Medical Group, et al

S273630

General Docket

United States Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 21−55229 **Docketed:** 03/11/2021
Nature of Suit: 3790 Other Labor Litigation **Termed:** 03/16/2022
Kristina Raines, et al v. U.S. Healthworks Medical Group, et al
Appeal From: U.S. District Court for Southern California, San Diego
Fee Status: Paid

Case Type Information:
1) civil
2) private
3) null

Originating Court Information:
District: 0974−3 : 3:19−cv−01539−DMS−DEB
Trial Judge: Dana M. Sabraw, Chief District Judge
Date Filed: 08/15/2019

Date Order/Judgment:	Date Order/Judgment EOD:	Date NOA Filed:	Date Rec'd COA:
03/02/2021	03/02/2021	03/10/2021	03/10/2021

Prior Cases:
None

Current Cases:
None

KRISTINA RAINES Plaintiff − Appellant,	Nicholas A. Carlin, Attorney Direct: 415−398−0900 Email: nac@phillaw.com Fax: 415−398−0911 [COR NTC Retained] Phillips Erlewine, Given & Carlin, LLP 39 Mesa Street Suite 201 San Francisco, CA 94129 R. Scott Erlewine Direct: 415−398−0900 Email: rse@phillaw.com Fax: 415−398−0911 [COR NTC Retained] Phillips Erlewine, Given & Carlin, LLP 39 Mesa Street Suite 201 San Francisco, CA 94129 Kyle P. O'Malley Direct: 415−398−0900 Email: kpo@phillaw.com Fax: 415−398−0911 [COR NTC Retained] Phillips Erlewine, Given & Carlin, LLP 39 Mesa Street Suite 201 San Francisco, CA 94129 Leah Romm **Terminated:** 03/14/2022 Direct: 415−398−0900 Email: lhr@phillaw.com [COR NTC Retained] Phillips Erlewine, Given & Carlin, LLP 39 Mesa Street Suite 201 San Francisco, CA 94129
DARRICK FIGG, individually and on behalf of all others similarly situated Plaintiff − Appellant,	Nicholas A. Carlin, Attorney Direct: 415−398−0900 [COR NTC Retained] (see above) R. Scott Erlewine Direct: 415−398−0900 [COR NTC Retained] (see above) Kyle P. O'Malley Direct: 415−398−0900

	[COR NTC Retained] (see above) Leah Romm **Terminated:** 03/14/2022 Direct: 415−398−0900 [COR NTC Retained] (see above)
v.	
U.S. HEALTHWORKS MEDICAL GROUP, a corporation Defendant − Appellee,	Raymond A. Cardozo Direct: 415−543−8700 Email: rcardozo@reedsmith.com Fax: 415−391−8269 [COR NTC Retained] Reed Smith, LLP 101 2nd Street Suite 1800 San Francisco, CA 94105 Cameron O'Brien Flynn, Attorney Direct: 858−652−3100 Email: cameron.flynn@ogletreedeakins.com Fax: 858−652−3101 [COR NTC Retained] Ogletree, Deakins, Nash, Smoak & Stewart, P.C. 4370 La Jolla Village Drive Suite 990 San Diego, CA 92122 Timothy L. Johnson, Esquire, Attorney Direct: 858−652−3100 Email: tim.johnson@ogletree.com Fax: 858−652−3101 [COR NTC Retained] Ogletree, Deakins, Nash, Smoak & Stewart, P.C. 4370 La Jolla Village Drive Suite 990 San Diego, CA 92122
SELECT MEDICAL HOLDINGS CORPORATION, a corporation Defendant − Appellee,	Raymond A. Cardozo Direct: 415−543−8700 [COR NTC Retained] (see above) Cameron O'Brien Flynn, Attorney Direct: 858−652−3100 [COR NTC Retained] (see above) Timothy L. Johnson, Esquire, Attorney

	Direct: 858−652−3100 [COR NTC Retained] (see above)
CONCENTRA GROUP HOLDINGS LLC, a Corporation Defendant − Appellee,	Raymond A. Cardozo Direct: 415−543−8700 [COR NTC Retained] (see above) Cameron O'Brien Flynn, Attorney Direct: 858−652−3100 [COR NTC Retained] (see above) Timothy L. Johnson, Esquire, Attorney Direct: 858−652−3100 [COR NTC Retained] (see above)
U.S. HEALTHWORKS, INC., a corporation Defendant − Appellee,	Raymond A. Cardozo Direct: 415−543−8700 [COR NTC Retained] (see above) Cameron O'Brien Flynn, Attorney Direct: 858−652−3100 [COR NTC Retained] (see above) Timothy L. Johnson, Esquire, Attorney Direct: 858−652−3100 [COR NTC Retained] (see above)
SELECT MEDICAL CORPORATION, a corporation Defendant − Appellee,	Raymond A. Cardozo Direct: 415−543−8700 [COR NTC Retained] (see above) Cameron O'Brien Flynn, Attorney Direct: 858−652−3100 [COR NTC Retained] (see above) Timothy L. Johnson, Esquire, Attorney Direct: 858−652−3100 [COR NTC Retained] (see above)
CONCENTRA, INC., a corporation Defendant − Appellee,	Raymond A. Cardozo Direct: 415−543−8700 [COR NTC Retained]

	(see above) Cameron O'Brien Flynn, Attorney Direct: 858−652−3100 [COR NTC Retained] (see above) Timothy L. Johnson, Esquire, Attorney Direct: 858−652−3100 [COR NTC Retained] (see above)
CONCENTRA PRIMARY CARE OF CALIFORNIA, a medical corporation Defendant − Appellee,	Raymond A. Cardozo Direct: 415−543−8700 [COR NTC Retained] (see above) Cameron O'Brien Flynn, Attorney Direct: 858−652−3100 [COR NTC Retained] (see above) Timothy L. Johnson, Esquire, Attorney Direct: 858−652−3100 [COR NTC Retained] (see above)
OCCUPATIONAL HEALTH CENTERS OF CALIFORNIA, a Medical Corporation Defendant − Appellee,	Raymond A. Cardozo Direct: 415−543−8700 [COR NTC Retained] (see above) Cameron O'Brien Flynn, Attorney Direct: 858−652−3100 [COR NTC Retained] (see above) Timothy L. Johnson, Esquire, Attorney Direct: 858−652−3100 [COR NTC Retained] (see above)
DOES, 4 and 8 through 10, inclusive Defendant − Appellee,	Raymond A. Cardozo Direct: 415−543−8700 [COR NTC Retained] (see above)
_____	
STATE OF CALIFORNIA Amicus Curiae,	Francisco Valenciana Balderrama, Deputy Attorney General Direct: 213−269−6000 Email: francisco.balderrama@doj.ca.gov

	[COR LD NTC Dep State Aty Gen] California Department of Justice Public Rights Division − Civil Rights Enforcement Section Suite 1702 300 S Spring Street Los Angeles, CA 90013 Panchalam Seshan Srividya, Ms **Terminated:** 08/24/2021 Email: srividya.panchalam@doj.ca.gov [COR LD NTC Dep State Aty Gen] Disability Rights Legal Center 256 S. Occidental Blvd. Los Angeles, CA 90057 Panchalam Seshan Srividya, Ms Direct: 213−269−6496 Email: srividya.panchalam@doj.ca.gov Fax: 213−897−2801 [COR NTC Dep State Aty Gen] California Department of Justice Public Rights Division − Civil Rights Enforcement Section Suite 1702 300 S Spring Street Los Angeles, CA 90013
LEGAL AID AT WORK Amicus Curiae,	Alexis Michelle Alvarez Direct: 415−593−0068 Email: aalvarez@legalaidatwork.org [COR LD NTC Retained] Legal Aid At Work 180 Montgomery Street Suite 600 San Francisco, CA 94104

KRISTINA RAINES; DARRICK FIGG, individually and on behalf of all others similarly situated,

Plaintiffs − Appellants,

v.

U.S. HEALTHWORKS MEDICAL GROUP, a corporation; SELECT MEDICAL HOLDINGS CORPORATION, a corporation; CONCENTRA GROUP HOLDINGS LLC, a Corporation; U.S. HEALTHWORKS, INC., a corporation; SELECT MEDICAL CORPORATION, a corporation; CONCENTRA, INC., a corporation; CONCENTRA PRIMARY CARE OF CALIFORNIA, a medical corporation; OCCUPATIONAL HEALTH CENTERS OF CALIFORNIA, a Medical Corporation; DOES, 4 and 8 through 10, inclusive,

Defendants − Appellees.

03/11/2021	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes. The schedule is set as follows: Appellants Darrick Figg and Kristina Raines Mediation Questionnaire due on 03/18/2021. Appellants Darrick Figg and Kristina Raines opening brief due 05/10/2021. Appellees Concentra Group Holdings LLC, Concentra Primary Care of California, Concentra, Inc., Does, Occupational Health Centers of California, Select Medical Corporation, Select Medical Holdings Corporation, U.S. Healthworks Medical Group and U.S. Healthworks, Inc. answering brief due 06/09/2021. Appellant's optional reply brief is due 21 days after service of the answering brief. [12032095] (JBS) [Entered: 03/11/2021 10:52 AM]
03/18/2021	2	Filed (ECF) Appellants Darrick Figg and Kristina Raines Mediation Questionnaire. Date of service: 03/18/2021. [12045892] [21−55229] (Erlewine, R.) [Entered: 03/18/2021 11:40 AM]
03/18/2021	3	The Mediation Questionnaire for this case was filed on 03/18/2021. To submit pertinent **confidential** information directly to the Circuit Mediators, please use the following **link**. Confidential submissions may include any information relevant to mediation of the case and settlement potential, including, but not limited to, settlement history, ongoing or potential settlement discussions, non−litigated party related issues, other pending actions, and timing considerations that may impact mediation efforts.[12046002]. [21−55229] (AD) [Entered: 03/18/2021 12:44 PM]
03/23/2021	4	MEDIATION CONFERENCE SCHEDULED − DIAL−IN AssessmentConference, 04/06/2021, 10:00 a.m., PACIFIC Time. The briefing schedule previously set by the court remains in effect. See order for instructions and details. [12050294] (VS) [Entered: 03/23/2021 09:29 AM]
04/02/2021	5	Filed (ECF) Streamlined request for extension of time to file Opening Brief by Appellants Darrick Figg and Kristina Raines. New requested due date is 06/09/2021. [12061947] [21−55229] (Erlewine, R.) [Entered: 04/02/2021 11:55 AM]
04/02/2021	6	**Streamlined request [5] by Appellants Darrick Figg and Kristina Raines to extend time to file the brief is approved. Amended briefing schedule: Appellants Darrick Figg and Kristina Raines opening brief due 06/09/2021. Appellees Concentra Group Holdings LLC, Concentra Primary Care of California, Concentra, Inc., Does, Occupational Health Centers of California, Select Medical Corporation, Select Medical Holdings Corporation, U.S. Healthworks Medical Group and U.S. Healthworks, Inc. answering brief due 07/09/2021. The optional reply brief is due 21 days from the date of service of the answering brief.** [12061994] (BG) [Entered: 04/02/2021 12:25 PM]
04/06/2021	7	MEDIATION ORDER FILED: This case is RELEASED from the Mediation Program. [12065075] (VS) [Entered: 04/06/2021 11:44 AM]
05/25/2021	8	Filed (ECF) notice of appearance of Kyle Patrick O'Malley (Phillips, Erlewine, Given & Carlin LLP, 39 Mesa Street, Suite 201, San Francisco, CA 94129) for Appellants Darrick Figg and Kristina Raines. Date of service: 05/25/2021. (Party was previously proceeding with counsel.) [12124565] [21−55229] (O'Malley, Kyle) [Entered: 05/25/2021 04:46 PM]
05/25/2021	9	Added Attorney(s) Kyle P. O'Malley for party(s) Appellant Darrick Figg Appellant Kristina Raines, in case 21−55229. [12124583] (RR) [Entered: 05/25/2021 04:55 PM]
06/09/2021	10	Submitted (ECF) Opening Brief for review. Submitted by Appellants Darrick Figg and Kristina Raines. Date of service: 06/09/2021. [12139730] [21−55229] (O'Malley, Kyle) [Entered: 06/09/2021 07:32 PM]
06/09/2021	11	Submitted (ECF) excerpts of record. Submitted by Appellants Darrick Figg and Kristina Raines. Date of service: 06/09/2021. [12139731] [21−55229] (O'Malley, Kyle) [Entered: 06/09/2021 07:37 PM]

06/10/2021	12	Filed clerk order: The opening brief [10] submitted by Darrick Figg and Kristina Raines is filed. Within 7 days of the filing of this order, filer is ordered to file 6 copies of the brief in paper format, accompanied by certification (attached to the end of each copy of the brief) that the brief is identical to the version submitted electronically. Cover color: blue. The excerpts of record [11] submitted by Darrick Figg and Kristina Raines are filed. Within 7 days of this order, filer is ordered to file 3 copies of the excerpts in paper format securely bound on the left side, with white covers. The paper copies shall be submitted to the principal office of the Clerk. [12140369] (KWG) [Entered: 06/10/2021 11:35 AM]
06/15/2021	13	Received 3 paper copies of excerpts of record [11] in 1 volume(s) filed by Appellants Darrick Figg and Kristina Raines. [12144418] (KWG) [Entered: 06/15/2021 10:40 AM]
06/15/2021	14	Received 6 paper copies of Opening Brief [10] filed by Darrick Figg and Kristina Raines. [12145121] (SD) [Entered: 06/15/2021 02:56 PM]
06/16/2021	15	Submitted (ECF) Amicus brief for review and filed Motion to become amicus curiae. Submitted by Legal Aid at Work. Date of service: 06/16/2021. [12146479] [21−55229] (Alvarez, Alexis) [Entered: 06/16/2021 04:46 PM]
06/16/2021	16	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by State of California. Date of service: 06/16/2021. [12146572] [21−55229] (Srividya, Panchalam) [Entered: 06/16/2021 06:17 PM]
06/17/2021	17	Entered appearance of Amicus Curiae − Pending Legal Aid at Work. [12146694] (KT) [Entered: 06/17/2021 07:48 AM]
06/17/2021	18	Entered appearance of Amicus Curiae State of California. [12146695] (KT) [Entered: 06/17/2021 07:49 AM]
06/17/2021	19	Filed clerk order: The amicus brief [16] submitted by State of California is filed. Within 7 days of the filing of this order, filer is ordered to file 6 copies of the brief in paper format, accompanied by certification (attached to the end of each copy of the brief) that the brief is identical to the version submitted electronically. Cover color: green. The paper copies shall be submitted to the principal office of the Clerk. [12146697] (KT) [Entered: 06/17/2021 07:50 AM]
06/17/2021	20	Filed clerk order (Deputy Clerk: th): Motion [15] submitted by Legal Aid at Work (ECF Filing) to become amicus is referred to panel. (see attached PDF for complete order addressing Dkt No. 15) [12146875] (TH) [Entered: 06/17/2021 09:40 AM]
06/21/2021	21	Received 6 paper copies of Amicus Brief [15] filed by Legal Aid at Work. [12151267] (SD) [Entered: 06/22/2021 03:40 PM]
06/23/2021	22	Received 6 paper copies of Amicus Brief [16] filed by State of California. [12152251] (SD) [Entered: 06/23/2021 01:52 PM]
07/01/2021	23	Filed (ECF) Streamlined request for extension of time to file Answering Brief by Appellees U.S. Healthworks Medical Group, Select Medical Holdings Corporation, Concentra Group Holdings LLC, Concentra Primary Care of California, Concentra, Inc., Occupational Health Centers of California, Select Medical Corporation and U.S. Healthworks, Inc.. New requested due date is 08/06/2021. [12160869] [21−55229] (Johnson, Timothy) [Entered: 07/01/2021 03:56 PM]
07/01/2021	24	**Streamlined request [23] by Appellees Concentra Group Holdings LLC, Concentra Primary Care of California, Concentra, Inc., Occupational Health Centers of California, Select Medical Corporation, Select Medical Holdings Corporation, U.S. Healthworks Medical Group and U.S. Healthworks, Inc. to extend time to file the brief is approved. Streamlined requests allow for a 30 day extension of time to file the brief. Amended briefing schedule: Appellees Concentra Group Holdings LLC, Concentra Primary Care of California, Concentra, Inc., Does, Occupational Health Centers of California, Select Medical Corporation, Select Medical Holdings Corporation,**

		U.S. Healthworks Medical Group and U.S. Healthworks, Inc. answering brief due 08/09/2021. The optional reply brief is due 21 days from the date of service of the answering brief. [12160901] (JN) [Entered: 07/01/2021 04:17 PM]
07/28/2021	25	Filed (ECF) Streamlined request for extension of time to file Reply Brief by Appellants Darrick Figg and Kristina Raines. New requested due date is 09/29/2021. [12185397] [21−55229] (O'Malley, Kyle) [Entered: 07/28/2021 11:26 AM]
07/28/2021	26	**Streamlined request [25] by Appellants Darrick Figg and Kristina Raines to extend time to file the brief is not approved because the request is premature the answering brief has not been filed with the court brief due date 08/09/2021.** [12185709] (BG) [Entered: 07/28/2021 01:50 PM]
07/30/2021	27	Filed (ECF) Appellees Concentra Group Holdings LLC, Concentra Primary Care of California, Concentra, Inc., Occupational Health Centers of California, Select Medical Corporation, Select Medical Holdings Corporation, U.S. Healthworks Medical Group and U.S. Healthworks, Inc. Motion to extend time to file answering brief until 08/23/2021. Date of service: 07/30/2021. [12188276] [21−55229]−−COURT UPDATE: corrected docket text to reflect content of filing; resent notice. [Edited 07/30/2021 by ASW] (Johnson, Timothy) [Entered: 07/30/2021 02:47 PM]
08/02/2021	28	Filed clerk order (Deputy Clerk: th): Granting Appellees' Unopposed Motion [27] (ECF Filing) to extend time to file ans. brief. Appellees Concentra Group Holdings LLC, Concentra Primary Care of California, Concentra, Inc., Does, Occupational Health Centers of California, Select Medical Corporation, Select Medical Holdings Corporation, U.S. Healthworks Medical Group and U.S. Healthworks, Inc. answering brief due 08/23/2021. The optional reply brief is due 21 days after service of the answering brief. [12189829] (TH) [Entered: 08/02/2021 03:45 PM]
08/19/2021	29	Filed (ECF) notice of appearance of Raymond A. Cardozo (Reed Smith LLP, 101 Second Street, Suite 1800, San Francisco, CA 94105) for Appellees Concentra Group Holdings LLC, Concentra Primary Care of California, Concentra, Inc., Does, Occupational Health Centers of California, Select Medical Corporation, Select Medical Holdings Corporation, U.S. Healthworks Medical Group and U.S. Healthworks, Inc.. Date of service: 08/19/2021. (Party was previously proceeding with counsel.) [12206585] [21−55229] (Cardozo, Raymond) [Entered: 08/19/2021 04:57 PM]
08/20/2021	30	Added Attorney(s) Raymond A. Cardozo for party(s) Appellee U.S. Healthworks Medical Group Appellee Concentra Group Holdings LLC Appellee Does Appellee Select Medical Corporation Appellee Select Medical Holdings Corporation Appellee Concentra Primary Care of California Appellee Occupational Health Centers of California Appellee Concentra, Inc. Appellee U.S. Healthworks, Inc., in case 21−55229. [12206682] (RR) [Entered: 08/20/2021 06:01 AM]
08/23/2021	31	Submitted (ECF) Answering Brief for review. Submitted by Appellees Concentra Group Holdings LLC, Concentra Primary Care of California, Concentra, Inc., Occupational Health Centers of California, Select Medical Corporation, Select Medical Holdings Corporation, U.S. Healthworks Medical Group and U.S. Healthworks, Inc.. Date of service: 08/23/2021. [12209429] [21−55229] (Johnson, Timothy) [Entered: 08/23/2021 08:14 PM]
08/24/2021	32	Filed (ECF) Streamlined request for extension of time to file Reply Brief by Appellants Darrick Figg and Kristina Raines. New requested due date is 10/13/2021. [12209615] [21−55229] (O'Malley, Kyle) [Entered: 08/24/2021 08:54 AM]
08/24/2021	33	**Streamlined request [32] by Appellants Darrick Figg and Kristina Raines to extend time to file the brief is approved. Amended briefing schedule: the optional reply brief is due 10/13/2021.** [12209805] (BG) [Entered: 08/24/2021 10:34 AM]

08/24/2021	34	Filed clerk order: The answering brief [31] submitted by appellees is filed. Within 7 days of the filing of this order, filer is ordered to file 6 copies of the brief in paper format, accompanied by certification (attached to the end of each copy of the brief) that the brief is identical to the version submitted electronically. Cover color: red. The paper copies shall be submitted to the principal office of the Clerk. [12209854] (LA) [Entered: 08/24/2021 11:08 AM]
08/24/2021	35	Attorney Srividya Panchalam substituted by Attorney Francisco Valenciana Balderrama for amicus curiae State of California in 21−55229 (Srividya Panchalam does not have an active CM/ECF account). [12209862] (LA) [Entered: 08/24/2021 11:14 AM]
08/27/2021	36	Added Attorney(s) Panchalam Seshan Srividya for party(s) Amicus Curiae State of California, in case 21−55229. [12213315] (JBS) [Entered: 08/27/2021 10:03 AM]
08/27/2021	37	Received 6 paper copies of Answering Brief [31] filed by Appellees. [12213868] (SD) [Entered: 08/27/2021 02:11 PM]
09/02/2021	38	Filed (ECF) notice of appearance of Leah, Romm (Phillips, Erlewine, Given & Carlin LLP; 39 Mesa Street, Suite 201 − The Presidio, San Francisco, CA 94129) for Appellants Darrick Figg and Kristina Raines. Date of service: 09/02/2021. (Party was previously proceeding with counsel.) [12219132] [21−55229] (Romm, Leah) [Entered: 09/02/2021 02:26 PM]
09/02/2021	39	Added Attorney(s) Leah Romm for party(s) Appellant Darrick Figg Appellant Kristina Raines, in case 21−55229. [12219213] (RR) [Entered: 09/02/2021 03:06 PM]
09/22/2021	40	This case is being considered for an upcoming oral argument calendar in Pasadena Please review the Pasadena sitting dates for January 2022 and the 2 subsequent sitting months in that location at http://www.ca9.uscourts.gov/court_sessions. If you have an unavoidable conflict on any of the dates, please file Form 32 **within 3 business days of this notice** using the CM/ECF filing type **Response to Case Being Considered for Oral Argument**. Please follow the form's instructions carefully. When setting your argument date, the court will try to work around unavoidable conflicts; the court is not able to accommodate mere scheduling preferences. You will receive notice that your case has been assigned to a calendar approximately 10 weeks before the scheduled oral argument date. If the parties wish to discuss settlement before an argument date is set, they should jointly request referral to the mediation unit by filing a letter **within 3 business days of this notice**, using CM/ECF (**Type of Document**: Correspondence to Court; **Subject**: request for mediation).[12236138]. [21−55229] (KS) [Entered: 09/22/2021 02:41 PM]
09/23/2021	41	Filed (ECF) Attorney R. Scott Erlewine for Appellants Darrick Figg and Kristina Raines response to notice for case being considered for oral argument. Date of service: 09/23/2021. [12237204] [21−55229] (Erlewine, R.) [Entered: 09/23/2021 12:50 PM]
10/05/2021	42	Submitted (ECF) Reply Brief for review. Submitted by Appellants Kristina Raines and Darrick Figg. Date of service: 10/05/2021. [12247679] [21−55229] (Erlewine, R.) [Entered: 10/05/2021 11:30 AM]
10/05/2021	43	Filed clerk order: The reply brief [42] submitted by Darrick Figg and Kristina Raines is filed. Within 7 days of the filing of this order, filer is ordered to file 6 copies of the brief in paper format, accompanied by certification (attached to the end of each copy of the brief) that the brief is identical to the version submitted electronically. Cover color: gray. The paper copies shall be submitted to the principal office of the Clerk. [12247968] (LA) [Entered: 10/05/2021 01:18 PM]
10/08/2021	44	Received 6 paper copies of Reply Brief [42] filed by Darrick Figg and Kristina Raines. [12252273] (SD) [Entered: 10/08/2021 01:35 PM]

10/31/2021	45	Notice of Oral Argument on Wednesday, January 12, 2022 − 09:30 A.M. − Courtroom 1 − Scheduled Location: Pasadena CA. The hearing time is the local time zone at the scheduled hearing location. View the Oral Argument Calendar for your case **here**. NOTE: Although your case is currently scheduled for oral argument, the panel may decide to submit the case on the briefs instead. *See* Fed. R. App. P. 34. Absent further order of the court, if the court does determine that oral argument is required in this case, you may have the option to appear in person at the Courthouse or remotely by video. Check here for updates on the status of reopening as the hearing date approaches. At this time, even when in person hearings resume, an election to appear remotely by video will not require a motion, **and any attorney wishing to appear in person must provide proof of vaccination**. The court expects and supports the fact that some attorneys and some judges will continue to appear remotely. If the panel determines that it will hold oral argument in your case, the Clerk's Office will contact you directly at least two weeks before the set argument date to review any requirements for in person appearance or to make any necessary arrangements for remote appearance. Please note however that if you do elect to appear remotely, the court **strongly prefers** video over telephone appearance. Therefore, if you wish to appear remotely by telephone you will need to file a motion requesting permission to do so. Be sure to review the GUIDELINES for important information about your hearing, including when to be available (30 minutes before the hearing time) and when and how to submit additional citations (filing electronically as far in advance of the hearing as possible). If you are the specific attorney or self−represented party who will be arguing, use the **ACKNOWLEDGMENT OF HEARING NOTICE** filing type in CM/ECF no later than 28 days before Wednesday, January 12, 2022. No form or other attachment is required. If you will not be arguing, do not file an acknowledgment of hearing notice.[12273606]. [21−55229] (KS) [Entered: 10/31/2021 06:09 AM]
11/10/2021	46	Filed (ECF) Acknowledgment of hearing notice by Attorney Raymond A. Cardozo for Appellees Concentra Group Holdings LLC, Concentra Primary Care of California, Concentra, Inc., Does, Occupational Health Centers of California, Select Medical Corporation, Select Medical Holdings Corporation, U.S. Healthworks Medical Group and U.S. Healthworks, Inc.. Hearing in Pasadena on 01/12/2022 at 09:30 A.M. (Courtroom: Courtroom 1). Filer sharing argument time: No. (Argument minutes: 15) Appearance in person or by video: I wish to appear in person. Special accommodations: NO. Filer admission status: I certify that I am admitted to practice before this Court. Date of service: 11/10/2021. [12284917] [21−55229] (Cardozo, Raymond) [Entered: 11/10/2021 05:23 PM]
11/11/2021	47	Filed (ECF) Acknowledgment of hearing notice by Attorney R. Scott Erlewine for Appellants Darrick Figg and Kristina Raines. Hearing in Pasadena on 01/12/2022 at 09:30 A.M. (Courtroom: Courtroom 1). Filer sharing argument time: No. Appearance in person or by video: I wish to appear in person. Special accommodations: NO. Filer admission status: I certify that I am admitted to practice before this Court. Date of service: 11/11/2021. [12285012] [21−55229] (Erlewine, R.) [Entered: 11/11/2021 12:12 PM]
12/07/2021	48	Filed text clerk order (Deputy Clerk: AF): The unopposed motion of Legal Aid at Work, et al., to appear as amicus curiae in support of appellants, Dkt. [15], is granted. [12308968] (AF) [Entered: 12/07/2021 03:19 PM]
12/07/2021	49	Filed clerk order: The amicus brief [15] submitted by Legal Aid at Work is filed. No additional paper copies are required at this time. [12309207] (LA) [Entered: 12/07/2021 04:31 PM]

12/17/2021	50	Filed (ECF) notice of appearance of R. Scott, Erlewine (Phillips, Erlewine, Given & Carlin LLP; 39 Mesa Street, Suite 201, San Francisco, CA 94129.) for Appellants Darrick Figg and Kristina Raines. Date of service: 12/17/2021. (Party was previously proceeding with counsel.) [12319572] [21−55229] (Erlewine, R.) [Entered: 12/17/2021 02:56 PM]
12/17/2021	51	Added Attorney(s) R. Scott Erlewine for party(s) Appellant Darrick Figg Appellant Kristina Raines, in case 21−55229. [12319592] (RR) [Entered: 12/17/2021 03:05 PM]
01/12/2022	52	ARGUED AND SUBMITTED TO JOHNNIE B. RAWLINSON, PAUL J. WATFORD and JED S. RAKOFF. [12338592] (BG) [Entered: 01/12/2022 10:59 AM]
01/13/2022	53	Filed Audio recording of oral argument. **Note:** Video recordings of public argument calendars are available on the Court's website, at http://www.ca9.uscourts.gov/media/ [12340180] (BG) [Entered: 01/13/2022 12:56 PM]
01/25/2022	54	Filed (ECF) Appellants Kristina Raines and Darrick Figg citation of supplemental authorities. Date of service: 01/25/2022. [12351286] [21−55229] (Erlewine, R.) [Entered: 01/25/2022 05:25 PM]
03/14/2022	55	Filed (ECF) Notice of withdrawal of counsel. Filed by Attorney Leah Romm for Appellants Darrick Figg and Kristina Raines. Party proceeding without counsel: No. Date of service: 03/14/2022. [12394336] [21−55229] (Romm, Leah) [Entered: 03/14/2022 03:53 PM]
03/14/2022	56	Terminated Leah Romm for Kristina Raines and Darrick Figg in 21−55229 [12394423] (RR) [Entered: 03/14/2022 04:35 PM]
03/16/2022	57	Order filed for PUBLICATION (JOHNNIE B. RAWLINSON, PAUL J. WATFORD and JED S. RAKOFF) We certify to the Supreme Court of California the following question of state law: (SEE ORDER FOR FULL TEXT). The clerk of this court is hereby directed to file in the Supreme Court of California, under official seal of the United States Court of Appeals for the Ninth Circuit, copies of all relevant briefs and excerpts of the record, and an original and ten copies of this order and request for certification, along with a certification of service on the parties, pursuant to California Rule of Court 8.548(c), (d). This case is withdrawn from submission. Further proceedings before us are stayed pending final action by the Supreme Court of California. The Clerk is directed to administratively close this docket pending further order. The parties shall notify the clerk of this court within seven days after the Supreme Court of California accepts or rejects certification, and again within seven days if that court accepts certification and subsequently renders an opinion. The panel retains jurisdiction over further proceedings. [12395888] (AKM) [Entered: 03/16/2022 08:15 AM]

No. 21-55229

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTINA RAINES ET AL.,

Plaintiffs-Appellants,

v.

U.S. HEALTHWORKS MEDICAL GROUP ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of California
No. 3:19-CV-01539-DMS
Hon. Dana M. Sabraw

APPELLANTS' OPENING BRIEF

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INTRODUCTION

"Have you had, or do you commonly have, any of the following: Venereal disease? Painful or irregular vaginal discharge or pain? Problems with menstrual periods? Penile discharge? Prostate problems? Cancer? Hair loss? Diarrhea? Constipation? Tumors? Painful/frequent urination? Hemorrhoids? Headaches? Asthma? Anemia?" "Are you pregnant?" "State the date of your last menstrual period." "Have you ever had any major injuries?" "Have you ever had a surgery or been hospitalized?" "Do you have any permanent disabilities?" "Are you currently on any medications? List them and the dosage."

While one might expect these kinds of probing and deeply personal inquiries from one's personal physician, in California, this kind of interrogation has been prohibited as a condition of employment for decades. In 2000, the state's Legislature amended the Fair Employment and Housing Act ("FEHA") to protect job applicants from invasions of privacy and discrimination by restricting pre-employment medical screenings. Specifically, FEHA only permits pre-employment screenings to the extent any medical inquiry or examination is "job

related and consistent with business necessity." Cal. Gov. Code § 12940(e).

Defendants are large occupational health services corporations that provide pre-employment screenings in California in excess of 200,000 annually. Defendants wholly ignore the strict limits imposed by FEHA, and instead subject applicants to detailed and all-encompassing medical inquiries and force applicants to disclose their entire history of health conditions, treatment, and medication, including their physical, psychological and sexual health. There are dozens of such questions. Defendants also coerce applicants to authorize them to release any collected health information to employers and to other unspecified parties. Applicants who decline to answer every question asked of them are "failed" by Defendants and denied medical clearance for work.

Having been subjected to these illegal practices, Plaintiffs, individually and on behalf of over 500,000 similarly-situated job applicants, brought this putative class action against Defendants, challenging their violations of California law. The district court dismissed Plaintiffs' claims based on narrow, erroneous interpretations

of the statutes and common law at issue. That decision should be reversed.

First, Plaintiffs sued Defendants for violating FEHA's clear prohibition on their conduct. Even though FEHA expressly treats an employer's direct or indirect agents as the "employer" for this purpose, the district court found that Defendants are not subject to FEHA liability. The court's conclusion was based on an unwarranted extension of the California Supreme Court's 1998 decision in *Reno v. Baird* holding that FEHA does not impose personal liability on an employer's individual supervisory employees. But these corporate Defendants are in no way comparable to individual subordinate employees of an employer, and no California case has ever interpreted FEHA in the narrow manner adopted by the district court. Indeed, the California Supreme Court has repeatedly declined to interpret FEHA in the way the district court did. This Court should reverse the district court's errroneous constriction of FEHA's protections, or, if there is any doubt as to the proper scope of FEHA, refer the matter to the California Supreme Court for an authoritative decision.

Second, Plaintiffs sued Defendants on the alternative theory that they are "business establishments" subject to the Unruh Act, Cal. Civ. Code § 51 *et seq*. and that job applicants are their patrons (or, to use Defendants' term, their "patients"). Plaintiffs allege that they went to Defendants to receive a service in the form of medical clearance for the job position they had been offered and that Defendants discriminated against them and the putative class by arbitrarily treating them as if they were disabled and drawing arbitrary distinctions between them on the basis of gender. The district court fundamentally misapprehended these claims and the nature of discrimination, conceptualizing the "service" as "receiving an exam" and concluding that so long as everyone received an exam there was no discrimination. But Plaintiffs allege that the service is medical clearance for work, and that because that service was provided in a discriminatory manner, it constitutes actionable discrimination. It does not matter that no one was denied a medical screening: Plaintiffs and the putative class are entitled to job clearance free from discriminatory treatment based on perceived disabilities, sex, gender, or any other characteristic that has no relationship to their jobs.

Third, Plaintiffs sued Defendants for common law invasion of privacy by intrusion upon seclusion. The district court found that, as a matter of law, Defendants' illegal, invasive, irrelevant, and mandatory inquiries are not offensive to a reasonable person because doctors ask similar questions of their patients during routine medical exams. But this was not a routine medical exam. Despite Defendants referring to applicants as their "patients," Plaintiffs and the putative class did not seek or receive treatment, and the illegal questions had no bearing on medical clearance for work. Defendants then magnified the offensiveness of their conduct by forcing applicants to consent to Defendants disclosing their health information to employers and unspecified others. Whether Defendants' practice is highly offensive in this context should be left to a trier of fact; it certainly cannot be conclusively determined at the pleading stage.[1]

[1] Plaintiffs elect not to pursue their California Unfair Competition Law ("UCL") claim under Cal. Bus. & Prof. Code § 17200 *et seq*., which the district court dismissed for lack of standing.

JURISDICTIONAL STATEMENT

The district court exercised diversity jurisdiction following removal of this case from the Superior Court of the State of California (San Diego County) under the Class Action Fairness Act, 28 U.S.C. § 1332(d). The Court of Appeals has jurisdiction pursuant to 28 U.S.C. § 1291.

The Order dismissing with prejudice the first three causes of action in the Third Amended Complaint ("TAC") and dismissing the fourth cause of action (under the UCL) without prejudice was entered on January 25, 2021. ER-3–21. Pursuant to *WMX Techs. v. Miller*, 104 F.3d 1133, 1136-37 (9th Cir. 1997) and upon Plaintiffs' *ex parte* application, the district court entered its Order dismissing with prejudice the UCL cause of action on March 2, 2021. ER-22–23. Plaintiffs filed their Notice of Appeal on March 10, 2021. ER-99–100. This appeal is therefore timely pursuant to 28 U.S.C. § 2107(a) and Fed. R. App. P. 4(a) and is taken from a final order or judgment that disposes of all of the claims below.

STATUTORY AND REGULATORY AUTHORITIES

All relevant statutory and regulatory authorities appear in the Addendum to this brief.

ISSUES PRESENTED

1. FEHA prohibits employers from subjecting a job applicant to medical inquiries unless the inquiries are both job-related and necessary. FEHA defines "employer" to include persons acting directly or indirectly as the employer's agent. Defendants are corporations that conduct pre-employment screenings as agents for employers, not individual supervisory employees. Defendants do not limit their inquiries to applicants as required by FEHA. Can Plaintiffs sue Defendants for violating FEHA?
2. The Unruh Act prohibits discrimination by businesses providing services in California. As an alternative to their FEHA claim, Plaintiffs allege that Defendants provide services to applicants to medically clear them for work in a discriminatory fashion. Defendants ask all applicants

invasive and irrelevant questions that assume they are disabled and are designed to confirm that assumption, and also include many gender-specific questions directed to irrelevant reproductive and sexual health issues. If Defendants are not liable as employers under FEHA, can they state a claim for intentional discrimination under the Unruh Act? (Even if the Court finds that Defendants can be liable under FEHA, given that Defendants contest the sufficiency of Plaintiffs' agency allegations, it should still decide this Unruh Act issue.)

3. California Rule of Court 8.548 allows this Court to certify questions of law to the California Supreme Court for decision. Certification is appropriate where the Supreme Court's decision would dispose of a claim, there is no controlling precedent, and the issue has important public policy ramifications. The above questions fall squarely within this criteria. Should this Court certify the two questions above to the California Supreme Court rather than predict what that court would decide?

4. To state a claim for intrusion upon seclusion, Plaintiffs must allege conduct that is highly offensive to a reasonable person. Applicants are required to submit to Defendants' medical inquiries for the sole purpose of receiving clearance to begin work. Defendants unlawfully force Plaintiffs and the putative class to answer invasive medical questions, including about their perceived disabilities and reproductive and sexual histories. Defendants also force Plaintiffs to consent to disclosure of their health information to employers and other unspecified parties. Refusal to answer any question or to authorize disclosure results in denial of clearance. Do these facts allege highly offensive conduct sufficient to state a common law claim for intrusion upon seclusion against Defendants?

STATEMENT OF THE CASE

California law permits employers to condition an offer of employment upon an applicant's completion of a pre-employment medical screening conducted by a healthcare provider of the employer's choice. Under FEHA, such "examination or inquiry" must be "job

related and consistent with business necessity." Cal. Gov. Code § 12940(e)(3).

Historically, employers conducted pre-employment medical screenings themselves through an in-house "company doctor." ER-69. Over the years, however, employers began outsourcing these pre-employment screenings to corporate, third-party occupational healthcare providers such as Defendant U.S. Healthworks Medical Group and the other Defendants. ER-69. Before it was purchased by Concentra defendants[2] in 2018-2019 and re-branded, U.S. Healthworks was the nation's second largest provider of occupational health services and the largest in California, owning and operating 78 medical centers in this state. ER-68–69. Defendants conducted in excess of 200,000 pre-

[2] The "Concentra defendants" were at all relevant times together the nation's largest provider of occupational and urgent care centers, with over 1,200 medical centers nationally, and together are the successor in interest to U.S. Healthworks. ER-69. Concentra defendants consist of Select Medical Holdings Corporation, Select Medical Corporation, Concentra Group Holdings, LLC, Concentra, Inc., Concentra Primary Care of California, a medical corporation, and Occupational Health Centers of California, a medical corporation. ER-69. For purposes of this appeal, each Defendant is alleged to have engaged in the same conduct, and they thus are referred to simply as "Defendants."

employment medical screenings in California annually during the relevant time period. ER-70.

Referring employers delegated to Defendants the decision either to permit or deny employment to applicants, and employers accepted and adopted Defendants' "recommendations" as a matter of course. ER-70. Employers told applicants that they were required to undergo and pass the pre-employment screening by Defendants at Defendants' California facilities in order to be hired. ER-71. The screening was involuntary and applicants had no say in the administrator of the screening; they were not free to go to a medical provider of their choice. ER-71. While employers could choose to provide certain screening protocols to Defendants (*e.g.*, by specifying "lifting restrictions") and provided other instructions to Defendants, Defendants at all times unilaterally followed a practice requiring every applicant, at the outset of the screening and regardless of job position, to complete in full an omnibus Health History Questionnaire ("Questionnaire"). ER-35–36, 71, 75.

The Questionnaire asked numerous unlawful, highly-intrusive, highly-private, non-job-related and discriminatory questions. ER-57, 74.

These included whether the applicant has and/or has ever had: (1) venereal disease; (2) painful or irregular vaginal discharge or pain; (3) problems with menstrual periods; (4) irregular menstrual period; (5); penile discharge, prostate problems, genital pain or masses; (6) cancer; (7) mental illness; (8) HIV; (9) permanent disabilities; (10) painful/frequent urination; (11) hair loss; (12) hemorrhoids; (13) diarrhea; (14) black stool; (15) constipation; (16) tumors; (17) organ transplant; (18) stroke; or (19) a history of tobacco or alcohol use. ER-57, 74. The Questionnaire likewise asked about (20) pregnancy, (21) all over-the-counter and prescribed medication, and (22) prior on-the-job injuries or illnesses. ER-57, 74. In effect, the Questionnaire was so broad that it required applicants to disclose their entire personal and private medical and disability history from birth to present. ER-57, 75. Certain of these questions only women were required to answer in a box marked "FOR WOMEN ONLY"; others only men were required to answer in a box marked "FOR MEN ONLY." ER-57, 74, 85–86.

Employers did not develop the Questionnaire and did not require that applicants complete it; rather, Defendants were solely responsible for creating and implementing that document and for the policy

requiring all applicants answer every question it posed. ER-71–72, 73–75. If an applicant failed or refused to fully answer the Questionnaire, Defendants would not pass the applicant, resulting in denial of employment. ER-70–71, 75, 86.

Defendants' highly-intrusive Questionnaire was almost entirely unrelated to any applicant's ability to perform the essential functions of any job position. ER-75. Further, when the applicant provided a positive response, it was Defendants' systematic policy and practice to verbally ask the applicant to explain the basis for the positive response. ER-74.

In direct contravention of California law, Defendants treated no question as out-of-bounds. ER-37–38, 75. Only once Defendants had reviewed the applicant's answers to the Questionnaire would they assess what information was relevant to the job position. ER-37–38, 75.

To make matters worse, Defendants required all applicants to sign an unlawful form titled "Authorization to Disclose Protected Health Information to Employer" (the "Authorization"). ER-71, 74. This document authorized Defendants to disclose the applicants' protected health information to their prospective employers and to unspecified others. ER-71, 74. Defendants themselves acknowledged that this

authorization violated the Americans with Disabilities Act ("ADA"), having advised every employer that "in compliance with the ADA," the Defendants may not disclose the applicant's medical diagnoses or conditions to the employer. ER-58, 74–75. This Authorization was coerced, since it was unlawful and threatened every one of the more than 500,000 putative class member applicants that her or his "refusal to sign" "may violate a condition of … employment" and that "revocation of this authorization may carry consequences related to [the applicant's] … employment." ER-71, 74–75.

Plaintiff Kristina Raines applied for a job as a food service aide at a California retirement community managed by Front Porch Communities. ER-76. Her job duties were to consist of delivering food trays to residents; cleaning, disposing of waste, and washing dishes; re-stocking food supplies; and the like. ER-76. Front Porch offered her the job but conditioned the start of work on her passing Defendants' pre-employment medical screening at their Carlsbad, California facility. ER-76.

During the required screening, Defendants' staff directed Raines to fill out the Questionnaire and to sign the Authorization. ER-76. She

signed the Authorization and answered all of the questions on the Questionnaire and all subsequent verbal questions—save for a question about the date of her last menstrual period. ER-77. She objected on the grounds that the date of her last menstrual period had nothing to do with the job Front Porch offered her and that the question sought particularly private information. ER-77.

Defendants' staff then threatened Raines by stating that she would not "pass" the screening or be permitted to start work unless she answered all of their questions. ER-77. When she again declined, consistent with their policy, Defendants terminated and refused to administer the remainder of the screening and forced her to leave the premises. ER-77. Shortly thereafter, Front Porch revoked the job offer because Defendants' staff informed it that Raines did not complete the screening. ER-77.

Plaintiff Darrick Figg applied for a job as a member of the San Ramon Valley Fire Protection District's Volunteer Communication Reserve. ER-77. The Fire Protection District offered Figg the job but conditioned the start of work on him passing a pre-employment medical screening at one of Defendants' facilities. ER-77. Figg attended the

screening at Defendants' facility in Pleasanton, California. ER-77. Like Raines, Figg was required to complete the entire Questionnaire and to sign the Authorization. ER-77–78. He complied, despite that most of the questions had no bearing on his present ability to do the job in question. ER-78. He was then deemed by Defendants "medically acceptable for the position offered" and, because he "passed" the screening, was allowed to begin work. ER-78.

On October 23, 2018, Raines filed an individual action against Front Porch and U.S. Healthworks in the Superior Court of California for the County of San Diego. She later substituted Concentra defendants for Doe defendants. Following discovery revealing that Defendants systematically asked the questions on its Questionnaire to all California jobseekers, Raines filed a First Amended Complaint to assert class claims.

On August 15, 2019, Defendants removed the action to the United States District Court for the Southern District of California under the Class Action Fairness Act, 28 U.S.C. § 1332(d). ER-113. On February 19, 2020, Raines filed a Second Amended Complaint ("SAC") adding

Figg as a plaintiff, dismissing Front Porch as a defendant pursuant to a settlement, and adding additional Concentra defendants. ER-108.

On March 27, 2020, Defendants moved to dismiss the SAC under Fed. R. Civ. P. 12(b)(6), which the district court granted with leave to amend. ER-98, 107. On August 6, 2020, Plaintiffs filed the operative Third Amended Complaint ("TAC"), asserting the same causes of action as the SAC with additional facts. ER-69–94. Defendants again moved to dismiss. ER-59. On January 25, 2021, the district court granted the motion under Fed. R. Civ. P. 12(b)(6) without leave to amend as to the FEHA, Unruh Act, and intrusion upon seclusion claims and with leave to amend as to the claim for violation of the UCL. ER-3–21.

Plaintiffs thereafter on February 26, 2021 filed an *ex parte* application to dismiss the UCL claim with prejudice pursuant to *WMX Techs. v. Miller*, 104 F.3d 1133, 1136-37 (9th Cir. 1997), which the district court granted. ER-22–23, 24–25. On March 10, 2021, Plaintiffs timely filed their Notice of Appeal of the district court's orders dismissing the TAC's causes of action. ER-99–100.

SUMMARY OF THE ARGUMENT

I. California's Fair Employment and Housing Act ("FEHA") prohibits employers from subjecting a job applicant to medical inquiries or examinations except where they are both "job related and consistent with business necessity." Cal. Gov. Code § 12940(e)(3). FEHA and its implementing regulations specifically provide that persons who act, directly or indirectly, as agents for the employer are themselves treated as employers and subject to this requirement. Defendants are corporations that provided pre-employment medical screenings for employers and violated FEHA's clear prohibitions by asking numerous invasive and personal questions that were not job related and not consistent with business necessity.

The district court erroneously concluded that Defendants are immune from FEHA liability based on the court's misapplication of *Reno v. Baird*, 18 Cal. 4th 640 (1998), which held that an employer's individual supervisory employee is not subject to personal liability for discrimination under FEHA. The district court's dramatic constriction of FEHA's scope is inconsistent with the language and policy of the statute and applicable regulations and wholly unsupported by the

holding or reasoning of *Reno v. Baird*. This Court should either reverse or, if it finds the legal standard unclear, certify the highly important question of the proper scope of FEHA's treatment of agents as employers to the California Supreme Court for a definitive decision.

II. The district court erred by dismissing the alternative Unruh Civil Rights Act claim against Defendants. The Unruh Act prohibits discrimination by businesses in California, including those providing employment-related services. Defendants improperly discriminated in the provision of medical clearance services for employment by requiring applicants—under threat of denying clearance—to answer numerous invasive questions that regarded applicants as disabled and were designed to discover actual or perceived disabilities and biological sex-based differences among applicants which had no bearing on their fitness to work. Conditioning employment clearance in this manner discriminated on the bases of perceived disability and gender, irrespective of whether all applicants were asked the same questions. This Court should reverse the district court's dismissal of Plaintiffs' Unruh Act claim or, alternatively, certify it along with the FEHA claim to the California Supreme Court so that court can delineate the proper

scope of FEHA and the Unruh Act in preventing such discrimination. Given that Defendants contest the sufficiency of Plaintiffs' agency allegations, this Court (or the California Supreme Court) should reach the Unruh Act question even if Defendants can be liable under FEHA.

III. The district court also improvidently dismissed Plaintiffs' common law privacy claim for intrusion upon seclusion, concluding that Defendants' alleged conduct was not highly offensive to a reasonable person. Plaintiffs were forced as a condition of receiving employment clearance to answer broad, invasive, and personal medical inquiries even though FEHA specifically prohibits making such inquiries as a condition of employment. The district court erred in treating these mandatory screenings as analogous to either an examination by one's own doctor, undergone for the purpose of seeking treatment, or a college athlete's mandatory drug testing, undergone as a condition of playing competitive sports. The district court also erred by concluding that the inquiries must be repeated or persistent to be sufficiently offensive. The offensiveness of such conduct was magnified by Defendants coercing applicants to consent to disclosure of their personal health information to employers and unspecified others. Because the medical inquiries

were compulsory, irrelevant to employment and illegal, and because Defendants illegally threatened disclosure to employers and others, the district court's conclusion that as a matter of law no jury could find them highly offensive was error and its dismissal of this claim should be reversed.

STANDARD OF REVIEW

An order granting a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6) is reviewed *de novo*. See *Depot, Inc. v. Caring for Montanans*, 915 F.3d 643, 652 (9th Cir. 2019).

ARGUMENT

I. DEFENDANTS, AS AGENTS OF EMPLOYERS, ARE LIABLE UNDER FEHA FOR SYSTEMATICALLY VIOLATING FEHA'S PROHIBITION ON IRRELEVANT AND INVASIVE PRE-EMPLOYMENT MEDICAL INQUIRIES

A. FEHA Prohibits Forcing Prospective Employees to Submit to Broad Medical Examination or Inquiry

California law provides that "it is an unlawful employment practice … for any employer or employment agency … to make any medical or psychological inquiry of an applicant." Cal. Gov. Code §

12940(e)(1). FEHA provides a limited exception for inquiries made after employment is offered, but before work has commenced, "provided that the … inquiry is job related and consistent with business necessity." Cal. Gov. Code § 12940(e)(3). An inquiry is job related if it is "tailored to assess the employee's ability to carry out the essential functions of the job or to determine whether the employee poses a danger to the employee or others due to disability." *Kao v. Univ. of S.F.*, 229 Cal. App. 4th 437, 451 (2014) (quoting Cal. Code Regs., tit. 2, § 11065(k)). It is consistent with business necessity if "the need for the disability inquiry or medical examination is vital to the business." *Id.* at 452 (quoting Cal. Code Regs., tit. 2, § 11065(b)); see also *Rodriguez v. Walt Disney*, No. 8:17-CV-01314-JLS, 2018 WL 3201853, at *4 (C.D. Cal. June 14, 2018). The purpose of a permissible examination is to assess whether the applicant is presently able to do the specific job in question, and to facilitate the required good faith, interactive process between applicant and employer to determine whether a reasonable accommodation is necessary. See *Assem. Com. on Lab. and Emp.,* Analysis of Assem. Bill No. 2222 (1999-2000 Reg. Sess.) as amended April 5, 2000, p. 1 (hereinafter "*Legislative Analysis*").

