceed on its merits.

For the following reasons, **Petitioner's request for leave to resubmit all rejected documents is granted**.

**Statement of Facts**

On December 1, 2024, counsel for Petitioner, Damon Appelblatt, instructed Daniel Miranda, a California Registered Process Server and Legal Document Assistant, to electronically file all documents required to initiate this action. These documents included: (1) the Substitution of Attorney; (2) Notice of the Verified Petition for a Writ of Administrative Mandate; (3) the Verified Petition for Writ of Administrative Mandate; (4) the Memorandum of Points and Authorities in support of the Petition; (5) the Notice of Motion and Motion to Consider Evidence Outside the Administrative Record (5) supporting declarations; and (6) accompanying exhibits. (Declaration of Damon Appelblatt, ¶ 2.)

That evening, at approximately 7:00 PM, Mr. Miranda reported to counsel that he electronically submitted the documents to the Contra Costa County Clerk's Office through Legal Pro, a certified third-party electronic filing service. He also emailed preliminary copies of the submitted documents to confirm completion of the submission. (Declaration of Damon Appelblatt, ¶ 3, Exhibit A.)

On December 2, 2024, Mr. Miranda reported that he served all parties with the submitted documents via U.S. Mail, in compliance with applicable rules of service. These documents included: (1) the Substitution of Attorney; (2) the Verified Petition for Writ of Administrative Mandamus; (3) the Memorandum of Points and Authorities in support of the Petition; (4) the Notice of Motion and Motion to Consider Evidence Outside the Administrative Record; (5) supporting declarations; and (6) accompanying exhibits. Mr. Miranda provided the Proof of Service by Mail of the petition and supporting documents. However, Mr. Miranda failed to serve the Real Party in Interest with the documents. Upon discovering this oversight, counsel took immediate steps to ensure that the Real

Party in Interest is served with all relevant documents, including this motion and supporting papers, well in advance of the hearing date. (Declaration of Damon Appelblatt, ¶¶ 4, 5, Exhibit B.)

On December 5, 2024, the Contra Costa County Clerk's Office issued rejection notices for the submitted documents due to errors in the Substitution of Attorney form (MC-050). The errors cited included: (1) checking the box for "Attorney" instead of "Party Represented Self"; and (2) omitting the date and location of service on the Proof of Service portion of the Substitution of Attorney form. Contrary to counsel's earlier understanding, the omission of the signature was not the reason for the rejection. (Declaration of Damon Appelblatt, ¶ 6, Exhibit C.) Upon receiving the rejection notices, counsel reviewed the errors and determined they were minor and clerical. Counsel corrected the Substitution of Attorney form and its Proof of Service to include the correct box selection, date, and location of service. (Declaration of Damon Appelblatt, ¶ 7.)

On December 6, 2024, counsel informed opposing counsel via email, of the rejection issued by the Court and the basis for this motion to refile. In the email, counsel explained that the petition and supporting documents were timely submitted and served to her office via first-class mail but were rejected due to clerical errors in the Substitution of Attorney form. Counsel also mistakenly stated that one reason for the rejection was a missing signature; upon further review, the actual basis for rejection included the omission of the date and location of service on the Proof of Service portion of the Substitution of Attorney form. Counsel further explained in the email that the courts generally prefer resolving cases on their merits rather than on procedural technicalities and requested, as a professional courtesy, that opposing counsel consider not opposing the motion. (Declaration of Damon Appelblatt, ¶ 8, Exhibit D.)

**Respondents' Request for Judicial Notice**

Respondent requests the Court to take judicial notice of four exhibits:

1) Exhibits 1 through 3 are the Declaration of Dangerous Animal, Proposed Decision Affirming Declaration of Dangerous Animal, and the Dangerous Animal Final Order. Since all three exhibits are administrative decisions, or related to those decisions, and constitute official acts relevant to the determination of the matter before this Court, the exhibits are judicially noticeable under Evid. Code § 452(c). (See *State Comp. Ins. Fund v. ReadyLink Healthcare, Inc*. (2020) 50 Cal.App.5th 422, 444 [taking judicial notice of administrative decisions relevant to the determination of the issue before the court].)
2) Pursuant-to Evidence Code section 452(d), the Court may take judicial notice of Chapter 416-18 of the County Ordinance Code, because it is a legislative enactment of the County. (*Melton v. City of San Pablo* (1967) 252 Cal.App.2d 794, 802 fn. 3 [stating that courts may take judicial notice of a city ordinance].)

**Respondents' requests for judicial notice of Exhibits 1-4 are granted**.

**Legal Standard**

Petitioner has brought his Petition pursuant to Section 1094.5 of the Code of Civil Procedure, which provides for appeals of final administrative orders to the superior court. However, the statute requires

a petition for writ of mandate to be filed "not later than the 90th day following the date on which the decision becomes final." (Code of Civ. Proc. § 1094.6(b).) If an appeal of the final administrative order is not filed within the 90-day period set forth in section 1094.6(b), "the decision is final for purposes of this section upon the expiration of the period during which reconsideration can be sought." (Ibid.) Moreover, "[t]his section shall prevail over any conflicting provision in any otherwise applicable law relating to the subject matter…" (Code of Civ. Proc. § 1094.6(g).)

**Analysis**

**Petitioner's Errors Were Insubstantial**

The *Rojas* court opined, "Where, as here, the defect, if any, is insubstantial, the clerk should file the complaint and notify the attorney or party that the perceived defect should be corrected at the earliest opportunity. (See Code of Civil Procedure section 128.7, subdivision (a), providing in part that '[a]n unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.') That should create no more difficulty than returning all the documents with a notice pointing out the defects. To deny Rojas her cause of action for lack of a signature makes a mockery of judicial administration." (*Rojas v. Cutsforth* (1998) 67 Cal.App.4th 774, 777.)

The *Carlton* court ruled, "state law is clear that a paper is deemed filed when it is presented to the clerk for filing in a form that complies with rule 201. If a paper is thus presented, the clerk has a ministerial duty to file it. As noted by the Supreme Court in *United Farm Workers*, the filing of a defective paper may bring later adverse consequences if timely corrections are not made. However, subject to possible differing interpretations of the *Hartford* case, the only authority in state law for rejecting a complaint for filing is that contained in rule 201, discussed above, which does not include authority to reject a filing for lack of a Certificate of Assignment required by local rule." (*Carlson v. Dep't of Fish & Game* (1998) 68 Cal.App.4th 1268, 1276.)

The functions of the clerk are purely ministerial. (See 2 Witkin, Cal. Procedure (4th ed. 1996) Courts, § 370, pp. 442-444.) The clerk has no discretion to reject a complaint that substantially conforms to the local rules. (See *Dillon v. Superior Court* (1914) 24 Cal. App. 760, 765-766 [When a proper offer of filing has been made by a party, the party shall not suffer for the failure of the clerk to perform his duty.].

A paper is deemed filed when it is deposited with the clerk with directions to file the paper. (*Dillon v. Superior Court*, *supra*, 24 Cal. App. 760, 765.) Because here the clerk had no proper basis for rejecting Rojas's complaint, it must be deemed filed when it was presented on November 7, 1996. (*Rojas v. Cutsforth* (1998) 67 Cal.App.4th 774, 778.)

Here, there is no evidence that Petitioner's papers that complies with current paper requirements set forth (formerly in rule 201) currently in the California Rules of Court Title 2, Division 2, Chapter 1 which governs the form and format of papers presented for filing which includes but is not limited to the size, quality and color of papers, the font, margins, spacing, binding, exhibits, and hole punching. (See California Rules Court Title 2, Division 2, Chapter 1 generally.) Since there is no evidence that Petitioner's papers were in violation of any of the California Rules of Court, the clerk did not have the proper basis nor authority to reject the filing. Thus, Petitioner's papers shall be deemed filed the day it was presented for filing, on December 2, 2024. (*Carlson v. Dep't of Fish & Game* (1998) 68 Cal.App.4th 1268, 1282.)

**CCP § 1094.6(d) Extension**

Under CCP § 1094.6(d), a petitioner who requests the administrative record within 10 days of the agency's final decision receives an automatic extension: the limitations period runs until 30 days after the record is provided. This provision ensures meaningful time for reviewing agency materials and drafting a writ petition.

Petitioner alleges he made a timely record request, thus triggering the extension. Petitioner further alleges that Respondents have yet to furnish the complete record, which means the limitations period has not even started. Courts prohibit agencies from evading judicial scrutiny by withholding the very materials needed for a petitioner's review. Since § 1094.6(d) requires an automatic extension and leaves no discretion to an agency to frustrate a petitioner's rights, this would make the subject petition timely.

However, Petitioner does not provide any evidence of a timely record request, not an email or a declaration. The Court cannot rule if Petitioner is eligible for a CCP § 1094.6(d) extension without any evidence of a timely record request.

**Conclusion**

For the reasons mentioned above, **Petitioner's motion for leave is granted**.

**23. 9:00 AM CASE NUMBER: N24-1991**
**CASE NAME: CLAIM OF:JAMES ALVAREZ**
**HEARING IN RE: PETITION FOR APPROVAL OF COMPROMISE OF CLAIM FILED BY JAMES ALVAREZ ON 10/30/24**
**FILED BY:**
***TENTATIVE RULING:***

The petition for approval of minor compromise is granted.

