1. PEOPLE v. $115,720 U.S. CURRENCY PC-20200401

Hearing Re: Claim Opposing Forfeiture.

On August 3, 2020 claimant Judkins filed a Judicial Council Form MC-200 claim opposing forfeiture in response to a notice of administrative proceedings.

On August 17, 2020 the People filed a petition for forfeiture of cash in the amount of $115,720, gold valued at $21,673, silver valued at $5,538, platinum valued at $785, and collectable U.S. Currency valued at $5,925 that was seized by the El Dorado County Sheriff's Department. The petition states: the funds and other property are currently in the hands of the El Dorado County District Attorney's Office; and the property became subject to forfeiture pursuant to Health and Safety Code, § 11470(f), because that money was a thing of value furnished or intended to be furnished by a person in exchange for a controlled substance, the proceeds was traceable to such an exchange, and the money was used or intended to be used to facilitate a violation of various provisions of the Health and Safety Code. The People pray for judgment declaring that the money is forfeited to the State of California.

The proof of service of the petition declares that on August 17, 2020 the petition was served on the claimant by mail to his address of record.

"The following are subject to forfeiture: ¶ * * * (f) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, or securities used or intended to be used to facilitate any violation of Section 11351, 11351.5, 11352, 11355, 11359, 11360, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11382, or 11383 of this code, or Section 182 of the Penal Code, or a felony violation of Section 11366.8 of this code, insofar as the offense involves manufacture, sale, possession for sale, offer for sale, or offer to manufacture, or conspiracy to commit at

least one of those offenses, if the exchange, violation, or other conduct which is the basis for the forfeiture occurred within five years of the seizure of the property, or the filing of a petition under this chapter, or the issuance of an order of forfeiture of the property, whichever comes first." (Health and Safety Code, § 11470(f).)

"(a) Except as provided in subdivision (j), if the Department of Justice or the local governmental entity determines that the factual circumstances do warrant that the moneys, negotiable instruments, securities, or other things of value seized or subject to forfeiture come within the provisions of subdivisions (a) to (g), inclusive, of Section 11470, and are not automatically made forfeitable or subject to court order of forfeiture or destruction by another provision of this chapter, the Attorney General or district attorney shall file a petition of forfeiture with the superior court of the county in which the defendant has been charged with the underlying criminal offense or in which the property subject to forfeiture has been seized or, if no seizure has occurred, in the county in which the property subject to forfeiture is located. If the petition alleges that real property is forfeitable, the prosecuting attorney shall cause a lis pendens to be recorded in the office of the county recorder of each county in which the real property is located. ¶ A petition of forfeiture under this subdivision shall be filed as soon as practicable, but in any case within one year of the seizure of the property which is subject to forfeiture, or as soon as practicable, but in any case within one year of the filing by the Attorney General or district attorney of a lis pendens or other process against the property, whichever is earlier." (Emphasis added.) (Health and Safety Code, § 11488.4(a).)

"(a)(1) Any person claiming an interest in the property seized pursuant to Section 11488 may, unless for good cause shown the court extends the time for filing, at any time within 30 days from the date of the first publication of the notice of seizure, if that person was not personally served or served by mail, or within 30 days after receipt of actual notice, file with the

superior court of the county in which the defendant has been charged with the underlying or related criminal offense or in which the property was seized or, if there was no seizure, in which the property is located, a claim, verified in accordance with Section 446 of the Code of Civil Procedure, stating his or her interest in the property. An endorsed copy of the claim shall be served by the claimant on the Attorney General or district attorney, as appropriate, within 30 days of the filing of the claim…" (Health and Safety Code, § 11488.5(a)(1).)

"(c)(1) If a verified claim is filed, the forfeiture proceeding shall be set for hearing on a day not less than 30 days therefrom, and the proceeding shall have priority over other civil cases. Notice of the hearing shall be given in the same manner as provided in Section 11488.4. Such a verified claim or a claim filed pursuant to subdivision (j) of Section 11488.4 shall not be admissible in the proceedings regarding the underlying or related criminal offense set forth in subdivision (a) of Section 11488. ¶ (2) The hearing shall be by jury, unless waived by consent of all parties. ¶ (3) The provisions of the Code of Civil Procedure shall apply to proceedings under this chapter unless otherwise inconsistent with the provisions or procedures set forth in this chapter. However, in proceedings under this chapter, there shall be no joinder of actions, coordination of actions, except for forfeiture proceedings, or cross-complaints, and the issues shall be limited strictly to the questions related to this chapter." (Emphasis added.) (Health and Safety Code, § 11488.5(c).)

"(d)(1) At the hearing, the state or local governmental entity shall have the burden of establishing, pursuant to subdivision (i) of Section 11488.4, that the owner of any interest in the seized property consented to the use of the property with knowledge that it would be or was used for a purpose for which forfeiture is permitted, in accordance with the burden of proof set forth in subdivision (i) of Section 11488.4. ¶ (2) No interest in the seized property shall be affected by a forfeiture decree under this section unless the state or local governmental entity

has proven that the owner of that interest consented to the use of the property with knowledge that it would be or was used for the purpose charged. Forfeiture shall be ordered when, at the hearing, the state or local governmental entity has shown that the assets in question are subject to forfeiture pursuant to Section 11470, in accordance with the burden of proof set forth in subdivision (i) of Section 11488.4." (Health and Safety Code, § 11488.5(d).)

"(e) The forfeiture hearing shall be continued upon motion of the prosecution or the defendant until after a verdict of guilty on any criminal charges specified in this chapter and pending against the defendant have been decided. The forfeiture hearing shall be conducted in accordance with Sections 190 to 222.5, inclusive, Sections 224 to 234, inclusive, Section 237, and Sections 607 to 630 of the Code of Civil Procedure if trial by jury, and by Sections 631 to 636, inclusive, of the Code of Civil Procedure, if by the court. Unless the court or jury finds that the seized property was used for a purpose for which forfeiture is permitted, the court shall order the seized property released to the person it determines is entitled thereto. ¶ If the court or jury finds that the seized property was used for a purpose for which forfeiture is permitted, but does not find that a person claiming an interest therein, to which the court has determined he or she is entitled, had actual knowledge that the seized property would be or was used for a purpose for which forfeiture is permitted and consented to that use, the court shall order the seized property released to the claimant." (Emphasis added.) (Health and Safety Code, § 11488.5(e).)

"(2) In the case of property described in subdivision (f) of Section 11470, except cash, negotiable instruments, or other cash equivalents of a value of not less than twenty-five thousand dollars ($25,000), for which forfeiture is sought and as to which forfeiture is contested, the state or local governmental entity shall have the burden of proving beyond a reasonable doubt that the property for which forfeiture is sought meets the criteria for forfeiture

described in subdivision (f) of Section 11470." (Emphasis added.) (Health and Safety Code, § 11488.4(i)(2).)

"(3) In the case of property described in paragraphs (1) and (2), a judgment of forfeiture requires as a condition precedent thereto, that a defendant be convicted in an underlying or related criminal action of an offense specified in subdivision (f) or (g) of Section 11470 which offense occurred within five years of the seizure of the property subject to forfeiture or within five years of the notification of intention to seek forfeiture. If the defendant is found guilty of the underlying or related criminal offense, the issue of forfeiture shall be tried before the same jury, if the trial was by jury, or tried before the same court, if trial was by court, unless waived by all parties. The issue of forfeiture shall be bifurcated from the criminal trial and tried after conviction unless waived by all the parties." (Health and Safety Code, § 11488.4(i)(3).)

"In the case of property described in subdivision (f) of Section 11470 that is cash or negotiable instruments of a value of not less than twenty-five thousand dollars ($25,000), the state or local governmental entity shall have the burden of proving by clear and convincing evidence that the property for which forfeiture is sought is such as is described in subdivision (f) of Section 11470. There is no requirement for forfeiture thereof that a criminal conviction be obtained in an underlying or related criminal offense." (Emphasis added.) (Health and Safety Code, § 11488.4(i)(4).)

"(5) If there is an underlying or related criminal action, and a criminal conviction is required before a judgment of forfeiture may be entered, the issue of forfeiture shall be tried in conjunction therewith. Trial shall be by jury unless waived by all parties. If there is no underlying or related criminal action, the presiding judge of the superior court shall assign the action brought pursuant to this chapter for trial." (Health and Safety Code, § 11488.4(i)(5).)

The court was previously advised that there was a criminal proceeding pending.

At the hearing on June 16, 2021, claimant requested a continuance to retain counsel. The People did not object. The hearing was continued to August 13, 2021. At the hearing on August 13, 2021, the claimant/respondent confirmed that he has retained an attorney. The People stated the People and claimant's/respondent's counsel are currently engaged in negotiations and requested a continuance of the hearing.

The court has not been informed as to the current status of the criminal proceeding or whether the negotiations resulted in a settlement of the matter.

TENTATIVE RULING # 1: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, SEPTEMBER 17, 2021 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldoradocourt.org/onlineservices/vcourt.html.

2. PEOPLE v. RODRIGUEZ PCL-20190512

Petition for Forfeiture.

The People filed a petition for forfeiture of certain funds seized pursuant to the provisions of Health and Safety Code, §§ 11469, et seq. The unverified petition contends: the sum of $2,775 in U.S. Currency was seized by the El Dorado County Sheriff's Office on or about March 28, 2019; such funds are currently in the hands of the El Dorado County District Attorney's Office; the property became subject to forfeiture pursuant to Health and Safety Code, § 11470(f), because that money was a thing of value furnished or intended to be furnished by a person in exchange for a controlled substance, the proceeds was traceable to such an exchange, and the money was used or intended to be used to facilitate a violation of Health and Safety Code, § 11358; the claimant/respondent filed a claim opposing forfeiture in which he contends the funds are his; a criminal case pertaining to the property and related allegations of violations of Health and Safety Code, §§ 11351, 11366, 11352(a), and 11379(a) has been filed under case number P19CRF0095; and claimant was arraigned on May 21, 2019. The People pray for a judgment declaring that the money is forfeited to the State of California.

The People state that they do not waive their right to a jury trial, they intend to try the asset forfeiture case in conjunction with the related criminal trial pursuant to Health and Safety Code, §§ 11488.4(i)(3) and 11488.4(i)(5), and the People intend to conduct civil discovery pursuant to Health and Safety Code, § 11488.5(c)(3).

Claimant/Respondent Rodriguez filed a response to the petition denying the allegations of the unverified petition.

"The following are subject to forfeiture: ¶ * * * (f) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in

exchange for a controlled substance, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, or securities used or intended to be used to facilitate any violation of Section 11351, 11351.5, 11352, 11355, 11359, 11360, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11382, or 11383 of this code, or Section 182 of the Penal Code, or a felony violation of Section 11366.8 of this code, insofar as the offense involves manufacture, sale, possession for sale, offer for sale, or offer to manufacture, or conspiracy to commit at least one of those offenses, if the exchange, violation, or other conduct which is the basis for the forfeiture occurred within five years of the seizure of the property, or the filing of a petition under this chapter, or the issuance of an order of forfeiture of the property, whichever comes first." (Health and Safety Code, § 11470(f).)

"(5) If there is an underlying or related criminal action, and a criminal conviction is required before a judgment of forfeiture may be entered, the issue of forfeiture shall be tried in conjunction therewith. Trial shall be by jury unless waived by all parties. If there is no underlying or related criminal action, the presiding judge of the superior court shall assign the action brought pursuant to this chapter for trial." (Health and Safety Code, § 11488.4(i)(5).)

At the hearing on June 11, 2021 the court was informed that the criminal case was set for trial setting on June 25, 2021. At the hearing on August 13, 2021 the court was informed that the criminal matter was pending trial on August 20, 2021. The court granted a continuance of this hearing as requested by the People.

TENTATIVE RULING # 2: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, SEPTEMBER 17, 2021 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldoradocourt.org/onlineservices/vcourt.html.

3. PEOPLE v. KING PCL-20210435

Claim Opposing Forfeiture.

Claimant King filed a claim opposing forfeiture in response to a notice of administrative proceedings to determine that certain funds are forfeited. The verified claim contends $3,775 that he owns was seized from a Chase Bank 401k account and that forfeiture is being pursued under Health and Safety Code, § 11488.5.

The proof of service declares that the El Dorado County District Attorney's Office was served the claim opposing forfeiture. The People have not filed a petition for forfeiture or any other response to the claim.