Defendants make no attempt to assert that their Questionnaire only asks questions which are "job related and consistent with business necessity." Nor could they, given the broad and invasive nature of the Questionnaire. See ER-57. Plaintiffs allege many of these questions are irrelevant to *any* job position. ER-75.

Instead, Defendants argue Plaintiffs failed to adequately plead agency, and that even if Defendants are agents, FEHA exempts them from liability. See ER-60. While the district court accepted Plaintiffs' agency allegations as well-pled, it nevertheless agreed with Defendants and misconstrued cases holding that individual supervisory employees are not personally liable under FEHA as creating a broad immunity for any "agent" despite the clear statutory definition subjecting agents to the law's prohibitions. ER-7–12. The district court's novel interpretation of California law should be reversed or, at a minimum, referred to the California Supreme Court for decision.

B. FEHA Expressly Treats an Employer's Agents as Themselves Being an Employer

FEHA defines "employer" to include four categories of regulated persons: (1) a person with five or more employees, (2) "any person acting as an agent of an employer, directly or indirectly," (3) the state and its

subdivisions, and (4) cities. Cal. Gov. Code § 12926(d). Thus, FEHA's prohibitions on unlawful employment practices, including the one at issue here, apply both to the employer itself *and* to "any person acting as an agent of the employer, directly or indirectly." *Id.* FEHA's implementing regulations leave no doubt on this point: "Any person or individual acting as an agent of an employer, directly or indirectly, is also an employer." Cal. Code Regs., tit. 2, § 11008(d)(3).

The plain language of Cal. Gov. Code §§ 12926(d) and 12940(e) thus prohibit any person acting "directly or indirectly" as an employer's agent from making irrelevant and unnecessary medical inquiries of a job applicant. Plaintiffs unequivocally allege that Defendants are doing that. ER-65, 69–72, 83. Defendants conduct these unlawful medical inquiries on behalf of employers who refer job applicants to them, delegate the power to deny employment to them, and retain some contractual ability to control Defendants' conduct. ER-65, 69–72. Defendants are therefore the employers' agents, and thus "employers" under the plain language of FEHA and its implementing regulations. ER-81–82. See *Los Angeles Metro. Transp. Auth. v. Alameda Produce*

Mkt., 52 Cal. 4th 1100, 1107 (2011) ("If the statutory language is unambiguous, then its plain meaning controls.").

Defendants argued, however, and the district court agreed, that despite the plain language of Cal. Gov. Code § 12926(d) and Cal. Code Regs., tit. 2, § 11008(d)(3), corporations like Defendants are immune from FEHA liability. ER-9–12. The court reached this broad conclusion by expanding the holding of *Reno v. Baird*, 18 Cal. 4th 640 (1998), which held that individual supervisory employees are not personally liable for discrimination under FEHA. The district court's ruling constitutes a dramatic constriction of FEHA's scope and effectively negates Cal. Code Regs., tit. 2, § 11008(d)(3). That ruling cannot be justified by existing California cases, the policy behind exempting individual supervisors from liability, or the scope of analogous federal law.

C. California Courts Have Never Found a Corporation Like Defendants Immune from FEHA Liability

The trial court's conclusion that Defendants are immune from FEHA liability was based on *Reno v. Baird*, 18 Cal. 4th 640 (1998). In *Reno*, the California Supreme Court considered whether an individual supervisory employee could be sued for discrimination under FEHA.

The Court agreed with an earlier Court of Appeal decision, *Janken v. GM Hughes Electronics*, 46 Cal. App. 4th 55 (1996), which had analyzed this "difficult question" of "whether the FEHA exposes individual supervisory employees to the risk of personal liability for discrimination" and concluded that individual supervisors are not liable for discrimination as the "agents" of the employer. *Id.* at 59, 66-76.

The *Reno* decision was quite narrow. The only "issue in this case is *individual* liability for discrimination." *Reno*, 18 Cal. 4th at 658 (emphasis in original). The Court expressly did not determine when other types of agents are regulated as employers for FEHA purposes. "We specifically express no opinion on whether the 'agent' language [in Gov. Code § 12926(d)] merely incorporates respondeat superior principles or has some other meaning." *Reno*, 18 Cal. 4th at 658. A decade later in *Jones v. Torrey Pines*, 42 Cal. 4th 1158 (2008), the California Supreme Court applied the same rule to retaliation claims under FEHA, but again only addressed the narrow question of whether individual supervisory employees may be held personally liable. *Id.* at 1164 ("*Reno*'s rationale for not holding individuals personally liable for discrimination applies equally to retaliation.").

The district court erroneously extended *Reno* well beyond its holding and logic to dispose of the question presented here which the California Supreme Court expressly did not consider. The district court concluded that the statute defining "agents" as "employers" "simply ensures employers will be liable for agents' actions, rather than imposing liability on the agents themselves." ER-9. That ruling is not supported by *Reno* or the plain language of the statute and is directly contrary to the implementing regulation. Cal. Gov. Code § 12926(d); Cal. Code Regs., tit. 2, § 11008(d)(3). Appellants are not aware of any other case in the 23 years since *Reno* or before that has limited the scope of FEHA in this manner.

D. The Policy Reasons Animating *Reno*'s Exemption of Individual Supervisory Employees from FEHA Liability Do Not Apply to Corporate Third-Party Agents

The district court's expansion of *Reno* fails to recognize the significant policy differences between holding individual supervisory employees personally liable for discrimination and holding corporate third-party agents like Defendants liable for violating FEHA.

In evaluating legislative intent, courts look both to the wording of a statute and to the consequences of differing possible constructions.

See *California Teachers Assn. v. San Diego Community College*, 28 Cal. 3d 692, 698 (1981); *Whitman v. Sup. Ct.*, 54 Cal. 3d 1063, 1072 (1991).

The public policy consequences of holding corporate third-party agents liable for unlawful employment practices, as FEHA's plain language provides, are entirely different from the consequences of holding individual supervisors liable for discrimination. *Reno* was concerned, for example, with the "incongruity" of holding individual supervisors personally liable when FEHA does not apply to employers with fewer than five employees. See *Reno*, 18 Cal. 4th at 650-51. *Reno* reasoned that the "Legislature clearly intended to protect employers of less than five from the burdens of litigating discrimination claims," and "it is 'inconceivable' that the legislature simultaneously intended to subject individual non-employers to the burdens of litigating such claims." *Id.*

Needless to say, that rationale has no application here. Defendants are not individuals. During the relevant time period, they were California's largest occupational healthcare providers. ER-65. There is no inconsistency in holding both employers with more than five

employees and their direct and indirect corporate agents of similar or greater size liable for violating FEHA.

Nor do any of the other policy reasons cited by *Reno* or *Janken* for exempting individual supervisory employees from FEHA liability apply to Defendants. Unlike individuals, Defendants do not face potentially ruinous "burdens of litigating such [FEHA discrimination] claims." *Janken*, 46 Cal. App. 4th at 71-72. Nor is there any "in terrorem" effect attached to Defendants' liability as there might be for individual supervisors. See *Janken*, 46 Cal. App. 4th at 75; *Reno*, 18 Cal. 4th at 653. Requiring Defendants to comply with FEHA does not raise, as it might for individual supervisors, "the spectre of financial ruin for themselves and their families." *Janken*, 46 Cal. App. 4th at 75. Nor does holding Defendants liable for violating FEHA create the inherent conflict of interest among co-workers and management that the Supreme Court was concerned about in *Reno* and *Jones*. See *Reno*, 18 Cal. 4th at 651-54; *Jones*, 42 Cal. 4th at 1166.

Defendants argued below that the full burden of FEHA must fall exclusively on the actual employer. See ER-11. But that argument cannot be reconciled with FEHA's express language making both

employers and direct *or indirect* agents liable, or with FEHA's implementing regulation. Cal. Gov. Code § 12926(d); Cal. Code Regs., tit. 2, § 11008(d)(3). On the contrary, Defendants are the businesses performing the unlawful medical inquiries and profiting, in the words of *Janken*, "from the fruits of the enterprise," and it is they who should bear the consequences of their legal violations. *Janken*, 46 Cal. App. 4th at 78-79. See also ER-89.

Indeed, it is Defendants—and not referring employers—who benefit from propounding and requiring answers to a cost-saving, all-encompassing Questionnaire instead of spending the additional time to tailor inquiries to the job in question as the law requires. ER-37, 75. It is Defendants who unilaterally created and imposed this offending Questionnaire and required all questions be answered before an applicant could be deemed to have "completed" the screening. ER-71–72, 73–75. And it is Defendants that are directly committing the conduct prohibited by FEHA. ER-75, 83. Defendants simply cannot be analogized to an individual employee with supervisory responsibility who would not be subject to FEHA liability.

Holding corporate agents responsible for their own unlawful practices also furthers the underlying purposes of FEHA. The animating purpose of the statute is "to provide effective remedies that will eliminate … discriminatory practices." Cal. Gov. Code § 12920. Unlike individual supervisory employees, who might make a "personnel decision which could *later* be considered discriminatory" (see *Janken*, 46 Cal. App. 4th at 66) (emphasis added), corporate occupational medical screeners know at the time of the screening whether their medical inquiries are tailored or not. If the screening is tailored to the job in question, there is no latent risk of liability. But if, as here, the occupational medical screener simply applies the same overbroad examination or inquiry to everyone, it should be well aware that its conduct is unlawful.

E. Federal Cases Involving Similar "Agent" Language Under the ADA and Title VII Support FEHA Liability Here

The district court's decision is also out of step with analogous federal law. Because the California Supreme Court considers federal court decisions in resolving novel legal questions, the Ninth Circuit may

likewise consider federal court decisions. See *Fourth Investment LP v. United States*, 720 F.3d 1058, 1069 (9th Cir. 2013).

By the California Legislature's design, FEHA is far more protective than its federal counterparts. See*, e.g.*, Cal. Gov. Code § 12926.1(a) ("Although the [ADA] provides a floor of protection, this state's law has always, even prior to passage of the federal act, afforded additional protections."). Yet federal courts interpreting the ADA and Title VII have held that a third-party corporate agent or administrator can be liable for discrimination as an "employer." That is because, liberally construed, "employer" encompasses third-party administrators of an employer's pre-employment medical screenings like Defendants.

In *Williams v. City of Montgomery*, 742 F.2d 586, 588-589 (11th Cir. 1984), for example, the Court of Appeals held that a third-party agent was liable under Title VII where the employer delegated control of its traditional rights to the third-party agent. See also *Cyprian v. Auburn University Montgomery, et. al.*, 2010 WL 2683163, at *1 (M.D. Ala. 2010) (citing *Williams* and finding that supervisor could be held liable under Title VII as a third-party agent).

Similarly, where, as here, the agent "significantly affects access of any individual to employment opportunities," federal courts have held that the agent can be independently liable. *Spirt v. Teachers Ins.*, 691 F.2d 1054, 1063 (2d Cir. 1982), *vacated and remanded on other grounds*, 463 U.S. 1223 (1983), *reinstated and modified on other grounds*, 735 F.2d 23 (2d Cir. 1984), *cert. denied*, 469 U.S. 881 (1984) (interpreting Title VII); see also *Ass'n of Mexican-Am. Educators v. State of Cal.*, 231 F.3d 572, 581–82 (9th Cir. 2000) (same). Agents of employers can also be liable where, as here, the agents "exercise control over an important aspect of [Plaintiffs'] employment." *Carparts Distrib. v. Auto. Wholesaler's*, 37 F.3d 12, 17 (1st Cir. 1994) (interpreting the ADA).

Just as the California Supreme Court did in interpreting FEHA in *Reno*, the federal courts have also noted that the rule prohibiting the imposition of ADA or Title VII liability upon individual agents reflects the desire of Congress to strike a balance between the goal of stamping out all discrimination and the goal of protecting small entities from the hardship of litigating discrimination claims. See *E.E.O.C. v. AIC Security Investigations*, 55 F.3d 1276, 1281 (7th Cir. 1995). Crucially, "those objectives are not in conflict when the 'agent' engaging in

discriminatory conduct falls within the applicable statutory definition [of 'employer']." *E.E.O.C. v. Grane Healthcare*, 2 F. Supp. 3d 667, 684 (W.D. Pa. 2014). That is, an agent that "has the requisite number of employees and is engaged in an industry affecting commerce" can be liable for discriminatory conduct perpetrated against a plaintiff employed by another. *DeVito v. Chicago Park Dist.*, 83 F.3d 878, 882 (7th Cir. 1996).

The federal cases—interpreting statutes that provide less protection to employees than FEHA—thus agree that third party agents like Defendants are subject to liability under discrimination and civil rights laws even where individual employees are not. The district court's contrary conclusion wholly undermines the purpose of FEHA and shifts responsibility away from the centralized large corporation that is actually committing the legal violation.

F. Any New Judicial Determination on FEHA's Scope Should Come from the California Supreme Court

In interpreting state law, this Court follows the decisions of the California Supreme Court. *Johnson v. Fankell*, 520 U.S. 911, 916 (1997); *Muniz v. UPS*, 738 F.3d 214, 219 (9th Cir. 2013). Absent a binding California Supreme Court decision, this Court must endeavor to

predict how California's highest court would decide the question. *Ingenco Holdings v. ACE American Ins.*, 921 F.3d 803, 815 (9th Cir. 2019). Where an issue of California law is both important and unsettled, however, there is a better option. Rather than predict what the California Supreme Court would say, this Court can ask it.

California Rule of Court 8.548(a) allows this Court to certify questions of law to the California Supreme Court for decision. See *Kremen v. Cohen*, 325 F.3d 1035, 1037 (9th Cir. 2003); see also *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997) ("Speculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when the state courts stand willing to address questions of state law on certification from a federal court"). Certification is appropriate where (1) the decision could determine the outcome of the matter pending in the requesting court, (2) there is no controlling precedent, and (3) the case presents significant issues with important public policy ramifications. *Kremen*, 325 F.3d at 1037. Whether FEHA imposes liability on corporate third-party agents like Defendants clearly meets that standard.

First, the California Supreme Court's interpretation of FEHA will clearly determine the outcome of this appeal with respect to the FEHA claim. The only basis for that claim's dismissal was the district court's incorrect conclusion that no agent *of any kind* is subject to liability under FEHA. ER-11–12.

Second, as discussed above, the applicability of FEHA to agents like Defendants is a question of California law for which there is no judicial precedent. This is a matter of first impression in California. Indeed, the district court's Order tacitly acknowledges as much. ER-9–10.

Third, whether FEHA's prohibition on unlawful employment practices applies to agents—as Cal. Code Regs., tit. 2, § 11008(d)(3) says it does—has important public policy ramifications for hundreds of thousands of California workers who are required to undergo these screenings every year and whom these laws ostensibly protect. FEHA expresses California's fundamental public policy against arbitrary discrimination. See *City of Moorpark v. Sup. Ct.*, 18 Cal. 4th 1143, 1156–57 (1998) ("FEHA broadly announces 'the public policy of this state that it is necessary to protect and safeguard the right and

opportunity of all persons to seek … employment without discrimination or abridgment on account of … physical [or] mental disability"). It must be liberally construed in order to carry out its purposes. See *id.* at 1157-58.

This Court should not predict that the California Supreme Court would remove an entire category of businesses from FEHA's prohibitions, particularly when it has already expressly declined to do so. See *Reno*, 18 Cal. 4th at 658. To the extent this Court harbors any question about whether FEHA subjects corporate third party agents to liability, it should refer that question to the California Supreme Court rather than predict whether or not that Court would limit FEHA's scope as the district court did.

G. Should the Court Decline to Refer the Question to the California Supreme Court and Affirm the District Court's Interpretation of FEHA, It Should Remand with Instructions to Consider Whether Plaintiffs Can Amend

In addition to prohibiting any "employer" and any employer's direct and indirect agents from making untailored inquiries during the post-offer hiring process, FEHA at Cal. Gov. Code § 12940(e)(3) also forbids any "employment agency" to do so. An "employment agency" is

"any person undertaking for compensation to procure … opportunities to work." Cal. Gov. Code § 12926(e). Were this Court both to decline to certify the FEHA question to the California Supreme Court and to affirm the district court's order as to Plaintiffs' FEHA claim on the ground that Defendants cannot be liable as an "agent" of an "employer," it should nevertheless remand to the district court with instruction to consider whether Plaintiffs have either stated a claim for FEHA liability on the theory that Defendants are an "employment agency" under Cal. Gov. Code § 12926(e) or can cure any defects by alleging facts supporting that theory. See *Doe v. U.S.*, 58 F.3d 494, 497 (9th Cir. 1995).

Here, Plaintiffs alleged that a significant part of Defendants' business was the undertaking for compensation of more than 200,000 pre-employment screenings in California every year and that employers who referred applicants to Defendants for these screenings accepted Defendants' "recommendations" as to applicants' fitness for work as a matter of course. ER-70. Federal courts interpreting similar language under Title VII (which defines an "employment agency" as "any person regularly undertaking with or without compensation to procure

employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person," see 42 U.S.C. § 2000e(c)) have found plaintiffs stated a claim under Title VII where the agency specializes, as Defendants do in evaluating applicants for fitness for duty, in certification for employment.[3]

II. PLAINTIFFS STATE A CLAIM FOR DISCRIMINATION UNDER THE UNRUH ACT

Plaintiffs alternatively pled a claim against Defendants for violation of the Unruh Civil Rights Act, Cal. Civ. Code § 51 *et seq*. ER-65, 72–73, 84–87. In enacting the Unruh Act, the "Legislature intended to prohibit *all* arbitrary discrimination by business establishments." *Marina Point, Ltd. v. Wolfson*, 30 Cal. 3d 721, 725 (1982) (emphasis in

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[3] See, e.g., *Dumas v. Town of Mount Vernon*, 612 F.2d 974, 980 (5th Cir. 1980) (plaintiff stated a valid claim under Title VII when she alleged that the personnel board that certified her for employment conspired with town's officials to avoid hiring a black person), *overruled on other grounds, Larkin v. Pullman-Standard Div., Pullman, Inc.,* 854 F.2d 1549, 1569 (11th Cir. 1988); *Scaglione v. Chappaqua Cent. Sch. Dist.*, 209 F. Supp. 2d 311, 318 (S.D.N.Y. 2002) (agency that certified plaintiff for employment was an "employment agency" because it exercised significant control over potential employees' opportunities for employment and access to those opportunities) (citing *Spirt*, 691 F.2d at 1063); cf. *Beasley v. Desai*, No. B239941, 2013 WL 1943974, at *3-4 (Cal. Ct. App. May 13, 2013), *as modified* (June 6, 2013) (holding, on the basis of *Reno* and *Jankins*, that an individual supervisory employee could not be liable as an "employment agency" under FEHA).

original). While, unlike FEHA, the Unruh Act does not prohibit discrimination by employers and their agents (see *Alcorn v. Anbro Engineering, Inc.*, 2 Cal. 3d 493, 500 (1970)), it does apply to a business that provides employment-related services. See *Alch v. Superior Court*, 122 Cal. App. 4th 339, 392-93 (2004) ("'employment discrimination' claims not covered by the [Unruh] Act are confined to claims by an employee against his employer, or against an entity in the position of the employer"). Thus, to the extent Defendants were not entities in the position of the employer subject to liability under FEHA (which, as discussed above, they are), they are subject to liability under the Unruh Act.

Plaintiffs allege that Defendants provide services to Plaintiffs and the putative class and fall under the Unruh Act's statutory definition of a "business establishment." ER-72–73. Defendants do not contest this, nor could they: the Legislature "intended that the phrase 'business establishments' be interpreted 'in the broadest sense reasonably possible.'" *Isbister v. Boys' Club of Santa Cruz, Inc.*, 40 Cal. 3d 72, 78 (1985), *as modified on denial of reh'g* (Dec. 19, 1985) (citation omitted). Corporate entities like Defendants that are open to the public, employ

large staffs, and operate facilities that are not incidental to their purposes undoubtedly do qualify. See *Harris v. Mothers Against Drunk Driving*, 40 Cal. App. 4th 16, 20-22 (1995), *as modified* (Nov. 30, 1995) (enumerating factors). Further, "medical practices and physician services" are considered "business establishments" under the Act. *Leach v. Drummond Med. Grp., Inc.*, 144 Cal. App. 3d 362 (1983).

Here, job applicants, as patrons, went to Defendants—who referred to applicants as their "patients"—to receive medical clearance for the job position they had been offered. ER-39, 72–73. That medical clearance is a service provided to them by Defendants. ER-72–73, 84–86. Plainitffs allege that Defendants discriminated against them and the putative class because in providing the service of medical clearance to applicants, Defendants arbitrarily treated them as if they were disabled and drew arbitrary distinctions between them on the basis of gender. ER-85–86.

The district court fundamentally misapprehended these claims and the nature of discrimination, conceptualizing the "service" as "receiving an exam" and concluding that so long as everyone received an exam there was no discrimination. ER-14–15. But Plaintiffs do not

allege that the "service" was a medical screening, per se, or that they were denied that service. Instead, they allege that the service is medical clearance for work, and that because that service was provided in a discriminatory manner, it constitutes actionable discrimination. As the California Courts have long made clear, that is sufficient to state a claim.

A. Business Establishments Need not "Deny" Services to Patrons or "Exclude" Them to Be Liable under the Unruh Act

As with FEHA, the California Supreme Court has consistently held that the Unruh Act "must be construed liberally in order to carry out its purpose." *White v. Square, Inc.*, 7 Cal. 5th 1019, 1025 (2019). That purpose is the "eradication of discrimination" in California's business establishments. *Koire v. Metro Car Wash*, 40 Cal. 3d 24, 36 (1985). Consistent with its broad purpose, the Unruh Act uses expansive and pliant language to guarantee all persons in California "the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." Cal. Civ. Code § 51(b). "Whoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to Section 51 … is liable for

each and every offense." Cal. Civ. Code § 52. The Act's broad language and long history "compel the conclusion that the Legislature intended to prohibit all arbitrary discrimination by business establishments." *In re Cox*, 3 Cal. 3d 205, 216 (1970).

Thus, as the California Supreme Court recently clarified on certification of the question from this Court, the standing requirements under the Unruh Act are extremely low. For example, the Act does not require a plaintiff to make use of any facility or even engage in any transaction with a business establishment to have standing. *White*, 7 Cal. 5th at 1028, 1033. "It is sufficient for a plaintiff to encounter [the] facility with the intent to use it." *Id.* at 1028 (citations and quotations omitted). While the court in *White* reiterated that "a plaintiff cannot sue for discrimination in the abstract, but must actually suffer the discriminatory conduct," it did not hold that "suffering discriminatory conduct" requires being denied services or excluded from a facility. *Id.* at 1025.

Indeed, it has long been understood that "[t]he scope of the statute is clearly not limited to exclusionary practices" and the "Legislature's choice of terms evidences concern *not only with access* to business

establishments, but with equal treatment of patrons in *all aspects* of the business." *Koire*, 40 Cal. 3d at 29 (emphasis added). See also *Smith v. BP Lubricants USA Inc.*, No. E073174, 2021 WL 1905229, at *8 (Cal. Ct. App. May 12, 2021) (that plaintiff was "not denied anything" is "not dispositive"); *Hutson v. The Owl Drug Co.*, 79 Cal. App. 390, 392 (1926) (African American patron who was not denied service at soda fountain nevertheless experienced "humiliation and embarrassment" actionable under the Unruh Act). As the court in *Disney* observed, "making impermissible medical inquiries *is discrimination*." *Disney*, 2018 WL 3201853, at *3 (emphasis added). The fact that in *Disney* the plaintiff received the screening did not mean that he did not experience discrimination. The same pertains here: Plaintiffs allege that in asking them the impermissible questions, Defendants "*made a discrimination or distinction* … contrary to Civil Code [section] 51" on the basis of perceived disability and gender. ER-85.

B. Defendants Discriminated on the Basis of Perceived Disability

The Unruh Act applies the FEHA definition of disability. Cal. Civ. Code § 51(e)(1) ("'Disability' means any mental or physical disability as defined by Sections 12926 and 12926.1 of the Government Code").

"[D]isability" must "be construed so that applicants and employees are protected from discrimination due to an actual or perceived physical or mental impairment that is disabling, potentially disabling, or perceived as disabling or potentially disabling." Cal. Gov. Code § 12926.1(b); see also Cal. Gov. Code § 12926.1(c).

Thus, the Unruh Act protects against discrimination based on actual or perceived disability, including "[h]aving any physiological disease, disorder, condition" that both affects one or more enumerated body systems and limits a "major life activity." Cal. Gov. Code § 12926(m)(1). "Physical disability" also includes "[h]aving a record or history of a disease, disorder, condition, … or health impairment described in [§ 12926(m)(1)]." Cal. Gov. Code § 12926(m)(3). It further includes "[b]eing regarded or treated" by a business establishment "as having, or having had, any physical condition that makes achievement of a major life activity difficult" or that "has no present disabling effect but may become a physical disability." Cal. Gov. Code § 12926(m)(4)-(5). Working is, of course, a major life activity. Cal. Gov. Code § 12926(m)(1)(B)(iii).

As such, where a business establishment makes a "discrimination or distinction contrary to" the provision of "full and equal services" because the applicant presently has or ever had a condition or a record of such a condition or because the business perceives or regards the patron as presently having or ever having a condition that makes "working" "difficult" for that patron, the business has engaged in prohibited discrimination. Similarly, even if the patron's perceived condition does not presently make "working" "difficult" but may in the future, and the business makes a "discrimination or distinction" on that basis, then the business has engaged in prohibited discrimination.

Plaintiffs allege Defendants' business model was precisely that. ER-74, 86. Defendants' Questionnaire by design regarded applicants as disabled and their subsequent verbal inquiries concerning any positive indication provided by applicants were designed to confirm Defendants' pre-existing perceptions. ER-74, 86. That is, Defendants' assumed applicants were disabled and posed inquiries "designed to bring any and every health condition to the surface" and to "ferret[] out" and confirm those perceived disabilities. ER-82–83, 86. The district court took no account of these allegations of disparate treatment discrimination on

the basis of perceived disability. Instead, relying on *Turner v. Ass'n of Am. Med. Colleges*, 167 Cal. App. 4th 1401, 1408 (2008), *as modified on denial of reh'g* (Nov. 25, 2008), the district court reasoned in cursory fashion that a practice cannot be discriminatory if it applies to everyone, even if the policy is not facially neutral.

In *Turner*, the plaintiffs challenged a decision not to provide extra time as an accommodation to MCAT test-takers with disabilities. *Id.* at 1405. There, the court construed the plaintiffs' claim as one for disparate impact discrimination because the time limit applied to all test takers (*i.e.*, was "neutral on its face") but adversely impacted disabled ones. *Id.* at 1408-1409. Relying on Cal. Civ. Code § 51(c) and prior cases, *Turner* held that disparate impact discrimination is not actionable under the Unruh Act. *Turner* also noted that there was no allegation that the defendant applied its facially neutral policy in an intentionally discriminatory manner. *Id.* at 1411 (citing *Koebke v. Bernardo Heights Country Club*, 36 Cal. 4th 824, 854 (2005)). Nor was there any allegation that the defendant's MCAT time limits were motivated by an animus toward those disabled test-takers; on the contrary, the defendants had a process for granting reasonable test-

taking accommodations to test-takers with disabilities. *Turner*, 167 Cal. App. 4th at 1404.

Because this case is not about disparate impact, *Turner* is inapposite. First, unlike in *Turner*, here *the district court acknowledged* that Plaintiffs alleged the Questionnaire is *not* facially neutral; instead, it is discriminatory on its face. ER-14. Whereas in disparate impact cases "the disproportionate impact of a facially neutral policy on a protected class is a substitute for discriminatory intent," here Plaintiffs' theory does not rely "on the *effects* of a facially neutral policy on a particular group" to show discrimination or "require [the court] to infer *solely* from such effects a discriminatory intent." *Koebke*, 36 Cal. 4th at 854 (emphasis in original). Rather, Plaintiffs allege that the overbreadth of Defendants' inquiries and the inquiries themselves expressed an intent to discriminate on the basis of perceived disability—the Court need not infer *solely* from the *effects* of the inquiries that there was intentional discrimination. ER-82–83, 86.

Second, the fact that Defendants gave the facially discriminatory and illegal medical questionnaire to every applicant does not immunize them from discrimination. For example, in *Hankins v. El Torito*

Restaurants, Inc., 63 Cal. App. 4th 510, 518 (1998), the defendant argued that its purportedly neutral bathroom policy, prohibiting all diners from using a first-floor restroom, "was not discriminatory because it applied to all restaurant patrons," even though its available second floor bathroom was inaccessible to disabled patrons. *Id.* at 518. The court disposed of that "semantic argument," noting that the plaintiff both "alleg[ed] a violation of section 51" and that the restaurant "acted with knowledge of" the effect its conduct had on its patrons and therefore the plaintiff "did plead intentional discrimination." *Id.* (quotation omitted). Here, Plaintiffs have also sufficiently alleged intentional discrimination: Defendants' inquiries were "designed to bring any and every health condition to the surface," to "regard every applicant as having a disability," to "ferret[] out" disabilities, and that the inquiries "express[ed]" an "intent to" discriminate on the basis of perceived disability." ER-82–83, 86.

Finally, in *Turner,* there was nothing illegal about the MCAT, which is designed to "assess a medical school applicant's knowledge of basic science concepts, writing skills and facility in problem solving and critical thinking." *Turner,* 167 Cal. App. 4th at 1404. Here, by contrast,

the broad Questionnaire and related verbal follow-up questions are expressly illegal under Cal. Gov. Code § 12940(e) and *necessarily* "is discrimination" under Cal. Gov. Code § 12940(d). See *Disney*, 2018 WL 3201853, at *3.

C. Defendants Discriminated on the Basis of Gender

Defendants also discriminated on the basis of gender. Defendants' Questionnaire asked numerous questions about reproductive and sexual health, including different questions for men and women. ER-57, 74, 85–86. Women, for example, were separately required to answer whether they have ever had or commonly have painful or irregular menstruation or vaginal discharge or pain and to disclose whether they are pregnant and the date of their last menstrual periods. ER-57, 74, 85–86. The questions were in a box marked "FOR WOMEN ONLY." ER-57, 74, 85–86. Men were separately required to answer whether they have ever had or commonly have penile discharge, prostate problems, or genital pain or masses. ER-57, 74, 85–86. These questions were in a box marked "FOR MEN ONLY." ER-57, 74, 85–86. None of these questions had any bearing on fitness for employment.

Here, both Defendants and the district court disregarded the context of Defendants' conduct. Defendants argued, and the district court appeared to accept, that this facially discriminatory practice was not actionable because "there is no authority that medical professionals must ignore anatomical differences." ER-15, 61. This, however, conflates a routine medical examination, conducted by a patient's own physician, with a FEHA-regulated pre-placement employment screening. But Plaintiffs were not seeking treatment or health advice from their own physicians. ER-50, 57, 87–88, 90. They were receiving a compelled medical screening, from strangers they did not select, in order to be cleared for employment for their specific jobs. ER-87–88. And although California law severely restricts the scope of such screenings, Defendants simply ignored and ran roughshod over that restriction. ER-37, 75, 83, 89. The "anatomical differences" between Raines and a man or between Figg and a woman have nothing to do with their respective abilities to serve food and wash dishes or to serve in a volunteer fire corps. ER-86.

It is thus wholly irrelevant that medical professionals providing health care and treatment are allowed to address their patient's

biological sex-specific issues. None of those issues were relevant to an employment screening except as a way to discriminate, for example, against applicants who might be pregnant or have a history of prostate cancer.

Nevertheless, Defendants argue that their arbitrary sex discrimination is not actionable because there is "a strong public policy" allowing it—namely, that they must be permitted "to explore medical conditions without fear of frivolous litigation like this." ER-62–63. Setting aside that there are other sufficient protections against "frivolous litigation" and Plaintiffs' claims are not frivolous, the California Supreme Court has unequivocally explained that "'public policy' exceptions to the Unruh Act are rare." *Koire*, 40 Cal. 3d at 32, n.8. On the rare occasions where they do exist, *Koire* explained that those public policy exceptions "may be gleaned by reviewing other statutory enactments" and indeed *usually* have a statutory basis. *Id.* at 31-32 & n.8 (citing *Pines v. Tomson*, 160 Cal. App. 3d 370, 387 (1984)). But "few cases have held discriminatory treatment to be nonarbitrary," as the district court did here, "based solely on the special nature of the business establishment." *Id.* at 30.

As noted above, businesses providing medical services are not categorically immune from Unruh Act liability. *Leach*, 144 Cal. App. 3d at 370. Nor did Defendants point to any statutory basis justifying the exemption from Unruh Act liability they seek. On the contrary, the public policy of the State of California concerning pre-employment screenings—as expressed by FEHA—is that all medical inquiries must be individually tailored such that they are "job related and consistent with business necessity." Cal. Gov. Code § 12940(e)(3). While it may be true, as Defendants argued below, that "generally, males have different parts than females," it does not follow that this "is a reality that must be addressed and factored into" pre-employment screenings regardless of the job in question. See ER-62–63. FEHA expressly prohibits that kind of arbitrary and irrelevant questioning.

For the same reasons, Defendants' parade of horribles—that Plaintiffs' reasoning "would render it nearly impossible for medical professionals to ever ask patients questions pertaining to gender or disability"—is misconceived. ER-15. This improperly conflates a routine and voluntary medical exam conducted by a patient's own personal doctor regarding the patient's general health for the purpose of

diagnosis and treatment with a pre-placement medical screening conducted by a corporate agent selected by a job applicant's employer for the sole purpose of being medically cleared for employment. Medical professionals have always been subject to Unruh Act liability; where they provide employment-related services such as pre-employment screenings, the Unruh Act, consistent with the related provisions of FEHA, simply requires that those services be non-discriminatory and that all questions be limited to those which are job related and consistent with business necessity.

D. The Unruh Act Question Is Also Appropriate for Certification to the California Supreme Court

Plaintiffs request that, to the extent that the Court refers the scope of FEHA's application to agents to the California Supreme Court, it would be appropriate to also submit the alternative Unruh Act claim as well. The two statutes were passed in the same legislative session as part of a comphrensive effort serving twin goals. See *Alcorn*, 2 Cal. 3d at 500; *Angelucci v. Century Supper Club*, 41 Cal. 4th 160, 167 (2007) (The Unruh Act was "intended as an active measure that would create and preserve a nondiscriminatory environment in California business establishments by 'banishing' or 'eradicating' arbitrary, invidious

discrimination by such establishments"). Given the complimentary nature of these claims (one against employers and their agents and the other against non-employer businesses), it is logical and useful for the claims to be addressed together to avoid the gap created by the district court here when it found that Defendants are not subject to either statute.

III. DEFENDANTS' INTRUSIVE AND ILLEGAL CONDUCT CONSTITUTES INTRUSION UPON SECLUSION

Finally, Plaintiffs alleged that Defendants' use of the illegal and overbroad Questionnaire, the illegal Authorization, and their follow-up verbal inquiries during their pre-employment screenings constitute intrusion upon seclusion. ER-87–91. To state a claim for intrusion upon seclusion, a plaintiff must plead (1) "intrusion into a private place, conversation or matter" of which the plaintiff has an objectively reasonable expectation of privacy, (2) "in a manner highly offensive to a reasonable person." *Shulman v. Group W Productions*, 18 Cal. 4th 200, 231 (1998). The district court held that as a matter of law Defendants' conduct was not "highly offensive."[4]

[4] In granting USHW's motion to dismiss the SAC with leave to amend, the district court found that Plaintiffs failed to plead facts

Plaintiffs agree with the district court that "there is a preliminary determination of 'offensiveness' which must be made by the court in discerning the existence of a cause of action for intrusion." *Miller v. National Broadcasting Co.*, 187 Cal. App. 3d 1463, 1483 (1986). But given that "California tort law provides no bright line" on what is "highly offensive," "each case must be taken on its facts." *Hernandez v. Hillsides, Inc.*, 47 Cal. 4th 272, 287 (2009) (internal citations omitted). Thus, in making the "preliminary determination" of whether conduct is "highly offensive," the court *must* consider "*all of the circumstances* of the intrusion" as alleged. *Shulman*, 18 Cal. 4th at 236 (emphasis added). These circumstances include but are not limited to "the degree

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sufficient to support either element. ER-96–97. It is unclear whether the district court found the TAC adequately pleads facts supporting a reasonable expectation of privacy in Plaintiffs' personal health histories. See ER-15–19. In any event, the courts have resolved that question in the affirmative: "A person's medical profile is an area of privacy infinitely more intimate, more personal in quality and nature than many areas already judicially recognized and protected." *Hill v. National Collegiate Athletic Assn.*, 7 Cal. 4th 1, 41 (1994) (citing *Bd. of Med. Quality Assurance v. Gherardini*, 93 Cal. App. 3d 669, 678 (1979)), *disapproved of on other grounds by Williams v. Superior Court*, 3 Cal. 5th 531 (2017). And FEHA provides a bright line for what constitutes a reasonable expectation of privacy in the pre-employment screening context, *i.e.*, only inquiries that are "job related and consistent with business necessity" may be made. Cal. Gov. Code § 12940(e)(3)

of intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder's motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded." *Miller*, 187 Cal. App. 3d at 1483–84.

The district court erred by failing to consider the specific circumstances of Defendants' inquiry, as well as the express prohibition of such broad inquiries in Cal. Gov. Code § 12940(e) and the coerced consent to disclose applicants' health information to employers and unspecified others. Based on the totality of circumstances alleged here, Plaintiffs adequately alleged a claim for intrusion upon seclusion.

A. This Was Not a Traditional Medical Examination

The district court's primary error on this claim was accepting Defendants' analogy that their pre-employment screenings are no different than routine medical examinations. There is no doubt that questions "about personal health history are routinely asked in the context of a medical exam." ER-17. But this is not a routine medical exam in which a patient seeks treatment from a physician of his or her choice for the purposes of diagnosis and treatment or maintenance of general health; it is a mandatory pre-employment screening conducted

by a corporate agent of the employer's choice for the narrow purpose of assessing a job applicant's present ability to do the specific job in question. ER-71, 87–90.

Where a patient is seeking treatment from his or her own physician, the patient can choose the physician and can choose what and how much to disclose to that physician. ER-71, 87–90. Here, on the other hand Plaintiffs were forced to undergo an involuntary, extensive, and invasive inquiry by Defendants, and a single refusal to state when her last menstrual period occurred resulted in one Plaintiff being denied medical clearance. ER-77.

Nor can this screening be analogized to the drug testing in *Hill v. National Collegiate Athletic Assn.*, 7 Cal. 4th 1 (1994) relied on by the district court. "[A]thletic participation" is not "an economic necessity that society has decreed must be open to all." *Id.* at 42-43. Drug use also is plainly relevant to athletics. *Id.* at 44 ("[Athletic] competition should be decided on the basis of who has done the best job of perfecting and utilizing his or her natural abilities, not on the basis of who has the best pharmacist."). Here, by contrast, working is without question an economic necessity that society has decreed must be open to all (see Cal.

Gov. Code § 12920), and the occurrence of Ms. Raines' last menstrual period was not relevant in any way to assessing her present ability to serve food, wash dishes, and the like. ER-75, 77.

Indeed, overbroad and irrelevant medical screenings are specifically prohibited in this context. Cal. Gov. Code § 12940(e)(3). There is simply no analogy to school athletics which present a "unique set of demands" justifying rigorous medical examinations and full disclosure of an athlete's "bodily condition, both internal and external" as a condition of participating in physically demanding competitive sport. *Hill*, 7 Cal. 4th at 42. Nor is medical examination and testing of student athletes strictly regulated in the way pre-employment screenings are by FEHA. See *Dawson v. Nat'l Collegiate Athletic Ass'n*, 932 F.3d 905, 913 (9th Cir. 2019) ("under California law, student-athletes are generally deemed not to be employees of their schools, [or] the NCAA/PAC-12").

An unlawful, overbroad pre-employment inquiry cannot be analogized—as a matter of law no less—to a routine medical examination by one's personal physician or to a student athlete's drug test. Indeed, while an intrusion does not need to be separately unlawful

to constitute a tort, see *Shulman*, 18 Cal. 4th at 241 n.19, the illegality of the Questionnaire under FEHA is plainly relevant to its offensiveness. See, *e.g., id.* (wiretapping law relevant); *Helton v. U.S.*, 191 F. Supp. 2d 179, 181, 182, 186 (D.D.C. 2002) (plaintiffs stated a claim for intrusion when U.S. Marshalls compelled them to submit to a strip search); *Hutchinson v. West Virginia State Police*, 731 F. Supp. 2d 521, 548 (S.D. W.Va. 2010) (denying summary judgment against plaintiff's intrusion claim where she was forced to remain nude without any reasonable justification for such nakedness).

Thus, to characterize Defendants' improper inquiries as nothing more than "uncomfortable and irrelevant" and not actionable "given the setting" (see ER-17) is to ignore FEHA's privacy dimensions. As the legislative history reveals, its additional protections were developed *expressly to protect jobseekers' privacy*:

> According to the author, the provision of the bill requiring post-offer medical or psychological examinations or inquiries to be job-related and consistent with business necessity appropriately builds upon the ADA's provisions in this area, *especially given this state's long history of strong protections for the privacy rights of Californians*.

Legislative Analysis at p. 4 (emphasis added). It would undermine those very same protections—and contravene clear legislative intent—to

foreclose Plaintiffs' privacy claim on the grounds that, in other medical examinations unregulated by FEHA, such questions are generally permitted.

B. The District Court Ignored Factual Allegations and Improperly Characterized Plaintiffs' Privacy Claims as Challenging Only the Act of "Asking Questions" About Private Information, Thereby Failing to Consider All Relevant Circumstances

Citing to the putative class definition and Raines' refusal to disclose the date of her last menstrual period, the district court concluded that Plaintiffs

> cannot base their claim on a theory that USHW intruded by *obtaining* their personal information, because not all of members of the putative class disclosed information. Accordingly, the alleged intrusion is USHW's act of asking questions.

ER-17–18 (emphasis in original). Here too the district court failed to consider all of the relevant circumstances alleged and instead improperly drew inferences *against* Plaintiffs.

First, this characterization ignores the allegation that, while Plaintiff Raines refused to answer one question, she answered dozens of others that were similarly unnecessary to assessing her present ability to do the job in question. ER-77.

Second, it likewise ignores the allegation that Plaintiff Figg answered every question. ER-77–78.

Third, it does not follow from the class definition, consisting of "all applicants for employment in the State of California requested to respond to standardized Impermissible Non-Job-Related Questions at USHW within the Class Period" (see ER-78), that "not all members of the putative class disclosed information." ER-17–18. There is no allegation in the TAC that some members of the class refused to answer *any* question. Quite the opposite: the TAC clearly alleges Defendants inquired "about virtually every conceivable past and present health condition" and as such, "*all Class Members* were required to *and did disclose* one or more health conditions." ER-86 (emphasis added). To infer the opposite—that some class members did not disclose any information—based on the class definition alone is unwarranted, especially where the opposite is clearly alleged. To the extent the district court made that unwarranted inference *against* Plaintiffs, it failed to construe all facts in the light most favorable to them. See *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

Because the district court improperly limited Plaintiffs' theory based on an unwarranted inference improperly drawn against them, the two federal trial court decisions it cited for the proposition that the mere act of questioning likely must be persistent or repeated to be actionable are inapposite. Those cases, *Chaconas v. JP Morgan Chase Bank*, 713 F. Supp. 2d 1180, 1185 (S.D. Cal. 2010) and *In re Vizio, Inc., Consumer Priv. Litig.*, 238 F. Supp. 3d 1204, 1216 (C.D. Cal. 2017), do not hold that questioning must *necessarily* be persistent or repeated to be highly offensive—those were just the facts presented in those cases. That repeated and persistent debt collection calls are offensive does not mean that dozens of illegal medical inquiries in a compelled pre-employment screening can only be offensive if they are repeated and persistent.

Indeed, the Restatement (Second) of Torts provides many other examples where a single action was offensive: "opening [] private and personal mail," "searching [a] safe or [a] wallet," "examining [a] private bank account," or "compelling" someone by improper means such as "a forged court order to permit an inspection of [] personal documents." See Restatement (Second) of Torts § 652B, comment b. In any event, the

district court's focus on the fact that applicants underwent only a "single" screening ignores the allegation that during each screening applicants were asked *dozens* of impermissible questions both through the questionnaire and again in a verbal follow-up. See ER-17, 57, 74.

The offensive conduct also went beyond the impermissible asking of questions. Defendants compelled applicants to disclose highly personal and irrelevant information, in violation of FEHA, with the threat that failure to answer all questions on the Questionnaire and all follow-up questions would result in revocation of the job offer. ER-71, 74–75, 77, 83. Defendants also required applicants to sign the illegal Authorization form purporting to permit Defendants to disclose that information to third parties, such as referring employers and others. ER-71, 88, 90. Defendants further threatened jobseekers that failure to sign the Authorization may violate a condition of their employment and that revoking it "may carry consequences related to [their] employment." ER-71, 88.

Further aggravating their illegal and coercive conduct, Defendants compelled these disclosures, as in *Miller*, "at a time of vulnerability and confusion." 187 Cal. App. 3d at 1484. That is,

Plaintiffs underwent these screenings as a condition of working, under illegal threat of disclosure to their prospective employers and unspecified others, in the presence of Defendants' staff members who were strangers to them and who sought information about "an area of privacy infinitely more intimate, more personal in quality and nature than many areas already judicially recognized and protected." *Hill*, 7 Cal. 4th at 41.

Finally, the district court was required, but failed, to consider the Defendants' "motives and objectives" in making a preliminary determination of offensiveness. See *Shulman*, 18 Cal. 4th at 236; *Miller*, 187 Cal. App. 3d at 1483–84. Plaintiffs alleged that Defendants' "motives were contrary to [Plaintiffs'] interests" and that Defendants' failure to tailor inquiries as required by FEHA was for the purpose of enriching themselves by "expediting the exam process to be able to conduct more exams (and thereby generate more revenue)." ER-89. These motives are especially concerning given that FEHA's pre-employment screening protections were designed both to protect applicants' privacy and to require and facilitate a good faith, interactive process with an applicant in response to a request for reasonable

accommodations—not to line the pockets of for-profit medical screening administrators in violation of those applicants' rights and with utter disregard for Defendants' responsibilities. See *Legislative Analysis* at p. 1, 4.

The foregoing facts, taken as a whole and applying all inferences in Plaintiffs' favor as required, state a claim for intrusion upon seclusion.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the judgment of the district court on Plaintiffs' First, Second, and Third causes of action be reversed or, alternatively as to the First and Second causes of action, that the Court certify the proper scope of FEHA and the Unruh Act on the alleged facts for determination by the Supreme Court of the State of California.

Date: June 9, 2021

Phillips, Erlewine, Given & Carlin LLP

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATEMENT OF RELATED CASES

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

The undersigned attorney or self-represented party states the following:

[**X**] I am unaware of any related cases currently pending in this court.

Signature s/ R. Scott Erlewine
Date June 9, 2021

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CERTIFICATE OF COMPLIANCE

Form 8. Certificate of Compliance for Briefs

I am the attorney or self-represented party.

This brief contains 12,372 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief complies with the word limit of Cir. R. 32-1.

Signature s/ R. Scott Erlewine
Date June 9, 2021

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CERTIFICATE OF SERVICE

9th Cir. Case Number(s) No. 21-55229

I hereby certify that I electronically filed the foregoing/attached document(s) on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

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Description of Document(s):

Plaintiffs-Appellants' Opening Brief
Addendum
Excerpts of Record (Vol. 1 of 1)

Signature s/ R. Scott Erlewine
Date June 9, 2021

ADDENDUM

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Public policy; discrimination in employment rights and opportunities and housing; purpose; police power

It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status.

It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment for these reasons foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advancement, and substantially and adversely affects the interests of employees, employers, and the public in general.

Further, the practice of discrimination because of race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, veteran or military status, or genetic information in housing accommodations is declared to be against public policy.

It is the purpose of this part to provide effective remedies that will eliminate these discriminatory practices.

This part shall be deemed an exercise of the police power of the state for the protection of the welfare, health, and peace of the people of this state.

Cal. Gov. Code § 12926

Additional definitions

As used in this part in connection with unlawful practices, unless a different meaning clearly appears from the context:

(a) "Affirmative relief" or "prospective relief" includes the authority to order reinstatement of an employee, awards of backpay, reimbursement of out-of-pocket expenses, hiring, transfers, reassignments, grants of tenure, promotions, cease and desist orders, posting of notices, training of personnel, testing, expunging of records, reporting of records, and any other similar relief that is intended to correct unlawful practices under this part.

(b) "Age" refers to the chronological age of any individual who has reached a 40th birthday.

(c) Except as provided by Section 12926.05, "employee" does not include any individual employed by that person's parent, spouse, or child or any individual employed under a special license in a nonprofit sheltered workshop or rehabilitation facility.

(d) "Employer" includes any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly, the state or any political or civil subdivision of the state, and cities, except as follows:

"Employer" does not include a religious association or corporation not organized for private profit.

(e) "Employment agency" includes any person undertaking for compensation to procure employees or opportunities to work.

(f) "Essential functions" means the fundamental job duties of the employment position the individual with a disability holds or desires. "Essential functions" does not include the marginal functions of the position.

(1) A job function may be considered essential for any of several reasons, including, but not limited to, any one or more of the following:

(A) The function may be essential because the reason the position exists is to perform that function.

(B) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed.

(C) The function may be highly specialized, so that the incumbent in the position is hired based on expertise or the ability to perform a particular function.

(2) Evidence of whether a particular function is essential includes, but is not limited to, the following:

(A) The employer's judgment as to which functions are essential.

(B) Written job descriptions prepared before advertising or interviewing applicants for the job.

(C) The amount of time spent on the job performing the function.

(D) The consequences of not requiring the incumbent to perform the function.

(E) The terms of a collective bargaining agreement.

(F) The work experiences of past incumbents in the job.

(G) The current work experience of incumbents in similar jobs.

(g)(1) “Genetic information” means, with respect to any individual, information about any of the following:

(A) The individual's genetic tests.

(B) The genetic tests of family members of the individual.

(C) The manifestation of a disease or disorder in family members of the individual.

(2) “Genetic information” includes any request for, or receipt of, genetic services, or participation in clinical research that includes genetic services, by an individual or any family member of the individual.

(3) “Genetic information” does not include information about the sex or age of any individual.

(h) “Labor organization” includes any organization that exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection.

(i) “Medical condition” means either of the following:

(1) Any health impairment related to or associated with a diagnosis of cancer or a record or history of cancer.