**24. 10:00 AM CASE NUMBER: L22-01405**
**CASE NAME: BANK OF AMERICA, N.A. VS. VAL RODRIGUES**
**COURT TRIAL HEARING**
**FILED BY:**
***TENTATIVE RULING:***

Appearance required.

**25. 10:00 AM CASE NUMBER: L24-05456**
**CASE NAME: KIMBERLY GRAVES VS. KAUSHA JACKSON**
**COURT TRIAL HEARING**
**FILED BY:**
***TENTATIVE RULING:***

Appearance required.

**26. 10:00 AM CASE NUMBER: C22-01623**
**CASE NAME: PRIME CAPITAL INVESTMENTS LLC, A CALIFORNIA LIMITED LIABILITY COMPANY VS. MO ZHOU**
**COURT TRIAL HEARING 3 DAYS**
**FILED BY:**
***TENTATIVE RULING:***

Appearance required.

**9:00 AM CASE NUMBER: N23-2108**
**CASE NAME: GLEN STEWART VS. SUPERIOR COURT OF CALIFORNIA, COUNTY OF CONTRA COSTA**
**HEARING ON DEMURRER TO: FIRST AMENDED PETITION**
**FILED BY:**
***TENTATIVE RULING:***

Appearance required.

Before the Court is a demurrer by Contra Costa County Employees' Retirement Association and its Board of Retirement (collectively "CCCERA") to the Amended Petition for Writ of Mandate filed by Glen Stewart. For the reasons set forth, the general demurrer to the Amended Petition is **overruled**.

Further, pursuant to the Court's Order After Hearing issued January 16, 2025, the Court hereby **strikes**, *sua sponte*, Petitioner's second amended petition for writ of mandate ("2AP") filed on December 12, 2024. (Code Civ. Proc. §§ 435 and 436.) The 2AP was improperly filed while CCCERA's demurrer to the Amended Petition for Writ of Mandate ("Amended Petition") was under submission and could not be filed, pending the Court's determination of the demurrer to the Amended Petition set forth in this ruling.

**Background**

The original Petition filed by Dr. Glen Stewart in pro per ("Dr. Stewart" or "Petitioner") asserted three causes of action for (1) violation of due process (1st C/A), (2) breach of fiduciary duties (2nd C/A), and (3) failure of CCCERA to comply with a prior writ of mandate by not "automatically excluding" "on call," "standby" or similar pay code compensation from "compensation earnable" for purposes of calculating retirement benefits for "legacy" employees. (Orig. Petn. p. 1, ll. 25-28.) The hearing on CCCERA's demurrer to the original Petition was held on July 15, 2024. The Court sustained CCCERA's demurrer to the first and second causes of action with leave to amend and sustained the demurrer to

the third cause of action for failure to comply with a prior writ of mandate without leave to amend.

Dr. Stewart timely filed his Amended Petition on July 29, 2024. The Amended Petition does not identify any individual causes of action but instead alleges in effect a single cause of action seeking a writ of mandate under Code of Civil Procedure section 1085. (Am. Pet. p. 1, ll. 21-25.) The Amended Petition cites as grounds for issuance of the writ of mandate that (1) CCCERA violated Petitioner's due process rights in making its "compensation earnable" determination without affording him an opportunity for a hearing, and (2) CCCERA breached its fiduciary duty to Petitioner by excluding his on call pay from his "compensation earnable." Though the Amended Petition continues to name the Contra Costa Superior Court as respondent, the allegations of the Amended Petition are clearly directed to CCCERA and its Board of Retirement as respondents, not just as real parties in interest. CCCERA makes a general demurrer to the Amended Petition.

**Standards Governing Demurrer**

In ruling on the demurrer, the Court must accept as true all well-pled factual allegations of the complaint, but not legal or factual conclusions or contentions of law. (*City of Dinuba v. County of Tulare* (2007) 41 Cal. 4th 859, 865; *Carloss v. County of Alameda* (2015) 242 Cal. App.4th 116.) The Court also considers judicially noticeable facts. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.) " ' "[A] complaint otherwise good on its face is subject to demurrer when facts judicially noticed render it defective." [Citation.]' [Citations omitted.]" (*Id.*)

The Court gives the complaint "a reasonable interpretation, reading it as a whole and its parts in their context." (*Blank v. Kirwan, supra,* 39 Cal. 3d at 318.) In determining whether the complaint states a cause of action, the Court evaluates "whether a cause of action has been stated under any legal theory. [Citation omitted.]" (*Gomez v. Regents of University of California* (2021) 63 Cal.App.5th 386, 391.)

"[I]t is well established a trial court may take notice of an earlier judgment in deciding whether to sustain a demurrer on *res judicata* grounds." (*Kirkpatrick v. City of Oceanside* (1991) 232 Cal.App.3d 267, 281.) "The court may sustain a demurrer on claim preclusion grounds '[i]f all of the facts necessary to show that the action is barred are within the complaint or subject to judicial notice . . . .' [Citation omitted.]" (*Thompson v. Ioane* (2017) 11 Cal.App.5th 1180, 1190-1191 [quoting *Carroll v. Puritan Leasing Co., supra,* 77 Cal.App.3d at 485].)

**CCCERA Request for Judicial Notice**

CCCERA requests the Court take judicial notice of four documents filed in the action *Contra Costa County Deputy Sheriffs Association, et al. v. Contra Costa County Employees' Retirement Association, et al.*, Contra Costa County Superior Court Case No. N12-1870 ("Prior Litigation"). CCCERA asks the Court to take judicial notice of a consolidation order issued June 7, 2013 (RJN Exh. 1), the Verified Petition in Intervention filed by the Physicians' and Dentists' Organization of Contra Costa ("PDO") (RJN Exh. 2), the initial judgment issued May 12, 2014 (RJN Exh. 3), and the final judgment issued November 8, 2021 (RJN Exh. 4). The Court finds the documents are the proper subject of judicial notice and **grants** the request. (Evid. Code § 452(d); *Kirkpatrick, supra,* 232 Cal.App.3rd at 281; *Sosinksy v. Grant* (1992) 6 Cal.App.4th 1548, 1564–1565.)

CCCERA also asks the Court to take judicial notice of its "Compensation Earnable Policy" adopted September 10, 2014 and amended May 5, 2021 (RJN Exh. 5), and a CCCERA policy titled "Determining Which Pay Items Are 'Compensation' for Retirement Purposes" adopted December 5, 1997, as amended by the latest amendment of December 12, 2012 with an Addendum and Second Addendum (collectively "December 2012 Pay Items Compensation Policy") (RJN Exh. 6). These documents are also a proper subject of judicial notice, and the Court **grants** the request. (Evid. Code § 452(c).)

CCCERA also requests the Court take judicial notice of the minutes of the April 10, 2013 CCCERA Board of Retirement meeting (RJN Exh. 7). These are government records of which the Court can take judicial notice (Evid. Code § 452(c)), but the Court does not take judicial notice of the truth or interpretation of the content of the minutes to the extent those matters are reasonably disputable. (*StorMedia, Inc. v. Superior Court* (1999) 20 Cal.4th 449, 457, fn. 9 [judicial notice of documents extends to the existence of the document or filing but not the truth or interpretation of the contents to the extent either is reasonably disputable]; *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 113-115.) The Court **grants** the request as to RJN Exh. 7 with these limitations.

CCCERA also asks the Court to take judicial notice of the Memorandum of Understanding between Contra Costa County and Physicians' and Dentists' Organization of Contra Costa for November 1, 2019-October 31, 2022 ("2019 MOU") (RJN Exh. 8). CCCERA requests judicial notice of the 2019 MOU as a government document, because a portion of the 2019 MOU is quoted in the Amended Petition and attached to the Amended Petition and the entire document provides context for the excerpts relied on by Petitioner. (RJN p. 4, ll. 25-26.) Both Petitioner, in quoting and attaching an excerpt of the 2019 MOU in the Amended Petition, and CCCERA, in its demurrer (MPA ISO Dem. p. 5, ll. 6-9), rely on the 2019 MOU to argue their positions, though it appears from the exhibits attached to the Amended Petition that Dr. Stewart retired in 2016, and the 2019 MOU does not specifically apply to Dr. Stewart. Nevertheless, both parties rely on the 2019 MOU for their arguments, and the Amended Petition alleges facts regarding Dr. Stewart's working hours and on-call obligations not strictly tied to the 2019 MOU but to some extent supported by that document, which suggests that as pertinent to the issues raised, the facts alleged support some inference the 2019 MOU reflects terms similar to those of the MOU applicable in 2016 and earlier prior to Dr. Stewart's retirement. The Court will **grant** the request for judicial notice of RJN Exh. 8, subject to the limitations on judicial notice under the above-cited authorities and with due consideration of the limitations on its relevance as directly applicable to Dr. Stewart for the reasons stated.

**Analysis**

Legacy employees are persons who were first employed by the County prior to January 1, 2013, when the Public Employees' Pension Reform Act of 2013 ("PEPRA"), enacted by AB 197, became effective. PEPRA made substantial revisions to the law governing pension plans for public employees. Government Code section 31461(b)(3), which was added by PEPRA, excludes from "compensation earnable" "[p]ayments for additional services rendered outside normal working hours."

