1.	PC20210162	ANDERSON v. PROGRESS HOUSE
Compromise Minor's Claim		

This is a Petition to compromise a minor's claim. This claim arises from a wrongful death lawsuit, for the death of minor's mother. The claim is brought by the minor's father. Petitioner requests the court authorize a compromise of the minor's claim against defendant/respondent in the gross amount of $584,727.86.

The total amount offered by Defendant is $1,325,000.00. The minor's attorney requests attorney's fees in the amount of $441,666.66, which represents 33 1/3% of the gross settlement amount. The court uses a reasonable fee standard when approving and allowing the amount of attorney's fees payable from money or property paid or to be paid for the benefit of a minor or a person with a disability. (Local Rules of the El Dorado County Superior Court, Rule 7.10.12A.(8); California Rules of Court, Rule 7.955(a)(1).) The Petition does include a Declaration by the attorney as required by California Rules of Court, Rule 7.955(c).

The minor's attorney also requests reimbursement for costs in the amount of $298,605.48. There are no copies of bills substantiating the claimed costs attached to the Petition as required by Local Rules of the El Dorado County Superior Court, Rule 7.10.12A.(6).

With respect to the $584,727.86 due to the minor, the Petition requests that they be deposited into an insured account with Morgan Stanely, subject to withdrawal with court authorization. See attachment 18b.2. which includes the name and address of the depository, as required by Local Rules of the El Dorado County Superior Court**,** Rule 7.10.12A(7).

The minor's presence at the hearing generally is required in order for the court to approve the Petition. Local Rules of the El Dorado County Superior Court, Rule 7.10.12.D. Given the age of the minor and the fact that the minor has a GAL, the court finds good cause to permit the GAL to appear either remotely or in person instead of the minor.

TENTATIVE RULING #1:

APPEARANCES REQUIRED ON FRIDAY, SEPTEMBER 6, 2024, AT 8:30 AM IN DEPARTMENT NINE.

PARTIES MAY PERSONALLY APPEAR AT THE HEARING.

IF A PARTY OR PARTIES WISH TO APPEAR BY ZOOM, PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED.

2.	**PC20200294**	**ALL ABOUT EQUINE**
Motion to Expunge Lis Pendens		

Defendants Alexander Byrd, Maynard Byrd, Debra Byrd, Laura Byrd Rodarte, Joshua Rodarte, Terry Wilson, and Dawn Wilson (collectively the "Defendants" or "Byrd and Wilson Defendants") bring these Motions to Expunge Lis Pendens[1], one as Georgetown Divide Recreation District's ("GDRD") and the other as to All About Animal Equine Rescue ("AAE").

At the hearing on August 23, 2024, Defendants and GRD confirmed that all issues pending between these parties were off calendar, thereby mooting the motion as to GRD. As to AAE, Defendants' arguments appear to be almost entirely synonymous with its arguments to terminate or modify the preliminary injunction, a request which the court denied at the hearing on August 30, 2024. At the same time, AAE's opposition focuses on the procedural defects of the motion which it argues preclude the court considering the motion on its merits.

The court agrees with Defendants that the development of the property presents new facts that may warrant a reconsideration of the court's prior orders. However, even these facts, if true, do not seem alter the court's analysis as to the probable validity of the property claim; rather, they implicate whether alternate relief, namely an undertaking under CCP 405.33, would be adequate instead of a notice of pendency of action. AAE has not fully responded to this issue, but the code permits AAE an opportunity to provide oral testimony on this issue at the hearing.

The court is mindful that the parties are scheduled to be in court on September 6, 2024 to apprise the court as to the status of AAE's inspection of Defendants' properties. The court orders the parties to appear to address the pending motion as well as to give the court a status update on the inspection and for the court to make further orders as appropriate regarding the inspection and any related sanctions, as appropriate.

TENTATIVE RULING #2:

PARTIES ARE ORDERED TO APPEAR AT THE SEPTEMBER 6, 2024 HEARING AT 8:30 A.M. IN DEPARTMENT 9.

IF A PARTY OR PARTIES WISH TO APPEAR BY ZOOM, PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED.

[1] Roger Saunders and Trisha Saunders (collectively the "Saunders") initially filed a Joinder to the Motion. Counsel for AAE communicated with the Saunders regarding their default status and therefore, their inability to join. On August 9, 2024, withdrew their joinder in the Motion. Counsel for AAE requests attorney's fees in the amount of $1,789.36, for the time expended in opposing the Saunders' Joinder.

3.	**21PR0038**	**ESTATE OF ROEDIGER**
Petition for Final Distribution		

Letters of Administration were issued on January 26, 2022, granting Petitioner full authority under the Independent Administration of Estates Act. A Final Inventory and Appraisal was filed on July 2, 2024.

Waivers of Account were executed by all of the heirs entitled to distributions under the estate. The proposed distribution of the estate includes equal division between decedent's two adult daughters.

Proof of Service of Notice of the hearing on the Petition was filed on August 30, 2024. No one has filed a request for special notice in this proceeding.

The Petition complies with Local Rule 10.07.12 in stating that all income taxes have been paid and that no California or federal estate tax is due.

The Petition requests:

1. The administration of the estate be brought to a close without the requirement of an accounting;
2. All acts and proceedings of the Administrator be confirmed and approved;
3. Distribution of the estate of the decedent in petitioner's hand and any other property of the decedent or the estate not now known or discovered be distributed to the beneficiaries as set forth in the Petition;
4. That waiver of statutory compensation to the personal representative be approved; and,
5. That waiver of statutory compensation to the attorney be approved.

TENTATIVE RULING #3:

ABSENT OBJECTION, PETITION IS GRANTED AS REQUESTED.

NO HEARING ON THIS MATTER WILL BE HELD UNLESS A REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. CAL. RULE CT. 3.1308; LOCAL RULE 8.05.07; SEE ALSO LEWIS V. SUPERIOR COURT, 19 CAL.4TH 1232, 1247 (1999).

NOTICE TO ALL PARTIES OF A REQUEST FOR ORAL ARGUMENT AND THE GROUNDS UPON WHICH ARGUMENT IS BEING REQUESTED MUST BE MADE BY TELEPHONE OR IN PERSON BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. CAL. RULE CT. 3.1308; EL DORADO

COUNTY LOCAL RULE 8.05.07. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING.

LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING.

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4.	**PC20080086**	**TATE v. FIESELER**
Motion to Enforce Settlement Agreement		

Richard and Kristine Feisler ("Defendants") seek to enforce the Court's minute order from the June 5, 2024 hearing ("minutes") arguing that the minutes constitute a written memorandum of a settlement agreement between the parties, which they allege occurred on May 31, 2024, in this Court.

