SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 21, Honorable THANG NGUYEN BARRETT, Presiding

Donna M. O'Hara, Courtroom Clerk

DATE: 01/12/2021 TIME: 9:00 AM

191 North First Street, San Jose, CA 95113

Telephone: 408-882-2330

To contest the ruling, call (408) 808-6856 before 4:00 P.M.

LAW AND MOTION TENTATIVE RULINGS

DEPARTMENT: 21 DATE: January 12, 2021 TIME: 9:00 AM

PREVAILING PARTY SHALL PREPARE THE ORDER, UNLESS OTHERWISE INDICATED BELOW.

(SEE RULE OF COURT 3.1312 – PROPOSED ORDER MUST BE E-FILED BY COUNSEL AND SUBMITTED PER 3.1312(C))

TROUBLESHOOTING TENTATIVE RULINGS

If you do not see this week's tentative rulings, either they have not yet been posted, or your web browser cache (temporary internet files) is pulling up an older version. You may need to "REFRESH", or "QUIT" your browser and reopen it

PLEASE NOTE:

IN LIGHT OF THE SHELTER-IN- PLACE ORDERS DUE TO COVID-19, ALL APPEARANCES MUST BE BY COURTCALL, UNLESS OTHERWISE AUTHORIZED BY THE COURT. COURT REPORTING ALSO MUST BE DONE REMOTELY (NOT IN COURTROOM) AND FORM #CV-5100 IS REQUIRED.

IF PERSONAL APPEARANCE IS PERMITTED BY THE COURT, COMPLIANCE IS REQUIRED WITH PROTOCOLS CONCERNING SOCIAL DISTANCING AND FACE MASKS.

MEMBERS OF THE PUBLIC MAY LISTEN IN TO THE HEARINGS BY CALLING THE **PUBLIC ACCESS LINE** AT TOLL FREE # 888-363-4734, ACCESS CODE 1737120
AS A REMINDER, STATE AND LOCAL COURT RULES PROHIBIT RECORDING OF COURT PROCEEDINGS WITHOUT A COURT ORDER. THIS PROHIBITION APPLIES WHILE IN THE COURTROOM AND WHILE LISTENING IN ON THE PUBLIC ACCESS LINE.

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LAW AND MOTION TENTATIVE RULINGS

LINE #	CASE #	CASE TITLE	RULING
LINE 1	19CV343088	*Jane Doe et al vs. Union School District et al*	Demurrer by defendant Union School District to the second amended complaint of plaintiff Jane Doe 2. Please press ctrl key and click on Line 1 for tentative ruling. The Court will prepare the final order.
LINE 2	20CV364608	*Jane Roe vs. John Doe et al*	Demurrer by plaintiff Jane Roe to the first amended cross-complaint of defendant John Doe. Please press ctrl key and click on Line 2 for tentative ruling. The Court will prepare the final order.
LINE 3	20CV369829	*A.H. et al vs. Jason Curtis et al*	Defendant Alicia Labana's special motion to strike the Complaint's sixth cause of action. Please press ctrl key and click on Line 3 for tentative ruling. The Court will prepare the final order.
LINE 4	20CV369829	*A.H. et al vs. Jason Curtis et al*	Defendant Saint Francis High School of Mountain View' demurrer to the Complaint's first, second, third and fourth causes of action. Please see Line 3.

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LAW AND MOTION TENTATIVE RULINGS

LINE 5	20CV369829	*A.H. et al vs. Jason Curtis et al*	Defendants Saint Francis High School of Mountain View and Jason Curtis' motion to strike the Complaint's request for punitive damages. Please see Line 3.
LINE 6	20CV369829	*A.H. et al vs. Jason Curtis et al*	Defendants Saint Francis High School of Mountain View and Jason Curtis' special motion to strike the Complaint's fifth cause of action. Please see Line 3.
LINE 7	20CV364078	*JPMorgan chase Bank, N.A. vs. Jenni Nguyen*	Motion for judgment on the pleadings Plaintiff JPMorgan Chase Bank, N.A. The parties are invited to appear to inform the Court whether they have reached a settlement. Although telephonic appearance is preferable, appearance in person in court is allowed.

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LAW AND MOTION TENTATIVE RULINGS

LINE 8	17CV312580	*Steve Hartley vs. Bellarmine College Preparatory et al*	Defendant Bellarmine College Preparatory ("Bellarmine')'s motion to compel further responses to Requests for Production of Documents, Set Three, Requests Nos. 33 and 34 ("Motion") is DENIED as moot, as further production were provided by Plaintiff Steve Hartley ("Plaintiff") following the filing of Bellarmine's motion. Plaintiff's request for judicial notice, filed on December 12, 2020, is GRANTED in its entirety. Plaintiff's request for monetary sanctions is DENIED. Bellarmine's request for monetary sanctions is GRANTED against Plaintiff in the amount of $1,485.00, payable within 30 days of the filing of this order Bellarmine is to prepare the final order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 9	19CV358633	*Xe Tran et al vs. Marco Sanchez et al*	Plaintiffs' motion to compel Defendant Villara Corporation ("Villara")'s appearance at deposition and production of documents is GRANTED. Villara is to appear at the next properly noticed deposition and to produce all documents responsive to the requests for production as set forth in the deposition notice dated August 3, 2020. Villara is to provide a privilege log for any document withheld on the basis of privilege. Villara is also allowed to make lproper objections to questions posed at the deposition. Plaintiffs' request for judicial notice, filed on January 5, 2021, is GRANTED as to Plaintiffs' complaint and amended complaint. Plaintiffs' request for judicial notice is DENIED as to Defendants' motion to strike punitive damages allegations and Plaintiffs' opposition To Defendants' motion to strike. Plaintiffs' request for monetary sanctions is granted against Villara in the amount of $2,250.00, payable within 30 days of the filing of this order. Defendant's request for monetary sanctions is DENIED. Plaintiffs are to prepare the final order.

SUPERIOR COURT, STATE OF CALIFORNIA
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LAW AND MOTION TENTATIVE RULINGS

LINE 10	20CV366939	*ZL Technologies, Inc. vs. Arvind Srinivasan et al*	Defendant and Cross-Complainant Arvind Srinivasan and Defendant SplitByt, Inc. ("Defendants")'s motion for protective order ("Motion") This motion is taken OFF CALENDAR. Based on the notice of motion, the Motion was to be heard by the Court-appointed Discovery Referee, Hon. John Flaherty (ret) at JAMS on October 21, 2020.
LINE 11	16CV299696	*Amy Cheng vs. Mark McConville et al*	The motion by Shea & McIntyre, A P.C. c/o Marc L. Shea to be relieved as counsel for Plaintiff Amy Cheng is unopposed and is GRANTED. The Court will use the submitted proposed order.
LINE 12	19CV355736	*Citibank, N.A. et al vs. Jacqueline Trujillo*	Defendant's motion to set aside default/judgment ("Motion") On September 10, 2020, this Motion was continued to October 29, 2020, in D. 21. However, it appears that this Motion was set for hearing on October 29, 2020 by mistake in both D. 20 and in D. 21. Based on the minute orders, Defendant appeared in D. 21 but not in D. 20, and counsel for Plaintiff appeared in D. 20 but not in D. 21. The motion in D. 21 was continued to January 12, 2021, but the same Motion was heard and decided in D. 19. The parties are invited to appear. Although telephonic appearance is preferable, appearance in person in court is allowed.

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LAW AND MOTION TENTATIVE RULINGS

LINE 13	2010-1-CV-183957	*World Botanical Gardens, Inc. vs. W. Wagner, et al*	Motion by Dan Perkins and Walter L. Wagner to vacate the Renewal of Judgment filed on May 21, 2020. The Parties are invited to appear telephonically.
LINE 14	19CV353577	*Absolute Resolutions Investments, LLC vs. Quang Ly*	Plaintiff Absolute Resolutions Investments, LLC, ("Plaintiff")'s motion for the Court to enter judgment in favor of Plaintiff and against Defendant Quang Ly ("Motion") The Motion is unopposed and is GRANTED. Judgment is entered in favor of Plaintiff and against Defendant Quang Ly in the amount of $18,238.11. The declaration of Plaintiff's counsel states that Plaintiff was submitting a proposed order and a proposed judgment, but no proposed order or proposed judgment have been submitted. Plaintiff is to prepare the final order and judgment.
LINE 15	20PR188918	*In the Matter of Jose Parra*	The petition to compromise disputed claim of minor The Petition is DENIED WITHOUT PREJUDICE. There is no Attachment 19(a(1) (information re: financial institution) and no Attachment 18a (agreement re: legal services). Moreover, an Order to Deposit Money Into Blocked Account (form MC-355) was not provided.
LINE 16			
LINE 17			
LINE 18			
LINE 19			
LINE 20			
LINE 21			
LINE 22			

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LAW AND MOTION TENTATIVE RULINGS

LINE 23			
LINE 24			
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LINE 27			
LINE 28			
LINE 29			
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Case Name: Jane Doe, a minor, by and through her Guardian ad Litem, John Doe v. Union School District, et al.

Case No.: 19-CV-343088 (consolidated with Case Nos. 19-CV-343101 and 19-CV-348167)

Before the Court is the demurrer by defendant Union School District ("District") to the second amended complaint ("SAC") of plaintiff Jane Doe 2 ("Plaintiff").