(2) Genetic characteristics. For purposes of this section, “genetic characteristics” means either of the following:

(A) Any scientifically or medically identifiable gene or chromosome, or combination or alteration thereof, that is known to be a cause of a disease or disorder in a person or that person's offspring, or that is determined to be associated with a statistically increased risk of development of a disease or disorder, and that is presently not associated with any symptoms of any disease or disorder.

(B) Inherited characteristics that may derive from the individual or family member, that are known to be a cause of a disease or disorder in a person or that person's offspring, or that are determined to be associated with a statistically increased risk of development of a disease or disorder, and that are presently not associated with any symptoms of any disease or disorder.

(j) “Mental disability” includes, but is not limited to, all of the following:

(1) Having any mental or psychological disorder or condition, such as intellectual disability, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity. For purposes of this section:

(A) “Limits” shall be determined without regard to mitigating measures, such as medications, assistive devices, or reasonable accommodations, unless the mitigating measure itself limits a major life activity.

(B) A mental or psychological disorder or condition limits a major life activity if it makes the achievement of the major life activity difficult.

(C) "Major life activities" shall be broadly construed and shall include physical, mental, and social activities and working.

(2) Any other mental or psychological disorder or condition not described in paragraph (1) that requires special education or related services.

(3) Having a record or history of a mental or psychological disorder or condition described in paragraph (1) or (2), which is known to the employer or other entity covered by this part.

(4) Being regarded or treated by the employer or other entity covered by this part as having, or having had, any mental condition that makes achievement of a major life activity difficult.

(5) Being regarded or treated by the employer or other entity covered by this part as having, or having had, a mental or psychological disorder or condition that has no present disabling effect, but that may become a mental disability as described in paragraph (1) or (2).

"Mental disability" does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.

(k) "Veteran or military status" means a member or veteran of the United States Armed Forces, United States Armed Forces Reserve, the United States National Guard, and the California National Guard.

(l) "On the bases enumerated in this part" means or refers to discrimination on the basis of one or more of the following: race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, age, sexual orientation, or veteran or military status.

(m) "Physical disability" includes, but is not limited to, all of the following:

(1) Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:

(A) Affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.

(B) Limits a major life activity. For purposes of this section:

(i) "Limits" shall be determined without regard to mitigating measures such as medications, assistive devices, prosthetics, or reasonable accommodations, unless the mitigating measure itself limits a major life activity.

(ii) A physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss limits a major life activity if it makes the achievement of the major life activity difficult.

(iii) "Major life activities" shall be broadly construed and includes physical, mental, and social activities and working.

(2) Any other health impairment not described in paragraph (1) that requires special education or related services.

(3) Having a record or history of a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment described in paragraph (1) or (2), which is known to the employer or other entity covered by this part.

(4) Being regarded or treated by the employer or other entity covered by this part as having, or having had, any physical condition that makes achievement of a major life activity difficult.

(5) Being regarded or treated by the employer or other entity covered by this part as having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical disability as described in paragraph (1) or (2).

(6) “Physical disability” does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.

(n) Notwithstanding subdivisions (j) and (m), if the definition of “disability” used in the federal Americans with Disabilities Act of 1990 (Public Law 101-336)1 would result in broader protection of the civil rights of individuals with a mental disability or physical disability, as defined in subdivision (j) or (m), or would include any medical condition not included within those definitions, then that broader protection or coverage shall be deemed incorporated by reference into, and shall prevail over conflicting provisions of, the definitions in subdivisions (j) and (m).

(o) “Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, age, sexual orientation, or veteran or military status” includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics.

(p) “Reasonable accommodation” may include either of the following:

(1) Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities.

(2) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(q) “Religious creed,” “religion,” “religious observance,” “religious belief,” and “creed” include all aspects of religious belief, observance, and practice, including religious dress and grooming practices. “Religious dress practice” shall be construed broadly to include the wearing or carrying of religious clothing, head or face coverings, jewelry, artifacts,

and any other item that is part of an individual observing a religious creed. “Religious grooming practice” shall be construed broadly to include all forms of head, facial, and body hair that are part of an individual observing a religious creed.

(r)(1) “Sex” includes, but is not limited to, the following:

(A) Pregnancy or medical conditions related to pregnancy.

(B) Childbirth or medical conditions related to childbirth.

(C) Breastfeeding or medical conditions related to breastfeeding.

(2) “Sex” also includes, but is not limited to, a person's gender. “Gender” means sex, and includes a person's gender identity and gender expression. “Gender expression” means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.

(s) “Sexual orientation” means heterosexuality, homosexuality, and bisexuality.

(t) “Supervisor” means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(u) “Undue hardship” means an action requiring significant difficulty or expense, when considered in light of the following factors:

(1) The nature and cost of the accommodation needed.

(2) The overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility.

(3) The overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities.

(4) The type of operations, including the composition, structure, and functions of the workforce of the entity.

(5) The geographic separateness or administrative or fiscal relationship of the facility or facilities.

(v) "National origin" discrimination includes, but is not limited to, discrimination on the basis of possessing a driver's license granted under Section 12801.9 of the Vehicle Code.

(w) "Race" is inclusive of traits historically associated with race, including, but not limited to, hair texture and protective hairstyles.

(x) "Protective hairstyles" includes, but is not limited to, such hairstyles as braids, locks, and twists.

Cal. Gov. Code § 12926.1

Legislative findings and declarations; disability, mental disability, and medical condition; broad coverage under state law; interaction in determining reasonable accommodation

The Legislature finds and declares as follows:

(a) The law of this state in the area of disabilities provides protections independent from those in the federal Americans with Disabilities Act of 1990 (P.L. 101-336).1 Although the federal act provides a floor of protection, this state's law has always, even prior to passage of the federal act, afforded additional protections.

(b) The law of this state contains broad definitions of physical disability, mental disability, and medical condition. It is the intent of the Legislature that the definitions of physical disability and mental disability be construed so that applicants and employees are protected from discrimination due to an actual or perceived physical or mental impairment that is disabling, potentially disabling, or perceived as disabling or potentially disabling.

(c) Physical and mental disabilities include, but are not limited to, chronic or episodic conditions such as HIV/AIDS, hepatitis, epilepsy, seizure disorder, diabetes, clinical depression, bipolar disorder, multiple sclerosis, and heart disease. In addition, the Legislature has determined that the definitions of "physical disability" and "mental disability" under the law of this state require a "limitation" upon a major life activity, but do not require, as does the federal Americans with Disabilities Act of 1990, a "substantial limitation." This distinction is intended to result in broader coverage under the law of this state than under that federal act. Under the law of this state, whether a condition limits a major life activity shall be determined without respect to any mitigating measures, unless the mitigating measure itself limits a major life activity, regardless of federal law under the Americans with Disabilities Act of 1990. Further, under the law of this state, "working" is a major life activity, regardless of whether the actual or perceived

working limitation implicates a particular employment or a class or broad range of employments.

(d) Notwithstanding any interpretation of law in Cassista v. Community Foods (1993) 5 Cal.4th 1050, the Legislature intends (1) for state law to be independent of the federal Americans with Disabilities Act of 1990, (2) to require a "limitation" rather than a "substantial limitation" of a major life activity, and (3) by enacting paragraph (4) of subdivision (j) and paragraph (4) of subdivision (l) of Section 12926, to provide protection when an individual is erroneously or mistakenly believed to have any physical or mental condition that limits a major life activity.

(e) The Legislature affirms the importance of the interactive process between the applicant or employee and the employer in determining a reasonable accommodation, as this requirement has been articulated by the Equal Employment Opportunity Commission in its interpretive guidance of the federal Americans with Disabilities Act of 1990.

Cal. Gov. Code § 12940

Employers, labor organizations, employment agencies and other persons; unlawful employment practices; exceptions

It is an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or veteran or military status of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.

(1) This part does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee with a physical or mental disability, if the employee, because of a physical or mental disability, is unable to perform the employee's essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations.

(2) This part does not prohibit an employer from refusing to hire or discharging an employee who, because of the employee's medical condition, is unable to perform the employee's essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations. Nothing in this part shall subject an employer to any legal liability

resulting from the refusal to employ or the discharge of an employee who, because of the employee's medical condition, is unable to perform the employee's essential duties, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations.

(3) Nothing in this part relating to discrimination on account of marital status shall do either of the following:

(A) Affect the right of an employer to reasonably regulate, for reasons of supervision, safety, security, or morale, the working of spouses in the same department, division, or facility, consistent with the rules and regulations adopted by the commission.

(B) Prohibit bona fide health plans from providing additional or greater benefits to employees with dependents than to those employees without or with fewer dependents.

(4) Nothing in this part relating to discrimination on account of sex shall affect the right of an employer to use veteran status as a factor in employee selection or to give special consideration to Vietnam-era veterans.

(5)(A) This part does not prohibit an employer from refusing to employ an individual because of the individual's age if the law compels or provides for that refusal. Promotions within the existing staff, hiring or promotion on the basis of experience and training, rehiring on the basis of seniority and prior service with the employer, or hiring under an established recruiting program from high schools, colleges, universities, or trade schools do not, in and of themselves, constitute unlawful employment practices.

(B) The provisions of this part relating to discrimination on the basis of age do not prohibit an employer from providing health benefits or health care reimbursement plans to retired persons that are altered, reduced, or eliminated when the person becomes eligible for Medicare health benefits. This subparagraph applies to all retiree health benefit plans and contractual provisions or practices concerning retiree health

benefits and health care reimbursement plans in effect on or after January 1, 2011.

(b) For a labor organization, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or veteran or military status of any person, to exclude, expel, or restrict from its membership the person, or to provide only second-class or segregated membership or to discriminate against any person because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or veteran or military status of the person in the election of officers of the labor organization or in the selection of the labor organization's staff or to discriminate in any way against any of its members or against any employer or against any person employed by an employer.

(c) For any person to discriminate against any person in the selection, termination, training, or other terms or treatment of that person in any apprenticeship training program, any other training program leading to employment, an unpaid internship, or another limited duration program to provide unpaid work experience for that person because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or veteran or military status of the person discriminated against.

(d) For any employer or employment agency to print or circulate or cause to be printed or circulated any publication, or to make any nonjob-related inquiry of an employee or applicant, either verbal or through use of an application form, that expresses, directly or indirectly, any limitation, specification, or discrimination as to race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital

status, sex, gender, gender identity, gender expression, age, sexual orientation, or veteran or military status, or any intent to make any such limitation, specification, or discrimination. This part does not prohibit an employer or employment agency from inquiring into the age of an applicant, or from specifying age limitations, if the law compels or provides for that action.

(e)(1) Except as provided in paragraph (2) or (3), for any employer or employment agency to require any medical or psychological examination of an applicant, to make any medical or psychological inquiry of an applicant, to make any inquiry whether an applicant has a mental disability or physical disability or medical condition, or to make any inquiry regarding the nature or severity of a physical disability, mental disability, or medical condition.

(2) Notwithstanding paragraph (1), an employer or employment agency may inquire into the ability of an applicant to perform job-related functions and may respond to an applicant's request for reasonable accommodation.

(3) Notwithstanding paragraph (1), an employer or employment agency may require a medical or psychological examination or make a medical or psychological inquiry of a job applicant after an employment offer has been made but prior to the commencement of employment duties, provided that the examination or inquiry is job related and consistent with business necessity and that all entering employees in the same job classification are subject to the same examination or inquiry.

(f)(1) Except as provided in paragraph (2), for any employer or employment agency to require any medical or psychological examination of an employee, to make any medical or psychological inquiry of an employee, to make any inquiry whether an employee has a mental disability, physical disability, or medical condition, or to make any inquiry regarding the nature or severity of a physical disability, mental disability, or medical condition.

(2) Notwithstanding paragraph (1), an employer or employment agency may require any examinations or inquiries that it can show to be job

related and consistent with business necessity. An employer or employment agency may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that worksite.

(g) For any employer, labor organization, or employment agency to harass, discharge, expel, or otherwise discriminate against any person because the person has made a report pursuant to Section 11161.8 of the Penal Code that prohibits retaliation against hospital employees who report suspected patient abuse by health facilities or community care facilities.

(h) For any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.

(i) For any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so.

(j)(1) For an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or veteran or military status, to harass an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract by an employee, other than an agent or supervisor, shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An employer may also be responsible for the acts of nonemployees, with respect to harassment of employees, applicants, unpaid interns or volunteers, or persons providing services pursuant to a contract in the

workplace, if the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing cases involving the acts of nonemployees, the extent of the employer's control and any other legal responsibility that the employer may have with respect to the conduct of those nonemployees shall be considered. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment.

(2) The provisions of this subdivision are declaratory of existing law, except for the new duties imposed on employers with regard to harassment.

(3) An employee of an entity subject to this subdivision is personally liable for any harassment prohibited by this section that is perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action.

(4)(A) For purposes of this subdivision only, "employer" means any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities. The definition of "employer" in subdivision (d) of Section 12926 applies to all provisions of this section other than this subdivision.

(B) Notwithstanding subparagraph (A), for purposes of this subdivision, "employer" does not include a religious association or corporation not organized for private profit, except as provided in Section 12926.2.

(C) For purposes of this subdivision, "harassment" because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions. Sexually harassing conduct need not be motivated by sexual desire.

(5) For purposes of this subdivision, "a person providing services pursuant to a contract" means a person who meets all of the following criteria:

(A) The person has the right to control the performance of the contract for services and discretion as to the manner of performance.

(B) The person is customarily engaged in an independently established business.

(C) The person has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work.

(k) For an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.

(l)(1) For an employer or other entity covered by this part to refuse to hire or employ a person or to refuse to select a person for a training program leading to employment or to bar or to discharge a person from employment or from a training program leading to employment, or to discriminate against a person in compensation or in terms, conditions, or privileges of employment because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer or other entity covered by this part demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance, including the possibilities of excusing the person from those duties that conflict with the person's religious belief or observance or permitting those duties to be performed at another time or by another person, but is unable to reasonably accommodate the religious belief or observance without undue hardship, as defined in subdivision (u) of Section 12926, on the conduct of the business of the employer or other entity covered by this part. Religious belief or observance, as used in this section, includes, but is not limited to, observance of a Sabbath or other religious holy day or days, reasonable time necessary for travel prior and subsequent to a religious observance, and religious dress practice and religious grooming practice as described in subdivision (q) of Section 12926. This

subdivision shall also apply to an apprenticeship training program, an unpaid internship, and any other program to provide unpaid experience for a person in the workplace or industry.

(2) An accommodation of an individual's religious dress practice or religious grooming practice is not reasonable if the accommodation requires segregation of the individual from other employees or the public.

(3) An accommodation is not required under this subdivision if it would result in a violation of this part or any other law prohibiting discrimination or protecting civil rights, including subdivision (b) of Section 51 of the Civil Code and Section 11135 of this code.

(4) For an employer or other entity covered by this part to, in addition to the employee protections provided pursuant to subdivision (h), retaliate or otherwise discriminate against a person for requesting accommodation under this subdivision, regardless of whether the request was granted.

(m)(1) For an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in paragraph (1) or (2) of subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship, as defined in subdivision (u) of Section 12926, to its operation.

(2) For an employer or other entity covered by this part to, in addition to the employee protections provided pursuant to subdivision (h), retaliate or otherwise discriminate against a person for requesting accommodation under this subdivision, regardless of whether the request was granted.

(n) For an employer or other entity covered by this part to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or

applicant with a known physical or mental disability or known medical condition.

(o) For an employer or other entity covered by this part, to subject, directly or indirectly, any employee, applicant, or other person to a test for the presence of a genetic characteristic.

(p) Nothing in this section shall be interpreted as preventing the ability of employers to identify members of the military or veterans for purposes of awarding a veteran's preference as permitted by law.

Cal. Civ. Code § 51

Unruh Civil Rights Act; equal rights; business establishments; violations of federal Americans with Disabilities Act

(a) This section shall be known, and may be cited, as the Unruh Civil Rights Act.

(b) All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

(c) This section shall not be construed to confer any right or privilege on a person that is conditioned or limited by law or that is applicable alike to persons of every sex, color, race, religion, ancestry, national origin, disability, medical condition, marital status, sexual orientation, citizenship, primary language, or immigration status, or to persons regardless of their genetic information.

(d) Nothing in this section shall be construed to require any construction, alteration, repair, structural or otherwise, or modification of any sort whatsoever, beyond that construction, alteration, repair, or modification that is otherwise required by other provisions of law, to any new or existing establishment, facility, building, improvement, or any other structure, nor shall anything in this section be construed to augment, restrict, or alter in any way the authority of the State Architect to require construction, alteration, repair, or modifications that the State Architect otherwise possesses pursuant to other laws.

(e) For purposes of this section:

(1) "Disability" means any mental or physical disability as defined in Sections 12926 and 12926.1 of the Government Code.

(2)(A) "Genetic information" means, with respect to any individual, information about any of the following:

(i) The individual's genetic tests.

(ii) The genetic tests of family members of the individual.

(iii) The manifestation of a disease or disorder in family members of the individual.

(B) “Genetic information” includes any request for, or receipt of, genetic services, or participation in clinical research that includes genetic services, by an individual or any family member of the individual.

(C) “Genetic information” does not include information about the sex or age of any individual.

(3) “Medical condition” has the same meaning as defined in subdivision (i) of Section 12926 of the Government Code.

(4) “Religion” includes all aspects of religious belief, observance, and practice.

(5) “Sex” includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth. “Sex” also includes, but is not limited to, a person's gender. “Gender” means sex, and includes a person's gender identity and gender expression. “Gender expression” means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.

(6) “Sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status” includes a perception that the person has any particular characteristic or characteristics within the listed categories or that the person is associated with a person who has, or is perceived to have, any particular characteristic or characteristics within the listed categories.

(7) “Sexual orientation” has the same meaning as defined in subdivision (s) of Section 12926 of the Government Code.

(f) A violation of the right of any individual under the federal Americans with Disabilities Act of 1990 (Public Law 101-336)1 shall also constitute a violation of this section.

(g) Verification of immigration status and any discrimination based upon verified immigration status, where required by federal law, shall not constitute a violation of this section.

(h) Nothing in this section shall be construed to require the provision of services or documents in a language other than English, beyond that which is otherwise required by other provisions of federal, state, or local law, including Section 1632.

Cal. Civ. Code § 52

Denial of civil rights or discrimination; damages; civil action by persons aggrieved; intervention; unlawful practice complaint; waiver of rights by contract

(a) Whoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to Section 51, 51.5, or 51.6, is liable for each and every offense for the actual damages, and any amount that may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage but in no case less than four thousand dollars ($4,000), and any attorney's fees that may be determined by the court in addition thereto, suffered by any person denied the rights provided in Section 51, 51.5, or 51.6.

(b) Whoever denies the right provided by Section 51.7 or 51.9, or aids, incites, or conspires in that denial, is liable for each and every offense for the actual damages suffered by any person denied that right and, in addition, the following:

(1) An amount to be determined by a jury, or a court sitting without a jury, for exemplary damages.

(2) A civil penalty of twenty-five thousand dollars ($25,000) to be awarded to the person denied the right provided by Section 51.7 in any action brought by the person denied the right, or by the Attorney General, a district attorney, or a city attorney. An action for that penalty brought pursuant to Section 51.7 shall be commenced within three years of the alleged practice.

(3) Attorney's fees as may be determined by the court.

(c) Whenever there is reasonable cause to believe that any person or group of persons is engaged in conduct of resistance to the full enjoyment of any of the rights described in this section, and that conduct is of that nature and is intended to deny the full exercise of those rights, the Attorney General, any district attorney or city attorney, or any person aggrieved by the conduct may bring a civil

action in the appropriate court by filing with it a complaint. The complaint shall contain the following:

(1) The signature of the officer, or, in his or her absence, the individual acting on behalf of the officer, or the signature of the person aggrieved.

(2) The facts pertaining to the conduct.

(3) A request for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for the conduct, as the complainant deems necessary to ensure the full enjoyment of the rights described in this section.

(d) Whenever an action has been commenced in any court seeking relief from the denial of equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States on account of race, color, religion, sex, national origin, or disability, the Attorney General or any district attorney or city attorney for or in the name of the people of the State of California may intervene in the action upon timely application if the Attorney General or any district attorney or city attorney certifies that the case is of general public importance. In that action, the people of the State of California shall be entitled to the same relief as if it had instituted the action.

(e) Actions brought pursuant to this section are independent of any other actions, remedies, or procedures that may be available to an aggrieved party pursuant to any other law.

(f) Any person claiming to be aggrieved by an alleged unlawful practice in violation of Section 51 or 51.7 may also file a verified complaint with the Department of Fair Employment and Housing pursuant to Section 12948 of the Government Code.

(g) This section does not require any construction, alteration, repair, structural or otherwise, or modification of any sort whatsoever, beyond that construction, alteration, repair, or modification that is otherwise required by other provisions of law, to any new or existing establishment, facility, building, improvement, or any other structure,

nor does this section augment, restrict, or alter in any way the authority of the State Architect to require construction, alteration, repair, or modifications that the State Architect otherwise possesses pursuant to other laws.

(h) For the purposes of this section, "actual damages" means special and general damages. This subdivision is declaratory of existing law.

(i) Subdivisions (b) to (f), inclusive, shall not be waived by contract except as provided in Section 51.7

42 U.S.C. § 2000e

Definitions

For the purposes of this subchapter--

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint

or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after March 24, 1972, or (B) fifteen or more thereafter, and such labor organization--

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term “employee” means an individual employed by an employer, except that the term “employee” shall not include any person elected to

public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(g) The term “commerce” means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term “industry affecting commerce” means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry “affecting commerce” within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, and further includes any governmental industry, business, or activity.

(i) The term “State” includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

(j) The term “religion” includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for

all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, that nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

(l) The term "complaining party" means the Commission, the Attorney General, or a person who may bring an action or proceeding under this subchapter.

(m) The term "demonstrates" means meets the burdens of production and persuasion.

(n) The term "respondent" means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 2000e-16 of this title.

Cal. Code Regs., tit. 2, § 11065

Definitions.

As used in this article, the following definitions apply:

(a) "Assistive animal" means an animal that is necessary as a reasonable accommodation for a person with a disability.

(1) Specific examples include, but are not limited to:

(A) "Guide dog," as defined at Civil Code section 54.1, trained to guide a blind or visually impaired person.

(B) "Signal dog," as defined at Civil Code section 54.1, or other animal trained to alert a deaf or hearing impaired person to sounds.

(C) "Service dog," as defined at Civil Code section 54.1, or other animal individually trained to the requirements of a person with a disability.

(D) "Support dog" or other animal that provides emotional, cognitive, or other similar support to a person with a disability, including, but not limited to, traumatic brain injuries or mental disabilities, such as major depression.

(2) Minimum standards for assistive animals include, but are not limited to, the following. Employers may require that an assistive animal in the workplace:

(A) is free from offensive odors and displays habits appropriate to the work environment, for example, the elimination of urine and feces; and

(B) does not engage in behavior that endangers the health or safety of the individual with a disability or others in the workplace.

(3) A "support animal" may constitute a reasonable accommodation in certain circumstances. A support animal is one that provides emotional, cognitive, or other similar support to a person with a disability, including, but not limited to, traumatic brain injuries or mental disabilities, such as major depression. As in other contexts, what constitutes a reasonable accommodation requires an individualized analysis reached through the interactive process.

(b) “Business Necessity,” as used in this article regarding medical or psychological examinations, means that the need for the disability inquiry or medical examination is vital to the business.

(c) “CFRA” means the Moore-Brown-Roberti Family Rights Act of 1993. (California Family Rights Act, Gov. Code §§ 12945.1 and 12945.2.) As used in this article “CFRA leave” means medical leave taken pursuant to CFRA.

(d) “Disability” shall be broadly construed to mean and include any of the following definitions:

(1) “Mental disability,” as defined at Government Code section 12926, includes, but is not limited to, having any mental or psychological disorder or condition that limits a major life activity. “Mental disability” includes, but is not limited to, emotional or mental illness, intellectual or cognitive disability (formerly referred to as “mental retardation”), organic brain syndrome, or specific learning disabilities, autism spectrum disorders, schizophrenia, and chronic or episodic conditions such as clinical depression, bipolar disorder, post-traumatic stress disorder, and obsessive compulsive disorder.

(2) “Physical disability,” as defined at Government Code section 12926, includes, but is not limited to, having any anatomical loss, cosmetic disfigurement, physiological disease, disorder or condition that does both of the following:

(A) affects one or more of the following body systems: neurological; immunological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; circulatory; skin; and endocrine; and

(B) limits a major life activity.

(C) “Disability” includes, but is not limited to, deafness, blindness, partially or completely missing limbs, mobility impairments requiring the use of a wheelchair, cerebral palsy, and chronic or episodic

conditions such as HIV/AIDS, hepatitis, epilepsy, seizure disorder, diabetes, multiple sclerosis, and heart and circulatory disease.

(3) A "special education" disability is any other recognized health impairment or mental or psychological disorder not described in section 11065(d) of this article, that requires or has required in the past special education or related services. A special education disability may include a "specific learning disability," manifested by significant difficulties in the acquisition and use of listening, speaking, reading, writing, reasoning or mathematical abilities. A specific learning disability can include conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia and developmental aphasia. A special education disability does not include special education or related services unrelated to a health impairment or mental or psychological disorder, such as those for English language acquisition by persons whose first language was not English.

(4) A "record or history of disability" includes previously having, or being misclassified as having, a record or history of a mental or physical disability or special education health impairment of which the employer or other covered entity is aware.

(5) A "perceived disability" means being "regarded as," "perceived as" or "treated as" having a disability. Perceived disability includes:

(A) Being regarded or treated by the employer or other entity covered by this article as having, or having had, any mental or physical condition or adverse genetic information that makes achievement of a major life activity difficult; or

(B) Being subjected to an action prohibited by this article, including non-selection, demotion, termination, involuntary transfer or reassignment, or denial of any other term, condition, or privilege of employment, based on an actual or perceived physical or mental disease, disorder, or condition, or cosmetic disfigurement, anatomical loss, adverse genetic information or special education disability, or its symptom, such as taking medication, whether or not the perceived condition limits, or is perceived to limit, a major life activity.

(6) A “perceived potential disability” includes being regarded, perceived, or treated by the employer or other covered entity as having, or having had, a physical or mental disease, disorder, condition or cosmetic disfigurement, anatomical loss, adverse genetic information or special education disability that has no present disabling effect, but may become a mental or physical disability or special education disability.

(7) “Medical condition” is a term specifically defined at Government Code section 12926, to mean either:

(A) any cancer-related physical or mental health impairment from a diagnosis, record or history of cancer; or

(B) a “genetic characteristic,” as defined at Government Code section 12926. “Genetic characteristics” means:

1. Any scientifically or medically identifiable gene or chromosome, or combination or alteration of a gene or chromosome, or any inherited characteristic that may derive from a person or the person's family member, and

2. That is known to be a cause of a disease or disorder in a person or the person's offspring, or that is associated with a statistically increased risk of development of a disease or disorder, though presently not associated with any disease or disorder symptoms.

(8) A “Disability” is also any definition of “disability” used in the federal Americans with Disabilities Act of 1990 (ADA), and as amended by the ADA Amendments Act of 2008 and the regulations adopted pursuant thereto, that would result in broader protection of the civil rights of individuals with a mental or physical disability or medical condition than provided by the FEHA. If so, the broader ADA protections or coverage shall be deemed incorporated by reference into, and shall prevail over conflicting provisions of, the FEHA's definition of disability.

(9) “Disability” does not include:

(A) excluded conditions listed in the Government Code section 12926 definitions of mental and physical disability. These conditions are compulsive gambling, kleptomania, pyromania, or psychoactive

substance use disorders resulting from the current unlawful use of controlled substances or other drugs, and "sexual behavior disorders," as defined at section 11065(q), of this article; or

(B) conditions that are mild, which do not limit a major life activity, as determined on a case-by-case basis. These excluded conditions have little or no residual effects, such as the common cold; seasonal or common influenza; minor cuts, sprains, muscle aches, soreness, bruises, or abrasions; non-migraine headaches, and minor and non-chronic gastrointestinal disorders.

(e) "Essential job functions" means the fundamental job duties of the employment position the applicant or employee with a disability holds or desires.

(1) A job function may be considered essential for any of several reasons, including, but not limited to, the following:

(A) The function may be essential because the reason the position exists is to perform that function.

(B) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed.

(C) The function may be highly specialized, so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(2) Evidence of whether a particular function is essential includes, but is not limited to, the following:

(A) The employer's or other covered entity's judgment as to which functions are essential.

(B) Accurate, current written job descriptions.

(C) The amount of time spent on the job performing the function.

(D) The legitimate business consequences of not requiring the incumbent to perform the function.

(E) Job descriptions or job functions contained in a collective bargaining agreement.

(F) The work experience of past incumbents in the job.

(G) The current work experience of incumbents in similar jobs.

(H) Reference to the importance of the performance of the job function in prior performance reviews.

(3) “Essential functions” do not include the marginal functions of the position. “Marginal functions” of an employment position are those that, if not performed, would not eliminate the need for the job or that could be readily performed by another employee or that could be performed in an alternative way.

(f) “Family member,” for purposes of discrimination on the basis of a genetic characteristic or genetic information, includes the individual's relations from the first to fourth degree. This would include children, siblings, half-siblings, parents, grandparents, aunts, uncles, nieces, nephews, great aunts and uncles, first cousins, children of first cousins, great grandparents, and great-great grandparents.

(g) “FMLA” means the federal Family and Medical Leave Act of 1993 and its implementing regulations. For purposes of this section only, “FMLA leave” means medical leave taken pursuant to FMLA.

(h) “Genetic information,” as defined at Government Code section 12926, means genetic information derived from an individual's or the individual's family members' genetic tests, receipt of genetic services, participation in genetic services clinical research or the manifestation of a disease or disorder in an individual's family members.

(i) “Health care provider” means either:

(1) a medical or osteopathic doctor, physician, or surgeon, licensed in California or in another state or country, who directly treats or supervises the treatment of the applicant or employee; or

(2) a marriage and family therapist or acupuncturist, licensed in California or in another state or country, or any other persons who meet

the definition of “others capable of providing health care services” under FMLA and its implementing regulations, including podiatrists, dentists, clinical psychologists, optometrists, chiropractors, nurse practitioners, nurse midwives, clinical social workers, physician assistants; or

(3) a health care provider from whom an employer, other covered entity, or a group health plan's benefits manager will accept medical certification of the existence of a health condition to substantiate a claim for benefits.

(j) “Interactive process,” as set forth more fully at California Code of Regulations, title 2, section 11069, means timely, good faith communication between the employer or other covered entity and the applicant or employee or, when necessary because of the disability or other circumstances, his or her representative to explore whether or not the applicant or employee needs reasonable accommodation for the applicant's or employee's disability to perform the essential functions of the job, and, if so, how the person can be reasonably accommodated.

(k) “Job-related,” as used in sections 11070, 11071 and 11072 means tailored to assess the employee's ability to carry out the essential functions of the job or to determine whether the employee poses a danger to the employee or others due to disability.

(l) “Major life activities” shall be construed broadly and include physical, mental, and social activities, especially those life activities that affect employability or otherwise present a barrier to employment or advancement.

(1) Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.

(2) Major life activities include the operation of major bodily functions, including functions of the immune system, special sense organs and skin, normal cell growth, digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine,

hemic, lymphatic, musculoskeletal, and reproductive functions. Major bodily functions include the operation of an individual organ within a body system.

(3) An impairment "limits" a major life activity if it makes the achievement of the major life activity difficult.

(A) Whether achievement of the major life activity is "difficult" is an individualized assessment, which may consider what most people in the general population can perform with little or no difficulty, what members of the individual's peer group can perform with little or no difficulty, and/or what the individual would be able to perform with little or no difficulty in the absence of disability.

(B) Whether an impairment limits a major life activity will usually not require scientific, medical, or statistical analysis. Nothing in this paragraph is intended, however, to prohibit the presentation of scientific, medical, or statistical evidence, where appropriate.

(C) "Limits" shall be determined without regard to mitigating measures or reasonable accommodations, unless the mitigating measure itself limits a major life activity.

(D) Working is a major life activity, regardless of whether the actual or perceived working limitation affects a particular employment or class or broad range of employments.

(E) An impairment that is episodic or in remission is a disability if it would limit a major life activity when active.

(m) A "medical or psychological examination" is a procedure or test performed by a health care provider that seeks or obtains information about an individual's physical or mental disabilities or health.

(n) "Mitigating measure" is a treatment, therapy, or device that eliminates or reduces the limitation(s) of a disability. Mitigating measures include, but are not limited to:

(1) Medications; medical supplies, equipment, or appliances; low-vision devices (defined as devices that magnify, enhance, or otherwise

augment a visual image, but not including ordinary eyeglasses or contact lenses); prosthetics, including limbs and devices; hearing aids, cochlear implants, or other implantable hearing devices; mobility devices; oxygen therapy equipment and supplies; and assistive animals, such as guide dogs.

(2) Use of assistive technology or devices, such as wheelchairs, braces, and canes.

(3) "Auxiliary aids and services," which include:

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing disabilities such as text pagers, captioned telephone, video relay TTY and video remote interpreting;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual disabilities such as video magnification, text-to-speech and voice recognition software, and related scanning and OCR technologies;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(4) Learned behavioral or adaptive neurological modifications.

(5) Surgical interventions, except for those that permanently eliminate a disability.

(6) Psychotherapy, behavioral therapy, or physical therapy.

(7) Reasonable accommodations.

(o) "Qualified individual," for purposes of disability discrimination under California Code of Regulations, title 2, section 11066, is an applicant or employee who has the requisite skill, experience, education, and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.

(p) “Reasonable accommodation” is:

(1) modifications or adjustments that are:

(A) effective in enabling an applicant with a disability to have an equal opportunity to be considered for a desired job, or

(B) effective in enabling an employee to perform the essential functions of the job the employee holds or desires, or

(C) effective in enabling an employee with a disability to enjoy equivalent benefits and privileges of employment as are enjoyed by similarly situated employees without disabilities.

(2) Examples of Reasonable Accommodation. Reasonable accommodation may include, but are not limited to, such measures as:

(A) Making existing facilities used by applicants and employees readily accessible to and usable by individuals with disabilities. This may include, but is not limited to, providing accessible break rooms, restrooms, training rooms, or reserved parking places; acquiring or modifying furniture, equipment or devices; or making other similar adjustments in the work environment;

(B) Allowing applicants or employees to bring assistive animals to the work site;

(C) Transferring an employee to a more accessible worksite;

(D) Providing assistive aids and services such as qualified readers or interpreters to an applicant or employee;

(E) Job Restructuring. This may include, but is not limited to, reallocation or redistribution of non-essential job functions in a job with multiple responsibilities;

(F) Providing a part-time or modified work schedule;

(G) Permitting an alteration of when and/or how an essential function is performed;

(H) Providing an adjustment or modification of examinations, training materials or policies;

(I) Modifying an employer policy;

(J) Modifying supervisory methods (e.g., dividing complex tasks into smaller parts);

(K) Providing additional training;

(L) Permitting an employee to work from home;

(M) Providing a paid or unpaid leave for treatment and recovery, consistent with section 11068(c);

(N) Providing a reassignment to a vacant position, consistent with section 11068(d); and

(O) other similar accommodations.

(q) “Sexual behavior disorders,” as used in this article, refers to pedophilia, exhibitionism, and voyeurism.

(r) “Undue hardship” means, with respect to the provision of an accommodation, an action requiring significant difficulty or expense incurred by an employer or other covered entity, when considered under the totality of the circumstances in light of the following factors:

(1) the nature and net cost of the accommodation needed under this article, taking into consideration the availability of tax credits and deductions, and/or outside funding;

(2) the overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business;

(3) the overall financial resources of the employer or other covered entity, the overall size of the business of a covered entity with respect to the number of its employees, and the number, type, and location of its facilities;

(4) the type of operation or operations, including the composition, structure, and functions of the workforce of the employer or other covered entity; and

(5) the geographic separateness, administrative, or fiscal relationship of the facility or facilities.

Cal. Code Regs., tit. 2, § 11008

Definitions.

As used in this chapter, the following definitions shall apply unless the context otherwise requires:

(a) “Applicant.” Any individual who files a written application or, where an employer or other covered entity does not provide an application form, any individual who otherwise indicates a specific desire to an employer or other covered entity to be considered for employment. Except for recordkeeping purposes, “Applicant” is also an individual who can prove that he or she has been deterred from applying for a job by an employer's or other covered entity's alleged discriminatory practice. “Applicant” does not include an individual who without coercion or intimidation willingly withdraws his or her application prior to being interviewed, tested or hired.

(b) “Apprenticeship Training Program.” Any apprenticeship program, including local or state joint apprenticeship committees, subject to the provision of Chapter 4 of Division 3 of the California Labor Code, section 3070 et seq.

(c) “Employee.” Any individual under the direction and control of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written.

(1) “Employee” does not include an independent contractor as defined in Labor Code section 3353.

(2) “Employee” does not include any individual employed by his or her parents, by his or her spouse, or by his or her child.

(3) “Employee” does not include any individual employed under special license in a non-profit sheltered workshop or rehabilitation facility.

(4) An employment agency is not an employee of the person or individual for whom it procures employees.

(5) An individual compensated by a temporary service agency for work to be performed for an employer contracting with the temporary service

agency is an employee of that employer for such terms, conditions and privileges of employment under the control of that employer. Such an individual also is an employee of the temporary service agency with regard to such terms, conditions and privileges of employment under the control of the temporary service agency.

(d) "Employer." Any person or individual engaged in any business or enterprise regularly employing five or more individuals, including individuals performing any service under any appointment, contract of hire or apprenticeship, express or implied, oral or written.

(1) "Regularly employing" means employing five or more individuals for any part of the day on which the unlawful conduct allegedly occurred, or employing five or more employees on a regular basis.

(A) "Regular basis" refers to the nature of a business that is recurring, rather than constant. For example, in an industry that typically has a three-month season during a calendar year, an employer that employs five or more employees during that season "regularly employs" the requisite number of employees. Thus, to be covered by the Act, an employer need not have five or more employees working every day throughout the year or have five or more employees at the time of the allegedly unlawful conduct, so long as at least five employees are regularly on its payroll during the season.

(B) Part-time employees, including those who work partial days and fewer than each day of the work week, will be counted the same as full-time employees. For example, for counting purposes, an employer has five employees when three work every day and two work alternate days to fill one position, and there are no more than four employees working on any working day. Employees on paid or unpaid leave, including California Family Rights Act (CFRA), parenting leave, pregnancy leave, leave of absence, disciplinary suspension, or any other employer-approved leave of absence, are counted.

(C) Employees located inside and outside of California are counted in determining whether employers are covered under the Act. However, employees located outside of California are not themselves covered by

the protections of the Act if the allegedly unlawful conduct did not occur in California, or the allegedly unlawful conduct was not ratified by decision makers or participants in unlawful conduct located in California.

(2) The means for counting five employees described in this subsection also applies to counting employees for purposes of establishing coverage under Government Code sections 12945.2, 12945.6, and 12950.1.

(3) Any person or individual acting as an agent of an employer, directly or indirectly, is also an employer.

(4) "Employer" includes the State of California, any political or civil subdivision thereof, counties, cities, city and county, local agencies, or special districts, irrespective of whether that entity employs five or more individuals.

(5) A religious association or religious corporation not organized for private profit is not an employer under the meaning of this Act; any non-profit religious organization exempt from federal and state income tax as a non-profit religious organization is presumed not to be an employer under this Act. Notwithstanding such status, any portion of such tax exempt religious association or religious corporation subject to state or federal income taxes as an unrelated business and regularly employing five or more individuals is an employer.

(6) "Employer" includes any non-profit corporation or non-profit association other than that defined in subsection (5).

(e) "Employer or Other Covered Entity." Any employer, employment agency, labor organization or apprenticeship training program as defined herein and subject to the provisions of the Act.

(f) "Employment Agency." Any person undertaking for compensation to procure job applicants, employees or opportunities to work.

(g) "Employment Benefit." Except as otherwise provided in the Act, any benefit of employment covered by the Act, including hiring, employment, promotion, selection for training programs leading to employment or promotions, freedom from disbarment" or discharge

from employment or a training program, compensation, provision of a discrimination-free workplace, and any other favorable term, condition or privilege of employment.

(1) For a labor organization, “employment benefit” includes all rights and privileges of membership, including freedom from exclusion, expulsion or restriction of membership, second class or segregated membership, discrimination in the election of officers or selection of staff, or any other action against a member or any employee or person employed by an employer.

(2) “Employment benefit” also includes the selection or training of any person for, or freedom from termination from, an unpaid internship or another limited duration program to provide unpaid work experience for that person in any apprenticeship training program or any other training program leading to employment or promotion.

(3) “Provision of a discrimination-free workplace” is a provision of a workplace free of harassment, as defined in section 11019(b).

(h) “Employment Practice.” Any act, omission, policy or decision of an employer or other covered entity affecting any of an individual's employment benefits or consideration for an employment benefit.

(i) “Labor Organization.” Any organization that exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers regarding grievances, terms or conditions of employment, or of providing other mutual aid or protection.

(j) “Person performing services pursuant to a contract.” A person who meets all of the following criteria: 1) has the right to control the performance of the contract for services and discretion as to the manner of performance; 2) is customarily engaged in an independently established business; and 3) has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work.

(k) “Unpaid interns and volunteers.” For purposes of the Act, any individual (often a student or trainee) who works without pay for an employer or other covered entity, in any unpaid internship or another limited duration program to provide unpaid work experience, or as a volunteer. Unpaid interns and volunteers may or may not be employees.

No. 21-55229

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTINA RAINES ET AL.,

Plaintiffs-Appellants,

v.

U.S. HEALTHWORKS MEDICAL GROUP ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of California
No. 3:19-CV-01539-DMS
Hon. Dana M. Sabraw

APPELLANTS' EXCERPTS OF RECORD
VOLUME 1 of 1

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

KRISTINA RAINES and DARRICK FIGG, individually and on behalf of all other similarly situated,

Plaintiffs,

v.

U.S. HEALTHWORKS MEDICAL GROUP, a corporation; U.S. HEALTHWORKS, INC., a corporation; SELECT MEDICAL HOLDINGS CORPORATION, a corporation; SELECT MEDICAL CORPORATION, a corporation; CONCENTRA GROUP HOLDINGS, LLC, a corporation; CONCENTRA, INC., a corporation; CONCENTRA PRIMARY CARE OF CALIFORNIA, a medical corporation; OCCUPATIONAL HEALTH CENTERS OF CALIFORNIA, a medical corporation; and DOES 4 and 8 through 10, inclusive,

Defendants.

Case No.: 19-cv-1539-DMS-MSB

ORDER GRANTING MOTION TO DISMISS

Pending before the Court is Defendants U.S. Healthworks Medical Group, U.S. Healthworks, Inc., Select Medical Holdings Corporation, Select Medical Corporation,

Concentra Group Holdings, LLC, Concentra, Inc., Concentra Primary Care of California, and Occupational Health Centers of California's (collectively, "USHW"[1]) motion to dismiss, or in the alternative, motion to strike Plaintiffs Kristina Raines and Darrick Figg's Third Amended Complaint ("TAC"). Plaintiffs filed a response in opposition to USHW's motion, and USHW filed a reply. For the reasons discussed below, the Court grants USHW's motion.

I.

BACKGROUND

In March of 2018, Plaintiff Kristina Raines applied for a job with Front Porch Communities and Services ("Front Porch"), located in Carlsbad, California. (TAC ¶ 47.) Plaintiff Raines applied for the position of Food Service Aide. (*Id.*) Her job description included cleaning and maintaining the work area, transporting trash disposal, and re-stocking dishes, kitchen utensils and food supplies. (*Id.* ¶ 48.) Front Porch ultimately offered Plaintiff Raines the position, but conditioned the offer on her passing a pre-placement medical examination, which was administered by Defendant USHW at its facility in Carlsbad. (*Id.* ¶ 49.) During the pre-employment medical examination, Plaintiff Raines was directed to complete a standardized health history questionnaire. (*Id.* ¶ 50.) She was also directed to sign a disclosure form, titled "Authorization to Disclose Protected Health Information to Employer." (*Id.*)

Plaintiffs allege USHW's health history questionnaire asked questions that were intrusive, "overbroad," and "unrelated to . . . the functions of any job position." (*Id.* ¶ 42).

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[1] Plaintiffs allege Select Medical Holdings Corporation, Select Medical Corporation, Concentra Group Holdings, LLC, Concentra, Inc., Concentra Primary Care of California, Occupational Health Centers of California, and Does 9–10 ("Concentra Defendants") acquired U.S. Healthworks Medical Group and U.S. Healthworks Inc. in or around 2018 and are thus the successors in interest to those defendants. (TAC ¶¶ 15, 22–25.) Plaintiffs collectively refer to U.S. Healthworks Medical Group, U.S. Healthworks Inc., and the Concentra Defendants as "USHW" (TAC ¶ 25), and the Court does the same here.

These questions included whether the applicant had a history of: venereal disease, painful or irregular vaginal discharge, problems with menstrual periods, penile discharge, prostate problems, genital pain or masses, cancer/tumors, HIV, mental illness, disabilities, painful or frequent urination, hemorrhoids, and constipation. (*Id.* ¶ 37.) Additional questions asked whether the applicant was pregnant, what prescription medication they took, and for information about prior on-the-job injuries or illnesses. (*Id.* ¶ 38.) Plaintiff Raines refused to complete the required forms in their entirety, noting the intrusiveness of the questions asked. (*Id.* ¶ 52.) In response, a USHW physician terminated the exam. (*Id.* ¶ 53.) Front Porch ultimately revoked Plaintiff Raines's offer of employment because she refused to complete the medical examination. (*Id.* ¶ 54.)

Similarly, San Ramon Valley Fire Protection District conditioned Plaintiff Darrick Figg's employment in the Volunteer Communication Reserve on him passing a pre-employment medical examination, also administered by USHW. (*Id.* ¶¶ 56–57.) Just like Plaintiff Raines, Plaintiff Figg was directed to complete the same health history questionnaire and to sign the same disclosure form. (*Id.* ¶ 58.) Unlike Plaintiff Raines, Plaintiff Figg answered all the questions and was ultimately employed by the San Ramon Valley Fire Protection District. (*Id.* ¶¶ 60–62.)

Based on these alleged facts, Plaintiff Raines filed suit against Front Porch and U.S. Healthworks Medical Group in California state court. (Ex. 1 to ECF No. 1.) Plaintiff Raines subsequently filed the First Amended Complaint, adding Select Medical Holdings Corporation and Concentra Group Holdings, LLC, as Defendants. (Ex. 13 to ECF No. 1.) Following removal to this court, Plaintiff Raines settled with Front Porch and filed the Second Amended Complaint ("SAC"), which added Plaintiff Figg and U.S. Healthworks, Inc., Select Medical Corporation, Concentra, Inc., and Concentra Primary Care of California as Defendants (ECF Nos. 58, 59, 69.) The Court granted Defendants' motion to dismiss the SAC and granted Plaintiff leave to file a TAC. (ECF No. 102.) Plaintiffs filed the TAC on August 6, 2020, adding Occupational Health Centers of California as a defendant. (ECF No. 106.) In the TAC, Plaintiffs Raines and Figg claim, individually and

on behalf of all putative class members, USHW's medical examinations (1) violated the California Fair Employment and Housing Act ("FEHA"), Cal. Gov't Code § 12940, *et seq.*; (2) violated the Unruh Civil Rights Act ("Unruh" or "Unruh Act"), Cal. Civ. Code § 51, *et seq.*, (3) intruded on Plaintiffs' seclusion; and (4) violated the California Business & Professions Code, Cal. Bus. & Prof. Code § 17200, *et seq.* ("UCL"). Plaintiffs seek injunctive relief, compensatory damages, punitive damages, and attorneys' fees and costs. USHW now moves to dismiss Plaintiffs' TAC.

II.
LEGAL STANDARD

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. Fed. R. Civ. P. 12(b)(6); *Navarro v. Block*, 250 F.3d 729, 731 (9th Cir. 2001). In deciding a motion to dismiss, all material factual allegations of the complaint are accepted as true, as well as all reasonable inferences to be drawn from them. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 338 (9th Cir. 1996). A court, however, need not accept all conclusory allegations as true. Rather it must "examine whether conclusory allegations follow from the description of facts as alleged by the plaintiff." *Holden v. Hagopian*, 978 F.3d 1115, 1121 (9th Cir. 1992) (citation omitted). A motion to dismiss should be granted if a plaintiff's complaint fails to contain "enough facts to state a claim to relief that is plausible." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556).

III.
DISCUSSION

In their TAC, Plaintiffs allege USHW's medical examination health history questionnaire asked intrusive and overbroad questions in violation of California state law. Specifically, Plaintiffs allege USHW's questions violated the FEHA, Unruh Act, and UCL,

and amounted to an invasion of privacy by "intrusion upon seclusion." USHW contends Plaintiffs' FEHA claim must fail because FEHA liability does not extend to USHW, Plaintiffs' Unruh Act claim must fail because Plaintiffs did not suffer discriminatory conduct, and Plaintiffs do not allege facts sufficient to establish a reasonable expectation of privacy with respect to their claim for intrusion upon seclusion. Moreover, USHW argues that because Plaintiffs' UCL is derivative of Plaintiffs' other causes of action, it must also fail. The Court addresses these arguments in turn.

A. Plaintiffs Do Not Adequately Plead A FEHA Claim

Plaintiffs allege Defendants required putative class members to answer impermissible questions, or questions that were not related to and inconsistent with their prospective jobs, in violation of FEHA, Cal. Gov't Code § 12940 *et seq*. Plaintiffs predicate USHW's liability on its alleged status as an agent of Plaintiffs' employers. USHW argues Plaintiffs fail to adequately allege agency, and even if USHW were an agent of Plaintiffs' employers, FEHA does not provide a path for liability against agents.

FEHA establishes "a civil right to be free from job discrimination based on certain classifications including . . . race, religious creed, color, national origin, ancestry, physical disability, medical condition, marital status, and sex." *Vernon v. State of California*, 10 Cal. Rptr. 3d 121, 127 (Cal. Ct. App. 2004) (internal quotation marks omitted). Although FEHA provides that an employer "may require a medical or physical examination . . . of a job applicant after an employment offer has been made," it requires the examination to be tailored to the specific employment position offered and "consistent with business necessity." Cal. Gov't Code § 12940(e)(3); *see also Rodriguez v. Walt Disney Parks & Resorts U.S., Inc.*, 2018 WL 3201853, at *4 (C.D. Cal. June 14, 2018) (noting FEHA regulations "require tailoring for medical inquires, stating that an inquiry is job-related if it is tailored to assess the employee's ability to carry out the essential functions of the job") (internal quotation marks omitted).

FEHA predicates liability for employment discrimination on the status of the defendant as the claimant's employer. *See* Cal. Gov't Code § 12940(e)(3) ("An employer

or employment agency may require . . . ."); *see also Vernon*, 116 Cal. App. 4th at 126 (noting that FEHA prohibits only an employer from engaging in discrimination). An employer is defined as "any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly." Cal. Gov't Code § 12926(d).