"The following are subject to forfeiture: ¶ * * * (f) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, or securities used or intended to be used to facilitate any violation of Section 11351, 11351.5, 11352, 11355, 11359, 11360, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11382, or 11383 of this code, or Section 182 of the Penal Code, or a felony violation of Section 11366.8 of this code, insofar as the offense involves manufacture, sale, possession for sale, offer for sale, or offer to manufacture, or conspiracy to commit at least one of those offenses, if the exchange, violation, or other conduct which is the basis for the forfeiture occurred within five years of the seizure of the property, or the filing of a petition under this chapter, or the issuance of an order of forfeiture of the property, whichever comes first." (Health and Safety Code, § 11470(f).)

"(a)(1) Any person claiming an interest in the property seized pursuant to Section 11488 may, unless for good cause shown the court extends the time for filing, at any time within 30 days from the date of the first publication of the notice of seizure, if that person was not personally served or served by mail, or within 30 days after receipt of actual notice, file with the superior court of the county in which the defendant has been charged with the underlying or related criminal offense or in which the property was seized or, if there was no seizure, in which the property is located, a claim, verified in accordance with Section 446 of the Code of Civil Procedure, stating his or her interest in the property. An endorsed copy of the claim shall be served by the claimant on the Attorney General or district attorney, as appropriate, within 30 days of the filing of the claim…" (Health and Safety Code, § 11488.5(a)(1).)

"(j) The Attorney General or the district attorney of the county in which property is subject to forfeiture under Section 11470 may, pursuant to this subdivision, order forfeiture of personal property not exceeding twenty-five thousand dollars ($25,000) in value. The Attorney General or district attorney shall provide notice of proceedings under this subdivision pursuant to subdivisions (c), (d), (e), and (f), including: ¶ (1) A description of the property. ¶ (2) The appraised value of the property. ¶ (3) The date and place of seizure or location of any property not seized but subject to forfeiture. ¶ (4) The violation of law alleged with respect to forfeiture of the property. ¶ (5) The instructions for filing and serving a claim with the Attorney General or the district attorney pursuant to Section 11488.5 and time limits for filing a claim and claim form. ¶ If no claims are timely filed, the Attorney General or the district attorney shall prepare a written declaration of forfeiture of the subject property to the state and dispose of the property in accordance with Section 11489. A written declaration of forfeiture signed by the Attorney General or district attorney under this subdivision shall be deemed to provide good and sufficient title to the forfeited property. The prosecuting agency ordering forfeiture pursuant to

this subdivision shall provide a copy of the declaration of forfeiture to any person listed in the receipt given at the time of seizure and to any person personally served notice of the forfeiture proceedings. ¶ If a claim is timely filed, then the Attorney General or district attorney shall file a petition of forfeiture pursuant to this section within 30 days of the receipt of the claim. The petition of forfeiture shall then proceed pursuant to other provisions of this chapter, except that no additional notice need be given and no additional claim need be filed." (Emphasis added.) (Health and Safety Code, § 11488.4(j).)

"(c)(1) If a verified claim is filed, the forfeiture proceeding shall be set for hearing on a day not less than 30 days therefrom, and the proceeding shall have priority over other civil cases. Notice of the hearing shall be given in the same manner as provided in Section 11488.4. Such a verified claim or a claim filed pursuant to subdivision (j) of Section 11488.4 shall not be admissible in the proceedings regarding the underlying or related criminal offense set forth in subdivision (a) of Section 11488. ¶ (2) The hearing shall be by jury, unless waived by consent of all parties. ¶ (3) The provisions of the Code of Civil Procedure shall apply to proceedings under this chapter unless otherwise inconsistent with the provisions or procedures set forth in this chapter. However, in proceedings under this chapter, there shall be no joinder of actions, coordination of actions, except for forfeiture proceedings, or cross-complaints, and the issues shall be limited strictly to the questions related to this chapter." (Health and Safety Code, § 11488.5(c).)

"(d)(1) At the hearing, the state or local governmental entity shall have the burden of establishing, pursuant to subdivision (i) of Section 11488.4, that the owner of any interest in the seized property consented to the use of the property with knowledge that it would be or was used for a purpose for which forfeiture is permitted, in accordance with the burden of proof set forth in subdivision (i) of Section 11488.4. ¶ (2) No interest in the seized property shall be

affected by a forfeiture decree under this section unless the state or local governmental entity has proven that the owner of that interest consented to the use of the property with knowledge that it would be or was used for the purpose charged. Forfeiture shall be ordered when, at the hearing, the state or local governmental entity has shown that the assets in question are subject to forfeiture pursuant to Section 11470, in accordance with the burden of proof set forth in subdivision (i) of Section 11488.4." (Health and Safety Code, § 11488.5(d).)

"(e) The forfeiture hearing shall be continued upon motion of the prosecution or the defendant until after a verdict of guilty on any criminal charges specified in this chapter and pending against the defendant have been decided. The forfeiture hearing shall be conducted in accordance with Sections 190 to 222.5, inclusive, Sections 224 to 234, inclusive, Section 237, and Sections 607 to 630 of the Code of Civil Procedure if trial by jury, and by Sections 631 to 636, inclusive, of the Code of Civil Procedure, if by the court. Unless the court or jury finds that the seized property was used for a purpose for which forfeiture is permitted, the court shall order the seized property released to the person it determines is entitled thereto. ¶ If the court or jury finds that the seized property was used for a purpose for which forfeiture is permitted, but does not find that a person claiming an interest therein, to which the court has determined he or she is entitled, had actual knowledge that the seized property would be or was used for a purpose for which forfeiture is permitted and consented to that use, the court shall order the seized property released to the claimant." (Health and Safety Code, § 11488.5(e).)

The People did not appear at the hearing on July 23, 2021. The court continued the hearing from July 23, 2021 to September 17, 2021. The claimant was directed to serve the People with a copy of the claim that included the hearing date. The proof of service is not in the court's file. A copy of the July 23, 2021 minute order was placed in the District Attorney's court will call in Department 7 on July 26, 2021.

TENTATIVE RULING # 3: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, SEPTEMBER 17, 2021 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldoradocourt.org/onlineservices/vcourt.html.

4. MATTER OF SILVER PC-20210285

OSC Re: Name Change.

The mandated CLETS report is not in the court's file. (See Code of Civil Procedure, § 1279.5(f).)

There is no proof of publication in the court's file, which is mandated by Code of Civil Procedure, § 1277(a).

TENTATIVE RULING # 4: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, SEPTEMBER 17, 2021 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldoradocourt.org/onlineservices/vcourt.html.

5. MATTER OF KARANDANIS PC-20210293

OSC Re: Name Change.

TENTATIVE RULING # 5: THE PETITION IS GRANTED.

6. MATTER OF SAILOR K. PC-20210294

OSC Re: Name Change.

TENTATIVE RULING # 6: THE PETITION IS GRANTED.

7. MATTER OF HANNUM PC-20210374

OSC Re: Name Change.

TENTATIVE RULING # 7: THE PETITION IS GRANTED.

8. RYAN v. MEDEL PC-20180283

Defendants Pacific Bell Telephone Co.'s and Medel's Motion for Mental Examination of Plaintiff.

Plaintiff filed an action for damages sustained in a motor vehicle accident, which allegedly occurred on June 30, 2016. Defendants allegedly breached their duty of due care by not properly securing cable on the Pacific Bell truck and instead allowed the cable to come off, hitting plaintiff's vehicle causing her injury. (Judicial Council Form Complaint, General Negligence Attachment, paragraph GN-1.)

Defendants Pacific Bell Telephone Co. and Medel move for an order directing plaintiff to submit to a mental examination conducted by Dr. Strassberg for the purpose of determining plaintiff's mental, psychological, and neurological conditions as well as plaintiff's post-traumatic stress disorder, depression, and other psychological and mental injuries claimed in this action. Defendants state that the examination should include both oral and mental examinations of plaintiff as well as psychiatry and neurological testing which may be deemed necessary for the sole purpose of determining the nature, cause, and extent of plaintiff's past, present and future mental and neurological conditions as well as plaintiff's post-traumatic stress disorder, depression and other psychological mental injuries claimed in this action. The proposed mental examination is to be conducted by remote electronic video means.

Defendants contend that good cause exists to issue a court order as plaintiff' claimed mental injuries allegedly arising from the subject accident has clearly placed her mental condition at issue in this case and discovery of her mental condition is necessary to prepare for trial and prevent surprise at trial.

The proof of service declares that on July 28, 2021 the notice of motion and moving papers were served by mail on plaintiff's counsel. There is no opposition to the motion in the court's file.

"If any party desires to obtain discovery by a physical examination other than that described in Article 2 (commencing with Section 2032.210), or by a mental examination, the party shall obtain leave of court." (Code of Civil Procedure, § 2032.310(a).)

"A motion for an examination under subdivision (a) shall specify the time, place, manner, conditions, scope, and nature of the examination, as well as the identity and the specialty, if any, of the person or persons who will perform the examination. The motion shall be accompanied by a meet and confer declaration under Section 2016.040." (Code of Civil Procedure, § 2032.310(b).)

"Notice of the motion shall be served on the person to be examined and on all parties who have appeared in the action." (Code of Civil Procedure, § 2032.310(c).)

"The court shall grant a motion for a physical or mental examination under Section 2032.310 only for good cause shown." (Code of Civil Procedure, § 2032.320(a).)

"If a party stipulates as provided in subdivision (c), the court shall not order a mental examination of a person for whose personal injuries a recovery is being sought except on a showing of exceptional circumstances." (Code of Civil Procedure, § 2032.320(b).)

"A stipulation by a party under this subdivision shall include both of the following: ¶ (1) A stipulation that no claim is being made for mental and emotional distress over and above that usually associated with the physical injuries claimed. ¶ (2) A stipulation that no expert testimony regarding this usual mental and emotional distress will be presented at trial in support of the claim for damages." (Code of Civil Procedure, § 2032.320(c).)

"(d) An order granting a physical or mental examination shall specify the person or persons who may perform the examination, as well as the time, place, manner, diagnostic tests and procedures, conditions, scope, and nature of the examination." (Code of Civil Procedure, § 2032.320(d).)

"A mental examination conducted under this chapter shall be performed only by a licensed physician, or by a licensed clinical psychologist who holds a doctoral degree in psychology and has had at least five years of postgraduate experience in the diagnosis of emotional and mental disorders." (Code of Civil Procedure, § 2032.020(c).)

With the above-cited legal authority in mind, the court will rule on defendants Pacific Bell Telephone Co.'s and Medel's motion for mental examination of plaintiff.

Good Cause to Compel Mental Examination

"It is another matter entirely, however, when a party places his *own* mental state in controversy by alleging mental and emotional distress. Unlike the bus driver in *Schlagenhauf,* who had a controversy thrust upon him, a party who chooses to allege that he has mental and emotional difficulties can hardly deny his mental state is in controversy. To the extent the decision in *Cody,* supra, 103 F.R.D. 421, is inconsistent with this conclusion, we decline to follow it. (See also *Reuter v. Superior Court,* supra, 93 Cal.App.3d at p. 340, 155 Cal.Rptr. 525.) ¶ In the case at bar, plaintiff haled defendants into court and accused them of causing her various mental and emotional ailments. Defendants deny her charges. As a result, the existence and extent of her mental injuries is indubitably in dispute. In addition, by asserting a causal link between her mental distress and defendants' conduct, plaintiff implicitly claims it was not caused by a preexisting mental condition, thereby raising the question of alternative sources for the distress. We thus conclude that her mental state is in controversy. ¶ We emphasize that our conclusion is based solely on the allegations of emotional and mental

damages in this case. A simple sexual harassment claim asking compensation for having to endure an oppressive work environment or for wages lost following an unjust dismissal would not normally create a controversy regarding the plaintiff's mental state. To hold otherwise would mean that every person who brings such a suit implicitly asserts he or she is mentally unstable, obviously an untenable proposition. ¶ Determining that the mental or physical condition of a party is in controversy is but the first step in our analysis. In contrast to more pedestrian discovery procedures, a mental or physical examination requires the discovering party to obtain a court order. The court may grant the motion only for good cause shown. (§ 2032, subd. (a).) [Footnote omitted.]" (Vinson v. Superior Court (1987) 43 Cal.3d 833, 839-840.)