The Court notes that the minutes state: "The Court confirms parties agree to the terms and conditions of the agreement discussed on 5/31/24." The minutes go on to recite the terms of the full settlement agreement on the record.

Defendants argue that Linda Tate ("Plaintiff") has placed a gate and fence line in such a manner that Defendants' easement is effectively blocked. Defendants request an Order that the gate and fence line be moved to a location perpendicular to the easement travel lane, allowing the maximum width for ingress and egress using the easement.

Plaintiff opposes the Motion arguing that Defendants violated the settlement agreement by attempting to move the green gate from the property line onto Defendants' property, after Plaintiff's daughter allegedly moved them to the court ordered location. Plaintiff argues that she has fulfilled all requirements of the settlement agreement.

TENTATIVE RULING #4:

APPEARANCES REQUIRED ON FRIDAY, SEPTEMBER 6, 2024, AT 8:30 AM IN DEPARTMENT NINE.

IF A PARTY OR PARTIES WISH TO APPEAR BY ZOOM, PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED.

5.	**24CV0958**	**PETERSON v. FORD MOTOR COMPANY**
Compelling Arbitration and Staying Proceedings		

The Motion to Compel Arbitration and Stay Proceedings was filed by Folsom Lake Ford on August 2, 2024. However, Folsom Lake Ford was dismissed from the case on August 23, 2024. Therefore, this hearing is dropped from calendar.

TENTATIVE RULING #5:

HEARING DROPPED FROM CALENDAR.

NO HEARING ON THIS MATTER WILL BE HELD UNLESS A REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. CAL. RULE CT. 3.1308; LOCAL RULE 8.05.07; SEE ALSO LEWIS V. SUPERIOR COURT, 19 CAL.4TH 1232, 1247 (1999).

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IF A PARTY OR PARTIES WISH TO APPEAR BY ZOOM, PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED.

6.	**22CV0884**	**SANCHEZ v. GENERAL MOTORS**
Motion to Compel PMQ		

The case was heard on August 16, 2024, at which time, the Court ordered:

1) Defendant to produce a Person Most Qualified ("PMQ") for deposition on Plaintiff's noticed categories, Nos. 1-4, 7, 10, and 20, within 30 days of August 16, 2024;
2) Defendant to produce a Person Most Qualified ("PMQ") for deposition on Plaintiff's noticed categories, Nos. 5, 16, 17, and 18, within 45 days of August 16, 2024;
3) The parties are to confer over the PMQ notice of deposition in an effort to agree on noticed categories that have yet to be agreed upon;
4) Plaintiff's Motion to Compel the Deposition of Defendant's Person Most Qualified is continued to September 6, 2024, at 8:30 a.m., in Department 9 of the above-captioned Court.
5) The parties must submit a declaration no later than August 28, 2024, regarding the remaining noticed categories that are still in dispute as well as the outstanding sanctions issue, if desired.

Plaintiff's counsel filed a declaration as ordered, but it seems nothing has been resolved, as Plaintiff argues that Defendant has been non-responsive. Plaintiff's counsel, however, did not address the issue of sanctions. Under the Civil Discovery Act, sanctions are mandatory against a party who unsuccessfully opposes the motion unless the court finds that there was substantial justification for the noncompliance or that other circumstances make the imposition of the sanction unjust. The court does not have sufficient information to find that either exception applies and therefore imposes a sanction of $1,000 against General Motors payable by September 30, 2024.

TENTATIVE RULING #6:

PLAINTIFF'S MOTION TO COMPEL IS GRANTED IN FULL. DEFENDANT TO PRODUCE A PMQ FOR DEPOSITION ON THE REMAINING CATEGORIES WITHIN 60 DAYS. THE COURT ORDERS DEFENDANT TO PAY PLAINTIFF $1,000 AS A SANCTION PAYABLE BY SEPTEMBER 30, 2024.

NO HEARING ON THIS MATTER WILL BE HELD UNLESS A REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. CAL. RULE CT. 3.1308; LOCAL RULE 8.05.07; SEE ALSO LEWIS V. SUPERIOR COURT, 19 CAL.4TH 1232, 1247 (1999).

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COUNTY LOCAL RULE 8.05.07. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING.

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IF A PARTY OR PARTIES WISH TO APPEAR BY ZOOM, PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED.

7.	**23CV0608**	**SACRAMENTO HOT TUBS v. MONSON**
Motion to Compel Production of Documents		

This Motion is brought by Paul Monson, Gone North, LLC, Travis Monson, and the Vollman Company ("Defendants") against Sacramento Hot Tubs ("Plaintiff"). On May 8, 2024, Defendants served a Request for Production of Documents, Set Two on Plaintiff's counsel by electronic service.[1] Plaintiff's responses were due on June 11, 2024, but no responses were served. Defendants state they gave Plaintiff three-time extensions for responding, with the final extension expiring on June 24, 2024. At the time of the Motion, no responses had been received.

Defendants claim 3.5 hours to research, draft, meet and confer, and gather exhibits for the Motion. Pursuant to the Declaration of Tyler O'Connell, his hourly rate in this matter is $200.00. They anticipate 1 hour for attending the hearing. Defendants further note the $60.00 filing fee. Defendants request sanctions in the amount of $960.00. The Court reduces the amount requested by $200.00, as appearance at a hearing may not be necessary unless Plaintiff requests oral argument, and at that time, sanctions may be re-addressed.

TENTATIVE RULING #7:

ABSENT OBJECTION, MOTION IS GRANTED AS REQUESTED, WITH SANCTIONS IN THE AMOUNT OF $760.00 AWARDED AGAINST PLAINTIFF.

NO HEARING ON THIS MATTER WILL BE HELD UNLESS A REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. CAL. RULE CT. 3.1308; LOCAL RULE 8.05.07; SEE ALSO LEWIS V. SUPERIOR COURT, 19 CAL.4TH 1232, 1247 (1999).

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[1] The Court notes that on August 14, 2024, the day that the Motion was filed, Plaintiff's counsel was substituted out and Plaintiff became self-represented. Then, on August 28, 2024, new counsel for Plaintiff came into the case.

IF A PARTY OR PARTIES WISH TO APPEAR BY ZOOM, PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED.