Petitioner contends that his on-call pay should not be excluded from CCCERA's determination of his "compensation earnable" under section 31461(b)(3) as pay for "additional services rendered outside normal working hours" and CCCERA's Compensation Earnable Policy. In summary, he alleges in the Amended Petition that his on-call hours were part of his "normal working hours" under his

employment agreement and based on the practice and nature of the "on-call" work by pathologists working for the County. (*See* 10/19/2001 offer letter from Contra County Health Services ("Employment Agreement") and 7/2/2022 letter from Dr. Stewart to CCCERA, both attached to the Amended Petition; 2019 MOU section 6.8 p. 22 [Pathologist].)

Unlike the original Petition, the Amended Petition does not identify separate causes of action as such. (*See generally Nowicki v. Contra Costa County Employees' Retirement Assn.* (2021) 67 Cal.App.5th 736, 744 [operative petition alleged single cause of action for writ of mandate under Code of Civil Procedure section 1085].) The Court interprets the Amended Petition as alleging a single cause of action for a writ of mandate under Code of Civil Procedure section 1085 made on two grounds: (a) that Petitioner was denied due process by CCCERA's failure to conduct a hearing on his challenges to CCCERA's compensation earnable calculation and the Board's delegation of the determination to the Deputy CEO of CCCERA, and (b) that CCCERA failed to comply with a clear, mandatory ministerial duty to include Petitioner's on call pay as part of his "compensation earnable" for purposes of his final compensation retirement calculation, or that it abused its discretion in excluding the on call pay because his services were services performed during "normal working hours" for a pathologist. (*Id.*)

A. **Traditional Mandamus Generally**

Petitioner seeks traditional mandamus relief under Code of Civil Procedure section 1085. That statute provides that "A writ of mandate may be issued by any court to any . . . board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station . . . ." (Code Civ. Proc. § 1085(a).) "To obtain a writ of mandate, 'the petitioner must show there is no other plain, speedy, and adequate remedy; the respondent has a clear, present, and ministerial duty to act in a particular way; and the petitioner has a clear, present and beneficial right to performance of that duty.' [Citation, internal quotation marks omitted.]" (*California Privacy Protection Agency v. Superior Court* (2024) 99 Cal.App.5th 705, 721.) "A ministerial duty is an act that a public agency is required to perform in a prescribed manner under the mandate of legal authority without the exercise of judgment or opinion concerning the propriety of the act. [Citation omitted.] 'Put another way, a ministerial act is one "[w]here a statute or ordinance clearly defines the specific duties or course of conduct that a governing body must take," thus "eliminat[ing] any element of discretion." ' [Citation, internal quotation marks omitted.]" (*Id.*) (*See also Shelden v. Marin County Employees' Retirement Assn.* (2010) 189 Cal.App.4th 458, 463 ("*Shelden*"); *Alameda Health System v. Alameda County Employees' Retirement Assn.* (2024) 100 Cal.App.5th 1159, 1177 [writ can issue to enforce a mandatory and ministerial duty, but not to control discretion conferred].)

A writ of mandate under Code of Civil Procedure section 1085 can also be issued when the petitioner is challenging the public agency's exercise of its discretion on the ground of abuse of discretion. (*Alameda Health System, supra,* 100 Cal.App.5th at 1177.) If the Petitioner alleges an abuse of discretion by the public agency or a public officer, the Court evaluates whether the public agency's or public officer's action was "arbitrary, capricious or entirely without evidentiary support" or did not follow procedures required by law. (*Id.*)

B. **Breach of Fiduciary or Mandatory Ministerial Duty to Include Petitioner's On Call Pay as Compensation Earnable, or Abuse of Discretion in Failing to Do So**

CCCERA acknowledges that it owes a fiduciary duty to Petitioner as a retiree in the retirement system it administers but disputes that Petitioner has alleged any facts showing a breach of that duty or any ministerial duty on which a writ of mandate can issue. CCCERA contends its fiduciary duties are bounded by its duty to pay retirement benefits only as allowed by statute and not to pay benefits greater than applicable law permits. (*Chaidez v. Board of Administration etc.* (2014) 223 Cal.App.4th 1425, 1431 ["The constitutional mandate by which PERS operates does not include an overlay of fiduciary obligations justifying an order to pay greater benefits than the statutes allow. In other words, the Constitution does not give [retiree] a right to benefits he did not earn."].)

CCCERA argues Petitioner has not cited any authority that CCCERA has a mandatory, ministerial duty to include his on-call pay in compensation earnable under Government Code section 31461(b)(3) and its Compensation Earnable Policy adopted under PEPRA. CCCERA also contends that Petitioner's objections to CCCERA's exclusion of the on call pay based on CCCERA's interpretation of Government Code section 31461(b)(3) and its Compensation Earnable Policy is barred by the doctrines of *res judicata* and collateral estoppel as a result of the final judgment in the Prior Litigation.

1. Analysis of CCCERA's Compensation Earnable Policy and Exclusion of On-Call Pay under Government Code section 31461(b)(3)

Government Code section 31461(a) sets forth the general scope of compensation earnable for purposes of calculating a member's retirement benefits. That provision states that "compensation earnable" "means the average compensation as determined by the board, for the period under consideration upon the basis of the average number of days ordinarily worked by persons in the same grade or class of positions during the period, and at the same rate of pay." (Govt. Code § 31461(a)(1).) Government Code section 31461(b) then sets forth items that are excluded from compensation earnable. The parties also do not seem to dispute that an employee's retirement pay is to be calculated based on what constitutes "compensation earnable" under Government Code section 31461 so long as the compensation is not excluded under Government Code section 31461(b) or some other statute.

CCCERA has included with its current demurrer its December 2012 Pay Items Compensation Policy. The amendment to that policy, however, by its terms addressed PEPRA's provisions for calculating pensionable compensation for "new members" of CCCERA under Government Code section 7522.34, not legacy members such as Dr. Stewart. (RJN Exh. 6.) In addition, that policy is not the policy that the PDO challenged in the PDO Petition in Intervention. The PDO Petition in Intervention alleged that "On October 30, 2012, the CCCERA Board voted to implement AB 197 effective January 1, 2013 and announced a new policy for the calculation of retirement benefits." (RJN Exh. 2 [PDO Petn. ¶ 22 (emphasis added)].) The documents before the Court do not include an October 30, 2012 CCCERA Board meeting or policy, as alleged in the PDO Complaint in Intervention.

Respondent has put before the Court the April 10, 2013 CCCERA Board minutes. Those minutes reflect in Items 7 and 8 the Board discussed standby and on-call pay for "classic" members (referred to in the Prior Litigation as legacy members), and that a vote was taken and passed to "support counsel's recommendation to eliminate standby, on-call and call back pay from compensation earnable and directed staff to notify members, but hold off implementation during the pendency of the stay order."

(RJN Exh. 7 [4/10/2013 CCCERA Bd. Min. Items 7 and 8, pp. 5-6] (emphasis added).) However, based on the timing of Dr. Stewart's retirement in 2016 according to the records he attached to his Amended Petition, new policies were issued by CCCERA in September 2014 (the Compensation Earnable Policy) and then amended in 2021 after the California Supreme Court decision in *Alameda County Deputy Sheriff's Assn. v. Alameda County Employees' Retirement Assn.* (2020) 9 Cal.5th 1032 ("*Alameda*"). (RJN Exh. 5, pp. 1-2.) Implementing AB 197, Policy III.D addresses Government Code section 31461(b)(3). (RJN Exh. 5, p. 4.)

The Compensation Earnable Policy defines the "CCCERA Policies and Practices" related to on-call work and excludes from "compensation earnable" any "[p]ay received for services rendered outside normal working hours," consistent with the exclusion of such pay in Government Code section 31461(b)(3). (RJN Exh. 5, p. 4.) The policy provides for employers to use different pay codes for "pensionable pay" that meets all of the three-point criteria set forth in the policy and pay that does not meet the three-point criteria. (RJN Exh. 5 [Compensation Earnable Policy Section III.D,. p. 4.) (*See also* RJN Exh. 5 [Chart of General Pay Items That Are Included and Excluded from "Compensation Earnable" Effective July 12, 2014, stating compensation earnable "ordinarily" excludes pay for additional services outside normal working hours including on-call pay].)

The three criteria in the CCCERA Compensation Earnable Policy for inclusion of "time for which compensation is received" are that the time must be "normal working hours set forth in the applicable . . . employment agreement," required by the employer, not voluntarily worked, as set forth in the applicable employment agreement, and must be "ordinarily worked by all others in the same grade or classification at the same rate of pay." (RJN Exh. 5 [Compensation Earnable Policy Section III.D, p. 4.) CCCERA concedes that on-call pay is not required to be excluded under the Government Code statute or CCCERA's Compensation Earnable Policy but rather is "presumptively" excluded, and that the CCCERA policy is intended to mirror Government Code section 31461. (MPA ISO Dem. p. 14, fn. 5.) It asserts it "retains authority to examine the sort of work associated with paycodes to determine whether or not the pay for that work is pensionable under Section 31461 notwithstanding labels assigned to the work by CCCERA's participating employers." (*Id.*) The Compensation Earnable Policy on its face does not mandate categorical exclusion of all "on-call" pay, contrary to what is reflected in the April 10, 2013 Board minutes. (Compare RJN Exh. 7 to RJN Exh. 5.). The policy does not "categorically" exclude that pay from "compensation earnable," as CCCERA acknowledges. Instead, on-call pay is "presumptively excluded." (RJN Exh. 5 [Compensation Earnable Policy Section III.D, p. 4].)