"Section 2036 defines a showing of "good cause" as requiring that the party produce specific facts justifying discovery and that the inquiry be relevant to the subject matter of the action or reasonably calculated to lead to the discovery of admissible evidence. [FN 6.] The requirement of a court order following a showing of good cause is doubtless designed to protect an examinee's privacy interest by preventing an examination from becoming an annoying fishing expedition. While a plaintiff may place his mental state in controversy by a general allegation of severe emotional distress, the opposing party may not require him to undergo psychiatric testing solely on the basis of speculation that something of interest may surface. (*Schlagenhauf v. Holder,* supra, 379 U.S. at pp. 116-122, 85 S.Ct. at pp. 241-245.) ¶ FN6. This section has been repealed and has apparently not been replaced by equivalent language. There is no indication, however, that the Legislature intended repeal of former section 2036 to change the requirements for good cause in regard to mental examinations. ¶ Plaintiff in the case at bar asserts that she continues to suffer diminished self-esteem, reduced motivation, sleeplessness, loss of appetite, fear, lessened ability to help others, loss of social

contacts, anxiety, mental anguish, loss of reputation, and severe emotional distress. In their motion defendants pointed to these allegations. Because the truth of these claims is relevant to plaintiff's cause of action and justifying facts have been shown with specificity, good cause as to these assertions has been demonstrated. Subject to limitations necessitated by plaintiff's right to privacy, defendants must be allowed to investigate the continued existence and severity of plaintiff's alleged damages." (Emphasis added.) (Vinson v. Superior Court (1987) 43 Cal.3d 833, 840-841.)

The California Supreme Court concluded "Plaintiff's present mental and emotional condition is directly relevant to her claim and essential to a fair resolution of her suit; she has waived her right to privacy in this respect by alleging continuing mental ailments. But she has not, merely by initiating this suit for sexual harassment and emotional distress, implicitly waived her right to privacy in respect to her sexual history and practices. Defendants fail to explain why probing into this area is directly relevant to her claim and essential to its fair resolution. Plaintiff does not contend the alleged acts were detrimental to her present sexuality. Her sexual history is even less relevant to her claim. We conclude that she has not waived her right to sexual privacy." (Vinson v. Superior Court (1987) 43 Cal.3d 833, 842.)

"In *Vinson,* the plaintiff brought an action for sexual harassment and intentional infliction of emotional distress in which she sought damages for "continuing" emotional distress. (*Vinson at p. 837, 239 Cal.Rptr. 292, 740 P.2d 404*.) The defendants sought to compel a physical and mental examination of her "to test the true extent of her injuries and to measure her ability to function in the workplace." (*Id. at p. 838, 239 Cal.Rptr. 292, 740 P.2d 404*.) The superior court granted the defendants' request. The plaintiff sought writ review. On review, the California Supreme Court rejected the plaintiff's claim that her mental condition was not placed "in controversy" by her allegation of continuing emotional distress. "[C]ourts must balance the right

of civil litigants to discover relevant facts against the privacy interests of persons subject to discovery." (*Vinson at p. 842, 239 Cal.Rptr. 292, 740 P.2d 404*.) "[A] party who chooses to allege that he *has* mental and emotional difficulties can hardly deny his mental state is in controversy." (*Vinson at p. 839, 239 Cal.Rptr. 292, 740 P.2d 404*, emphasis added.) "[T]he existence and extent of her mental injuries is indubitably in dispute. In addition, by asserting a causal link between her mental distress and defendants' conduct, plaintiff implicitly claims it was not caused by a preexisting mental condition, thereby raising the question of alternative sources for the distress." (*Vinson at p. 840, 239 Cal.Rptr. 292, 740 P.2d 404*.) The California Supreme Court expressly based its holding in *Vinson* on the nature of the plaintiff's allegation of "continuing emotional distress." "We emphasize that our conclusion is based *solely* on the allegations of emotional and mental damages *in this case.* A simple sexual harassment claim asking compensation for having to endure an oppressive work environment or for wages lost following an unjust dismissal would not normally create a controversy regarding the plaintiff's mental state. To hold otherwise would mean that every person who brings such a suit implicitly asserts he or she is mentally unstable, obviously an untenable proposition." (*Vinson at p. 840, 239 Cal.Rptr. 292, 740 P.2d 404*, emphasis added.) "Plaintiff's *present* mental and emotional condition is directly relevant to her claim and essential to a fair resolution of her suit; she has waived her right to privacy in this respect by alleging *continuing* mental ailments." (*Vinson* at p. 842, 239 Cal.Rptr. 292, 740 P.2d 404, emphasis added.) "[Mental] examinations may ordinarily be considered *only* in cases in which the alleged mental or emotional distress is said to be *ongoing.*" (*Vinson at p. 847, 239 Cal.Rptr. 292, 740 P.2d 404*, emphasis added.)" (Doyle v. Superior Court (1996) 50 Cal.App.4th 1878, 1885-1886.)

Defense Counsel's declaration in support of the motion authenticates the following: plaintiff's verified responses to form interrogatory numbers 6.2 and 6.3, and special

interrogatory number 6.7; a report from plaintiff's treating physician/expert witness dated January 13, 2021; and an email from plaintiff's therapist dated August 21, 2018. (See Declaration of Michael A. Sawamura in Support of Motion paragraphs 10, 11, 12 and 14; and Defense Exhibits C, D, E and G.)

Plaintiff admits the following in her verified responses to discovery: she attributes to the subject incident ongoing emotional distress equal to the horror of the collision and problems sleeping; attributes to the subject incident anxiety when following trucks; and she is being treated by a health care provider for her anxiety following or meeting large trucks. (Defense Exhibit C – Responses to Form Interrogatory Numbers 6.2 and 6.3; Defense Exhibit D – Response to Special Interrogatory Number 6.7.) Her treating physician/retained expert witness states in a report dated January 13, 2021 that plaintiff admits that she is in quite emotional distress by her chronic pain, the doctor's assessment is that plaintiff suffers from major depressive disorder, singe episode unspecified, and the plan was that she be referred to neuropsychology placement; and the email from plaintiff's therapist dated August 21, 2018, states that the therapist met with plaintiff for the purpose of providing services to treat PTSD and continue with the assessment process and plaintiff became very tearful when she realized how strongly impacted she has been by the car accident and resulting PTSD she experienced. (Defense Exhibit E – January 13, 2021 Report of Dr. Topher Stephenson; and Defense Exhibit G – Email dated August 21, 2018 from Lauren Lowe, MFT.)

Absent opposition, under the circumstances presented, it appears appropriate to grant the motion and order plaintiff to appear for a mental examination.

Defendants Pacific Bell Telephone Co. and Medel are to submit to the court and serve on plaintiff a proposed order that specifies the person or persons who may perform the examination as well as the time, place, manner, diagnostic tests and procedures, conditions,

scope, and nature of the examination. (Code of Civil Procedure, § 2032.320(d).) (See Defense Exhibit B, page 2, lines 5-13.)

TENTATIVE RULING # 8: DEFENDANTS PACIFIC BELL TELEPHONE CO.'S AND MEDEL'S MOTION FOR MENTAL EXAMINATION OF PLAINTIFF IS GRANTED. DEFENDANTS PACIFIC BELL TELEPHONE CO. AND MEDEL ARE TO SUBMIT TO THE COURT AND SERVE ON PLAINTIFF A PROPOSED ORDER THAT SPECIFIES THE PERSON OR PERSONS WHO MAY PERFORM THE EXAMINATION AS WELL AS THE TIME, PLACE, MANNER, DIAGNOSTIC TESTS AND PROCEDURES, CONDITIONS, SCOPE, AND NATURE OF THE EXAMINATION. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND 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. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. 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 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 TELEPHONICALLY THEY MUST APPEAR BY "VCOURT",

WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldoradocourt.org/onlineservices/vcourt.html. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, SEPTEMBER 17, 2021 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

9. ON DECK CAPITAL, INC. v. EPOXY ARMOR SYSTEMS, INC. PC-20210219

Defendant's Motion to Quash Service of Summons.

TENTATIVE RULING # 9: THIS MATTER IS CONTINUED TO 8:30 A.M. ON FRIDAY, OCTOBER 1, 2021 IN DEPARTMENT NINE.

10. KBR, INC. v. HARTNETT PCL-20190005

Hearing Re: Claim of Exemption

On January 3, 2021 the court entered default judgment against the defendant/judgment debtor in the amount of $3,816.81. The judgment creditor executed by wage garnishment.

The judgment debtor claims all earnings are exempt, because they are necessary for the support of herself and her family. She is not willing to have anything withheld to pay on this judgment debt.

The judgment creditor opposes the claim on the ground that all earnings are not exempt.

The public policy of the state's wage exemption statutes is to insure that the debtor and his or her family will retain enough money to maintain a basic standard of living. (Barnhill v. Robert Saunders & Co. (1981) 125 Cal.App.3d 1, 6.) The exemption claimant has the burden of proof. (Code of Civil Procedure, § 703.580(b).) Absent the judgment debtor establishing his or her entire monthly net income is necessary for support of the debtor and his or her family, the amount the debtor's wages subject to garnishment is 25% of his or her net monthly income (See 15 U.S.C. § 1673; and Code of Civil Procedure, § 706.050.), which amounts to $379.63 per month. (Financial Statement - $1,600 per month - $81.47 = net monthly income of $1,518.53.)

The judgment debtor's verified financial statement reports that the take home income of the debtor and her spouse is $7,518.53 and the monthly expenses are $7,070.

The exemption claimant has not met her burden of proof that all wages are exempt. (Code of Civil Procedure, § 703.580(b).) The court is inclined to deny the claim of exemption.

The judgment debtor needs to explain whether the claimed earnings withholding order in effect is the earnings withholding order in this case that is the subject of this claim of exemption or an order in another case. (See Financial Statement, paragraph 7.)

TENTATIVE RULING # 10: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, SEPTEMBER 17, 2021 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldoradocourt.org/onlineservices/vcourt.html.

11. HARDEN v. POSTELNYAK PCL-20210536

Plaintiff's Motion for Preliminary Injunction.

On July 15, 2021 plaintiff filed a Judicial Council Form Complaint for damages.

On July 16, 2021 the court denied plaintiff's ex parte motion for preliminary injunction. A TRO was not requested and an OSC was not issued. Plaintiff filed a noticed motion for a preliminary injunction asserting that defendant is a 25% owner of a 21 acre historic mine parcel held in the name of 17 persons; plaintiff owns 8.333% of the parcel; the parcel has not been subdivided, yet the parcel is divided into separate Assessor's parcel numbers for each interest; and defendant is engaging in certain conduct on her APN without the required permits, which exposes the other parcel owners to liability.

A preliminary injunction shall not be granted without notice to the opposing parties. (Code of Civil Procedure, § 527(a).)

"An injunction may be granted in the following cases: ¶ (1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and the relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually. ¶ (2) When it appears by the complaint or affidavits that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury, to a party to the action. ¶ (3) When it appears, during the litigation, that a party to the action is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the rights of another party to the action respecting the subject of the action, and tending to render the judgment ineffectual. ¶ (4) When pecuniary compensation would not afford adequate relief. ¶ (5) Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief. ¶ (6) Where the restraint is

necessary to prevent a multiplicity of judicial proceedings. ¶ (7) Where the obligation arises from a trust." (Code of Civil Procedure, § 526(a).)

A preliminary injunction may be granted upon a verified complaint or upon affidavits which show that sufficient grounds exist for the issuance of such an injunction. (Code of Civil Procedure, § 527(a).) In deciding whether to issue a preliminary injunction, two factors must be weighed: the likelihood of the moving party ultimately prevailing on the merits and the relative interim harm to the parties from the issuance of a preliminary injunction. (Butt v. State of California (1992) 4 Cal.4th 668, 677-678.) "The latter factor involves consideration of such things as the inadequacy of other remedies, the degree of irreparable harm, and the necessity of preserving the status quo. The determination whether to grant a preliminary injunction generally rests in the sound discretion of the trial court. (Citation omitted.)" (Abrams v. St. John's Hospital & Health Center (1994) 25 Cal.App.4th 628, 636.)

"It is said: "To issue an injunction is the exercise of a delicate power, requiring great caution and sound discretion, and rarely, if ever, should (it) be exercised in a doubtful case. . . ." (*Willis v. Lauridson*, 161 Cal. 106, 117, 118 P. 530, 535; *West v. Lind*, 186 Cal.App.2d 563, 569, 9 Cal.Rptr. 288; *Mallon v. City of Long Beach*, 164 Cal.App.2d 178, 190, 330 P.2d 423.)" (Ancora-Citronelle Corp. v. Green (1974) 41 Cal.App.3d 146, 148.)

"The plaintiff bears the burden of presenting facts establishing the requisite reasonable probability: "[T]he drastic remedy of an injunction pendente lite may not be permitted except upon a sufficient factual showing, by someone having knowledge thereof, made under oath or by declaration under penalty of perjury." (*Ancora–Citronelle Corp. v. Green, supra,* 41 Cal.App.3d at p. 150, 115 Cal.Rptr. 879.)" (Fleishman v. Superior Court (2002) 102 Cal.App.4th 350, 356.)