Factual and Procedural Background

Plaintiff brings an action against District and a former teacher ("Teacher"), defendant Samuel Neipp, for damages arising from Teacher's sexual abuse of Plaintiff at Dartmouth Middle School, one of District's schools. Plaintiff filed a complaint against District and Teacher on February 13, 2019.

On November 21, 2019, the Court consolidated Plaintiff's action –*Jane Doe 2 v. Union School District, et al.* (Santa Clara County Superior Court, Case No. 19-CV-343101) - with the following cases for all purposes, except trial: (1) *Jane Doe v. Union School District, et al.* (Santa Clara County Superior Court, Case No. 19-CV-343088); and (2) *Jane Doe 1 and 2 v. Union School District, et al*. (Santa Clara County Superior Court, Case No. 19-CV-348167).

On December 26, 2019, Plaintiff filed a motion for leave to file a first amended complaint ("FAC"). The proposed FAC was attached as Exhibit 1 to the motion and alleged causes of action for: (1) sexual abuse of a minor (against Teacher); (2) intentional infliction of emotional distress (against Teacher); (3) sexual harassment (against Teacher); (4) negligent hiring, supervision, and retention (against District); (5) breach of mandatory duty to report suspected child abuse (against District); (6) negligent failure to warn, train, or educate (against District); (7) negligent supervision of a minor (against District); and (8) negligence. In connection with her claims, Plaintiff sought general damages, special damages, and treble damages against District under Code of Civil Procedure section 340.1. Plaintiff asked that if her motion was granted, the FAC be deemed the operative pleading and deemed filed as of the date the motion was granted.

The minute order of the hearing on Plaintiff's motion for leave to file a first amended complaint, dated January 23, 2020, indicates that Plaintiff's motion was unopposed and granted by the court (Hon. Mark H. Pierce).[1]

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[1] On August 19, 2020, the Court entered a formal order pursuant to Code of Civil Procedure section 635 granting Plaintiff's motion.

Subsequently, District filed a demurrer to the fourth, sixth, and seventh causes of action of the FAC as well as Plaintiff's request for treble damages under Code of Civil Procedure section 340.1. District also filed a motion to strike Plaintiff's request for treble damages.

At the hearing on August 11, 2020, the Court sustained District's demurrer to the fourth, sixth, and seventh causes of action with leave to amend, and overruled District's demurrer to Plaintiff's request for treble damages. On September 4, 2020, the Court filed its formal order on District's demurrer. This order also denied District's motion to strike.

On August 20, 2020, Plaintiff filed the operative SAC. According to the allegations of the SAC, Teacher repeatedly sexually abused Plaintiff over a three-year period at her middle school, causing her severe emotional distress and injury. (SAC, ¶¶ 1, 3, 8-13, 15-20, & 28.) Prior to Teacher's abuse of Plaintiff, District personnel had notice that Teacher previously engaged in the same "grooming" type behavior, including sending flirtatious and sexual text messages to minor female students, but District failed to supervise Teacher to prevent the same "grooming" and abusive conduct directed at the Plaintiff. (*Id.* at ¶ 14.) Additionally, prior to Teacher's abuse of Plaintiff, District allegedly knew of other student and parent complaints of serious misconduct made against Teacher, yet District failed to properly and adequately investigate those complaints and failed to take appropriate disciplinary action against Teacher. (*Id.* at ¶¶ 48-50.) Had District properly investigated, supervised, trained, and monitored Teacher's conduct, it would have discovered Teacher was unfit to be employed as a teacher. (*Id.* at ¶ 52.) By failing to adequately supervise, monitor, or investigate, District allegedly allowed Teacher to continue his predatory conduct towards underage students, including Plaintiff. (*Ibid.*) Furthermore, District allegedly engaged in a cover-up of Teacher's prior sexual abuse of minor, female students beginning in early 2009 and continuing during the time that Plaintiff was being abused by Teacher on the District campus. (*Id.* at ¶¶ 24-29.) As a result of District's cover-up of Teacher's prior sexual abuse, Plaintiff was sexually abused. (*Ibid.*)

Based on these allegations, the SAC alleges causes of action for: (1) sexual abuse of a minor (against Teacher); (2) intentional infliction of emotional distress (against Teacher); (3) sexual harassment (against Teacher); (4) negligent hiring, supervision, and retention (against District); (5) breach of mandatory duty to report suspected child abuse (against District); (6) negligent failure to warn, train, or educate (against District); (7) negligent supervision of a minor (against District); and (8) negligence. In addition to general and special damages, Plaintiff also seeks an award of treble damages against District under Code of Civil Procedure section 340.1.

On October 16, 2020, District filed the instant demurrer to the SAC. Plaintiff filed papers in opposition to the demurrer on December 28, 2020. On January 5, 2021, District filed a reply in support of its demurrer.

Discussion

District demurs to the fourth through seventh causes of action of the SAC and Plaintiff's request for treble damages under Code of Civil Procedure section 340.1 on the ground of failure to allege sufficient facts to constitute a cause of action. (See Code Civ. Proc., § 430.10, subd. (e).)

A. Request for Judicial Notice

In connection with her opposition, Plaintiff asks the Court to take judicial notice of its September 4, 2020 order, sustaining District's demurrer to the fourth, sixth, and seventh causes of action of the FAC, overruling District's demurrer to Plaintiff's request for treble damages, and denying District's motion to strike. Plaintiff also asks the Court to take judicial notice of various legislative history materials.

The Court declines to take judicial notice of the subject materials because they are not necessary, helpful, or relevant to the material issues before the Court. (See *Jordache Enterprises, Inc. v. Brobeck, Phleger Harrison* (1998) 18 Cal.4th 739, 748, fn. 6 [a court need not take judicial notice of matter if it is not "necessary, helpful, or relevant"].)

Accordingly, Plaintiff's request for judicial notice is DENIED.

B. Legal Standard

The function of a demurrer is to test the legal sufficiency of a pleading. (*Trs. Of Capital Wholesale Elec. Etc. Fund v. Shearson Lehman Bros.* (1990) 221 Cal.App.3d 617, 621.) Consequently, " '[a] demurrer reaches only to the contents of the pleading and such matters as may be considered under the doctrine of judicial notice' [citation]." (*Hilltop Properties, Inc. v. State* (1965) 233 Cal.App.2d 349, 353; see Code Civ. Proc., § 430.30, subd. (a).) "It is not the ordinary function of a demurrer to test the truth of the [ ] allegations [in the challenged pleading] or the accuracy with which [the plaintiff] describes the defendant's conduct. [ ] Thus, [ ] the facts alleged in the pleading are deemed to be true, however improbable they may be." (*Align Technology, Inc. v. Tran* (2009) 179 Cal.App.4th 949, 958, internal citations and quotations omitted.) However, while "[a] demurrer admits all facts properly pleaded, [it does] not [admit] contentions, deductions or conclusions of law or fact." (*George v. Automobile Club of Southern California* (2011) 201 Cal.App.4th 1112, 1120.)

C. Request for Treble Damages

District demurs to Plaintiff's request for treble damages under Code of Civil Procedure section 340.1, arguing that the request should be dismissed because Plaintiff fails to allege sufficient facts to support her claim of a cover up under Code of Civil Procedure section 340.1.

The proper procedural vehicle to challenge the propriety of a remedy is a motion to strike, not a demurrer. (*Caliber Bodyworks, Inc. v. Super. Ct.* (2005) 134 Cal.App.4th 365, 384-385, disapproved of on other grounds in *ZB, N.A. v. Super. Ct.* (2019) 8 Cal.5th 175, 196, fn. 8; *Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1047 ["a demurrer cannot rightfully be sustained to part of a cause of action or to a particular type of damage or remedy"].)

Here, District improperly attempts to challenge the propriety of a sought-after remedy, treble damages under Code of Civil Procedure section 340.1, by way of demurrer. The proper procedural vehicle to challenge Plaintiff's request for treble damages under Code of Civil Procedure section 340.1 is a motion to strike, and District has not brought such a motion.

Accordingly, District's demurrer to Plaintiff's request for treble damages under Code of Civil Procedure section 340.1 is OVERRULED.

D. Fourth through Seventh Causes of Action

District initially argues the fourth, sixth, and seventh causes of action fail to state a claim because Plaintiff does not identify the particular statutory basis for those causes of action. District contends Plaintiff does not identify any statute that imposes a legal duty on it.

California's Government Claims Act creates a comprehensive statutory scheme regarding governmental liability and immunity. (*Tuthill v. City of San Buenaventura* (2014) 223 Cal.App.4th 1081, 1089.) This scheme precludes a finding of liability against public entities without express statutory authorization. (*Ibid.*) "[I]n California all government tort liability is dependent on the existence of an authorizing statute or 'enactment' [citations], and to state a cause of action every fact essential to the existence of statutory liability must be pleaded with particularity, including the existence of a statutory duty. [Citations.] Since the duty of a governmental agency can only be created by statute or 'enactment,' the statute or 'enactment' claimed to establish the duty must at the very least be identified." (*Searcy v. Hemet Unified School Dist.* (1986) 177 Cal.App.3d 792, 802; *Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, 1183 ["[D]irect tort liability of public entities must be based on a specific statute declaring them to be liable, or at least creating some specific duty of care].)

