TENTATIVE RULINGS
Judge SHEILA RECIO, Dept. W8

Law & Motion is heard on Fridays at 9:30 a.m.

CIVIL COURT REPORTERS: Department W8 does not provide the services of an official court reporter for law and motion hearings. Please see the court's website at http://www.occourts.org/directory/cris/availability.html for rules and procedures for court reporters obtained by the parties.

POSTING TENTATIVES: Department W8 endeavors to post tentative rulings for law and motion hearings by 5 p.m. on Thursdays. Do NOT call the Department for a tentative ruling if none is posted. **The court will NOT entertain a request for continuance or the filing of further documents once a tentative ruling has been posted.**

SUBMITTING ON THE TENTATIVE: If ALL sides intend to submit on the tentative ruling, please advise the Department's clerk or courtroom attendant by calling **(657) 622-5908**. If so advised, the tentative ruling shall become the court's final ruling and the prevailing party shall file and serve a Notice of Ruling and if appropriate, prepare a Proposed Order pursuant to Rule 3.1312 of the California Rules of Court. **Please do not call the Department unless ALL parties submit on the tentative ruling.**

NO APPEARANCES: If no one appears for the hearing and the court has not been notified that all parties submit on the tentative ruling, the court will determine if the matter is taken off calendar, the tentative ruling becomes the final ruling, or a different order is issued at the hearing. (See *Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436, 442, fn. 1.)

REMOTE APPEARANCES: Department W8 conducts non-evidentiary proceedings, including law and motion via Zoom through the court's online check-in process available through the court's website at https://www.occourts.org/general-information/covid-19-response/civil-covid-19-response/civil-remote-hearings. All counsel and self-represented parties appearing for such hearings **must check-in at least 5 minutes before** the 9:30 a.m. hearing on Friday.

The court encourages the parties and attorneys to take advantage of remote appearances for non-evidentiary hearings to reduce travel time, parking costs, and potential hearing delays. However, keep in mind that potential technological or audibility issues could arise when using remote

technology, which may require a delay of or halt the proceedings. To help avoid such, please log in and test your equipment in advance of the hearing. Also, if technological or audibility issues arise during the proceeding, please call **(657) 622-5908.**

All remote video participants shall comply with the court's **"Guidelines for Remote appearances"**, found at https://www.occourts.org/system/files/guidelinesforremoteproceedings.pdf .

IN-PERSON: Parties preferring to appear in-person for a law and motion hearing may do so, consistent with Section 367.75 of the Code of Civil Procedure and Orange County Local Rule 375.

PUBLIC ACCESS: The courtroom remains open for all evidentiary and non-evidentiary proceedings.

No filming, broadcasting, photography, or electronic recording is permitted of the video session pursuant to California Rules of Court, rule 1.150 and Orange County Superior Court rule 180.

April 19, 2024

#	Case Name	
2	Cabrera vs. Kaur	1. Demurrer (re Complaint) 2. Motion to Strike **OVERRULED/DENIED as MOOT.** On 12/12/23, Defendants PETER CHOI and SUSIE CHOI LIVING TRUST filed a demurrer and a motion to strike apparently directed at the original Complaint. Thereafter, on 4/8/24, Plaintiff GABRIELA CABRERA responded with the filing of a First Amended Complaint (FAC) and an Opposition Brief for the motion to strike. (ROAs 50, 52.) Section 472 of the Code of Civil Procedure grants a plaintiff the right to file an amended complaint in response to a demurrer or motion to strike directed at the original complaint, if filed and served by the date for filing an opposition brief.

		Here, the filing of the FAC renders both the demurrer and the motion to strike moot since the original Complaint has been superseded and the FAC is now the operative pleading. (See, e.g., *State Comp. Ins. Fund v. Superior Court* (2010) 184 Cal.App.4th 1124, 1131 ["Because there is but one complaint in a civil action [citation], the filing of an amended complaint moots a motion directed to a prior complaint."]; *JKC3H8 v. Colton* (2013) 221 Cal.App.4th 468, 477 ["the filing of an amended complaint renders moot a demurrer to the original complaint"].) Plaintiff to give notice.
3	Tran vs. Garden Grove Unified School District	<u>1. Demurrer (re Second Amended Complaint)</u> <u>2. Motion to Strike</u> ***1. Demurrer*** The court **SUSTAINS without leave** Defendants GARDEN GROVE UNIFIED SCHOOL DISTRICT, THAO P. DINH, ALLIE BAK and BILL GATES' demurrer to each cause of action in Plaintiffs' Second Amended Complaint (SAC). ***Re Defendants' Request for Judicial Notice:*** The court **GRANTS** Defendants' request to take judicial notice (re four documents). Unlike the prior demurrer/motion to strike, Plaintiffs filed an opposition to Defendants' Request to take Judicial Notice of documents apparently related to the pre-litigation complaints made by plaintiffs to defendants. (See ROAs 76, 95.) At the same time, Plaintiffs state that "judicial notice is unnecessary if these are the documents attached to Plaintiff's SAC already filed with the court." Copies of the same documents are in fact attached to the SAC and were previously judicially noticed for the demurrer to the First Amended Complaint. As noted with the prior demurrer, both sides rely on these same documents in their moving or opposing briefs. Also, "[i]f a plaintiff alleges compliance with the claims presentation requirement, but the public records do not

reflect compliance, the governmental entity can request the court to take judicial notice under Evidence Code section 452(c) that the entity's records do not show compliance." (*Gong v. City of Rosemead* (2014) 226 Cal.App.4th 363, 376.)