8.	22CV1334	BLY-CHESTER v. EL DORADO COUNTY BD. OF SUP.
Demurrer		

Defendant El Dorado County Board of Supervisors ("Defendant" or "Board")) demurrers to Plaintiff Cheryl Bly-Chester's ("Plaintiff") Second Amended Complaint ("Complaint"). Plaintiff was a member of the El Dorado Planning Commission ("Planning Commission") and received a $100.00 stipend per meeting she attended. The Planning Commission members are responsible for implementing the policies of the Board. Plaintiff was removed from the Planning Commission by majority vote of the Board, and she brought this lawsuit.[1]

The Demurrer is brought pursuant to Code of Civil Procedure section 430.10, subsection (e), on the grounds that the Second Amended Complaint, and each cause of action contained therein, fail to state facts upon which a claim for relief may be stated for the reasons set forth below in the demurrer.

1. Plaintiff's First Cause of Action Claim for Wrongful Termination in Violation is without merit as a matter of law in that the County and its Board of Supervisors is immune from liability and Plaintiff was never an employee of El Dorado County or its Board of Supervisors;
2. Plaintiff's Second Cause of Action for alleged violation of Labor Code section 1102.5 is without merit as a matter of law because Plaintiff was not an employee of the County of El Dorado or its Board of Supervisors;
3. Plaintiff's Third Cause of Action for Gender Discrimination is without merit as a matter of law because Plaintiff was not an employee of the County of El Dorado or its Board of Supervisors, and therefore no cause of action can be alleged under the Fair Employment and Housing Act;
4. Plaintiff's Fourth Cause of Action for Disparate Treatment is without merit as a matter of law because Plaintiff was not an employee of the County of El Dorado or its Board of Supervisors, and therefore no cause of action can be alleged under the Fair Employment and Housing Act, and to the extent Plaintiff seeks to allege a non-statutory claim, the County of El Dorado and its Board of Supervisors are immune from liability;
5. Plaintiff's Fifth Cause of Action for violation of due process is without merit as a matter of law because Plaintiff does not allege that she was deprived of either a

[1] In the initial Complaint, Plaintiff alleged Malicious Defamation. The County filed a special motion to strike the defamation claim, which the Court granted. Plaintiff filed an appeal and the Court agreed to stay all proceedings pending the outcome of the appeal. The County demurred to the Complaint and Plaintiff filed a First Amendment Complaint, mooting the demurrer. Plaintiff was granted leave to file a Second Amended Complaint and no response was filed due to the stay. The parties have since stipulated to lift the stay in order to address the employment related causes of action while the appeal is pending.

property interest or a liberty interest that would be protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution;

6. Plaintiff's sixth cause of action for Retaliation for Whistleblowing is without merit as a matter of law because Plaintiff was not an employee of the County of El Dorado or its employees, and therefore no statutory whistleblower claim can be alleged, and to the extent Plaintiff is attempting to allege a non-statutory claim, and to the extent Plaintiff seeks to allege a non-statutory claim, the County of El Dorado and its Board of Supervisors are immune from liability; and,
7. Plaintiff's Seventh Cause of Action for Retaliation in violation of the DFEH, ADU laws, and Misappropriation of Public Funds Per Section 424(a)7 is without merit as a matter of law as Plaintiff is not an employee of the County of El Dorado and its Board of Supervisors and Plaintiff cannot state a claim for violation of the Fair Employment and Housing Act, any alleged violation of "ADU laws" or Penal Code section 424 do not give rise to a cause of action in the County of El Dorado or its Board of Supervisors.

Request for Judicial Notice

Defendant requests that the Court take judicial notice of El Dorado County Code of Ordinances, El Dorado Board of Supervisors Resolutions, the agenda for a meeting, and the minutes for that meeting. Plaintiff requests that the Court take judicial notice of the El Dorado County Charter.

Judicial notice is a mechanism which allows the court to take into consideration matters which are presumed to be indisputably true. California Evidence Code Sections 451, 452, and 453 collectively govern the circumstances in which judicial notice of a matter may be taken. While Section 451 provides a comprehensive list of matters that must be judicially noticed, Section 452 sets forth matters which *may* be judicially noticed. A trial court is required to take judicial notice of any matter listed in section 452 if a party requests it and gives the other party sufficient notice to prepare to meet the request. (Evidence Code § 453)

Pursuant to Evidence Code §§451-453, the Court grants both parties' requests for judicial notice.

Meet and Confer Requirement

Code of Civil Procedure §430.41(a) provides: Before filing a demurrer pursuant to this chapter, the demurring party shall meet and confer in person or by telephone with the party who filed the pleading that is subject to demurrer for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised in the demurrer.

Code of Civil Procedure §430.41(a)(3):

The demurring party shall file and serve with the demurrer a declaration stating either of the following:

(A) The means by which the demurring party met and conferred with the party who filed the pleading subject to demurrer, and that the parties did not reach an agreement resolving the objections raised in the demurrer.

(B) That the party who filed the pleading subject to demurrer failed to respond to the meet and confer request of the demurring party or otherwise failed to meet and confer in good faith.

Dumas v. Los Angeles County Bd. of Supervisors (2020) 45 Cal. App. 5th 348 ("If, upon review of a declaration under section 430.41, subdivision (a)(3), a court learns no meet and confer has taken place, or concludes further conferences between counsel would likely be productive, it retains discretion to order counsel to meaningfully discuss the pleadings with an eye toward reducing the number of issues or eliminating the need for a demurrer, and to continue the hearing date to facilitate that effort").

While Defense Counsel's declaration is not very detailed, it seems there was a discussion with Plaintiff's Counsel wherein an agreement to proceed with the Demurrer occurred.

Standard of Review - Demurrer

A demurrer tests the sufficiency of a complaint by raising questions of law. *Rader Co. v. Stone* (1986) 178 Cal.App.3d 10, 20. In determining the merits of a demurrer, all material facts pleaded in the complaint and those that arise by reasonable implication, but not conclusions of fact or law, are deemed admitted by the demurring party. (*Moore v. Conliffe,* 7 Cal.4th 634, 638; *Interinsurance Exchange v. Narula,* 33 Cal.App.4th 1140, 1143. The complaint must be construed liberally by drawing reasonable inferences from the facts pleaded. *Flynn v. Higham* (1983) 149 Cal.App.3d 677, 679.

Rodas v. Spiegel (2001) 87 Cal. App. 4th 513, 517

Argument

Defendant's overarching arguments are that Plaintiff was a politically appointed volunteer, not an employee, and that Plaintiff cannot state generalized claims against a public entity without reference to a form of statutory liability. In this case, Defendant argues the only statutes available all depend on Plaintiff being an employee. Defendant further argues that Plaintiff's due process claims are meritless as Plaintiff fails to identify a protected property or liberty interest of which she was deprived and that her Penal Code based claim is nonsensical.