Here, the fourth, sixth, and seventh causes of action satisfy the heightened pleading standard as Plaintiff identifies the statutory bases for those claims. Specifically, Plaintiff cites Government Code sections 815.2 and 820 as the bases for her claims. Those statutes provide that a governmental entity, such as District, can be held vicariously liable for its employees' failure to adequately supervise students and/or the negligent hiring, training, retention or supervision of staff. (See *C.A. v. William S. Hart Union High Sch. Dist.* (2012) 53 Cal.4th 861, 869-872 (*C.A.*) [discussing the statutory framework for vicarious liability against governmental entities]; see also *D.Z. v. Los Angeles Unified School Dist.* (2019) 35 Cal.App.5th 210, 223 (*D.Z.*).)

Next, District argues that Plaintiff fails to plead sufficient facts showing that it had actual knowledge of Teacher's assaultive propensities. District asserts Plaintiff must, and fails to, plead facts showing that it had actual knowledge of prior instances of sexual abuse on the part of Teacher.

Plaintiff's negligence claims depend, in part, on a showing that the risk of harm was reasonably foreseeable. (See *C.A., supra*, 53 Cal.4th at pp. 869–870; see also *D.Z., supra,* 35 Cal.App.5th at p. 229.) " 'Foreseeability is determined in light of all the circumstances and does not require prior identical events or injuries.' " (*D.Z., supra,* 35 Cal.App.5th at p. 229, citing *M. W. v. Panama Buena Vista Union School Dist.* (2003) 110 Cal.App.4th 508, 519 (*M.W.*).) " 'It is not necessary to prove that the very injury which occurred must have been foreseeable by the school authorities …. Their negligence is established if a reasonably prudent person would foresee that injuries of the same general type would be likely to happen in the absence of [adequate] safeguards.' " (*Ibid.*; see *Romero v. Super. Ct.* (2001) 89 Cal.App.4th 1068, 1083 [a defendant who assumes a special relationship with a minor is deemed to have owed a duty of care to take reasonable measures to protect the minor against an assault when the evidence and surrounding circumstances establish that the defendant had actual knowledge of, and thus must have known, the offender's assaultive propensities].) "In *M.W.*, for example, the court found the school district owed a duty of care to a student who

was sexually assaulted by another student in a school bathroom. [Citation.] The court concluded that the risk of assault was foreseeable based on (1) the district's lack of supervision in the early morning when the assault occurred in a known ' "trouble spot[]," ' (2) the assailant's extensive prior record of discipline, and (3) the unique vulnerabilities of special education students such as the victim. [Citation.]" (*Ibid.;* see *Pamela L. v. Farmer* (1980) 112 Cal.App.3d 206, 208-209 [although the plaintiffs did not allege that the defendant actually knew that the perpetrator was engaging in acts of molestation, the plaintiffs alleged facts (knowledge of prior instances of sexual molestation on the part of the perpetrator) which demonstrated that defendant knew about the perpetrator's deviant propensities].)

Here, Plaintiff alleges District knew, prior to the fall of 2009, that Teacher engaged in repeated misconduct such as "being overly friendly with female minor students on campus, texting and email female minor students and meeting with female minor students for the purpose of engaging in sexual conduct with them." (SAC, ¶ 50.) Prior to Teacher's abuse of Plaintiff, District personnel were aware that Teacher had sent flirtatious and sexual text messages to minor female students. (*Id.* at ¶ 14.) During the fall of 2009, District allegedly knew of complaints made by other students and parents regarding serious misconduct by Teacher. (*Id.* at ¶¶ 27 & 48.) Around that same time, District personnel witnessed Teacher and Plaintiff alone together on multiple occasions and expressed to Teacher, Plaintiff, and others that they believed Teacher and Plaintiff "were spending an inappropriate amount of time together." (*Id.* at ¶ 13.) "In or around early 2009 through June 2011, [District] learned that … [Teacher]: (1) was seen kissing a minor female student; (2) was sending inappropriate, flirtatious and sexual text messages to 12 and 13 year old female … students; (3) was text messaging minor, female … students late at night about non-school related issues; (4) was asking minor, female … students about their sex lives; (5) was hugging minor, female … students alone in his classroom; (6) was repeatedly violating [District's] mandates to not have text message and/or non-school related conversations with minor, female … students[;] and (7) that [Teacher] had 'predatory behaviors' and 'crossed the lines of child exploitation.' " (*Id.* at ¶ 25.) Taken together, these allegations are sufficient to show that District had knowledge of Teacher's deviant propensities such that the risk of sexual abuse was reasonably foreseeable. Thus, District's argument on demurrer is not well-taken.

With respect to the fifth cause of action, District argues Plaintiff fails to state a claim because the allegations of the SAC do not demonstrate that it had knowledge of facts that would raise reasonable suspicion that there was sexual relationship between Teacher and Plaintiff. District therefore concludes that Plaintiff fails to allege facts showing that it breached its mandatory duty to report suspected child abuse. Lastly, District asserts the claim fails because Plaintiff does not identify the specific employees who were in a position to observe, or reasonably suspect, the abuse.

District's arguments regarding the fifth cause of action are not well-taken. First, Plaintiff was a student at Dartmouth Middle School, where Teacher was employed, through June 2010. (SAC, ¶¶ 1-16.) Some of Teacher's abuse of Plaintiff occurred while she was a student at Dartmouth Middle School. (*Ibid.*) Thus, Plaintiff was in the care of District at the time Teacher's alleged abuse of her occurred. (See *Randi W. v. Muroc Joint Unified School Dist.* (1997) 14 Cal.4th 1066, 1087 [the Child Abuse and Neglect Reporting Act was intended to protect children in the custodial care of the person charged with reporting the abuse].) Furthermore, as explained above, the SAC sufficiently alleges facts showing that District knew of the risk that Teacher posed to minor female students, like Plaintiff. Finally, District does not

cite any legal authority providing that Plaintiff must identify the specific employees who were in a position to observe, or reasonably suspect, the abuse in order to plead a claim for breach of mandatory duty to report suspected child abuse. (See *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 ["When [a party] fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived."]; see also *Schaeffer Land Trust v. San Jose City Council* (1989) 215 Cal.App.3d 612, 619, fn. 2 ["[A] point which is merely suggested by a party's counsel, with no supporting argument or authority, is deemed to be without foundation and requires no discussion."].)

Finally, District contends that it is immune under Government Code sections 820.2 and 821.6 and/or the Paul D. Coverdell Teacher Protection Act to the extent Plaintiff's claims are predicated on "its employees' acts in investigating [Teacher] its employees' discretionary acts in not terminating [Teacher] …." (Mem. Ps. & As., pp. 19:13-22:13.)

Government Code section 820.2 provides immunity for public employees from liability for injuries resulting from an "act or omission … where it was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." (Gov. Code, § 820.2.) In order to sustain a demurrer on the basis of immunity, the facts must appear on the face of the complaint. (*Caldwell v. Montoya* (1995) 10 Cal.4th 972, 981 (*Caldwell*).) Furthermore, immunity under Government Code section 820.2, is reserved for those "basic policy decisions [which have] ... been [expressly] committed to coordinate branches of government," and as to which judicial interference would thus be "unseemly." (*Ibid*., citing *Johnson v. State of California* (1995) 69 Cal.2d 782, 783; *Jacqueline T. v. Alameda County Child Protective Services* (2007) 155 Cal.App.4th 456, 465 (*Jacqueline*) [immunity is limited to policy and planning decisions, and does not reach lower level decisions that merely implement a basic policy already formulated].) Since all acts involve choices among alternatives, the immunity does not depend upon a semantic parsing of the word "discretion." (*Caldwell, supra*, 10 Cal.4th at p. 981.) Instead, the analysis turns on whether on the face of the complaint, facts alleged show that the employee was acting in a quasi-legislative, policy making capacity versus making "ministerial" decisions implementing policies already formulated. (*Id*. at p. 784.) Only the former are entitled to the immunity under this section. (*Ibid*.)

Here, the allegations of the SAC indicate that District's employees were involved in the supervision and discipline of Teacher and were also responsible for keeping students, such as Plaintiff, safe. While the choices and decisions made by District's employees regarding the investigation and discipline of Teacher were discretionary in nature, they are not the kind of basic policy decisions made by quasi-legislative governing bodies entitled to judicial deference. Thus, the claims, as pleaded, do not show an available immunity defense under Government Code section 820.2.

Next, Government Code section 821.6 shields prosecutors and other government actors involved in investigations deemed to be part of judicial and administrative proceedings. (*Paterson v. City of Los Angeles* (2009) 174 Cal.App.4th 1393, 1404 (*Paterson*).) However, the cases cited by District regarding that statute are lawsuits against police, prosecutors, social workers with Child Protective Services, and a workers' compensation investigator; those cases do not involve the type of "investigatory" behavior at issue in this case. (See e.g., *Paterson, supra*, 174 Cal.App.4th 1393; *Richardson-Tunnell v. Schools Ins. Program for Employees* (2007) 157 Cal.App.4th 1056; *Jacqueline, supra*, 155 Cal.App.4th 456; *Ingram v. Flippo* (1999) 74 Cal.App.4th 1280; *Amylou R. v. County of Riverside* (1994) 28 Cal.App.4th 1205.)

Therefore, the demurrer cannot be sustained on the basis of government immunity pursuant to Government Code section 821.6.