Re all Causes of Action

When the court sustained Defendants' demurrer to the prior pleading, the First Amended Complaint, it granted leave "*only if* [Plaintiffs] can show that they complied with the Government Claims Act." (See 9/29/23 Minute Order, p. 3, last paragraph, emphasis in original [ROA 70].)

As explained below, the documents properly before the court do not show that Plaintiffs have complied with the claim presentation requirement of the Government Claims Act.

The Government Claims Act requires a plaintiff to file a written claim with the public entity within six months of the accrual of the cause of action, as a prerequisite to filing a civil claim. (Govt. Code, § 911.2.) The date of accrual is the date of the occurrence of the last fact essential to the cause of action. (*Howard Jarvis Taxpayers Ass'n v. City of La Habra* (2001) 25 Cal.4th 809, 815, as modified July 18, 2001.)

Here, the judicially noticeable facts show that Plaintiff Tran filed three "GARDEN GROVE UNIFIED SCHOOL DISTRICT FORMAL COMPLAINT FORMS" against Defendants Dinh, Bak, and Gates (collectively, the "Personnel Complaints"). Each formal complaint states that the "SOLUTION SOUGHT BY COMPLAINANT" is an apology letter by McGarvin's staff for negligence.

The Personnel Complaints allege the following:

1. Dinh's unsubstantiated conclusion, temperament, and refusal to provide the records in question violated the EDC. (RJN, Exh. 4 at ¶ 23.)

2. Dinh's and Bak's conduct in humiliating Jane Doe violates the EDC (RJN, Exh. 4 at ¶¶ 25, 31-32),

Gates's disregard for Jane Doe's well-being and Plaintiff Tran's concern (*id*. at ¶ 53), or Bak's sitting while Gates intimidated Jane Doe violates the EDC (*id*. at ¶ 42.)

3. The District's disclosing to Gates that Plaintiff Tran had inquired about transferring to the virtual learning academy (RJN, Exh. 4 at ¶¶ 33, 36.)

Although the Government Claims Act does not define "money or damages," courts have held the claim process applicable in cases based on negligence (*Martinez v. County of Los Angeles* (1978) 78 Cal.App.3d 242), intentional tort (*Cooper v. Jevne* (1976) 56 Cal.App.3d 860), nuisance (*City of San Jose v. Superior Court*. (1974) 12 Cal.3d 447), and violation of a statutorily imposed duty (*San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 Cal.App.3d 553).

Government Code Section 910 provides in relevant part that the claim must include all of the following: (a) the name and mailing address of the claimant; (b) the mailing address to which the person presenting the claim desires notices to be sent; (c) the date, place, and other circumstances of the occurrence giving rise to the claim asserted; (d) a general description of the injury or damage; (e) the name(s) of the public employee(s) causing the injury or damage; and (f) the amount claimed, if the amount claimed totals less than ten thousand dollars ($10,000), or if the amount claimed totals more than $10,000, whether the claim would be a limited civil case. (Govt. Code, § 910(a)-(f).)

"The purpose of the claims statutes is to: (1) provide a public entity with sufficient information to allow it to thoroughly investigat[e] the matter; (2) facilitate settlement of meritorious claims; (3) enable a public entity to engage in fiscal planning; and (4) to allow a public entity to avoid similar liability in the future." (*Canova v. Trustees of Imperial Irrigation Dist. Employee Pension Plan* (2007) 150 Cal.App.4th 1487, 1493.)

"Courts have long recognized that '[a] claim that fails to substantially comply with sections 910 and 910.2, may still