USHW did not at any point directly employ Plaintiffs. Rather, Plaintiffs allege USHW acted as an agent of Plaintiffs' employers when it conducted the medical examinations at issue, and thus USHW is liable under FEHA. "An agent is one who represents another, called the principal, in dealings with third persons." Cal. Civ. Code § 2295. An agent "must have authority to act on behalf of the principal and '[t]he person represented [must have] a right to control the actions of the agent.' " *Mavrix Photographs, LLC v. Livejournal, Inc.*, 873 F.3d 1045, 1054 (9th Cir. 2017) (quoting Restatement (Third) of Agency § 1.01, cmt. c (2006)). Although the existence of an agency relationship is a question of fact typically resolved at the summary judgment stage or by a jury, *see Banks v. N. Trust Corp.*, 929 F.3d 1046, 1054 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 1243, 206 L. Ed. 2d 240 (2020) (citing *Rookard v. Mexicoach*, 680 F.2d 1257, 1261 (9th Cir. 1982)), the party claiming its existence must still adequately plead the grounds for the relationship. "To sufficiently plead an agency relationship, a plaintiff must allege facts demonstrating the principal's control over its agent." *Buchanan v. Neighbors Van Lines*, No. CV 10-6206 PSG (RCX), 2011 WL 13217383, at *2 (C.D. Cal. Mar. 15, 2011) (citing *Sonora Diamond Corp. v. Superior Court*, 83 Cal. App. 4th 523, 541, 99 Cal. Rptr. 2d 824 (Cal. Ct. App. 2000)).

In the TAC, Plaintiffs have cured the deficiencies of the SAC with respect to the agency allegations. Plaintiffs allege Plaintiffs' prospective employers delegated to USHW the decision to withhold employment from Plaintiffs, and that Plaintiffs' prospective employers controlled USHW's administration of exams by providing particular requirements and approving forms. (TAC ¶¶ 30–32.) The TAC pleads specific facts regarding the alleged relationship that go beyond conclusory allegations. *Cf. Langer v.*

Badger Co., LLC, No. 18CV934-LAB (AGS), 2020 WL 759312, at *1 (S.D. Cal. Feb. 14, 2020) (conclusory allegations of agency are insufficient) (citing *Williams v. Yamaha Motor Co. Ltd.*, 851 F.3d 1015, 1025 n.5 (9th Cir. 2017)). Plaintiffs have sufficiently pled that USHW was an agent of Plaintiffs' prospective employers to survive the motion to dismiss.

However, even assuming USHW is an agent of Plaintiffs' employers, the issue of liability remains. USHW contends agents may not be held liable separately from their employer-principals under FEHA. Although agents are included in FEHA's definition of "employer," Cal. Gov't Code § 12926(d), USHW argues this inclusion simply ensures employers will be liable for agents' actions, rather than imposing liability on the agents themselves, relying on *Reno v. Baird*, 957 P.2d 1333 (Cal. 1998), and *Janken v. GM Hughes Electronics*, 53 Cal. Rptr. 2d 741 (Cal. Ct. App. 1996).

In *Janken*, the California Court of Appeals held individual supervisory employees could not be liable under FEHA for discrimination, stating "by the inclusion of the 'agent' language the Legislature intended only to ensure that *employers* will be held liable if their supervisory employees take actions later found discriminatory, and that *employers* cannot avoid liability by arguing that a supervisor failed to follow instructions." 53 Cal. Rptr 2d at 747–48. (emphasis in original); *see id.* (citing similar conclusions by courts interpreting analogous federal statutes). The California Supreme Court in *Reno* agreed with *Janken*, concluding "individuals who do not themselves qualify as employers may not be sued under the FEHA for alleged discriminatory acts." 957 P.2d at 1347. USHW argues agents are not themselves liable under FEHA and thus any remedy is against the direct employer, not USHW as the direct employer's agent.

Plaintiffs contend these cases do not foreclose liability because unlike the defendants in *Janken* and *Reno*, USHW is a business entity, not an individual supervisor. Plaintiffs point to the language of the statute, FEHA's remedial purpose, and case law under other employment discrimination statutes to argue the "agent" provision creates liability for agents themselves.

Plaintiffs are correct that the cases cited by Defendants address only the question of whether an individual supervisory employee is liable under FEHA. In *Reno*, the California Supreme Court emphasized: "The issue in this case is *individual* liability for discrimination. Therefore, we express no opinion on the scope of *employer* liability under the FEHA . . . ." 957 P.2d at 1344.

Nevertheless, the broader reasoning of these cases is persuasive. In *Janken*, the court found the "agent" language "was not intended to expose individual, *non-employer*, supervisory employees to personal liability on discrimination claims." 53 Cal. Rptr. 2d at 748 (emphasis added). It stated: "The 'clear and growing consensus' of courts which have considered the effect of such 'agent' language . . . is that this language was intended *only* to ensure that employers would be held liable for discrimination by their supervisory employees." *Id.* (emphasis added). In other words, the purpose of FEHA's "agent" language, Cal. Gov't Code § 12926(d), is to hold *employers*—the entities which actually employ individuals—liable for discriminatory actions of their agents. Applying this reasoning, FEHA liability would not extend to USHW as an agent, regardless of whether it is a large business or an individual supervisor.

Certainly, some of the policy reasons articulated by the California courts in *Janken* and *Reno* are less applicable here. There, the courts were concerned with the burden that personal liability would impose on individuals. *See Reno*, 957 P.2d at 1347 ("By limiting the threat of lawsuits to the employer itself, the entity ultimately responsible for discriminatory actions, the Legislature has drawn a balance between the goals of eliminating discrimination in the workplace and minimizing the debilitating burden of litigation on individuals."); *Janken*, 53 Cal. Rptr. 2d at 744 ("[T]he statutory language here in question was not intended to place individual supervisory employees at risk of personal liability for performing the job of making personnel decisions."). The *Janken* court cited FEHA's exemption for small employers as evidence that the Legislature did not intend to extend liability to individual supervisors. 53 Cal. Rptr. 2d at 751 ("The Legislature clearly intended to protect employers of less than five from the burdens of litigating discrimination

claims … We agree that it is 'inconceivable' that the Legislature simultaneously intended to subject individual nonemployers to the burdens of litigating such claims.") Here, by contrast, because USHW is a large business entity, there is no threat of burdening an individual with liability.

However, other policy reasons counsel limiting liability in the present circumstances. Indeed, as the Court previously noted, the cases are concerned broadly with constraining the application of FEHA to direct employers. *See Jones v. Lodge at Torrey Pines P'ship*, 177 P.3d 232, 42 Cal. 4th 1158, 1173 (Cal. 2008) (holding employer may be liable for retaliation under FEHA, "but nonemployer individual may not be held personally liable for their role in that retaliation"); *Reno*, 957 P.2d at 1348; *Janken*, 53 Cal. Rptr. 2d at 748. As Defendants point out, there do not appear to be any cases where a court found a separate business liable as an employer's agent under FEHA. The Court finds the burden of complying with FEHA is properly placed on the direct employer, not on USHW or other agents. USHW conducts pre-placement medical examinations for thousands of employers. Those employers are the entities who best know what the relevant job qualifications are, which qualifications may vary considerably from position to position. It is the employers' responsibility to tailor medical questions to comply with FEHA—or if they hire a third-party entity such as USHW to administer the questions, to instruct that entity to ask the appropriate questions.

FEHA's intent is "to provide effective remedies that will both prevent and deter unlawful employment practices." Cal. Gov't Code § 12920.5; *see Harris v. City of Santa Monica*, 294 P.3d 49, 59–60 (Cal. 2013) (discussing purposes of FEHA). Allowing employers to evade liability by outsourcing placement examinations to a third party would be inconsistent with these purposes. Each of Plaintiffs' prospective employers is "the entity ultimately responsible for discriminatory actions." *Reno*, 957 P.2d at 1347; *see, e.g.*, *Rodriguez*, 2018 WL 3201853, at *5 (holding employer Disney's medical questions were not appropriately narrowly tailored to business necessity and job-related purposes under FEHA). The fact that "the employer is liable via the respondeat superior effect of the

'agent' language provides protection to employees even if [the agents] are not personally liable." *Janken*, 53 Cal. Rptr. 2d at 754.

Accordingly, the Court concludes USHW may not be held liable as an agent of Plaintiffs' employers as a matter of law under FEHA. Plaintiffs' FEHA claim is therefore dismissed.

B. Plaintiffs Do Not Adequately Plead An Unruh Violation

Next, Plaintiffs allege the questions asked during their medical examinations sought "information about protected characteristics" and were "based upon [Plaintiffs'] perceived protected characteristics." (TAC ¶ 86). Plaintiffs allege this constitutes discrimination in violation of the Unruh Act.

The Unruh Act guarantees all persons in California, regardless of sex or disability, "the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." Cal. Civ. Code § 51(b). The California Supreme Court has "consistently held that "[Unruh] must be construed liberally in order to carry out its purpose." *White v. Square, Inc.*, 446 P.3d 276, 279 (Cal. 2019) (citing *Angelucci v. Century Supper Club*, 158 P.3d 718, 721 (Cal. 2007)). At the same time, courts "have acknowledged that 'a plaintiff cannot sue for discrimination in the abstract, but must actually suffer the discriminatory conduct.' " *Id.* (citing *Angelucci*, 158 P.3d at 726). More specifically, "the plaintiff must be able to allege injury—that is, some invasion of the plaintiff's legally protected interests." *Angelucci*, 158 P.3d at 726–27 (internal quotation marks omitted). Furthermore, Unruh "has no application to employment discrimination." *Rojo v. Kliger*, 801 P.2d 373, 380 (Cal. 1990) (citing *Alcorn v. Anbro Engineering, Inc.*, 468 P.2d 216, 219–20 (Cal. 1970)); *see also Isbister v. Boys' Club of Santa Cruz, Inc.*, 707 P.2d 212, 219 n.12 (Cal. 1985) (noting that Unruh does not cover discrimination within "the employer-employee relationship"). Instead, Unruh's application is confined to discrimination against recipients of a business establishment's goods, services, or facilities. *See Isbister*, 707 P.2d at 219.

Plaintiffs state their Unruh claim is not predicated on an employment relationship between Plaintiffs and USHW. (TAC ¶ 87.) Rather, Plaintiffs contend their Unruh claim is pled in the alternative to Plaintiffs' FEHA claim. In other words, Plaintiffs allege that if USHW is not subject to FEHA, it falls under the Unruh Act's statutory definition of a "business establishment" providing services to Plaintiffs. Plaintiffs allege that for the purposes of their Unruh claim, USHW is a business establishment and they are its patrons or customers. (TAC ¶¶ 87–88.) A business establishment that provides employment-related services is not exempt from Unruh, *see Alch v. Superior Court*, 19 Cal. Rptr. 3d 29, 68–72 (Cal. Ct. App. 2004), and "medical practices and physician services" are considered business establishments, *Leach v. Drummond Med. Grp., Inc.*, 192 Cal. Rptr. 650, 655 (Cal. Ct. App. 1983).

In the TAC, Plaintiffs allege USHW's health history questionnaire is discriminatory because it requires potential employees to answer gender- and disability-based questions.[2] (TAC ¶ 89.) USHW contends the same questionnaire and examination was given to all applicants, there was no denial of accommodations or services, and the practice was therefore not discriminatory.

The Unruh Act "does not extend to practices and policies that apply equally to all persons." *Turner v. Ass'n of Am. Med. Colleges*, 85 Cal. Rptr. 3d 94, 100 (Cal. Ct. App. 2008); *see* Cal. Civ. Code § 51(c). "A policy that is neutral on its face is not actionable under the Unruh Act." *Turner*, 85 Cal. Rptr. 3d at 100. However, a policy that purports to apply to all patrons but creates a denial of service to certain protected classes may be

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[2] Plaintiffs correctly assert that being confronted with a discriminatory form may suffice to establish Unruh Act standing. *See White*, 446 P.3d at 284 (holding a person who visits a business's website intending to use its services and encounters discriminatory terms or conditions denying full and equal access has standing to sue under Unruh Act). However, Plaintiffs still must allege how the form denied them equal access to accommodations or services. For instance, in *White*, defendant Square, Inc.'s terms of service excluded a particular class of individuals from using its payment services. *Id.* at 278. The court thus found this was a denial of access to those services. *Id.*

discriminatory. *See Hankins v. El Torito Restaurants, Inc.*, 74 Cal. Rptr. 2d 684, 689 (Cal. Ct. App. 1998).[3]

Here, although all applicants received the same questionnaire, Plaintiffs allege the questionnaire had segregated boxes with certain questions labeled "For Men Only" and "For Women Only" (TAC ¶ 89a.) Plaintiffs claim by requiring women to respond to the questions marked "For Women Only," and not requiring men to do the same, USHW discriminated against every woman applicant, and vice versa by requiring men to respond to the questions marked "For Men Only." Similarly, Plaintiffs claim requiring applicants to answer questions about potential disabilities constitutes discrimination based on perceived disability. Plaintiffs allege that in asking these impermissible questions, USHW deprived them of services under the Unruh Act. Specifically, Plaintiffs allege USHW deprived them of a "discrimination-free" examination. (*Id.* ¶ 89.)

Plaintiffs' logic is circular. Plaintiffs allege the questionnaire on its face is discriminatory,[4] but Plaintiffs do not explain how the allegedly impermissible questions denied them "full and equal access" to USHW's services, beyond claiming they are entitled to a "discrimination-free" exam. Not every medical exam will be identical, even in the context of a job placement exam, because inquiry and assessment will differ depending on

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[3] *Hankins* rejected the defendant's argument that its policy of denying customers access to an employee restroom was not discriminatory because it applied to all patrons. The court found the policy, when combined with the physical layout of defendant's premises, created a denial of service where non-disabled customers could use a restroom (located on the second floor), but physically disabled customers could not because they were prohibited from using the employee restroom on the first floor. 74 Cal. Rptr. 2d at 689.

[4] Plaintiffs plead that the harm in this case was being confronted with the questionnaire itself, and accordingly that all Class Members have standing regardless of whether or not they answered all the questions and regardless of whether or not they were deemed medically fit for employment. (TAC ¶ 90; *see id.* ¶ 63 ("The proposed Class is comprised of all applicants for employment in the State of California requested to respond to standardized Impermissible Non-Job-Related Questions at USHW within the Class Period.").)

the patient's own conditions or complaints. But this is not a denial of the service of the medical exam itself. Plaintiffs do not allege USHW excluded particular individuals from receiving an exam on the basis of protected characteristics, or that Plaintiffs received an inadequate exam. USHW contends it gave an exam with the same standardized questionnaire to all applicants, and Plaintiffs do not appear to dispute this. Plaintiffs fail to plead how any exam was not "full and equal" beyond the fact that the standardized questionnaire contained questions specific to different genders and asked about disabilities and other medical conditions.[5] The Court finds the questionnaire does not constitute a denial of services sufficient to sustain an Unruh Act claim.

The fact that certain questions complained of by Plaintiffs may have been irrelevant to the jobs for which Plaintiffs applied does not establish discrimination. Plaintiffs are unable to show USHW discriminated against them as customers by denying them full and equal access to its services, and thus fail to plead a viable Unruh Act claim. Accordingly, Plaintiffs' Unruh claim is dismissed.

C. Plaintiffs Do Not Adequately Plead Intrusion Upon Seclusion

Plaintiffs allege forcing applicants to disclose private, non-job-related information constitutes an intentional intrusion into seclusion. Plaintiffs allege they had "a reasonable expectation in the privacy of their personal, private and non-job-related health information," and USHW's questions intruded on this privacy because they would be considered "highly offensive to a reasonable person." (TAC ¶¶ 95, 104.) USHW contends Plaintiffs' claim must fail because USHW did not force anyone to take an exam and no reasonable person expects to shield all medical information during a medical examination.

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[5] As USHW notes, there is no authority for the proposition that the Unruh Act prohibits medical professionals from asking certain questions in a medical exam. Were the Court to adopt Plaintiffs' reasoning, this would render it nearly impossible for medical professionals to ever ask patients questions pertaining to gender or disability.

Intrusion upon seclusion is one of the four categories of the tort of invasion of privacy under California law. *See Cruz v. Nationwide Reconveyance, LLC*, No. 15cv2082, 2016 WL 127585, at *3 (S.D. Cal. Jan. 11, 2016). Under California law, an action for intrusion upon seclusion has two elements: "(1) intrusion into a private place, conversation or matter, (2) in a manner highly offensive to a reasonable person." *Shulman v. Grp. W Prods., Inc.*, 955 P.2d 469, 490 (Cal. 1998). Intrusion requires the plaintiff to have an "objectively reasonable expectation of seclusion or solitude in the place, conversation or data source" intruded upon. *Id.* "To prove actionable intrusion, the plaintiff must show the defendant penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, the plaintiff." *Id.* "If the undisputed material facts show no reasonable expectation of privacy or an insubstantial impact on privacy interests, the question of invasion may be adjudicated as a matter of law." *Deteresa v. Am. Broad. Cos., Inc.*, 121 F.3d 460, 465 (9th Cir. 1997) (quoting *Sanders v. Am. Broad. Cos.*, 60 Cal. Rptr. 2d 595, 598 (Cal. Ct. App. 1997)). The court must make a "preliminary determination of 'offensiveness' " in "discerning the existence of a cause of action for intrusion." *Id.* (citing *Miller v. Nat'l Broad. Co.*, 232 Cal. Rptr. 668, 678 (Cal. Ct. App. 1986)). Determining offensiveness "requires consideration of all the circumstances of the intrusion, including its degree and setting." *Shulman*, 955 P.2d at at 493.

Plaintiffs' TAC alleges additional facts in support of their claim. Plaintiffs allege that because the exam was solely for the purpose of obtaining a job, they had a reasonable expectation of privacy in information which was irrelevant to the job, such as venereal disease. Plaintiffs argue this reasonable expectation is supported by FEHA's requirement that pre-placement medical exams be narrowly tailored and job-related. Plaintiffs further allege they were required to sign a form authorizing USHW to disclose the applicant's private health information to the prospective employers or other entities, and if they did not sign this form or complete the health questionnaire, they would not be able to obtain the job. In sum, Plaintiffs contend USHW's exams were not routine medical exams, but involuntary, coercive, pre-placement exams for employment purposes, and thus USHW's

questions about personal, non-job-related information intruded upon their privacy in a manner highly offensive under the circumstances.

USHW's questions may have been uncomfortable and irrelevant to Plaintiffs' job functions, but Plaintiffs fail to establish that USHW's questioning was an actionable intrusion upon seclusion given the setting. In *Hill v. National Collegiate Athletic Association*, college athletes challenged a drug testing program in which they were asked specific questions about personal medications, including birth control. Rejecting the plaintiffs' challenge, the California Supreme Court stated the "extent of the intrusion on plaintiffs' privacy presented by the question[s]" must be considered in light of the fact that such questions are "routinely asked and answered in the athletic context." 865 P.2d at 666. *Hill* involved a state constitutional right to privacy claim, but the Court finds its reasoning persuasive here. Questions about personal health history are routinely asked in the context of a medical exam. USHW's questions were presented on a standardized questionnaire which was given to every applicant. While the examinations at issue here were for a specific purpose, the broader medical context remains relevant and indicates the questions were not so highly offensive as to constitute an intrusion upon seclusion.

Moreover, although Plaintiffs argue they were effectively forced to answer the questions and consent to disclosure of their information, Plaintiffs could refuse to answer the questions—as Plaintiff Raines did. The Court is not persuaded USHW intruded on Plaintiffs' privacy by simply asking each Plaintiff the unwelcome questions during a single examination.[6] Other cases suggest that if the alleged intrusion is the act of questioning,

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[6] The putative class includes all applicants who were confronted with the questions, including those who, like Plaintiff Raines herself, refused to disclose personal information. (*See* TAC ¶ 63 ("The proposed Class is comprised of all applicants for employment in the State of California requested to respond to standardized Impermissible Non-Job-Related Questions at USHW within the Class Period.") (emphasis added).) Plaintiffs cannot base their claim on a theory that USHW intruded by *obtaining* their personal information, because not all members of the putative class disclosed information. Accordingly, the

rather than the acquisition of private information, it likely must be persistent or repeated to rise to the level of intrusion upon seclusion. *See, e.g.*, *Chaconas v. JP Morgan Chase Bank*, 713 F. Supp. 2d 1180, 1185 (S.D. Cal. 2010) (denying defendant's motion to dismiss because allegations of 380 calls—at a rate of five to ten times per day—to collect a debt was sufficient to state a claim for intrusion upon seclusion); *In re Vizio, Inc., Consumer Privacy Litig.*, 238 F. Supp. 3d 1204, 1216 (C.D. Cal. 2017) (identifying as examples of actionable conduct "eavesdropping . . . , examining a person's private correspondence or records without consent, and making repeated telephone calls") (citing Restatement (Second) of Torts § 652B, cmts. b, c (1977)). Accordingly, frequent and harassing phone calls for someone's private medical information could potentially constitute an offensive intrusion, as could accessing such information without consent. But the Court finds a one-time inquiry in a clinical setting, where the patient can refuse to answer, as Plaintiff Raines did here, does not rise to a level of intrusion that is "highly offensive." The "highly offensive" element of intrusion upon seclusion indicates liability should not extend to an individual who simply asks another person about sensitive information.

Indeed, in the journalism context, "routine . . . reporting techniques, such as *asking questions* of people with information (including those with confidential or restricted information) could rarely, if ever, be deemed an actionable intrusion." *Shulman*, 955 P.2d at 494 (internal quotation marks omitted) (emphasis added). Such questioning stands in contrast to the "other extreme" of intrusions such as "trespass into a home or tapping a personal telephone line" which would be "rarely . . . justified." *Id.* Here, the Court finds USHW's questioning is more analogous to routine methods than to a type of intrusion which "would be deemed highly offensive even if the information sought was of weighty . . . concern." *Id.* Under all the circumstances, USHW's practice of asking its patients

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alleged intrusion is USHW's act of asking questions about private information unrelated to Plaintiffs' prospective jobs.

questions about private information in the context of a medical examination, without even necessarily obtaining that information, does not rise to the level of intrusion upon seclusion.[7] Plaintiffs' intrusion claim is therefore dismissed.

D. Plaintiffs Fail to Allege UCL Standing

Lastly, Plaintiffs allege USHW "committed unfair, unlawful, and/or fraudulent business practices" in violation of the UCL when USHW's medical professionals performed the pre-employment medical examinations. (TAC ¶ 110). USHW argues Plaintiffs' claim cannot survive because Plaintiffs lack standing, and their UCL claim lacks a predicate violation.

The UCL allows a court to enjoin any person who engages in "unfair competition," which "include[s] any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200. Here, Plaintiffs allege USHW's actions were both unlawful and unfair. First, the TAC re-alleges the SAC's claim of "unlawful" practices. Second, the TAC alleges USHW's conduct was "unfair" because it gave USHW an "illegal advantage in the marketplace," offended public policy regarding medical examinations, invaded Plaintiffs' right to privacy, and was otherwise "immoral, unscrupulous, unethical, oppressive, and substantially injurious." (TAC ¶¶ 112, 113.)

Under the UCL, an "unlawful" business practice "is an act or practice, committed pursuant to business activity, that is at the same time forbidden by law." *Martinez v. Welk Grp.*, 907 F. Supp. 2d 1123, 1139 (S.D. Cal. 2012). "The UCL borrows violations from virtually any state, federal, or local law" and makes them independently actionable. *Aguilar v. Boulder Brands, Inc.*, No. 12CV01862, 2013 WL 2481549, at *4 (S.D. Cal.

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[7] At least one court has held that similar questioning by an *employer*, let alone a medical professional, does not establish a claim for intrusion. *See Horgan v. Simmons*, 704 F. Supp. 2d 814, 821 (N.D. Ill. 2010) (holding supervisor's questioning of employee about employee's medical condition, including HIV status, is not actionable intrusion upon seclusion).

2013) (internal citations omitted). A practice that is unfair or fraudulent may also violate the UCL even if it is not prohibited by another statute. *Zhang v. Superior Court*, 304 P.3d 163, 167 (Cal. 2013).

Private standing under the UCL is "limited to those who have 'suffered injury in fact and [have] lost money or property as a result of . . . unfair competition.' " *Id.* at 168 (quoting Cal. Bus. & Prof. Code § 17204). To satisfy the UCL's standing requirements, a private plaintiff must "1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury,* and (2) show that that economic injury was the result of, i.e., *caused by,* the unfair business practice . . . that is the gravamen of the claim." *Kwikset Corp. v. Superior Court*, 246 P.3d 877, 885 (Cal. 2011) (emphasis in original).

Here, Plaintiffs' TAC alleges generally that Defendants' conduct "injured" Plaintiffs, and that "the general public, including all applicants, have suffered damages." (TAC ¶¶ 114, 17.) Plaintiffs' claim incorporates the remaining allegations of the TAC, including that Plaintiffs have suffered "pecuniary losses." (TAC ¶ 91.) However, Plaintiffs fail to plead how they have lost money or property as a result of USHW's alleged unfair business practice. The Court, therefore, finds that Plaintiffs have not demonstrated standing to pursue their claim against USHW for violation of the UCL.

Moreover, even assuming Plaintiffs have standing, to the extent Plaintiffs' TAC alleges a violation of the UCL's "unlawful" prong, these allegations are derivative of Plaintiffs' above claims. As discussed above, Plaintiffs fail to state a claim for violation of FEHA or the Unruh Act and fail to state a claim of intrusion upon seclusion. Accordingly, Plaintiffs fail to allege an act or practice that violates law for the purpose of their UCL claim of "unlawful" conduct.

Because Plaintiffs do not sufficiently allege facts to demonstrate UCL standing, Plaintiffs' UCL claim is dismissed.

/ / /

/ / /

E. Leave to Amend

Generally, leave to amend is granted "even if no request to amend the pleading was made, unless [the court] determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (internal citation omitted). Plaintiffs have now had three opportunities to amend their claims. The Court finds the allegation of additional facts will not cure the deficiencies in Plaintiffs' complaint with respect to their claims alleging violations of FEHA, violations of the Unruh Act, and intrusion upon seclusion. Accordingly, the Court declines to grant Plaintiffs leave to amend on these claims. However, the Court grants Plaintiffs leave to amend on their UCL claim.

IV.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss is granted. Counts 1, 2, and 3 are dismissed with prejudice. Count 4 is dismissed without prejudice. Plaintiffs may file a Fourth Amended Complaint within fourteen (14) days of this order.

IT IS SO ORDERED.

Dated: January 25, 2021

Hon. Dana M. Sabraw, Chief Judge
United States District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

KRISTINA RAINES and DARRICK FIGG, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

U.S. HEALTHWORKS MEDICAL GROUP, et al.,

Defendants.

Case No.: 19-cv-01539-DMS-DEB

ORDER DISMISSING PLAINTIFFS' FOURTH CAUSE OF ACTION

Pending before the Court is Plaintiffs' *ex parte* application for an order dismissing the fourth cause of action in the Third Amended Complaint with prejudice.

On January 25, 2021, the Court granted Defendants' motion to dismiss Plaintiffs' Third Amended Complaint ("TAC"). (ECF No. 114.) The Court dismissed Counts One, Two, and Three with prejudice and dismissed Count Four without prejudice, granting Plaintiffs fourteen (14) days' leave to amend. The time for Plaintiffs to file a Fourth Amended Complaint has since expired.

On February 26, 2021, Plaintiffs filed the present application, stating they do not elect to file a Fourth Amended Complaint, but rather intend to appeal the Court's dismissal of the TAC. (ECF No. 115.)

In the Ninth Circuit, an order dismissing a complaint with leave to amend is not a final order for purposes of appeal. *WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136–37 (9th Cir. 1997) (en banc). "Unless a plaintiff files in writing a notice of intent not to file an amended complaint, [a dismissal order with leave to amend] is not an appealable final decision." *Lopez v. City of Needles*, 95 F.3d 20, 22 (9th Cir. 1996). Here, the filing of such a notice of intent "gives the district court an opportunity to . . . to enter an order dismissing the action, one that is clearly appealable." *Id.* Plaintiffs request the Court dismiss Count Four with prejudice to permit an appeal. (ECF No. 115 at 2.)

Accordingly, Plaintiffs having submitted written notice of their intent not to file an amended complaint and request for dismissal, the Court GRANTS Plaintiffs' request and DISMISSES Plaintiffs' fourth cause of action in the TAC with prejudice, pursuant to the reasoning in the January 25, 2021 Order.

IT IS SO ORDERED.

Dated: March 2, 2021

Hon. Dana M. Sabraw, Chief Judge
United States District Court

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NICHOLAS A. CARLIN (State Bar No. 112532)
BRIAN S. CONLON (State Bar No. 303456)
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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

KRISTINA RAINES and DARRICK FIGG, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

U.S. HEALTHWORKS MEDICAL GROUP, a corporation, et al.

Defendants.

Case No: 19CV1539-DMS-DEB

PLAINTIFFS' *EX PARTE* APPLICATION TO DISMISS FOURTH CAUSE OF ACTION IN THE THIRD AMENDED COMPLAINT WITH PREJUDICE

Judge: Hon. Dana M. Sabraw

PHILLIPS, ERLEWINE, GIVEN & CARLIN LLP
39 Mesa Street, Suite 201 – The Presidio
San Francisco, CA 94129
Telephone: (415) 398-0900

APPLICATION

Plaintiffs Kristina Raines and Darrick Figg hereby seek an order dismissing the Fourth Cause of Action in the Third Amended Complaint with prejudice. On January 25, 2021, the court granted Defendants' motion to dismiss the Third Amended Complaint. (ECF No. 114.) The court granted the motion without leave to amend as to Plaintiffs' First, Second and Third Causes of Action and dismissed those counts with prejudice. The court dismissed the Fourth Cause of Action without prejudice and granted Plaintiffs 14 days leave to file a Fourth Amended Complaint to amend the Fourth Cause of Action. (Order, at p. 19.)

Plaintiffs have elected not to file a Fourth Amended Complaint and intend to appeal the court's dismissal of the Third Amended Complaint. As such, Plaintiffs request that the court now dismiss the Fourth Cause of Action with prejudice to permit an appeal. *WMX Techs. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc).

This Application is made pursuant to Local Rules 7.1.e.5. and 83.2.g. and F.R.C.P. Rule 12(b)(6).

This Application is based upon this Application, the attached Memorandum of Points and Authorities and Declaration of Counsel, all pleadings and papers on file in this action, and any other matters of which the Court may take notice or that may be presented.

Dated: February 26, 2021 PHILLIPS, ERLEWINE, GIVEN & CARLIN LLP

By /s/ R. Scott Erlewine
R. Scott Erlewine
Attorneys for Plaintiffs

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Attorneys for Plaintiff Kristina Raines

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

KRISTINA RAINES and DARRICK FIGG, individually and on behalf of all others similarly situated,

Plaintiff,

v.

U.S. HEALTHWORKS MEDICAL GROUP, a corporation; U.S. HEALTHWORKS, INC., a corporation; SELECT MEDICAL HOLDINGS CORPORATION, a corporation; SELECT MEDICAL CORPORATION, a corporation; CONCENTRA GROUP HOLDINGS, LLC, a corporation; CONCENTRA, INC., a corporation; CONCENTRA PRIMARY CARE OF CALIFORNIA, a medical corporation; and DOES 4 and 8 through 10, inclusive,

Defendants.

Case No: 19CV1539-DMS-MSB

DECLARATION OF COUNSEL IN SUPPORT OF OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND STRIKE

Date: October 30, 2020
Time: 1:30 p.m.
Judge: Hon. Dana M. Sabraw

Complaint Filed October 23, 2018
Third Amended Complaint Filed Aug. 6, 2020

R. Scott Erlewine declares:

1. I am a partner with Phillips, Erlewine, Given & Carlin LLP, co-counsel for Plaintiffs in this action. The facts set forth in this Declaration are based upon my personal knowledge, except where stated to be on information and belief, and as to those facts, I believe them to be true.

2. On February 18 and March 6, 2020, I attended and took the deposition of defendant U.S. Healthworks Prof. Corp. ("USHW") pursuant to F.R.C.P. Rule 30(b)(6). USHW designated its former Vice President of Medical, West Division (Dr. Minh Nguyen) to testify on all designated topics. Dr. Minh is now Vice President of Medical Operations – Pacific at Concentra. Attached hereto as Exhibit A are true and correct copies of portions of USHW's deposition testimony and specified exhibits thereto. For purposes of this motion, my office redacted Exhibit 4 to shield the handwritten medical information provided by Ms. Raines to protect her privacy rights

3. We intend to present expert testimony that a number of questions on USHW's Health History Questionnaire form (Exhibit 4 to USHW deposition) are not relevant and/or consistent with business necessity for *any* job position.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: October 9, 2020

/s/ R. Scott Erlewine
R. Scott Erlewine

PHILLIPS, ERLEWINE, GIVEN & CARLIN LLP
39 Mesa Street, Suite 201 – The Presidio
San Francisco, CA 94129
Telephone: (415) 398-0900

EXHIBIT A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

KRISTINA RAINES, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

FRONT PORCH COMMUNITIES AND SERVICES, a corporation; U.S. HEALTHWORKS MEDICAL GROUP, a corporation; SELECT MEDICAL HOLDINGS CORPORATION, a corporation; CONCENTRA GROUP HOLDINGS, LLC, a corporation; and DOES 3 through 10, inclusive,

Defendants.

Case No: 19CV1539-DMS-MSB

CERTIFIED COPY

VIDEOTAPED DEPOSITION OF

MINH Q. NGUYEN, DO

Tuesday, February 18, 2020

VOLUME I

Taken at San Diego, California

Reported by Kathleen Shelburne, CSR
Certificate No. 7227

NOGARA REPORTING SERVICE
5 Third Street, Suite 415
San Francisco, California 94103
(415) 398-1889

THE VIDEOGRAPHER: The reporter today is Kathy Shelburne, and she will now swear in the witness.

MINH Q. NGUYEN, DO,

Called as a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. ERLEWINE:

Q. Good morning.

A. Good morning.

Q. We're here to take the deposition of the Person Most Knowledgeable of the United States HealthWorks Medical Group, and are you the designee for today's deposition?

A. I am.

Q. So it appears after Regional Medical Director your next position was Vice President of Medical West Division; is that correct?

A. That is correct.

Q. And that was between January of 2014 until the -- February 2018, the Concentra acquisition; is that correct?

A. Correct.

Q. And who were you employed by as the Vice

President of Medical West Division?

A. By U.S. HealthWorks Medical Group Professional Corp.

Can you identify Exhibit 3 as the -- the Employment Exam Health History form that was used by U.S. HealthWorks between October of 2014 and the -- sometime in 2018 when the Concentra acquisition occurred?

A. Yes.

Q. And in your vernacular how do you -- what terminology do you give to this form?

A. This is the Health History form.

(Exhibit 4 was marked for identification by the certified court reporter.)

BY MR. ERLEWINE:

Q. So I've had marked as Exhibit 4 a document also produced by U.S. HealthWorks.

This appears to be the -- I'll represent to you this is the form that was used in our client's

examination, but this form has a -- another question on it, 25.

A. Okay.

Q. So the form looks to be completely the same except for the form that our client was given had another question, Number 25, do you see that?

A. I do.

Q. Okay. And would you agree with me that these two forms are the same except for the addition of question 25?

A. I agree.

Q. So apart from the addition of Exhibit 25 --

I'm sorry, of question 25, are these the two forms that were used as the Health History forms for all preplacement examinations during the period of October of 2014 through sometime in 2018 when Concentra took over?

A. Yes, I believe so.

Q. Okay. And am I correct that every preplacement examination that was given between October of 2014 and sometime in 2018 when Concentra took over the facilities, every patient had to fill out one of these Health History forms?

A. That's correct.

Q. So do you know between October of 2014 and -- let me ask this: As far as the discontinuance of this Health History form, which is Exhibit 3 and 4, what dates were these discontinued?

A. When the clinic converted to Concentra clinics.

Q. Okay. And were those all in 2018?

A. No, they were in 2019.

Q. Okay. So you said that on the Health History form, which is Exhibits 3 and 4, everybody had to fill this out?

A. Correct.

Q. Would you agree that you're required to tailor the medical questions that are given to a pre-placement examination?

A. No.

MS. SANTA MARIA: Vague.

BY MR. ERLEWINE:

Q. To the job position?

A. No.

Q. Why is that?

MS. SANTA MARIA: Calls for a legal conclusion.

THE WITNESS: Because in order for me to determine if somebody's fit to do the essential job function I need to know everything about their health history to determine if it's relevant to their ability to do that job or not.

Q. Do you consider the people who you exam for preplacement examinations to be your patients?

A. We establish a doctor-patient relationship.

Q. Is that a yes?

A. Yes.

Q. So your view -- your view is that there is a doctor-patient relationship, correct, with these people that are there for preplacement exams?

A. Yes.

Q. Have you ever notified an employer that the person was not medically -- was only medically acceptable if -- well, how could you -- how could you find somebody medically acceptable if you thought they had a mental illness that precluded their doing the job?

MS. SANTA MARIA: Vague. And incomplete hypothetical.

THE WITNESS: What I would do is ask for more medical information from their personal doctor, and then make the determine. If their -- they've been -- they've had -- they've been diagnosed with a mental illness for a long period of time, they're stable on their medication, there's no concern from their psychologist or psychiatrist, then they're safe to do the job.

But if their medications are having -- they have side effects from their medications, they may not be safe to do the job.

Q. Okay. So what would you advise the employer?

MS. SANTA MARIA: Incomplete hypothetical.

THE WITNESS: So what I would do is, if they have such a history I would tell the employer that the person is on what I call medical hold until

I can get further medical information.

Based on that medical information, then I may allow them to do their essential job function or not.

BY MR. ERLEWINE:

Q. What if you find out they're not able to do it?

A. Then I would -- so until their condition gets stable, they would stay on medical hold until that I know it's safe for them to do that job.

Q. How long could that be?

MS. SANTA MARIA: Calls for speculation. Incomplete hypothetical.

THE WITNESS: It depends on how soon I can get the information that I need to make that determination.

BY MR. ERLEWINE:

Q. And what if you find out that the person is not responding to medication, they just have a mental illness. They are not stable?

A. Then -- then I need to continue to get information from their doctor until that situation -- their condition is well controlled.

Q. What's the longest you put somebody on a medical hold in a preplacement environment?

A. I could be a year. It could be longer. It Depends. And then --

Q. Have you done that?

A. Yes, I have.

DECLARATION UNDER PENALTY Of PERJURY

I, MINH Q. NGUYEN, declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct; that I have read my deposition and have made the necessary corrections, additions, or changes to my answers that I deem necessary.

Executed on this ____ day of _____, 2020, at

_____, _____.

(City) (State)

_____

MINH Q. NGUYEN

STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

I, KATHLEEN SHELBURNE, Certified Shorthand Reporter, in and for the State of California, Certificate Number 7227, do hereby certify:

That the witness in the foregoing deposition was by me first duly sworn to testify to the truth; that said deposition was reported by me in shorthand and transcribed, through computer-aided transcription, under my direction; and that the above and foregoing pages are a true record of the testimony elicited and proceedings had at said deposition.

I do further certify that I am a disinterested person and am in no way interested in the outcome of this action or connected with or related to any of the parties in this action or to their respective counsel.

In witness whereof, I have hereunto set my hand this 28th day of March, 2020.

KATHLEEN SHELBURNE, CSR NO. 7227

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

KRISTINA RAINES, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

Case No: 19CV1539-DMS-MSB

CERTIFIED COPY

FRONT PORCH COMMUNITIES AND SERVICES, a corporation; U.S. HEALTHWORKS MEDICAL GROUP, a corporation; SELECT MEDICAL HOLDINGS CORPORATION, a corporation; CONCENTRA GROUP HOLDINGS, LLC, a corporation; and DOES 3 through 10, inclusive,

Defendants.

_____/

VIDEOTAPED DEPOSITION OF

MINH Q. NGUYEN, DO

Friday, March 6, 2020

VOLUME II

Taken at San Diego, California

Reported by Kathleen Shelburne, CSR
Certificate No. 7227

NOGARA REPORTING SERVICE
5 Third Street, Suite 415
San Francisco, California 94103
(415) 398-1889

(Exhibit 25 was marked for identification by the certified court reporter.)

BY MR. ERLEWINE:

Q. I've had marked as Exhibit 26, can you identify this as the Medical Examiner Recommendations form you just testified about?

A. Yes, but it's marked as 25.

Q. 25. Thank you.

And was this form filled out by the physician that saw the applicant? Was that the practice?

A. It may or may not be filled out by the clinician, not always.

Q. And what other persons sometimes filled this out?

A. So it would be our staff but reviewed by our clinician, but it may not be the same clinician that saw the person.

Q. All right. Would it be another physician or a non-physician?

A. It's depends.

Q. All right. What does it depend on?

A. Who's available.

Q. All right. So the form, it has -- it says, "Considering any job-related information provided to me by the employer, either before or upon my request during the course of my evaluation, it is my opinion, that based on the results of the," Number 1, "Physical Examination," Number 2, "Physical Agility Testing."

Do you see that?

A. I do.

Q. All right. What goes in the -- what would fall within the third category, which is "Other," what would fall within that category?

A. Treadmill test; other parts of the exam; PPD; drug screens.

Q. And it goes on to state, "The aforementioned individual is," and then it has four boxes that can be checked.

The first is, "Medically acceptable for the position offered." What does that mean?

A. The document speaks for itself, medically acceptable for the position offered.

Q. Okay. And the second box is, says, "Medically acceptable for the position offered, except that a condition exists which limits work as follows," and what -- what type of information goes in there?

A. Whatever limitations that may be pertinent to that individual.

Q. Okay. Can you give me some examples of limitations that would go in that box?

A. They may be restricted to a certain weight limit in terms of lift, pull, push. Standing for a certain amount of hours, bending, stooping, any

functional type of activities.

Q. Would there be an indication of the -- what medical condition led to the restriction?

A. No.

Q. Would there be an indication in here that the applicant may -- may be at increased risk in doing the job from a health standpoint?

A. No.

Q. And then the third box says, "Placed on medical hold pending," and what -- what goes in this box?

A. What is the pending item? Medical records, for instance. They need to go see their primary care physician to address something.

Q. What else?

A. Whatever is the rational for the medical hold.

Q. What other rash -- what other rationals are there for medical hold?

A. They may need to go see their doctor, and then come back for a reevaluation. They may -- if they were -- they may be pending surgery, and we won't see them until after they recover from their surgery.

Q. And what else?

A. Other reasons for medical hold, waiting for -- besides medical record, maybe they had a prior work-related injury, and we may need to get those records.

Q. What else?

A. Those are the common reasons I can think of.

Q. In the -- you testified concerning the process for conducting preplacement exams.

When in that process, that is, when the patient first arrived at the facility and through the time that they left, when is it that U.S. HealthWorks reviewed the job description?

MS. SANTA MARIA: Calls for speculation. Incomplete hypothetical.

THE WITNESS: It depends if the job description may come with the applicant at the time. It may be printed up by the front office when they check the person in, or they may not have a job description all the time.

BY MR. ERLEWINE:

Q. Okay. And assuming they had a job

description, or it was printed out when they got there, who would review that?

MS. SANTA MARIA: Calls for speculation.

THE WITNESS: It would be the physician in general.

BY MR. ERLEWINE:

Q. All right. Would anybody else review that besides a physician?

A. I wouldn't know if other people would review it, but the clinician should.

Q. What was the purpose of the physician reviewing the job description?

A. To know what the central job functions are.

Q. And you said sometimes the -- there would be no job description?

A. We don't always have a job description; that's correct.

Q. Okay. What would happen when there was no job description?

MS. SANTA MARIA: Vague.

BY MR. ERLEWINE:

Q. Yeah. What -- how would the physician assist whether there was a -- what the essential function of the job without a job description?

A. Usually the applicant would tell us what

kind of job they would be applying for and if we -- most of the time, if it's a general category we have a pretty good idea of what those essential job functions are.

Q. And you say the doctors -- the doctors have a good idea; is that correct?

A. The occupational physicians, yes, you do.

Q. And how -- where do they gain that knowledge?

A. In their experience.

Q. And do they go out and see employers, or how do they get that experience?

A. At times we go to employer site, yes.

Q. And how often do you go to the employer site?

A. Me, personally, or -- I can't talk about other clinicians, but when I was practicing maybe half a dozen times a year.

Q. And what was your purpose of going to the employer sites?

A. To get a better understanding of their -- what they do.

DECLARATION UNDER PENALTY Of PERJURY

I, MINH Q. NGUYEN, DO, declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct; that I have read my deposition and have made the necessary corrections, additions, or changes to my answers that I deem necessary.

Executed on this _____ day of _____,2020,

At _____,_____.
(City) (State)

_____
MINH Q. NGUYEN, DO

STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

I, KATHLEEN SHELBURNE, Certified Shorthand Reporter, in and for the State of California, Certificate Number 7227, do hereby certify:

That the witness in the foregoing deposition was by me first duly sworn to testify to the truth; that said deposition was reported by me in shorthand and transcribed, through computer-aided transcription, under my direction; that above and foregoing pages are a true record of the testimony elicited and proceedings had at said deposition.

The dismantling, unsealing, or unbinding of the original transcript will render the reporter's certificate null and void.

I do a disinterested person and am in no way interested in the outcome of this action or connected with or related to any of the parties in this action or to their respective counsel.

In witness whereof, I have hereunto set my hand this 7th day of April, 2020.

KATHLEEN SHELBURNE, CSR NO. 7227

WITNESS: Nguyen, V.T.
DATE: 7/19/20 ptr: KS

US HealthWorks MEDICAL GROUP
A Dignity Health Member

ES1

EMPLOYMENT EXAM / EXÁMEN DE EMPLEO
HEALTH HISTORY / HISTORIA MÉDICA

In accordance with current law, limit yourself to answering the questions below. Do not disclose any genetic information about you or your relatives.
De acuerdo con ley vigente, limítese a contestar las preguntas; no ofrezca información genética suya o de sus padres.

PAST MEDICAL / SOCIAL HISTORY — ANTECEDENTES MÉDICOS PERSONALES Y SOCIALES

1	No	Yes/Si	Have you ever had any medical allergies? ¿Alguna vez ha sufrido de alergias médicas?	7	No	Yes/Si	Do you have any permanent disabilities? ¿Sufre usted de alguna incapacidad permanente?
2	No	Yes/Si	Have you ever had recurrent illnesses or major injuries? ¿Ha sufrido de enfermedades o lesiones importantes?	8	No	Yes/Si	Do you use tobacco in any way? If "Yes" state type and quantity per day. ¿Usa usted algún tipo de tabaco? ¿Si lo hace, marque tipo y cantidad diaria?
3	No	Yes/Si	Currently on any medications? If YES, list names and dosage below. ¿Toma alguna medicina? Liste los nombres y las dosis abajo.	9	No	Yes/Si	Do you consume alcohol? If YES, state type and quantity. ¿Consume bebidas alcohólicas? Si responde Si, indique tipo y cantidad.
4	No	Yes/Si	Have you ever had hospitalizations or surgeries? ¿Alguna vez ha tenido hospitalizaciones u operaciones?	10	No	Yes/Si	Do you currently have a chronic illness such as: • High blood pressure, heart disease, stroke • Diabetes, thyroid disease, liver disease, kidney disease • Mental illness, seizures or movement disorders? ¿Sufre usted de alguna enfermedad crónica como: • Presión alta, enfermedades del corazón, trombosis, • Diabetes, enfermedades de la tiroides, hígado o riñones, • Enfermedades mentales, convulsiones o movimientos involuntarios?
5	No	Yes/Si	Have you worked in hazardous environments? If so, describe. ¿Ha trabajado en ambientes peligrosos? Por favor, describa.				
6	No	Yes/Si	Have you suffered any work-related injuries/illnesses? ¿Ha sufrido alguna vez una lesión o enfermedad en el trabajo?				

REVIEW OF SYSTEMS / REVISION DE SISTEMAS

HAVE YOU HAD, OR COMMONLY HAVE ANY OF THE FOLLOWING? ¿HA PRESENTADO USTED, O COMUNMENTE PRESENTA ALGUNA DE LAS SIGUIENTES CONDICIONES?

10	No	Yes/Si	CONSTITUTIONAL — CONSTITUCIONAL Fever, chills, fatigue, body aches or weight gain or loss? Fiebre, escalofríos, fatiga dolor en el cuerpo o cambios significativos de peso?	17	No	Yes/Si	SKIN — PIEL Skin diseases or problems like color changes, cancer, tumors, cysts or other? ¿Enfermedades de piel como manchas cáncer, tumores, quistes u otros?
11	No	Yes/Si	HEAD — CABEZA Trauma, injuries, or frequent or severe headaches? ¿Golpes, lesiones o dolores de cabeza severos o seguidos?	18	No	Yes/Si	EYES — OJOS Trauma, injuries, infections, pain, burning, itching or light sensitivity? ¿Trauma, lesiones, infección, dolor, picazón, quemazón o sensibilidad a la luz?
12	No	Yes/Si	CARDIOVASCULAR — CARDIOVASCULAR Palpitations, shortness of breath, chest pain/pressure, swelling in legs/feet? ¿Palpitadones, dificultad para respirar, dolor en el pecho, hinchazón en piernas o pies?	19	No	Yes/Si	GENITOURINARY — GENITOURINARIO Blood in urine, painful/frequent urination, kidney stones, venereal diseases? ¿Orina con sangre o dolor, orina frecuente, cálculos de riñón, enfermedades venéreas?
13	No	Yes/Si	EARS,NOSE,THROAT — OIDOS,NARIZ,GARGANTA Ear, nose or throat problems such as decreased hearing, pain, hoarseness, sinus problems, etc.? ¿Problemas de oído, nariz o garganta como sordera, dolor, ronquera, sinusitis, etc.?	20	No	Yes/Si	MUSCULOSKELETAL — MUSCULOSQUELÉTICO Joint pain, neck or back pain, broken bones? ¿Dolor en las articulaciones, dolor en la espalda o el cuello, fracturas?
				21	No	Yes/Si	ENDOCRINE — ENDOCRINO Increased appetite or thirst, increased urination, hair loss, osteoporosis? ¿Aumento de la sed, apetito u orina, perdida del cabello, osteoporosis?
14	No	Yes/Si	RESPIRATORY — RESPIRATORIO Asthma, frequent coughing, bronchitis, tuberculosis or coughing of blood? ¿Asma, tos frecuente, bronquitis, tuberculosis, tos con sangre?	22	No	Yes/Si	NEUROLOGICAL — NEUROLÓGICO Dizziness, muscle weakness, numbness? ¿Mareos o vértigo, debilidad muscular, falta de sensación?
15	No	Yes/Si	GASTROINTESTINAL — GASTROINTESTINAL Abdominal problems such as pain, reflux, nausea, vomiting, ulcers, black stools, diarrhea, constipation, hemorrhoids, diverticulitis, liver disease? ¿Dolor abdominal, indigestión o reflujo, nausea o vómitos, vómitos o heces con sangre, constipación, diarrea, úlceras digestivas, diverticulitis?	23	No	Yes/Si	FOR WOMEN ONLY — PARA MUJERES SOLAMENTE Painful or irregular menstruation, vaginal discharge or pain? Are you pregnant? Last menstrual period? _____ ¿Menstruación o periodos dolorosos o irregulares, secreciones o dolor vaginal? ¿Esta embarazada? Último periodo menstrual: _____
16	No	Yes/Si	BLOOD DISORDERS, CANCER — ENFERMEDADES DE LA SANGRE Anemia, spontaneous or easy bleeding, bruising, cancer? ¿Anemia, moretones, sangramiento espontáneo, cáncer?	24	No	Yes/Si	FOR MEN ONLY — PARA HOMBRES SOLAMENTE Penile discharge, prostate problems, genital pain or masses? ¿Secreciones en el pene, problemas de próstata, dolor o masas genitales?
25	No	Yes/Si	If your work requires wearing body armor or respirators, will you have any problems with their use? If "Yes", explain below. ¿Si su trabajo requiere el uso de chalecos antibalas o respiradores, va a tener usted algun problema con su uso? Explique abajo si su respuesta es "Si".				