Lastly, the Paul D. Coverdell Teacher Protection Act provides teachers with immunity from liability for acts within the scope of employment. (*C.B. v. Sonora School Dist.* (E.D.Cal. 2009) 691 F.Supp.2d 1123, 1148-1149.) As is relevant here, title 20 United States Code section 7946, subdivision (a) provides that except as "provided in subsection (b) of this section," which specifies exceptions to teacher liability protection, "no teacher in a school shall be liable for harm caused by an act or omission of the teacher on behalf of the school if—(1) the teacher was acting within the scope of the teacher's employment or responsibilities to a school or governmental entity; (2) the actions of the teacher were carried out in conformity with Federal, State, and local laws (including rules and regulations) in furtherance of efforts to control, discipline, expel, or suspend a student or maintain order or control in the classroom or school; (3) if appropriate or required, the teacher was properly licensed, certified, or authorized by the appropriate authorities for the activities or practice involved in the State in which the harm occurred, where the activities were or practice was undertaken within the scope of the teacher's responsibilities; (4) the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the teacher; and (5) the harm was not caused by the teacher operating a motor vehicle …." Thus, the statute sets forth numerous factors that must be present before the affirmative defense of immunity is granted. (See *Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 69; *Mirzada v. Department of Transportation* (2003) 111 Cal.App.4th 802, 806.)

Here, the facts required to establish the section 7946, subdivision (a) immunity are not stated on the face of the SAC, but rather depend on pleading and proof by District. (See *Varshock v. Department of Forestry & Fire Protection* (2011) 194 Cal.App.4th 635, 651-652; *Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 856; *Bacon v. Southern Cal. Edison Co*. (1997) 53 Cal.App.4th 854, 858-859.) " ' "[I]n governmental tort cases 'the rule is liability, immunity is the exception' …. Unless the Legislature has clearly provided for immunity, the important societal goal of compensating injured parties for damages caused by willful or negligent acts must prevail." [Citations.]' [Citation.]" (*Virginia G. v. ABC Unified School Dist*. (1993) 15 Cal.App.4th 1848, 1855-1856.) District has not established federal immunity as a matter of law and factual disputes raised by the section 7946, subdivision (a) immunity claim cannot be resolved by demurrer. (See *Favila v. Katten Muchin Rosenman LLP* (2010) 188 Cal.App.4th 189, 224.)

Accordingly, District's demurrer to the fourth through seventh causes of action is OVERRULED.

Calendar line 2

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Case Name: Jane Roe v. John Doe
Case No.: 20-CV-364608

Before the Court is the demurrer by plaintiff Jane Roe ("Plaintiff") to the first amended cross-complaint ("FACC") of defendant John Doe ("Defendant").

The demurrer by plaintiff Jane Roe ("Plaintiff") to the first amended cross-complaint ("FACC") of defendant John Doe ("Defendant") came on for hearing before the Honorable Thang N. Barrett on January 12, 2021, at 9:00 a.m. in Department 21. The matter having been submitted, the Court finds and orders as follows:

Factual and Procedural Background

This action for personal injury arises out of allegations that Defendant engaged in a sexual relationship with Plaintiff while fraudulently concealing the risk of infection presented by his medical condition - genital herpes - and eventually infected Plaintiff with the disease. Based on those allegations, Plaintiff filed the operative first amended complaint against Defendant on August 31, 2020, alleging causes of action for: (1) sexual battery; (2) battery; (3) sexual harassment; (4) gender violence; (5) negligence; (6) fraudulent concealment; (7) fraudulent misrepresentation; (8) intentional infliction of emotional distress ("IIED"); and (9) negligent infliction of emotional distress.

On September 18, 2020, Defendant filed the operative FACC against Plaintiff. As is relevant here, Defendant alleges that Plaintiff engaged in conduct that seriously alarmed, annoyed, and harassed him. (FACC, ¶ 48.) Plaintiff allegedly sent Defendant's wife sexually explicit photographs, misleading emails creating the impression that Defendant reserved a hotel room for an affair, and text messages regarding Defendant's sexual partners. (*Id.* at ¶ 49.) Plaintiff also contacted Defendant's professional colleagues and accused him of being incompetent and breaching fiduciary duties. (*Ibid.*) Plaintiff's alleged conduct served no legitimate purpose and was undertaken to alarm, annoy, and harass Defendant and his family. (*Id.* at ¶¶ 48 & 50.) Plaintiff's conduct caused Defendant to suffer emotional distress and professional and reputational harm. (*Id.* at ¶¶ 50-51.) Based on the foregoing allegations, the FACC alleges causes of action for: (1) disclosure of private materials under Civil Code section 1708.85; (2) civil harassment under Code of Civil Procedure section 527.6; (3) IIED; and (4) defamation per se.

On October 19, 2020, Plaintiff filed the instant demurrer to the FACC. Defendant filed an opposition to the demurrer on December 23, 2020. On January 4, 2021, Plaintiff filed a reply.

Discussion

Plaintiff demurs to the second cause of action of the FACC on the ground of failure to allege facts sufficient to constitute a cause of action. (See Code Civ. Proc., § 430.10, subd. (e).)

I. Request for Judicial Notice

In connection with her moving papers, Plaintiff asks the Court to take judicial notice of the FACC and Judicial Council Form CH-100, Request for Civil Harassment Restraining Orders.

As an initial matter, Plaintiff's request for judicial notice of the FACC is unnecessary as the Court already considers the operative pleading in analyzing the pending demurrer. (See *Paul v. Patton* (2015) 235 Cal.App.4th 1088, 1091, fn. 1 [denying as unnecessary a request for judicial notice of the pleading under review on demurrer].)

Next, the Court may properly take judicial notice of the existence of Judicial Council Form CH-100 under Evidence Code section 452, subdivision (c). (See Evid. Code, § 452, subd. (c) [permissive judicial notice for "[o]fficial acts of the … judicial departments" of any state]; see also *Alan v. American Honda Motor Co., Inc.* (2007) 40 Cal.4th 894, 904, fn. 5 [judicial notice of Judicial Council forms]; *In re Trenton D.* (2015) 242 Cal.App.4th 1319, 1324, fn. 2 [same].)

Accordingly, Plaintiff's request for judicial notice is DENIED IN PART and GRANTED IN PART. The request is DENIED as to the FACC and GRANTED as to the existence of Judicial Council Form CH-100.

II. Legal Standard

The function of a demurrer is to test the legal sufficiency of a pleading. (*Trs. Of Capital Wholesale Elec. Etc. Fund v. Shearson Lehman Bros.* (1990) 221 Cal.App.3d 617, 621.) Consequently, " '[a] demurrer reaches only to the contents of the pleading and such matters as may be considered under the doctrine of judicial notice' [citation]." (*Hilltop Properties, Inc. v. State* (1965) 233 Cal.App.2d 349, 353; Code Civ. Proc., § 430.30, subd. (a).) " 'It is not the ordinary function of a demurrer to test the truth of the … allegations [in the challenged pleading] or the accuracy with which [the plaintiff] describes the defendant's conduct. … .' [Citation.] Thus, … 'the facts alleged in the pleading are deemed to be true, however improbable they may be. [Citation.]' [Citations.]" (*Align Technology, Inc. v. Tran* (2009) 179 Cal.App.4th 949, 958.)

III. Second Cause of Action

In the second cause of action for civil harassment under Code of Civil Procedure section 527.6, Defendant seeks "an injunction to prevent further acts of harassment directed toward him, his wife, and his family, including without limitation, contacting [him] and his family in any way, either directly or indirectly, including in person or by email, telephone, text message." (FACC, ¶ 52.) Defendant also seeks to recover "damages for the emotional distress

[he] has suffered as a result of [Plaintiff's] campaign of harassment," "reasonable attorneys' fees," and "costs of suit." (*Id.* at ¶¶ 53 & 56.)

Plaintiff argues the second cause of action for civil harassment under Code of Civil Procedure section 527.6 fails to allege sufficient facts to state a claim because Defendant failed to follow the specific statutory procedures for making a request for an injunction preventing harassment. Plaintiff asserts that a request for injunctive relief under Code of Civil Procedure section 527.6 must be brought by way of a petition on Judicial Council Form CH-100, Request for Civil Harassment Restraining Orders. Plaintiff points out that Defendant's request for injunctive relief is made as part of the FACC and not on the required Judicial Council form. Plaintiff further contends that the request for injunctive relief under Code of Civil Procedure section 527.6 is procedurally deficient because it was not personally served on her as required by the statute. Plaintiff also notes that Defendant's request for damages in connection with second cause of action is improper because Code of Civil Procedure section 527.6 does not authorize an award of damages; rather, the statute authorizes injunctive relief as well as the recovery of attorney fees and costs.

Conversely, Defendant contends he is not required to follow the procedures set forth in Code of Civil Procedure section 527.6 and he may, instead, seek relief under the statute by way of his FACC.

Code of Civil Procedure section 527.6, subdivision (a)(1) provides that a victim of "harassment … may seek a temporary restraining order and an order after hearing prohibiting harassment as provided in this section."

"[R]estraining orders issued under section 527.6 are not normal injunctions obtained under the usual procedures. Instead, they are obtained using simplified, quick procedures." (*Yost v. Forestiere* (2020) 51 Cal.App.5th 509, 524 (*Yost*).) "The legislative history for section 527.6 states that, under prior law, ' "a victim of harassment [could] bring a tort action based either on invasion of privacy or on intentional infliction of emotional distress. Where great or irreparable injury [was] threatened, such victim [could] obtain an injunction under procedures detailed in [section] 527(a)." ' [Citation.]" (*Yost, supra,* 51 Cal.App.5th at p. 520, citing *Smith v. Silvey* (1983) 149 Cal.App.3d 400, 405.) "In comparison, section 527.6 ' "would establish an expedited procedure for enjoining acts of 'harassment,' as defined …. [Section 527.6] would make it a misdemeanor to violate the injunction and … provide[s] for the transmittal of information on the TRO or injunction to law enforcement agencies. [¶] The purpose of the [statute] is to provide quick relief to harassed persons." ' [Citation.]" (*Ibid.*; see *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1260 (*Huntingdon*) ["in enacting section 527.6 the Legislature intended to supplement existing causes of action for emotional distress and invasion of privacy available to a victim of harassment"].)