"**Plaintiff is Not an Employee and Cannot State a Claim Under the Labor Code"**

Plaintiff's Second Cause of Action alleges a violation of Labor Code §1102.5, which involves employer retaliation against an employee. Plaintiff has the burden of pleading and proving the existence of this relationship. (See *Bennett v. Rancho California Water Dist.* (2019) 35 Cal.App.5th 908, 920-921 ["In order to prove a claim under section 1102.5(b), the plaintiff must establish a prima facie case of retaliation. [Citations.] It is well established that such a prima facie case includes proof of the plaintiff's employment status."]; see also CACI No. 4603 [setting forth standard jury instruction defining essential elements for a § 1102.5 claim, which requires the plaintiff to prove "[t]hat [name of defendant] was [name of plaintiff]'s employer"].)

In determining whether someone is an employee, Defendant points to general common law, since the Labor Code does not expressly define the term. Defendant argues that applying the common law test, California and federal courts have held that "compensation of some sort is indispensable to the formation of an employment relationship." (*Mendoza v. Town of Ross* (2005) 128 Cal.App.4th 625, 637 [affirming trial court's decision to sustain demurrer without leave to amend because appellant was an uncompensated volunteer and therefore, not an employee under the FEHA].) "The promise to pay money in return for services rendered lies at the heart of" the employer-employee relationship. (*Voris v. Lampert* (2019) 7 Cal.5th 1141, 1148.)

Defendant argues that to constitute substantial compensation, the renumeration received must constitute a substantial benefit. (*Talley v. County of Fresno* (2020) 51 Cal.App.5th 1060, 1083-84.) Defendant alleges the financial benefits received must "meet a minimum level of 'significance,' or substantiality, in order to find an employment relationship in the absence of more traditional compensation." (*Id*. at 1084, quoting *Pietras v. Board of Fire Comm'rs* (2d Cir. 1999) 180 F.3d 468, 471.) Defendant states it is well recognized that the payment of a small insubstantial stipend does not create an employment relationship, without other factors being present. For example, in determining whether a person is an employee for purposes of the Fair Employment and Housing Act, courts have looked to the Labor Code definition of employee for purposes of workers compensation. (See, *Mendoza v. Town of Ros*s, supra, 128 Cal.App.4th at 635.) There, the Labor Code states "For purposes of this section, 'voluntary service without pay' shall include services performed by any person, who receives no remuneration other than meals, transportation, lodging, or reimbursement for incidental expenses." Defendant alleges that a mere stipend does not convert a volunteer into an employee.

While someone who receives a stipend can be deemed an employee, Defendant argues that there need to be additional indicia of employment – such as leave benefits, a bargaining agreement, or retirement. See *Cuddeback v. Fla. Bd. of Educ.* (11th Cir. 2004) 381 F.3d 1230, 1234-1235. Defendant states that requiring trainings of volunteers, does not convert the person into an employee – just as local sports leagues or churches would require a training of its volunteers. <u>The Court agrees with Defendant that a simple stipend, without additional benefits, does not establish Plaintiff as an employee.</u>

Opposition & Reply

Plaintiff argues that she is an employee of the County pursuant to the County's Charter, and the State pursuant to the California Constitution. Plaintiff argues that because the County Charter lists "all appointed boards, committees and commissions" as unclassified rather than classified, that that automatically means Plaintiff was an unclassified employee.

Defendant replies, noting that Plaintiff only provided one limited portion of the Charter. Defendant states that this provision is part of the larger portion of the County Charter establishing the existence of a civil service system, and section 502.1, in particular, only defines those "positions" that are excluded from the civil service protections. Article V, section 502 of the Charter establishes the existence of a civil service system in favor of "classified employees." (See, Pltf RJN, Exh. 1.) Section 502.1 differentiates then between "employees who have achieved civil service status," from "those positions designated as unclassified below." (*Id*.) Section 501.2 then goes on to list the "positions" that are unclassified, which includes "all appointed boards, committees and commissions." (*Id*., County Charter, Art V, § 502.1 subd. (c).) There is nothing in this charter that demonstrates an intent to create an employment relationship with all persons holding one of the listed unclassified positions. This becomes obvious when one looks to the very next listed positions. Subsection (d) of Section 502.1 lists "all persons serving without compensation (compensation does not include incidental fees and expenses)," as also being excluded from civil service. That is, along with commission members, Section 501.2 lists volunteers as not being included in the civil service system.

The Court finds that Plaintiff misinterpreted the selected portion of the Charter, and that overall, the Charter does not define a volunteer board position as an employee, nor does it intend to.

Plaintiff next argues that she was an employee not only of the County, but of the State. Plaintiff states that California Constitution Article XI § 1(b) states that "[t]he governing body shall provide for the number, compensation, tenure, and appointment of employees" by ordinance, but does not specify any amounts, manner or type of compensation. Just as she is not a county employee pursuant to the Charter, the Court does not read the Constitution as establishing an employment relationship for Plaintiff.

Plaintiff further argues that she is an employee pursuant to Labor Code §1106. While it is not disputed that the Labor Code protects employees against retaliation from employers, it has not been established in this case that Plaintiff was an employee. Defendant responds that to be covered by this statute, Plaintiff must have been "employed by" the County and that there is nothing in this definition which creates an exception to the rule that a volunteer not receiving substantial compensation is someone who is not "employed by" an entity. Defendant states that Plaintiff's argument to the contrary is simply that since public employees are included in the definition of employee under Labor Code §1106, she must therefore be an employee for

purposes of that statute. In order to be covered by Labor Code §1106, Plaintiff must be an employee, which the Court does not find to be the case.

Plaintiff argues that she is an employee pursuant to IRS Code §3121, which defines an employee. However, Defendant responds that 28 U.S.C. § 3121 would not consider a volunteer receiving a stipend to be an employee. The Court finds that the subsection Plaintiff relies on, subdivision (d)(2) states that the term "employee" means, "any individual who, under the usual *common law rules* applicable in determining the employer-employee relationship, has the status of an employee."