		be considered a "claim as presented" if it puts the public entity on notice both that the claimant is attempting to file a valid claim and that litigation will result if the matter is not resolved.' [Citation.] (*State of Calif. v. Superior Court* (2004) 32 Cal.4th 1234, 1245.) "'[B]ecause the purpose of the claims is not "to prevent surprise [but rather] is to provide the public entity sufficient information to enable it to adequately investigate claims and to settle them, if appropriate, without the expense of litigation . . . [citations][,] . . . [i]t is well-settled that claims statutes must be satisfied even in face of the public entity's actual knowledge of the circumstances surrounding the claim. Such knowledge—standing alone—constitutes neither substantial compliance nor basis for estoppel." [Citation.]' [Citation.]" (*J.J. v. County of San Diego* (2014) 223 Cal.App.4th 1214, 1219; see *Willis v. City of Carlsbad* (2020) 48 Cal.App.5th 1104, 1122 [citing *J.J.*, *supra*, and others].) Here, Plaintiff Tran submitted the Personnel Complaints dated 11/04/2021. (See RJN, Exhs. 1-4.) On the one hand, some facts in the SAC fairly reflect the facts alleged in the Personnel Complaints. Importantly however, the Personnel Complaints do not put the District or the School on notice that Plaintiff is attempting to file a Government Claim or that litigation will result if the matter is not resolved. Importantly, Plaintiff Tran sought only one solution by way of the Personnel Complaints – to wit, an apology letter. (See RJN, Exhs. 1-3.) Similarly, the declaration attached to the Personnel Complaints requests only that the situation be "investigated diligently." (See RJN, Exh. 4 at 14:12-13.) The Personnel Complaints do not identify any monetary amount claimed, or in the alternative, whether the claim would be a limited civil case. (See Govt. Code, § 910(f).) Unlike the letter in *Simms v. Bear Valley Community Healthcare District* (2022) 80 Cal.App.5th 391, cited by Plaintiffs, the Personnel Complaints do not "expressly threaten litigation" (*id*. at 401) or propose a monetary settlement. Even if the court assumed the Personnel Complaints provided the District and the School with actual knowledge of the circumstances surrounding the claim, that knowledge alone is insufficient. The Personnel Complaints do not achieve the primary purpose of the claims statute – to wit, enabling the District and the School

to adequately investigate the claims and settle them, if appropriate, without the expense of litigation.

The demurrer to the first through fifth causes of action as to the District and the School is therefore SUSTAINED.

1st C/A ("Violation of California Elementary and Secondary Education Code")

The first cause of action alleges that Defendants violated Education Code sections 49062 *et seq*., 49070(a)(1)-(6), 49066, 49069.7, 49070, 49072, and 51101(7)(10)(15). (SAC ¶ 40.)

Section 49066 provides in relevant part that grades given for any course of instruction taught in a school district "shall be the grade determined by the teacher of the course and the determination of the pupil's grade by the teacher, in the absence of clerical or mechanical mistake, fraud, bad faith, or incompetency, shall be final." A change of grades at the conclusion of a semester is governed by this section, rather than section 49070, which governs "change of record." (*Johnson v. Santa Monica-Malibu Unified School Dist. Bd. of Edu*. (1986) 179 Cal.App.3d 593.)

Section 49069.7 provides that parents of enrolled pupils "have an absolute right to access to any and all pupil records related to their children that are maintained by school districts.... The editing or withholding of any of those records, except as provided for in this chapter, is prohibited." The statute obligates school districts, not teachers, to adopt procedures for granting request by parents for access. (Educ. Code, § 49069.7(b).)

Section 49070 provides that following an inspection and review of a pupil's records, the parent may challenge the content of any record by way of written request to the superintendent of the school district. (Educ. Code, § 49070(a).) The section also provides the procedure by which the superintendent sustains or denies the allegations, and by which parents may appeal that decision. (Educ. Code, § 49070(b)-(d).)

Section 49072 provides parents the right to include in a pupil record a written statement or response concerning disciplinary action. (Educ. Code, § 49072.)

Section 51101 provides in relevant part that parents of pupils enrolled in public schools have the right to be informed by the school and to participate in the education of their children: to have a school environment for their child that is safe and supportive of learning (subd. (7)), to have access to the school records of their child (subd. (10)), and to question anything in their child's record that the parent feels is inaccurate or misleading and to receive a response from the school (subd. (15)).

The parties do not cite to any authority providing a private right of action or enforcement against teachers and administrators for violations of these sections, and the court has not found none. Assuming there is a private right of action nonetheless, the right of enforcement would be against the school districts who adopt and implement policies to comply with these statutes, rather than against any individual teacher/staff.

Plaintiffs do not address the first cause of action in the opposition. The failure to address or oppose an issue in a motion may be considered a waiver on that issue. (See *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 288; see also *Wright v. Fireman's Fund Ins. Companies* (1992) 11 Cal.App.4th 998, 1011 ["it is clear that a defendant may waive the right to raise an issue on appeal by failing to raise the issue in the pleadings or in opposition to a . . . motion"].) Here, Plaintiff has not put forward any arguments on the merits opposing the demurrer to the first cause of action and any such arguments are considered waived.

The demurrer is SUSTAINED as to the first cause of action.