"The quick, injunctive relief provided by section 527.6 'lies only to prevent threatened injury' - that is, future wrongs. [Citation.]" (*Yost, supra,* 51 Cal.App.5th at p. 520, citing *Scripps Health v. Marin* (1999) 72 Cal.App.4th 324, 332.) "The injunctive relief is not intended to punish the restrained party for past acts of harassment." (*Ibid.*)

"To provide quick relief, '[a] request for the issuance of a temporary restraining order without notice under this section shall be granted or denied on the same day that the petition is

submitted to the court.' (§ 527.6, subd. (e).) If a request is submitted too late in the day for effective review, the temporary restraining order must be granted or denied the next business day. (*Ibid.*) Subject to the provisions governing continuances, a hearing on the petition shall be held '[w]ithin 21 days, or, if good cause appears to the court, 25 days from the date that a petition for a temporary order is granted or denied.' (§ 527.6, subd. (g); see § 527.6, subds. (o), (p) [continuances].)" (*Yost, supra,* 51 Cal.App.5th at pp. 520-521.) "If a request for a temporary order is not made, the hearing shall be held within 21 days, or, if good cause appears to the court, 25 days, from the date that the petition is filed." (Code Civ. Proc., § 527.6, subd. (g).)

"The request for a protective order, notice of hearing, and any temporary restraining order, must be personally served on the respondent at least five days before the hearing, unless the court for good cause orders a shorter time," and "must be made in the manner provided by law for personal service of summons in civil actions." (Cal. Rules of Ct., rule 3.1160(c); Code Civ. Proc., § 527.6, subd. (m).) "The response to a request for a protective order may be written or oral, or both. If a written response is served on the petitioner or, if the petitioner is represented, on the petitioner's attorney at least two days before the hearing, the petitioner is not entitled to a continuance on account of the response." (Cal. Rules of Ct., rule 3.1160(d).)

"Compared to the normal injunctive procedures set forth in the Code of Civil Procedure, section 527.6 provides a quick, simple and truncated procedure. [Citation.] The statute provides for the proceeding to be completed in a matter of weeks and was drafted with the expectation that victims often would seek relief without the benefit of a lawyer. [Citation.]" (*Yost, supra,* 51 Cal.App.5th at p. 521, citing *Byers v. Cathcart* (1997) 57 Cal.App.4th 805, 811.) "To assist persons proceeding without a lawyer, the Legislature directed the Judicial Council to 'develop forms, instructions, and rules relating to matters governed by this section. The petition and response forms shall be simple and concise, and *their use by parties in actions brought pursuant to this section is mandatory*.' (§ 527.6, subd. (x)(1).)" (*Id.* at p. 521, italics added.) Accordingly, the Judicial Council developed Form CH-100 for requesting civil harassment restraining orders. "Also, judges are required to 'receive any testimony that is relevant' and are authorized to 'make an independent inquiry.' (§ 527.6, subd. (i).) This provision has been interpreted to mean hearsay evidence, such as a declaration or police report, is admissible during hearings conducted pursuant to section 527.6. [Citations.] Under this less formal approach to the admission of evidence, '[b]oth sides may offer evidence by deposition, affidavit, or oral testimony, and the court shall receive such evidence, subject only to such reasonable limitations as are necessary to conserve the expeditious nature of the harassment procedure set forth by … section 527.6' [Citation.]" (*Ibid.*)

In addition to injunctive relief, the prevailing party in an action brought pursuant to Code of Civil Procedure section 527.6 may be awarded court costs and attorney's fees. (Code Civ. Proc., § 527.6, subd. (s).)

Finally, "the Legislature offset the expedited procedures in section 527.6 with safeguards and several provisions limiting the scope of civil harassment restraining orders," such as a higher burden of proof and limitations the duration of the restraining order. (*Yost, supra,* 51 Cal.App.5th at pp. 521-522.)

Here, it readily apparent that Defendant has failed to comply with the statutory procedures for obtaining injunctive relief under Code of Civil Procedure section 527.6. First,

Defendant did not submit his request for a civil harassment injunction on Judicial Council Form CH-100 as required under subdivision (x)(1) of section 527.6. Rather, Defendant's request is set forth as a cause of action in his FACC. Furthermore, there is no indication that Defendant personally served Plaintiff with a copy of the request as required under subdivision (m) of section 527.6 and California Rules of Court, rule 3.1160(c). Plaintiff is also correct that the second cause of action seeks relief that is not authorized by Code of Civil Procedure section 527.6 - specifically, damages for emotional distress.

However, Plaintiff does not present any legal authority, and the Court is aware of none, providing that these procedural defects and Defendant's improper request for damages constitute a failure to state a cause of action for harassment under Code of Civil Procedure section 527.6. (See *Huntingdon, supra,* 129 Cal.App.4th at pp. 1239 & 1249-1258 [discussing whether the defendants' evidence was sufficient to demonstrate a probability of prevailing on their claim for harassment under Code of Civil Procedure section 527.6, and holding that some of the defendants met their burden].)

A motion to strike - not a demurrer - is the proper mechanism to attack a remedy that is believed to be improper and challenge portions of a pleading that are not filed in conformity with the laws of this state or a court rule. (See Code Civ. Proc., § 436, subd. (b) [providing that the court may strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court]; see also *Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509, 528 [Code Civ. Proc., § 436, subd. (b) "authorizes the striking of a pleading due to improprieties in its form or in the procedures pursuant to which it was filed]"; *Venice Town Council, Inc. v. City of Los Angeles* (1996) 47 Cal.App.4th 1547, 1561-1562 [a demurrer tests the sufficiency of the factual allegations of the complaint rather than the relief requested in the complaint]; *Turman v, Turning Point of Central Calif., Inc.* (2010) 191 Cal.App.4th 53, 63 [a motion to strike is the proper instrument to challenge a request for damages].) Notably, Plaintiff has not brought a motion to strike the second cause of action of the FACC.

For these reasons, Plaintiff's demurrer to the second cause of action is OVERRULED.

Calendar line 3

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(Also Calendar Lines 3, 4, and 5)

Case Name: A.H., et al. v. Jason Curtis, et al.

Case No.: 20CV369829

This is an action arising from the alleged constructive expulsion and defamation of minor Plaintiffs A.H. and H.H. These minors, by and through their parents (collectively "Plaintiffs") have sued Defendants Saint Francis High School ("SFHS"), Jason Curtis and Alicia Labana.

The original and still operative unverified Complaint, filed August 21, 2020, states claims for: 1) Breach of Contract (the Saint Francis High School Student-Parent Handbook; 2) Declaratory Judgment (as to the parties' "respective duties under the Handbook," Complaint at ¶97); 3) "Violation of Common Law Right to Fair Procedure"; 4) Violation of Cal. Education Code §48950; 5) Defamation (slander per se) against Defendants SFHS and Curtis, and; 6) Defamation (libel per se) against Defendant Labana. The Complaint's prayer claims that Plaintiffs have suffered general, special and compensatory damages "in excess of $20,240,000."

Currently before the Court are the following motions: 1) Defendant Alicia Labana's special motion to strike the Complaint's sixth cause of action (the only claim brought against her), filed October 19, 2020; 2) Defendants SFHS and Jason Curtis' special motion to strike the Complaint's fifth cause of action; 3) Defendant SFHS' demurrer to the Complaint's first, second, third and fourth causes of action, and; 4) Defendants SFHS and Jason Curtis' motion to strike the Complaint's request for punitive damages (¶¶107 and 126 of the Complaint.)

I. Requests for Judicial Notice

"Judicial notice may not be taken of any matter unless authorized or required by law." (Evidence Code §450.) A precondition to judicial notice in either its permissive or mandatory form is that the matter to be noticed be relevant to the material issue before the Court. (*Silverado Modjeska Recreation and Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 307, citing *People v. Shamrock Foods Co*. (2000) 24 Cal.4th 415, 422, fn. 2.)

Defendants SFHS and Curtis have submitted three requests for judicial notice ("RJN") in support of their motions and demurrer.

SFHS/Curtis' RJN in support of anti-SLAPP motion

In support of this motion SFHS/Curtis ask the Court to take judicial notice of a copy of the operative Complaint (submitted as exhibit A to the request) pursuant to Evidence Code §452(d) (court records). This request is DENIED as unnecessary as the Court already considers the operative pleading in analyzing demurrers and motions to strike. (See *Paul v.*

Patton (2015) 235 Cal.App.4th 1088, 1091, fn.1 [denying as unnecessary a request for judicial notice of pleading under review on demurrer].)

SFHS's RJN in support of demurrer

In support of its demurrer, SFHS submits a request for judicial notice of two documents: another copy of the Complaint (submitted as exhibit A to the request) and a copy of SFHS' "Amended Articles of Incorporation" (submitted as exhibit B). SFHS again asserts that the Complaint may be noticed pursuant to Evidence Code §452(d). The request is DENIED for the reasons stated above. SFHS asserts that its articles may be noticed pursuant to Evidence Code §§452(c) (as a purported official act of the State of California) and 452(h). This request is also DENIED.