"The trial court considers two interrelated factors when deciding whether to issue preliminary injunctions: the interim harm the applicant is likely to sustain if the injunction is denied as compared to the harm to the defendant if it issues, and the likelihood the applicant will prevail on the merits at trial. (*Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286, 219 Cal.Rptr. 467, 707 P.2d 840; *IT Corp. v. County of Imperial, supra,* 35 Cal.3d at pp. 69–70, 196 Cal.Rptr. 715, 672 P.2d 121.) However, before the trial court can exercise its discretion the applicant must make a prima facie showing of entitlement to injunctive relief. The applicant must demonstrate a real threat of immediate and irreparable injury (6 Witkin, Cal.Procedure (3d ed. 1985) Provisional Remedies, § 254; *E.H. Renzel Co. v. Warehousemen's Union* (1940) 16 Cal.2d 369, 373, 106 P.2d 1) due to the inadequacy of legal remedies. (6 Witkin, *op. cit. supra,* § 253.)" (Triple A Machine Shop, Inc. v. State of California (1989) 213 Cal.App.3d 131, 138.)

A trial court's decision on a motion for preliminary injunction is not a adjudication of the ultimate rights in controversy (Association for Los Angeles Deputy Sheriffs v. County of Los Angeles (2008) 166 Cal.App.4th 1625, 1634.); the order is not a determination of the merits of the case; and the order may not be given issue-preclusive effect with respect to the merits of the action (Upland Police Officers Ass'n v. City of Upland (2003) 111 Cal.App.4th 1294, 1300.).

- Service of Notice

At the hearing on August 13, 2021 the bailiff served the moving papers on the defendant in open court. The defendant was in court when the court ordered the hearing continued to 8:30 a.m. on Friday, September 17, 2021.

The proof of service of the summons and complaint declares that defendant was served the summons and complaint by mail with an acknowledgement of receipt form on August 21, 2021. There is no notice and acknowledgement of receipt executed by defendant as acknowledging

service of the summons and complaint in the court's file, therefore, there is no evidence before the court to establish that defendant has been served a copy of the summons and complaint. "Service of a summons pursuant to this section is deemed complete on the date a written acknowledgment of receipt of summons is executed, if such acknowledgment thereafter is returned to the sender." (Code of Civil Procedure, § 415.30(c).)

The court questions whether the court has jurisdiction to consider and rule on a motion for preliminary injunction where there is insufficient evidence to establish that the court has personal jurisdiction over defendant by means of adequate service of the summons and complaint in this action. The only document served on defendant has been a motion and defendant has only filed a request for interpreter.

"Notice of the litigation does not confer personal jurisdiction absent substantial compliance with the statutory requirements for service of summons. (See *Ault v. Dinner For Two, Inc.* (1972) 27 Cal.App.3d 145, 148, 103 Cal.Rptr. 572.)" (MJS Enterprises, Inc. v. Superior Court (1983) 153 Cal.App.3d 555, 557-558.)

The failure of proof sufficient to establish personal jurisdiction is an independent reason to deny the motion.

Likelihood of the Plaintiff Ultimately Prevailing on the Merits and the Relative Interim Harm to the Parties

The Judicial Council form complaint asserts a claim for damages premised upon an unstated, uncertain theory of law and is not verified. Therefore, the unverified complaint provides no support to plaintiff's claim of irreparable harm and that he is likely to prevail in this action against defendant.

The plaintiff's declaration in support of the motion is also deficient in that while he declares a legal conclusion that defendant owns 25% of a 21 acre parcel consisting of an historic gold

mine held in title by 17 persons, including plaintiff, he also declares that each owner has separate parcel numbers. To support this legal conclusion of joint ownership of a single parcel of land is an email with an unauthenticated list of owners of unknown origin. There are no certified copies of grant deeds establishing joint ownership of a single parcel of land, rather than each owning a separately numbered subdivided parcel.

Plaintiff has not met his burden of presenting a declaration with admissible evidence of facts establishing the requisite reasonable probability of success in this action. "The plaintiff bears the burden of presenting facts establishing the requisite reasonable probability: "[T]he drastic remedy of an injunction pendente lite may not be permitted except upon a sufficient factual showing, by someone having knowledge thereof, made under oath or by declaration under penalty of perjury." (*Ancora–Citronelle Corp. v. Green, supra,* 41 Cal.App.3d at p. 150, 115 Cal.Rptr. 879.)" (Fleishman v. Superior Court (2002) 102 Cal.App.4th 350, 356.)

The motion is denied.

TENTATIVE RULING # 11: PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION IS DENIED. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND 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. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. 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 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 TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldoradocourt.org/onlineservices/vcourt.html. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, SEPTEMBER 17, 2021 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

12. HENSON v. BELWOOD INVESTMENTS, LLC PC-20210277

(1) Defendants Belwood Investments, LLC's and Belwood's Demurrer to Complaint.

(2) Defendants Belwood Investments, LLC's and Belwood's Motion to Strike Punitive Damages and Alter Ego Allegations.

TENTATIVE RULING # 12: DEFENDANTS BELWOOD INVESTMENTS, LLC AND BELWOOD HAVING FILED NOTICES OF WITHDRAWAL OF THEIR DEMURRER AND MOTION TO STRIKE ON SEPTEMBER 13, 2021, THESE MATTERS ARE DROPPED FROM THE CALENDAR.

13. MISZKEWYCZ v. COUNTY OF PLACER PC-20210419

Defendant's Demurrer to 1st Amended Complaint.

On May 20, 2021 plaintiff filed a 1st amended complaint against defendant County of Placer (County) asserting a cause of action for Whistleblower Retaliation under Labor Code, § 1102.5.

Defendant County demurs to the 1st amended complaint on the following grounds: nearly all of plaintiff's alleged activities are not activities protected by Labor Code, § 1102.5; the allegations fail to establish that defendant imposed an adverse employment action on plaintiff; plaintiff failed to adequately allege a causal connection between protected activities and an adverse employment action; and the Government Code discretionary acts immunity bars this action.

Plaintiff opposes the demurrer on the following grounds: plaintiff sufficiently alleged that she engaged in protected activities; plaintiff alleged sufficient facts that establish that plaintiff was subjected to adverse employment actions; the 1st amended complaint adequately alleges facts establishing a causal nexus between the protected activities and the adverse employment actions; and there is no governmental immunity to whistleblower actions.

Defendant replied to the opposition.

General Demurrer Principles

When any ground for objection to a complaint appears on its face, or from any matter of which the court is required to or may take judicial notice, the objection on that ground may be taken by demurrer to the pleading. (Code of Civil Procedure, § 430.30(a).)

"'A demurrer admits all material and issuable facts properly pleaded. [Citations.] However, it does not admit contentions, deductions or conclusions of fact or law alleged therein.' (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 713 [63 Cal.Rptr. 724, 433 P.2d 732].) Also, '...

"plaintiff need only plead facts showing that he may be entitled to some relief [citation]." [Citation.] Furthermore, we are not concerned with plaintiff's possible inability or difficulty in proving the allegations of the complaint.' (*Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 572 [108 Cal.Rptr. 480, 510 P.2d 1032].)" (Highlanders, Inc. v. Olsan (1978) 77 Cal.App.3d 690, 696-697.)

"A demurrer challenges only the legal sufficiency of the complaint, not the truth of its factual allegations or the plaintiff's ability to prove those allegations. (*Amarel v. Connell* (1988) 202 Cal.App.3d 137, 140 [248 Cal.Rptr. 276].) We therefore treat as true all of the complaint's material factual allegations, but not contentions, deductions or conclusions of fact or law. (*Id*. at p. 141; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 [216 Cal.Rptr. 718, 703 P.2d 58].) We can also consider the facts appearing in exhibits attached to the complaint. (See *Dodd v. Citizens Bank of Costa Mesa*, supra, 222 Cal.App.3d at p. 1627.) We are required to construe the complaint liberally to determine whether a cause of action has been stated, given the assumed truth of the facts pleaded. (*Rogoff v. Grabowski* (1988) 200 Cal.App.3d 624, 628 [246 Cal.Rptr. 185].)" (Picton v. Anderson Union High School Dist. (1996) 50 Cal.App.4th 726, 732-733.)

""To determine whether a cause of action is stated, the appropriate question is whether, upon a consideration of all the facts alleged, it appears that the plaintiff is entitled to any judicial relief against the defendant, notwithstanding that the facts may not be clearly stated, or may be intermingled with a statement of other facts irrelevant to the cause of action shown, or although the plaintiff may demand relief to which he is not entitled under the facts alleged. (*Elliott v. City of Pacific Grove*, 54 Cal.App.3d 53, 56, 126 Cal.Rptr. 371.) Mistaken labels and confusion of legal theory are not fatal because the doctrine of "theory of the pleading" has long been repudiated in this state. (*Lacy v. Laurentide Finance Corp*., 28 Cal.App.3d 251, 256-257, 104 Cal.Rptr. 547.)" (Spurr v. Spurr (1979) 88 Cal.App.3d 614, 617.)

The rule is that a general demurrer should be overruled if the pleading, liberally construed, states a cause of action under any theory. (Brousseau v. Jarrett (1977) 73 Cal.App.3d 864, 870-871.)

With the above cited principles in mind, the court will rule on the demurrers to the 1st amended complaint.

Government Code, § 1102.5 Cause of Action

"Fundamental public policy prohibits the retaliatory discharge of employees for whistle blowing in the public interest. (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 670-671, 254 Cal.Rptr. 211, 765 P.2d 373.) Labor Code section 1102.5, subdivision (b), prohibits employers from retaliating against employees for disclosing information to a government or law enforcement agency when the employee has reasonable cause to believe that such information discloses a violation of federal or state statutes or regulations. 'This provision reflects the broad public policy interest in encouraging workplace whistle-blowers to report unlawful acts without fearing retaliation.' (*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 77, 78 Cal.Rptr.2d 16, 960 P.2d 1046.)" (Colores v. Board of Trustees (2003) 105 Cal.App.4th 1293, 1301, fn.1.)

"(b) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for disclosing information, or because the employer believes that the employee disclosed or may disclose information, to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance, or for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or

regulation, regardless of whether disclosing the information is part of the employee's job duties." (Emphasis added.) (Labor Code, § 1102.5(b).)

California's general whistleblower statute, Labor Code, § 1102.5(b), reflects the broad public policy interest in encouraging workplace whistle-blowers to report unlawful acts without fearing retaliation. (McVeigh v. Recology San Francisco (2013) 213 Cal.App.4th 443, 468.) "Labor Code section 1102.5, subdivision (b) should be given a broad construction commensurate with its broad purpose (*Green, supra,* 19 Cal.4th at p. 77, 78 Cal.Rptr.2d 16, 960 P.2d 1046)". (McVeigh v. Recology San Francisco (2013) 213 Cal.App.4th 443, 471.)

The Third District Court of Appeal has stated the following with respect to a Section 1102.5 "whistleblower" cause of action: "The elements of a section 1102.5(b) retaliation cause of action require that (1) the plaintiff establish a prima facie case of retaliation, (2) the defendant provide a legitimate, nonretaliatory explanation for its acts, and (3) the plaintiff show this explanation is merely a pretext for the retaliation. (See *Flait, supra,* 3 Cal.App.4th at p. 476, 4 Cal.Rptr.2d 522; see also *Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1453, 116 Cal.Rptr.2d 602 (*Akers*); *Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 68–69, 105 Cal.Rptr.2d 652.)" (Patten v. Grant Joint Union High School Dist. (2005) 134 Cal.App.4th 1378, 1384.) The Third District further stated that the following must be established in order to satisfy the element of a prima facie case of retaliation: "…a plaintiff must show (1) she engaged in a protected activity, (2) her employer subjected her to an adverse employment action, and (3) there is a causal link between the two. (*Akers, supra,* 95 Cal.App.4th at p. 1453, 116 Cal.Rptr.2d 602.)" (Patten v. Grant Joint Union High School Dist. (2005) 134 Cal.App.4th 1378, 1384.)

- Protected Activities

Defendant argues that in order for the activity to be protected, the plaintiff must disclose a violation of law and the plaintiff employee must have had reasonable cause to believe the disclosure involves a violation of law. (Labor Code, § 1102.5(b).)

The court notes that Section 1102.5(b) is also violated where the employer retaliates against the employee when the employer believes that the employee disclosed or may disclose information, to a government or law enforcement agency.