Defendant replies that the cases establishing that volunteers are not employees irrespective of whether they receive a small stipend are all decided under common law principles. (See, *Mendoza v. Town of Ross*, supra, 128 Cal.App.4th at 636; *Estrada v. FedEx Ground Package System, Inc.* (2007) 154 Cal.App.4th 1, 10.) As Defendant argued above, under common law principles "compensation of some sort is indispensable to the formation of an employment relationship," and that a small stipend does not constitute "compensation for this purpose." (*Mendoza v. Town of Ross*, supra, 128 Cal.App.4th at 635.) Defendant argues that nothing in the Internal Revenue Code suggests that a volunteer receiving a small stipend is an "employee." (See, Rev. Rul. 78- 80, 1978 IRB LEXIS 433 [stipends paid to volunteer foster grandmother are not wages]; Private Letter Ruling 200918007, 2009 PLR LEXIS 835 [monthly benefit to bona fide fire and rescue squad volunteers did not result in "wages" for FICA tax purposes].) Further, the Form 700 under California Conflict of Interest Laws is not enough to establish an employment representation, as it is logical that even volunteers serving the Board would need to be unbiased.

The Court does not find that the IRS Code establishes Plaintiff as an employee.

Plaintiff argues that under the "ABC test" a person is an employee unless the alleged employer can demonstrate:

> (a) The person is free from the control and direction of the hiring entity in the performance of the work, both under the contract for the performance of the work and in fact; (b) The person performs work that is outside the usual course of the hiring entity's business; and (c) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed. Labor Code §2775(b)(1).

The test was based upon the California Supreme Court decision in *Dynamex Ops. W., Inc. v. Superior Ct.* (2018) 4 Cal.5th 903, which as Plaintiff points out – is the test to differentiate employees from independent contractors. The *Dynamex* case does not discuss volunteers nor does Plaintiff address why it should be extended to volunteers.

Plaintiff also fails to address Defendant's arguments that she is not an employee under FEHA or Labor Code §1102.5.

Therefore, the demurrer is sustained as to the Second Cause of Action.

"**Plaintiff is Not an Employee under FEHA"**

Plaintiff's Third (and potentially Fourth[1]) Cause of Action is brought under the Fair Employment and Housing Act ("FEHA") for gender discrimination. Defendant argues that like the Labor Code, "[i]In order to recover under the discrimination in employment provisions of the FEHA, the aggrieved plaintiff must be an employee" (*Shephard v. Loyola Marymount Univ.* (2002) 102 Cal. App. 4th 837, 842; *Vernon v. State of California* (2004) 116 Cal.App.4th 114, 124 [affirming trial court's judgment against appellant in employment discrimination case where trial court sustained public entity's demurrer on the grounds that appellant was not an employee].) Defendant argues that also like the Labor Code, "the FEHA's definition of 'employee' provides little guidance to ascertain who qualifies as an 'employee.'" (*Talley v. County of Fresno* (2020) 51 Cal.App.5th 1060, 1071, citing, *Shephard v. Loyola Marymount Univ*. (2002) 102 Cal.App.4th 837, 842.) Like elsewhere, for purposes of the FEHA, "while compensation alone does not prove the existence of an employment relationship, 'it is an essential condition to the existence of an employer-employee relationship.'" (*Talley*, at 1074, quoting, *Graves v. Women's Professional Rodeo Assn., Inc.* (8th Cir. 1990) 907 F.2d 71, 73.)

Defendant cites to *Estrada v. City of Los Angeles* (2013) 218 Cal.App.4th 143, where the court followed the basic rule that "compensation by the putative employer to the putative employee in exchange for his services" is "an essential condition to the existence of an employer-employee relationship." (*Id.* at 151.) The court went on to hold that providing an unpaid volunteer with workers compensation benefits was not "renumeration" for purposes of creating an employment relationship for the FEHA; rather, providing such benefits was "similar to the recurring $50 reimbursement for a volunteer's out-of-pocket expenses, simply serve to make a volunteer whole in the event the volunteer were to sustain injury while performing his or her duties." (*Id.* at 155).

By using the foregoing example of a small stipend being the equivalent of providing workers' compensation coverage, the Court in *Estrada* recognized that small, insignificant stipends do not convert volunteers into paid employees. In *Talley v. County of Fresno*, the court cited with approval the Fifth Circuit decision *in Juino v. Livingston Parish Fire Dist. No. 5* (5th Cir. 2013) 717 F.3d 431. (*Talley*, 51 Cal.App.5th at 1075.) In *Juino*, the court rejected a claim that a volunteer firefighter was an employee for purposes of Title VII, even though the firefighter received a small per-fire stipend, a life insurance policy, uniform and emergency response gear, firefighting and emergency first-response training. (*Juino*, 717 F.3d at 430-431.) The Court

[1] The Fourth Cause of Action does not specifically provide a statutory reference, but the language seems to be from the FEHA.

reasoned that these benefits were merely incidental to the volunteer's service and were not the type of substantial benefits to support the existence of an employment relationship. (*Id.* at 440.) Defendant argues and the Court agrees that these cases support their position that Plaintiff was not an employee.

Opposition & Reply

Plaintiff argues she is an employee pursuant to the "right to sue" letter issued by the California Department of Fair Housing and Employment. Plaintiff misinterprets the Department of Civil Rights/Department of Fair Housing and Employment's ("DCR") system. As Defendant notes, once a complaint is made, if there are sufficient facts alleged, then DCR does an investigation. If DCR does not plan to bring a civil action, then a right to sue letter must be issued, either by request of the person bringing the complaint or by DCR before the time limit. Gov't Code § 12965 subd. (c)(1)(A). The right to sue letter does not constitute a legal opinion or determination.

Plaintiff further argues that the EEOC Compliance Manual defines Plaintiff's role as an employee. Defendant replies that the guidelines cited by Plaintiff explicitly state "Volunteers usually are not protected 'employees,'" and that they will be treated as employees only where they receive benefits constituting "significant remuneration" rather than merely the inconsequential incidents of an otherwise gratuitous relationship." EEOC Compliance Manual, 2-III-A-1(c). Again, Plaintiff is relying on one portion of a document in an effort to make the argument that she is an employee, but the document must be taken as a whole.

The demurrer is sustained as to the Third Cause of Action.

"**First, Fourth, Sixth, and Seventh Causes Cannot be Brought Against Public Entities"**

Government Code section 815 states, "[e]xcept as otherwise provided by statute: [¶] (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." "This section abolishes all common law or judicially declared forms of liability for public entities, except for such liability as may be required by the state or federal constitution, e.g., inverse condemnation. In the absence of a constitutional requirement, public entities may be held liable only if a statute (not including a charter provision, ordinance or regulation) is found declaring them to be liable." (Legislative Committee Comments, Gov't Code § 815.)