First, Evidence Code §452(h) does not apply to the existence or contents of SFHS' articles. (See *Gould v. Md. Sound Indus*. (1995) 31 Cal.App.4th 1137, 1145 ["Judicial notice under Evidence Code section 452, subdivision (h) is intended to cover facts which are not reasonably subject to dispute and are easily verified. These include, for example, facts which are widely accepted as established by experts and specialists in the natural, physical, and social sciences which can be verified by reference to treatises, encyclopedias, almanacs and the like or by persons learned in the subject matter."].)

Second, §452(c) does not apply here because SFHS's submission of its articles does not make them an official act of the State of California. (See *Stevens v. Superior Court* (1999) 75 Cal.App.4th 594, 607-608 [applications and supporting documents filed by private parties with Department of Insurance were not official acts of department subject to judicial notice]; *People v. Thacker* (1985) 175 Cal.App.3d 594, 598-599 [copies of articles of incorporation, statement by domestic corporation, and notice of issuance of shares were materials prepared by private person, merely on file with state agencies, and not official acts].)

SFHS/Curtis' RJN in support of motion to strike punitive damages

In support of their motion to strike the request for punitive damages from the Complaint, SFHS and Curtis again request that the Court take judicial notice of the Complaint (exhibit A) and SFHS' articles (exhibit B) pursuant to Evidence Code §§452(d), (c) and (h). This request is DENIED for the reasons stated above.

II. Special Motions to Strike Defamation claims

There are two steps or prongs to the anti-SLAPP analysis.

First Step

When a special motion to strike is filed, the initial burden rests with the moving party to demonstrate that the challenged pleading arises from protected activity. (Code Civ. Proc. "CCP" §425.16(e); *Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.) "A defendant meets his or her burden on the first step of the anti-SLAPP analysis by demonstrating the acts underlying the plaintiff's cause of action fall within one of the four categories spelled out in [CCP] section 425.16, subdivision (e)." (*Collier v. Harris* (2015) 240 Cal.App.4th 41, 50-51.) That section provides that an "'act in furtherance of a person's right of petition or free speech under the

United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (CCP §425.16(e).) "These categories define the scope of the anti-SLAPP statute by listing acts which constitute an 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue.'" (*Collier, supra,* at 51, citing CCP §425.16(e).)

As the California Supreme Court has stressed, "the critical point is whether the plaintiff's cause of action itself was based on an act in furtherance of the defendant's right of petition or free speech." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) "In other words, the defendant's act underlying the plaintiff's cause of action must itself have been in furtherance of the right of petition or free speech." (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 670 (*Peregrine Funding*).) "In deciding whether the 'arising from' requirement is met, a court considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.'" (*Peregrine Funding, supra*, 133 Cal.App.4th at p. 670.) "[H]owever, it is not enough to establish that the action was filed in response to or in retaliation for a party's exercise of the right to petition. [Citations.] Rather, the claim must be based on the protected petitioning activity." (*Bergstein v. Stroock & Stroock & Lavan LLP* (2015) 236 Cal.App.4th 793, 804, (*Bergstein*), citing *Navellier v. Sletten* (2003) 29 Cal.4th 82, 89.) "[I]f the defendant does not demonstrate this initial prong, the court should deny the anti-SLAPP motion and need not address the second step." (*Baharian-Mehr v. Smith* (2010) 189 Cal.App.4th 265, 271 (*Baharian-Mehr*).)

A defendant needs only make a prima facie showing that the complaint "arises from" protected activity. (See *Governor Gray Davis Committee v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 458-459.)

Second Step

Only if the first step has been satisfied does the burden shift to the plaintiff to establish the second step, a "probability" that he/she/it will prevail on whatever claims are asserted against the defendant. (See CCP §425.16(b).) The plaintiff's burden in this step "is subject to a standard similar to that used in deciding a motion for nonsuit, directed verdict, or summary judgment." (*Siam v. Kizilbash* (2005) 130 Cal.App.4th 1563, 1570.) It requires the plaintiff to show that the complaint is both legally sufficient and supported by sufficient prima facie evidence to sustain a favorable judgment. (*Premier Med. Mgmt. Systems, Inc. v. Cal. Ins. Guar. Ass'n* (2006) 136 Cal.App.4th 464, 476.) "The plaintiff need only establish that his or her claim has 'minimal merit' [citation] to avoid being stricken." (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291 ("*Soukup*").) "In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (CCP §425.16(b)(2).) The evidence considered is that which would be admissible at trial. (*Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1087.)

The court considers both parties' pleadings and evidence without weighing "the credibility or comparative probative strength"; however, "it should grant the motion if, as a matter of law, the defendant's evidence … defeats the plaintiff's attempt to establish evidentiary support for the claim." (*Soukup*, supra, at p. 291.) "The plaintiff may not rely on the allegations in the complaint or assertions in a declaration based on information and belief." (*Wong v. Tai Jing* (2010) 189 Cal.App.4th 1354, 1368; accord *Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1497.) Affidavits or declarations not based on personal knowledge, or that contain hearsay or impermissible opinions, or that are argumentative, speculative or conclusory, are insufficient to show a "probability" that the plaintiff will prevail. (*Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 26; *Dwight R. v. Christy B*. (2013) 212 Cal.App.4th 697, 714.)

In order to demonstrate a probability of prevailing, the plaintiff must also produce admissible evidence sufficient to overcome any privilege or defense the defendant has asserted. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 323; *Bergstein, supra*, 236 Cal.App.4th at pp. 819-821.)

Attorneys' fees

The "prevailing defendant" on the motion to strike "shall be entitled" to recover his or her attorney fees and costs. (CCP §425.16(c).) The purpose of this fee-shifting provision is both to discourage meritless lawsuits and to provide financial relief to the SLAPP lawsuit victim. "[A]ny SLAPP defendant who brings a successful motion to strike is entitled to mandatory attorney fees." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131. See also *Platypus Wear, Inc. v. Goldberg* (2008) 166 Cal.App.4th 772 [A prevailing defendant on an anti-strategic lawsuit against public participation (SLAPP) motion may recover attorney fees and costs only on the anti-SLAPP motion, not the entire suit.]).

A. Defendant Labana's special motion to strike the sixth cause of action

The sixth cause of action specifically alleges (Complaint at ¶128) that "[o]n or around June 7, 2020, Ms. Labana published the Facebook Post, which clearly depicted and identified A.H. and H.H. and falsely accused them of engaging in 'blackface.' This false accusation was made in conjunction with holding a march and rally to demand, in part, that SFHS take disciplinary action against A. H. and H. H." A copy of the Facebook Post is attached to the Complaint as exhibit 3. The sixth cause of action further alleges that this defamatory publication constituted libel per se. The Complaint does not allege that Labana created the photo of Plaintiffs included in the "Facebook Post," but rather that she is liable for defamation because she "published" it. (See Complaint at ¶¶128, 19, 2 and 36-37.) The sixth cause of action cannot be reasonably interpreted as based on anything other than the June 7, 2020 Facebook post and so, having chosen to base the sixth cause of action on this one alleged act of Defendant Labana, Plaintiffs' argument in opposition that Labana's motion fails to address her alleged statement to the Los Altos Town Crier (Complaint at ¶48) is not a basis for denial of the motion.[2]

[2] "Where a pleading includes a general allegation, such as an allegation of an ultimate fact, as well as specific allegations that add details or explanatory facts, it is possible that a conflict or inconsistency will exist between the more general allegation and the specific allegations." (*Perez v. Golden Empire Transit Dist*. (2012) 209 Cal.App.4th 1228, 1235.) "To handle these contradictions, California courts have adopted the principle that specific

"The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage." (*Wong v. Tai Jing* (2010) 189 Cal.App.4th 1354, 1369.) To be actionable, a defamation claim must be based on a publication, "which means [a] 'communication to some third person who understands the defamatory meaning of the statement.' [Citation.]" (*Dible v. Haight Ashbury Free Clinics* (2009) 170 Cal.App.4th 843, 853.) Only false statements of fact, not opinion, are actionable as defamation. (See CACI 1707.) Whether an alleged defamatory statement constitutes fact or opinion is a question of law to be decided by the court. (*Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260.) Courts apply a "totality of the circumstances" test to determine this issue, first examining the language of the statement and then by considering the context in which the statement was made. (*Id.*)

"Libel is a false and unprivileged publication by writing, printing, picture, effigy or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injury him in his occupation." (Civ. Code, § 45.) "A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face." (Civ. Code, § 45a.)

Regarding the first prong or step of the analysis, Defendant Labana asserts that her publication of the Facebook post constitutes protected activity under CCP §425.16(e)(2), (3) and (4). While §425.16(e)(2) does not clearly apply (and Plaintiffs argue it does not), Plaintiffs concede that §425.16(e)(3) (a statement made in a public forum in connection with an issue of public interest) applies and that the first prong is satisfied. (See Plaintiffs' Opp. to Labana motion at p. 4:22-23.)

The forum of the alleged defamation, Facebook, clearly constitutes a "public forum" for purposes of the anti-SLAPP statute. (See *Kronmeyer v. Internet Movie Database Inc.* (2007) 150 Cal.App.4th 941, 950, citing *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 41, fn. 4 among others.)