Citing Lehto v. City of Oxnard (1985) 171 Cal.App.3d 285, 292–293 and Turner v. Anheuser-Busch, Inc. (1994) 7 Cal.4th 1238, 1257, defendant argues that the 1st amended complaint is fatally defective in that it does not allege the specific statute or rule allegedly violated.

The opinion in Lehto, supra, is distinguishable.

The appellate court held: "Based upon the manifest intent underlying section 815.6, we think it obvious that a litigant seeking to plead the breach of a mandatory duty must specifically allege the applicable statute or regulation. Only by so doing may the public entity be advised of the factual and legal basis of the claim against it. (See *Jones v. Oxnard School District* (1969) 270 Cal.App.2d 587, 75 Cal.Rptr. 836; *Levine v. Jessup* (1958) 161 Cal.App.2d 59, 326 P.2d 238.) Without this requirement of specificity in pleading, a court would be hard pressed to determine whether the enactment relied upon was intended to impose an obligatory duty to take official action to prevent foreseeable injuries or whether it was merely advisory in character." (Lehto v. City of Oxnard (1985) 171 Cal.App.3d 285, 292–293.) The action in Lehto involved a claim by plaintiff for injuries sustained in a collision between an automobile in which he was a passenger and the vehicle driven by Raul Carbajal. Plaintiff alleged that defendant City of Oxnard was liable for the alleged negligence of certain police officers in failing to

prevent Carbajal from driving while under the influence of alcohol, because the officers were under a mandatory duty to use due care to take precautions to prevent Raul Carbajal from further driving the automobile in his intoxicated condition as the police officers employed by the City of Oxnard, acting within the scope of their employment, stopped defendant Carbajal for a traffic violation and during the course of the stop, the officers knew, or should have known that "Raul Carbajal was under the influence of intoxicating liquor and that he was totally incapable of safely operating a motor vehicle." The appellate court affirmed the trial court's granting of judgment on the pleadings. The appellate court did not hold that failure to specifically allege the exact statute, rule or regulation violated, which plaintiff allegedly reported to plaintiff's employer or an investigating agency, renders a complaint under Labor Code, § 1102.5 fatally defective.

The appellate court merely found that where a plaintiff claims that a governmental entity breached a mandatory duty rendering the entity liable for damages, the specific statute breached must be alleged in order for the court to determine whether the enactment relied upon was intended to impose an obligatory duty to take official action to prevent foreseeable injuries or whether it was merely advisory in character.

"An opinion is not authority for a point not raised, considered, or resolved therein. (E.g., *People v. Castellanos* (1999) 21 Cal.4th 785, 799, fn. 9, 88 Cal.Rptr.2d 346, 982 P.2d 211; *San Diego Gas & Elec. Co. v. Superior Court* (1996) 13 Cal.4th 893, 943, 55 Cal.Rptr.2d 724, 920 P.2d 669.)" (Styne v. Stevens (2001) 26 Cal.4th 42, 57-58.)

The California Supreme Court opinion in Turner v. Anheuser-Busch, Inc. (1994) 7 Cal.4th 1238 is also distinguishable in that it involved a motion for summary judgment proceeding and is not authority for a legal proposition that the complaint must allege citations to specific

statutory or constitutional provisions that the plaintiff disclosed were violated in order to adequately plead a whistleblower cause of action for violation of Labor Code, § 1102.5.

"Turner does refer in some of his claims to statutory provisions. He charges that ABI management employees Liakos and Schmitt violated unspecified provisions of "the [federal] Alcohol, Tobacco and Firearms laws." He points to Schmitt's alleged gifts to alcohol retailers "in contravention of ABC laws." According to Turner, Schmitt also instructed sales personnel to remove or tear down competitor's products and advertising, to make consignment sales of alcoholic beverages in violation of "ABC Act § 25503." ¶ Turner's vague charge of "Alcohol, Tobacco and Firearms laws" violations, largely unaccompanied by citations to specific statutory or constitutional provisions, puts ABI and the court in the position of having to guess at the nature of the public policies involved, if any. This kind of showing is plainly insufficient to create an issue of *material* fact justifying a trial on the merits of Turner's claims. [Footnote omitted.]" (Turner v. Anheuser-Busch, Inc. (1994) 7 Cal.4th 1238, 1257.)

The California Supreme Court in the Turner opinion did not hold that failure to specifically allege the exact statute, rule or regulation reported as being violated rendered the pleading of a Section 1102.5 case of action fatally deficient. The opinion merely held that for the purposes of ruling on a motion for summary judgment in order to create a triable issue of material fact justifying a trial of the merits of the plaintiff's claim, the plaintiff must provide citations to specific statutory or constitutional provisions that the plaintiff disclosed were violated. A summary judgment proceeding is a different procedural process with a different burden of proof than a demurrer proceeding. The demurrer proceeding has a very liberal standard to avoid the sustaining of a demurrer, while a summary judgment proceeding requires plaintiff to present admissible evidence raising a triable issue of material fact in response to defendant's evidence establishing a defense or absence of an element of the claimed cause of action, which would

necessarily require more specificity as to what plaintiff disclosed and what statues or rules were claimed in that disclosure as being violated. Therefore, it is not authority for a legal proposition that the complaint the must allege citations to specific statutory or constitutional provisions that the plaintiff disclosed were violated. (Styne v. Stevens (2001) 26 Cal.4th 42, 57-58.)

Defendant argues that since the Attorney General was not investigating the County, informing the Attorney General's Office that the District Attorney's office investigating the County was a conflict of interest was not a protected disclosure as plaintiff did not report a violation of law and could not have reasonably believed she was reporting a violation of law.

Plaintiff argues in opposition that plaintiff complained to the County and State Attorney General's Office of potentially illegal conduct, which meets the first element of protected activity.

Plaintiff alleges: in December 2018 plaintiff was promoted to Assistant District Attorney; sometime between March 4 and 6, 2020 District Attorney Wilson advised plaintiff that the FPPC contacted the District Attorney's Office regarding an inquiry into potential unlawful conduct at the County and District Attorney Wilson told plaintiff the FPPC asked whether the County District Attorney's Office will investigate or whether the FPPC will be allowed to investigate; District Attorney Wilson stated he needed to contact the State Attorney General's Office about the claim; on March 9, 2020 the County HR Director and County Counsel called plaintiff and told her that District Attorney Wilson was placed on administrative time off and plaintiff would fill in as interim District Attorney; she was instructed not to talk to District Attorney Wilson about any office related matters; on March 10, 2020 plaintiff emailed the State Attorney General's Office about the FPPC inquiry making clear that there was an unlawful conflict of interest in asking the District Attorney's Office to investigate, or not investigate,

potentially unlawful conduct at the County while the County was in the process of appointing a new District Attorney; on March 11, 2020 plaintiff advised the County CEO, HR Director and County Counsel that she had emailed the Attorney General's Office about the FPPC complaint without disclosing she had also stated the FPPC requested the District Attorney investigate; County Counsel advised plaintiff that they were already aware of the FPPC complaint; and on March 12, 2020 plaintiff advised the County CEO, HR Director and County Counsel that the State Attorney General's Office had determined there was a conflict of interest with the District Attorney's Office handling the investigation. (1st Amended Complaint, paragraphs 8, 11-13, 15, and 16.)

The 1st amended complaint admits that the FPPC only inquired as to whether the District Attorney or the FPPC would conduct the investigation. It is not an allegation that the FPPC violated conflict of interest rules and/or regulations by directing the District Attorney's Office to violate conflict of interest rules or regulations by doing the investigation or the that the District Attorney's Office violated the conflict of interest rules and/or regulations by conducting an investigation of the FPPC complaint. If anything, plaintiff has alleged that there was only an inquiry as to who should do the investigation and a legal opinion that the District Attorney's Office had a conflict of interest, which was communicated to the Attorney General's Office.

The alleged communication with the Attorney General's Office simply was not a report of a violation of law. Therefore, plaintiff has failed to allege that such conduct was protected.

Defendant argues that plaintiff's complaint to the County that FPPC was investigating potential unlawful conduct at the County and plaintiff had asked the Attorney General to take over the investigation was not a protected disclosure, because plaintiff does not allege she made the complaint to the FPPC and she merely stated there was an investigation, which is not a claim that the County violated a law, rule, or regulation.

Plaintiff argues in opposition that plaintiff complained to the County and State Attorney General's Office of potentially illegal conduct, which meets the first element of protected activity.

The previously cited allegations of the 1st amended complaint do no allege that plaintiff complained to the County that there was a violation of the conflict of interest rules and/or regulations and, at best, the plaintiff only alleges she informed defendant that there was a FPPC complaint and the State Attorney General's Office was investigating as it was determined there was a conflict of interest preventing the District Attorney's Office from investigating. Plaintiff failed to allege sufficient facts to establish these communications amounted to reports to the County or FPPC that the County violated a law, rule, or regulation.

The alleged communication with the County and FPPC simply was not a report of a violation of law. Therefore, plaintiff has failed to allege that such conduct was protected.

Defendant contends that plaintiff's alleged disclosure of the FPPC investigation to the newly appointed District Attorney Gire and disclosure she was interviewed by one of the investigators is not protected activity as she has not alleged that she made the FPPC complaint that was being investigated and did not state she had reported that the County violated the law.

Plaintiff alleges in paragraphs 22 and 35 that she informed and complained to the new District Attorney that the State Attorney General's Office was investigating potentially unlawful conduct at the County.

This is a report of the fact that there as an ongoing investigation and not a report of a violation of law. Therefore, the facts alleged are insufficient to establish that the communication of the existence of an investigation is a protected activity.

Plaintiff also alleges in paragraph 22 that on or around April 15, 2020, just after new District Attorney Gire assumed office, plaintiff told him that she had been interviewed by one of the Attorney General investigators and would comply with their investigation if called upon.

Section 1102.5(b) is also violated where the employer retaliates against the employee when the employer believes that the employee disclosed or may disclose information, to a government or law enforcement agency.

Defendant concedes that this communication was a protected activity. (Defendant's Memorandum of Points and Authorities in Support of Demurrer, page 13, lines 4-6.)

Defendant contends that the plaintiff's communication of a text message that allegedly was a bribe offered by a Count Supervisor's wife to District Attorney Wilson was not a protected activity, because only the existence of the text message was disclosed and the actual text message alleged in plaintiff Wilson's verified complaint in case number PC-20210420 can not be viewed by any reasonable person a suggesting an unlawful quid pro quo arrangement.

Defendant requests the court to take judicial notice of the truth the allegations of plaintiff Wilson's complaint in his case to establish that the allegations of a bribe in the text alleged in plaintiff Miszkewycz are untrue. The court can not take judicial notice of the truth of allegations contained in a verified complaint of a different person in another case as a judicial admission or a court record.

""A judicial admission is a party's unequivocal concession of the truth of a matter, and removes the matter as an issue in the case. [Citations.]" (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 48, 43 Cal.Rptr.3d 874.) "Judicial admissions may be made in a pleading.... [Citations.] Facts established by pleadings as judicial admissions ' "are conclusive concessions of the truth of those matters, are effectively removed as issues from the litigation, and may not be contradicted by the party whose pleadings are used against him or her."

[Citations.] " '[A] pleader cannot blow hot and cold as to the facts positively stated.' " [Citation]' [Citation.]" (*Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 746, 100 Cal.Rptr.3d 658.) ¶ A defendant may rely on judicial admissions in moving for summary judgment. (*Uram v. Abex Corp.* (1990) 217 Cal.App.3d 1425, 1433, 266 Cal.Rptr. 695.) However, "[a] judicial admission is effective (i.e., conclusive) *only* in the particular case." (4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 453, p. 586, italics added; e.g., *Betts v. City Nat. Bank* (2007) 156 Cal.App.4th 222, 235, 67 Cal.Rptr.3d 152 [admission in proposed probate pleading not binding because pleading was not filed in current case].)" (Emphasis added.) (Minish v. Hanuman Fellowship (2013) 214 Cal.App.4th 437, 456.)

Any purported judicial factual admission by plaintiff Wilson in another case can not be held to be an unequivocal concession of the truth of a matter by plaintiff Miszkewycz, who did not make such an admission in her pleading in this case.

"Evidence Code section 452(d) permits the court to take judicial notice of court records. However, a court cannot take judicial notice of the truth of hearsay statements simply because the statements are part of a court record. (*Ramsden v. Western Union* (1977) 71 Cal.App.3d 873, 879, 138 Cal.Rptr. 426; *People v. Thacker* (1985) 175 Cal.App.3d 594, 598-599, 221 Cal.Rptr. 37.) As stated in *Day v. Sharp* (1975) 50 Cal.App.3d 904, 123 Cal.Rptr. 918, '"A court may take judicial notice of the *existence* of each document in a court file, but can only take judicial notice of the truth of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments."' (Id. at p. 914, 123 Cal.Rptr. 918, quoting Jefferson, Cal.Evid.Benchbook (1972) Judicial Notice, § 47.3, p. 840.)" (Magnolia Square Homeowners Assn. v. Safeco Ins. Co. (1990) 221 Cal.App.3d 1049, 1056.)