PLEASE WRITE THE NUMBER OF ANY "YES" ANSWERS ABOVE AND EXPLAIN EACH ONE OF THEM HERE.
Por favor, escriba aquí el número de las preguntas en las cuáles haya contestado que SÍ y explíquelas a continuación.

PROVIDER COMMENTS

Sue Radoff PAC
Physician Assistant
Lic# 19822 CA

I certify that the information provided above is correct. / Certifico que la información suministrada es correcta.

Patient Signature (Firma del Paciente): _____ Date (Fecha): _____

☐ Relevant history was discussed with the patient.
☐ Advised to follow up with personal physician.

Provider Signature _____

IF ID LAB — FRONT PORCH/CARLSBAD BY T 107664 — EXT ABOVE.

DOS: 3/07/18 DOB:

Patient: RAINES, KRISTINA

Case # : Ref # : CG

Name: _____

EMPLOYMENT EXAM
HEALTH HISTORY

Date _____

SH 000003

ST2001 (Rev 0

U.S. HealthWorks MEDICAL GROUP

REC

MEDICAL EXAMINER RECOMMENDATIONS

Applicant/Employee: _____ Date of Birth: _____

Employer: _____

Position Title: _____ Date of Exam: _____

Considering any job-related information provided to me by the employer, either before or upon my request during the course of my evaluation, it is my opinion, that based on the results of the:

- ☐ Physical Examination
- ☐ Physical Agility Testing
- ☐ Other:

The aforementioned individual is:

- ☐ Medically acceptable for the position offered.
- ☐ Medically acceptable for the position offered, except that a condition exists which limits work as follows: *

- ☐ Placed on medical hold pending:

- ☐ Other:

PHYSICIAN: Signature: _____

Name: _____

Date: _____

* In compliance with the Americans with Disabilities Act, the medical examiner may **not** list this form either medical diagnoses or conditions. Only restrictions and/or job-related tasks that cannot be adequately performed by the applicant/employee are to be listed.

25
WITNESS: Nguyen
DATE: 3/6/20 Rptr: Vol. II

ST2013 (Rev. 1/11)

USHW 001552

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

KRISTINA RAINES, individually and on behalf of all other similarly situated

Plaintiff,

v.

FRONT PORCH COMMUNITIES AND SERVICES, a corporation; U.S. HEALTHWORKS MEDICAL GROUP, a corporation; SELECT MEDICAL HOLDINGS CORPORATION, a corporation; CONCENTRA GROUP HOLDINGS, LLC, a corporation; and DOES 3 through 10, inclusive

Defendants.

Case No. 19-cv-1539-DMS-MSB

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS OR, ALTERNATIVELY, MOTION TO STRIKE THE THIRD AMENDED COMPLAINT

Hearing Date: October 30, 2020
Hearing Time: 1:30 pm

Complaint Filed: October 23, 2018
Removal Date: August 15, 2019
Trial Date: Not Set

District Judge: Hon. Dana M. Sabraw

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2. THE UCRA CLAIM FAILS AS PLAINTIFFS ALLEGED NO DISCRIMINATION BY DEFENDANTS

The UCRA only requires that all persons, irrespective of protected characteristics are entitled to the full and equal accommodations, advantages, facilities, privileges, or services. Civ. Code § 51(b). The UCRA does not apply to practices and policies applied equally to all persons. *See Turner v. Association of American Medical Colleges* (App. 1 Dist. 2008) 167 Cal.App.4th 1401.

Plaintiffs contend: "USHW discriminated or made a distinction against each and every Class Member it provided services for by forcing them to answer sex-based and disability-based questions. USHW also denied accommodations to Class Members, since each individual was entitled to a discrimination-free (pre-employment) exam and no one got one." TAC ¶ 89. In other words, they are stating Defendants' medical professionals discriminated against putative class members because they asked questions related to gender and medical conditions – ***during a medical examination***.

Importantly, the allegations are that Defendants gave ***all*** pre-employment examinees the ***same*** form, with the ***same*** medical questions, during the ***same*** medical examinations. See TAC ¶ 36 ("USHW at all times relevant during the Class Period, engaged in a systematic, on-going … pattern and practice of forcing Class Members to fill-out standardized health history questionnaire(s)."). For example, all genders received the same form. A male could answer the female questions should he choose; a female the male questions; a non-binary individual could answer all (or none). USHW treated every person who appeared for an examination *exactly the same*. There is no authority that medical professionals must ignore anatomical differences and existing medical conditions.[3]

[3] If Plaintiffs' position on the UCRA is accepted, no medical professional could ever inquire about a person's medical conditions because such would trigger a "distinction" on perceived disability. Likewise, a general physician who refuses to treat a patient with terminal cancer, but instead refers the patient, would be violating the UCRA for

Simply put, Defendants did not discriminate. There is no actual denial of accommodations, advantages, facilities, privileges, or services by them. Examples of lawsuits brought properly under the UCRA are illustrative that such denials are the type of issues to be addressed by the statute – and none is analogous here. Cases include:

1) Allegations that a business establishment's premises discriminate against disabled customers and/or are not in compliance with the ADA, *Hankins v. El Torito Restaurants, Inc.* (1998) 63 Cal. App. 4th 510, *Moeller v. Taco Bell Corp*. (2011) 816 F. Supp. 2d 831;

2) Allegations that gender-based membership in a group is impermissible, *Randall v. Orange County Council, Boy Scouts of Am*. (1998) 17 Cal. 4th 736;

3) Allegations that airline personnel engaged in alleged national-origin discrimination, *Abou-Jaoude v. British Airways, Inc.* (1991) 228 Cal. App. 3d 1137;

4) Allegations a car wash provided sex-based price discounts only to women, *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24; and

5) Allegations a retail websites are inaccessible to blind customers, *Nat'l Fedn. of the Blind v. Target Corp*. (N.D. Cal. 2007) 452 F. Supp. 2d 946.

In fact, where there is a strong public policy, clear discrimination does not violate the UCRA. See *Sargoy v. Resolution Trust Corp.* (2d Dist.1992) 8 Cal.App.4th 1039 (finding bank practice of paying higher interest rates to senior citizens did not violate UCRA because doing so would jeopardize every discount or preference offered to

---

failing to treat a person based on a perceived disability. Or an OB-GYN could be sued under the UCRA for refusal to see men. When viewed in perspective, Plaintiffs' position is nonsensical and certainly contrary to the intent of the UCRA. For medical professionals, the reality that people are anatomically different (i.e., generally, males have different parts than females) is a reality that must be addressed and factored into examinations.

senior citizens and eliminate socially beneficial practices). Defendants submit there is a strong public policy behind allowing medical professional to explore medical conditions without fear of frivolous litigation like this. Without discrimination, there can be no UCRA claim.

3. PLAINTIFFS DO NOT HAVE STANDING TO SUE

In *White v. Square, Inc.* (2019) 7 Cal.5th 1019, 1025, the California Supreme Court acknowledged that "'a plaintiff cannot sue for discrimination in the abstract, but must ***actually suffer the discriminatory conduct***.'" It confirmed an individual plaintiff only "has standing under the [UCRA] if he or she has been the victim of the defendant's discriminatory act." *Id.*

There is no discrimination here as Plaintiffs concede Defendants treated everyone the same. Without any actual allegations of actual discriminatory conduct, Plaintiffs lack standing to pursue claims under the UCRA. *See Turner v. Association of American Medical Colleges* (App. 1 Dist. 2008) 167 Cal.App.4th 1401 (holding UCRA does not apply to practices and policies applied equally to all persons).

C. THE THIRD CAUSE OF ACTION FOR INTRUSION TO SECLUSION FAILS TO STATE A CLAIM UPON WHICH THE COURT CAN GRANT RELIEF

An action for invasion of privacy by intrusion upon seclusion has two elements: (1) an intentional intrusion into a private place, conversation, or matter, (2) in a manner highly offensive to a reasonable person. *Taus v. Loftus* (2007) 40 Cal.4th 683, 725 (citing *Shulman* v. *Group W Productions, Inc.* (1998) 18 Cal.4th 200, 237). The intrusion must be intentional and is "proven only if the plaintiff had an objectively reasonable expectation of seclusion or solitude in the place, conversation or data source." *Taus v. Loftus* (2007) 40 Cal.4th 683, 725. "Privacy for purposes of the intrusion tort must be evaluated with respect to the identity of the alleged intruder and the nature of the intrusion." *Sanders v. American Broadcasting Companies, Inc.* (Cal. 1999) 20 Cal.4th 907, 918 "(T)here is a preliminary determination of 'offensiveness' which must be made by the court in discerning the existence of a cause of action for

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

KRISTINA RAINES and DARRICK FIGG, individually and on behalf of all others similarly situated,

Plaintiff,

v.

U.S. HEALTHWORKS MEDICAL GROUP, a corporation; U.S. HEALTHWORKS, INC., a corporation; SELECT MEDICAL HOLDINGS CORPORATION, a corporation; SELECT MEDICAL CORPORATION, a corporation; CONCENTRA GROUP HOLDINGS, LLC, a corporation; CONCENTRA, INC., a corporation; CONCENTRA PRIMARY CARE OF CALIFORNIA, a medical corporation; OCCUPATIONAL HEALTH CENTERS OF CALIFORNIA, a Medical Corporation; and DOES 4 and 8 through 10, inclusive,

Defendants.

Case No: 19CV1539-DMS-MSB

CLASS ACTION

THIRD AMENDED COMPLAINT FOR IMPERMISSIBLE INQUIRIES IN VIOLATION OF FEHA; VIOLATION OF UNRUH CIVIL RIGHTS ACT; INTRUSION UPON SECLUSION; AND VIOLATION OF UNFAIR BUSINESS PRACTICES ACT

DEMAND FOR JURY TRIAL

Complaint Filed: Oct. 23. 2018
FAC Filed: July 16, 2019
SAC Filed: Feb. 19, 2020

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Plaintiffs, individually and on behalf of all others similarly situated, allege as follows:

INTRODUCTION

1. This is a class action brought by Plaintiffs Kristina Raines and Darrick Figg, individually and on behalf of at least 500,000 California job applicants, against Defendants U.S. HealthWorks and its successors (Concentra and Select Medical), the nation's and California's largest providers of occupational health. The job applicants were required by their prospective employers to undergo and pass a "pre-placement" medical examination by Defendants as a condition of being hired.

2. In conducting these pre-placement medical exams, Defendants, for the four years prior to filing this action and through at least Spring 2019, engaged in a systematic, ongoing and illegal practice of forcing job applicants to answer highly-intrusive, non-job-related and discriminatory questions in violation of California law. These questions included, for example, whether the applicant has and/or ever has had: 1) venereal disease; 2) painful or irregular vaginal discharge; 3) problems with menstrual periods; 4) whether the applicant is pregnant; 5) penile discharge, prostate problems, genital pain or masses; 6) cancer/tumors; 7) HIV; 8) mental illness; 9) disabilities; 10) painful/frequent urination; 11) hair loss; 12) hemorrhoids; 13) diarrhea; 14) black stool; 15) constipation; 16) organ transplant; and 17) stroke.

3. In engaging in this wrongful conduct, Defendants acted as an agent on behalf of the referring employers, who delegated to Defendants employment decision-making authority and who had the right to control how Defendants conducted significant aspects of the exams. Alternatively, Defendants discriminated against the applicants, who were their patrons or customers, by providing services to determine whether the applicant was able to perform the offered job position, in a discriminatory fashion.

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THE PARTIES

4. Plaintiff KRISTINA RAINES is an individual who was, at all times relevant hereto, a resident of the State of California, and at the time of filing this action was a resident of the State of Florida.

5. Plaintiff DARRICK FIGG is an individual who is, and at all times relevant hereto was, a resident of the State of California.

6. Defendant U.S. HEALTHWORKS MEDICAL GROUP is a California corporation with its principal place of business and offices located in Valencia, California.

7. On information and belief, Defendant U.S. HEALTHWORKS, INC. is a corporation incorporated under the laws of one of the states of the United States of America, with its principal place of business in the State of Texas or the State of Pennsylvania. (As alleged herein, U.S. HEALTHWORKS MEDICAL GROUP and U.S. HEALTHWORKS, INC., and Doe 4, individually and collectively, are hereafter referred to as "USHW MEDICAL GROUP.")

8. USHW MEDICAL GROUP at all times relevant offered and provided employers comprehensive occupational health services that included both medical examinations and occupational therapy.

9. On information and belief, Defendant CONCENTRA GROUP HOLDINGS, LLC is a corporation incorporated under the laws of one of the states of the United States of America, having its principal place of business in the State of Texas.

10. On information and belief, Defendant CONCENTRA, INC. is a corporation incorporated under the laws of one of the states of the United States of America, having its principal place of business in the State of Texas or the State of Pennsylvania.

11. On information and belief, CONCENTRA PRIMARY CARE OF CALIFORNIA, A MEDICAL CORPORATION, is a corporation incorporated under the laws of the State of California, having its principal place of business in the State of California.

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12. On information and belief, Defendant SELECT MEDICAL HOLDINGS CORPORATION is a corporation incorporated under the laws of one of the states of the United States of America, having its principal place of business in the State of Pennsylvania.

13. On information and belief, defendant SELECT MEDICAL CORPORATION is a corporation incorporated under the laws of one of the states of the United States of America, having its principal place of business in the State of Texas or the State of Pennsylvania.

14. On information and belief, defendant OCCUPATIONAL HEALTH CENTERS OF CALIFORNIA, A MEDICAL CORPORATION (added here as Doe 8), is a corporation incorporated under the laws of one of the states of the United States of America, having its principal place of business in the State of Texas or the State of Pennsylvania.

15. As alleged herein, Defendants SELECT MEDICAL HOLDINGS CORPORATION, SELECT MEDICAL CORPORATION, CONCENTRA GROUP HOLDINGS, LLC, CONCENTRA, INC., CONCENTRA PRIMARY CARE OF CALIFORNIA, A MEDICAL CORPORATION, OCCUPATIONAL HEALTH CENTERS OF CALIFORNIA, A MEDICAL CORPORATION and DOES 9-10, and each of them, are individually and collectively referred to as "CONCENTRA DEFENDANTS."

16. The true names or capacities, whether individual, corporate, associate or otherwise of Defendants Does 4 and 9 to 10, inclusive, being unknown to Plaintiffs prior to filing of this action, Plaintiffs assert their claims against these Defendants under fictitious names pursuant to California Code of Civil Procedure § 474.

17. Plaintiffs are informed and believe that each Defendant named in this Complaint, and each Doe Defendant, individually and/or collectively (hereafter "Defendants"), is in some manner responsible for the wrongs and damages alleged below, individually and/or, except as specified otherwise herein, as a joint employer, employer and/or as the agent, servant, partner, alter ego and/or employee of, and/or co-conspirator with, each other Defendant or employer(s) which referred the Class Members to Defendants, and each of them, and in doing the actions described below, was acting within the course and scope of its authority as such joint employer, employer, agent, servant, partner, employee, and/or

conspirator, with the permission and consent of each of the other Defendants and/or each referring employer. Defendants, and each of them, also were aider and/or abettors with each other and in doing the actions described below, were acting within the course and scope of its authority as such aider and abettor. On information and belief, Defendants, and each of them, are and/or were successors in interest to each of the other defendants, and/or were transferees and/or obtained ownership or control over the assets of each of the other defendants for no consideration and/or for inadequate consideration, and are therefore liable for the wrongs and damages alleged below on those independent bases. All acts herein alleged were approved of and ratified by the other Defendants.

JURISDICTION AND VENUE

18. On October 23, 2018, Plaintiff Kristina Raines filed this action against defendants U.S. Healthworks Medical Group and Front Porch Communities and Services in California Superior Court (San Diego County), Case No. 37-2018-00053708-CU-CR-CTL.

19. On July 16, 2019, Plaintiff filed a First Amended Complaint against these defendants and additional defendants Select Medical Holdings Corporation and Concentra Group Holdings, LLC.

20. On August 15, 2019, Defendants (except Front Porch) removed this Action to this court asserting jurisdiction under the Class Action Fairness Act. (28 U.S.C. §1332(d).)

21. Assuming this court has proper jurisdiction, venue is appropriate under 28 U.S.C. §1391 because a substantial part of the events or omissions giving rise to the claims alleged occurred in this judicial district.

CONCENTRA ACQUISITION AND MANAGEMENT OF USHW AND USHW FACILITIES

22. USHW MEDICAL GROUP was at all times relevant the nation's second largest provider of occupational health services and the largest provider of occupational health services in California. USHW MEDICAL GROUP at all times relevant owned and operated approximately 78 medical centers in the State of California ("USHW FACILITIES").

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23. CONCENTRA DEFENDANTS were at all times relevant the nation's largest provider of occupational health and urgent care centers, having over 1,200 medical centers nationally.

24. On information and belief, in or about February 2018, CONCENTRA DEFNEDANTS acquired USHW MEDICAL GROUP and/or began operating, managing or controlling, directly and/or through USHW MEDICAL GROUP, the USHW FACILITIES.

25. On information and belief, in or about Spring 2019, CONCENTRA DEFENDANTS acquired ownership of the USHW FACILITIES and/or their assets, rebranded them as Concentra facilities and continued operating them, and USHW MEDICAL GROUP is now essentially defunct. (USHW MEDICAL GROUP and CONCENTRA DEFENDANTS are hereinafter individually and collectively referred to as "USHW.") On information and belief, CONCENTRA DEFENDANTS acquired ownership and/or control of the USHW FACILITIES for no or inadequate consideration, in fraud or neglect of USHW MEDICAL GROUP'S creditors. On information and belief, CONCENTRA DEFENDANTS are successors in interest to USHW MEDICAL GROUP.

GENERAL ALLEGATIONS

26. California law permits an employer to condition an employment offer upon the job applicant passing a "pre-placement" medical examination. Cal. Govt. Code § 12940(e)(3). Historically, employers generally conducted pre-placement medical exams in-house using a company doctor. Over the years, employers began outsourcing these pre-placement medical exams to third party occupational health providers such as USHW.

27. These pre-placement medical exams are mandated by employers and are involuntary for the job applicant. The employer tells the applicant where to go and who will conduct the exam; the applicant has no say in the matter. The applicant is only going because he or she needs the job.

28. As a significant part of its business, at the request of numerous California employers who regularly employ five or more persons, USHW during the four-year period prior to filing this action through the date USHW ceased asking the impermissible questions

which are the subject of this action (at least through Spring 2019) conducted such pre-placement medical exams of the employers' job applicants (collectively "Class Members") at the approximately 78 USHW FACILITIES. Plaintiffs are informed and believe that USHW conducted in excess of 200,000 of these examinations annually in the State of California.

29. In performing these pre-placement exams, USHW acted as an agent for the employers, and alternatively, as a business establishment providing services to the applicants.

AGENCY

30. For purposes of all causes of action alleged herein except the Second Cause of Action, USHW acted as an agent on behalf of the referring employers in conducting pre-placement examinations in its dealings with Class Members.

31. The referring employers delegated to USHW certain aspects of the employers' employment decisions as to Class Members. For example:

a. The employers delegated to USHW the decision to either permit or withhold Class Members from gaining employment. The employers advised USHW that the purpose for the exam was to determine whether the job applicant would be able to get the job. After completing each exam, USHW filled out and sent to the employer a "medical examiner recommendation" form stating either that the applicant is: 1) "medically acceptable for the position offered," 2) "medically acceptable for the position offered, except that a condition exists which limits work [and specifies]," 3) "Placed on medical hold pending [further investigation]" or 4) "Other" [and specifies]. On information and belief, employers adopted the "recommendations" of USHW as a matter of course. Stating that the applicant was medically acceptable without limitation meant that USHW passed the applicant meaning they got the job. Placing limiting restrictions on an applicant which did not comply with the job description potentially operated as a denial of employment (depending on whether the employer would accept the restrictions). Placing applicants on medical hold (sometimes for a year or more) was often effectively a denial of employment, since there was no guarantee the job position would remain open. This was especially true where the hold or limitation was based on information that USHW obtained from applicant answers to USHW's discriminatory

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and/or irrelevant questions which the applicant was forced to answer in order to try and pass the exam as a condition of getting the job.

b. On information and belief, employers who sent job applicants to USHW for pre-placement medical exams generally sent all of their job applicants exclusively to USHW for this purpose. On information and belief, the medical directors at USHW facilities visited employer worksites to familiarize themselves with the employer's operation, and employers would likewise visit the USHW clinics.

c. The employers told job applicants they were required to undergo and pass a pre-placement medical examination by USHW at a USHW facility in order to receive a job. The exam was involuntary and the employers dictated that applicants go to USHW for the exam; applicants were not free to go to a medical provider of their choice for this evaluation. The employers paid for the exam.

32. The referring employers also had the right to control USHW in how it conducted the pre-placement medical exams. For example:

a. The employers decided and directed USHW on what specific medical tests (known as "protocols") would be given to job applicants. Employers often required that USHW use the employers' own physical examination form, rather than USHW's medical form, in conducting the physical examination component of the pre-placement exam. Employers also gave USHW lifting restrictions for the position, rather than USHW determining what the lifting restrictions were for the job.

b. Acting expressly or impliedly at the direction of employers, USHW threatened to deny Class Members getting hired unless they cooperated in the exam. USHW required applicants to sign a form titled "AUTHORIZATION TO DISCLOSE PROTECTED HEALTH INFORMATION TO EMPLOYER," which unlawfully authorized USHW to disclose the applicant's protected health information to the employer and others. This form warned that the applicant's refusal to sign "may violate a condition of employment or employment" and the applicant's revocation "may carry consequences related to my employment" and directed the applicant to "contact your employer for details." One of USHW's physical exam forms which

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applicants were required to fill out during at least a portion of the Class Period warned that "I certify that the information above is correct and understand that falsification may be cause of termination." Employers expressly or impliedly approved the use of these forms by USHW; copies were available on USHW's website through which many employers made their bookings for the pre-placement exams.

c. Employers gave other instructions to USHW as well. For example, Plaintiff Raines' prospective employer, Front Porch, instructed USHW 1) that if the applicant's medical evaluation was put on hold by USHW, USHW should "call employee immediately when an employee is on medical hold" and "call patient immediately explaining what the hold is for and how to clear"; 2) that applicants must present a current valid ID at the clinic, and if they did not, directed that USHW not perform the exam and instead refer the applicant back to Front Porch; and 3) to contact the employer if the applicant was unable to meet lifting requirements.

USHW'S ROLE AS A BUSINESS ESTABLISHMENT PROVIDING SERVICES TO CLASS MEMBERS

33. For purposes of all causes of action except the First Cause of Action, USHW was at all times a third-party occupational health provider. Job applicants went to USHW to get a non-discriminatory pre-placement medical examination for the sole purpose of evaluating whether they could presently perform the essential functions for the job position they had been offered so the applicants could get the job.

34. In addition, USHW led job applicants to believe that USHW was the applicants' own physician and the applicants were their "patients." For example:

a. USHW considered that it had a physician-patient relationship with each job applicant.

b. Many of the USHW forms which applicants were required to sign as part of the pre-placement examination refer to the applicant as the "patient." These forms had "patient signature" lines for the applicants to sign. The USHW Health History Questionnaire which each applicant was required to fill out had a section for the examiner to fill out (readily

observable by the applicant) stating "Relevant history was discussed *with patient (emphasis added)*." A USHW Tuberculosis screening form for pre-placement exams was labeled "patient questionnaire" and had a "Patient signature" line for the applicant to sign.

c. The applicant was required to sign a USHW form titled "PATIENT CONSENT TO TREAT AND ACKNOWLEDGMENT OF PRIVACY PRACTICES" which had a "patient signature" line. This form also stated that the applicant may be responsible to pay USHW for its services, stating: "If I am receiving employer-directed services (*e.g.,* physicals), USHW will seek payment from the employer; I may be responsible for payment if allowed by state or federal law," and "If I am responsible for payment and my account is referred to collections, I understand that I may have to pay collections expenses incurred by USHW."

d. In conducting the pre-placement exams, USHW considered whether the applicant's future health may be at risk in taking the job. USHW clinicians would attempt to dissuade applicants from taking the job where the clinician thought the job could be potentially hazardous to the applicant's future health even though it would not impact his or her ability to currently perform the essential job functions (such as where the applicant was a smoker and would be working with asbestos creating a heightened chance of developing lung cancer or where a pregnant woman would be working with silica which could increase her exposure to cancer but did not impact her current ability to do the job). This had the effect of discriminatorily attempting to dissuade workers considered to have a disability from taking the job.

35. As such, the job applicants were patrons or customers of USHW for the furnishing of these services.

USHW'S UNLAWFUL PRACTICES

36. As part of the pre-placement examinations, USHW at all times relevant during the Class Period engaged in a systematic, on-going and illegal pattern and practice of forcing Class Members to fill-out standardized health history questionnaire(s) (hereinafter "Health History Questionnaire(s)"), and sign unlawful disclosure authorizations.

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37. The Health History Questionnaire(s) asked numerous unlawful, highly-intrusive, highly-private, non-job-related and discriminatory questions. These included questions such as whether the applicant has and/or has ever had: 1) venereal disease; 2) painful or irregular vaginal discharge or pain; 3) problems with menstrual periods; 4) irregular menstrual period; 5); penile discharge, prostate problems, genital pain or masses; 6) cancer; 7) mental illness; 8) HIV; 9) permanent disabilities; 10) painful/frequent urination; 11) hair loss; 12) hemorrhoids; 13) diarrhea; 14) black stool; 15) constipation; 16) tumors; 17) organ transplant; 18) stroke; or 19) a history of tobacco or alcohol use.

38. The Health History Questionnaire(s) likewise illegally asked whether the Class Member was pregnant, sought information regarding every type of over-the-counter and prescribed medication taken by the Class Member (which would include, for example, birth control and medication evidencing non-job-related disabilities and illnesses), and required that the Class Member reveal information about prior on-the-job injuries or illnesses. (The questions in the Health History Questionnaires are hereafter individually and collectively referred to as "Impermissible Non-Job-Related Questions.")

39. The questions concerning pregnancy, menstrual and vaginal issues were in a box marked "FOR WOMEN ONLY." The questions concerning penile discharge, prostate problems, genital pain or masses were in a box marked "FOR MEN ONLY."

40. Plaintiffs are informed and believe that, when the Class Member provided a positive response to any of the inquiries contained in the Health History Questionnaire(s), it was USHW's systematic policy and practice to have a USHW medical examiner verbally ask the Class Member to explain the basis for the positive responses.

41. Finally, all Class Members were required by USHW to sign an unlawful form titled "AUTHORIZATION TO DISCLOSE PROTECTED HEALTH INFORMATION TO EMPLOYER." This document authorized USHW to disclose the Class Member's protected health information to his/her prospective employer and others. USHW itself acknowledged that this authorization violated the Americans with Disabilities Act ("ADA"), since USHW advised every employer that "in compliance with the ADA", the medical examiner may not

disclose the applicant's medical diagnoses or conditions to the employer. This Authorization was coerced, since it was unlawful and threatened the Class Member that her or his "refusal to sign" "may violate a condition of [] employment" and that "revocation of this authorization may carry consequences related to my [] employment."

42. The Impermissible Non-Job-Related Questions, and each of them, were highly-intrusive, highly-private, overbroad, unrelated to any Class Member's ability to perform the functions of any job position, inconsistent with business necessity for any Class Member's job position and discriminatory. Indeed, except for the specific questions not relating to the applicant's gender described above, all Class Members were required to answer all of the Impermissible Non-Job-Related Questions, regardless of the nature and duties of their particular job position. If Class Members did not answer all of the questions, they were not permitted to complete the rest of the examination.

43. Defendants, and each of them, had no legitimate, necessary, job-related or compelling need to collect and compile such detailed and intimate information about each Class Member regardless of employment position or job duties.

44. In sum, and in brazen disregard of the applicants' statutory protections, USHW at all times followed a practice requiring that every job applicant, at the outset of the exam and regardless of job position, fill out in full and complete an omnibus health history questionnaire requiring that the applicant essentially disclose his/her entire personal and private medical and disability history from birth to present. In direct contravention of California law, USHW's position was that no medical question was out of bounds, and that only once it had reviewed the applicant's answers to the questionnaire would it then assess what information was relevant to the job position.

45. Instead of taking the additional time to tailor and limit the health questions to those relevant to the specific job position, USHW used an omnibus health history questionnaire asking every conceivable past and current health question to every job applicant. On information and belief, USHW did so for the purpose of expediting exams and thereby permitting it to perform more exams and generate greater revenues.

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46. Plaintiffs are informed and believe that Defendants, and each of them, approved of, authorized and ratified the use of the Health History Questionnaire(s) and Impermissible Non-Job-Related Questions.

FACTS SPECIFIC TO PLAINTIFF RAINES

47. On or about March 5, 2018, Ms. Raines, a woman, applied for a job with Front Porch Communities and Services ("Front Porch"), a company which provides housing and services to residents in the State of California. Ms. Raines applied to work as a non-exempt Food Service Aide I at Front Porch's Carlsbad By The Sea facility located in Carlsbad, California.

48. At the time of her application, Front Porch provided Ms. Raines with a job description listing the job duties for a Food Service Aide. The job description was similar to what would be expected of any food server – "cleans and maintains work area; transports trash and waste to disposal area; re-stocks dishes, kitchen utensils and food supplies; loads and unloads food service cart; picks up and/or delivers supplies and food; washes dishes, pots and cleans general work area as assigned; and delivers trays to residents as assigned."

49. Front Porch offered Ms. Raines employment. However, as part of the hiring process, Front Porch conditioned such offer upon Ms. Raines passing a pre-employment medical examination by USHW at the USHW facility located in Carlsbad, CA.

50. On or about March 7, 2018, at Front Porch's direction, Ms. Raines attended the required pre-employment medical examination at USHW. During the medical examination, Ms. Raines was directed by the USHW medical staff to fill out the Health History Questionnaires, including the Impermissible Non-Job-Related Questions. She was also directed to sign the form titled AUTHORIZATION TO DISCLOSE PROTECTED HEALTH INFORMATION TO EMPLOYER, which she did.

51. The Health History Questionnaires and their components are intrusive, overbroad and unrelated to Ms. Raines's ability to perform the functions of her offered position as a Food Service Aide I.

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52. Ms. Raines reluctantly answered all of the Impermissible Non-Job-Related Questions and verbal follow up by a USHW physician assistant, except the specific Impermissible Non-Job-Related Question about the date of her last menstrual period. Ms. Raines objected to such question on the grounds that it had nothing to do with the job duties and was particularly private information.

53. In response to Ms. Raines declining to provide the date of her "Last menstrual period," she was threatened by USHW staff members that she couldn't pass the exam and get the job without answering all of the questions, and the USHW physician terminated the examination and USHW forced Ms. Raines to leave the premises.

54. Shortly after Ms. Raines left the USHW facility, Front Porch verbally told Ms. Raines that it was revoking the job offer because Ms. Raines had refused to answer questions about her menstrual cycle.

55. During this conversation, Front Porch's Human Resources manager informed Ms. Raines that all Front Porch job applicants, including the Human Resources manager herself, had to answer the exact same USHW questions Ms. Raines had been asked in order to get their jobs.

FACTS SPECIFIC TO PLAINTIFF FIGG

56. In or about early January 2018, Mr. Figg, a man, applied to serve as a member of the Volunteer Communication Reserve of the San Ramon Valley Fire Protection District ("SRF").

57. On or about January 10, 2018, SRF made a conditional offer of employment to Mr. Figg. As part of the hiring process, SRF conditioned such offer upon Mr. Figg passing a pre-employment medical examination by USHW. Mr. Figg was directed by SRF to undergo the pre-employment medical examination at USHW.

58. On or about January 18, 2018, Mr. Figg attended the required pre-employment medical examination at a USHW facility located in Pleasanton, CA. During the medical examination, Mr. Figg was directed by USHW staff to fill out the Health History Questionnaires, including the Impermissible Non-Job-Related Questions. Mr. Figg complied.

On information and belief, he was also directed to sign the form titled "AUTHORIZATION TO DISCLOSE PROTECTED HEALTH INFORMATION TO EMPLOYER," which he did.

59. The Health History Questionnaires and their components were intrusive, overbroad and unrelated to Mr. Figg's ability to perform the functions of the offered position in the Volunteer Communication Reserve.

60. Mr. Figg reluctantly answered all of the Impermissible Non-Job-Related Questions. He found many of the Impermissible Non-Job-Related questions asked on the Health History Questionnaires to be inappropriate and inapplicable. Because Mr. Figg completed the Health History Questionnaires and answered the Impermissible Non-Job-Related Questions, he was seen by a USHW physician and was allowed to complete the remaining portions of the examination.

61. Mr. Figg was deemed "Medically acceptable for the position offered" by USHW.

62. Having been passed by USHW, on or about February 15, 2018, SRF hired Mr. Figg for the offered position with the Volunteer Communication Reserve.

CLASS ALLEGATIONS

63. Plaintiffs bring this lawsuit as a class action on behalf of themselves individually and all similarly situated current and former job applicants pursuant to Federal Rule of Civil Procedure 23. The proposed Class is comprised of all applicants for employment in the State of California requested to respond to standardized Impermissible Non-Job-Related Questions at USHW within the Class Period ("Class Members" or the "Class"). Plaintiffs reserve the right to name additional Class and Sub-Class representatives and to identify additional subclasses as necessary and appropriate. (The term "Class" hereafter also includes the term "Sub-Class.")

64. The Class Period is defined as the period commencing on the date that is within four (4) years prior to the filing of this action and ending at the time that USHW ceased its practice of asking job applicants the Impermissible Non-Job Related Questions, which at the earliest, ended in or about Spring 2019 (the "Class Period").

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65. Subject to additional information obtained through further investigation and discovery, the foregoing definition of the Class may be expanded or narrowed by amendment or amended complaint. Defendants, their subsidiaries, their officers, directors, managing agents and members of those persons' immediate families, the Court, Court personnel, and legal representatives, heirs, successors or assigns of any excluded person or entity are excluded from the Class.

66. **Numerosity**. The Class for whose benefit this action is brought is so numerous that joinder of all Class Members is unfeasible and impracticable. Plaintiffs are informed and believe that the entire Class consists of over 500,000 job applicants and that those Class Members can be readily determined and identified through Defendants' files and other documents maintained by Defendants and, if necessary, appropriate discovery.

67. **Typicality**. Plaintiffs' claims are typical of the claims of the members of the Class. Plaintiffs, like all Class Members, were requested to respond to the standardized Impermissible Non-Job-Related Questions at USHW. Furthermore, the factual bases of Defendants' misconduct are common to all Class Members and represent a common thread of unfair and/or unlawful conduct resulting in injury to all members of the Class.

68. **Commonality**. Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members. Issues of law and fact common to the Class include:

a. Whether Defendants requested Class Members to respond to Impermissible Non-Job-Related Questions;

b. Whether the Impermissible Non-Job-Related Questions violated the Fair Employment and Housing Act ("FEHA" - Cal. Govt Code § 12940);

c. Whether the Impermissible Non-Job-Related Questions violated the Class Members' privacy rights;

d. Whether Defendants required that Class Members sign an unlawful authorization to disclose protected health information to the employer and others;

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e. Whether Defendants were subject to and violated Civil Code § 51;

f. Whether Defendants were an agent of Front Porch, SRF and all other employers who referred Class Members to USHW for medical examinations and therefore subject to liability under FEHA;

g. Whether Defendants by way of the conduct alleged herein, engaged in unfair or unlawful acts or practices in violation of California unfair competition practices laws including, but not limited to, California Business & Professions Code § 17200, *et seq.*, for which Class Members are entitled to recover;

h. Whether Class Members have been damaged by Defendants' actions or conduct;

i. Whether Class Members are entitled to statutory damages under Civil Code §52;

j. Whether Class Members are entitled to statutory damages (compensatory and/or nominal) and civil penalties and fines under Civil Code §§ 56.35 and 56.36;

k. Whether Class Members are entitled to nominal damages;

l. The effect upon and the extent of injuries suffered by the Class and the appropriate amount of compensation;

m. Whether declaratory and injunctive relief are appropriate to curtail Defendants' conduct as alleged herein;

n. Whether Defendants acted with malice, oppression and/or fraud, thereby justifying the award of punitive damages;

o. Whether Defendants operated, managed and/or controlled the USHW FACILITIES where Class Members were examined and/or administered such examinations and/or are otherwise responsible for the conduct alleged in this action;

p. Whether defendants are the alter ego of one another;

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q. Whether some or all of the defendants constitute a single enterprise;

r. Whether the CONCENTRA DEFENDANTS acquired ownership and/or control of the USHW FACILITIES for no consideration or inadequate consideration in fraud of the CLASS MEMBERS as creditors; and

s. Whether the CONCENTRA DEFENDANTS are successors in interest to the USHW MEDICAL GROUP.

69. **Adequacy**. Plaintiffs will fairly and adequately represent the interests of the Class and have no interests adverse to or in conflict with other Class Members. Plaintiffs' retained counsel will vigorously prosecute this case, have previously been designated class counsel in cases in the State and Federal courts of California, and are highly experienced in employment law, class and complex, multi-party litigation.

70. **Superiority**. A class action is superior to other available methods for the fair and efficient adjudication of this controversy since, among other things, joinder of all Class Members is impracticable, and a class action will reduce the risk of inconsistent adjudications or repeated litigation on the same conduct. Further, the expense and burden of individual lawsuits would make it virtually impossible for Class Members, Defendants, or the Court to cost-effectively redress separately the unlawful conduct alleged. Thus, absent a class action, Defendants would unjustly retain the benefits of their wrongdoings. Plaintiffs know of no difficulties to be encountered in the management of this action that would preclude its maintenance as a class action, either with or without sub-classes.

71. Adequate notice can be given to Class Members directly using information maintained in Defendants' records, or through notice by publication.

72. Accordingly, class certification is appropriate under Code of Civil Procedure § 382.

FIRST CAUSE OF ACTION
VIOLATION OF FEHA (GOVT CODE § 12940(d), (e))
(Class Against all Defendants)

73. Plaintiffs re-allege and incorporate by this reference the allegations in paragraphs 1-32 and 36-72 as though fully set forth herein.

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74. The FEHA (Cal. Government Code §12940, *et seq.*) predicates liability for employment discrimination on the status of the defendant as the claimant's "employer." FEHA defines an "Employer" to "include[] any person regularly employing five or more persons, *or any person acting as an agent of an employer, directly or indirectly*." (Section 12926(d), emphasis added.)

75. Front Porch, SRF and every other person which employed five or more employees in the State of California which sent Class Members to USHW for pre-placement medical examinations are employers subject to FEHA.

76. USHW was at all times relevant during the Class Period an agent of Front Porch, SRF and each other employer which sent Class Members for pre-placement examinations to USHW in the State of California and is therefore subject to FEHA. As more fully set forth in paragraphs 30-32, the referring prospective employers delegated to USHW significant aspects of the employers' employment decisions as to Class Members. The prospective employers also had the right to control the manner in which USHW conducted significant aspects of its pre-employment examinations and they often exercised such control.

77. The FEHA (Govt Code §12940, *et seq.*) provides that the following constitute unlawful employment practices:

a. Section 12940(d) – which prohibits employers from circulating or causing to be printed any publication, or to make any non-job-related inquiry of an employee or applicant, either verbal or through use of an application form, that expresses, directly or indirectly, any limitation, specification, or discrimination as to physical disability, mental disability, medical condition, sex, gender, age, sexual orientation, or any intent to make any such limitation, specification, or discrimination and

b. Section 12940(e) – which prohibits employers as to a job applicant from requiring any medical or psychological examination or making any medical or psychological inquiry or any inquiry whether he or she has a mental or physical disability or medical condition or the nature and severity thereof, after a conditional job offer has been made but

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prior to the commencement of employment duties "*unless the examination or inquiry is job related and consistent with business necessity*" (emphasis added).

78. Under FEHA, medical inquiries must be narrowly tailored to assess only whether the applicant is presently able to perform the essential duties of the specific job position for purposes of a pre-placement medical exam.

79. As alleged above, Defendants, and each of them, were at all times relevant employers under FEHA, which engaged in a continuing pattern and practice of unlawfully violating the foregoing FEHA sections by requiring that Class Members answer Impermissible Non-Job-Related Questions. These inquiries were neither job related nor consistent with business necessity, and certainly not tailored. These questions also expressed, directly or indirectly, limitation, specification or discrimination as to physical and/or mental disability, medical condition, sex, gender and/or sexual orientation, and/or an intent to do so.

80. As a proximate result of the acts and conduct of Defendants, and each of them, Plaintiffs and the other Class Members have suffered and continue to suffer damages and injury in amounts not yet fully ascertained, but in excess of the jurisdictional minimum of this Court, including but not limited to emotional and mental distress, anguish, humiliation, embarrassment, fright, shock, pain, discomfort, anxiety, loss of self-esteem, stress, sleeplessness, nervousness, stigma and diminishment of enjoyment and quality of life.

81. Said Defendants' actions were malicious, oppressive and fraudulent, and Plaintiffs and the other Class Members are entitled to recover punitive damages from Defendants, and each of them.

82. Plaintiffs have exhausted their administrative remedies for themselves and the Class. On or about August 28, 2018, Ms. Raines filed a Complaint with the California Department of Fair Employment and Housing ("DFEH" - No. 201803-01557514) against USHW for harassment, discrimination, improper questions and retaliation, and received a Right to Sue notice. On or about March 21, 2019, Plaintiffs took the deposition of Susan Radoff, the USHW physician assistant who examined Ms. Raines. Ms. Radoff's testimony revealed that USHW systematically required that every job applicant sent by any employer to USHW in the

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State of California for a medical examination answer the Impermissible Non-Job-Related Questions and that Ms. Radoff conducted approximately 20 such pre-hire examinations a week. Accordingly, based on that discovery and out of an abundance of caution and while unnecessary to do so, on or about May 8, 2019, Ms. Raines filed an Amended Complaint with the DFEH against USHW expressly to allege, in addition to plaintiff Kristina Raines, the claims on behalf of all other similarly situated Class Members (which includes Plaintiff Darrick Figg) and received a Right to Sue notice.

SECOND CAUSE OF ACTION
VIOLATION OF UNRUH CIVIL RIGHTS ACT – CIVIL CODE § 51
(Class Against All Defendants)

83. Plaintiffs re-allege and incorporate by this reference the allegations in paragraphs 1–29 and 33-72 as though fully set forth herein.

84. As an alternative to the First Cause of Action for FEHA violations, Plaintiffs allege a claim under the Unruh Civil Rights Act – Cal. Civil Code § 51, *et seq.* ("UCRA"). The UCRA provides that all persons in California are free and equal, and no matter what, *inter alia*, their sex, disability, medical condition and sexual orientation (hereafter "protected characteristics"), are entitled to the full and equal accommodations, advantages, facilities, privileges or services in all business establishments of every kind whatsoever. (UCRA § 51.) The UCRA further provides that no business establishment shall discriminate against any person in California on account of any perceived protected characteristic. (UCRA § 51.5.)

85. Defendants, and each of them, were at all times relevant a business establishment subject to liability under the UCRA. As more fully set forth in paragraphs 33-35 above, USHW was a third-party vendor providing services to Class Members to get a non-discriminatory pre-placement medical examination for the sole purpose of evaluating whether they could presently perform the essential functions for the job position they had been offered so the applicants could get the job. USHW also led applicants to believe that USHW was the applicants' own physician. As such, the applicants were patrons or customers of USHW for purposes of the UCRA.

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86. During the pre-placement medical examinations, Defendants' medical staff asked class members questions which impermissibly sought information about protected characteristics and/or were based upon the class members' perceived protected characteristics. These included questions seeking information about applicants' sex (*e.g.,* whether a female applicant has or ever had any history of vaginal discharge or pain, whether she is pregnant, and the date of her last menstrual period; whether a male applicant has penal discharge or prostate problems). These questions also sought information about disability status (*e.g.,* whether the applicant has or ever had any disabilities, mental illness, cancer, tumors, HIV, and every medication the applicant takes).

87. The predicate for this claim is not employment discrimination. There was no employment relationship between Class Members and USHW. The Class Members were patrons or customers who visited USHW to obtain their services. They were not employees of USHW nor seeking employment by USHW. USHW did not pay the applicants nor did applicants perform any work for USHW nor was there any intention they do so.

88. Based on the foregoing, Defendants, and each of them, denied, aided, incited a denial or made a discrimination or distinction against Class Members contrary to Civil Code §§ 51 and 51.5. USHW discriminated and/or made distinctions against Class Members and/or invaded their legally protected interests as patrons or customers. In asking the impermissible questions, USHW deprived Class Members of USHW's services to provide a non-discriminatory or non-distinction medical examination to permit the applicant to obtain the offered job position.

89. USHW discriminated or made a distinction against each and every Class Member it provided services for by forcing them to answer sex-based and disability-based questions. USHW also denied accommodations to Class Members, since each individual was entitled to a discrimination-free exam and no one got one. USHW discriminated and/or made a distinction in at least two ways:

a. First, USHW posed gender-specific questions [under separate categories marked "FOR WOMEN ONLY" and "FOR MEN ONLY"] to applicants and required them to

answer those questions to complete their exams. By requiring only female applicants to answer questions about, for example, pregnancy, the date of the applicant's last menstrual period or vaginal discharge — and not requiring male candidates to disclose that information—USHW discriminated or made a distinction against every female applicant on the basis of sex. Similarly, by requiring only male applicants to answer questions about, for example, penile discharge or prostate problems—and not requiring female applicants to disclose that information—USHW discriminated or made a distinction on the basis of sex against every male applicant. These sex-specific questions simply draw an arbitrary gender distinction contrary to § 51 for which USHW is liable.

b. Second, USHW discriminated or made a distinction on the basis of perceived disability. UCRA adopts FEHA's definition of "disability" (including being "regarded as" having a disability) (Civ. Code § 51(e)(1)) and prohibits distinction-drawing on the basis of any "perceived" protected characteristic (Civ. Code § 51.1). Here, USHW asked every applicant irrelevant questions, spanning from birth to present, about virtually every conceivable past and present health condition (such as past fevers, diarrhea, chills, weight gain, weight loss, vomiting, bruising, etc.) and required every applicant to answer every question (except for questions specific to the opposite sex). As such, all Class Members were required to and did disclose one or more health conditions. A positive answer to even the most banal or universal condition (*e.g.,* of whether the applicant has ever had a fever) triggered the perception of disability. That is, by asking questions designed to bring any and every health condition to the surface for further examination, USHW's policy was to regard every applicant as having a disability and by ferreting it out discriminated or made a distinction against them on the basis of perceived disability.

90. The Class Members have standing to assert claims under the UCRA whether or not they answered the discriminatory or non-distinction questions, whether or not USHW determined them to be medically qualified for the job and whether or not they were denied employment. It is sufficient that the applicant was denied equal rights and encountered a discriminatory or non-distinction policy.

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91. As a direct and proximate result of the above conduct of Defendants, and each of them, Plaintiffs and the other Class Members have and will continue to suffer damages in amounts not yet fully ascertained, including but not limited to the following:

a. past and future pecuniary losses;

b. loss of other benefits related to the position they were offered by the employer; and

c. severe emotional and mental distress, anguish, humiliation, embarrassment, fright, shock, pain, discomfort, anxiety, loss of self-esteem, stress, sleeplessness, nervousness, stigma and diminishment of enjoyment and quality of life.

92. Civil Code § 52 provides that whoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to Section 51 or 51.5 is liable for each and every offense for the actual damages, and any amount that may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage but in no case less than four thousand dollars ($4,000), and any attorneys' fees that may be determined by the court in addition thereto, suffered by any person denied the rights provided in Sections 51 or 51.5.

93. The actions of Defendants, and each of them, were malicious, oppressive and fraudulent, and Plaintiffs and the other Class Members are entitled to recover punitive damages from said defendants, and each of them.

THIRD CAUSE OF ACTION
INTRUSION ON SECLUSION
(Class Against All Defendants)

94. Plaintiffs re-allege and incorporate by this reference the foregoing allegations as though fully set forth herein.

95. The Class Members had a reasonable expectation in the privacy of their personal, private and non-job-related health information. Pre-placement medical examinations are by definition involuntary and coercive - not a routine medical examination performed by the applicant's own personal physician. The employer requires that the applicant undergo and pass a medical examination by USHW as a condition to getting the job. Applicants go to the

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employer-selected doctor for a pre-placement medical exam only after they are given a conditional job offer. Class Members do not have a choice and are forbidden from choosing their own doctor to perform the exam. This is not a personal physician voluntarily chosen and visited by the Class Member. Private physicians do not have the power to influence whether their patients get a job.

96. To add to the coercive nature of these involuntary pre-placement medical examinations, USHW required that every applicant sign an unlawful form authorizing USHW to disclose the applicant's private health information to the prospective employer or to an "entity designated" (unidentified) to evaluate the applicant's suitability for initial employment or for any other disclosure required by law. The form further stated that "my health information may not be protected from further disclosure by some entities receiving my information under this authorization, and that USHW has no control over subsequent disclosures by other entities." Thus, applicants were told that their private, health information could be disclosed not only to their prospective employer, but also potentially to other unidentified entities and to the public.

97. USHW knew that this authorization was unlawful, since USHW sent a separate form to the prospective employer advising that the Americans with Disabilities Act prohibits the applicant's health information being disclosed to the prospective employer. To further heighten the applicant's fears and concerns, USHW even threatened the applicant that refusal to sign the [unlawful] authorization may violate a condition of the employment and revocation of the authorization "may carry consequences related to my employment."

98. Accordingly, in stark contrast to a medical examination by the applicant's own personal doctor where the applicant knows all medical information will remain within the confines of the medical office, here the applicants were made acutely aware that USHW may disclose to the employer (and potentially to other entities or even to the public) the applicant's private and invasive medical information about all aspects of their medical history from birth to present.

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99. The Class Members' privacy concerns were further heightened given that the disclosure to the company-selected doctor – and potential disclosure to the prospective employers and other unidentified entities and to the public - included the most intimate and private health and personal information, such as venereal diseases, penile or vaginal discharge, pregnancy, menstrual problems, disabilities, cancer, etc. – none of which had anything to do with applicants' offered job position. Whether or not this information was actually shared with the employer or the other unidentified entities or to the public; it was enough that the applicant understood that it might.

100. The applicants' reasonable expectation of privacy was also established by the FEHA requirement that any medical inquiry or examination in a pre-placement examination must be narrowly tailored, job-related and consistent with business necessity, and by the UCRA's requirement that USHW's services be provided in a non-discriminatory fashion. These statutes establish a baseline for what is reasonable to ask of job applicants attending mandatory medical screeners at the post-offer, pre-employment stage. The Impermissible Non-Job Related Questions violated all of these standards. The scope of the applicants' consent was likewise delineated by these statutory restrictions, and was limited to only what was relevant to their present ability to perform the essential job functions.

101. USHW's motives were contrary to the Class Members' interests. USHW was using the omnibus questionnaire form to enrich itself by expediting the exam process to be able to conduct more exams (and thereby generate more revenue) instead of taking the added time necessary to tailor the questions such that they were strictly limited to assessing the applicants' present ability to perform the essential duties of the particular job position as required by law. USHW thereby placed its interests over the applicants' interests.

102. The Class Members' private affairs included their private, personal and non-job-related health history information. These were not matters of legitimate public concern or concern by an employer.

103. By forcing Class Members to disclose their private, personal and non-job-related health history information to potentially obtain employment, Defendants, and each of

them, intentionally intruded on and into each respective Class Members' solitude, seclusion or private affairs.

104. Defendants' intrusions were highly offensive to a reasonable person. As noted, the information involves an applicant's most intimate and private health and personal information, such as venereal diseases, penile or vaginal discharge, pregnancy, menstrual problems, disabilities, cancer, etc. --, none of which has anything to do with their offered job position. This was not a thorough medical exam conducted by an applicant's own personal physician, whom the applicant voluntarily visits (*e.g.*, for an annual checkup) to determine whether he/she has any possible condition which would impact their present and/or future health and well-being. To the contrary, the pre-placement exam is involuntary and mandated by a prospective employer for the limited purpose of a company-selected doctor (USHW) determining the applicant's present ability to perform the essential functions of the job.

105. To make matters worse, the Class Members were forced to share this private information with the company-selected doctor even though it had nothing to do with the offered job position. Where an applicant marked yes to any of the medical inquiries, the USHW personnel followed a practice of verbally following up to discuss it, adding to the offensiveness of the intrusion. The applicant was forced to sign an unlawful authorization permitting this information to be disclosed to the prospective employer or other "entity designated" (unidentified), with a disclaimer that the information may not be protected from even further disclosure to others (unidentified) or potentially to the public, under threat that if the applicant did not consent the applicant would likely not get the job. Whether or not this information was actually shared with the employer or some other entity or with the public; it was enough that a reasonable applicant understood that it might be. Whether or not the applicant got the job, the applicant would always be concerned and worried whether their supervisor or HR personnel or potentially some entity designated (unidentified) or a member of the public would know their most personal and intimate medical information or what they did with it or who they disclosed it to.

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106. A reasonable applicant would find USHW's approach highly offensive, cavalier, evidencing a lack of restraint and insensitive. For example, by citing the ADA restrictions on their "medical examiner recommendation" form, USHW knew it was subject to laws protecting job applicants from certain acts relating to private health information.

107. As a direct and proximate result of Defendants' actions, Plaintiffs and the other Class Members have suffered harm, damages and injury in amounts not yet fully ascertained, but in excess of the jurisdictional minimum of this Court, including but not limited to severe emotional and mental distress, anguish, humiliation, embarrassment, fright, shock, pain, discomfort, anxiety, loss of self-esteem, stress, sleeplessness, nervousness, stigma and diminishment of enjoyment and quality of life.

108. Defendants' actions were malicious, oppressive and fraudulent, and Plaintiffs and the other Class Members are entitled to recover punitive damages from Defendants, and each of them.

FOURTH CAUSE OF ACTION
VIOLATION OF UCL
Cal. Bus. & Prof. Code §§ 17200 et seq.
(Class Against All Defendants)

109. Plaintiffs re-allege and incorporate by this reference, the foregoing allegations as if fully set forth herein.

110. By their actions described in this Complaint, Defendants, and each of them, have committed unfair, unlawful and/or fraudulent business practices in violation of California Business & Professions Code § 17200 *et seq.* (the "UCL").

111. These unlawful, unfair and/or fraudulent business practices affected Plaintiffs and all other Class Members and included, but were not limited to, the following illegal practices:

a. Requiring that Class Members disclose intimate and sensitive medical and other personal information by asking Impermissible Non-Job-Related Questions, which have no job-related, business necessity justification and/or which are related to or based upon

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actual or perceived protected characteristics, in violation of the California Constitution, Civil Code §§ 51 and 56.10, the FEHA and Class Members' privacy rights; and

b. Unlawfully requiring that Class Members sign authorizations permitting disclosure of medical information which was unlawfully obtained by asking Impermissible Non-Job-Related Questions, in violation of the California Constitution, Civil Code §§ 51 and 56.10, the FEHA and Class Members' privacy rights.

112. The conduct of Defendants, and each of them, as described herein was anti-competitive and injurious to Defendants' competitors who complied with the laws and policies violated by Defendants, as Defendants' conduct provided an unfair and illegal advantage in the marketplace.

113. Defendants' actions also were unfair because, in addition to Defendants' statutory and regulatory violations, the Class Members' injuries were substantial, were not outweighed by any countervailing benefits to Class Members or to competition, and were not injuries that Class Members could reasonably have avoided. Defendants' practices also offended an established public policy requiring that medical examinations for job applicants be non-discriminatory and limited to job-related inquiries, invaded their constitutional right to privacy and were immoral, unscrupulous, unethical, oppressive, and substantially injurious to Class Members.

114. The foregoing conduct by Defendants, and each of them, has injured Plaintiffs and each Class Member.

115. Pursuant to Cal. Bus. & Prof. Code § 17200, *et. seq.*, Plaintiffs and the other Class Members are entitled to injunctive and declaratory relief against Defendants' continuation of the unlawful, unfair and/or fraudulent business practices described here and Defendants' maintenance and retention of records containing the applicants' unlawfully obtained personal health information, and any additional equitable and relief necessary to remedy the effects of these practices. Plaintiffs and the other Class Members are also entitled to restitution.

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116. As a result of Defendants' conduct, Plaintiffs and the other Class Members are entitled to reasonable attorneys' fees and costs of suit as provided in section 1021.5 of the California Code of Civil Procedure.

117. As a proximate result of these unlawful, unfair and/or fraudulent business practices, the general public, including all applicants, have suffered damages.

118. Pursuant to Cal. Bus. & Prof. Code § 17203, Plaintiffs and the other Class Members are entitled to the return of the unlawful Health History Questionnaire(s), and/or expungement of medical and personal information from the files maintained by Defendants and the disgorgement of Defendants' profits gained by providing these unlawful examinations.

PRAYER FOR RELIEF

Wherefore, Plaintiffs, on behalf of themselves and on behalf of all other members of the Class defined herein, pray for judgment in their favor and relief against Defendants, and each of them, as follows as appropriate for the above causes of action:

(a) For an order certifying this case as a class action and appointing Plaintiffs and their counsel to represent the Class;

(b) For injunctive relief restraining further acts of wrongdoing by Defendants;

(c) For compensatory damages in an amount to be determined at trial;

(d) For imposition of a constructive trust over all amounts by which Defendants have been unjustly enriched;

(e) For nominal damages;

(f) For disgorgement of Defendants' profits;

(g) For restitution;

(h) For actual damages and treble damages in an amount not less than $4,000 per class member under Civil Code § 52;

(i) For punitive and exemplary damages;

(j) For pre- and post-judgment interest, at the legal rate;

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(k) For attorneys' fees and costs, including but not limited to fees and costs pursuant to California Code of Civil Procedure § 1021.5, Civil Code §§ 52, 56.35 and 56.36 and Government Code §12965(b);

(l) All related costs of this suit; and

(m) For all such other and further relief as the Court may deem just, proper and equitable.

Dated: August 6, 2020

PHILLIPS, ERLEWINE, GIVEN & CARLIN LLP

By /s/ R. Scott Erlewine
R. Scott Erlewine
Nicholas A. Carlin
Brian S. Conlon
Kyle P. O'Malley
Attorneys for Plaintiffs

DEMAND FOR JURY TRIAL

Plaintiffs, and each of them, hereby request a trial by jury of all issues so triable.

Dated: August 6, 2020

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

KRISTINA RAINES and DARRICK FIGG, individually and on behalf of all other similarly situated

Plaintiff,

v.

U.S. HEALTHWORKS MEDICAL GROUP, a corporation; U.S. HEALTHWORKS, INC., a corporation; SELECT MEDICAL HOLDINGS CORPORATION, a corporation; SELECT MEDICAL CORPORATION, a corporation; CONCENTRA GROUP HOLDINGS, LLC, a corporation; CONCENTRA, INC., a corporation; CONCENTRA PRIMARY CARE OF CALIFORNIA, a medical corporation; and DOES 4 and 8 through 10, inclusive

Defendant.

Case No.: 19-cv-1539-DMS-MSB

ORDER GRANTING MOTION TO DISMISS

Pending before the Court is Defendant U.S. Healthworks Medical Group's ("USHW") motion to dismiss, or in the alternative, motion to strike Plaintiffs Kristina Raines and Darrick Figg's Second Amended Complaint ("SAC"). (ECF No. 81). Plaintiffs

C. Plaintiffs Do Not Adequately Plead Intrusion Upon Seclusion

Plaintiffs allege they had "a reasonable expectation in the privacy of their personal, private, non-job-related health information[,]" and USHW's questions intentionally intruded upon their seclusion in a manner that would be considered "highly offensive to a reasonable person." (ECF No. 69 at ¶¶ 75, 78). Defendants contend that a medical professional asking a patient medical questions in a medical setting does not amount to intrusion upon seclusion, especially given the voluntary nature of the examination.

Intrusion upon seclusion is one of the four categories of the tort of invasion of privacy under California law. *See Cruz v. Nationwide Reconveyance, LLC*, No. 15cv2082. 2016 WL 127585, at *3 (S.D. Cal. Jan. 11, 2016) (noting that the other three categories are (1) public disclosure of private facts, (2) false light, and (3) appropriation of name or likeness). "Under California law, the essential elements of an intrusion upon seclusion claim are as follows: '(1) [t]he defendant intentionally intruded, physically or otherwise, upon the solitude or seclusion, private affairs or concerns of the plaintiffs; (2) [t]he intrusion was substantial, and of a kind that would be highly offensive to an ordinarily reasonable person; and (3) [t]he intrusion caused plaintiff to sustain injury, damage, loss or harm." *Rowland v. JPMorgan Chase Bank, N.A.*, No. 14-00036, 2014 WL 992005, at *11 (N.D. Cal. Mar. 12, 2014) (quoting Cal. BAJI 7.20).

Plaintiffs do not satisfy either of the first two elements of an intrusion upon seclusion claim. Plaintiff does not allege the kind of harassing, persistent, or highly offensive behavior that courts have required for intrusion upon seclusion claims. *See Chaconas v. JP Morgan Chase Bank*, 713 F. Supp. 2d 1180, 1185 (S.D. Cal. 2010) (denying defendant's motion to dismiss because allegations of 380 calls—at a rate of five to ten times per day—to collect a debt was sufficient to state a claim for intrusion upon seclusion); *Miller v. Nat'l Broad. Co.*, 232 Cal. Rptr. 668 (Cal. Ct. App. 1986) (finding facts sufficient to state an intrusion upon seclusion claim where a television crew filmed a man dying in his private home without gaining permission from him or his wife); *Noble v. Sears, Roebuck & Co.*, 109 Cal. Rptr. 269 (Cal. Ct. App. 1973) (finding facts sufficient to state an intrusion upon

seclusion claim where an investigator hired by the defendant in a personal injury suit gained admission to the plaintiff's hospital room and, through deception, obtained evidence). Instead, Plaintiffs' allegations illustrate a routine medical examination performed by a medical professional in a standard medical facility. Although Plaintiffs allege the questions asked were impermissible given that Plaintiffs' employment were conditioned on the medical examinations, Plaintiffs fail to show that these questions were highly offensive to a reasonable person. In fact, a reasonable person would expect questions concerning his or her medical history during a medical examination. Plaintiffs' intrusion upon seclusion claim is therefore dismissed.

D. Plaintiffs' UCL Claim Must Fail

Plaintiffs allege USHW "committed unfair, unlawful, and/or fraudulent business practices" in violation of the UCL when USHW's medical professionals performed the pre-employment medical examinations. (ECF No. 69 at ¶ 82). USHW argues Plaintiffs' UCL claim lacks a predicate violation and as such, cannot survive.

The UCL allows a court to enjoin any person who engages in "unfair competition," which "include[s] any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200. Here, Plaintiffs allege USHW's actions violated all three of the UCL's prongs—it was unlawful, unfair, and fraudulent. Plaintiffs' factual allegations, however, focus only on the first prong: unlawfulness. Plaintiffs do not include any allegations concerning the unfairness or fraudulent nature of USHW's actions. Therefore, Plaintiffs' UCL claim must be considered as a claim premised on unlawfulness.

Under the UCL, an "unlawful" business practice "is an act or practice, committed pursuant to business activity, that is at the same time forbidden by law." *Martinez v. Welk Grp.*, 907 F. Supp. 2d 1123, 1139 (S.D. Cal. 2012). "The UCL borrows violations from virtually any state, federal, or local law" and makes them independently actionable. *Aguilar v. Boulder Brands, Inc.*, No. 12CV01862, 2013 WL 2481549, at *4 (S.D. Cal. 2013) (internal citations omitted). Here, Plaintiffs' SAC does not allege an act or practice

that violates law, and thus, fails to state a claim upon which relief may be granted. The Court, therefore, finds that Plaintiffs have not adequately alleged a claim against USHW for "unlawful" conduct in violation of the UCL.

E. Leave To Amend

Generally, leave to amend is granted "even if no request to amend the pleading was made, unless [the court] determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (internal citation omitted). Here, Plaintiffs should be afforded an opportunity to attempt to cure the deficiencies in their SAC. Accordingly, the Court grants Plaintiff leave to amend.

IV.

CONCLUSION

For the foregoing reasons, USHW's motion to dismiss is granted without prejudice. Plaintiffs' may file their Third Amended Complaint within 30 days of this order.

IT IS SO ORDERED.

Dated: July 7, 2020

Hon. Dana M. Sabraw
United States District Judge

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

KRISTINA RAINES and DARRICK FIGG, individually and on behalf of all others similarly situated,

Plaintiff,

v.

U.S. HEALTHWORKS MEDICAL GROUP, a corporation; U.S. HEALTHWORKS, INC., a corporation; SELECT MEDICAL HOLDINGS CORPORATION, a corporation; SELECT MEDICAL CORPORATION, a corporation; CONCENTRA GROUP HOLDINGS, LLC, a corporation; CONCENTRA, INC., a corporation; CONCENTRA PRIMARY CARE OF CALIFORNIA, a medical corporation; OCCUPATIONAL HEALTH CENTERS OF CALIFORNIA, a Medical Corporation; and DOES 4 and 8 through 10, inclusive,

Defendants.

Case No: 19CV1539-DMS-DEB

CLASS ACTION

NOTICE OF APPEAL

Complaint Filed: Oct. 23. 2018

Notice is hereby given that Plaintiffs Kristina Raines and Darrick Figg, individually and on behalf of all others similarly situated, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Order Granting Motion to Dismiss entered in this action on January 25, 2021 (ECF Docket No. 114) and from the Order Dismissing Plaintiffs' Fourth Cause of Action entered in this action on March 2, 2021 (ECF Docket No. 116).

Dated: March 10, 2021

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APPEAL,CLOSED,.,ENE,PROTO

U.S. District Court
Southern District of California (San Diego)
CIVIL DOCKET FOR CASE #: 3:19−cv−01539−DMS−DEB

Raines v. Front Porch Communities and Services et al
Assigned to: Judge Dana M. Sabraw
Referred to: Magistrate Judge Daniel E. Butcher
Case in other court: USCA, 21−55229
San Diego County− San Diego Superior Court, 37−02018−00053708−CU−CR−CTL
Cause: 28:1332 Diversity Action

Date Filed: 08/15/2019
Date Terminated: 01/25/2021
Jury Demand: Plaintiff
Nature of Suit: 790 Labor: Other
Jurisdiction: Diversity

Plaintiff

Kristina Raines
individually and on behalf of all other similarly situated

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V.

Defendant

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TERMINATED: 01/21/2020

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Defendant

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Defendant

Does 3 through 10
inclusive
TERMINATED: 02/19/2020

Defendant

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a corporation

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Defendant

Select Medical Corporation
a corporation

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Defendant

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Defendant

Does 4 and 8 through 10
inclusive

Defendant

Occupational Health Centers of California, a Medical Corporation

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Date Filed	#	Docket Text
03/11/2021	119	USCA Time Schedule Order as to 117 Notice of Appeal to the 9th Circuit filed by Darrick Figg, Kristina Raines. (akr) (Entered: 03/11/2021)
03/11/2021	118	USCA Case Number 21−55229 for 117 Notice of Appeal to the 9th Circuit filed by Darrick Figg, Kristina Raines. (akr) (Entered: 03/11/2021)
03/10/2021	117	NOTICE OF APPEAL to the 9th Circuit by Darrick Figg, Kristina Raines as to 114 Order Granting Motion to Dismiss, 116 Order Dismissing Plaintiffs' Fourth Cause of Action. (Filing fee $505, receipt no. ACASDC−15505165.) (Notice of Appeal electronically transmitted to the US Court of Appeals. Fee payment made by the filer via pay.gov prior to the docketing of the Notice of Appeal by the deputy clerk.) (akr) (Entered: 03/10/2021)
03/02/2021	116	ORDER Re: 115 Dismissing Plaintiffs' Fourth Cause of Action. Plaintiffs having submitted written notice of their intent not to file an amended complaint and request for dismissal, the Court GRANTS Plaintiffs request and DISMISSES Plaintiffs' fourth cause of action in the TAC with prejudice, pursuant to the reasoning in the January 25, 2021 Order. Signed by Chief District Judge Dana M. Sabraw on 3/2/2021. (mme)(jrd) (Entered: 03/02/2021)
02/26/2021	115	Ex Parte MOTION to Dismiss Fourth Cause of Action in the Third Amended Complaint with Prejudice by Darrick Figg, Kristina Raines. (Attachments: # 1 Memo of Points and Authorities in Support of Ex Parte Application, # 2 Declaration of Counsel in Support of Ex Parte Application, # 3 Proposed Order Granting Ex Parte Application to Dismiss Fourth Cause of Action in the Third Amended Complaint)(Conlon, Brian)Attorney Brian S. Conlon added to party Darrick Figg(pty:pla) *QC Mailer sent re proposed order should not be attached* (mme). (Entered: 02/26/2021)
01/25/2021	114	ORDER Granting 110 Motion to Dismiss. Defendants' motion to dismiss is granted. Counts 1, 2, and 3 are dismissed with prejudice. Count 4 is dismissed without prejudice. Plaintiffs may file a Fourth Amended Complaint within fourteen (14) days of this order. Signed by Chief Judge Dana M. Sabraw on 1/25/21. (sxa) (Entered: 01/25/2021)
10/22/2020	113	ORDER re 110 Oral Argument. Hearing is vacated. Signed by Judge Dana M. Sabraw on 10/22/2020.(mme) (Entered: 10/23/2020)

10/16/2020	112	REPLY − Other re 110 MOTION to Dismiss *or, Alternatively, Motion to Strike the Third Amended Complaint* filed by Concentra Group Holdings LLC, Concentra Primary Care of California, Concentra, Inc., Occupational Health Centers of California, a Medical Corporation, Select Medical Corporation, Select Medical Holdings Corporation, U.S. Healthworks Medical Group, U.S. Healthworks, Inc.. (Johnson, Timothy) (anh). (Entered: 10/16/2020)
10/09/2020	111	RESPONSE in Opposition re 110 MOTION to Dismiss *or, Alternatively, Motion to Strike the Third Amended Complaint* filed by Darrick Figg, Kristina Raines. (Attachments: # 1 Declaration Declaration of Counsel in Support of Opposition to Defendants' Motion to Dismiss and Strike, # 2 Proof of Service Proof of Service)(Conlon, Brian)(anh). (Entered: 10/09/2020)
09/25/2020	110	MOTION to Dismiss *or, Alternatively, Motion to Strike the Third Amended Complaint* by Concentra Group Holdings LLC, Concentra Primary Care of California, Concentra, Inc., Occupational Health Centers of California, a Medical Corporation, Select Medical Corporation, Select Medical Holdings Corporation, U.S. Healthworks Medical Group, U.S. Healthworks, Inc.. (Attachments: # 1 Memo of Points and Authorities in Support of Motion to Dismiss or, Alternatively, Motion to Strike the Third Amended Complaint)(Johnson, Timothy)Attorney Timothy L. Johnson added to party Concentra Primary Care of California(pty:dft), Attorney Timothy L. Johnson added to party Concentra, Inc.(pty:dft), Attorney Timothy L. Johnson added to party Occupational Health Centers of California, a Medical Corporation(pty:dft), Attorney Timothy L. Johnson added to party Select Medical Corporation(pty:dft), Attorney Timothy L. Johnson added to party U.S. Healthworks, Inc.(pty:dft) (mme). (Entered: 09/25/2020)
08/28/2020	108	ORDER Setting Briefing Schedule. Defendants shall file their Federal Rule of Civil Procedure 12(b) motions as a consolidated motion of no more than 30 pages on or before 9/25/20 at 5:00 p.m. Defendants shall contact the Court to obtain a hearing date upon the filing of their motion. Plaintiffs shall file their response to Defendant's motion on or before 10/9/20 at 5:00 p.m. Plaintiffs' response shall be no more than 30 pages. Defendants may file a reply of no more than 15 pages on or before 10/16/20 at 5:00 p.m. Signed by Judge Dana M. Sabraw on 8/28/20.(jmo) (Entered: 08/28/2020)
08/27/2020	109	Minute Entry for proceedings held before Judge Dana M. Sabraw: Telephonic Status Conference held on 8/27/2020. (Plaintiff Attorney Randy Erlewine, Kyle O'Malley). (Defendant Attorney Cameron Flynn, Tim Johnson). (no document attached) (jak) (Entered: 08/28/2020)
08/07/2020	107	Summons Issued as to Third Amended Complaint. **Counsel receiving this notice electronically should print this summons and serve it in accordance with Rule 4, Fed.R.Civ.P and LR 4.1.** (Attachments: # 1 Attachment)(mme) (Entered: 08/07/2020)
08/06/2020	106	AMENDED COMPLAINT with Jury Demand *Third Amended Complaint for Impermissible inquires in Violation of FEHA; Violation of FEHA; Violation of Unruh Civil Rights Act; Intrusion upon Seclusion; and Violation of Unfair Business Practices Act* against Concentra Group Holdings LLC, Concentra Primary Care of California, Concentra, Inc., Does 4 and 8 through 10, Select Medical Corporation, Select Medical Holdings Corporation, U.S. Healthworks Medical Group, U.S. Healthworks, Inc., Occupational Health Centers of California, a Medical Corporation, filed by Kristina Raines, Darrick Figg. (Attachments: # 1 REDLINED−Plaintiff's Third Amended Complaint)New Summons Requested. (Erlewine, Randy) (mme). (Entered: 08/06/2020)
07/17/2020	105	ORDER Vacating Pretrial and Trial Dates and Staying Discovery 104 . Signed by Magistrate Judge Daniel E. Butcher on 7/17/20. (jmo) (Entered: 07/17/2020)
07/14/2020	104	Joint MOTION to Vacate *Joint Motion to Vacate Discovery, Pretrial and Trial Dates and to Stay Discovery* by Darrick Figg, Kristina Raines. (Attachments: # 1 Memo of Points and Authorities in Support of Plaintiffs' and Defendants' Joint Motion to Vacate All Discovery, Pretrial and Trial Dates and Stay Discovery, # 2 Stipulation in Support of Joint Motion to Vacate Discovery, Pretrial and Trial Dates and to Stay Discovery)(Erlewine, Randy) (mme). (Entered: 07/14/2020)

07/08/2020	103	NOTICE of Appearance by Timothy L. Johnson on behalf of Concentra Group Holdings LLC, Select Medical Holdings Corporation, U.S. Healthworks Medical Group (Johnson, Timothy)Attorney Timothy L. Johnson added to party Concentra Group Holdings LLC(pty:dft), Attorney Timothy L. Johnson added to party Select Medical Holdings Corporation(pty:dft), Attorney Timothy L. Johnson added to party U.S. Healthworks Medical Group(pty:dft) (jmo). (Entered: 07/08/2020)
07/07/2020	102	ORDER Granting Motion to Dismiss. USHW's motion to dismiss is granted without prejudice. Plaintiffs' may file their Third Amended Complaint within 30 days of this order. Signed by Judge Dana M. Sabraw on 7/7/20. (jmo) (dlg). (Entered: 07/07/2020)
06/29/2020	101	ORDER Extending Deadlines to File Joint Motions for Discovery Dispute (DKT. No. 100). The parties' deadline to file the Joint Motion(s) for Determination of Discovery Dispute with respect to the issues listed above is 7/10/20. Signed by Magistrate Judge Daniel E. Butcher on 6/29/20. (jmo) (Entered: 06/29/2020)
06/26/2020	100	Joint MOTION for Extension of Time to File *Stipulation to Alter Deadlines to File Joint Motions for Discovery Dispute* by Darrick Figg, Kristina Raines. (Erlewine, Randy) (mme). (Entered: 06/26/2020)
06/18/2020	99	ORDER Granting Joint 97 Motion to Extend Deadlines to File Joint Motions for Discovery Dispute. Signed by Magistrate Judge Daniel E. Butcher on 6/18/20. (dlg) (Entered: 06/18/2020)
06/17/2020	98	NOTICE *of Withdrawal of Appearance* by Concentra Group Holdings LLC, Select Medical Holdings Corporation, U.S. Healthworks Medical Group (Gray, Kathryn) (dlg). (Entered: 06/17/2020)
06/15/2020	97	Joint MOTION for Extension of Time to File *Stipulation to Alter Deadline to File Joint Motions for Discovery Dispute* by Darrick Figg, Kristina Raines. (Erlewine, Randy) (aef). (Entered: 06/15/2020)
06/11/2020	96	NOTICE of Appearance by Kathryn B Gray on behalf of Concentra Group Holdings LLC, Select Medical Holdings Corporation, U.S. Healthworks Medical Group (Gray, Kathryn)Attorney Kathryn B Gray added to party Concentra Group Holdings LLC(pty:dft), Attorney Kathryn B Gray added to party Select Medical Holdings Corporation(pty:dft), Attorney Kathryn B Gray added to party U.S. Healthworks Medical Group(pty:dft)(aef). (Entered: 06/11/2020)
06/10/2020	95	NOTICE *of Withdrawal of Counsel − Jennifer L. Santa Maria* by Concentra Group Holdings LLC, Select Medical Holdings Corporation, U.S. Healthworks Medical Group (Flynn, Cameron) (aef). (Entered: 06/10/2020)
05/27/2020	94	ORDER OF TRANSFER. This case is transferred from the calendar of the Honorable Michael S. Berg to the calendar of the Honorable Daniel E. Butcher for all further proceedings. All pending dates including discovery deadlines, hearings, and conferences before Magistrate Judge Berg, if any, remain unchanged until further order and are now SET before Magistrate Judge Daniel E. Butcher. Any dates set before any district judge remain unchanged. Signed by Magistrate Judge Michael S. Berg on 05/27/2020.(jcj) (Entered: 05/27/2020)
05/14/2020	93	ORDER Granting 92 Joint Motion to Continue the Deadline to File Joint Motion(s) for Determination of Discovery. The Court GRANTS the motion and approves the stipulation. Accordingly, the Court CONTINUES the parties' deadline to file the Joint Motion(s) for Determination of Discovery Dispute with respect to the issues enumerated above, until June 22, 2020. Signed by Magistrate Judge Michael S. Berg on 5/14/2020. (aef) (Entered: 05/14/2020)
05/14/2020	92	Joint MOTION for Extension of Time to File *Stipulation to Alter Deadlines to File Joint Motion for Discovery Dispute* by Darrick Figg, Kristina Raines. (Erlewine, Randy)(aef). (Entered: 05/14/2020)
04/30/2020	91	ORDER: (1) Granting 90 Joint Motion to Continue Remaining Deadlines and (2) Issuing Second Amended Scheduling Order Regulating Discovery and Other Pre−Trial Proceedings. The Mandatory Settlement Conference is set for 11/4/2020 at 09:30 AM before Magistrate Judge Michael S. Berg. The Memorandum of Contentions of Fact and Law is due by 6/11/2021. The Proposed Final Pretrial Conference Order is due by 7/2/2021. The Final Pretrial Conference is set for 7/9/2021 10:30 AM before Judge

		Dana M. Sabraw. The Jury Trial is set for 8/9/2021 at 09:00 AM before Judge Dana M. Sabraw. Signed by Magistrate Judge Michael S. Berg on 4/30/2020. (aef) (Entered: 04/30/2020)
04/29/2020	90	Joint MOTION for Extension of Time to Complete Discovery *Plaintiffs and Defendants Joint Motion to Reset All Discovery, Pretrial and Trial Dates* by Darrick Figg, Kristina Raines. (Attachments: # 1 Memo of Points and Authorities, # 2 Stipulation in Support of Joint Motion to Reset Discovery, Pretrial and Trial Dates)(Erlewine, Randy) (aef). (Entered: 04/29/2020)
04/27/2020	89	ORDER Re: Oral Argument. (ECF 81) The Court finds this matter suitable for decision without oral argument pursuant to Civil Local Rule 7.1(d)(1). Accordingly, the hearing is vacated. Signed by Judge Dana M. Sabraw on 4/27/2020.(aef) (Entered: 04/27/2020)
04/17/2020	88	REPLY to Response to Motion re 81 MOTION to Strike *F.R.C.P. Rule 12(F) Plaintiffs Second Amended Complaint Reply In Support of Defendants' Motion to Dismiss (FRCP Rule 12(B)(6)(7)) or, Alternatively, Motion to Strike (FRCP Rule 12(F)) Second Amended Complaint* filed by Concentra Group Holdings LLC, Select Medical Holdings Corporation, U.S. Healthworks Medical Group. (Santa Maria, Jennifer) (aef). (Entered: 04/17/2020)
04/14/2020	87	DECLARATION re 85 Response in Opposition to Motion, *Supplemental Declaration of Counsel In Support of Opposition to Defendants' Motion to Dismiss and Strike* by Plaintiffs Darrick Figg, Kristina Raines. (Erlewine, Randy) (aef). (Entered: 04/14/2020)
04/13/2020	86	Minute Entry for proceedings held before Magistrate Judge Michael S. Berg: (T)Discovery Conference was held on 4/13/2020. The parties' discovery disputes were discussed and resolved. (Plaintiff Attorneys Randy S. Erlewine; Brian C. Conlon; Kyle P. O'Malley). (Defendant Attorney Cameron O'Brien Flynn)(no document attached) (dxm) (Entered: 04/13/2020)
04/10/2020	85	RESPONSE in Opposition re 81 MOTION to Strike *F.R.C.P. Rule 12(F) Plaintiffs Second Amended Complaint* filed by Darrick Figg, Kristina Raines. (Attachments: # 1 Declaration Declaration of Counsel in Support of Opposition to Defendants' Motion to Dismiss and Strike)(Erlewine, Randy) (aef). (Entered: 04/10/2020)
04/09/2020	84	ORDER Granting 83 Joint Motion to Continue the Deadline to File Joint Motion(s) for Determination of Discovery Dispute. The Court CONTINUES the parties' deadline to file the Joint Motion(s) for Determination of Discovery Dispute with respect to the issues enumerated above, until May 16, 2020. Signed by Magistrate Judge Michael S. Berg on 4/9/2020. (aef) (Entered: 04/10/2020)
04/09/2020	83	Joint MOTION for Extension of Time to File *Stipulation to Alter Deadline to File Joint Motion for Determination of Discovery Dispute* by Darrick Figg, Kristina Raines. (Erlewine, Randy) (aef). (Entered: 04/09/2020)
04/07/2020	82	ORDER Setting Telephonic Discovery Conference. The Court sets a telephonic Discovery Conference for April 13, 2020, at 2:00 p.m. before Magistrate Judge Michael S. Berg. The parties are ORDERED to lodge the letter briefs via e−mail to efile_berg@casd.uscourts.gov by 5:00 p.m. on April 9, 2020. Signed by Magistrate Judge Michael S. Berg on 4/7/2020.(aef) (Entered: 04/07/2020)
03/27/2020	81	MOTION to Strike *F.R.C.P. Rule 12(F) Plaintiffs Second Amended Complaint* by U.S. Healthworks Medical Group. (Attachments: # 1 Memo of Points and Authorities In Support Of Defendants Motion To Dismiss (FRCP Rules 12(B)(6),(7)) Or, Alternatively, Motion To Strike (FRCP Rule 12(F)) Plaintiffs Second Amended Complaint, # 2 Proposed Order Granting Defendants' Motion to Dismiss (FRCP Rules 12(B)(6),(7)) Plaintiffs' Second Amended Complaint)(Flynn, Cameron) (Entered: 03/27/2020)
03/27/2020	80	ORDER Granting 79 Joint Motion and Approving Stipulation to Continue the Deadline to File Joint Motions for Determination of Discovery. The Court CONTINUES the parties' deadline to file the Joint Motion(s) for Determination of Discovery Dispute with respect to the issues enumerated above, until April 17, 2020. Signed by Magistrate Judge Michael S. Berg on 3/26/2020. (aef) (Entered:

		03/27/2020)
03/26/2020	79	Joint MOTION for Extension of Time to File *Stipulation to Alter Deadline to File Joint Motion for Determination of Discovery Dispute* by Darrick Figg, Kristina Raines. (Erlewine, Randy) (aef). (Entered: 03/26/2020)
03/11/2020	78	ORDER Granting 77 Joint Motion and Approving Stipulation to Continue the deadline to File Joint Motions for Determination of Discovery Dispute. The Court CONTINUES the parties' deadline to file the Joint Motions for Determination of Discovery Dispute with respect to the issues enumerated above from March 20, 2020, until April 3, 2020. Signed by Magistrate Judge Michael S. Berg on 3/11/2020. (aef) (Entered: 03/12/2020)
03/11/2020	77	Joint MOTION for Extension of Time to File *Stipulation to Alter Deadlines to File Joint Motion for Discovery Dispute* by Darrick Figg, Kristina Raines. (Erlewine, Randy) (aef). (Entered: 03/11/2020)
03/10/2020	76	ORDER Setting Briefing Schedule. Defendants shall file their Federal Rule of Civil Procedure 12(b) motion on or before March 27, 2020 at 5:00 p.m. Defendants shall contact the Court to obtain a hearing date upon the filing of their motion. Plaintiffs shall file their response to Defendant's motion on or before April 10, 2020 at 5:00 p.m. Defendants may file a reply on or before April 17, 2020 at 5:00 p.m. Signed by Judge Dana M. Sabraw on 3/10/2020.(aef) (Entered: 03/10/2020)
03/10/2020	75	Minute Entry for proceedings held before Judge Dana M. Sabraw: Telephonic Informal 12(b) Status Conference held on 3/10/2020. (Plaintiff Attorney Randy Erlewine, Kyle O'Malley). (Defendant Attorney Jennifer Santa Maria, Cameron Flynn). (no document attached) (jak) (Entered: 03/10/2020)
02/27/2020	74	ORDER Granting 73 Joint Motion and Approving Stipulation to Continue the Deadline to File Joint Motion for Determination of Discovery Dispute. The Court CONTINUES the parties' deadline to file a Joint Motion for Determination of Discovery Dispute with respect to Plaintiffs First Set of Requests for Production of Documents and First Set of Interrogatories to Concentra Group Holdings, from March 2, 2020, until March 20, 2020. Signed by Magistrate Judge Michael S. Berg on 2/27/2020. (aef) (Entered: 02/27/2020)
02/26/2020	73	Joint MOTION for Extension of Time to File *Stipulation to Alter Deadlines to File Joint Motion for Discovery Dispute* by Darrick Figg, Kristina Raines. (Erlewine, Randy) (aef). (Entered: 02/26/2020)
02/25/2020	72	ORDER Granting 71 Joint Motion and Approving Stipulation to Continue Deadlines to File Joint Motion for Determination of Discovery Dispute. Signed by Magistrate Judge Michael S. Berg on 2/25/2020. (aef) (Entered: 02/26/2020)
02/25/2020	71	Joint MOTION for Extension of Time to File *Stipulation to Alter Deadlines to File Joint Motion for Discovery Dispute* by Darrick Figg, Kristina Raines. (Erlewine, Randy) (aef). (Entered: 02/25/2020)
02/20/2020	70	Summons Issued re 69 Second Amended Complaint. **Counsel receiving this notice electronically should print this summons and serve it in accordance with Rule 4, Fed.R.Civ.P and LR 4.1.** (aef) (Entered: 02/20/2020)
02/19/2020	69	SECOND AMENDED COMPLAINT with Jury Demand *Second Amended Complaint for Impermissible Inquiries in Violation of FEHA; Violation of Unruh Civil Rights Act; Intrusion Upon Seclusion; and Violation of Unfair Business Practices Act* against All Defendants, filed by Kristina Raines.New Summons Requested. (Erlewine, Randy) (aef). (Entered: 02/19/2020)
02/19/2020	68	ORDER Granting 39 Motion for Leave to File Second Amended Complaint. Plaintiff's motion for leave to file a SAC is granted. Plaintiff shall file the SAC within ten days of the entry of this order. Signed by Judge Dana M. Sabraw on 2/19/2020. (aef) (Entered: 02/19/2020)
02/07/2020	67	NOTICE of Appearance *for Plaintiff Kristina Raines by Kyle P. O'Malley* by Kyle P. O'Malley on behalf of Kristina Raines (O'Malley, Kyle)Attorney Kyle P. O'Malley added to party Kristina Raines(pty:pla) (aef). (Entered: 02/07/2020)

01/31/2020	66	ORDER Re Discovery Disputes Concerning Plaintiff's Interrogatory Nos. 10−14. Signed by Magistrate Judge Michael S. Berg on 1/31/2020.(aef) (Entered: 02/03/2020)
01/27/2020	65	Minute Entry for proceedings held before Magistrate Judge Michael S. Berg: (T)Discovery Conference was held on 1/27/2020. (Plaintiff Attorneys Randy S. Erlewine; Brian C. Conlon). (Defendant Attorney Cameron O'Brien Flynn). (no document attached) (dxm) (Entered: 01/28/2020)
01/23/2020	64	ORDER:(1) GRANTING JOINT MOTION TO CONTINUE REMAINING DEADLINESECF NO. 60 AND(2) ISSUING AMENDED SCHEDULING ORDER REGULATING DISCOVERY AND OTHER PRE−TRIAL PROCEEDINGS Final Pretrial Conference set for 4/16/2021 10:30 AM before Judge Dana M. Sabraw. Jury Trial set for 5/17/2021 09:00 AM before Judge Dana M. Sabraw. Mandatory Settlement Conference set for 8/3/2020 09:30 AM before Magistrate Judge Michael S. Berg. Memorandum of Contentions of Fact and Law due by 3/19/2021. Proposed Pretrial Order due by 4/9/2021. Signed by Magistrate Judge Michael S. Berg on 1/23/2020. (sjm) (Entered: 01/24/2020)
01/22/2020	63	ORDER Granting 61 Joint Motion and Approving Stipulation to Continue Deadlines to File Joint Motion for Determination of Discovery Dispute. Signed by Magistrate Judge Michael S. Berg on 1/22/2020. (aef) (Entered: 01/23/2020)
01/22/2020	62	ORDER Setting Telephonic Discovery Conference. A telephonic Discovery Conference is set for 1/27/2020 at 04:30 PM before Magistrate Judge Michael S. Berg. The parties are ORDERED to lodge the letter briefs via e−mail to efile_berg@casd.uscourts.gov by 5:00 p.m. on 1/24/2020. Signed by Magistrate Judge Michael S. Berg on 1/22/2020.(aef) (Entered: 01/22/2020)
01/22/2020	61	Joint MOTION to Continue *Stipulation to Alter Deadline to File Joint Motion for Determination of Discovery Dispute* by Kristina Raines. (Erlewine, Randy) (aef). (Entered: 01/22/2020)
01/22/2020	60	Joint MOTION to Continue *Joint Motion to Reset Discovery, Pretrial and Trial Dates* by Kristina Raines. (Attachments: # 1 Memo of Points and Authorities, # 2 Stipulation in Support of Joint Motion to Reset Discovery, Pretrial and Trial Dates)(Erlewine, Randy) (aef). (Entered: 01/22/2020)
01/21/2020	59	ORDER Granting 58 Plaintiff Kristina Raines and Defendant Front Porch Communities and Service' Joint Motion to Dismiss. Plaintiff's class claims are dismissed without prejudice as to Front Porch only. Signed by Judge Dana M. Sabraw on 1/21/2020. (aef) (Entered: 01/22/2020)
01/17/2020	58	Joint MOTION to Dismiss by Front Porch Communities and Services. (Attachments: # 1 Memo of Points and Authorities, # 2 Declaration of Counsel)(Kenny, Marie) (sjm). (Entered: 01/17/2020)
01/10/2020	57	ORDER Granting 55 Joint Motion and Approving Stipulation to Continue Deadlines to file Joint Motion for Determination of Discovery Dispute. The January 14, 2020 deadline with respect to Interrogatory Nos. 10−14 is continued until January 23, 2020, and 2) the January 12, 2020 deadline with respect to the remainder of Plaintiffs discovery is continued until January 23, 2020. Signed by Magistrate Judge Michael S. Berg on 1/10/2020. (aef) (Entered: 01/13/2020)
01/10/2020	56	Minute Entry for proceedings held before Magistrate Judge Michael S. Berg: (T)Discovery Conference was held on 1/10/2020. (Plaintiff Attorneys Randy S. Erlewine; Brian C. Conlon). (Defendant Attorney Jennifer L. Santa Maria). (no document attached) (dxm) (Entered: 01/10/2020)
01/09/2020	55	Joint MOTION for Extension of Time to File *Stipulation to Alter Deadlines to File Joint Motion for Discovery Dispute* by Kristina Raines. (Erlewine, Randy) (aef). (Entered: 01/09/2020)
01/09/2020	54	ORDER Following Telephonic Discovery Conference. The Court held a telephonic Discovery Conference on 1/8/2020. The Court sets a follow−up telephonic Discovery Conference for 1/10/2020 12:00 PM before Magistrate Judge Michael S. Berg. The Court VACATES the telephonic attorneys−only Case Management Conference scheduled for 1/13/2020, at 9:00 AM. Signed by Magistrate Judge Michael S. Berg on 1/9/2020.(aef) (Entered: 01/09/2020)

01/08/2020	53	Minute Entry for proceedings held before Magistrate Judge Michael S. Berg: (T)Discovery Conference was held on 1/8/2020. Order to follow. (Plaintiff Attorneys Randy S. Erlewine; Brian C. Conlon). (Defendant Attorney Jennifer L. Santa Maria). (no document attached) (dxm) (Entered: 01/09/2020)
01/07/2020	52	ORDER Granting 51 Joint Motion to Continue Settlement Disposition Conference. The Settlement Disposition Conference is set for 1/21/2020 at 01:30 PM in Courtroom 2C before Magistrate Judge Michael S. Berg. Signed by Magistrate Judge Michael S. Berg on 1/7/2020. (aef) (Entered: 01/07/2020)
01/06/2020	51	Joint MOTION to Continue *Settlement Disposition Conference* by Kristina Raines. (Erlewine, Randy)(aef). (Entered: 01/06/2020)
01/03/2020	50	REPLY − Other re 47 Response in Opposition to Motion, *Reply Declaration of R. Scott Erlewine in Support of Motion for Leave to File Second Amended Complaint* filed by Kristina Raines. (Erlewine, Randy) (aef). (Entered: 01/03/2020)
01/03/2020	49	RESPONSE in Support re 39 MOTION for Leave to File *Second Amended Complaint* filed by Kristina Raines. (Erlewine, Randy) (aef). (Entered: 01/03/2020)
01/03/2020	48	ORDER re: 39 Oral Argument. The Court finds this matter suitable for decision without oral argument pursuant to Civil Local Rule 7.1(d)(1). Accordingly, the hearing is vacated. Signed by Judge Dana M. Sabraw on 1/3/2020.(mme) (Entered: 01/03/2020)
12/27/2019	47	RESPONSE in Opposition re 39 MOTION for Leave to File *Second Amended Complaint* filed by Concentra Group Holdings LLC, Select Medical Holdings Corporation, U.S. Healthworks Medical Group. (Attachments: # 1 Declaration of Cameron Flynn in Support of Opposition to Plaintiff's Motion for Leave to File Second Amended Complaint)(Flynn, Cameron) (mme). (Entered: 12/27/2019)
12/27/2019	46	ORDER Granting 45 Joint Motion for to Continue Discovery Dispute Motion Filing Deadline. It is hereby ORDERED that the deadline for Plaintiff and Defendant U.S. Healthworks to file a Joint Motion for Determination of Discovery Dispute concerning Defendants responses to Plaintiffs Second Set of Interrogatories (Nos. 10−14) is CONTINUED from December 27, 2019 to January 14, 2020. Signed by Magistrate Judge Michael S. Berg on 12/27/2019. (mme) (Entered: 12/27/2019)
12/26/2019	45	Joint MOTION for Extension of Time to File *Stipulation to Alter Deadline to File Joint Motion for Determination of Discovery Dispute* by Kristina Raines. (Erlewine, Randy) (mme). (Entered: 12/26/2019)
12/24/2019	44	ORDER Following Telephonic Discovery Conference. Telephonic Discovery Conference set for 1/8/2020 04:30 PM before Magistrate Judge Michael S. Berg. Signed by Magistrate Judge Michael S. Berg on 12/24/2019.(mme) (Entered: 12/26/2019)
12/23/2019	43	Minute Entry for proceedings held before Magistrate Judge Michael S. Berg: (T)Discovery Conference was held on 12/23/2019. Order to follow. (Plaintiff Attorney Randy S. Erlewine). (Defendant Attorney Jennifer L. Santa Maria). (no document attached) (dxm) (Entered: 12/24/2019)
12/20/2019	42	ORDER Granting 41 Joint Motion to Continue Deadline to File Joint Motion for Determination of Discovery Dispute. The deadline for Plaintiff and Defendant U.S. Healthworks to file a Joint Motion for Determination of Discovery Dispute concerning Defendants responses to Plaintiffs Second Set of Interrogatories (Nos. 10−14) is hereby extended from December 20, 2019, until December 27, 2019. Signed by Magistrate Judge Michael S. Berg on 12/20/2019. (mme) (Entered: 12/20/2019)
12/19/2019	41	MOTION for Extension of Time to File *Stipulation to Alter Deadline to File Joint Motion for Determination of Discovery Dispute* by Kristina Raines. (Erlewine, Randy) (ag). (Entered: 12/19/2019)
12/19/2019	40	ORDER Setting Telephonic Discovery Conference. A telephonic Discovery Conference is set for 12/23/2019 at 05:00 PM before Magistrate Judge Michael S. Berg. Signed by Magistrate Judge Michael S. Berg on 12/18/2019.(aef) (Entered: 12/19/2019)

12/09/2019	39	MOTION for Leave to File *Second Amended Complaint* by Kristina Raines. (Attachments: # 1 Memo of Points and Authorities in Support of Motion for Leave to File Second Amended Complaint, # 2 Declaration of R. Scott Erlewine in Support of Motion to File Second Amended Complaint)(Erlewine, Randy) (aef). (Entered: 12/09/2019)
12/06/2019	38	ORDER Granting 34 Joint Motion to Continue Deadline for Plaintiff and Defendant Front Porch Communities and Services to File Joint Motion to Dismiss. A Settlement Disposition Conference is set for 1/7/2020 at 01:30 PM in Courtroom 2C before Magistrate Judge Michael S. Berg. Signed by Magistrate Judge Michael S. Berg on 12/6/2019. (aef) (Entered: 12/06/2019)
12/06/2019	37	ORDER Following Telephonic Discovery Conference. The Court held a telephonic Discovery Conference on December 4, 2019. The parties may file a Joint Motion for Determination of Discovery Dispute, no later than December 20, 2019. Signed by Magistrate Judge Michael S. Berg on 12/6/2019.(aef) (Entered: 12/06/2019)
12/04/2019	36	Minute Entry for proceedings held before Magistrate Judge Michael S. Berg: (T)Discovery Conference was held on 12/4/2019. Order to follow. (Plaintiff Attorneys Randy S. Erlewine; Brian S. Conlon). (Defendant Attorneys Jennifer L. Santa Maria; Clint Engleson). (no document attached) (dxm) (Entered: 12/06/2019)
12/04/2019	35	ORDER Re: Oral Argument. (ECF 19 , 22) The December 6, 2019 hearing is vacated. Signed by Judge Dana M. Sabraw on 12/4/2019.(aef) (Entered: 12/05/2019)
12/04/2019	34	Joint MOTION Extending Deadline for Parties to File Dismissal re 31 Order Scheduling Settlement Disposition Conference, by Kristina Raines. (Attachments: # 1 Proposed Order Extending Deadline for Parties to File Dismissal)(Erlewine, Randy) (aef). (Entered: 12/04/2019)
12/02/2019	33	ORDER: (1) Granting In Part Joint Motion to Continue Deadline to File Joint Motion for Determination of Discovery Dispute and (2) Setting Telephonic Discovery Dispute Conference for December 4, 2019. The Court will hold a telephonic Discovery Conference on December 4, 2019, at 4:00 p.m. Signed by Magistrate Judge Michael S. Berg on 12/2/2019. (aef) (Entered: 12/03/2019)
12/02/2019	32	Joint MOTION *Stipulation to Alter Deadline to File Joint Motion for Determination of Discovery Dispute* by Kristina Raines. (Attachments: # 1 Proposed Order Altering Deadlin to File Joint Motion for Determination of Discovery Dispute)(Erlewine, Randy) (aef). (Entered: 12/02/2019)
11/18/2019	31	Order: (1) Confirming Settlement between Plaintiff and Defendant Front Porch Communities and Services, and (2) Setting Deadline to File Joint Motion to Dismiss. A Joint Motion for Dismissal is due on 12/4/2019. The Settlement Disposition Conference is set for 12/12/2019 at 01:30 PM in Courtroom 2C before Magistrate Judge Michael S. Berg. Signed by Magistrate Judge Michael S. Berg on 11/18/2019.(aef) (Entered: 11/18/2019)
11/08/2019	30	ORDER Granting 29 Joint Motion for Protective Order with Modification. Signed by Magistrate Judge Michael S. Berg on 11/8/2019. (aef) (Entered: 11/08/2019)
11/08/2019	29	MOTION for Protective Order *Proposed Stipulated Protective Order* by Kristina Raines. (Erlewine, Randy) Modified on 11/8/2019 QC email sent re proposed orders should not be attached (aef). (Entered: 11/08/2019)
11/06/2019	28	Minute Entry for proceedings held before Magistrate Judge Michael S. Berg: Settlement Conference with Plaintiff and Defendant Front Porch Communities and Services was held on 11/6/2019. Order to follow. (Plaintiff Attorney Randy S. Erlewine). (Defendant Attorney Marie B. Kenny). (no document attached) (dxm) (Entered: 11/07/2019)
11/06/2019	27	Minute Entry for proceedings held before Magistrate Judge Michael S. Berg: (T)Discovery Conference was held on 11/6/2019. (Plaintiff Attorney Randy S. Erlewine). (Defendant Attorneys Marie B. Kenny; Clint Engleson). (no document attached) (dxm) (Entered: 11/06/2019)
11/05/2019	26	ORDER Granting 24 Ex Parte Motion to Excuse Personal Appearance of Claims Adjuster at the Settlement Conference. Front Porch's insurance claims adjuster is

		excused from personally appearing at the November 6, 2019 Settlement Conference. Signed by Magistrate Judge Michael S. Berg on 11/5/2019. (aef) (Entered: 11/06/2019)
11/05/2019	25	REPLY − Other re 24 MOTION to Excuse Appearance of Claims Adjuster at ENE, *Plaintiff's Opposition to Motion to Excuse Personal Appearance of Claims Adjuster* filed by Kristina Raines. (Erlewine, Randy) (aef). (Entered: 11/05/2019)
11/05/2019	24	MOTION to Excuse Appearance of Claims Adjuster at ENE, by Front Porch Communities and Services. (Attachments: # 1 Declaration, # 2 Proof of Service)(Kenny, Marie) (aef). (Entered: 11/05/2019)
11/01/2019	23	ORDER Setting Telephonic Discovery Conference. A telephonic Discovery Conference is set for 11/6/2019 at 10:00 AM before Magistrate Judge Michael S. Berg. Signed by Magistrate Judge Michael S. Berg on 11/1/2019.(aef) (Entered: 11/01/2019)
10/31/2019	22	MOTION to Dismiss for Failure to State a Claim by Front Porch Communities and Services. (Attachments: # 1 Memo of Points and Authorities, # 2 Declaration, # 3 Proof of Service)(Kenny, Marie) (aef). (Entered: 10/31/2019)
10/31/2019	21	NOTICE OF WITHDRAWAL OF DOCUMENT by Front Porch Communities and Services re 20 MOTION to Dismiss for Failure to State a Claim filed by Front Porch Communities and Services . (Attachments: # 1 Proof of Service)(Kenny, Marie) (aef). (Entered: 10/31/2019)
10/30/2019	20	***DOCUMENT WITHDRAWN PER ECF 21 *** − MOTION to Dismiss for Failure to State a Claim by Front Porch Communities and Services. (Attachments: # 1 Memo of Points and Authorities, # 2 Declaration, # 3 Proof of Service)(Kenny, Marie) Modified on 10/31/2019 QC email sent re incorrect pdf attached; must file notice of withdrawal of document (aef). Modified on 10/31/2019 to withdraw document (aef) (Entered: 10/30/2019)
10/30/2019	19	MOTION to Strike by Front Porch Communities and Services. (Attachments: # 1 Memo of Points and Authorities, # 2 Proof of Service)(Kenny, Marie)(aef). (Entered: 10/30/2019)
10/10/2019	18	SCHEDULING ORDER Regulating Discovery and Other Pre−Trial Proceedings: A Case Management Conference was held on 10/08/2019. A Settlement Conference is set for 11/6/2019 at 4:00 PM in the chambers of Magistrate Judge Michael S. Berg. A telephonic attorneys−only Case Management Conference is set for 1/13/2020 at 9:00 AM before Magistrate Judge Michael S. Berg. A Mandatory Settlement Conference is set for 5/4/2020 at 9:30 AM in the chambers of Magistrate Judge Michael S. Berg. Memorandum of Contentions of Fact and Law is due by 12/16/2020. The Proposed Pretrial Order is due by 1/8/2021. The Final Pretrial Conference is set for 1/15/2021 at 10:30 AM before Judge Dana M. Sabraw. Jury Trial is set for 2/16/2021 at 9:00 AM before Judge Dana M. Sabraw. Signed by Magistrate Judge Michael S. Berg on 10/09/2019.(ag) (Entered: 10/10/2019)
10/08/2019	17	Minute Entry for proceedings held before Magistrate Judge Michael S. Berg: Early Neutral Evaluation Conference was held on 10/8/2019. The case did not settle. Case Management Conference was held on 10/8/2019. Scheduling order to follow. (Plaintiff Attorneys Randy S. Erlewine; Michael Miller; David Given). (Defendant Attorneys Marie B. Kenny; Jennifer L. Santa Maria). (no document attached) (dxm) (Entered: 10/09/2019)
10/02/2019	16	NOTICE of Appearance by Cameron O'Brien Flynn on behalf of Concentra Group Holdings LLC, Select Medical Holdings Corporation, U.S. Healthworks Medical Group (Flynn, Cameron)Attorney Cameron O'Brien Flynn added to party Concentra Group Holdings LLC(pty:dft), Attorney Cameron O'Brien Flynn added to party Select Medical Holdings Corporation(pty:dft), Attorney Cameron O'Brien Flynn added to party U.S. Healthworks Medical Group(pty:dft) (aef). (Entered: 10/02/2019)
10/02/2019	15	ORDER Resetting Early Neutral Evaluation Conference and Case Management Conference. Due to a conflict on the Court's calendar, the Early Neutral Evaluation Conference and Case Management Conference scheduled for October 8, 2019, at 9:30 a.m. are hereby RESET for 10:00 a.m. on the same day. All other guidelines and requirements remain as previously set. (See ECF No. 13.) Signed by Magistrate Judge

		Michael S. Berg on 10/2/2019.(aef) (Entered: 10/02/2019)
10/01/2019	14	JOINT DISCOVERY PLAN by Kristina Raines (Erlewine, Randy) (aef). (Entered: 10/01/2019)
08/27/2019	13	NOTICE AND ORDER for Early Neutral Evaluation Conference and Case Management Conference. An Early Neutral Evaluation is set for 10/8/2019 at 09:30 AM before Magistrate Judge Michael S. Berg. Signed by Magistrate Judge Michael S. Berg on 8/27/2019.(aef) (Entered: 08/28/2019)
08/22/2019	12	NOTICE of Party With Financial Interest by Front Porch Communities and Services . Identifying Corporate Parent Front Porch Communities and Services for Front Porch Communities and Services. (Attachments: # 1 Proof of Service)(Kenny, Marie) (aef). (Entered: 08/22/2019)
08/19/2019	11	NOTICE of Appearance by Brian S. Conlon on behalf of Kristina Raines (Conlon, Brian)Attorney Brian S. Conlon added to party Kristina Raines(pty:pla) (aef). (Entered: 08/19/2019)
08/19/2019	10	DEMAND for Trial by Jury by Kristina Raines. (Erlewine, Randy) (aef). (Entered: 08/19/2019)
08/19/2019	9	NOTICE of Appearance by Randy Scott Erlewine on behalf of Kristina Raines (Erlewine, Randy)Attorney Randy Scott Erlewine added to party Kristina Raines(pty:pla) (aef). (Entered: 08/19/2019)
08/16/2019	8	NOTICE of Joinder by Front Porch Communities and Services re 1 Notice of Removal,, (Kenny, Marie) (aef). (Entered: 08/16/2019)
08/15/2019	7	ANSWER to Complaint (Notice of Removal) by Front Porch Communities and Services. (jxv) (Entered: 08/16/2019)
08/15/2019	6	NOTICE of Party With Financial Interest by Concentra Group Holdings, Select Medical Holdings Corporation, U.S. Healthworks Medical Group. Identifying Other Affiliate Lloyds of London, Other Affiliate Kristina Raines for Concentra Group Holdings, Select Medical Holdings Corporation, U.S. Healthworks Medical Group. (jxv)(sjt). (Main Document 6 replaced on 8/16/2019) (jxv). (Entered: 08/16/2019)
08/15/2019	5	Corporate Disclosure Statement by Concentra Group Holdings, Select Medical Holdings Corporation, U.S. Healthworks Medical Group identifying Corporate Parent Blackrock Inc., Other Affiliate T. Rowe Price for Select Medical Holdings Corporation.. (jxv) (sjt). (Entered: 08/16/2019)
08/15/2019	4	ANSWER to Complaint (Notice of Removal) by Concentra Group Holdings, Select Medical Holdings Corporation, U.S. Healthworks Medical Group. (jxv) (Entered: 08/16/2019)
08/15/2019	3	**Docketed in Error** (Entered: 08/16/2019)
08/15/2019	2	ANSWER to Complaint (Notice of Removal) by U.S. Healthworks Medical Group. (jxv) (Entered: 08/16/2019)
08/15/2019	1	NOTICE OF REMOVAL with Jury Demand from San Diego County− San Diego Superior Court, case number 37−2018−00053708−CU−CR−CTL. (Filing fee $ 400 receipt number 0974−12835960.), filed by Select Medical Holdings Corporation, Concentra Group Holdings, U.S. Healthworks Medical Group. (Additional attachment(s) added on 8/16/2019: # 1 Civil Cover Sheet, # 2 Declaration Jennifer L. Santa Maria in Support of Removal of Civil Action to, # 3 Exhibit 1−8, # 4 Exhibit A−D, # 5 Exhibit 9−15) (jxv). (sjt). Modified to correct filing entry on 8/16/2019 (sjt). (Entered: 08/16/2019)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 21-55229

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Description of Document(s):

Plaintiffs-Appellants' Opening Brief
Addendum
Excerpts of Record (Vol. 1 of 1)

Signature s/ R. Scott Erlewine
Date June 9, 2021

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-55229

KRISTINA RAINES and DARRICK FIGG, individually and on behalf of all others similarly situated,
Plaintiffs-Appellants,

vs.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
Respondent,

and

U.S. HEALTHWORKS MEDICAL GROUP, a corporation; et al.,
Defendants-Appellees.

APPEAL FROM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
No. 3:19-CV-01539-DMS
(Honorable Dana M. Sabraw, Judge Presiding)

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CORPORATE DISCLOSURE STATEMENT REQUIRED BY FRAP 26.1

U.S. HealthWorks Medical Group, U.S. HealthWorks, Inc., Select Medical Corporation, Concentra Group Holdings, LLC, Concentra, Inc., Concentra Primary Care of California, and Occupational Health Centers of California are subsidiaries of Select Medical Holdings Corporation (NYSE: SEM), a publically traded company. Select Medical Holdings Corporation has no parent. T. Rowe Price (NASDAQ: TROW) owns more than 10% of Select Medical Holdings Corporation's stock. Blackrock, Inc. (NYSE: BLK) also owns more than 10% of Select Medical Holdings Corporation's stock.

DATED: August 23, 2021

REED SMITH

By: *s/ Raymond A. Cardozo*
Raymond A. Cardozo

DATED: August 23, 2021

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

By: *s/ Tim Johnson*
Tim L. Johnson
Cameron O. Flynn

ATTORNEYS FOR DEFENDANTS-APPELLEES U.S. HEALTHWORKS MEDICAL GROUP, U.S. HEALTHWORKS, INC., SELECT MEDICAL HOLDINGS CORPORATION, SELECT MEDICAL CORPORATION, CONCENTRA GROUP HOLDINGS, LLC, CONCENTRA, INC., CONCENTRA PRIMARY CARE OF CALIFORNIA, AND OCCUPATIONAL HEALTH CENTERS OF CALIFORNIA

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INTRODUCTION

When sitting in diversity jurisdiction, a federal court's only role is to apply the state substantive law, as the state legislature and state courts have specified the law. The federal court cannot create new state law.

Yet in this case, Plaintiffs-Appellees Kristina Raines and Darrick Figg (collectively "Plaintiffs") raise unprecedented claims that ask the Court to create new state law. They want the Court to impose employer liability under California's Fair Employment and Housing Act ("FEHA") on an alleged agent of an employer whom the employer used for services, where the alleged agent did not employ any of the plaintiffs themselves. Excerpts of Record ("ER")[1] 81-83, ¶73-82. FEHA is a California statute prohibiting sexual harassment and unlawful discrimination in employment and housing. Gov't. Code §§ 12900-12996. In *Reno v. Baird*, 18 Cal.4th 640 (1998), the California Supreme Court construed the very "agent" language in the FEHA on which Plaintiffs rely as only permitting FEHA liability on the principal/employer, and not on the employer's agents. In the intervening decades

[1] The ER includes documents beyond what is appropriate under Rule 30-1.4. Plaintiffs included an attorney declaration, discovery documents, excerpts from a deposition transcript, and briefing filed in the District Court which are "not relevant to the issues on appeal and, therefore, should be excluded from the excerpts." Advisory Committee Note to Rule 30-1.4. This Court should ignore any assertion not properly supported by the operative Complaint (*i.e.*, what should be in the ER). However, even with the improperly included documents, this Court should affirm the District Court's dismissal.

since the California Supreme Court decided *Reno*, the California Legislature has not amended the "agent" language in FEHA to permit liability on an agent, as distinct from the employer. Thus, the District Court correctly and prudently declined to create the new state law that Plaintiffs propose and dismissed their unprecedented claims. ER-7-12.

This appeal arises from the following context. U.S. HealthWorks Medical Group ("USHW") operated urgent care clinics in California. ER-68, ¶22. USHW also worked with other businesses to provide occupational health care, including pre-employment, post-job-offer exams ("PEPO Exams"). ER-69-70, ¶28. Businesses and governmental entities required individuals who received offers of employment from those businesses or entities to obtain PEPO Exams administered by USHW to determine if those individuals could perform the functions of the jobs that their putative employers had offered to them. ER-69, ¶27. In connection with the PEPO Exams, USHW asked patients to complete a standardized form titled "Health History Questionnaire" ("Questionnaire").[2] ER-73-74, ¶36-37. It also asked patients to sign a form titled "Authorization to Disclose Protected Health Information to Employer" ("Authorization") so it could report results of the PEPO Exams. ER-74-75, ¶ 41.

[2] Since it is a questionnaire, patients determined what information, if any, to provide in response to the Questionnaire.

Plaintiff Raines sued her employer, claiming, among other things, that it violated FEHA by requiring her and other "applicants"[3] to complete the Questionnaire and undergo a PEPO Exam with USHW. ER-5. Then, she settled with her employer and Plaintiff Figg joined the lawsuit. ER-5. However, Plaintiff Figg elected not to sue his employer at all, while Plaintiff Raines refused to limit the FEHA claim to her employer. ER-5. Together, they seek to extend FEHA through unprecedented claims against USHW, who did not employ them and merely performed health services requested by their employers. ER-82, ¶75-76. They claim USHW violated FEHA by seeking "non-job-related" information via the Questionnaire and the PEPO Exams. ER-83, ¶79.

Plaintiffs do not allege USHW had a direct employment relationship with them or other applicants. ER-82, ¶75-76. Still, they claim USHW is liable under FEHA because it acted as "agents" of the employers who sent individuals to USHW for PEPO Exams.[4] ER-82-83, ¶73-79. To support their claim, they point to language in FEHA, which states an "employer" is "any person regularly employing five or

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[3] Plaintiffs refer to USHW's patients as applicants – applicants for employment with businesses other than USHW. *See, e.g.*, ER-78, ¶ 63.

[4] Plaintiffs allege U.S. HealthWorks Medical Group, U.S. HealthWorks, Inc., Select Medical Holdings Corporation, Select Medical Corporation, Concentra Group Holdings, LLC, Concentra, Inc., Concentra Primary Care of California, and Occupational Health Centers of California (together with USHW, "Defendants") are jointly liable with USHW. Defendants deny this. However, it is inconsequential for purposes of this appeal. If USHW is not liable, neither are the other Defendants.

more persons, or any person acting as an agent of an employer, directly or indirectly." Gov't Code § 12926(d). ER-82, ¶74.

Asserted as an alternative to the FEHA cause of action, Plaintiffs claim USHW violated the Unruh Civil Rights Act ("Unruh Act") by presenting the Questionnaire to them and other applicants and asking related verbal follow-up questions in the PEPO Exams. ER-84-87, ¶83-93. The Unruh Act is a California statute that requires businesses to provide full and equal accommodations, advantages, facilities, privileges, or services to consumers irrespective of any protected characteristics. Civ. Code § 51. The Unruh Act does not apply to employment relationships and instead regulates businesses that are open to the public by prohibiting them from discriminating among the members of the public that the business serves. *Rojo v. Kliger*, 52 Cal.3d 65 (1990). Plaintiffs did not seek out USHW's services as a customer; their employers directed them to complete the Questionnaire and undergo a PEPO exam to confirm they could perform the job they had been offered. ER-69, ¶27; ER-84, ¶85. Plaintiffs allege USHW treated them and other applicants the same by presenting them with the Questionnaire and administering a PEPO Exam, if they wanted one. ER-85, ¶86. Still, they claim USHW violated the Unruh Act by asking questions that had no "bearing on fitness for employment" and supposedly are illegal under FEHA. Appellants-Plaintiffs' Opening Brief ("AOB") at 50.

Plaintiffs also assert a claim for intrusion upon seclusion. ER-87-91, ¶94-108. They claim USHW committed an unlawful intrusion by merely asking patients questions about private health information in a medical examination. ER-89-90, ¶103. However, they acknowledge USHW operated as "a third-party occupational health provider" and they and other applicants went to USHW to obtain "a pre-placement medical examination." ER-72, ¶33; ER-87-88, ¶95. Despite this, they claim USHW committed unlawful intrusions by asking questions regarding health information they believed to be irrelevant or unrelated to the applicable job functions.[5] ER-87-91, ¶94-108. Plaintiffs seek to pursue these claims on a class-wide basis. ER-78-81, ¶63-72. They seek to represent other applicants who completed the Questionnaire in connection with PEPO Exams. ER-78, ¶63.

Each claim fails on its face as a matter of law.

1. **FEHA Claim**: Agents of employers who themselves do not qualify as employers are not liable under FEHA. As the California Supreme Court has repeatedly recognized, the agent language in FEHA is there to hold an employer liable for the discriminatory actions of its agents. It does not create liability for agents under FEHA, and no California court has ever so held. USHW had no employment

[5] At the District Court, Plaintiffs also asserted a claim under California's Unfair Competition Law. ER-91-93, ¶109-118. However, they abandoned it here. AOB at 5, Footnote 1.

relationship with Plaintiffs or other applicants. Plaintiffs do not and cannot contend otherwise. The FEHA claim fails.[6]

2. **Unruh Act Claim**: The Unruh Act does not apply in the employment setting. The sole claim applicable here is the FEHA claim, and Plaintiffs must assert that claim against their employers alone, as Plaintiff Raines originally did. Independently, the Unruh Act does not apply to practices and policies applied equally to all consumers, irrespective of any protected characteristics. Plaintiffs do not allege USHW excluded certain individuals based on protected characteristics, or that anyone received different treatment. To the contrary, they concede USHW provided them and other applicants with the same services. The Unruh Act claim fails.

3. **Intrusion Upon Seclusion Claim**: An intrusion upon seclusion claim fails either where there is no reasonable expectation of privacy or only an insubstantial impact on privacy interests. Plaintiffs and other applicants went to USHW, an independent third-party health provider, to undergo medical exams. While some questions USHW asked them in connection with the medical exams may have made them uncomfortable and been irrelevant to the applicable job functions, such questioning does not constitute actionable intrusion upon seclusion given the context. As the District Court noted, medical professionals routinely ask patients about personal, private health history in the context of a medical exam. The intrusion upon seclusion claim fails.

The District Court analyzed each claim and correctly noted these deficiencies in two detailed rulings. ER-3-21; ER-95-98. This Court should affirm.

STATEMENT OF JURISDICTION

Defendants removed the action to the District Court under the Class Action Fairness Act ("CAFA"). ER-5. The District Court dismissed it for failure to state a

[6] Defendants dispute USHW acted as an agent of any employers. However, since USHW has no liability under FEHA even if it acted as agent, Defendants need not address whether USHW indeed acted as an agent of the employers.

claim. ER-5. Plaintiffs filed a timely notice of appeal. ER-99-100. Under 28 U.S.C. Section 1291, the Court has jurisdiction to review the District Court's dismissal.

STATEMENT OF ISSUES PRESENTED

The issues in this appeal include:

I. FEHA CLAIM

1) Under two California Supreme Court decisions finding liability under FEHA does not extend to individuals acting as agents of employers, did the District Court correctly conclude that the exact same "agent" language in the FEHA likewise does not permit a plaintiff to sue a business acting as an alleged agent of the plaintiff's employers?

II. UNRUH ACT CLAIM

2) Does the Unruh Act not apply to this employment context, since Plaintiffs' theory of liability rests on the assertion that an employer cannot ask the type of questions USHW asked in connection with the challenged medical exams because FEHA allegedly prohibits such questions?

3) Did the District Court correctly conclude USHW is not liable under the Unruh Act because Plaintiffs fail to plead or explain how USHW denied full and equal access to services when they claim it presented them and other applicants with the same standardized health history form (Questionnaire) and offered the same medical exam (PEPO Exam)?

III. INTRUSION UPON SECLUSION CLAIM

4) Did the District Court correctly conclude USHW is not liable for intrusion upon seclusion by asking Plaintiffs and other applicants about health information in the context of a medical examination?

STATEMENT OF THE CASE

I. RELEVANT PARTS OF FEHA AND THE UNRUH ACT

FEHA contemplates PEPO Exams and medical inquiries *by employers*. Government Code Section 12940 states:

> [A]n *employer or employment agency* may inquire into the ability of an applicant to perform job-related functions and may respond to an applicant's request for reasonable accommodation.

Gov't Code § 12940(e)(2) (emphasis added).

It further provides:

> [A]n *employer or employment agency* may *require a medical or psychological examination* or make a *medical or psychological inquiry* of a job applicant after an employment offer has been made but prior to the commencement of employment duties, provided that the *examination* or inquiry *is job related and consistent with business necessity* and that all entering employees in the same job classification are subject to the same examination or inquiry.

Gov't Code § 12940(e)(3) (emphasis added).

The Unruh Act states:

> All persons within the jurisdiction of this state are free and equal, and no matter what their [protected characteristic], are *entitled to the full and equal accommodations, advantages, facilities, privileges, or services* in all business establishments of every kind whatsoever.

Civ. Code § 51(b) (emphasis added).

It further provides that it "shall not be construed to confer any right or privilege on a person that is conditioned or limited by law or that is *applicable alike to persons of every [protected characteristic]*." Civ. Code § 51(c) (emphasis added).

II. THE QUESTIONNAIRE

The Questionnaire includes questions about (1) venereal disease; (2) painful or irregular vaginal discharge or pain; (3) problems with menstrual periods; (4) irregular menstrual period; (5); penile discharge, prostate problems, genital pain or masses; (6) cancer; (7) mental illness; (8) HIV; (9) permanent disabilities; (10) painful/frequent urination; (11) hair loss; (12) hemorrhoids; (13) diarrhea; (14) black stool; (15) constipation; (16) tumors; (17) organ transplant; (18) stroke; and (19) history of tobacco or alcohol use. ER-74, ¶37. The questions about menstrual and vaginal issues are in a box marked for women only. ER-74, ¶39. Likewise, the questions about penile discharge, prostate problems, and genital pain or masses are in a box marked for men only.[7] ER-74, ¶39. They assert USHW provided the Questionnaire to "each and every" person who went for a PEPO Exam. ER-85, ¶ 89.

[7] Defendants maintain USHW did not violate FEHA, the Unruh Act, or any other statute by using the Questionnaire or by conducing the PEPO Exams. Both are lawful. However, to prevail on this appeal, Defendants need not defend the legality of the Questionnaire or the PEPO Exams here.

III. THE PEPO EXAMS

Plaintiffs assert USHW operate as "a third-party vendor providing services" and that it led patients to believe it acted as their "own physician." ER-84, ¶ 85. They contend that if a patient "provided a positive response to any of the inquiries contained in the [Questionnaire]," USHW would have a "medical examiner verbally ask the [patient] to explain the basis for the positive responses." ER-74, ¶40. Since they went to USHW for PEPO Exams, Plaintiffs allege they had to sign the Authorization. It "authorized USHW to disclose the [patient's] protected health information to his/her prospective employer and others." ER-74-75, ¶41.

"In conducting the pre-placement exams, USHW considered whether the applicant's future health may be at risk in taking the job. USHW clinicians would attempt to dissuade applicants from taking the job where the clinician thought the job could be potentially hazardous to the applicant's future health even though it would not impact his or her ability to currently perform the essential job functions (such as where the applicant [smoked] and would be working with asbestos creating a heightened chance of developing lung cancer or where a pregnant woman would be working with silica which could increase her exposure to cancer but did not impact her current ability to do the job)." ER-72-73, ¶34(d).

Plaintiffs allege their prospective employer required them to undergo and pass a "pre-placement" medical examination as a condition of being hired. ER-65, ¶1.

However, they do not allege USHW required the PEPO Exams in any way; instead, they allege the "***employer*** requires that the applicant undergo and pass a medical examination by USHW as a condition to getting the job." ER-87-88, ¶95.

IV. PLAINTIFFS' PEPO EXAMS

Plaintiffs received employment offers from two different companies: Front Porch Communities and Services ("Front Porch") and San Ramon Valley Fire Protection District ("San Ramon"), respectively. ER-76, ¶48-49; ER-77, ¶57. Those employers allegedly required Plaintiffs to receive PEPO Exams from USHW as a condition of employment. *Id*. Plaintiffs do not allege USHW required them to undergo the PEPO Exams. ER-77, ¶52; ER-77-78, ¶58. As part of the PEPO Exams, Plaintiffs completed the Questionnaire and the Authorization. ER-76, ¶50; ER-77-78, ¶58. Plaintiffs also allege USHW asked verbal follow-up questions related to the Questionnaire. ER-77, ¶52; ER-78, ¶60.

Plaintiff Raines refused to complete the PEPO Exam. ER-77, ¶52-53. Pursuant to the Authorization, she claims USHW shared her refusal with Front Porch. ER-77, ¶54 Thereafter, Front Porch rescinded her employment offer. *Id*. However, she does not allege USHW made the decision to rescind her employment offer, or took any other adverse employment action against her. Plaintiff Figg completed the PEPO Exam, and apparently, commenced employment with San Ramon. ER-78, ¶62.

V. PROCEDURAL HISTORY

In October 2018, Plaintiff Raines filed a lawsuit in the San Diego Superior Court against Front Porch, USHW, and other Defendants alleging individual claims for violation of FEHA, violations of the Unruh Act, violation of the Confidentiality of Medical Information Act, and intrusion into private affairs. ER-113. Subsequently, she dismissed the FEHA claims against USHW and the other non-employing Defendants. However, in May 2019, she reasserted the claims against USHW and the other non-employing Defendants in a First Amended Complaint ("FAC") and added class claims, triggering removal under CAFA. ER-113.

After filing the FAC, Plaintiff Raines settled her claims against Front Porch on an individual basis, and in January 2020, dismissed her employer. ER-109. The following month, she filed a Second Amended Complaint ("SAC"), in which Plaintiff Figg joined. ER-108. The SAC named additional non-employing Defendants but Plaintiff Figg did not name his employer, San Ramon. ER-5. The SAC asserted claims for impermissible inquiries in violation of FEHA; violation of the Unruh Act; intrusion upon seclusion; and violations of California Business and Professions Code. ER-5-6. Defendants moved to dismiss the SAC and the District Court dismissed it for failure to state a claim. ER-5-6. However, it granted Plaintiffs leave to amend. ER-95-98.

In August 2020, Plaintiffs filed a Third Amended Complaint ("TAC"), alleging the same claims. ER-64-94. Defendants moved to dismiss the TAC and the District Court dismissed it for failure to state a claim, but without leave to amend. ER-3-21. In a 19-page ruling, it carefully considered each claim and made these findings:

1. **FEHA Claim**: "[E]ven assuming USHW is an agent of Plaintiffs' employers, the issue of liability remains." ER-9. The "purpose of FEHA's 'agent' language, Cal. Gov't Code § 12926(d), is to hold employers – the entities which actually employ individuals – liable for discriminatory actions of their agents." ER-10. Under the reasoning from *Reno v. Baird*, 18 Cal.4th 640 (1998) and *Jones v. Lodge at Torrey Pines*, 42 Cal.4th 1158 (2008), "FEHA liability would not extend to USHW as an agent, regardless of whether it is a large business or an individual supervisor." *Id*. The "fact that 'the employer is liable via the respondeat superior effect of the 'agent' language provides protection to employees even if [the agents] are not personally liable.'" ER-11-12. "USHW may not be held liable as an agent of Plaintiffs' employers as a matter of law under FEHA." ER-12.

2. **Unruh Act Claim**: Plaintiffs "must allege how the [Questionnaire] denied them equal access to accommodations or services." ER-13 "Plaintiffs do not explain how the allegedly impermissible questions denied them 'full and equal access' to USHW's services, beyond claiming they are entitled to a 'discrimination-free' exam. Not every medical exam will be identical, even in the context of a job placement exam, because inquiry and assessment will differ depending on the patient's own conditions or complaints." ER-14-15. "But this is not a denial of the service of the medical exam itself. Plaintiffs do not allege USHW excluded particular individuals from receiving an exam on the basis of protected characteristics, or that Plaintiffs received an inadequate exam." ER-15. "Plaintiffs fail to plead how any exam was not 'full and equal' beyond the fact that the standardized questionnaire contained questions specific to different genders and asked about disabilities and other medical conditions." *Id.* "[T]he questionnaire does not constitute a denial of services sufficient to sustain an Unruh

Act claim." *Id.* Since "Plaintiffs are unable to show USHW discriminated against them as customers by denying them full and equal access to its services, [they] fail to plead a viable Unruh Act claim." *Id.*

3. **Intrusion Upon Seclusion Claim**: "USHW's questions may have been uncomfortable and irrelevant to Plaintiffs' job functions, but Plaintiffs fail to establish that USHW's questioning was an actionable intrusion upon seclusion given the setting." ER-17. "[Q]uestions about personal health history are routinely asked in the context of a medical exam." *Id.* "[W]hile the examinations at issue here were for a specific purpose, the broader medical context remains relevant and indicates the questions were not so highly offensive as to constitute an intrusion upon seclusion." *Id.* USHW did not intrude "on Plaintiffs' privacy by simply asking each Plaintiff the unwelcome questions during a single examination." *Id.* "USHW's practice of asking its patients questions about private information in the context of a medical examination, without even necessarily obtaining that information, does not rise to the level of intrusion upon seclusion." ER-18-19. "At least one court has held that similar questioning by an *employer*, let alone a medical professional, does not establish a claim for intrusion. *See Horgan v. Simmons*, 704 F.Supp.2d 814, 821 (N.D. Ill. 2010) (holding supervisor's questioning of employee about employee's medical condition, including HIV status, is not actionable intrusion upon seclusion)." ER-19.

STANDARD OF REVIEW

This Court reviews a district court's order granting dismissal under Federal Rules of Civil Procedure Rule 12(b)(6) *de novo*. *See Depot, Inc. v. Caring for Montanans*, 915 F.3d 643, 652 (9th Cir. 2019). It should "affirm a dismissal for failure to state a claim where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 886 (9th Cir. 2018). To survive dismissal, the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim

to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). While this Court may "accept as true all factual allegations," it need not "accept as true allegations that are conclusory." *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1051 (9th Cir. 2014). Nor must it consider factual assertions made for the first time on appeal, as "review is limited to the contents of the complaint." *Allen v. City of Beverly Hills*, 911 F.2d 367, 372 (9th Cir. 1990).

SUMMARY OF ARGUMENT

I. THE FEHA CLAIM FAILS

In two decisions separated by 10 years, the California Supreme Court held that agents who themselves do not qualify as employers are not liable under FEHA. *Reno v. Baird*, 18 Cal.4th 640 (1998); *Jones v. Lodge at Torrey Pines*, 42 Cal.4th 1158 (2008).

Reno and *Jones* concern individuals (supervisors) acting as agents, and here, Plaintiffs allege that a business entity, USHW, acted as an agent of Plaintiffs' respective employers. ER-70-72, ¶30-32. However, the "agent" language in FEHA is identical and draws no distinction between businesses acting as agents as opposed to individuals, or any other type of agent. Thus, there is no textual basis in FEHA to confine the California Supreme Court's controlling interpretation of FEHA's agent language to individuals only.

The reasoning in *Reno* and *Jones* also does not support any such distinction. To the contrary, *Reno* and *Jones* support a finding that all agents – individuals and businesses – who themselves do not qualify as employers are not liable under FEHA. Any other rule would turn on its head the employer liability and agency principles in FEHA. FEHA focuses liability for adverse employment actions on the employer – not the employer's agent. This makes sense because an agency relationship can only arise if the principal has control over the agent; an agent does not control its principal. Thus, a court may hold an employer liable for the actions of the employer's individual and corporate agents because the employer can control those actions and prevent their occurrence or direct that actions occur in a lawful manner. By contrast, an agent cannot control the principal's actions. That is why the legal system calls the vicarious liability doctrine *respondeat superior* and there is no vicarious liability doctrine of *respondeat inferior*.

II. THE UNRUH ACT CLAIM FAILS

The Unruh Act does not apply to employment discrimination (*e.g.*, alleged violations of FEHA). *Rojo v. Kliger*, 52 Cal.3d 65 (1990). It also does not extend to practices and policies that apply equally to all consumers. *Turner v. Association of American Medical Colleges*, 167 Cal.App.4th 1401 (2008).

Plaintiffs' theory of liability is premised on the assertion that an employer cannot ask the questions that USHW asked of Plaintiffs or conduct the kind of

medical screening that they challenge. ER-84-87, ¶83-93. Thus, their claim is indisputably a FEHA employment-based claim, not a denial of public accommodation claim under the Unruh Act. Worse, Plaintiffs cannot explain how USHW's conduct denied them full and equal access to its services. *Id.* As the District Court recognized, there is no denial of services sufficient to trigger the Unruh Act. ER-12-15.

III. THE INTRUSION UPON SECLUSION CLAIM FAILS

Where a plaintiff lacks a reasonable expectation of privacy or, at most, the defendant's conduct only affects privacy interests in an insubstantial way, a court may adjudicate the question of invasion as a matter of law. *Deteresa v. American Broadcasting Co., Inc*., 121 F.3d 460, 465 (9th Cir. 1997). In assessing reasonableness, the court considers the customs, practices, and physical settings surrounding the alleged invasion. *Leonel v. Am. Airlines, Inc*., 400 F.3d 702, 712 (9th Cir. 2005), opinion amended on denial of reh'g, No. 03-15890, 2005 WL 976985 (9th Cir. 2005).

Plaintiffs claim they and other applicants went to USHW, an independent third-party health provider, to undergo medical exams. ER-72, ¶ 33; ER-87-88, ¶95. They understood this before they went. Once there, they signed the Authorization to allow USHW to report the results of the medical exams. ER-71-72, ¶32. Plaintiffs allege USHW asked non-job-related questions about private health history

information. ER-85, ¶88. However, even if true, the alleged conduct does not sufficiently state a claim for intrusion upon seclusion, given the degree (or lack thereof) of the intrusion, the context, and the expectations of Plaintiffs and other applicants.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED THE FEHA CLAIM BECAUSE AGENTS WHO THEMSELVES DO NOT QUALIFY AS EMPLOYERS ARE NOT LIABLE UNDER FEHA

Plaintiffs premise the FEHA claim on the contention that USHW acted as employers' agents, and thus is an "employer" under FEHA. AOB at 23-25. They claim that because FEHA's definition of employer includes the employer's agents, FEHA makes alleged agents, like USHW, directly liable for employment discrimination to individuals that the agents never employed.

No California court has ever adopted this reasoning. In fact, in *Reno v. Baird*, 18 Cal.4th 640 (1998), the California Supreme Court considered whether an agent of the employer, (a supervisor) could, based on the agent language in FEHA, be liable under FEHA. Likewise, in *Jones v. Lodge at Torrey Pines*, 42 Cal.4th 1158 (2008), the California Supreme Court analyzed whether individual agents may be held directly liable as employers for retaliation under FEHA. In both cases, the California Supreme Court held the employer's agents are not liable under FEHA by virtue of being agents.

There is no basis, textual or otherwise, for this Court to deviate from the California Supreme Court's interpretation of agency liability under FEHA.

A. There Is No Textual Basis in FEHA to Limit the California Supreme Court's Controlling Interpretation of the Agency Language in FEHA Only to Agents Who Are Individuals

Plaintiffs ask this Court to depart from the California Supreme Court's interpretation of the agent language in FEHA based on the type of agent against whom a plaintiff makes a claim—individual versus entity agents. AOB at 27-31. Yet, nothing in the text of FEHA supports any such distinction, much less a federal court drawing such a distinction even though no California court has done so.

Regarding agents, FEHA states an "employer" is "any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly." Gov't Code § 12926(d). FEHA defines a "person" as "one or more individuals, partnerships, associations, corporations, limited liability companies, legal representatives, trustees, trustees in bankruptcy, and receivers or other fiduciaries." Gov't Code § 12925(d). Thus, "an agent" under FEHA can be an individual or a company acting at the behest and under the control of the employer, directly or indirectly. FEHA does not distinguish between different types of agents – individuals or corporations, direct or indirect. Plaintiffs provided no authority to support any distinction. This Court cannot create a distinction in a statute that does not exist. It must treat all agents the same, just as the statute does.

Plaintiffs' contention that "California courts have never found a corporation like [USHW] immune from FEHA liability" is an attempt to sidestep the salient point. The fact that no published California case has ever found a corporation like [USHW] liable under FEHA as an agent is a strong reason for this Court to decline Plaintiffs' proposal to create new state law. "'Federal diversity jurisdiction provides an alternative forum for the adjudication of state-created rights, but it does not carry with it generation of rules of substantive law.'" *Snead v. Metro. Prop. & Cas. Ins. Co.*, 237 F.3d 1080, 1090 (9th Cir. 2001), quoting *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 426 (1996). Rather, when sitting in diversity, the role of the federal court is to apply state law, as it currently exists—not to expand the scope of state law beyond its existing confines. *See Kremen v. Cohen*, 325 F.3d 1035, 1038 (9th Cir. 2003) (it is not the role of federal courts to expand state law); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 44 (1997) ("Federal courts lack competence to rule definitively on the meaning of state legislation"); *City of Philadelphia v. Lead Industries Ass'n, Inc.*, 994 F.2d 112, 123 (3rd Cir. 1993) ("In a diversity case . . . federal courts may not engage in judicial activism. Federalism concerns require that [they] permit state courts to decide whether and to what extent they will expand state common law.").

Importantly, "[a] federal court in a diversity case is not free to engraft onto ... state rules exceptions or modifications which may commend themselves to the

federal court, but which have not commended themselves to the State in which the federal court sits." *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3, 4 (1975). Given the California Supreme Court's holding in *Reno* and *Jones*, and the absence of any authority for Plaintiffs' position, this Court should reject Plaintiffs' request that this Court go where no California court has gone before.

B. The Reasoning in *Reno* and *Jones* Applies to All Agents – Individuals and Businesses

The reasoning in *Reno* and *Jones* applies equally to all agents – individuals and businesses – who themselves did not employ a plaintiff suing under FEHA. The California Supreme Court did not limit its holdings to agents who are individuals because there is no statutory or other basis to do so.

> In *Reno*, the Court considered two alternative constructions.
>
> > One construction is that argued for by plaintiffs here: that by this language the Legislature intended to define every [agent] in California as an "employer," and hence place each at risk of personal liability whenever [the agent] makes a personnel decision which could later be considered discriminatory. The other construction is the one widely accepted around the country: that by the inclusion of the "agent" language the Legislature intended only to ensure that employers will be held liable if their [agents] take actions later found discriminatory, and that employers cannot avoid liability by arguing that [an agent] failed to follow instructions or deviated from the employer's policy.

Id. at 647, *citing Janken v. GM Hughes Electronics*, 46 Cal.App.4th 55, 65-66 (1996). It rejected "the contention that individual [agents] are at risk of personal liability for [] discrimination on the theory that the 'agent' language in [FEHA]

defines them as an "employer" for purposes of liability." *Ibid*. It did the same in *Jones*.

> Plaintiff argues that section 12940's plain language — specifically, the use of the word 'person' in subdivision (h) to describe who may not retaliate — compels the conclusion that all persons who engage in prohibited retaliation are personally liable, not just the employer. Accordingly, plaintiff argues, we must follow that plain meaning without engaging in other kinds of statutory interpretation. … We disagree.

Jones, 42 Cal.4th at 1162 (cleaned).

This reasoning recognized that either the agency language must be construed as merely ensuring the employer is liable for all actions undertaken by the employer's agents, or that language would render every agent—individual or entity—personally liable. Just as the statutory text provides no basis to distinguish between individuals and entities for purposes of the agent liability question, the California Supreme Court's examination of that language in two controlling decisions provides no basis for any such distinction.[8]

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[8] Like Plaintiffs advocate here (AOB at 31-34), the California Supreme Court considered federal authority regarding agent liability under similar federal statutes. It noted that "federal circuit court decisions [] overwhelmingly find no individual liability." *Reno*, 18 Cal.4th at 661. It noted that many of the rulings holding differently "rested solely on now-outdated federal authority." *Id.* at 661. It found "the cases concluding [agents] are not individually liable persuasive in both number and reasoning." *Id*. at 659. It held that "FEHA, like similar federal statutes, allows persons to sue and hold liable their employers, but not individuals [as agents]." *Id.* at 643. Likewise, the Ninth Circuit reviewed and dismissed some of the federal authority cited by Plaintiffs. *See Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1113, fn. 48 (9th Cir. 2000), noting repudiation of the test Plaintiffs seek

C. The Reasoning in *Reno* and *Jones* Reinforces the Employer Liability and Agency Principles in FEHA

The California Supreme Court explained that the California Legislature included the agent language in FEHA to memorialize the principle of *respondeat superior*, making the principal (employer) liable for the agent's actions.

> [It is there to] eliminate potential confusion and avoid the need to research extraneous legal sources to understand the statute's full meaning. Legislatures are free to state legal principles in statutes, even if they repeat preexisting law, without fear the courts will find them unnecessary and, for that reason, imbued with broader meaning.

Reno v. Baird, 18 Cal.4th 640, 658 (1998).

The California Supreme Court explained that the agent language in FEHA protects employees by making "the employer liable via the *respondeat superior* effect." *Id*. at 655. Where unlawful conduct by an agent occurs, FEHA makes the employer liable, not any agent. The essential feature of an agency relationship that gives rise to liability of the principal under the doctrine of *respondeat superior* is that the principal must exercise sufficient control in order for the relationship to qualify as an agency relationship. As the California Supreme Court noted, the doctrine also incentivizes the principal to discipline agents who engage in conduct that gives rise to employer liability or prevent such conduct from occurring at all. *Id*. at 654-655.

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to adopt from *Carparts Distributing Center v. Automotive Wholesaler's*, 37 F.3d 12 (1st Cir. 1994).

On the other hand, an agent does not make the ultimate hiring, firing, or other adverse employment decisions on which FEHA focuses. The agent does not control the principal. Therefore, holding the employer liable for the agent's actions serves the remedial and deterrence purposes of the FEHA, yet unmanageable problems result when imposing *employer* liability on the *agent*.

For example, in this case, each Plaintiff was free to challenge the conduct at issue by suing his or her employer—Plaintiffs Raines did so and settled that claim. By contrast, USHW did not take any employment action and instead just administered a medical screening for the employer. The employer decided who would be required to take the exam. It also decided what to do if any applicant declined to answer the questions or refused to undergo the screening. To impose employer liability on the third party is to pound the proverbial square peg into the round hole. Doing so would open up untold claims against the vast number of "agents" who perform various services for California employers. Such a radical proposed rewrite of California law is a matter for the California Legislature.

D. Only the California Legislature Can Expand FEHA

This Court "cannot insert what has been omitted, omit what has been inserted, or rewrite the statute to conform to a presumed intention that is not expressed. If the plain language of the statute is unambiguous and does not involve an absurdity, then the plain meaning governs." *Lewis v. Clarke*, 108 Cal.App.4th 563, 567 (2003).

Notably, the California Supreme Court admonished that "until the Legislature provides for punishing [agents], [the courts] should leave that task to the employers." *Reno*, 18 Cal.4th at 662. That admonishment occurred more than two decades ago, but the California Legislature has never since amended the FEHA to suggest that agents generally should bear liability or to distinguish entity agents from the individuals that *Reno* held could not be liable. Any change to the law must come from the California Legislature.

II. THE DISTRICT COURT PROPERLY DISMISSED THE UNRUH ACT CLAIM BECAUSE THE ACT DOES NOT APPLY TO THIS EMPLOYMENT CONTEXT AND USHW PROVIDED PLAINTIFFS WITH FULL AND EQUAL ACCESS TO ITS SERVICES

A. The Unruh Act Does Not Apply to Employment Discrimination

Courts have "rejected attempts by plaintiffs to expand the scope of the Unruh Act to include employment claims." *Bass v. County of Butte*, 458 F.3d 978, 981 (9th Cir. 2006), *citing Alcorn v. Anbro Engineering, Inc*., 2 Cal.3d 493 (1970). In *Rojo v. Kliger*, the California Supreme Court unequivocally held that "the [Unruh Act] has no application to employment discrimination." *Rojo v. Kliger*, 52 Cal.3d 65, 77 (1990), *citing Alcorn v. Anbro Engineering, Inc*., 2 Cal.3d 493 (1970). Since then, the Ninth Circuit has "applied the rule of *Rojo*" in multiple cases. *Bass*, 458 F.3d at 982-83, *citing Strother v. S. Cal. Permanente Med. Group*, 79 F.3d 859, 874-75 (9th Cir. 1996) and *Sprewell v. Golden State Warriors*, 266 F.3d 979, 989 (9th Cir. 2001).

The reason for doing so is simple: the exclusive way to address discrimination in the employment context is via FEHA. To allow FEHA-based discrimination to be addressed via the Unruh Act would "create an end-run around the administrative procedures of FEHA solely for disability discrimination claimants." *Bass*, 458 F.3d at 982. "Nothing in the legislative history of either amendment suggests that the legislature intended to carve out such an exception by roundabout implication." *Ibid.*

Plaintiffs base their Unruh Act claim on the contention that they failed to receive a FEHA-compliant PEPO Exam. ER-85, ¶ 86. Indeed, the only discrimination they allege is "pre-employment screenings … [not] consistent with the related provisions of FEHA." AOB at 54. As such, FEHA governs here, not the Unruh Act. The TAC's allegations make clear Plaintiffs are claiming USHW allegedly discriminated solely in the employment context.

- "**Job applicants** went to USHW to get a non-discriminatory **pre-placement** medical examination for the sole purpose of evaluating whether they could presently perform the essential functions for the **job position** they had been **offered** so the **applicants** could get the **job**" ER-72, ¶33.

- "USHW led **job applicants** to believe that USHW was the **applicants'** own physician and the **applicants** were their "patients" ER-72-73, ¶34(a).

- "In conducting the **pre-placement exams**, USHW considered whether the applicant's future health may be at risk in taking the **job**. USHW clinicians would attempt to dissuade applicants from taking the **job** where the clinician thought the **job** could be potentially hazardous to the applicant's future health even though it would not impact his or her

ability to currently perform the **essential job functions"** ER-72-73, ¶34(d).

- "USHW was a third-party vendor providing services to Class Members to get a non-discriminatory **pre-placement medical examination** for the sole purpose of evaluating whether they could presently perform the essential functions for the **job position** they had been offered so the applicants could get the **job"** ER-84, ¶85.

- "In asking the impermissible questions, USHW deprived Class Members of USHW's services to provide a non-discriminatory or non-distinction medical examination to permit the **applicant to obtain the offered job position"** ER-85, ¶ 88.

(Emphasis added.)

Plaintiffs artfully contend the "service is medical clearance for work, and that because [USHW provided that service] in a discriminatory manner, it constitutes actionable discrimination." AOB at 41-42. They claim by asking "impermissible questions," (based on FEHA), USHW discriminated against them. *Ibid*. Yet, the questions are only arguably "impermissible" if the FEHA framework between employer and employee governs. They state, "None of these questions had any bearing on fitness for employment." AOB at 50. They *cite Rodriguez v. Walt Disney Parks & Resorts U.S., Inc*., No. 817CV01314JLSJDE, 2018 WL 3201853 (C.D. Cal. June 14, 2018) to support the claim that making impermissible medical inquiries is discrimination. However, critically, the plaintiff in *Rodriguez* brought his claims under FEHA – he alleged his employer discriminated against him by allegedly

making impermissible medical inquiries during employment. He did not assert any claims under the Unruh Act.

To the extent Plaintiffs contend the Unruh Act claim is an alternative legal theory, applicable in the event the Court rules USHW cannot be liable under the FEHA, the argument also is meritless. This is an employment claim. Plaintiffs cannot credibly contend otherwise. As to USHW, the issue is whether this FEHA claim extends beyond the employer to the alleged agent as well. In sum, since FEHA is the sole basis for the alleged discrimination here, the Unruh Act does not apply.

B. The Unruh Act Does Not Apply to Practices and Policies That Apply Equally to All Consumers

The Unruh Act provides that "[a]ll persons within the jurisdiction of [California] are free and equal, and no matter what their ... disability [or] medical condition ... are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." Civ. Code § 51(b). Despite its broad application, "by its terms, the Unruh Act 'does not extend to practices and policies that apply equally to all persons.'" *Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 425 (9th Cir. 2014), *citing Turner v. Ass'n of Am. Med. Colls.*, 167 Cal.App.4th 1401, 1408 (2008); *see also* Cal. Civ. Code § 51(c).

To establish a violation of the Unruh Act, a plaintiff must "plead and prove intentional discrimination in public accommodations in violation of the terms of the

Act." *Id., citing Munson v. Del Taco, Inc.*, 46 Cal.4th 661 (2009) (internal quotation marks omitted). The California Supreme Court has made clear that for a claim to survive under the Unruh Act, it must be the result of intentional discrimination involving disparate treatment, not disparate impact: "*A disparate impact analysis does not apply to Unruh Act claims.*" *Koebke v. Bernardo Heights Country Club*, 36 Cal.4th 824, 854-55 (2005) (rejecting an Unruh Act claim challenging a neutral policy do deny club privileges to unmarried couples, regardless of sexual orientation).

In addition to *Koebke*, there are numerous cases illustrative of the maxim that the Unruh Act does not extend to practices and policies that apply equally to all persons. Repeatedly, courts have found that where all are treated the same, an Unruh Act claim fails since it "explicitly exempts standards that are applicable alike to persons of every sex, color, race, religion, ancestry, national origin, or blindness or other physical disability." *Harris v. Capital Growth Investors XIV*, 52 Cal.3d 1142, 1172 (1991), superseded by statute on other grounds as explained in *Munson v. Del Taco, Inc.*, 46 Cal.4th 661 (2009).

- ***Belton v. Comcast Cable,* 151 Cal.App.4th 1224 (2007)** (rejecting an Unruh Act claim challenging a neutral policy of packaging music services with television programming to all consumers, blind or not).
- ***Turner v. Association of American Medical Colleges,* 167 Cal.App.4th 1401 (2008)** (rejecting an Unruh Act claim challenging a neutral policy to analyze all disability accommodation requests under federal law, regardless of the type of disability).

- ***Greater L.A. Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414 (9th Cir. 2014)** (rejecting an Unruh Act claim challenging a neutral policy to display online video programming without closed captioning to all consumers, hearing-impaired or not).