2nd C/A ("Violation of General Education Provision Act and Elementary and Secondary Education Code")

The second cause of action alleges that Defendants violated Education Code sections 200 *et seq*., 201, 234.1(a)

		& (b)(1), 49070(a)(6), and 51101(7) by intimidating, publicly humiliating, and verbally abusing Plaintiff Jane Doe based on false accusation of cheating. (SAC ¶¶ 44, 49.) The SAC also alleges that the misconduct is systematic and ongoing. (SAC ¶ 52.) The California Legislature enacted a statutory scheme to ensure all pupils can participate fully in the educational process. (See Educ. Code, §§ 200 *et seq*.) As the court in *Donavan v. Poway Unified School District* explained, > Students in public schools are entitled to "equal rights and opportunities" in education (§ 200) and to participate fully in the educational process "free from discrimination and harassment." (§ 201, subd. (a).) To effectuate this policy, which is guaranteed by the federal and state constitutions, the Legislature requires California's public schools to take affirmative steps to "combat racism, sexism, and other forms of bias." (§ 201, subd. (b).) They also must "prevent and respond to acts of hate violence and bias-related incidents" in an "urgent" manner (§ 201, subd. (d)); and they must "teach and inform pupils in the public schools about their rights ... in order to increase pupils' awareness and understanding of their rights and the rights of others, with the intention of promoting tolerance and sensitivity in public schools and in society as a means of responding to potential harassment and hate violence." (§ 201, subd. (e).) (*Donovan v. Poway Unified School Dist*. (2008) 167 Cal.App.4th 567, 606-607.) Section 234.1(a) directs the state Department of Education to "assess whether local education agencies have . . . [a]dopted a policy that prohibits discrimination, harassment, intimidation, and bullying on the basis of among other things, race. (Educ. Code, § 234.1(a).) Sections 201 and 234.1 include a private right of action. (See Educ. Code, § 262.4 [providing the "chapter may be enforced through a civil action"].)

		Plaintiffs, however, cite no authority holding that public *employees* such as Defendants Dinh, Bak, and Gates can be held liable for violating sections 200 *et seq*. (See, e.g., *Donovan v. Poway Unified School Dist*. (2008) 167 Cal.App.4th 567, 606–607 [holding claims for violation of the provision prohibiting discrimination required actual knowledge by the district].) In fact, given that the statutory scheme is directed at the school- and district-level policies and procedures, it appears the Legislature did not intend to create a means of enforcement against individual teachers and administrators. (See Educ. Code, §§ 201 *et seq*.) Plaintiffs also do not address the second cause of action in the opposition. Plaintiff has not put forward any arguments on the merits opposing the demurrer to the second cause of action and any such arguments are considered waived. The demurrer is SUSTAINED as to the second cause of action. ***3rd C/A (IIED)*** The SAC's third cause of action alleges Defendants' disciplining Jane Doe in front of her peers and giving her an "F" grade on an exam and misleading the Plaintiffs' family to believing a proper investigation would be conducted were outrageous and caused Jane Doe to suffer severe emotional distress. (SAC ¶¶ 55-56.) To state a claim for intentional infliction of emotional distress, plaintiff must allege: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050-51.) "A defendant's conduct is 'outrageous' when it is so 'extreme as to exceed all bounds of that usually tolerated in a civilized community.' And the defendant's conduct must be 'intended to inflict injury or engaged in with the

realization that injury will result.'" (*Hughes, supra,* 46 Cal.4th at pp. 1050-51.) Further, that conduct must be directed at the plaintiff, or occur in the presence of a plaintiff of whom the defendant is aware. (*Potter v. Firestone Tire & Rubber Co*. (1993) 6 Cal.4th 965, 1002 [re groundwater contamination].) "The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it. The intensity and duration of the distress are factors to be considered in determining the severity." (*Fletcher v. Western Life Ins. Co*. (1970) 10 Cal.App.3d 376, 397.) "Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 209.)

"Discomfort, worry, anxiety, upset stomach, concern, and agitation" as the result of defendant's conduct do not constitute emotional distress of "such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it." (*Hughes*, *supra*, 46 Cal.4th at p. 1051.) The complaint must plead specific facts that establish severe emotional distress resulting from defendant's conduct." (*Michaelian v. State Comp. Ins. Fund* (1996) 50 Cal. App. 4th 1093, 1114.)

Here, the SAC does not allege outrageous conduct sufficient to support a claim for IIED. Nor does the SAC allege sufficient facts that Defendants' intended to cause Plaintiff emotional distress or that Plaintiffs Tran or Doe suffered severe emotional distress. Further, Plaintiffs do not allege facts as to the intensity and duration of their emotional distress. (*Fletcher*, 10 Cal.App.3d at 397.)

The demurrer is SUSTAINED as to the third cause of action.

4th C/A (negligent hiring, supervision, or retention of employee)

The SAC's fourth cause of action alleges Defendants hired Dinh who was unfit and/or incompetent to teach because Dinh had sudden outbursts and verbally abused students. (SAC ¶ 64.)