Plaintiff alleges that on March 19, 2020 plaintiff and Chief Investigator Green disclosed to the County Counsel that there was a text message in which the wife of a County Supervisor attempted to bribe District Attorney Wilson. (1st Amended Complaint, paragraph 18.)

Treating as true all of the complaint's material factual allegations and construing the complaint liberally to determine whether a cause of action has been stated, given the assumed truth of the facts pleaded, for the purposes of demurrer (Picton v. Anderson Union High School Dist. (1996) 50 Cal.App.4th 726, 732-733.), the court finds that plaintiff has adequately alleged that plaintiff reported to defendant County an attempted violation of law by attempted bribery of the District Attorney, which was a protected activity.

- Adverse Action

Defendant argues that plaintiff's allegations of a double demotion and defendant's creation of an overall hostile work environment are not adverse actions.

"…to be actionable, an employer's adverse conduct must materially affect the terms and conditions of employment. (See *Akers v. County of San Diego, supra,* 95 Cal.App.4th at pp. 1454–1457, 116 Cal.Rptr.2d 602; *Thomas v. Department of Corrections* (2000) 77 Cal.App.4th 507, 510–512, 91 Cal.Rptr.2d 770.)" (Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal.4th 1028, 1051, fn. 9.)

Plaintiff alleges in paragraphs 25 and 37 of the 1st amended complaint: on July 20, 2020 District Attorney Gire told plaintiff she was being demoted from Assistant District Attorney to Senior Deputy District Attorney, a double demotion, because they were moving in a different direction; and defendant unlawfully took adverse actions against plaintiff by imposing a double demotion and creating overall hostile terms and conditions of employment.

Allegedly demoting plaintiff two grades sufficiently alleges that defendant materially affected the terms and conditions of plaintiff's employment amounting to an adverse action.

Treating as true all of the complaint's material factual allegations and construing the complaint liberally to determine whether a cause of action has been stated, given the assumed truth of the facts pleaded, for the purposes of demurrer (Picton v. Anderson Union High School Dist. (1996) 50 Cal.App.4th 726, 732-733.), the court finds that plaintiff has adequately alleged an adverse employment action was taken against plaintiff by a double demotion.

- Causal Connection

Defendant argues: the 1st amended complaint fails to allege any facts that establishes a causa connection between any of the alleged protected activities and her double demotion; although she alleged she participated in an investigation, plaintiff has not alleged that she told the County or the County knew about the participation; plaintiff has not alleged that she participated in the investigation other than advising the Attorney General's Office that there was a conflict of interest; and she does not allege that she made complaints that initiated he investigation.

In discussing the evidence required to establish the causal link element of a prima facie case of retaliation under Labor Code, § 1102.5(b) an appellate court stated: "We therefore proceed to the third element of plaintiffs' prima facie case, whether a causal link exists between plaintiffs' whistleblowing and their termination. Circumstantial evidence such as proximity in time between protected activity and alleged retaliation may establish a causal link. (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 69, 105, 105 Cal.Rptr.2d 652.) Here, Kim raised his concerns in writing in August 2012. Hawkins raised them in writing in May 2013. Hawkins's complaint prompted a formal investigation, which concluded in October 2013. Plaintiffs were fired soon thereafter, Hawkins in November 2013 and Kim in December 2013. The closeness in time from the complaints and investigation to the City's firing of plaintiffs establishes the requisite causal link. ¶ Even if we found that a long period elapsed between the

protected activity and the terminations, a causal connection between them would still be established so long as the City engaged in a pattern of conduct consistent with a retaliatory intent. (See *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 421, 69 Cal.Rptr.3d 1.) In 2013, after Kim complained about being pressured to change decisions, he was counseled about how he handled two hearings. Then, in August 2013, on a day when Kim called in sick Heinsius made Kim get a doctor's note, which was unusual after just a one-day illness. Similarly, Hawkins had been openly and anonymously complaining about violations of the Vehicle Code since July 2012. Thereafter, he was counseled in January 2013. The jury could have believed that the City's pattern of counseling Kim and Hawkins was part of a retaliatory conduct." (Hawkins v. City of Los Angeles (2019) 40 Cal.App.5th 384, 394.)

Plaintiff alleges the following in paragraphs 22, 24, 25 and 37 of the 1st amended complaint: on or around April 15, 2020, just after new District Attorney Gire assumed office, plaintiff told him that she had been interviewed by one of the Attorney General investigators and would comply with their investigation if called upon; between April 2021 and July 20, 2020 plaintiff diligently performed her job duties as Assistant District Attorney; on July 20, 2020 District Attorney Gire told plaintiff was being demoted from Assistant District Attorney to Senior Deputy District Attorney, a double demotion, because they were moving in a different direction; and defendant unlawfully took adverse actions against plaintiff by imposing a double demotion.

Treating as true all of the complaint's material factual allegations and construing the complaint liberally to determine whether a cause of action has been stated, given the assumed truth of the facts pleaded, for the purposes of demurrer (Picton v. Anderson Union High School Dist. (1996) 50 Cal.App.4th 726, 732-733.), the court finds that plaintiff has adequately alleged a causal connection between her disclosure to the defendant County thorough the District Attorney that she was not only interviewed by an Attorney General investigator concerning the

subject investigation of an FPPC complaint, she would also comply with their investigation if called upon and her double demotion a few months thereafter.

County Immunity for Discretionary Acts

Defendant argues that the County is immune from liability pursuant to the provisions of Government Code, §§ 820.2 and 815.2, because the decision to return plaintiff to the position of Senior Deputy District Attorney is a discretionary decision of a County manager.

Plaintiff contends that the governmental immunity for discretionary decisions do not apply to whistleblower retaliation actions.

The facts before the trial court and appellate court in Whitehall v. County of San Bernardino (2017) 17 Cal.App.5th 352 were: plaintiff "…was a social worker for the San Bernardino County Children and Family Services (CFS or the County) who sought legal advice pertaining to any liability she might have for submitting misleading information and doctored photographs to the juvenile court at the direction of her superiors. Her counsel prepared a filing for the juvenile court to apprise it of the falsified information, and plaintiff was immediately placed on administrative leave for disclosing confidential information to an unauthorized person. Upon being informed she would be terminated for the breach, plaintiff resigned her position and filed a whistleblower action against the County." (Whitehall v. County of San Bernardino (2017) 17 Cal.App.5th 352, 357.) The appellate court expressly rejected the defendant County's argument that the County was immune from liability for the discretionary personnel decisions made by County employees pursuant to provisions of the Government Code. The appellate court held: "The County argues that the trial court erred because of the provisions of Government Code sections 815.2, 820.2, and 821.6. However, Government Code section 815.2, subdivision (b), pertains to vicarious liability upon a public entity. (See *Caldwell v. Montoya* (1995) 10 Cal.4th 972, 989, fn. 9, 42 Cal.Rptr.2d 842, 897 P.2d

1320, citing *Bradford v. State of California* (1973) 36 Cal.App.3d 16, 20, 111 Cal.Rptr. 852.) Government Code section 820.2 provides that a public employee is not liable for injuries resulting from acts or omissions where the act or omission was the result of the exercise of discretion vested in him, and section 821.6 provides that a public employee is not liable for injury caused by instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he or she acts maliciously and without probable cause. ¶ None of these Government Code sections apply because plaintiff's whistleblower action was not instituted against a public *employee.* "A wrongful termination action is viable where the employee alleges he [or she] was terminated for reporting illegal activity which could cause harm, not only to the interests of the employer but also to the public." (*Southern Cal. Rapid Transit Dist. v. Superior Court* (1994) 30 Cal.App.4th 713, 725, 36 Cal.Rptr.2d 665, citing *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 670-671, 254 Cal.Rptr. 211, 765 P.2d 373; *Shoemaker v. Myers* (1992) 2 Cal.App.4th 1407, 1418-1420, 4 Cal.Rptr.2d 203.) "An action brought under the whistleblower statute is inherently such an action." (*Southern Cal. Rapid Transit Dist., supra,* at p. 725, 36 Cal.Rptr.2d 665.) To preclude a whistleblower from revealing improper conduct by the government based on confidentiality would frustrate the legislative intent underlying the whistleblower statutes. For reasons of public policy, actions against a public entity for claims of discharge from or termination of employment grounded on a whistleblower claim are not barred by governmental immunity. (*Southern Cal. Rapid Transit Dist., supra,* 30 Cal.App.4th at p. 726, 36 Cal.Rptr.2d 665.)" (Whitehall v. County of San Bernardino (2017) 17 Cal.App.5th 352, 365.)

The discretionary decision immunity provision of the Government Code does not bar whistleblower actions against public entities.

Defendant's demurrer to the 1st amended complaint is overruled.

TENTATIVE RULING # 13: DEFENDANT'S DEMURRER TO THE 1ST AMENDED COMPLAINT IS OVERRULED. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND 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. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. 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 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 TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldoradocourt.org/onlineservices/vcourt.html. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, SEPTEMBER 17, 2021 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

14. VU v. FEITSER PC-20180223

Cross-Defendants Thayer and Omni Structures and Management's Demurrer to Cross-Complainant Feitser's 1st Amended Cross-Complaint.

TENTATIVE RULING # 14: THIS MATTER IS CONTINUED TO 8:30 A.M. ON FRIDAY, OCTOBER 15, 2021 IN DEPARTMENT NINE.

15. WILSON v. COUNTY OF PLACER PC-20210420

Defendant's Demurrer to 1st Amended Complaint.

On May 20, 2021 plaintiff filed a 1st amended complaint against defendant County of Placer (County) asserting a cause of action for Whistleblower Retaliation under Labor Code, § 1102.5.

Defendant County demurs to the 1st amended complaint on the following grounds: nearly all of plaintiff's alleged activities are not activities protected by Labor Code, § 1102.5; the allegations fail to establish that defendant imposed an adverse employment action on plaintiff; plaintiff failed to adequately allege a causal connection between protected activities and an adverse employment action; and the Government Code discretionary acts immunity bars this action.

Plaintiff opposes the demurrer on the following grounds: plaintiff sufficiently alleged that she engaged in protected activities; plaintiff alleged sufficient facts that establish that plaintiff was subjected to adverse employment actions; the 1st amended complaint adequately alleges facts establishing a causal nexus between the protected activities and the adverse employment actions; and there is no governmental immunity to whistleblower actions.

Defendant replied to the opposition.

General Demurrer Principles

When any ground for objection to a complaint appears on its face, or from any matter of which the court is required to or may take judicial notice, the objection on that ground may be taken by demurrer to the pleading. (Code of Civil Procedure, § 430.30(a).)

"'A demurrer admits all material and issuable facts properly pleaded. [Citations.] However, it does not admit contentions, deductions or conclusions of fact or law alleged therein.' (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 713 [63 Cal.Rptr. 724, 433 P.2d 732].) Also, '...

"plaintiff need only plead facts showing that he may be entitled to some relief [citation]." [Citation.] Furthermore, we are not concerned with plaintiff's possible inability or difficulty in proving the allegations of the complaint.' (*Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 572 [108 Cal.Rptr. 480, 510 P.2d 1032].)" (Highlanders, Inc. v. Olsan (1978) 77 Cal.App.3d 690, 696-697.)

"A demurrer challenges only the legal sufficiency of the complaint, not the truth of its factual allegations or the plaintiff's ability to prove those allegations. (*Amarel v. Connell* (1988) 202 Cal.App.3d 137, 140 [248 Cal.Rptr. 276].) We therefore treat as true all of the complaint's material factual allegations, but not contentions, deductions or conclusions of fact or law. (*Id*. at p. 141; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 [216 Cal.Rptr. 718, 703 P.2d 58].) We can also consider the facts appearing in exhibits attached to the complaint. (See *Dodd v. Citizens Bank of Costa Mesa*, supra, 222 Cal.App.3d at p. 1627.) We are required to construe the complaint liberally to determine whether a cause of action has been stated, given the assumed truth of the facts pleaded. (*Rogoff v. Grabowski* (1988) 200 Cal.App.3d 624, 628 [246 Cal.Rptr. 185].)" (Picton v. Anderson Union High School Dist. (1996) 50 Cal.App.4th 726, 732-733.)