As *Alameda* explains, the provisions of Government Code section 31461(b)(3) and analogous provisions on overtime pay "confirm pensionable compensation is generally to be based on pay for work performed during normal working hours." (*Alameda, supra,* 9 Cal.5th at 1097 [emphasis added].) (*See also Marin Assn. of Public Employees v. Marin County Employees' Retirement Assn.* (2016) 2 Cal.App.5th at 686 fn. 9, 687, 704-705 [Marin policy and procedure for implementing AB 197 which excluded " standby pay, administrative response pay, and any form of call-back even if not paid at overtime rates" from pensionable compensation did not violate constitutional rights of legacy employees].) The issue in *Alameda* was a constitutional question of impairment of contracts. CCCERA is correct that the decision does not mandate inclusion of on-call pay. At the same time, *Alameda*

does not preclude the inclusion of on-call pay if the pay meets the general criteria for "compensation earnable" and is not required to be excluded under Government Code section 31461(b)(3) because it meets all of the criteria of that section and CCCERA's Compensation Earnable Policy. (RJN. Exh. 5 [Compensation Earnable Policy Section D].)

2. Application of Policy to Dr. Stewart and Allegations of the Amended Petition

Dr. Stewart alleges on-call time was part of "the normal working hours" for pathologists, including Dr. Stewart, as on-call time was both required by him and all pathologists and was in effect built into his work week, as reflected in the terms of his Employment Agreement and the 2019 MOU. (Am. Pet. Exh. [Employment Agreement defining Dr. Stewart's "work week" as "32 hours a week, plus 10 weeks of on-call a year"].) He repeatedly alleges facts regarding the services he and other pathologists performed during on-call hours and why those hours were part of the normal working hours for him and other pathologists. The 2019 MOU Dr. Stewart and CCCERA have both relied on addresses on-call services for pathologists as well as other categories of physicians and dentists. (RJN Exh. 8.) The complete MOU of which CCCERA requests the Court take judicial notice supports the other factual allegations made by Dr. Stewart that pathologists as a grade or class have special provisions for on-call services that raise a factual issue under the CCCERA Compensation Earnable Policy as to whether on-call hours are part of the "normal working hours" set for pathologists under their collective bargaining agreement with County.

Section 6.1 defines a work week generally as five eight-hour days totaling 40 hours (RJN Exh. 8 [2019 MOU p. 12]), which is notably different from Dr. Stewart's Employment Agreement (Am. Pet. Exh. [Employment Agreement work week defined as 32 hours plus ten weeks of on-call time]). Section 6.4 of the 2019 MOU covers on-call pay generally for PDO member physicians and dentists and provides an employee is eligible for clinical on-call pay when "assigned additional on-call obligations beyond the obligations required as part pf their normal job duties" but the subsequent portion of Section 6, Section 6.8, addressing days and hours of work for each of the 13 categories of physicians and dentists covered by the MOU, provides that for pathologists, "All clinical on call shifts (including: holidays, days, nights, and weekends) must be shared equitably between all Providers in this classification. Payment for this duty is included in the classification's base pay." (RJN Exh. 8 [MOU p. 22 (emphasis added)].) Only one other employee category (Oral Surgeon) in the 2019 MOU includes mandatory on-call time, and that category does not provide that on-call pay is part of the base pay for that position. (RJN Exh. 8, p. 21.) It is not clear whether the MOU for the periods prior to the 2019 MOU has similar provisions, but the fact that CCCERA chose to rely on the 2019 MOU suggests that they were similar, and the terms of Dr. Stewart's Employment Agreement attached to the Amended Petition are consistent with those terms defining his work week with fewer than 40 hours and including mandatory "on call" hours.

3. Mandatory Duty or Showing of Abuse of Discretion

CCCERA contends that Petitioner cannot demonstrate (1) CCCERA had a mandatory duty to include his on-call pay in his compensation earnable, and (2) CCCERA abused its discretion in excluding his on-call pay as pay for work outside normal work hours. The Court was admittedly skeptical of whether Petitioner alleged facts sufficient to show CCCERA has a "clear," "mandatory," and "ministerial" duty

to include Petitioner's on-call pay as "compensation earnable" in his original Petition. On the Amended Petition based on the record before the Court, though, it is not clear to the Court that, if the facts and evidence show that Dr. Stewart's on-call services meet the criteria in CCCERA's Compensation Earnable Policy (RJN Exh. 5 [Compensation Earnable Policy Section III.D, p. 4), that CCCERA did not have a legal duty to include that pay as compensation earnable under its own Compensation Earnable Policy and Government Code section 31461, or that CCCERA had discretion to exclude that pay even if Petitioner overcomes the presumption of exclusion of that pay. CCCERA has not cited any authority that CCCERA has discretion to exclude pay made to an employee from "compensation earnable" if the pay meets the inclusion criteria in its Compensation Earnable Policy and Government Code section 31461 because the services and pay were part of the "normal working hours" and not outside normal working hours. Indeed, such a position would appear to violate CCCERA's Compensation Earnable Policy.

CCCERA's June 2022 Denial Letter cites a long list of evidence it considered in making its determination to exclude Petitioner's on-call pay, including the categorical assignment of nonpensionable status for all on-call pay in 2015, but all of that evidence is not before the Court on this demurrer. Upon further review, for the reasons set forth above and in light of the *Shelden* and *Stevenson* decisions cited below, the Court concludes the Amended Petition sufficiently alleges a claim not resolvable as a matter of law on demurrer that CCCERA may have a duty to include Petitioner's on-call pay in the calculation of his pensionable compensation because the on-call pay may meet the standards for inclusion under CCCERA's Compensation Earnable Policy and Government Code section 31641. (*See Shelden, supra,* 189 Cal.App.4th 458, 463-465 [addressing on an evidentiary record whether additional, overtime hours a deputy sheriff worked helping clear a backlog of warrants were hours "outside normal working hours" and properly excluded by the retirement association from his retirement compensation calculation]; *Stevenson v. Board of Retirement of Orange County Employees' Retirement System* (2010) 186 Cal.App.4th 498, 501-512 [with evidentiary record through administrative hearing and before trial court, trial court determination whether sheriff's classification was properly considered "narcotics investigator" or "investigator" and therefore whether his overtime pay in the narcotics bureaus should or should not have been included in the retirement board's calculation of his "compensation earnable"].)

CCCERA has cited decisions which it contends upheld exclusion of "on-call" pay from "compensation earnable" under PEPRA. (*Marin, supra,* 2 Cal.App.5th 674, 686 n. 9, 708; *City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th 522, 539.) The decision in *Marin, supra,* 2 Cal.App.5th 674, refers in a footnote to the retirement board's policy categorically excluding standby and certain other forms of pay in its implementation of PEPRA. (*Id*. at 686 n. 9.) "On-call" pay is not explicitly included in the list of excluded categories. Further, as in the Prior Litigation, the petitioners in that case made a constitutional claim for impairment of their vested rights based on the exclusion of certain pay categories for employees who had joined the retirement system before the changes were made to the scope of pensionable compensation under PEPRA. (*Id.* at 679-680.) The trial court sustained a demurrer without leave to amend, finding PEPRA's new provisions limiting pay included in compensation earnable did not violate the federal or state constitutions. (*Id.*) Consistent with the later holding in *Alameda*, the Court of Appeal held that there was no constitutional violation based on an impairment of any vested contract rights, since their vested right was to a reasonable pension, the

calculation of the components of which could be modified without violating their constitutional rights. (*Id.* at 693, 697, 700, 704, 708 ["[W]e are in effect deciding an odd hybrid—whether the Pension Reform Act is unconstitutional on its face as it applies to the claimed vested contractual rights of MCERA employees. That is a limited issue of legislative power considered in an undisputed factual context."].)

The *City of Pleasanton* decision addressed "standby pay" for a district fire chief and whether the pay should have been included in his pensionable compensation or excluded as compensation for additional service "outside normal working hours" under the Public Employees' Retirement Law, Government Code section 20000 *et seq.* ("PERL"). (*City of Pleasanton, supra,* 211 Cal.App.4th at 527.) Under PERL's administrative procedures, after the employee appealed, the case was assigned to an administrative law judge for a hearing and determination which created an evidentiary record on which the determination was made that the standby pay was properly excluded as compensation for services outside normal working hours. (*Id.* at 528-529.) In his petition, in addition to a due process claim, the employee argued that the determination by the board that his standby pay was properly excluded from his pensionable earnings because it was compensation for services outside his normal 40-hour work week and therefore outside his normal working hours was "against the weight of the evidence." (*Id.* at 537.) The division chief worked a regular weekday 40-hour shift and was paid an additional 7.5 percent as "standby pay" for his assignment to a backup schedule, but unless he was called into work, he could be at home not working on nights, weekends, and holidays. (*Id.* at 538 ["[T]here was no dispute that, unless called in to relieve the division chief who had primary responsibility in an emergency, he could be at home after 5:00 p.m. every day during the week and all day on weekends and holidays, while on backup duty. There was no evidence in the record as to the circumstances in which he would be called upon to relieve the division chief or how frequently or infrequently those circumstances arose."].)