"Because 'all governmental tort liability is based on statute, the general rule that statutory causes of action must be pleaded with particularity is applicable. Thus, to state a cause of action against a public entity, every fact material to the existence of its statutory liability must be pleaded with particularity.'" (*City of Los Angeles v. Superior Court* (2021) 62 Cal.App.5th 129, 138, quoting*, Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 795.)

First Cause of Action

Plaintiff's First Cause of Action is for wrongful termination in violation of public policy. Defendant argues this is a classic common law claim that cannot be stated against a public entity. (*Miklosy v. Regents of Univ. of Cal.* (2008) 44 Cal.4th 876, 899 [Government Claims Act bars a wrongful termination in violation of public policy claim against a public entity based on alleged whistleblower violations].) Defendant argues that wrongful termination in violation of public policy claim was first recognized as a common law tort in *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167. (See, *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 666–667, 668.) As the high court later explained, "because there was no statute specifically barring an employer from terminating an employee who refused to act illegally, the court [in *Tameny*] was required to consider whether, without the authority of an express prohibition on the reasons for discharge, the plaintiff's action could proceed." (*Foley*, at p. 668.) Defendant states that because a *Tameny* type claim is one that can only be stated as against an employer, (see, *Weinbaum v. Goldfarb, Whitman & Cohen* (1996) 46 Cal.App.4th 1310, 1315), there can be no derivative liability under subdivision (a) of Government Code section 815.2. (*Miklosy v. Regents of University of California*, supra, 44 Cal.4th at 899-901.)

Fourth, Sixth, and Seventh Causes of Action

Defendant argues, and the Court agrees, that the Fourth, Sixth, and Seventh Causes of Action do not state the legal theory on which Plaintiff claims damages are recoverable[1]. As stated by the authorities above, Plaintiff cannot bring these non-statutory claims against a public agency such as Defendant.

Further, Defendant argues that Plaintiff is asking the Court to impose liability on the basis of a discretionary legislative function. This doctrine has been codified in Government Code section 821, which provides "A public employee is not liable for an injury caused by his adoption of or failure to adopt an enactment," and Government Code section 820.1 which provides "a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." Defendant argues that since the members of the Board of Supervisors are immune from liability for their vote to remove Plaintiff, so too is the County. (Gov't Code § 815.2 ["Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability'.]

In its Reply, Defendant notes that the County argued that Plaintiff's First, Fourth, Sixth, and Seventh Causes of action were without merit as they did not allege a statutory basis of liability against a public agency, and that the County is immune from liability for these claims under the provisions of the Government Claims Act. (See, Demurrer P. & A. at pp. 17-19.) In her opposition, Plaintiff does not address these arguments. Therefore, Plaintiff has waived any right

[1] The Seventh Cause of Action is further addressed below.

to oppose the demurrer as to these causes of action. (*See Nazir v. United Airlines, Inc*. (2009) 178 Cal.App.4th 243, 288 [failure to address or oppose an issue in motion constitutes a waiver on that issue; *Wright v. Fireman's Fund Ins. Companies* (1992) 11 Cal.App.4th 998, 1011 [”it is clear that a defendant may waive the right to raise an issue on appeal by failing to raise the issue in the pleadings or in opposition to a . . . motion.”].)

Defendant’s demurrer is sustained as to the First, Fourth, Sixth, and Seventh Causes of Action.

“Plaintiff Has Not Alleged a Deprivation of Interest Protected by Due Process”

Plaintiff’s Fifth Cause of Action alleges a violation of due process in her removal from the Planning Commission. The Fourteenth Amendment protects against the deprivation of liberty or property without due process. (*Carey v. Piphus* (2004) 435 U.S. 247, 259) A procedural due process claim has two elements: 1) a deprivation of a constitutionally protected property or liberty interest, and 2) a denial of adequate procedural safeguards. (*Brewster v. Board of Education of Lynwood U. School Dist.* (9th Cir. 1998) 149 F.3d 971, 982.) Termination of an individual from a position may implicate two distinct interests: a property interest, and a liberty interest.

Defendant argues that a protected property interest in keeping an appointment only arises where a person possesses a reasonable expectation or “a legitimate claim of entitlement” to that position. (*Board of Regents v. Roth* (1972) 408 U.S. 564, 577.) Property interests are created and defined by existing rules or understandings stemming from an independent source, like state law. (*Id*.) At-will employees, or those who hold their posts at the pleasure of the of the governing body, as a matter of law do not hold a property interest in their position. (*Portman v. County of Santa Clara* (9th Cir. 1993) 995 F.2d 898, 904.) Defendant argues that Plaintiff served as a volunteer, for the Board, and could be removed at any time, and therefore, she had no property interest in continuing in her role.

Defendant alleges that a protected liberty interest arises when a government agency either seeks to bar forever an individual from public employment, makes a charge of “dishonesty,” or attaches a “stigma” to an employment decision. (*Llamas v. Butte Cmty. College Dist.* (9th Cir. 2001) 238 F.3d 1123, 1128.) In order to state a claim based on a ban of employment, the agency must take some formal action that bars a plaintiff from seeking any employment in the person’s chosen field. (*Conn v. Gabbert* (1999) 526 U.S. 286, 292 [claim requires “a complete prohibition of the right to engage in a calling”.) Defendant argues that Plaintiff has alleged nothing of the sort in this case. Defendant further argues that Plaintiff has not alleged a reputational type of liberty interest claims. “We have held that a plaintiff's "liberty interest is implicated only when the state makes a charge against him that might seriously damage his standing and associations in his community.” (*Llamas v. Butte Cmty. College Dist.*, supra, 238 F.3d at 1129.)

Plaintiff does not address these arguments in her Opposition.

The demurrer as to Plaintiff's Fifth Cause of Action is sustained.

"Seventh Cause of Action is Nonsensical"

Plaintiff's Seventh Cause of Action is titled "Misappropriation of Public Funds Per Section 424(a)(7). Her Seventh Cause of Action contains a lengthy account of her efforts to have the County approve an Accessory Dwelling Unit ("ADU.) on her Property. She alleges the County had returned her application, "requesting clarifications," concerning her applications. (SAC ¶ 89.) She alleges that she was required to remove her drawings to resubmit them. (SAC ¶ 91.) Apparently believing the county was required to approve her original application, she submitted checks for the permit fees, some of which would go the County Office of Education. (SAC ¶ 93.) The County then returned the Checks to Plaintiff asserting the plan review was not complete. (SAC ¶¶ 95-96.)