		California courts have consistently held that a public entity cannot be subject to a direct claim for negligent hiring or supervision practices. (*de Villers v. County of San Diego* (2007) 156 Cal.App.4th 238, 252 ["there is no statutory basis for declaring a governmental entity liable for negligence in its hiring and supervision practices"]; *Munoz v. City of Union City* (2004) 120 Cal.App.4th 1077, 1113 [concluding no statutory basis for such a claim exists], disapproved on other grounds of by *Hayes v. County of San Diego* (2013) 57 Cal.4th 662.) Accordingly, there can be no direct claim here for negligent hiring, supervision, or retention against the District or the School. Under the California Tort Claims Act, public employees are liable for injuries caused by their acts and omissions to the same extent as private persons. (Gov. Code, § 820, subd. (a).) "Vicarious liability is a primary basis for liability on the part of a public entity, and flows from the responsibility of such an entity for the acts of its employees under the principle of respondeat superior. [Citation]" (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1128.) As the Act provides, "[a] public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would ... have given rise to a cause of action against that employee," unless "the employee is immune from liability." (Gov. Code, § 815.2, subds. (a), (b).) The elements of a cause of action for negligent hiring, supervision, or retention are: (1) hiring and supervision of an employee; (2) the employee is incompetent or unfit; (3) the employer has reason to believe undue risk of harm would exist because of the employment; and (4) harm occurs. (*Federico v. Superior Court* (1997) 59 Cal.App.4th 1207, 1213–1214.) Here, the SAC does not allege that Bak or Gates were Dinh's supervisors, nor does the SAC allege sufficient facts to show that Bak or Gates had any prior knowledge of Dinh's alleged unfitness. The demurrer is SUSTAINED as to the fourth cause of action.

5th C/A (NIED)

As an initial matter, the court notes Plaintiffs did not seek leave to amend their complaint to add a cause of action for negligent infliction of emotional distress. As noted above, leave was granted for the specific purpose of showing compliance with the Government Claims Act. Further, when a court grants leave to amend after sustaining a demurrer, the scope of permissible amendment is limited to the causes of action that have been originally pleaded. (*People By & Through Dep't of Pub. Works v. Clausen* (1967) 248 Cal.App.2d. 770). A plaintiff, therefore, may not amend the complaint by adding new causes of action without first obtaining an order from the court. (*Harris v. Wachovia Mortg., FSB* (2010) 185 Cal.App.4th 1018, 1023 ["Following an order sustaining a demurrer … with leave to amend, the plaintiff may amend his or her complaint only as authorized by the court's order…. The plaintiff may not amend the complaint to add a new cause of action without having obtained permission to do so, unless the new cause of action is within the scope of the order granting leave to amend.")

The SAC's fifth cause of action alleges Defendants' conduct in disciplining Plaintiff Doe in front of her peers, giving her an F grade for all of her classes, and sharing information with Gates were outrageous and malicious. (SAC ¶ 67.)

"The law of negligent infliction of emotional distress in California is typically analyzed . . . by reference to two 'theories' of recovery: the 'bystander' theory and the 'direct victim' theory." (*Burgess v. Superior* Court (1992) 2 Cal.4th 1064, 1071.) Under the bystander theory, the plaintiff seeks to recover damages for serious emotional distress suffered as a result of an injury to a close family member. Recovery is limited as a matter of public policy to those cases where the plaintiff was present at the scene of the injury-producing event and was aware that the event was causing injury to the victim. (*Id.* at 1072–1073.)

In its decisions addressing the direct victim theory, the California Supreme Court has emphasized that "there is no independent tort of negligent infliction of emotional

		distress." (*Gu v. BMW of North America, LLC* (2005) 132 Cal.App.4th 195, 204, citations omitted.) Instead, "[n]egligent infliction of emotional distress is a form of the tort of negligence, to which the elements of duty, breach of duty, causation and damages apply." (*Huggins v. Longs Drug Stores California, Inc.* (1993) 6 Cal.4th 124, 129.) "[T]here is no duty to avoid negligently causing emotional distress to another . . ." (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 984.) Thus, "unless the defendant has assumed a duty to plaintiff in which the emotional condition of the plaintiff is an object, recovery is available only if the emotional distress arises out of the defendant's breach of some other legal duty and the emotional distress is proximately caused by that breach of duty." (*Id.* at 985, citations omitted.) The SAC does not allege that any of the individual defendants have assumed a duty in which Doe's emotional condition is an object. The demurrer to the fifth cause of action is SUSTAINED. Leave to amend is DENIED. Despite multiple opportunities, Plaintiffs have not demonstrated how they can properly amend. (See *Shaeffer v. Califia Farms, LLC* (2020) 44 Cal.App.5th 1125, 1145 ["onus" on plaintiff to show specific ways in which complaint can be amended, and denial of leave to amend affirmed where plaintiff "proffered no specific amendments to the trial court"]; *King v. CompPartners, Inc*. (2018) 5 Cal.5th 1039, 1050 ["The burden is on plaintiffs to prove that amendment could cure the defect."; *Hendy v. Losse* (1991) 54 Cal.3d 723, 742 ["If there is a reasonable possibility that the defect in a complaint can be cured by amendment, it is an abuse of discretion to sustain a demurrer without leave to amend. [Citation.] The burden is on the plaintiff, however, to demonstrate the manner in which the complaint might be amended. [Citation.]".) Defendants to give notice.