The trial court granted Petitioner's petition for writ relief. The Court of Appeal reversed, stating "In our view, [employee's] position that his 'normal working hours' included his standby schedule does not reflect a reasonable interpretation of the statute or of the standby pay provision of his labor agreement. It would mean [employee's] 'normal' workweek was not 40 hours, but over 60 hours—a difference of more than 50 percent. Yet for the additional 20-plus hours added to his normal workweek he was only being compensated at a small fraction of his base salary. Consistent with the testimony of the witnesses, and the unambiguous language of [employee's] compensation plan, we think it is more reasonable to view the 7.5 percent pay increment as compensation to Linhart for being available to work on a standby basis outside of his normal working hours." (*Id*. at 539.)

Petitioner attached the June 2022 Denial Letter, which identifies the information and documents on which CCCERA states it based its decision that his on-call pay is not properly considered "compensation earnable" under Government Code section 31461(b)(3) and the CCCERA Compensation Earnable Policy. However, the June 2022 Denial Letter attached to the Amended Petition also indicates CCCERA may have relied on the categorical exclusion of all on-call pay for all employees in the retirement system beginning in September 2015, including Dr. Stewart, and denied Dr. Stewart's claim for inclusion of his on-call pay on that basis. As set forth above, the June 2022 Denial Letter also cites other evidence as the basis for CCERA's decision, but that other evidence is not

before the Court on demurrer and the Court cannot determine as a matter of law on the demurrer that the evidence recited in the letter but not before the Court means that CCCERA's decision was supported by substantial evidence or not arbitrary or capricious in light of that evidence.

The issue on demurrer is only whether the Amended Petition states facts sufficient to state a cause of action, not whether Dr. Stewart will ultimately prevail on demonstrating his compensation earnable calculation must include his on-call pay as they were part of his "normal working hours." The Amended Petition and exhibits, and RJN Exhibits, collectively support that the Amended Petition alleges sufficient facts to state a claim that his on-call services were part of his "normal working hours" that meet the inclusion criteria of the CCCERA Compensation Earnable Policy at least for purposes of a demurrer. (*See Shelden, supra,* 189 Cal.App.4th 458, 463-465 [addressing on an evidentiary record whether additional, overtime hours a deputy sheriff worked helping clear a backlog of warrants were hours "outside normal working hours" and properly excluded by the retirement association from his retirement compensation calculation]; *Stevenson v. Board of Retirement of Orange County Employees' Retirement System* (2010) 186 Cal.App.4th 498, 501-512 [with evidentiary record through administrative hearing and before trial court, trial court determination whether sheriff's classification was properly considered "narcotics investigator" or "investigator" and therefore whether his overtime pay in the narcotics bureaus should or should not have been included in the retirement board's calculation of his "compensation earnable"].)

4. *Res Judicata* and Collateral Estoppel as Bar to the Claims in the Petition

The *res judicata* doctrine has two distinct aspects with different elements, claim preclusion and issue preclusion. (*DKN Holdings, LLC v. Faeber* (2015) 61 Cal.4th 813, 824 [noting courts sometimes use *res judicata* "with imprecision"].) "Claim preclusion 'prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them.' [Citation omitted.] Claim preclusion arises if a second suit involves (1) the same cause of action (2) between the same parties (3) after a final judgment on the merits in the first suit. [Citations omitted.] If claim preclusion is established, it operates to bar relitigation of the claim altogether." (*Id.* at 824 [emphasis added].) The claim preclusion aspect of *res judicata* prevents piecemeal litigation by splitting a single cause of action or relitigation of the same cause of action on a different legal theory or for different relief. (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 897.)

"Issue preclusion differs from claim preclusion in two ways. First, issue preclusion does not bar entire causes of action. Instead, it prevents relitigation of previously decided issues. Second, unlike claim preclusion, issue preclusion can be raised by one who was not a party or privy in the first suit. [Citations omitted.] . . . . In summary, issue preclusion applies (1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party. [Citations omitted.]" (*Id.* at 824-825 [emphasis added, citing, among others, *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 342-343].) The Court can decline to apply collateral estoppel where public policy dictates a different result. (*See Lucido, supra*, 51 Cal.3d at 342-343.)

a. Privity

For both claim preclusion and issue preclusion, Dr. Stewart must have been in privity with the PDO,

the party that litigated the Prior Litigation, and CCCERA also must show his interests were adequately represented in the prior proceeding. (*Kelly v. Vons Companies, Inc.* (1998) 67 Cal.App.4th 1329, 1338 ["A person who is in privity with a party to a former proceeding is bound by that proceeding only when his or her interests were adequately represented. [Citation omitted.]" (emphasis added)].) " ' "Due process requires that the nonparty have had an identity or community of interest with, and adequate representation by, the . . . party in the first action. [Citations.] The circumstances must also have been such that the nonparty should reasonably have expected to be bound by the prior adjudication. . . ." ' [Citations omitted.]" (*Citizens for Open Access etc. Tide, Inc. v. Seadrift Assn.* (1998) 60 Cal.App.4th 1053, 1069-1070 [adding that "[i]n the final analysis, the determination of privity depends upon the fairness of binding appellant with the result obtained in earlier proceedings in which it did not participate."].)

In *Kelly v. Vons Companies, Inc., supra,* 67 Cal.App.4th 1329, cited by CCCERA, the Court addressed privity in the context of a prior labor arbitration in which the union participated and whether the findings were binding on an employee who did not participate. The employees in that case did not contend they lacked privity, and the Court added "and it appears that their interests were adequately represented." (*Id.* at 1338.) The Court has only the records presented in CCCERA's request for judicial notice to show that the PDO adequately represented Dr. Stewart's interests in the Prior Litigation. While Dr. Stewart does not contest his membership in the PDO, Dr. Stewart's Amended Petition, and CCCERA's request for judicial notice of the 2019 MOU, show that the PDO represents approximately 13 different categories of physicians and dentists, not just pathologists. (RJN Exh. 8.) Further, the MOU shows that pathologists have certain unique terms and conditions regarding their work hours and compensation that vary from other physicians and dentists and that are specifically related to the issue of on call services and on call pay and whether those services and pay should be considered services "within normal working hours." (*See, e.g.*, RJN Exh. 8 [MOU pp. 21, 22].) The record on the demurrer is insufficient to demonstrate as a matter of law that in the Prior Litigation, the PDO adequately represented the particular interests of pathologists and what appear to be their unique on-call obligations and pay based on Dr. Stewart's Employment Agreement, his other factual allegations regarding his and other pathologists' on-call services, and the terms of the 2019 MOU. The adequacy of Dr. Stewart's representation by the PDO in the Prior Litigation is not a determination the Court can make as a matter of law on the record before it. This alone is sufficient to preclude sustaining the demurrer based on *res judicata* and collateral estoppel.

b. Same Cause of Action (*Res Judicata*)

In its current demurrer, CCCERA has presented evidence that before the PDO Petition in Intervention was filed, CCCERA had adopted a policy of excluding from compensation earnable after PEPRA all on-call pay for legacy members based on the April 10, 2013 minutes. (*See* RJN Exh. 7 [4/10/2013 CCCERA Bd. Min. Items 7 and 8, pp. 5-6].) The PDO Petition in Intervention alleged that CCCERA's failure to include in "compensation earnable" all compensation components included under a 1997 court-approved settlement (the "Paulson Settlement"), CCCERA's policy approved October 30, 2012 for implementing AB 197/PERPA ("October 2012 Policy"), and AB 197's exclusion of certain pay items from "compensation earnable" all unconstitutionally impaired vested rights of legacy employees. (RJN Exh. 2 [PDO Petn. ¶¶ 12-16, 20-22, 25-29.) The PDO Petition in Intervention alleged "on-call pay" was

an element of compensation that CCCERA allegedly committed "would be included in the calculation of [the members] final compensation," and that "AB 197's amendments are inconsistent with CCCERA and participating employers' representations and commitments to its members that these various pay items would be included in the calculation of final compensation." (RJN Exh. 2 [PDO Petn. ¶¶ 16, 21.].)

The statement of decision in the Prior Litigation indicates "on-call" and "standby" were categories of pay raised in the PDO Petition in Intervention and in some manner in the briefing because the trial court concluded in its initial judgment that the "on call" pay category required an individualized determination rather than automatic, categorical exclusion under AB 197. (RJN Exh. 3 [initial judgment Exh. A PDF pp. 82-83 [noting a change in practices by the boards in dealing with on-call compensation and lack of uniformity among the boards].) But the trial court made that conclusion based on the causes of action presented in the PDO Petition in Intervention which challenged the constitutionality of the automatic exclusion of those pay categories without an individualized determination as an impairment of vested rights. (*See* RJN Exh. 2 [PDO Petn. ¶¶ 25, 26, 29, 36, 37]; RJN Exh. 3 [initial judgment ¶¶ 5, 6, and Exh. A, PDF pp. 80-84 addressing "Services Outside of Normal Working Hours"].)

PDO also alleged that CCCERA "also decided to exclude certain pay items from compensation earnable without making a determination that such compensation has been paid to enhance CCCERA members' retirement benefits," and to the extent it made such determinations, the "determinations were incorrect." (RJN Exh. 2 [PDO Petn. ¶ 36].) There may be an inference that the "determinations" alleged in paragraph 36 of the PDO Petition in Intervention are the decisions made by CCCERA reflected in the April 10, 2013 CCCERA Board minutes, but there are no pleadings before the Court in the Prior Litigation that demonstrate those were the "determinations" litigated by the PDO in the Prior Litigation rather than determinations made in the October 30, 2012 policy that is specifically alleged in the Petition in Intervention, which is not before the Court. (PDO Petn. ¶ 22.)