Opposition & Reply

Plaintiff's argument for the Seventh Cause of Action is that as part of the process of applying for her ADU permit, she sent the County two checks for the outstanding Building Service fees and Office of Education fees (SAC 22:20- 26) and Aaron Mount, a Planning Manager (not participant in the permit review), intercepted those checks and returned them to Plaintiff (SAC 23:6-10), interfering with and delaying the permit approval process. Plaintiff did not authorize for the checks to be returned. (SAC 23:23-25.) Plaintiff argues that the Building Services Department and the Office of Education did not understand why they had not received the check. (SAC 23:1-5.) Plaintiff alleges that Planning Manager Mount willfully refused to pay over to persons authorized by law to receive the checks despite his duty to do so and that his interference and refusal to "pay over" the checks to the Building Services Department and Office of Education, as was his lawful duty, constitutes misappropriation of public funds and a violation of Cal. Penal Code § 424(a)(7). (SAC 23:6-13.)

Defendant replies that Penal Code §424 is designed to protect the public fisc, not Plaintiff's private interests. Defendant again points out that Plaintiff failed to oppose Defendant's argument that the Seventh Cause of Action is an attempt to assert a common law claim, for which the County is immune. In her Opposition, Plaintiff does not dispute that there were problems with her permit, and if so, then returning her checks seems like the proper action for the County to take. As stated above, the demurrer is sustained as to the Seventh Cause of Action.

In summary, Plaintiff's Complaint fails because she has not and cannot establish an employer-employee relationship, and she seeks to bring non-statutory claims against the County, when it is immune from such suits.

Additionally, Plaintiff failed to address Defendant's arguments as to the First, Fourth, Fifth, Sixth and Seventh Causes of Action, and therefore, Plaintiff has waived any right to oppose the demurrer as to these causes of action. (*See Nazir v. United Airlines, Inc*. (2009) 178 Cal.App.4th 243, 288 [failure to address or oppose an issue in motion constitutes a waiver on that issue; *Wright v. Fireman's Fund Ins. Companies* (1992) 11 Cal.App.4th 998, 1011 ["it is clear that a defendant may waive the right to raise an issue on appeal by failing to raise the issue in the pleadings or in opposition to a . . . motion."].)

Based on Plaintiff's pleadings and the facts alleged, there does not seem to be any new circumstances which would allow the Court to find an employee-employer relationship, and thus leave to amend would be futile.

TENTATIVE RULING #8:

DEFENDANT'S DEMURRER IS SUSTAINED WITHOUT LEAVE TO AMEND.

NO HEARING ON THIS MATTER WILL BE HELD UNLESS A REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. CAL. RULE CT. 3.1308; LOCAL RULE 8.05.07; SEE ALSO LEWIS V. SUPERIOR COURT, 19 CAL.4TH 1232, 1247 (1999).

NOTICE TO ALL PARTIES OF A REQUEST FOR ORAL ARGUMENT AND THE GROUNDS UPON WHICH ARGUMENT IS BEING REQUESTED MUST BE MADE BY TELEPHONE OR IN PERSON BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. CAL. RULE CT. 3.1308; EL DORADO COUNTY LOCAL RULE 8.05.07. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING.

LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING.

IF A PARTY OR PARTIES WISH TO APPEAR BY ZOOM, PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED.

9.	**23CV2180**	**WILSON v. TURNER**
Demurrer		

Defendants Norcal Gold, Inc. and Valerie Turner demur to the Second,[1] Third,[2] and Fourth[3] causes of action in plaintiffs' Complaint on the grounds of uncertainty, and to all causes of action for failure to state a cause of action. (Code Civ. Proc., §§ 430.10, subds. (e), (f).) Plaintiffs oppose the demurrer. Defendants did not file a reply.

Defendants submitted a declaration indicating they met and conferred with plaintiffs regarding the instant demurrer at least five days before the date a responsive pleading was due. (Code Civ. Proc., § 430.41, subd. (a).)

1. Background

This action involves the sale of real property commonly known as 1256 Crocker Drive in El Dorado Hills, California. In September 2020, Norcal, on behalf of Turner, listed the subject property in the Multiple Listing Service ("MLS"). (Compl., ¶ 8.) The MLS listing contained representations, including: "School, Transportation, Fire fees ALL PAID (OVER $60K)! Permit fees PAID (just renew)." (*Ibid.*) Turner allegedly made the same representations to defendants. (*Id.*, ¶ 9.)

Plaintiffs allege they were unable to confirm the status of the permit fees online. (Compl., ¶ 12.) But they relied upon defendants' representations and purchased the subject property. (*Id.*, ¶ 10.)

When plaintiffs applied to renew the permit fees in October 2022, the County informed them that the permit fees were withdrawn on September 7, 2018. (Compl., ¶ 13.) Plaintiffs allegedly had to pay $80,500 for new permits, as the fee structure had increased. (*Id.*, ¶ 22.)

On February 23, 2024, plaintiffs filed the instant action against defendants, asserting causes of action for: (1) negligent misrepresentation; (2) negligent non-disclosure (against Turner only); (3) violation of Civil Code section 1088; and (4) negligence.

2. Legal Principles

"[A] demurrer challenges only the legal sufficiency of the complaint, not the truth or the accuracy of its factual allegations or the plaintiff's ability to prove those allegations." (*Amarel v. Connell* (1998) 202 Cal.App.3d 137, 140.) A demurrer is directed at the face of the complaint and to matters subject to judicial notice. (Code Civ. Proc., § 430.30, subd. (a).) All properly pleaded allegations of fact in the complaint are accepted as true, however improbable they may be, but

[1] The second cause of action is mislabeled in the Complaint as the "third" cause of action.
[2] The third cause of action is mislabeled in the Complaint as the "fourth" cause of action.
[3] The fourth cause of action is mislabeled in the Complaint as the "fifth" cause of action.

not the contentions, deductions, or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) A judge gives "the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Blank*, *supra*, 39 Cal.3d at p. 318.)

3. Discussion

3.1. First Cause of Action for Negligent Misrepresentation

The elements of negligent misrepresentation are "(1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage." (*Apollo Capital Fund LLC v. Roth Capital Partners, LLC* (2007) 158 Cal.App.4th 226, 243.) A defendant may be liable even if they honestly believed what they said was true. (*Ibid.*)

Here, the Complaint alleges defendants misrepresented that there were prepaid permits for the subject property. This turned out to be false and plaintiffs allegedly suffered damage as a result.

Defendants argue the Complaint fails to allege that defendants made the misrepresentations with the "intent to purposefully conceal the truth about the permit fees or to demonstrate knowledge of the fees being withdrawn." (Dem. at 6:5–7.) However, the relevant intent is to induce reliance, not to deceive. (*Ford v. Cournale* (1973) 36 Cal.App.3d 172, 184.) Additionally, the Complaint alleges that defendants had no reasonable grounds for believing that the representations were true. (Compl., ¶ 16.)