		2. Motion to Strike Defendants' motion to strike is **MOOT** in light of the ruling on the demurrer. Defendants to give notice.
4	Pacific Attorney Group, Professional Law Corporation vs. Shirazi	<u>Motion to Compel Arbitration and Dismiss</u> The court **DENIES** Defendant AZADEH NEJAD SHIRAZI's "Motion to Compel Arbitration and Dismiss this case from the court". As explained below, the request is untimely. The State Bar regulates and administers a fees and costs dispute arbitration program under the Mandatory Fee Arbitration Act (MFAA). (Bus. & Prof. Code, §§ 6200 *et seq*.). MFAA arbitration is a separate and distinct "closed system" conducted by local bar associations (as opposed to private alternative dispute resolution providers) and has its own rules and limitations. (See *Aguilar v. Lerner* (2004) 32 Cal.4th 974, 984; *Greenberg Glusker Fields Claman & Machtinger LLP v. Rosenson* (2012) 203 Cal.App.4th 688, 693 [Legislature created MFAA as "separate and distinct arbitration scheme applicable to disputes between clients and attorneys over legal fees, costs, or both"], and State Bar Rules 3.500 *et seq*.) MFAA arbitration is not mandatory for the client absent written agreement otherwise, but it is mandatory for the attorney if the client requests it - even if the agreement requires that fees/costs disputes be submitted to "standard" private arbitration. (Bus. & Prof. Code, § 6200(c); *Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 Cal.4th 557, 562; *Huang v. Cheng* (1998) 66 Cal.App.4th 1230, 1234.) Importantly, the client must timely request arbitration. Business and Profession Code section 6201 states *inter alia*, "The rules adopted by the board of trustees shall provide that the client's ***failure to request arbitration within 30 days after receipt of notice***

from the attorney shall be deemed a waiver of the client's right to arbitration under the provisions of this article."

(Bus. & Prof. Code, § 6201(a), emphasis supplied.)

Here, Defendant failed to provide any admissible evidence to support the motion. By contrast, Plaintiff proffers evidence that it sent to Defendant a Notice of Client's Right to Fee Arbitration back on 10/20/20. (Hollomon Jr. Decl., ¶¶ 2-4., Exhs. A and B.) Consistent with Business and Profession Code section 6201, the notice sent to Plaintiff includes the following language:

"You will LOSE YOUR RIGHT TO ARBITRATION UNDER THIS PROGRAM if:

1. YOU DO NOT FILE A WRITTEN APPLICATION FOR ARBITRATION WITH THE BAR ASSOCIATION WITHIN **30 DAYS** FROM RECEIPT OF THIS NOTICE USING A FORM PROVIDED BY THE LOCAL BAR ASSOCIATION OR STATE BAR OF CALIFORNIA FEE ARBITRATION PROGRAM; OR

2. YOU RECEIVE THIS NOTICE AND THEN … ANSWER A COMPLAINT I HAVE FILED IN COURT…."

(Hollomon Decl., ¶4., Exh. B, emphasis in original.)

In her Response to Plaintiff's opposition papers, Defendant acknowledges that she received the 10/20/20 letter. (Def's Reply Br., filed 3/27/24, ¶2 (ROA 109).) Defendant apparently never requested arbitration before this lawsuit was filed on 3/17/23. (Hollomon Jr., Decl., ¶ 5.) Further, Defendant filed an Answer to the Complaint on 10/12/21 and did not file this motion to compel arbitration until 12/20/23. As such, Defendant has waived the right to arbitrate.

Defendant also asks the court to dismiss this action in its entirety. Defendant however provides no legal basis for the court to do so. As such, Defendant's request to dismiss is also denied.

		Plaintiff to give notice.
6	Perez Vargas vs. General Motors LLC	Motion to Compel Further (re RFPs) **OFF-CALENDAR.** On 4/12/24, moving party Plaintiff ERICK PEREZ VARGAS filed a Notice to Take Off Motion to Compel Hearing.
8	Moser vs. Limai Montessori Academy Cypress, LLC	Motion to Disqualify Attorney of Record The court **DENIES** Defendants' Motion to Disqualify Verve Law Group as Attorneys for Plaintiff. Specifically, Defendants seek an order disqualifying the law firm VERVE LAW GROUP (Verve) and its attorneys SARA WANG (Wang) and ALEX CHANG (Chang) from acting as attorneys for Plaintiff ALEXIS MOSER in this action. ***Rules of Professional Responsibility at Issue*** California Rule of Professional Conduct 1.9 (formerly 3-310(E)) provides in relevant part, (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person* in the same or a substantially related matter in which that person's* interests are materially adverse to the interests of the former client unless the former client gives informed written consent. (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and
(2) about whom the lawyer had acquired information protected by Business and Professions Code section 6068, subdivision (e) 1 and rules 1.62 and 1.9(c) that is material to the matter;

unless the former client gives informed written consent.