Whether CCCERA could constitutionally exclude on-call pay categories without violating legacy members' vested rights is a different issue than the issue Dr. Stewart is raising in the Amended Petition. Based on the record before the Court, the Court cannot conclude as a matter of law that the claims made in Dr. Stewart's Amended Petition are barred by *res judicata* based on the final judgment in the Prior Litigation.

c. Identical Issue (Issue Preclusion)

To constitute the "identical issue" for issue preclusion purposes, "the factual predicate of the legal issue decided in the prior case must be sufficient to frame the identical legal issue in the current case, even if the current case involves other facts or legal theories that were not specifically raised in the prior case." (*Textron Inc. v. Travelers Casualty & Surety Co.* (2020) 45 Cal.App.5th 733, 747 [emphasis added].) (*See also Murphy v. Murphy* (2008) 164 Cal.App.4th 376, 400 ["The ' "identical issue" requirement addresses whether "identical factual allegations" are at stake in the two proceedings . . . .' [Citation omitted.]"].) CCCERA broadly argues the issue of whether on-call pay could be excluded by CCCERA from "compensation earnable" under Government Code section 31461 as pay for services rendered outside "normal working hours" was the issue litigated and determined in the Prior Litigation.

While CCCERA's subsequent Compensation Earnable Policy may merely repeat, verbatim, language from the text of Government Code section 31461 with regard to excluding pay for additional services rendered "outside normal working hours," that does not mean that the identical issue presented for determination by Dr. Stewart's Amended Petition was litigated and finally determined in the Prior Litigation. The causes of action alleged by the PDO were framed as constitutional questions and constitutional violations of the vested rights of legacy members, which the California Supreme Court rejected in *Alameda*. CCCERA's Compensation Earnable Policy, which is intended to track Government Code section 31461, does not categorically exclude on-call pay. CCCERA has not demonstrated from the judicially noticed documents that the issue presented and litigated by the PDO was whether on-call pay for its legacy members who are pathologists is for additional services rendered outside normal working hours under Government Code section 31461 and the 2014/2021 Compensation Earnable Policy, which is the issue Dr. Stewart presents in his Amended Petition. Indeed, the issue cannot be identical because the Compensation Earnable Policy, unlike the policy reflected in the April 10, 2013 Board minutes, on its face is not a categorical, blanket exclusion of on-call pay.

**Conclusion**

The Amended Petition and matters of which the Court can take judicial notice preclude determining Petitioner's claims as a matter of law on CCCERA's demurrer. Evidence is required, based on the facts sufficiently alleged in the Amended Petition to state a potential claim for a traditional writ of mandate under the standards above. The Court does not need to reach the issue of whether Petitioner was denied due process based on this ruling.

**9:00 AM CASE NUMBER: MSC20-01066**
**CASE NAME: RHODES VS KRBC**
**HEARING ON SUMMARY MOTION AGAINST PLAINTIFF DAVID RHODES**
**FILED BY: BLUELINE ENGINEERING, INC CALIFORNIA CORPORATION**
***TENTATIVE RULING:***

Before the Court is Defendant Blueline Engineering, Inc.'s Motion for Summary Judgment or in the alternative, Summary Adjudication Against Plaintiff Rhodes.

**Factual Allegations and Background**

This matter pertains to issues related to the purchase of real property located at 18 Quiet Country Lane in Danville, California (the "Property"). Prior to the purchase of the Property by Plaintiff in September 2016, Defendant KRBC, LLC was the owner and developer of the new construction on the Property, as well as some of the surrounding area.

KRCB hired several entities to help it improve the Property by building a house and developing the property around the house (the "Project"). It hired Defendant Blueline to assist with the Project. The specific scope of Blueline's work is a point of dispute. Relevant to the issues at hand, KRCB also hired Humann Company, Inc. to prepare grading and drainage plans for the Property. Defendant Crouse General Engineering was hired to perform the work related to the grading and drainage for

the Property.

At issue here is the work performed at the back of the Property where there is a seasonal stream running across a portion thereof. The grading and drainage plans called for a 50-foot pipe to be installed in that area, with dirt or fill to be placed on top to create the appearance of level land. Humann prepared the plans, Crouse performed the work, and Blueline is alleged to have supervised all the work on this portion of the Project. At some point, the plans changed and additional pipe was installed.

After the Project was completed, KRBC sold the Property to Plaintiff David Rhodes in September 2016. In December 2018, Plaintiff received a Notice of Alleged Violation for the Army Corp of Engineers indicating that work performed around the 'stream' on the Property was considered an "unauthorized discharge of dredge or fill material" into the stream and was a potential violation of the Clean Water Act as it had not been done pursuant to a permit issued by the Corp. In January 2020, the Corp issued an Approved Jurisdictional Determination, which among other things, established that the 'stream' was within its jurisdiction.

Plaintiff filed his initial Complaint in June 2015 alleging various causes of action against the Parties he believed were responsible for creating this problem. The operative Third Amended Complaint was filed on February 8, 2024, and includes claims for breach of contract and breach of express warranty against Defendant Blueline.

**Standard**

Summary judgment is proper if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. (Code Civ. Proc. § 437c(c).) A moving defendant satisfies the initial burden of showing that a cause of action has no merit if he shows that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to the cause of action. (Code Civ. Proc., § 437c (p)(2).)

Once the defendant meets that burden, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto. (*Ibid*.) The plaintiff then has the burden of demonstrating that triable issues of material fact exist. (*Ibid*.)

The party moving for summary judgment has the burden of persuasion to show there is no triable issue of material fact and thus it is entitled to judgment as a matter of law. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850.) Only if the moving party successfully meets this burden does the burden shift to the opposing party to make its own prima facie showing of the existence of a triable issue of material fact. (*Ibid*.; *see also Chern v. Bank of America* (1976) 15 Cal.3d 866, 873.) "In ruling on the motion, the court must consider all of the evidence and all of the inferences reasonably drawn therefrom, and must view such evidence and such inferences, in the light most favorable to the opposing party." (*Aguilar, supra,* 25 Cal.4th at p. 843 (internal citations and quotations omitted); see also, Code of Civ. Proc. §437c(c).)

**Analysis**

**Breach of Warranty**

**Pre-Litigation Notice**

In its opening brief, Blueline argues that Plaintiff was required to provide it pre-litigation notice of the alleged breach of warranty citing several cases dating from 1943 through 2011 – without much analysis or discussion as to how the law changed over those almost 70-years. The main case Blueline appears to rely on is the California Supreme Court case of *Vogel v. Thrifty Drug Co.* (1954) 43 Cal.2d 184. Blueline's full argument that notice is required appears to be as follows: "The requirement that Plaintiff provide notice of a breach of an express warranty as a condition precedent to the right to recover is well established. (*Vogel v. Thrifty Drug Co.* (1954) 43 Cal.2d 184, 188 ["The clear and practically unbroken current of authority establishes the doctrine that the requirement of notice, to be given by the vendee charging breach of warranty is imposed as a condition precedent to the right to recover, and the giving of notice must be pleaded and proved by the party seeking to recover for such breach."]."

It is worth noting that the *Vogel* Court went on to explain that the "giving of such notice must be pleaded and proved by the purchaser seeking to recover or defend for the breach of warranty." (*Ibid.* citation omitted.) This appears to support Blueline's claim that pre-litigation notice is required before Plaintiff can move forward with a breach of warranty claim. It is undisputed that Blueline did not provide prelitigation notice of a breach of warranty. (UMF 52.)

In Opposition, Plaintiff notes, however, that the basis of the ruling in *Vogel* was the Court's interpretation and application of Section 1769 of the Civil Code, which provided for the required notice. (*Vogel* 43 Cal.3d at 187-88.) Civil Code section 1769 was repealed in 1963. (See e.g. *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.* (2010) 754 F.Supp.2d 1145, 1180 fn. 21 noting is repeal in 1963.) Given the repeal of Section 1769, Plaintiff contends that *Vogel* and the other cases cited by Blueline that likewise rely on interpretation and enforcement of Section 1769 are no longer good law and do not control. (See *Arata v. Tonegato* (1957) 152 Cal.App.2d 837; *Ice Bowl, Inc. v. Spalding Sales Corp.* (1943) 56 Cal.App.2d 918; *Davidson v. Herring-Hall-Marvin Safe Co.* (1955) 131 Cal.App.2d Supp. 874; *Title Ins. & Trust Co. v. Affiliated Gas Equipment, Inc.* (1961) 191 Cal.App.2d 318.)

Plaintiff then notes that other cases cited by Blueline (e.g. *Cardinal Health 301, Inc. v. Tyco Electronics Corporation* (2008) 169 Cal.App.4th 116 and *Alvarez v. Chevron Corporation* (9th Cir. 2011) 656 F.3d 925), while they don't rely on application of Section 1769 (since it had been repealed by the time of those cases) – they rely on application of Commercial Code section 2607, which Plaintiff argues does not apply to the sale of real property. (Opp. at 9:25-10:12.) Plaintiff goes on to outline how Commercial Code section 2607 only applies to "goods," which, by definition, in the Commercial Code does not apply to real property. (*Ibid.*) It is worth noting that Blueline never mentions Commercial Code section 2607 or that the cases it cites interpret different statutes.