Defendants also argue that the Complaint does not allege a specific fiduciary duty owed to them by Norcal. (Dem. at 6:16–17.) However, there is no duty requirement for a claim of negligent misrepresentation.

Therefore, the demurrer to the first cause of action is overruled for both defendants.

3.2. Second Cause of Action for Negligent Non-Disclosure

Plaintiffs assert their second cause of action for negligent non-disclosure against defendant Turner only.

Turner first argues that the second cause of action is uncertain because it is mislabeled in the Complaint as the third cause of action. The court rejects this argument. " '[D]emurrers for uncertainty are disfavored, and are granted only if the pleading is so incomprehensible that a defendant cannot reasonably respond.' " (*Mahan v. Charles W. Chan Ins. Agency, Inc.* (2017) 14 Cal.App.5th 841, 848, fn. 3.) That is not the case here.

Ordinarily, a negligent misrepresentation is not actionable unless it rises to the level of "a positive assertion…; an omission or an implied assertion or representation is not sufficient. [Citations.]" (*Apollo Capital Fund, LLC v. Roth Capital Partners, LLC* (2007) 158 Cal.App.4th 226, 243; accord, *Byrum v. Brand* (1990) 219 Cal.App.3d 926, 941–942; *Wilson v. Century 21 Great Western Realty* (1993) 15 Cal.App.4th 298, 306.) Here, the court finds that plaintiffs' claim of negligent non-disclosure is not actionable as it is based on an alleged omission. Therefore, the court sustains the demurrer to the second cause of action for negligent non-disclosure without leave to amend.

3.3. Third Cause of Action for Violation of Civil Code Section 1088

Civil Code section 1088, subdivision (b) provides, "If an agent or appraiser places a listing or other information in the multiple listing service, that agent or appraiser shall be responsible for the truth of all representations and statements made by the agent or appraiser of which that agent or appraiser had knowledge or reasonably should have had knowledge to anyone injured by their falseness or inaccuracy."

As previously discussed under the second cause of action, the court rejects defendants' uncertainty argument.

Next, defendants argue that the seller's broker had no obligation to purchasers to investigate public records or permits pertaining to title or use of the property. (Dem. at 7:25–8:2 (citing *Field v. Century 21 Klowden-Forness Realty* (1998) 63 Cal.App.4th 18, 24–25).) While that may be the case, the court finds that Civil Code section 1088 was triggered when defendant Norcal decided to make a representation in the MLS listing regarding the status of the permit fees. As to defendant Norcal, the demurrer to the third cause of action is overruled.

As for defendant Turner, there is no allegation that she is an agent or appraiser. The Complaint alleges that Turner should be held liable under Civil Code section 1088 "as a result of the law of agency and the fact that these statements were made on behalf of Turner." (Compl., ¶ 27.) The court disagrees. Turner is the principal, not the agent. A plain reading of Civil Code section 1088 shows there can be no liability against a defendant unless they are an agent or appraiser. Therefore, as to defendant Turner, the demurrer to the third cause of action is sustained. Because plaintiffs have not had an opportunity to amend the complaint in response to the demurrer, and there is a reasonable possibility that the defect can be cured by amendment, the court grants leave to amend. (*JPMorgan Chase Bank, N.A. v. Ward* (2019) 33 Cal.App.5th 678,684; *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 747.)

3.4. Fourth Cause of Action for Negligence

"The elements of a negligence cause of action are a legal duty, a breach of the legal duty, proximate or legal cause, and a resulting injury. [Citation.]" (*Huang v. The Bicycle Casino, Inc.* (2016) 4 Cal.App.5th 329, 338.)

As previously discussed under the second cause of action, the court rejects defendants' uncertainty argument.

Real estate brokers owe third parties only those duties imposed by regulatory statutes. (*Padgett v. Phariss* (1997) 54 Cal.App.4th 1270, 1279.) A broker's duties with respect to any listing or other information posted to an MLS are specified in Civil Code section 1088. As previously discussed, Section 1088 states in relevant part that the broker "shall be responsible for the truth of all representations and statements made by the agent [in an MLS] … of which that agent … had knowledge or reasonably should have had knowledge," and provides a statutory negligence claim for "anyone injured" by the "falseness or inaccuracy" of such representations and statements. (Civ. Code, § 1088; see *Furla v. Jon Douglas Co.* (1998) 65 Cal.App.4th 1069, 1077 [discussing Civ. Code, § 1088].) The court finds that the Complaint alleges sufficient facts to state a cause of action against Norcal for negligence.

Defendants also argue that the fourth cause of action is duplicative of plaintiffs' negligent misrepresentation and negligent non-disclosure causes of action. However, the court agrees with plaintiffs that they are allowed to plead alternative theories of recovery.

As to defendant Norcal, the demurrer to the fourth cause of action is overruled.

As to defendant Turner, the Complaint alleges that, like Norcal, she "had a duty to diligently exercise skill and care in the performance of [her] duties and a duty to inquire for the seller and others regarding the issues raised in the MLS." (Compl., ¶ 30.) Plaintiffs do not specifically address the source of Turner's duty in their opposition. The court is not aware of such duty for a seller. Therefore, as to defendant Turner, the demurrer to the fourth cause of action is sustained without leave to amend.

TENTATIVE RULING #9:

THE DEMURRER IS SUSTAINED IN PART WITH AND WITHOUT LEAVE TO AMEND AND OVERRULED IN PART.

AS TO NORCAL, THE DEMURRER TO THE FIRST, THIRD, AND FOURTH CAUSES OF ACTION ARE OVERRULED. AS TO TURNER, THE DEMURRER AS TO THE FIRST CAUSE OF ACTION IS OVERRULED, THE DEMURRER AS TO THE SECOND AND FOURTH CAUSES OF ACTION ARE SUSTAINED WITHOUT LEAVE TO AMEND, AND THE DEMURRER AS TO THE THIRD CASUE OF ACTION IS SUSTAINED WITH LEAVE TO AMEND WITHIN 10 DAYS OF THE ORDER.

NO HEARING ON THIS MATTER WILL BE HELD UNLESS A REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. CAL. RULE CT. 3.1308; LOCAL RULE 8.05.07; SEE ALSO LEWIS V. SUPERIOR COURT, 19 CAL.4TH 1232, 1247 (1999).

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LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR BY ZOOM, PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED.