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

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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

[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).

[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

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

By: *s/ Tim Johnson*
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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.

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*
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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.

DATED: August 23, 2021

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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.

I certify that I electronically filed the foregoing Answering Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 23, 2021. In doing so, I served a true and correct copy of the foregoing documents on:

RESPONDENT DISTRICT COURT:
Honorable Dana Sabraw
Clerk's Office
United States District Court
Southern District of California
333 West Broadway, Suite 420
San Diego, CA 92101

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Executed on August 23, 2021, at San Diego, California.

/s/ Michelle Doan
Michelle Doan

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