The sixth cause of action also clearly alleges that the Facebook post related to an issue of interest to a definable portion of the public, individuals connected to SFHS, a controversy over purported racist acts by SFHS students (which may not have had any reasonable connection to Plaintiffs). In determining whether a statement in a public forum was made "in connection with an issue of public interest," courts have stressed that there must truly be an issue of interest to the definable, measurable portion of the general public. (See *DuCharme v. Intl. Brotherhood of Elec. Workers* (2003) 110 Cal.App.4th 107, 119 ["[W]here the issue is not of interest to the public at large, but rather to a limited, but definable portion of the public (a private group, organization, or community), the constitutionally protected activity must, at a minimum, occur in the context of an ongoing controversy, dispute or discussion, such that it warrants protection by a statute that embodies the public policy of encouraging *participation* in matters of public significance."], emphasis in original; *Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1132-1133 [explaining that: (1) a matter in the "public interest" means more than a just a matter that sparks the public's curiosity, (2) such a matter must be of concern to a

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allegations in a complaint control over an inconsistent general allegation." (*Id.* at pp. 1235–1236.) Plaintiffs' decision to base the sixth cause of action specifically and solely on the Facebook post controls here.

substantial number of people, (3) there must be some degree of closeness between the challenged statements and the asserted public interest, and (4) a defendant cannot turn an issue into one in the public interest simply by broadcasting information about that issue to a large number of people].)

On the second prong or step of the analysis Plaintiffs are unable to demonstrate a probability of prevailing because, as Defendant Labana notes, section 230 of the federal Communications Decency Act of 1996 ("CDA") bars the sixth cause of action. "In the Communications Decency Act of 1996, Congress declared: '*No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider*.' (47 U.S.C. § 230(c)(1).) '*No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section*.' (§ 230(e)(3).) These provisions have been widely and consistently interpreted to confer broad immunity against defamation liability for those who use the Internet to publish information that originated from another source." (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 39 (*Barrett*); emphasis added.) The *Barrett* court held that section 230 of the CDA "exempts Internet intermediaries from defamation liability for republication. … Plaintiffs are free under section 230 to pursue the originator of a defamatory Internet publication." (*Barrett, supra*, 40 Cal.4th at p. 63.)

More recently in *Hassell v. Bird* (2018) 5 Cal.5th 522 the Supreme Court reiterated that section 230(c)(1) of CDA "'confer[s] broad immunity on Internet intermediaries' " in "'a strong demonstration of legislative commitment to the value of maintaining a free market for online expression.'" (*Hassell v. Bird, supra*, 5 Cal.5th at p. 539, quoting *Barrett v. Rosenthal, supra*, 40 Cal.4th at p. 56.) The *Hassell* Court acknowledged that "our opinion in Barrett, supra, 40 Cal.4th 33, voiced some qualms about the result it reached. It explained that "[w]e share the concerns of those who have expressed reservations about the *Zeran* court's broad interpretation of section 230 immunity. The prospect of blanket immunity for those who intentionally redistribute defamatory statements on the Internet has disturbing implications." (*Id*., at pp. 62–63.) But, we added, *these concerns were of no legal consequence, because the tools of statutory interpretation compelled a broad construction of section 230*. (*Barrett*, at p. 63.)" (*Hassell, supra*, 5 Cal.5th at p.540, emphasis added.)

The Complaint here admits on its face (at ¶¶16-19, 23) that Plaintiffs know the identity of the individuals who originally made the photograph available to other individuals on the internet, including Defendant Labana. The fact that those individuals are (or were at the time) minors in no way creates an exception to section 230 of the CDA or otherwise permits a defamation claim against Defendant Labana based on the Facebook Post. As Defendant Labana used the Internet (Facebook) to publish information (the photograph of Plaintiffs) that originated from another source, she is entitled to "broad immunity against defamation liability" under section 230 as interpreted by the California Supreme Court.

Because the Court finds that the sixth cause of action is barred by section 230 of the CDA, it is unnecessary for the Court to address the parties' arguments on other issues, such the common interest privilege, the official proceedings privilege, or whether the Facebook Post can be reasonably interpreted as containing a false statement of fact as opposed to a nonactionable statement of opinion by Defendant Labana as to the minor Plaintiffs' intentions in taking the photograph.

Defendant Labana's special motion to strike the sixth cause of action is GRANTED.

As a "prevailing defendant," Defendant Labana "shall" recover her attorneys' fees and costs incurred in bringing this motion. Defendant Labana is to proceed by way of a noticed motion to recover attorneys' fees and costs and/or a costs memorandum. [3] (See *Am. Humane Ass'n v. L.A.Times Commc'ns LLC* (2001) 92 Cal. App. 4th 1095, 1103.)

Plaintiffs' request to recover their attorneys' fees and costs incurred in opposing the motion pursuant to § 425.16(c)(1) is denied.

Defendant Labana's objections to Plaintiffs' evidence submitted in opposition to her motion are overruled.

B. Defendants SFHS/Curtis' special motion to strike the fifth cause of action

The fifth cause of action for defamation (slander per se) is specifically and expressly based on a single statement purportedly made by Defendant Curtis to the media in the scope of his employment as SFHS President on June 8, 2020 during a protest march. The Complaint at ¶116 alleges that on that date Defendant Curtis "confirmed to the Mountain View Voice that, in addition to the racist Instagram account, SFHS had 'found additional incidents of racist behaviors,' including one incident that 'involved the use of blackface,' and that the students involved would face 'serious consequences.'" The Complaint at ¶117 then states that "[u]nder the circumstances—including the use of the Photograph of the Plaintiffs in the Facebook Post organizing the protest march—readers of the Voice, including members of the SFHS community, reasonably understood that Mr. Curtis was referring to A.H. and H.H. when he accused students of being subject to 'serious consequences' for wearing 'blackface.'" The Complaint at ¶119 further alleges that Curtis' statement "tended to directly injure[] Plaintiffs in their occupation as students of SFHS."

Defendants argue that the first prong or step in the analysis is satisfied here because Curtis' alleged statement was made to the media in a public forum, a public protest, concerning an issue of interest to the general public or a significant portion thereof, the problem of racism (real or perceived) at SFHS. This is "protected activity" under CCP §425.16(e)(3) and (4). Plaintiffs do not dispute this, at least for purposes of this motion. (See Opp. to SFHS/Curtis motion at p.5:6-10.) The Court finds that the first step or prong of the analysis has been satisfied as the basis of the fifth cause of action is clearly protected activity under CCP §425.16(e)(3) and (4).

On the second prong/step the Court finds that Plaintiffs have shown that the claim against SFHS/Curtis has at least "minimal merit" sufficient to show a probability of prevailing at this stage.

Defendants' first argument on the second prong, that Curtis' statement was too general to be reasonably understood as referring to Plaintiffs, is unpersuasive. While Curtis did not refer to Plaintiffs by name this is not required and there is no evidence that any other students or individuals associated with SFHS were, at the time of the statement, asserted to have

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[3] In her moving papers, Defendant Labana has indicated her intention to do so should she prevail on her special motion to strike.

engaged in "blackface." Plaintiffs have also presented declarations from individuals (Nicholas Moore, Nicole Baker, Katherine Marron) asserting that they understood Curtis' reference to blackface to be a reference to the minor Plaintiffs.

The reference to "blackface" in Curtis' statement also defeats Defendants' argument that Plaintiffs cannot show a probability of prevailing at this stage because the claim is based on a nonactionable statement of opinion. While a general allegation of racism or racist conduct may be not be actionable as defamation (see *Overhill Farms v. Lopez* (2010) 190 Cal.App.4th 1248, 1261-1262), stating that an individual engaged in "blackface" is a factual assertion that they intentionally engaged in specific behavior intended to mock or insult African Americans. It is also an assertion that may be provably false, both as to whether an individual's appearance can be reasonably described as "blackface" (see exhibits 1 & 2 to the Complaint) and as to the individual's intent at the time it occurred.

Defendants have not shown that the common interest privilege bars the fifth cause of action. The common interest privilege (Civil Code §47(c)) does not apply whenever a statement is given to the media as Defendants argue. (See *Hawran v. Hixson* (2012) 209 Cal.App.4th 256, 287 [common interest privilege does not apply to press release regarding investigation].) The common interest privilege "extends a conditional privilege against defamation to statements made without malice on subjects of mutual interest" and is "recognized where the communicator and the recipient have a common interest and the communication is of a kind reasonably calculated to protect or further that interest." (*Id*.) It does not apply to a statement "merely because it relates to a matter which may have general public interest." (*Id*.) Whether a statement is privileged is a question of law for the Court. (*Mann v. Quality Old Time Service, Inc*. (2004) 120 Cal.App.4th 90, 108.) The Court finds that Defendants have failed to establish that the common interest privilege applies to Mr. Curtis' statement to the Mountain View Voice.

Private-figure plaintiffs, such as Plaintiffs here, need only prove actual malice to recover punitive or presumed damages for defamation if the matter is one of public concern. They are only required to prove negligence to recover damages for actual injury to reputation. (See *Khawar v. Globe Internat*. (1998) 19 Cal.4th 254, 273–274 (*Khawar*).) Thus, to establish a probability of prevailing, Plaintiffs here can show actual injury rather than malice. Actual injury "is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury." (*Gertz v. Robert Welch, Inc*. (1974) 418 U.S. 323, 350.)