""To determine whether a cause of action is stated, the appropriate question is whether, upon a consideration of all the facts alleged, it appears that the plaintiff is entitled to any judicial relief against the defendant, notwithstanding that the facts may not be clearly stated, or may be intermingled with a statement of other facts irrelevant to the cause of action shown, or although the plaintiff may demand relief to which he is not entitled under the facts alleged. (*Elliott v. City of Pacific Grove*, 54 Cal.App.3d 53, 56, 126 Cal.Rptr. 371.) Mistaken labels and confusion of legal theory are not fatal because the doctrine of "theory of the pleading" has long been repudiated in this state. (*Lacy v. Laurentide Finance Corp*., 28 Cal.App.3d 251, 256-257, 104 Cal.Rptr. 547.)" (Spurr v. Spurr (1979) 88 Cal.App.3d 614, 617.)

The rule is that a general demurrer should be overruled if the pleading, liberally construed, states a cause of action under any theory. (Brousseau v. Jarrett (1977) 73 Cal.App.3d 864, 870-871.)

With the above cited principles in mind, the court will rule on the demurrers to the 1st amended complaint.

Government Code, § 1102.5 Cause of Action

"Fundamental public policy prohibits the retaliatory discharge of employees for whistle blowing in the public interest. (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 670-671, 254 Cal.Rptr. 211, 765 P.2d 373.) Labor Code section 1102.5, subdivision (b), prohibits employers from retaliating against employees for disclosing information to a government or law enforcement agency when the employee has reasonable cause to believe that such information discloses a violation of federal or state statutes or regulations. 'This provision reflects the broad public policy interest in encouraging workplace whistle-blowers to report unlawful acts without fearing retaliation.' (*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 77, 78 Cal.Rptr.2d 16, 960 P.2d 1046.)" (Colores v. Board of Trustees (2003) 105 Cal.App.4th 1293, 1301, fn.1.)

"(b) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for disclosing information, or because the employer believes that the employee disclosed or may disclose information, to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance, or for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or

regulation, regardless of whether disclosing the information is part of the employee's job duties." (Emphasis added.) (Labor Code, § 1102.5(b).)

California's general whistleblower statute, Labor Code, § 1102.5(b), reflects the broad public policy interest in encouraging workplace whistle-blowers to report unlawful acts without fearing retaliation. (McVeigh v. Recology San Francisco (2013) 213 Cal.App.4th 443, 468.) "Labor Code section 1102.5, subdivision (b) should be given a broad construction commensurate with its broad purpose (*Green, supra,* 19 Cal.4th at p. 77, 78 Cal.Rptr.2d 16, 960 P.2d 1046)." (McVeigh v. Recology San Francisco (2013) 213 Cal.App.4th 443, 471.)

The Third District Court of Appeal has stated the following with respect to a Section 1102.5 "whistleblower" cause of action: "The elements of a section 1102.5(b) retaliation cause of action require that (1) the plaintiff establish a prima facie case of retaliation, (2) the defendant provide a legitimate, nonretaliatory explanation for its acts, and (3) the plaintiff show this explanation is merely a pretext for the retaliation. (See *Flait, supra,* 3 Cal.App.4th at p. 476, 4 Cal.Rptr.2d 522; see also *Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1453, 116 Cal.Rptr.2d 602 (*Akers*); *Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 68–69, 105 Cal.Rptr.2d 652.)" (Patten v. Grant Joint Union High School Dist. (2005) 134 Cal.App.4th 1378, 1384.) The Third District further stated that the following must be established in order to satisfy the element of a prima facie case of retaliation: "…a plaintiff must show (1) she engaged in a protected activity, (2) her employer subjected her to an adverse employment action, and (3) there is a causal link between the two. (*Akers, supra,* 95 Cal.App.4th at p. 1453, 116 Cal.Rptr.2d 602.)" (Patten v. Grant Joint Union High School Dist. (2005) 134 Cal.App.4th 1378, 1384.)

- Protected Activities

Defendant argues that in order for the activity to be protected, the plaintiff must disclose a violation of law and the plaintiff employee must have had reasonable cause to believe the disclosure involves a violation of law. (Labor Code, § 1102.5(b).)

The court notes that Section 1102.5(b) is also violated where the employer retaliates against the employee when the employer believes that the employee disclosed or may disclose information, to a government or law enforcement agency.

Citing Lehto v. City of Oxnard (1985) 171 Cal.App.3d 285, 292–293; and Turner v. Anheuser-Busch, Inc. (1994) 7 Cal.4th 1238, 1257, defendant argues that the 1st amended complaint is fatally defective in that it does not allege the specific statute or rule allegedly violated.

The opinion in Lehto, supra, is distinguishable.

The appellate court held: "Based upon the manifest intent underlying section 815.6, we think it obvious that a litigant seeking to plead the breach of a mandatory duty must specifically allege the applicable statute or regulation. Only by so doing may the public entity be advised of the factual and legal basis of the claim against it. (See *Jones v. Oxnard School District* (1969) 270 Cal.App.2d 587, 75 Cal.Rptr. 836; *Levine v. Jessup* (1958) 161 Cal.App.2d 59, 326 P.2d 238.) Without this requirement of specificity in pleading, a court would be hard pressed to determine whether the enactment relied upon was intended to impose an obligatory duty to take official action to prevent foreseeable injuries or whether it was merely advisory in character." (Lehto v. City of Oxnard (1985) 171 Cal.App.3d 285, 292–293.) The action in Lehto involved a claim by plaintiff for injuries sustained in a collision between an automobile in which he was a passenger and the vehicle driven by Raul Carbajal. Plaintiff alleged that defendant City of Oxnard was liable for the alleged negligence of certain police officers in failing to

prevent Carbajal from driving while under the influence of alcohol, because the officers were under a mandatory duty to use due care to take precautions to prevent Raul Carbajal from further driving the automobile in his intoxicated condition as the police officers employed by the City of Oxnard, acting within the scope of their employment, stopped defendant Carbajal for a traffic violation and during the course of the stop, the officers knew, or should have known that "Raul Carbajal was under the influence of intoxicating liquor and that he was totally incapable of safely operating a motor vehicle." The appellate court affirmed the trial court's granting of judgment on the pleadings. The appellate court did not hold that failure to specifically allege the exact statute, rule or regulation violated, which plaintiff allegedly reported to plaintiff's employer or an investigating agency, renders a complaint under Labor Code, § 1102.5 fatally defective.

The appellate court merely found that where a plaintiff claims that a governmental entity breached a mandatory duty rendering the entity liable for damages, the specific statute breached must be alleged in order for the court to determine whether the enactment relied upon was intended to impose an obligatory duty to take official action to prevent foreseeable injuries or whether it was merely advisory in character.

"An opinion is not authority for a point not raised, considered, or resolved therein. (E.g., *People v. Castellanos* (1999) 21 Cal.4th 785, 799, fn. 9, 88 Cal.Rptr.2d 346, 982 P.2d 211; *San Diego Gas & Elec. Co. v. Superior Court* (1996) 13 Cal.4th 893, 943, 55 Cal.Rptr.2d 724, 920 P.2d 669.)" (Styne v. Stevens (2001) 26 Cal.4th 42, 57-58.)

The California Supreme Court opinion in Turner v. Anheuser-Busch, Inc. (1994) 7 Cal.4th 1238 is also distinguishable in that it involved a motion for summary judgment proceeding and is not authority for a legal proposition that the complaint the must allege citations to specific

statutory or constitutional provisions that the plaintiff disclosed were violated in order to adequately plead a whistleblower cause of action under Labor Code, § 1102.5..

"Turner does refer in some of his claims to statutory provisions. He charges that ABI management employees Liakos and Schmitt violated unspecified provisions of "the [federal] Alcohol, Tobacco and Firearms laws." He points to Schmitt's alleged gifts to alcohol retailers "in contravention of ABC laws." According to Turner, Schmitt also instructed sales personnel to remove or tear down competitor's products and advertising, to make consignment sales of alcoholic beverages in violation of "ABC Act § 25503." ¶ Turner's vague charge of "Alcohol, Tobacco and Firearms laws" violations, largely unaccompanied by citations to specific statutory or constitutional provisions, puts ABI and the court in the position of having to guess at the nature of the public policies involved, if any. This kind of showing is plainly insufficient to create an issue of *material* fact justifying a trial on the merits of Turner's claims. [Footnote omitted.]" (Turner v. Anheuser-Busch, Inc. (1994) 7 Cal.4th 1238, 1257.)

The California Supreme Court in the Turner opinion did not hold that failure to specifically allege the exact statute, rule or regulation reported as being violated rendered the pleading of a Section 1102.5 case of action fatally deficient. The opinion merely held that for the purposes of ruling on a motion for summary judgment in order to create a triable issue of material fact justifying a trial of the merits of the plaintiff's claim, the plaintiff must provide citations to specific statutory or constitutional provisions that the plaintiff disclosed were violated. A summary judgment proceeding is a different procedural process with a different burden of proof than a demurrer proceeding. The demurrer proceeding has a very liberal standard to avoid the sustaining of a demurrer, while a summary judgment proceeding requires plaintiff to present admissible evidence raising a triable issue of material fact in response to defendant's evidence establishing a defense or absence of an element of the claimed cause of action, which would

necessarily require more specificity as to what plaintiff disclosed and what statues or rules were claimed in that disclosure as being violated. Therefore, it is not authority for a legal proposition that the complaint the must allege citations to specific statutory or constitutional provisions that the plaintiff disclosed were violated. (Styne v. Stevens (2001) 26 Cal.4th 42, 57-58.)

Plaintiff alleges the following in paragraphs 11-13 and 24 of the 1st amended complaint: on March 3, 2020 plaintiff received a letter from the FPPC asking if the District Attorney's Office intended to investigate potential unlawful conduct of the County, or if the Office would permit the FPPC to investigate directly; plaintiff drafted a letter to the FPPC that stated it would be a conflict of interest for the District Attorney to conduct the investigation and plaintiff wanted to meet in person with the FPPC investigator; on March 9, 2020; before he was able to respond to the FPPC, defendant placed him on paid administrative time off pending the appointment of a new district attorney; plaintiff was locked out of the DA office building and instructed not to discuss business or personnel affairs with the DA's Office; plaintiff understood that this was an attempt to prevent him from coordinating with the FPPC investigation and/or to discredit him as a witness; the County never notified plaintiff why he was plaintiff on administrative time off on March 19, 2020; despite being placed on paid administrative time off, plaintiff obtained contact information of the FPPC investigator, found out the investigation was being taken over by the Attorney General's Office, contacted the Attorney General Investigator, and gave a statement and documents to the investigator including all of the information plaintiff understood regarding the potential unlawful conduct being investigated; and plaintiff's complaint to and participation in the Attorney General investigation of suspected illegal conduct by the County were protected actions.

Defendant concedes that allegation of plaintiff's participation in the investigation was a protected activity. (Defendant's Memorandum of Points and Authorities in Support of Demurrer, page 11, lines 26-28.)

Therefore, the complaint contains allegations of at least one protected activity. That is all that is required to sufficiently allege the protected activity element of a whistleblower retaliation cause of action. Whether the remaining alleged conduct by plaintiff is protected is irrelevant for purposes of ruling on this demurrer.

"A demurrer does not lie to a portion of a cause of action. (Citations Omitted.)" (PH II, Inc. v. Superior Court (1995) 33 Cal.App.4th 1680, 1682.) Where a portion of the cause of action is defective on the face of the complaint, the appropriate remedy is to bring a motion to strike that portion of the complaint. (PH II, Inc., supra at pages 1682-1683.)

- Adverse Action

Defendant argues that placing defendant on paid administrative leave alone is not sufficient to allege an adverse employment action as it did not have a substantial and detrimental effect on his employment; Mr. Gire's prior announcement that should he be appointed District Attorney he would demote plaintiff was not an adverse employment action as plaintiff resigned the day before Mr. Gire was appointed District Attorney; plaintiff has failed to adequately allege constructive discharge and he voluntarily retired; and there are no facts alleged to support plaintiff's allegation of a conclusion of law or fact that the County created an overall hostile work environment..

"…to be actionable, an employer's adverse conduct must materially affect the terms and conditions of employment. (See *Akers v. County of San Diego, supra,* 95 Cal.App.4th at pp. 1454–1457, 116 Cal.Rptr.2d 602; *Thomas v. Department of Corrections* (2000) 77 Cal.App.4th

507, 510–512, 91 Cal.Rptr.2d 770.)" (Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal.4th 1028, 1051, fn. 9.)