(Cal. Rule Prof. Conduct 1.9(b).)

Professional Rule 1.10(a) states, "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by rules 1.7 and 1.9..."

Disqualification General Principles

The court has inherent power "to control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every manner pertaining thereto." (Code Civ. Proc., § 128(a)(5).) This includes the power to disqualify counsel in appropriate cases. (*In re Complex Asbestos Litig*. (1991) 232 Cal. App. 3d 572, 585.)

"A trial court's authority to disqualify an attorney derives from the power inherent in every court [t]o control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto. [D]isqualification motions involve a conflict between the clients' right to counsel of their choice and the need to maintain ethical standards of professional responsibility. The paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar. The important right to counsel of one's choice must yield to ethical considerations that affect the fundamental principles of our judicial process." (*Walker v. Apple, Inc*. (2016) 4 Cal.App.5th 1098, 1106 [internal quotes and citations omitted].)

As a rule, deciding a motion to disqualify requires the court to weigh the following variables:

- the party's right to counsel of choice;
- the attorney's interest in representing a client;
- the financial burden on a client of changing counsel;
- any tactical abuse underlying a disqualification motion; and
- the principle that the fair resolution of disputes requires vigorous representation of parties by independent counsel.

(*Mills Land & Water Co. v. Golden West Refining Co*. (1986) 186 Cal.App.3d 116, 126.)

There are two types of situations in which conflicts requiring the disqualification of counsel may arise—successive representation and concurrent representation. (*Cal West Nurseries, Inc. v. Super. Ct*. (2005) 129 Cal.App.4th 1170, 1174.) This case concerns purported successive representation.

Successive Representation

"A former client may seek to disqualify a former attorney from representing an adverse party by showing the former attorney actually possesses confidential information adverse to the former client. It is well settled, however, that actual possession of confidential information need not be proved in order to disqualify the former attorney. Instead, it is enough to show a 'substantial relationship' between the former and current representation. . . If the former client can establish the existence of a substantial relationship between representations the courts will conclusively presume the attorney possesses confidential information adverse to the former client." (*H. F. Ahmanson & Co. v. Salomon Brothers, Inc*. (1991) 229 Cal.App.3d 1445, 1452)

"The conclusive presumption of knowledge of confidential information has been justified as a rule of necessity, 'for it is not within the power of the former client to prove what is in the mind of the attorney. Nor should the attorney have to 'engage in a subtle evaluation of the extent to

		which he acquired relevant information in the first representation and of the actual use of that knowledge and information in the subsequent representation.'. . . The conclusive presumption also avoids the ironic result of disclosing the former client's confidences and secrets through an inquiry into the actual state of the lawyer's knowledge and it makes clear the legal profession's intent to preserve the public's trust over its own self-interest." (*Id*, at 1453.) "Where the requisite substantial relationship between the subjects of the prior and the current representations can be demonstrated, access to confidential information by the attorney in the course of the first representation (relevant, by definition, to the second representation) is presumed and disqualification of the attorney's representation of the second client is mandatory; indeed, the disqualification extends vicariously to the entire firm." (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 283.) Two matters are "the same or substantially related" for the purposes of Rule 1.9 if they involve a substantial risk of a violation of an attorney's duty not to do anything that will injuriously affect the former client in any matter in which the lawyer represented the former client, and use against the former client knowledge or information acquired by virtue of the previous relationship. (Rule 1.9 comments 1 [citing *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811], 3.) This occurs, for example, if the matters involve the same transaction or legal dispute; or if the lawyer normally would have obtained confidential information, and the lawyer would be expected to use or disclose that information in the subsequent representation because it is material to the subsequent representation. (Rule 1.9, comment 3.) In assessing whether there is a substantial relationship between two matters, courts focus on the similarities between the two factual situations, the legal questions posed, and the nature and extent of the attorney's involvement with the cases. (*Acacia Patent Acquisition, LLC v. Superior Court* (2015) 234 Cal.App.4th 1091, 1097-1098.) A substantial relationship exists where the attorney had a direct professional relationship with the former client in

which the attorney personally provided legal advice and services on a legal issue that is closely related to the legal issue in the present representation. (*City and County of San Francisco v. Cobra Solutions, Inc*. (2006) 38 Cal.4th 839, 847.) The substantial relationship test requires comparison not only of the legal issues involved in successive representations, but also of the evidence bearing on the materiality of the information the attorney received during the earlier representation. (*Khani v. Ford Motor Co*. (2013) 215 Cal.App.4th 916, 921.) "If a substantial relationship exists, courts will presume that confidences were disclosed during the former representation which may have value in the current relationship." (*Truck Ins. Exchange v. Fireman's Fund Ins. Co*. (1992) 6 Cal. App. 4th 1050, 1056.)

Are Defendants Former Clients?