On Reply, Blueline indicates that it "does not move for summary judgment on a statute repealed 60 years ago nor does Blueline move for summary judgment based on the Commercial Code." (Reply at 1:21-23.) Instead, it now argues for the first time in its Reply that what it's "authorities establish is that the common law requirement of pre-litigation notice is well-established," citing *Whitfield v. Jessup* (1948) 31 Cal.2d 826, 828 – which was not cited in its opening papers. As discussed below, *Whitfield* does not support this argument. Blueline does not identify which of the authorities it previously cited do support this argument. Nor does it try to discuss or explain any of its prior cases to show that they support its position.

As for *Whitfield*, it is another case discussing the applicability of Civil Code section 1769 – which was repealed in 1963. The citation to *Whitfield* includes the parenthetical that the "rule stated by

[section 1769] is the same as that state in the American Law Institute Restatement (Rest. Contracts, sec. 412) and probably the rule prevailing in California before the code section was added in 1931 (see cases cited 22 Cal.Jur. 983-988.)." Blueline does not explain the importance of this parenthetical, which does not appear to apply to the matter at hand. What the law "probably" was before the enactment of a statute which was repealed over sixty years ago does not appear relevant to the current state of the law in 2020 and beyond.

Blueline then argues that "Plaintiff fails to cite a single authority for the proposition that he need *not* give notice of breach when he is in privity with the warrantor." (Reply 2:1-2.) Plaintiff, as the moving party, however, has the burden to show that Plaintiff does have a duty to provide such notice.

Both parties overlook the case of *Pollard v. Saxe & Yolles Dev. Co.* (1974) 12 Cal.3d 374, which is cited by Blueline in its opening papers – but merely for the proposition that a nearly 4-year delay in providing notice is unreasonable. (MSJ at 8:16-17.) There is no other discussion of *Pollard*.

In *Pollard*, the California Supreme Court discussed the application of Commercial Code section 2607 to the sale of "newly constructed real property." There, the defendants (as developers) contracted with a general contractor for the construction of five apartment buildings. (*Id.* at 376.) Defendants ultimately conveyed the properties to plaintiffs. (*Id.*) Plaintiffs took possession of the properties in April 1963. Upon moving in, they became aware of numerous defects in the buildings. (*Id.* at 377.)

"Plaintiffs did not notify the defendants of the defects until January 1967. Suit was commenced on 3 February 1967, more than three years but less than four years after both actual and constructive notice of the damage to their property." (*Ibid.*) The trial court held that "plaintiffs would be barred by their failure to give timely notice of breach of warranty." (*Ibid.*) In upholding the trial court's determination, the California Supreme Court held:

> Although the statute requiring notice within a reasonable time (Cal.U.Com.Code, § 2607, subd. (3)) is applicable to sales of goods (see Cal.U.Com.Code § 2102 et seq.), a similar requirement should apply here. In treating common law warranties, it has been recognized that statutory standards should be utilized where appropriate. [citations] The requirement of notice of breach is based on a sound commercial rule designed to allow the defendant opportunity for repairing the defective item, reducing damages, avoiding defective products in the future, and negotiating settlements. The notice requirement also protects against stale claims. (E.g., *Whitfiled v. Jessup* (1948) 31 Cal.2d 826, 829 [].) ***These considerations are as applicable to builders and sellers of new construction as to manufacturers and dealers of chattels***.

In *Pollard*, the Court noted that "[a]lthough possibly not aware of the cause, [plaintiffs] knew of the defects for nearly four years before giving notice." (*Pollard*, 12 Cal.3d at 380.) As such, the Court upheld "the trial court's determination that the action for breach of warranty is barred by unreasonable delay in giving notice." (*Ibid.*)

It is unclear why Blueline failed to examine *Pollard* or cite to it as support for its claim that notice is required in the present situation. Since it was cited, however, the Court determined it needed to be discussed.

Based on the statements in *Pollard*, it appears there is a notice requirement for warranty claims that pertain to real estate transactions. The issue is whether the notice requirement applies as between

Plaintiff and Blueline.

**To whom is Notice Due?**

Commercial Code section 2607, subd. (3)(A), which forms the basis of the *Pollard* court's analysis, states, in pertinent part:

> "The buyer must, within a reasonable time after he or she discovers or should have discovered any breach, notify ***the seller*** of the breach or be barred from any remedy…." (emphasis added.)

The *Pollard* Court appears to have retained the same restriction in who needs to be notified when it determined that the same considerations "are as applicable to builders **and sellers** of new construction as to manufacturers and dealers of chattels." (*Pollard*, 12 Cal.3d at 380.)

Thus, under *Pollard*, the buyer that is claiming a breach of warranty claim must give notice to the seller before moving forward with a breach of express warranty claim. Other courts have found this to be the case. (See e.g. *Cardinal Health 301, Inc. v. Tyco Electronics Corp.* (2008) 169 Cal.App.4th 116, 135 ["To recover on a breach of warranty claim, '[t]he buyer must, within a reasonable time after he or she discovers or should have discovered any breach, notify the seller of breach or be barred from any remedy.'") Federal courts have recognized this rule as well: "The Ninth Circuit recently affirmed this rule, holding that '[t]o avoid dismissal of a breach of contract or breach of warranty claim in California, [a] buyer must plead that notice of the alleged breach was provided to the seller within a reasonable time after discovery of the breach.'" (*Keegan v. Am. Honda Motor Co.* (2012) 838 F.Supp.2d 929, 950-51 quoting *Alvarez v. Chevron Corp.* (9th Cir. 2011) 656 F.3d 925, 932, add'l citations omitted.)

The above notice requirement has been limited to the seller of the product and does not extend to the "manufacturers with whom they have not dealt." (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 61; see also *Sanders v Apple, Inc.* (2009) 672 F.Supp.2d 978, 989, quoting *Greenman*; *McVicar v. Goodman Global, Inc.* (2014) 1 F.Supp.3d 1044, 1057 [agreeing that where "a breach of express warranty claim is brought 'by injured consumers against manufacturers with whom they have not dealt[,]' then notice is not required.") While federal district court opinions are not binding, they can be used as persuasive authority. (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 296.)

Blueline makes it abundantly clear that it did not sell the Property to Plaintiff, nor did it execute any disclosures relating thereto. (UMF 36-37.) Blueline has provided no evidence that it directly interacted with Plaintiff at all. As such, it has failed to show that Plaintiff was required to give it notice of the breach of warranty claims before filing suit against Blueline for breach of warranty.

**Breach of Warranty Claim**

"It is well established that the pleadings determine the scope of relevant issues on a summary judgment motion." (*Nieto v. Blue Shield of California Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 74.) Here, the TAC alleges the following regarding the breach of warranty claim:

> 93. Defendant Blueline provided a written warranty to Plaintiff, which warranted and guaranteed that the construction on the Property conformed with the plans and specifications of the Construction Agreement's Contract Documents, including Humann's grading and drainage plans.
>
> 94. The construction on the Property did not conform to the Contract

> Documents because whereas Humann's grading and drainage plans called for 50 feet of pipe in the stream on the Property, Crouse installed approximately 135 feet of pipe. Blueline approved Crouse's invoices for payment for its grading work, including the work that deviated from Humann's grading and drainage plans.

As for the warranty, the relevant portion reads as follows:

> The Contractor herby warrants and guarantees to the Owner that all work, materials, equipment and workmanship provided, furnished or installed by or on behalf of Contractor in connection with the above-referenced Project ("work")have been provided, furnished and installed in the strict conformity with the Contract Documents for the work, including without limitation, the Plans and Specifications.

The "Contractor" is identified as Blueline Engineering Inc. The Owner is the Plaintiff. At the top of the warranty, the Project Name is stated as "Candau Residence."

Both parties agree that the Warranty also references the "Contract Documents," which includes the Contract between KRBC and Blueline (the "AIA Contract"). Article 1 defines the Contract Documents as follows:

> The Contract Documents consist of this Agreement, Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, Addenda issued prior to execution of this Agreement, other documents listed in this Agreement and Modifications issued after execution of this Agreement, all of which form the Contract, and are as fully a part of the Contract as if attached to this Agreement or repeated herein. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. An enumeration of the Contract Documents, other than a Modification, appears in Article 9.

Blueline makes a couple arguments based on the wording of the above documents. First, they argue that the "work"/Project to which the Warranty is limited is the Candau Residence – i.e. the house itself and not any of the property. This is because at the top of the Warranty, the Project name is Canadau Residence. Second, Blueline argues that even if one considers the Contract Documents, the grading and drainage plans are not listed in Article 9 of the AIA Contract. As such, it is not properly a part of the Contract Documents.

Plaintiff disputes this restrictive reading of the documents, and notes there are other reasonable interpretations. First, as to the "project" Plaintiff notes that the Project is listed as "18 Quiet Country Lane, Danville" on the AIA Contract. It is worth noting that the Warranty also identifies "18 Quiet Country Lane, Danville" at the top of it, before noting the Project Name is "Candau Residence."