Paid administrative leave can be an adverse employment action. The appellate opinion in Whitehall v. County of San Bernardino (2017) 17 Cal.App.5th 352 held: "Defendant also argues that placing plaintiff on administrative leave was not an adverse employment action because she remained on the payroll. However, plaintiff also had been removed from the dependency case to which she had been assigned as J/D writer prior to being placed on administrative leave. Plaintiff alleged in a declaration in opposition to the County's motion that while on administrative leave and under investigation, she was made aware of the County's intention to fire her. The County's human resources officer acknowledged that she had recommended terminating plaintiff's employment. Two administrative review hearings were conducted to alleged wrongdoing by plaintiff in disclosing confidential information to an unauthorized person. Plaintiff resigned to avoid being fired, so as not to harm her chances of finding employment. ¶ In determining whether a plaintiff suffered an adverse employment action, we employ the same standard of materiality that the California Supreme Court held should be applied to employment retaliation claims made under the California Fair Employment and Housing Act (FEHA). (*Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1381, 37 Cal.Rptr.3d 113, citing *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1051, 32 Cal.Rptr.3d 436, 116 P.3d 1123.) In *Yanowitz,* our Supreme Court reasoned that an adverse employment action is one that that materially affects the terms, conditions, or privileges of employment. (*Yanowitz v. L'Oreal USA, Inc., supra*, 36 Cal.4th at p. 1051, 32 Cal.Rptr.3d 436, 116 P.3d 1123.) As the court reasoned, "Retaliation claims are inherently fact-specific, and the impact of an employer's action in a particular case must be evaluated in context. Accordingly, although an adverse employment action must materially

affect the terms, conditions, or privileges of employment to be actionable, the determination of whether a particular action or course of conduct rises to the level of actionable conduct should take into account the unique circumstances of the affected employee as well as the workplace context of the claim." (*Ibid.*)" (Emphasis added.) (Whitehall v. County of San Bernardino (2017) 17 Cal.App.5th 352, 366–367.)

The Appellate court further held that under the circumstances presented, the trial court appropriately found that a paid administrative leave was an adverse employment action taken against the plaintiff. The court stated: "Federal cases, while employing a slightly different standard, agree that administrative leave may constitute an adverse employment action. (See *Dahlia v. Rodriguez* (9th Cir. 2013) 735 F.3d 1060, 1078, citing *Coszalter v. City of Salem* (9th Cir. 2003) 320 F.3d 968, 975.) Here, plaintiff did not request the administrative leave, and it was not intended as a reward or accommodation to plaintiff, given that the County acknowledged the leave was for the purpose of investigating plaintiff's alleged wrongdoing. Further, we must view the County's conduct in context, and in this case plaintiff's administrative leave coincided with the firing of the original social worker assigned to the case. The trial court correctly found that the act of placing plaintiff on administrative leave was an adverse employment action. ¶ Here, defendant's own evidence in support of its special motion to strike confirmed its intention to fire plaintiff for disclosing to the juvenile court the County's attempt to manipulate evidence in a child dependency action. The administrative leave pending the investigation, which included two hearings, and the fact the decision had been made to terminate plaintiff's employment, establishes the adverse nature of the administrative leave. The court correctly found that plaintiff had established an adverse employment action." (Whitehall v. County of San Bernardino (2017) 17 Cal.App.5th 352, 367.)

Plaintiff alleges: on March 3, 2020 plaintiff received a letter from the FPPC asking if the District Attorney's Office intended to investigate potential unlawful conduct of the County, or if the Office would permit the FPPC to investigate directly; plaintiff drafted a letter to the FPPC that stated it would be a conflict of interest for the District Attorney to conduct the investigation and plaintiff wanted to meet in person with the FPPC investigator; on March 9, 2020, before he was able to respond to the FPPC, defendant placed him on paid administrative time off pending the appointment of a new district attorney; plaintiff was locked out of the DA office building and instructed not to discuss business or personnel affairs with the DA's Office; plaintiff understood that this was an attempt to prevent him from coordinating with the FPPC investigation and/or to discredit him as a witness; plaintiff did contact the investigator, gave a statement and documents regarding all information he understood regarding the potential unlawful conduct being investigated; and it was previously announced by the person who became the District Attorney that should he be appointed, plaintiff would be demoted and his replacement was named. (1st Amended Complaint, paragraphs 11-13, 17, and 27.)

Treating as true all of the complaint's material factual allegations and construing the complaint liberally to determine whether a cause of action has been stated, given the assumed truth of the facts pleaded, for the purposes of demurrer (Picton v. Anderson Union High School Dist. (1996) 50 Cal.App.4th 726, 732-733.), the court finds under alleged circumstances wherein plaintiff was involuntarily placed on paid leave, was locked out from his employment, was ordered to not discuss DA Office business, and being threatened with imminent demotion adequately alleged that paid administrative leave amounts to an adverse employment action.

Therefore, the complaint contains adequate allegations of at least one adverse employment action taken against plaintiff. That is all that is required to sufficiently allege the adverse action element to state a whistleblower retaliation cause of action. Whether the remaining alleged

adverse actions are sufficiently alleged is irrelevant for purposes of ruling on this demurrer. (PH II, Inc. v. Superior Court (1995) 33 Cal.App.4th 1680, 1682-1683.)

- Causal Connection

Defendant argues that there is no causal connection between the alleged protected activities and the adverse action as the plaintiff was placed on paid leave before he allegedly engaged in the protected conduct.

Plaintiff argues in opposition that he engaged in two protected activities prior to being placed on administrative leave in that he refused to engage in an attempt to bribe him five days after he became interim District Attorney (1st Amended Complaint, paragraph 8.) and on March 3, 2020, six days before his placement on paid leave, he received a letter from the FPPC asking him to investigate unlawful behavior at the County and the placement on leave was designed to prevent him from participating in the investigation. (1st Amended Complaint, paragraphs 11-13.)

In discussing the evidence required to establish the causal link element of a prima facie case of retaliation under Labor Code, § 1102.5(b) an appellate court stated: "We therefore proceed to the third element of plaintiffs' prima facie case, whether a causal link exists between plaintiffs' whistleblowing and their termination. Circumstantial evidence such as proximity in time between protected activity and alleged retaliation may establish a causal link. (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 69, 105, 105 Cal.Rptr.2d 652.) Here, Kim raised his concerns in writing in August 2012. Hawkins raised them in writing in May 2013. Hawkins's complaint prompted a formal investigation, which concluded in October 2013. Plaintiffs were fired soon thereafter, Hawkins in November 2013 and Kim in December 2013. The closeness in time from the complaints and investigation to the City's firing of plaintiffs establishes the requisite causal link. ¶ Even if we found that a long period elapsed between the

protected activity and the terminations, a causal connection between them would still be established so long as the City engaged in a pattern of conduct consistent with a retaliatory intent. (See *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 421, 69 Cal.Rptr.3d 1.) In 2013, after Kim complained about being pressured to change decisions, he was counseled about how he handled two hearings. Then, in August 2013, on a day when Kim called in sick Heinsius made Kim get a doctor's note, which was unusual after just a one-day illness. Similarly, Hawkins had been openly and anonymously complaining about violations of the Vehicle Code since July 2012. Thereafter, he was counseled in January 2013. The jury could have believed that the City's pattern of counseling Kim and Hawkins was part of a retaliatory conduct." (Hawkins v. City of Los Angeles (2019) 40 Cal.App.5th 384, 394

As stated earlier in this ruling, plaintiff alleged that within a very short time period of a matter of days plaintiff received a letter from the FPPC asking about coordination of who would investigate the FPPC complaint of potential unlawful conduct at the County, he engaged in protected conduct of drafting a response regarding coordination of the investigation of the FPPC complaint of unlawful conduct at the County that included a statement that he wanted to meet in person with the FPPC investigator, he was placed on paid leave without explanation other than he was on leave pending appointment of a new District Attorney, locked out of his office, and told not to talk about business or personnel matters in the DA's Office; and the circumstances of the abrupt and inexplicable paid leave led him to understand that it was an attempt to prevent him from coordinating with the FPPC investigation and/or to discredit him as a witness.

Construing the complaint liberally to determine whether a cause of action has been stated, given the assumed truth of the facts pleaded, for the purposes of demurrer, the timing of the paid leave that cut plaintiff off from the DA's office and directed him not to discuss DA

business, which could be reasonably construed to include not participating in the FPPC investigation, together with the receipt of notification of the FPPC complaint of unlawful conduct involving the County and seeking to coordinate who investigates is suspect and raises reasonable inferences that the County was aware of the FPPC complaint and investigation and the County interfered with plaintiff's involvement in protected activities concerning the investigation by involuntarily placing him on paid leave. The court notes that Section 1102.5(b) is also violated where the employer retaliates against the employee when the employer believes that the employee may disclose information to a government or law enforcement agency.

Treating as true all of the complaint's material factual allegations and construing the complaint liberally to determine whether a cause of action has been stated, given the assumed truth of the facts pleaded, for the purposes of demurrer (Picton v. Anderson Union High School Dist. (1996) 50 Cal.App.4th 726, 732-733.), the court finds that plaintiff has adequately alleged a causal connection between the involuntary paid leave and interference with a protected activity to coordinate an investigation of alleged unlawful activities involving the FPPC complaint and possibly disclose information to the investigator.

County Immunity for Discretionary Acts

The facts before the trial court and appellate court in Whitehall v. County of San Bernardino (2017) 17 Cal.App.5th 352 were: plaintiff "…was a social worker for the San Bernardino County Children and Family Services (CFS or the County) who sought legal advice pertaining to any liability she might have for submitting misleading information and doctored photographs to the juvenile court at the direction of her superiors. Her counsel prepared a filing for the juvenile court to apprise it of the falsified information, and plaintiff was immediately placed on administrative leave for disclosing confidential information to an unauthorized

person. Upon being informed she would be terminated for the breach, plaintiff resigned her position and filed a whistleblower action against the County." (Whitehall v. County of San Bernardino (2017) 17 Cal.App.5th 352, 357.) The appellate court expressly rejected the defendant County's argument that the County was immune from liability for the discretionary personnel decisions made by County employees pursuant to provisions of the Government Code. The appellate court held: "The County argues that the trial court erred because of the provisions of Government Code sections 815.2, 820.2, and 821.6. However, Government Code section 815.2, subdivision (b), pertains to vicarious liability upon a public entity. (See *Caldwell v. Montoya* (1995) 10 Cal.4th 972, 989, fn. 9, 42 Cal.Rptr.2d 842, 897 P.2d 1320, citing *Bradford v. State of California* (1973) 36 Cal.App.3d 16, 20, 111 Cal.Rptr. 852.) Government Code section 820.2 provides that a public employee is not liable for injuries resulting from acts or omissions where the act or omission was the result of the exercise of discretion vested in him, and section 821.6 provides that a public employee is not liable for injury caused by instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he or she acts maliciously and without probable cause. ¶ None of these Government Code sections apply because plaintiff's whistleblower action was not instituted against a public *employee.* "A wrongful termination action is viable where the employee alleges he [or she] was terminated for reporting illegal activity which could cause harm, not only to the interests of the employer but also to the public." (*Southern Cal. Rapid Transit Dist. v. Superior Court* (1994) 30 Cal.App.4th 713, 725, 36 Cal.Rptr.2d 665, citing *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 670-671, 254 Cal.Rptr. 211, 765 P.2d 373; *Shoemaker v. Myers* (1992) 2 Cal.App.4th 1407, 1418-1420, 4 Cal.Rptr.2d 203.) "An action brought under the whistleblower statute is inherently such an action." (*Southern Cal. Rapid Transit Dist., supra,* at p. 725, 36 Cal.Rptr.2d 665.) To preclude a whistleblower from

revealing improper conduct by the government based on confidentiality would frustrate the legislative intent underlying the whistleblower statutes. For reasons of public policy, actions against a public entity for claims of discharge from or termination of employment grounded on a whistleblower claim are not barred by governmental immunity. (*Southern Cal. Rapid Transit Dist., supra,* 30 Cal.App.4th at p. 726, 36 Cal.Rptr.2d 665.)" (Whitehall v. County of San Bernardino (2017) 17 Cal.App.5th 352, 365.)

The discretionary decision immunity provision of the Government Code does not bar whistleblower actions against public entities.

Defendant's demurrer to the 1st amended complaint is overruled.

TENTATIVE RULING # 15: DEFENDANT'S DEMURRER TO THE 1ST AMENDED COMPLAINT IS OVERRULED. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND 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. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. 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 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 TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldoradocourt.org/onlineservices/vcourt.html. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, SEPTEMBER 17, 2021 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.