Defendants argue that, based on the declaration of Spring Zhang, communications between Spring Zhang and Sara Wang created an attorney-client relationship between all of Defendants and Sara Wang, Alex Chang, and Verve Law Group.

"It hardly needs citation of authority that the rule against representation adverse to a former client does not apply if there was no attorney-client relationship between the attorney and the complaining party." (*Victaulic Company v. American Home Assurance Company* (2022) 80 Cal.App.5th 485, 508.) "The party seeking disqualification has the burden to establish the attorney-client relationship." (*Lynn v. George* (2017) 15 Cal.App.5th 630, 638.)

"[N]o attorney-client relationship arises for purposes of the privilege if a person consults an attorney for nonlegal services or advice in the attorney's capacity as a friend, rather than in his or her professional capacity as an attorney." (*Edwards Wildman Palmer LLP v. Superior Court* (2014) 231 Cal.App.4th 1214, 1226.) "It is settled that the attorney-client privilege is inapplicable where the attorney merely acts as a negotiator for the client, gives business advice or otherwise acts as a business agent."

The court finds that Defendants have not met their burden of establishing that a prior attorney-client relationship

		exists between any of Defendants and Sara Wang, Alex Chang, and Verve Law Group. Zhang's declaration contains "loose legal generalities" and vague descriptions of the communications between Zhang and Wang. Throughout Zhang's declaration, she concludes that she sought legal advice from Wang and that an attorney-client relationship must have existed. However, Zhang's declaration is void of any specific evidentiary facts to provide context as to whether or not an actual attorney-client relationship existed or whether or not Zhang was speaking to Wang in another capacity. (See e.g., *Victaulic Company v. American Home Assurance Company* (2022) 80 Cal.App.5th 485, 508 [trial court did not abuse discretion in finding that defendant did not meet their burden of proving a prior attorney-client relationship where the declarations talked in "legal generalities"].) Zhang provides no details about the dates in which she spoke to Wang, the context (e.g., in a private meeting between them two or were other people present), the evidentiary basis on which believes Wang was acting in her capacity as an attorney, rather than as a parent, and/or any documentary evidence of communications between them that suggests the existence of an attorney-client relationship and/or that confidential information was being exchanged. Further, Zhang's declaration states that she is the principal of a specific campus location of Limai and does not provide any detail on her authority to bind and/or enter into attorney-client relationships on behalf of any of the other entity defendants. The declaration is insufficient to establish whether or not Zhang was communicating with Wang in her individual capacity or in her capacity as agent to bind any of the entity defendants. (See e.g., *Lynn v. George* (2017) 15 Cal.App.5th 630, 642 ["[A]n attorney representing a partnership does not necessarily have an attorney-client relationship with an individual partner for purposes of applying the conflict of interest rules. Whether such a relationship exists turns on finding an agreement, express or implied, that the attorney also represents the partners."].)

		Comparing the evidence between the parties, Plaintiff's supporting declarations provide more specific evidentiary context between Zhang and Wang. Plaintiff provides an approximate date of a meeting with all parents in which Zhang informed all parents that Plaintiff may be terminated. The text messages and emails that Wang attached to her declaration details messages that do not discuss legal matters but relate to personal niceties and/or communications relating to Wang's role as a parent of children attending Defendants' preschool. Where communications were directed to Wang in her role as a parent, there is no evidence showing any potentially personal legal advice that Wang was giving to Zhang. (See *Lynn v. George* (2017) 15 Cal.App.5th 630, 641 [eleven email communications relating to a transaction to Lynn as a broker and not an attorney was insufficient for disqualification].) Defendants cite to *Lister v. State Bar* (1990) 51 Cal.3d 1117, 1126, for the proposition that an attorney client relationship may arise by the conduct of the parties and no formal contract or attorney fee is necessary to create the relationship. In *Lister*, however, three clients retained an attorney whose firm performed work for them. (*Id*. at 1120-1121.) The attorney argued that because the clients did not pay him, no attorney client relationship existed between them. (*Id*. at 1126.) The Supreme Court rejected that argument and held that, in providing the attorney with documents and who had specifically asked the attorney to represent them, an attorney client relationship existed. (*Id*.) Here, there is no evidence that any of the Defendants specifically asked any of Plaintiff's counsel to represent them, that any relevant confidential documents were exchanged, or that Defendants specifically retained any of Plaintiff's counsel to represent them in any matter.

		Because Defendants failed to meet their burden of establishing the existence of a former attorney-client relationship, the motion is DENIED. Plaintiffs to give notice.
9	Cordova vs. Providence St. Jude Medical Center	<u>Motion for Summary Judgment and/or Adjudication</u> **OFF-CALENDAR.** After the motion was filed, Plaintiff dismissed (with prejudice) moving party Defendant ANDREW IMPARATO, M.D. from the Complaint on 3/7/24. (See Request for Dismissal, filed 3/7/24 [ROA 365].)