As to the lack of specifically identifying the grading and drainage plans, Plaintiff notes that the definition of Contract Documents specifically includes (in Article 1) the "Drawings," and "Specifications." The grading and drainage plans can and do easily qualify under either or both of these terms. (See Ex. 9 at HUMANN00040-41 – "Grading and Drainage Plan".) Plaintiff also points out that, while Blueline contends that it only warranted the work on the house itself, the plans for the house are nowhere listed in the AIA Contract. Nor is there any such limitation spelled out anywhere in the Contract Documents or the warranty itself.

The interpretation put forward by Plaintiff is a reasonable one. Without making any determination as to which interpretation is correct, the Court finds that Blueline has not met its burden of persuasion to show there is no triable issue of material fact and thus it is entitled to judgment as a matter of law. (*Aguilar*, supra, 25 Cal.4th at 850.)

**Negligence**

"The essential elements of a cause of action for negligence are: (1) the defendant's legal duty of care towards the plaintiff; (2) the defendant's breach of duty – the negligent act or omission; (3) injury to the plaintiff as a result of the breach – proximate or legal cause; and (4) damage to the plaintiff." (*Leyva v. Garcia* (2018) 20 Cal.App.5th 1095, 1103.) "The threshold element of a cause of action for negligence is the existence of a duty to use due care toward an interest of another that enjoys legal protection against unintentional invasion." (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 397.) "Whether this essential prerequisite to a negligence cause of action has been satisfied in a particular case is a question of law to be resolved by the court." (*Ibid.*)

As for the basis of the negligence claim, the TAC alleges (relevant to Blueline) that it "had a legal duty to exercise ordinary care when … performing construction, and inspecting the Property." (¶ 87.) It also alleges that Blueline "fail[ed] to adhere [to] the relevant standards of care in performing construction work for or related to the Property." (¶ 88.)

Both parties agree that when there is no privity of contract between the parties (as is the case here), California courts balance a checklist of factors to determine if a legal duty exists. These factors include: [1] the extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to him, [3] the degree of certainty that the plaintiff suffered injury, [4] the closeness of the connection between the defendant's conduct and the injury suffered, [5] the moral blame attached to the defendant's conduct, and [6] the policy of preventing future harm. (*Weseloh Family Ltd. P'ship v. K.L. Wessel Constr. Co., Inc*. (2004) 125 Cal.App.4th 152, 163 quoting *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 397.) The Parties disagree as to the applicability of each of the factors.

**1) Extent transaction intended to affect the Plaintiff**

Blueline notes that it worked for KRCB, and not Plaintiff, and that its work was intended to benefit KRCB and not an unknown future purchaser of the Property. It presents evidence that it did not design the grading plan, did not have any input into the grading plan, and did not perform or supervise any work relating to the grading plan in the area at issue. In addition, they did not hire or pay the contractor that performed the work at issue.

Plaintiff counters that Blueline was hired as the general contractor for the Project hired by KRCB, and as such Blueline was responsible for the construction and development of the Property including supervising the work being performed was in accordance with Humann's grading and drainage plan. (Opp. at 14:4-11.) The evidence cited by Plaintiff, however, does not indicate that Blueline was the 'general contractor' on the project. In fact, the AIA 101 and AIA 201 Contracts do not contain the term 'general contractor' anywhere within them. The only evidence that does mention Blueline being a 'general contractor' is the declaration of Mr. Candau indicating that was Blueline's role. That evidence, however, is inadmissible. (See evidentiary objections below.)

Per the AIA Contracts, Blueline was providing supervision of the Project for KRCB. They were not designing or performing any of the work related to the area in dispute. They had no direct contact with Plaintiff. All its efforts were meant to benefit KRCB. To the extent their efforts would benefit

Plaintiff, it was only through KRCB.

**2) Foreseeability of Harm**

Blueline presents evidence that several of the consultants and people hired by KRCB, including the members of KRCB, reviewed the area and did not identify any potential issues with performing the work in the area in dispute. This included the Town of Danville which issued a permit for the work. The PMQ for the Town of Danville testified that once it issued the grading permit, from their perspective, the permittee would not need to obtain any permits from other state or federal agencies. The people at the Town were surprised when the Army Corp of Engineers asserted jurisdiction. This is the first time in the PMQ's 35-years with the Town that such a thing occurred. There is additional evidence that the parties believed the area to be a man-made drainage area, and not a creek or stream. In other words, there was no consensus as to the area in dispute being a stream or creek.

Plaintiff presents evidence that Humann's PMQ testified that it is common knowledge that if there is a creek in the area, that you try to avoid it, and if necessary, you hire a consultant to 'guide you through any encroachment on the creek.' He also presents evidence that Mr. Crouse was told by the Town of Danville inspector that he should probably check with fish and game to see if they had jurisdiction.

While it may be true that when there is a creek at issue, people should try to avoid it and take extra care. The evidence presented by Blueline, however, shows that it was not clear that there was a creek in the area. As such, they type of harm at issue in this matter was not foreseeable at the time the actions were taken to develop the Property.

**3) Degree of certainty that Plaintiff suffered injury**

Blueline argues that Plaintiff has not been damaged as the Notice of Violation for the Army Corp of Engineers just requests his participation in the Corp's investigation. Plaintiff also testified that to date he has not spent any money on remediation. He also has not listed the property for sale or obtained any valuations for the Property.

Plaintiff argues that the Army Corp has asserted jurisdiction over the Property and "requires return of the Property's creek (*i.e.*, stream) area to its original condition." (Opp. at 15:18-20.) The exhibit cited, however, does not make any mention of requiring the creek area to its original condition. Plaintiff also attempts to submit evidence regarding how much it would cost to return the Property to that original condition. This evidence is inadmissible, however, based on Blueline's objections thereto. (See evidentiary objections below.) Plaintiff asserts that he intends to offer expert testimony supporting his claim for damages. Plaintiff does not, however, actually present any such evidence.

"[W]here the parties have had sufficient opportunity adequately to develop their factual cases through discovery and the defendant has made a sufficient showing to establish a prima facie case in his or her favor, in order to avert summary judgment the plaintiff ***must produce substantial responsive evidence*** sufficient to establish a triable issue of material fact on the merits of the defendant's showing." (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 162-63 emphasis added.) "For this purpose, responsive evidence that gives rise to no more than mere speculation cannot be regarded as substantial, and is insufficient to establish a triable issue of material fact." (*Id.* at 163.) Plaintiff does not offer evidence to support his claims of damages. Instead, he contends that he will offer expert testimony at trial to support his claims. At this point in time, however, any supposed

offer of evidence by a future expert is merely speculative. "Because '[s]peculation … is not evidence' [citation] speculation cannot create a triable issue of material fact.'" (*McHenry v. Asylum Entertainment Delaware, LLC* (2020) 46 Cal.App.5th 469, 479 citations omitted; see also *Pipitone v Williams* (2016) 244 Cal.App.4th 1437, 1453 ["A triable issue of fact can only be created by a conflict of evidence, not speculation or conjecture."]

**4) Closeness of Connection Between Defendant's Conduct and Injury Suffered**

As outlined above, Blueline did not design or perform any of the work in the disputed area. Per the Contract with KRCB, Blueline was to perform supervision and management for the Project.

Plaintiff argues that Blueline was also involved in identifying and hiring Crouse to perform the work, and that the grading was overseen, reviewed, and approved by Blueline. The evidence in support, however, is objected to by Blueline and such objections were sustained. (See evidentiary objections below.) As such, Plaintiff has not submitted any admissible evidence to support its contentions.

**5-6) Moral Blame Attached to Defendant's Conduct and Policy of Preventing Future Harm**

There is no evidence that Blueline acted intentionally with respect to the issues relating to the permitting issues and/or work involving the area in dispute. Numerous different people and organizations were involved in the development of the Property and none of them identified the issue. Even persons associated with the Town of Danville were surprised when they were informed of the Army Corp of Engineers involvement. While it is unclear Blueline's specific authority was relating to the area of the Project at issue, there is no evidence that it was solely responsible for these decisions. Under the circumstances of this case, it would be hard to assign much if any moral blame on Blueline.

In addition, given the unique circumstances of this matter, it does not appear that holding Blueline responsible in this situation would send any meaningful signal that would readily prevent similar future harm from occurring.

**Summary**

In weighing the above factors, the Court finds that on balance there is insufficient evidence to support a finding that a legal duty existed as between Blueline and Plaintiff to support Plaintiff's negligence claim.

**Conclusion**

Based on the above, Blueline's motion for summary judgment is **denied**. Blueline's motion for summary adjudication as to the breach of warranty cause of action is **denied**. Blueline's motion for summary adjudication as to the negligence cause of action is **granted**.

**Evidentiary Objections**

The Court needs to only rule on those objections to evidence that were material to the disposition of the MSJ/MSA. (See CCP § 437c(q).)

**Blueline's Objections:**

Objection 1: Sustained (Evid. Code § 403, 702.)
Objection 2: Sustained (Evid. Code § 403, 702.)
Objection 3: Sustained as to Ex. J (Evid. Code § 403, 702.)
Objection 4: Sustained.

Objection 5: Sustained (Evid. Code § 1523)
Objection 6: Overruled.
Objection 7: Overruled.
Objection 8: Sustained (Evid. Code § 403, 702.)
Objection 9: Sustained (Evid. Code § 350.)
Objections 10: Sustained (Evid. Code § 403, 702.)
Objection 11: Sustained (Evid. Code § 350.)