Applying the applicable jurisprudence here, only one result can follow: the Unruh Act claim fails. Plaintiffs concede that USHW treated them and other patients the same in providing the Questionnaire and a PEPO Exam. ER-85-86, ¶ 89. Further, as the District Court noted, "Plaintiffs do not allege USHW excluded particular individuals from receiving an exam on the basis of protected characteristics, or that Plaintiffs received an inadequate exam." ER-15. In short, they do not allege what is required to support a claim under the Unruh Act – a denial of full and equal access to services.[9]

III. THE DISTRICT COURT PROPERLY DISMISSED THE INTRUSION UPON SECLUSION CLAIM BECAUSE PLAINTIFFS LACKED A REASONABLE EXPECTATION OF PRIVACY AND USHW DID NOT SUBSTANTIALLY INTRUDE INTO THEIR PRIVACY INTERESTS

"California has adopted the Restatement definition of the intrusion into seclusion privacy tort: 'One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly

[9] Plaintiffs' reliance on *Hankins v. El Torito Restaurants, Inc.*, 63 Cal.App.4th 510 (1998) is misplaced. Unlike in *Hankins*, where the defendant restaurant denied disabled patrons access to a restroom due to the physical layout and policy, USHW provided its services to all, regardless of any protected characteristics.

offensive to a reasonable person.'" *Deteresa v. American Broadcasting Cos., Inc.*, 121 F.3d 460, 465 (9th Cir. 1997). If "the undisputed material facts show no reasonable expectation of privacy or an insubstantial impact on privacy interests, the question of invasion may be adjudicated as a matter of law." *Id.* at 465.

"To assess the reasonableness of the appellants' expectations, we consider the customs, practices and physical settings surrounding the [practice]…." *Leonel v. Am. Airlines, Inc.*, 400 F.3d 702, 712 (9th Cir. 2005), opinion amended on denial of reh'g, No. 03-15890, 2005 WL 976985 (9th Cir. Apr. 28, 2005). In determining the "'offensiveness' of an invasion of a privacy interest, common law courts consider, among other things: 'the degree of the intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder's motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded.'" *Deteresa*, 121 F.3d at 465-66, *citing Hill v. National Collegiate Athletic Ass'n*, 26 Cal.Rptr.2d 834, 850 (1994).

"There is a preliminary determination of 'offensiveness' which must be made by the court in discerning the existence of a cause of action for intrusion." *Miller v. National Broadcasting Co.*, 187 Cal.App.3d 1463, 1483 (1986). The elements "serve as threshold components of a valid claim to be used to 'weed out claims that involve so insignificant or de minimis an intrusion on a constitutionally protected privacy interest as not even to require an explanation or justification by the

defendant.'" *Leonel*, 400 F.3d at 712, *citing Loder v. City of Glendale*, 14 Cal.4th 846 (1997).

In the pre-employment context, the Ninth Circuit has made observations relevant here. In *Leonel*, the Court stated "job applicants should anticipate that a preemployment medical examination may be required." *Leonel*, 400 F.3d at 712.[10] There, the Ninth Circuit considered drawing and testing of an applicant's blood. It found that in the "mere drawing of [an applicant's] blood" during a pre-employment examination, the applicant "had no reasonable expectation of privacy as a matter of law." *Ibid*. By consenting to the blood draws required by the employer, they consented to some form of blood test. *Id*. at 713. There, prior to the blood draw, the employees had to complete a "medical questionnaire, [which] made wide-ranging

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[10] In *Leonel*, job applicants had to complete "medical history questionnaires and give blood samples." *Leonel*, 400 F.3d at 705. However, they "did not consent to any and all medical tests that American wished to run on their blood samples," because the circumstance around the "blood tests gave the appellants little reason to expect that comprehensive scans would be run on their blood." *Id*. at 713-714. Importantly, "the nurse drawing the blood explained … [the] scope of the test, [but] provided incomplete and possibly misleading information—that [the] blood sample would be tested for anemia, only one of the many conditions potentially revealed by the [blood test]." *Ibid.* Moreover, the medical examinations occurred immediately after hiring interviews at the employer's on-site medical facility. *Ibid*. Prior to the blood tests, plaintiffs completed numerous forms, but none addressed the blood test. *Ibid*. Moreover, as part of the notice and acknowledgment of the drug test, the form explained the scope of the test and provided explicit consent for that scope (but did not address the blood test). *Ibid.* The applicants received no similar form for the blood test. *Ibid.* Only under these circumstances, could the plaintiff maintain his privacy claim.

medical inquiries." *Ibid*. In the lawsuit, the *Leonel* plaintiff did not object to the questionnaire at all.

Another case observed that filing out medical questionnaires is, at most, only a "minor intrusion" on privacy. *Bloodsaw v. Lawrence Berkeley Lab'y*, 135 F.3d 1260, 1268 (9th Cir. 1998).[11] In *Bloodsaw*, prior to the blood draw and urinalysis, the plaintiffs had to complete a medical questionnaire. "The questionnaires asked, *inter alia*, whether the patient had ever had any of sixty-one medical conditions, including 'sickle cell anemia,' 'venereal disease,' and, in the case of women, 'menstrual disorders.[4]'" *Id.* at 1265 (Footnote 4: "The section of the questionnaire also asks women if they have ever had abnormal pap smears and men if they have ever had prostate gland disorders."). The plaintiffs did not actually object to the questionnaire; instead, the court addressed it in dicta by way of comparison to the challenged blood test and urinalysis.

[11] In *Bloodsaw*, the Ninth Circuit considered blood tests and urinalysis. The blood testing and urinalysis cases cited differ from Plaintiffs' claims. They are different from the Questionnaire and PEPO here for a key reason – individual discretion. With questionnaires, each person decides what to report. Compare questionnaires, with discretion to respond, to the "performance of unauthorized tests—that is, the non-consensual retrieval of previously unrevealed medical information that may be unknown even to plaintiffs." *Norman-Bloodsaw*, 135 F.3d at 1269 (9th Cir. 1998).

A. Patients Lack a Reasonable Expectation of Privacy in Personal Health History Information in the Context of a Medical Exam

Plaintiffs understood their employers required them to go to USHW, a third-party occupation health provider, for a PEPO Exam. *See, e.g.*, ER-65, ¶1; ER-72, ¶33; ER-87-88, ¶95. They also concede USHW refereed to them as patients, and before they spoke to anyone with USHW regarding medical issues, they received forms (1) requesting authorization to disclose health information and (2) addressing the types of information that would be the topic of the PEPO Exam. ER-74, ¶38, 41.

Given the setting and context of the PEPO Exams, Plaintiffs had no reasonable expectation of privacy as to personal health history. As the District Court noted, "[q]uestions about personal health history are routinely asked in the context of a medical exam." (ER-17.) For this reason alone, the intrusion upon seclusion claim fails. As the California Supreme Court observed in *Loder*, "a job applicant reasonably must anticipate that a prospective employer may require that he or she undergo a preemployment medical examination before the hiring process is completed." *Loder*, 14 Cal.4th at 897.

B. Inquiry by Medical Professionals Into Personal Health History Information in the Context of a Medical Exam Does Not Constitute a Substantial Invasion of Privacy

Plaintiffs also cannot claim a substantial impact on their privacy interests. As the District Court properly observed, "a one-time inquiry in a clinical setting, where the patient can refuse to answer, as Plaintiff Raines did here, does not rise to a level

of intrusion that is 'highly offensive.'" ER-18. Examples show that for an isolated incident to be highly offensive, they must be significantly more egregious than simply asking medical questions in a medical setting. *See, e.g., Miller v. National Broadcasting Co.* 187 Cal.App.3d 1463 (1986) (a claim for intrusion on seclusion may survive where television crew, without consent, followed fire department paramedics into plaintiff's apartment, filmed unsuccessful attempts to resuscitate plaintiff's husband, and subsequently used the film in a nightly news segment); *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971) (a claim for intrusion on seclusion may survive when someone gained entrance into another's home by subterfuge).

To be highly offensive, the Restatement[12] suggests that the conduct must be an exceptional kind of prying into another's private affairs. Rest. (2d) Torts § 652B, cmt. b. (offering the following examples: (1) taking the photograph of a woman in the hospital with a "rare disease that arouses public curiosity" over her objection, and (2) using a telescope to look into someone's upstairs bedroom window for two weeks and taking "intimate pictures" with a telescopic lens).

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12 California adopted the Restatement definition of the intrusion upon seclusion privacy tort, making its examples useful guidance. *See Deteresa,* 121 F.3d at 465, *citing Miller v. National Broadcasting Co.*, 187 Cal.App.3d 1463 (1986).

Compare such conduct to here, where Plaintiffs, albeit by request of their employers, chose to attend a PEPO Exam. ER-87-88, ¶95. USHW did not force them. Relatedly, Plaintiffs do not allege USHW knew of any objection. There are no allegations that USHW tricked them into providing information or that USHW engaged in subterfuge to garner information they intended to withhold. No, they decided what information to provide and decided if they wanted to discontinue the examination (with full knowledge it could have implications with their specific employer).

There are no allegations USHW immediately "ushered" Plaintiffs from the employment interview into the PEPO Exam. *See Leonel*, 400 F.3d at 713. They also allege USHW conducted all of the examinations the same way, with all patients receiving the Questionnaire. They understood their employers required them to undergo a PEPO Exam with USHW, a third party medical provider. ER-84, ¶ 85.

Given the factors of "offensiveness" and relevant considerations, the conduct alleged (or that could be properly alleged) is not sufficiently offensive to state a common law intrusion into seclusion claim. *Deteresa*, 121 F.3d at 465, *citing Hill*, 26 Cal.Rptr.2d at 850. Since Plaintiffs' alleged facts show "an insubstantial impact on privacy interests, the question of invasion may be adjudicated as a matter of law." *Deteresa*, 121 F.3d at 465.

CONCLUSION

For the foregoing reasons, the Court should affirm the District Court's dismissal of the TAC.

DATED: August 23, 2021

REED SMITH

By: *s/ Raymond A. Cardozo*
Raymond A. Cardozo

DATED: August 23, 2021

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STATEMENT OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure, Rule 32(a)(7)(C) and Ninth Circuit Rule 32-1, the undersigned counsel certifies this Answering Brief complies with the type-volume limitation. It uses a proportional typeface, Times New Roman, 14-point font, and contains 8,976 words, which is less than the 14,000 words permitted by this rule. Counsel relies on the word count of the processing system used to prepare this brief.

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Defendants-Appellees are unaware of any related cases currently pending in this Court.

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CERTIFICATE OF SERVICE

At all times herein mentioned, I have been over the age of 18 years and not a party to the action. At all times herein mentioned, I worked as an employee in the County of San Diego in the office of a member of the Bar of this Court, at whose direction I made service. My business address is 4370 La Jolla Village Drive, Suite 990, San Diego, CA 92122.

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No. 21-55229

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTINA RAINES ET AL.,

Plaintiffs-Appellants,

v.

U.S. HEALTHWORKS MEDICAL GROUP ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of California
No. 3:19-CV-01539-DMS
Hon. Dana M. Sabraw

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INTRODUCTION

Because FEHA defines an "employer" to include an "agent" (Cal. Gov. Code § 12926(d)), this Court should hold as a matter of law that corporate agents like Defendants are liable for violating FEHA. Defendants' position that *Reno v. Baird,* 18 Cal. 4th 640 (1998) bars Plaintiffs' FEHA claim is wrong. *Reno* carved out a narrow exception for individual supervisors based upon public policy considerations that do not apply to Defendants and "specifically express[ed] no opinion on whether the agent language merely incorporates respondeat superior or has some other meaning." 18 Cal. 4th at 658. If the Court harbors any doubt, it should refer this important, undecided state law issue to the California Supreme Court.

Defendants' challenge to Plaintiffs' alternative Unruh Act claims is misplaced. Defendants ignore *Alch v. Sup. Ct.*, 122 Cal. App. 4th 339 (2004), which holds that employment-related discrimination against a non-employee is actionable under Unruh. And Defendants concede that both forms of discrimination separately alleged in this case—gender and perceived disability—are encompassed by Unruh. On gender, Defendants arbitrarily discriminated by requiring male and female

jobseekers to undergo different sets of irrelevant gender-specific inquiries as a condition of being cleared for work, yet point to no public policy justifying such discrimination. On perceived disability, the myriad disability-related questions on Defendants' Questionnaire evince that Defendants perceived and treated all applicants as disabled or having a potentially disabling condition. Based on that perception, Defendants discriminated against jobseekers both by forcing them to submit to an illegal Questionnaire and to verbal follow-up questioning concerning any positive answer on the Questionnaire. Each constitutes intentional discrimination and not, as Defendants contend, non-actionable disparate impact discrimination based on a facially neutral policy. Asking these questions to all jobseekers is consistent with this theory, since Defendants perceived all of them to be disabled or potentially so. Again, if there is any question, the Court should refer these important and unresolved state law issues to the California Supreme Court.

Finally, the lower court erred in dismissing the intrusion upon seclusion claim. Defendants' view that these were "routine medical examinations" such that applicants should reasonably expect to disclose

their entire medical profiles is mistaken. These were employer-mandated, coerced examinations conducted by employer-selected doctors. Applicants were forced to answer all questions because they would otherwise be denied the job. FEHA prohibits questions in this setting unless they are job-related and consistent with business necessity. That prohibition embodies the very expectation of privacy at the core of this common law claim. Defendants' conduct also was highly offensive. Defendants' invasive inquiries unquestionably violated FEHA and sought intimate and private health information having nothing to do with any job, *e.g.*, history of venereal disease, penal discharge, vaginal discharge, menstrual problems, pregnancy, etc. Defendants also impermissibly forced applicants to sign an Authorization purportedly permitting Defendants to disclose their private health information to employers and other third persons with the threat that refusing to sign would result in denial of the job. Taking into account "all circumstances," as required by California courts, Defendants unlawfully intruded into Plaintiffs' privacy.

ARGUMENT IN REPLY

I. THIS COURT SHOULD REFER THE FEHA AND UNRUH ACT QUESTIONS TO THE CALIFORNIA SUPREME COURT

When exercising diversity jurisdiction, a federal court applies substantive state law as the state courts have interpreted it; a federal court cannot create new state law. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 44 (1997); *Ingenco Holdings v. ACE American Ins.*, 921 F.3d 803, 815 (9th Cir. 2019) (at best, this Court may predict what the State courts would do). As amici curiae demonstrate, this case presents pure questions of state law with broad public policy ramifications undecided by the California courts. Because Defendants failed to raise any counterargument in their Answering Brief ("AAB"), they have waived it. *U.S. v. Dreyer*, 804 F.3d 1266, 1277 (9th Cir. 2015).

Contrary to Defendants' position, *see* AAB at 1-2, new rules of substantive state law will be made *however* these questions are resolved because the California courts have never weighed in on whether corporate agents like Defendants can be held liable for violating FEHA. As Plaintiffs previously briefed, the California Supreme Court carved out only one narrow exception to FEHA agency liability, limited to

individual supervisory employees, and it "specifically express[ed] no opinion on whether the agent language [in Cal. Gov. Code § 12926(d)] merely incorporates respondeat superior or has some other meaning."[1] *Reno*, 18 Cal. 4th at 658. Under these circumstances, this Court should permit the state courts to decide the question. *Philadelphia v. Lead Industries*, 994 F.2d 112, 123 (3d Cir. 1993); *see also Kremen v. Cohen*, 325 F.3d 1035, 1038 (9th Cir. 2003).

The same is true for the closely-related Unruh Act question. FEHA and the Unruh Act were enacted in the same legislative session for the identical purpose of eradicating arbitrary discrimination—the former governing the workplace and the latter business establishments. *Alcorn v. Anbro*, 2 Cal. 3d 493, 500 (1970); *see also Rodriguez v. Disney*, 2018 WL 3201853, at *3 (C.D. Cal. June 14, 2018) ("making impermissible medical inquiries is discrimination"). The only relevant

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[1] As the State of California explains, "California courts have carved out only specific exceptions to agent liability under the statute without providing a complete exemption for agents." Attorney General Brief ("AG Br.") at 9. Defendants cannot "read into the statute a complete exemption for agent liability that the Legislature did not intend 'in the context of the statutory framework as a whole.'" *Id.* at 8-9 (citation omitted).

difference between the statutes is how the parties' relationship may be characterized. Yet Defendants' argument, if adopted, would create a gap between the two statutes, permitting otherwise prohibited discrimination by one of the largest businesses in California to flourish. Were this Court to decide that there is no agency liability under FEHA and at the same time that Plaintiffs claims are not governed by Unruh, then there would be no redress against Defendants for their own otherwise illegal conduct. The California Supreme Court is best suited to definitively resolve the question of whether the Legislature intended such a gap and to better define the scope of each statute. That court is also best equipped to resolve the questions of whether a "rare" public policy exception to otherwise plain gender discrimination exists and whether discrimination against patrons Defendants perceived to be disabled is not actionable merely because Defendants perceived all patrons to be disabled and correspondingly subjected all to discriminatory inquiries.

II. AS AGENTS OF EMPLOYERS, DEFENDANTS ARE LIABLE UNDER FEHA FOR THEIR ILLEGAL PRACTICES

Defendants concede that FEHA defines an "employer" to include an "agent," and that their conduct violates FEHA's prohibitions on

untailored pre-employment screenings. *See* AAB at 18. Nevertheless, Defendants argue that they are immune from liability because, by exempting one kind of agent from FEHA liability to avoid an absurd or unintended consequence flowing from otherwise plain statutory language, *Reno* must ineluctably have exempted all agents from liability. *Id.* at 19-21. This argument ignores *Reno*'s narrowly-circumscribed holding and the policy reasons the court provided for that holding.

A. Defendants Ignore Two Explicit Limitations on *Reno*'s Holding

Defendants' argument proceeds from a misstatement of *Reno*'s holding. In *Reno*, the California Supreme Court was presented with a precise question: "whether persons claiming discrimination may sue *their supervisors individually* and hold them liable for damages if they prove their allegations." *Reno*, 18 Cal. 4th at 643 (emphasis added). The California Supreme Court gave a narrow answer: Individual supervisory employees cannot be liable under FEHA for discrimination. *Id.* at 663.

The California Supreme Court made the limited scope of its decision clear. "The issue in this case is *individual* liability for

discrimination," *Id.* at 658 (original emphasis). Its conclusion that individual supervisors could not be liable did not rely, as Defendants argue, on the theory that FEHA's "agent" language merely incorporates respondeat superior principles; it "**specifically express[ed] no opinion on" that subject**.[2] *Id.*; *see also* AAB at 23.

Thus, *Reno* did not address the question presented here, *i.e.*, whether corporate agents like Defendants can be liable for violating FEHA. Nor did that court address the alternative question Defendants argue *Reno* conclusively answered, *i.e.*, whether *any* agent can be liable under FEHA. No California court has addressed these issues.

Given these unequivocal limitations on the holding in *Reno*—limitations not addressed, let alone eliminated, by *Jones v. Torrey Pines*, 42 Cal. 4th 1158 (2008)—the onus on Defendants was to address

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[2] Defendants' assertion that the California Supreme Court "explained that the agent language in FEHA protects employees by making 'the employer liable via the *respondeat superior* effect'" is a bald misreading of *Reno*. AAB at 23 (quoting *Reno*, 18 Cal. 4th at 655). The portion of the *Reno* decision Defendants quote is itself a quotation from *Janken*—one that *Reno* clarified: "The Court of Appeal [in *Reno*] interpreted *Janken* as concluding that the 'agent' language merely incorporated respondeat superior principles." *Reno*, 18 Cal. 4th at 657. The California Supreme Court, however, explicitly declined to answer that question.

them and to provide a rationale to this Court for why the California Supreme Court would remove those limitations. *See Ingenco*, 921 F.3d at 815. Defendants failed to do that.

B. Defendants' "Textual" Argument Ignores the Text of FEHA and *Reno*'s Public Policy Rationale

Defendants posit that there can be no agent liability of any kind because FEHA's definition of "employer" "does not distinguish between different types of agents" and therefore, absent any "authority to support any distinction," this Court "must treat all agents the same, just as the statute does." AAB at 19. But this purportedly "textual" argument ignores *Reno's* qualified holding and the policy considerations underlying that holding. As discussed above, *Reno* carved out a distinction between individual, supervisory employee agents and all others. *Reno*, 18 Cal.4th at 658. *Reno* refers to "individual supervisory employees" and "individuals who do not themselves qualify as employers" throughout. *See, e.g.*, *id.* at 663. It does not refer indiscriminately to "[agents]" as Defendants suggest. *See* AAB at 21-22, 25.

Setting aside that "FEHA's plain language [] compels an interpretation of 'employer' that includes all agents within its scope of

liability" (*see* AG Br. at 6), *Reno*'s distinction between individual supervisors and all other kinds of agents does not turn on the statutory text, but rather on the public policy consequences pertaining to one type of agent, *i.e.*, individual supervisors.

As *Janken* stated, the "question of whether the FEHA exposes individual supervisory employees to the risk of personal liability for discrimination … is one of legislative intent." *Janken v. GM Hughes Electronics*, 46 Cal. App. 4th 55, 59 (1996) (citing *California Teachers Assn. v. San Diego Community College Dist.*, 28 Cal. 3d 692, 698 (1981)). While "the primary determinant of legislative intent is the words used by the Legislature," a "literal reading" that would "result in absurd consequences" should be avoided. *Id.* at 60 (citing *Whitman v. Sup. Ct.*, 54 Cal. 3d 1063, 1072 (1981)). Thus, "the consequences of differing possible constructions must be evaluated." *Id.* "If the language of a statute supports more than one reasonable construction, then [the courts] may look to extrinsic aids, including the ostensible objects to be achieved and the legislative history." *Los Angeles County Metro v. Alameda Produce*, 52 Cal. 4th 1100, 1107 (2011).

In *Reno*, the California Supreme Court noted "two possible constructions of the 'agent' language" as it specifically applies to individual supervisory employees—both reasonable:

> One construction is … that by this language the Legislature intended to define every supervisory employee in California as an "employer," and hence place each at risk of personal liability whenever he or she makes a personnel decision which could later be considered discriminatory. The other construction is … that by the inclusion of the 'agent' language the Legislature intended only to ensure that employers will be held liable if their supervisory employees take actions later found discriminatory.

Reno, 18 Cal. 4th at 647 (quoting *Janken*, 46 Cal. App. 4th at 65-66).

Reno observed that *Janken* "adopted the latter construction for several reasons." *Id.* Those reasons were policy-related, not textual.

Reno's holding has no application here because this case does not involve individual supervisors. Instead, Plaintiffs ask a different question, arising in the wake of *Reno*'s interpretation of FEHA, and guided by the same public policy rationales: Can non-individual, corporate agents—for whom *Reno*'s public policy justifications for exempting individual supervisory agents from liability plainly do not apply—be liable under FEHA? That construction, and the policy

implications flowing from its adoption, have explicitly not been considered. *Id.* at 658.

Defendants' ancillary argument based on the fact that "the California Legislature has never since amended FEHA" following *Reno* is irrelevant. *See* AAB at 25. To the extent that legislative inaction here might arguably signal approval of *Reno*—which it does not necessarily, *see People v. Whitmer*, 59 Cal. 4th 733, 741 (2014)—it could only be approval of *Reno*'s actual holding (*i.e.,* a narrow exception for individual supervisory employee liability justified by public policy rationales), and not approval of what *Reno* explicitly declined to hold.

C. Defendants Fail to Explain Why *Reno*'s Public Policy Justifications for Excepting Individual Supervisory Agent Liability Should Apply to Corporate Agents Like Defendants

Rather than attempting to explain how *Reno*'s public policy rationale justifies expanding the narrow exception immunizing individual, supervisory agents from FEHA liability to immunize all agents of any kind, Defendants simply ignore it altogether. No wonder: The public policy rationale animating *Reno* (and *Jones*, and many of the analogous federal cases on which they relied) does not apply to corporate agents. *See also* AG Br. at 9.

Among the "absurd" or "unintended consequences" as to individual supervisors the California Supreme Court sought to avoid for public policy reasons were:

First, federal courts interpreting analogous federal statutes have held that "supervisors cannot be held personally liable for employment discrimination." *Reno*, 18 Cal. 4th at 648. Those federal cases "based their decisions in part on the incongruity that would exist if small employers were exempt from liability while individual non-employer supervisors were at risk of personal liability." *Id.* at 651-52.

Second, because "FEHA exempts small employers [any person employing five or more persons] from liability for discrimination," "it is 'inconceivable' that the Legislature simultaneously intended to subject individual nonemployers to the burdens of litigating such claims." *Id.* at 650-51.

Third, individual supervisory employee liability "adds mostly an *in terrorem* quality to the litigation, threatening individual supervisory employees with the spectre of financial ruin for themselves and their families." *Id.* at 651-53.

Fourth, "individual supervisory employees would bear a greater personnel management risk than the owners of the corporation who benefit from the fruits of the enterprise, but who are not exposed to personal liability because of the limited liability nature of a corporation." *Janken*, 46 Cal. App. 4th at 78. It is the "entity ultimately responsible for discriminatory actions" that the Legislature sought to subject to liability. *Jones*, 42 Cal. 4th at 1167 (citing *Reno*, 18 Cal. 4th at 663).

Fifth, "sound policy favors avoiding conflicts of interest [between supervisors and their employers] and the chilling of effective management." *Id.*

As detailed in Plaintiffs' Opening Brief and amici's briefs, none of these rationales militates in favor of exempting Defendants from agency liability. *See* AOB at 27-31; AG Br. at 9 ("underlying public policy" does not support Defendants' argument "that agents can never be independently liable under FEHA"). Defendants have not argued and cannot argue otherwise.

D. Defendants Ignore Federal Cases Construing Similar "Agent" Language in the ADA and Title VII

As set forth in the brief of amici curiae L.A.A.W. *et al.* at 6-12, federal cases interpreting the agency language in both FEHA and analogous federal statutes hold that agents like Defendants can be liable for employment discrimination. Yet Defendants say nothing about these cases or about amici's arguments.

The only case cited by Plaintiffs or amici that Defendants address is *Carparts Distrib. Ctr. v. Auto. Wholesaler's Ass'n*, 37 F.3d 12, 17 (1st Cir. 1994). Defendants say that *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1113, fn. 48 (9th Cir. 2000) noted the "repudiation of the test Plaintiffs seek to adopt" from *Carparts*. AAB at 22-23, fn. 8. But *Weyer* cited to *Bloom v. Bexar County*, 130 F.3d 722, 725, fn.2 (5th Cir. 1997), which, although it called the authority upon which *Carparts* relied in part "questionable," noted that those "cases do not rule out the possibility that a plaintiff may maintain an action against a defendant who is not, technically, the plaintiff's direct employer." In other words, *Weyer* and *Bloom* do not hold that the basic holding in *Carparts* has been repudiated.

In any event, Plaintiffs do not rely exclusively on *Carparts* to argue that federal cases interpreting federal statutes have permitted liability for non-employee, non-supervisory agents like Defendants. *See* L.A.A.W. Br. at 7-10; AG Br. at 12-14. Unsurprisingly, Defendants fail to mention, much less distinguish, any of those cases.

III. AS BUSINESS ESTABLISHMENTS, DEFENDANTS ARBITRARILY DISCRIMINATED AGAINST PLAINTIFFS ON THE BASES OF GENDER AND PERCEIVED DISABILITY

A. Plaintiffs' Unruh Act Claim Is Properly Pled as an Alternative to Their FEHA Claim

Defendants mischaracterize Plaintiffs' Unruh Act claim as "an employment claim" and argue that it can only be brought under FEHA. AAB at 26-28. This misstates Plaintiffs' pleadings and the law. It likewise ignores the district court's holding that, under *Alch*, 122 Cal. App. 4th at 391, a "business establishment which provides 'employment-related' services" is not exempt from Unruh, and, under *Leach v. Drummond Med. Grp., Inc.* 144 Cal. App. 3d 362, 370 (1983), "medical practices and physician services" are considered business establishments. *See* ER-13.

Plaintiffs' operative pleading alleges, in the alternative and solely for purposes of the Unruh claim, that Defendants are a "business establishment" providing the service of evaluating whether jobseekers (whom Defendants misled to believe were their "patients") could presently perform the essential functions for the job position they had been offered so they could get the job. ER-84.

Plaintiffs are "entitled to plead alternative [] theories of recovery on the basis of the *same conduct*." *MB Financial v. USPS*, 545 F.3d 814, 819 (9th Cir. 2008) (emphasis added); *see also* Fed. R. Civ. P. 8(d)(2). The Unruh Act and FEHA each prohibit the *same conduct*: discriminatory treatment. Both were passed in the same legislative session as part of a comprehensive effort to redress that conduct. *See Alcorn*, 2 Cal. 3d at 500 (1970) (FEHA enacted to prohibit discrimination); *Angelucci v. Century Supper Club*, 41 Cal. 4th 160, 167 (2007) (Unruh enacted to eradicate discrimination). The only difference between the two statutes relevant here is not what conduct each prohibits but how the parties' relationship is characterized: If the parties are in an "employer"/employee relationship, FEHA governs; if

the parties are in a business establishment/patron relationship, Unruh governs. *Alch*, 122 Cal. App. 4th at 391.

Nevertheless, Defendants argue that, because the challenged discrimination is "an employment claim," the "rule of *Rojo*" bars their Unruh Act claims. AAB at 25-26, 28. But *Alch* rejected precisely that argument. *See* 122 Cal. App. 4th at 391; AAB at 28. "Nothing in *Rojo* or *Alcorn*" or *Sprewell v. Golden State Warriors*, 266 F.3d 979, 989 (9th Cir. 2001), also cited by Defendants here, "suggests that a business establishment which provides 'employment related' services, or services 'in the employment context,' is exempt from the Act." *Id.* The "rule of *Rojo*" is "confined to claims by an employee against his employer, or against an entity in the position of the employer." *Id.*

Defendants' attempt to negate the applicability of *Rodriguez v. Disney*, 2018 WL 3201853, at *3 (C.D. Cal. June 14, 2018) to Plaintiffs' Unruh Act claims therefore fails. *See* AAB at 27-28. *Disney* understood that the same conduct alleged here "is discrimination." *Id.*

B. Defendants Identify No Public Policy Justification Permitting Their Gender Discrimination

Plaintiffs pled two distinct kinds of discrimination under Unruh—gender and perceived disability. ER-57, 74, 85–6. Defendants devote no

effort whatsoever to contesting that Plaintiffs' gender discrimination claim is well-pled or to substantiating a public policy exception to that discrimination and therefore again waive any counterarguments. *Dreyer*, 804 F.3d at 1277.

Plaintiffs' gender claim is straightforward: By requiring only women to answer certain arbitrary and irrelevant questions (*e.g.*, "Do you have irregular menstruation?") and only men to answer others (*e.g.*, "Do you have penile discharge?") to receive a "passing" medical screening, Defendants engaged in disparate treatment discrimination on the basis of gender.

Unlike with Plaintiffs' perceived disability discrimination claim, Defendants do not assert that Plaintiffs' gender discrimination claim is non-actionable disparate *impact* discrimination. Despite Plaintiffs adequately pleading disparate *treatment* gender discrimination, Defendants asserted below that "strong public policy" permits it—*i.e.*, because "males have different parts than females." *See* ER-62–63.

This statement ignores the California Supreme Court's admonition that "'public policy' exceptions to the Unruh Act are rare." *Koire v. Metro Car Wash*, 40 Cal. 3d 24, 32 (1985). It also ignores *Koire*'s

observation that public policy exceptions, when they do exist, are usually based in and justified by some other statutory scheme, and that "few cases have held" discrimination is not arbitrary "based solely on the special nature of the business establishment." *Id.* at 30-32, fn.8; *Pines v. Tomson*, 160 Cal. App. 3d 370, 387 (1984); *see also Leach*, 144 Cal. App. 3d at 370. Except for generalizing about binary anatomical sex differences (*see* ER-61-63), Defendants do not articulate how such differences justify the arbitrary requirement that Plaintiffs respond to irrelevant gender-based questions in a pre-employment screening where those questions have no bearing on assessing any applicant's ability to perform the essential functions of any job. And Defendants do not point to any statutory basis justifying that practice.

As *Koire* demonstrates, FEHA serves as a source for assessing whether public policy exceptions to Unruh exist. *See Koire*, 40 Cal. 3d at 38 (citing FEHA as justification for price discounts for the elderly that would otherwise violate Unruh). Given that FEHA and Unruh were passed in the same legislative session and both target arbitrary discrimination, few statutes provide more relevant guidance than FEHA on whether a public policy exception to Unruh exists. If FEHA

prohibits the discriminatory conduct alleged here, it cannot be the case that Unruh allows it.

Defendants' parade of horribles is no answer. ER-61-62, fn.3. Prohibiting Defendants from making arbitrary and irrelevant gender-based medical inquiries in the pre-employment context will not preclude other medical professionals from making those inquiries in contexts where doing so would not be arbitrary and irrelevant. Their failure to acknowledge that the purpose, setting, and nature of pre-employment medical screenings are vastly different than for routine medical examinations cannot be reconciled with the fact that the former are regulated in ways that the latter are not—fundamentally, in what inquiries may be made.

C. Plaintiffs Adequately Alleged Intentional Perceived Disability Discrimination

Defendants acknowledge that perceived disability discrimination is covered by the Unruh Act, but argue that 1) their Questionnaire and related follow-up inquiries are not disparate treatment but rather a facially neutral policy disparately impacting disabled applicants; and 2) requiring that all applicants answer the same discriminatory questionnaire negates any discrimination. This argument

misapprehends Plaintiffs' allegations and, if accepted, would excise perceived disability discrimination from the ambit of Unruh's protections.

1. Plaintiffs Allege Disparate Treatment—Not Disparate Impact—Discrimination

The Unruh Act prohibits discrimination but does not "confer any right or privilege on a person … that is applicable alike to persons of every sex, color, race, religion, ancestry, national origin, disability, medical condition, marital status, sexual orientation, citizenship, primary language, or immigration status." Cal. Civ. Code § 51(c). Courts interpret this provision of the Act to mean that only disparate *treatment*—not disparate *impact* discrimination—is actionable. *Turner v. Ass'n of Am. Med. Colleges*, 167 Cal. App. 4th 1401, 1408 (2008); *Harris v. Capital Growth Investors*, 52 Cal. 3d 1142, 1149, 1172-73 (1991) (citing § 51(c)).

Unlike disparate *treatment* discrimination, which requires proof of discriminatory intent, in a claim of disparate *impact* discrimination, "the disproportionate impact of a facially neutral policy on a protected class *is a substitute for* discriminatory intent." *Koebke v. Bernardo Heights Country Club*, 36 Cal. 4th 824, 854 (2005) (emphasis added). In

Koebke, a gay couple sued a country club, alleging the club's adoption of a facially neutral policy restricting membership benefits to legal spouses, without more, served on its own to establish intent to discriminate. *Id.* For this proposition, the plaintiffs relied on *Roth v. Rhodes*, 25 Cal. App. 4th 530, 538 (1994), which held that an otherwise "permissible" facially neutral policy "may nevertheless be illegal if it is merely a device employed to accomplish prohibited discrimination." *Id.* Without overruling *Roth*, *Koebke* rejected this argument on summary judgment because "plaintiffs do not point to any evidence" that the purpose of the country club's policy was "to accomplish discrimination on the basis of sexual orientation." *Id. Koebke* explained that, without that evidence of intent, the plaintiffs' theory amounted to disparate impact because it "relies on the *effects* of a facially neutral policy on a particular group and would require us to infer *solely* from such effects a discriminatory intent." *Id.* (original emphasis).

That is not Plaintiffs' theory here. Plaintiffs allege that Defendants intentionally discriminated against job applicants based on their perceived disability. Unlike in *Koebke*, Plaintiffs do not rely on the *effects* of a facially neutral policy or require this Court to infer *solely*

from such effects a discriminatory intent. Nor are Defendants' policies facially neutral. *See* AOB at 48-49; ER-82–83, 86 (Defendants' inquiries were "designed to bring any and every health condition to the surface," to "regard every applicant as having a disability," to "ferret[] out" disabilities or potentially disabling conditions, and the inquiries "express[ed]" an "intent to" discriminate on the basis of perceived disability). The district court acknowledged this. ER-14 ("Plaintiffs allege that the questionnaire on its face is discriminatory").

Moreover, this appeal does not arise, like *Koebke*, from summary judgment proceedings; Plaintiffs have not had the opportunity to exhaust discovery supporting their allegations of intentional discrimination. Even if, *arguendo*, Defendants' policies are facially neutral, Plaintiffs' perceived disability discrimination claim cannot be dismissed on the pleadings. "If [facially neutral] policies are subterfuges for invidious discrimination" then Plaintiffs have a viable Unruh Act claim. *Roth*, 25 Cal. App. 4th at 538.

2. Discrimination Against Every Member of a Protected Class Is Actionable

As discussed above, Cal. Civ. Code § 51(c) makes disparate impact discrimination non-actionable. But this rule does not mean that

intentional discrimination directed at every patron in a protected class is not actionable.

For example, a policy that discriminates against every member of a protected class—*e.g.*, against all women, or all Catholics, or all bankruptcy attorneys—is prohibited by Unruh. *See*, *e.g.*, *White v. Square*, 7 Cal. 5th 1019, 1024 (2019). Plaintiffs' perceived disability claim is no different: All persons whom Defendants perceived to be disabled were subjected to Defendants' discriminatory treatment. The fact that Defendants perceived or regarded all applicants to be disabled in the first instance does not turn their conduct into disparate impact discrimination—or make it not discrimination—as a matter of law.

Granted, perceived disability is unique among the "personal characteristics" on the basis of which Unruh forbids discrimination. Unlike various other antidiscrimination laws, Unruh's reach is not limited to "immutable characteristics": "The 'personal characteristics' protected by the Act are not defined by immutability, since some are, while others are not [immutable], but [instead] represent traits, conditions, decisions, or choices fundamental to a person's identity,

beliefs and self-definition." *Candelore v. Tinder*, 19 Cal. App. 5th 1138, 1145 (2018) (citation and quotation omitted).

Perceived disability status, by contrast, is not a trait, condition, decision, or choice fundamental to a person's identity, beliefs and self-definition; it is instead a trait imposed externally by another. Thus, as a conceptual matter, perceived disability discrimination, unlike other kinds of discrimination, can be directed against *anyone and everyone*. But this does not make perceived disability discrimination categorically non-actionable: Unruh extends "to those who are regarded by others as living with such a disability"—even if they are "wrongly perceived to be." *Maureen K. v. Tuschka*, 215 Cal. App. 4th 519, 529 (2013). By regarding Plaintiffs as disabled and requiring them to answer arbitrary and irrelevant questions designed to ferret out disabilities or potentially disabling conditions, Defendants engaged in prohibited discrimination on the basis of perceived disability. That it was possible for Defendants to do this to all of their patrons perceived as disabled serves only to highlight that this is classic discrimination against every member of a protected class. Defendants' argument to the contrary would mean that perceived disability discrimination is categorically not actionable; but

that argument cannot be reconciled with *Maureen K* or the text of the statute.

3. Defendants' Policies Did Not Apply Equally to All Persons

Defendants' argument that "practices and policies that apply equally to all persons" are not actionable is simply a restatement of their disparate impact argument. AAB at 28 (citing *Greater Los Angeles Agency on Deafness v. CNN*, 742 F.3d 414, 425 (9th Cir. 2014) and Cal Civ. Code § 51(c)). However, even assuming that requiring every jobseeker complete the Questionnaire in the first instance was facially neutral (it was not), Defendants' practice of subjecting jobseekers to further verbal questioning on a case-by-case basis constitutes as-applied intentional discrimination.

Defendants ignore that a facially neutral policy or practice, if applied unequally, is actionable. *See* AOB at 42-44; *see also Everett v. Sup. Ct.*, 104 Cal. App. 4th 388, 394 (2002) (reversing summary judgment for defendants where plaintiffs presented evidence to support inference that defendants' facially neutral policy was applied in a discriminatory manner); *Turner*, 167 Cal. App. 4th at 1411 (noting no allegation defendant applied its facially neutral policy in an

intentionally discriminatory manner) (citing *Koebke*, 36 Cal. 4th at 854); *Koire*, 40 Cal. 3d at 29 (the scope of Unruh "is clearly not limited to exclusionary practices").

Here Plaintiffs allege that after filling out the Questionnaire, each jobseeker was subjected to unique, additional, in-person questioning probing more deeply, on a case-by-case basis, into any condition for which a jobseeker provided a positive response. ER-74, 77, 90. The overbreadth of the Questionnaire (e.g., "Have you ever had a fever?" "Have you ever had a surgery or been hospitalized?" "Are you currently on any medications?") meant that each applicant gave at least one positive response. ER-86 ("As such, all Class Members were required to and did disclose one or more health conditions."). Given that the additional questioning necessarily varied according to each individual's medical profile, Defendants, in executing their policy in this way, intentionally engaged, on a case-by-case basis, in discriminatory treatment. Theirs was not a policy that "applied equally to all persons," but a policy that applied *unequally* to all persons.

IV. DEFENDANTS' INTRUSIVE AND ILLEGAL CONDUCT CONSTITUTES INTRUSION UPON SECLUSION

To state a claim for intrusion upon seclusion, Plaintiffs must allege (1) intrusion into a private matter in which they have a reasonable expectation of privacy (2) in a manner highly offensive to a reasonable person. *Shulman v. Group W Productions*, 18 Cal. 4th 200, 231 (1998). These two elements largely overlap, as does the court's analysis of each element. *See Hernandez v. Hillsides*, *Inc.*, 47 Cal. 4th 272, 286-87 (2009).) The district court ruled that the intrusion was not highly offensive as a matter of law but did not rule that Plaintiffs had no reasonable expectation of privacy in their medical profiles. ER-15–19. Defendants now argue, however, that it is unreasonable for Plaintiffs to have any expectation of privacy in any aspect of their medical profiles during a pre-employment screening and for similar reasons that their conduct is not offensive. AAB at 30-34.

A. Jobseekers Have a Reasonable Expectation of Privacy in Their Medical Profiles During Compelled Pre-Employment Medical Screenings

Defendants' argument that Plaintiffs had no reasonable expectation of privacy in their medical profiles ignores that "a person's medical profile is an area of privacy infinitely more intimate, more

personal … than many areas already judicially recognized and protected," *Hill v. NCAA*, 7 Cal. 4th 1, 41 (1994). It also ignores that FEHA, to protect jobseekers' privacy, forbids even the act of inquiring into these subjects (let alone obtaining the information) except where it is necessary to assessing present ability to do the specific job in question. *See* Cal. Gov. Code § 12940(e)(3).

Defendants do not seriously contest the illegality of their medical inquiries under FEHA. Nor can they: Inquiries must be "tailored to assess the employee's ability to carry out the essential functions of the job." Cal. Code Regs., tit. 2, § 11065(k); see also *Disney*, 2018 WL 3201853, at *4 ("medical inquiries must be narrowly tailored and job-related."). Defendants concede that they made no attempt to tailor their questions and instead opted for an omnibus, one-size-fits-all approach in violation of FEHA.

Nor do Defendants comment on, let alone contest, the significance of FEHA's legislative history, clarifying that Cal. Gov. Code § 12940(e)(3)'s tailoring requirement goes further than the ADA to give teeth to "this state's long history of *strong protections for the privacy rights of Californians*." Assem. Com. on Lab. and Emp., Analysis of

Assem. Bill No. 2222 (1999-2000 Reg. Sess.) *as amended* April 5, 2000, p. 4 (the "Legislative Analysis") (emphasis added).

Instead, Defendants urge that the coerced post-job offer screenings challenged in this case are as a matter of law no different than a patient's "routine" medical examination performed by her own doctor. AAB at 6, 14, 34. But this argument ignores the California Supreme Court's mandate that, in making "preliminary determination[s]," courts consider "all circumstances of the intrusion" as alleged. *Shulman*, 18 Cal. 4th at 231; *see also Hernandez*, 47 Cal. 4th at 286-87. It also fails to acknowledge that "privacy, for purposes of the intrusion tort, is not a binary, all-or-nothing characteristic. There are degrees and nuances to societal recognition of our expectations of privacy: the fact that the privacy one expects in a given setting is not complete or absolute does not render the expectation unreasonable as a matter of law." *Sanders v. ABC*, 20 Cal. 4th 907, 915–16 (1999).

Applying "all circumstances" and considering the "degrees and nuances" present here, the post-offer examinations, conducted by medical personnel of the employer's choosing solely as a condition of getting hired, are simply not comparable to routine medical

examinations performed by personal physicians chosen by their patients. The coerced exams challenged here had to be completed as a condition of working; routine medical exams do not. The coerced exams here must, by law, be "narrowly tailored and job related" (*Disney*, 2018 WL 3201853, at *4); routine medical exams need not be. The coerced exams here are the subject of a specific statute adopted by the Legislature that goes above and beyond the ADA precisely because the Legislature was concerned with protecting Californians' privacy (*Legislative Analysis* at 4); routine medical exams are not subject to FEHA's privacy protections. The coerced exams here were undertaken by applicants for the sole purpose of assessing their present ability to do the specific job in question; routine medical exams are undertaken by patients for many reasons, *e.g.*, diagnosis of unknown conditions, prognosis of known conditions, treatment, and maintenance of long-term health. Defendants may refer to themselves as an "occupational healthcare provider," but in no sense is the service they provide to Plaintiffs "healthcare" in the same way that the services provided to Plaintiffs by their personal physicians are.

Nor, as Defendants argue, were Plaintiffs in a position to "decide[] what information to provide" in response to Defendant's illegally overbroad inquiries. *See* AAB at 36. Plaintiffs and class members were required to answer every question, and every class member disclosed one or more health conditions. *See* ER-86. If they did not disclose their ***entire health histories***, Defendants would refuse to complete the screening and inform the employer that the applicant refused to complete the exam, whereupon the employment offer would be revoked. ER-75. Compare this to a routine medical exam, where a patient is truly free to decide what information to provide to his or her personal and personally-selected physician and where refusing to disclose certain information does not lead to revocation of a job offer. *See also* L.A.A.W. Br. at 14 ("these overbroad inquiries … force [applicants] to disclose medical details that they would otherwise keep private"). And unlike the court's observation in *Hill* (which involved similarly coerced exams) that athletic participation is not "an economic necessity that society has decreed must be open to all," 7 Cal. 4th at 42-43, here, working is without question an economic necessity. Indeed, "it is the public policy

of the State of California [] to safeguard the right of all persons to seek … employment." AG Br. at 1 (citing Cal. Gov. Code § 12920).

Defendants do not address these different circumstances as *Shulman* and *Sanders* require. *See* 18 Cal. 4th at 231; 20 Cal. 4th at 915–16. Instead, Defendants cite three cases challenging pre-employment blood and urinalysis tests to argue that Plaintiffs here had no reasonable expectation of privacy in their medical profiles as a matter of law. **But far from helping Defendants, those cases support Plaintiffs.**

Defendants cite *Leonel v. Am. Airlines*, 400 F.3d 702, 712 (9th Cir. 2005) for the unremarkable proposition that "job applicants should anticipate that a preemployment medical examination may be required." AAB at 32. But Plaintiffs here do not contend it was reasonable to expect *no* medical inquiries; instead, they contest the overbreadth of those inquiries, which is entirely consistent with *Leonel*. Although the *Leonel* plaintiffs "consent[ed] to preemployment blood tests," the court held that they "did not consent to any and all medical tests that American wished to run on their blood samples." *Id.* at 713. Thus, Plaintiffs' consent to pre-employment medical inquiries in the

first instance does not mean they consented to "any and all" of the dozens of invasive and overbroad medical inquiries alleged here.

Consistent with *Shulman*'s requirement that all circumstances be considered, *Leonel* explained that "in the specific context of preemployment medical examinations, the question of what tests plaintiffs should have expected or foreseen depends in large part upon what preplacement medical examinations usually entail, and what, if anything, plaintiffs were told to expect." *Id.* (quotation omitted). In California, pre-employment screenings usually entail—and indeed *may legally only entail*—narrowly tailored inquiries. Cal. Gov. Code § 12940(e)(3); Cal. Code Regs., tit. 2, § 11065(k). And despite Defendants' insinuation to the contrary (*see* AAB at 34), Plaintiffs were *not* told to expect such broad questioning before they were subjected to it and there is no allegation to the contrary.

For the same reasons, *Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260 (9th Cir. 1998) and *Loder v. Glendale*, 14 Cal. 4th 846

(1997) also support Plaintiff's position.[3] *Bloodsaw* and *Loder* were also decided prior to the amendment of FEHA to require narrow tailoring of medical inquiries—limitations imposed by the Legislature to protect applicants' privacy. *See Legislative Analysis* at 4. After those amendments to FEHA took effect, a pre-employment screening questionnaire could only legally entail narrowly tailored inquiries. Plaintiffs' expectation that the screening would be so-tailored cannot be unreasonable *as a matter of law*.

B. Plaintiffs Have Sufficiently Alleged Offensive Conduct

Defendants argue that the inquiries were not highly offensive because they occurred in the medical office setting. This again fails to

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[3] Defendants imply that *Bloodsaw* found a questionnaire containing three questions to be a "minor intrusion" "by way of comparison" to a blood draw or urinalysis. AAB at 33. Not so. *Bloodsaw* reasoned: "The fact that plaintiffs acquiesced in the minor intrusion of checking or not checking three boxes on a questionnaire does not mean that they had reason to expect further intrusions in the form of having their blood and urine tested for specific conditions that corresponded tangentially if at all to the written questions." *Id.* at 1268. *Bloodsaw* merely accords with *Leonel*'s observation that consent to a test or inquiry in the first instance does not constitute consent to tests or inquiries of any kind or amount.

take into consideration "all circumstances of the intrusion" as alleged. *Shulman*, 18 Cal. 4th at 231. Those circumstances here are as follows:

- Defendants—healthcare providers selected by ***employers*** to conduct medical screenings of ***applicants***—subjected applicants to deeply invasive, overbroad questions about their ***entire health history***—regardless of the potential job or capabilities required for it. These included, *inter alia*, questions about past and present venereal disease, vaginal and penile discharge, prostate problems, diarrhea, painful/frequent urination, hemorrhoids, menstruation, etc.;
- Any written health questions answered affirmatively by applicants were then followed up with equally invasive verbal questioning;
- Applicants were threatened with failing the medical screening—and therefore being denied the job—if they did not answer every single question;
- Applicants were also threatened with failing the medical screening—and therefore being denied the job—if they did not sign the Authorization form purporting to permit Defendants to

disclose the information they provided through the Questionnaire to prospective employers and third parties;

- This all occurred "at a time of vulnerability and confusion," given that these screenings were conducted as a condition of receiving gainful employment, under illegal threat of disclosure to prospective employers and unknown third parties, by random providers not of applicants' choosing, and in a highly invasive and overbroad manner. *Miller v. NBC*, 187 Cal. App. 3d 1463, 1484 (1986); and
- FEHA prohibits employers from subjecting applicants to such broad medical or psychological inquiries that are not "job related and consistent with business necessity." Cal. Gov. Code § 12940(e)(3).

Taken together, these circumstances show that applicants had a reasonable expectation of privacy in their non-job-related medical profiles and that Defendants' acts constitute "highly offensive" conduct.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court reverse the District Court's judgment on all causes of action.

With respect to the FEHA and Unruh Act claims, Plaintiffs respectfully request that, in the alternative, this Court certify those issues to the California Supreme Court.

Date: October 5, 2021

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Appellants' Reply Brief

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Date October 5, 2021