Plaintiffs' evidence (see declarations of A.H. and H.H.[4]) is sufficient to show actual injury at this stage. Plaintiffs have also submitted evidence (declarations of Wendy C., Bruce H., Tanya H. and Francis H.) suggesting that before Curtis made his statement Defendants had

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[4] While Plaintiffs have no right to file late papers, the Court has exercised its discretion to consider the "amended" declarations and signature pages submitted by Plaintiffs in response to Defendants' objections which, in the case of H.H., brings his declaration into compliance with CCP §2015.5.

not conducted a true investigation despite being presented with Plaintiffs' version of events and that Curtis' statement relied at least in part upon inherently unreliable sources—postings on social media. This is sufficient at this stage to demonstrate that Defendants may have acted negligently.[5]

Even public figure defamation plaintiffs (held to a higher standard than Plaintiffs here) "may rely on inferences drawn from circumstantial evidence to show actual malice. *A failure to investigate*, anger and hostility toward the plaintiff, *reliance upon sources known to be unreliable*, or known to be biased against the plaintiff—such factors may, in an appropriate case, indicate that the publisher himself had serious doubts regarding the truth of his publication." (*Christian Research Institute v. Alnor* (2007)148 Cal.App.4th 71, 84-85 [internal citations and quotation marks omitted, emphasis added]; see also *Sanders v. Walsh* (2013) 219 Cal.App.4th 855, 873.)

Thus, even if it were assumed for purposes of argument that Defendants had met their burden to show that the common interest privilege applied to the June 8, 2020 statement or that Plaintiffs were otherwise required to show actual malice at this point to demonstrate a probability of prevailing, Plaintiffs' evidence is sufficient for purposes of this special motion to strike to demonstrate that Defendants may have acted *both* negligently *and* with actual malice (due to lack of thorough investigation and reliance upon unreliable sources) in making the June 8, 2020 statement, a statement Mr. Curtis was neither required to make nor required to frame in the manner he did.

Defendants SFHS/Curtis' special motion to strike the fifth cause of action is DENIED.

Having not prevailed on their special motion to strike, Defendants SFHS/Curtis may not recover their attorneys' fees and costs incurred in bringing this motion.[6]

In light of the fact that the Court has chosen to exercise its discretion to consider the late-filed "amended" declarations and signature pages submitted by Plaintiffs, Defendants SFHS and Curtis' objections to Plaintiffs' evidence submitted in opposition to this motion are overruled.

III. Demurrer to the Complaint

Defendants SFHS demurs to the Complaint's first, second, third and fourth causes of action.

The court in ruling on a demurrer treats it "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not

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[5] Defendants' argument that the photo of the then minor plaintiffs that circulated online somehow in and of itself demonstrates a lack of negligence on their part is unpersuasive.

[6] Plaintiffs did not make a claim of entitlement to attorneys' fees and costs in their opposition to Defendants SFHS/Curtis' special motion to strike

concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp*. (1983) 35 Cal.3d 197, 213-214.)

As an initial matter Defendant's argument that the demurrer should be sustained as to all four causes of action because Plaintiffs were required to pursue administrative remedies before filing suit is unpersuasive and the Court will not sustain the demurrer on that basis. The Complaint plainly alleges (at ¶¶49-56) that when the minor Plaintiffs refused to voluntarily withdraw from the school as they were being pressured to do by SFHS, SFHS refused to provide them any administrative remedy despite requests from Plaintiffs' counsel. These factual allegations are accepted as true on demurrer.

Defendant SFHS demurs to the first cause of action for breach of contract on the ground that it fails to state sufficient facts because "Plaintiffs allege that they voluntarily resigned from the school. As such, the School could not have 'de facto expelled' Plaintiffs in violation of the Parent-Student Handbook . . . as Plaintiffs claim." (Notice of Demurrer and Demurrer at p. 2:6-8.) The demurrer is OVERRULED as this argument does not establish a failure to state facts sufficient to allege a breach of contract. Again the Complaint plainly alleges that SFHS refused to provide Plaintiffs administrative remedies (including the appeal required by the Parent-Student Handbook) and also plainly alleges (at ¶¶54-63) that Plaintiffs only initially agreed to "voluntarily withdraw" after this refusal to provide administrative remedies pursuant to an agreement that SFHS later reneged upon, stating that it would tell other educational institutions that the minor plaintiffs were required to withdraw because of a disciplinary situation. These factual allegations are accepted as true on demurrer.

The Court further notes that to the extent the parties dispute what the Parent-Student Handbook requires, a plaintiff's reasonable interpretation of an ambiguous contract is accepted as true on demurrer. (See *Rutherford Holdings, LLC v. Plaza Del Ray* (2014) 223 Cal.App.4th 221, 229-230, citing *Aragon-Haas v. Family Security Ins. Services, Inc*. (1991) 231 Cal.App.3d 232, 239.)

Defendant SFHS demurs to the second cause of action for declaratory judgment on the ground that it fails to state sufficient facts "because Plaintiffs have not sufficiently alleged a breach of contract." (Notice of Demurrer and Demurrer at p. 2:12-13). The demurrer is OVERRULED. A general demurrer (such as failure to state sufficient facts) to a cause of action for declaratory relief must be overruled as long as an actual controversy is alleged; the pleader need not establish that it is also entitled to a favorable judgment. (See *Lockheed Corp. v. Continental Ins. Co*. (2005) 134 Cal.App.4th 187, 221 ["demurrer is a procedurally inappropriate method for disposing of a complaint for declaratory relief."])

A general demurrer is usually not an appropriate method for testing the merits of a declaratory relief action because the plaintiff is entitled to a declaration of rights even if it is adverse to the plaintiff's interest. (*Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734, 752.) When a complaint sets forth facts showing the existence of an actual controversy between the parties relating to their respective legal rights and duties and requests that these rights and duties be adjudged, the plaintiff has stated a legally sufficient complaint for declaratory relief. It is an abuse of discretion for a judge to sustain a demurrer to such a complaint and to dismiss the action, even if the judge concludes that the plaintiff is not entitled to a favorable declaration. (*Id*. at p. 756.)

Defendant SFHS demurs to the third cause of action for "Violation of Common Law Right to Fair Procedure," on the ground that it fails to state sufficient facts "because Plaintiffs allege that they voluntarily resigned from the School before the School took any disciplinary action against them, including expulsion. Furthermore, the 'Common Law Right to Fair Procedure' does not apply and has not been applied by any court against a religious high school with respect to disciplinary action." (See Notice of Demurrer and Demurrer at p. 2:15-19.) This demurrer is OVERRULED.

As stated above, Defendant's first argument is contradicted by the factual allegations of the Complaint which are accepted as true on demurrer. Defendant's second argument, that the claim somehow as a matter of law cannot be brought against SFHS, is unsupported by the legal authority cited by Defendants. "The common law right to fair procedure protects an individual from arbitrary exclusion or expulsion from membership in a 'private entity affecting the public interest' where the exclusion or expulsion has substantial adverse economic ramifications. 'The purpose of the common law right to fair procedure is to protect, in certain situations, against arbitrary decisions by private organizations.' When the right to fair procedure is found to apply, 'the decisionmaking 'must be both substantively rational and procedurally fair.'" (*Kim v. Southern Sierra Council Boy Scouts of America* (2004) 117 Cal.App.4th 743, 747, internal citations omitted.) The Court is unaware of any California authority clearly holding (particularly at the pleading stage) that this cause of action may not as a matter of law be alleged against a religious high school.

Defendant demurs to the fourth cause of action for violation of Education Code §48950 on the ground that it fails to state sufficient facts "because (1) the School did not enforce any policy against Plaintiffs or discipline them, (2) the photograph was not protected speech because the photograph caused substantial disorder at the School, and (3) application of Education Code § 48950 would violate the School's religious tenets of equality." (Notice of Demurrer and Demurrer at p. 2:21-25.)

Defendant's demurrer is OVERRULED. Once again, the Complaint's factual allegations are accepted as true on demurrer. The Complaint clearly alleges that Plaintiffs were told that the minor plaintiffs would not be permitted to return to SFHS regardless of whether there was an innocent explanation for the photos of them that others (not the minor plaintiffs) had circulated online, and that SFHS was concerned with the impact of "optics" on its reputation rather than facts.

The Complaint (at ¶2) also alleges that the photos of the minor plaintiffs (exhibits 1 and 2 to the Complaint) were taken in a private residence in August 2017, before either minor plaintiff was a student at SFHS. Accepted as true on demurrer, this allegation contradicts the argument that the minor plaintiffs were not engaged in protected activity when the photos were taken or that the minor plaintiffs themselves engaged in or caused substantial disorder at SFHS in 2020. Defendant SFHS has also failed to establish how, accepting the Complaint's factual allegations as true, its alleged conduct towards Plaintiffs can be reasonably construed as falling under Educ. Code §48950(c).

As the demurrer has been overruled in its entirety, Defendants SFHS is directed to file an answer to the Complaint within 10 days of service of the Court's Order. (See CCP §472a(b) and (d); Rule of Court 3.1320(g) and (j).

IV. Motion to Strike Complaint's request for punitive damages

Defendants' SFHS and Curtis both move to strike the Complaint's request for punitive damages against them (¶¶107 and 126) pursuant to CCP §425.14.

The motion as brought by Defendant SFHS, unopposed by Plaintiffs, is GRANTED. Paragraph 107 is ordered struck from the Complaint. Paragraph 3 of the Prayer is not struck, as it was not identified in the notice of motion and makes no specific reference to SFHS.

The motion as brought by Defendant Curtis, opposed by Plaintiffs, is DENIED. CCP §425.14, by its express terms, only applies to claims for punitive or exemplary damages "against a religious corporation."

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