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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ORANGE**

15 LUIS SALDANA, an individual;
16 MICHAEL ANDREW RONQUILLO, an
17 individual; RAMIRO IVAN IBARRA,
18 and individual; CARLOS IVADO
19 BLANCO, an individual,

20 Plaintiffs,

21 vs.

22 VINCENT BITETTO, an individual, DBA
23 BITETTO TOW SERVICE CENTER,
24 RANDI BITETTO, an individual,
25 SHANNON JONES, an individual,
26 DUSTIN SWEETER, an individual,
27 JAVIER CHAVEZ, an individual; and
28 DOES 1 through 50 inclusive,

Defendants.

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County of Orange
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Case No. 30-2014-00725237-CU-WT-CJC

[Assigned to Hon. William D. Cluster]

**PLAINTIFF LUIS SALDANA'S OPPOSITION
TO DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT, OR IN THE
ALTERNATIVE, SUMMARY
ADJUDICATION**

[Filed concurrently with Plaintiffs' Separate
Statements of Disputed and Additional Material
Facts; Plaintiffs' Consolidated Compendium of
Exhibits; Declaration of Manbir S. Chowdhary;
Declaration of Robert J. Bekken, Declaration of
Ivan Ibarra, Declaration of Luis Saldana;
Plaintiffs' Request for Judicial Notice]

Date: June 11, 2015

Time: 1:30 p.m.

Dept. C-18

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I. INTRODUCTION

This case involves four Hispanic tow truck drivers who were subjected to rampant racial abuse and wrongfully terminated because they objected to unlawful pay practices, illegal workplace conduct, and health and safety violations. Defendants discriminated, abused, and retaliated against Plaintiffs, thereby depriving Plaintiffs of the rights guaranteed to them under the *Labor Code* and the *Fair Employment and Housing Act* (“FEHA”).

However, Defendants do not challenge the merits of the egregious allegations made by multiple Plaintiffs in this matter. Instead, they seek summary judgment/adjudication of Plaintiffs’ claims in demurrer fashion, with the hope of denying Plaintiffs a jury trial on the merits.

II. FACTUAL BACKGROUND

Despite the formation of a corporate entity, in 2004, known as “Bitetto’s Tow and Service Center, Inc.”, overwhelming evidence exists that during the relevant statutory period, Defendant Vincent Bitetto conducted business as “**Bitetto Tow & Service Center, Inc.**” (a non-existent corporation), “**Bitetto Tow & Service, Inc.**” (a dissolved corporation) and “**Bitetto Tow and Service Center**”. (*Plaintiff’s Disputed and Additional Material Facts* “AMF” Nos. 1, 2, 5).

Accordingly, Defendant Vincent Bitetto was sued as a sole proprietor dba “Bitetto Tow and Service Center” because this is exactly how he operated his towing business during Plaintiffs’ employment.

In fact, the first time Plaintiffs’ counsel learned of the entity known as “*Bitetto’s Tow & Service Center, Inc.*” was after Defendants filed the present motion. (*Pltfs. Compendium of Exhibits, Exh.1, Chowdhary Decl.* ¶ 30). Consequently, on May 15, 2015, Plaintiffs added the entity, “Bitetto’s Tow and Service Center, Inc.”, as a Doe defendant, per *Code of Civil Procedure* Section 474.

On May 20, 2015, Plaintiffs dismissed individual defendants Randi Bitetto, Shannon Jones, Dustin Sweeter and Javier Chavez from the present action. The remaining defendants are owner Vincent Bitetto and the corporate entity named “Bitetto’s Tow & Service Center, Inc.”

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III. ARGUMENT

A. Courts Must Look at the Evidence in a Light Most Favorable to the Opposing Party in Ruling on Summary Judgment/Adjudication

A defendant moving for summary judgment must show either that the plaintiff cannot establish one or more elements of a cause of action or that there is a complete defense to the action. *Code of Civil Procedure* § 437c(o) and (p). If the defendant makes the required showing, the burden shifts to the plaintiff to present evidence that there is a triable issue of material fact. *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 780. There is a triable issue if the evidence would allow a reasonable trier of fact to find the underlying fact in favor of plaintiff. *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.

“[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law.” *Aguilar, supra*, 25 Cal.4th at p. 850.

“All doubts as to whether there are any triable issues of fact are to be resolved in favor of the party opposing summary judgment.” *Ingham v. Luxor Cab Co.* (2001) 93 Cal.App.4th 1045, 1049. In ruling on the motion, a court must “consider all of the evidence” and “all” of the “inferences” reasonably drawn there from, and must view such evidence and such inferences, in the light most favorable to the opposing party. *Code of Civil Procedure* § 437(c)(c); *Aguilar, supra*, 25 Cal. 4th at p. 843.

B. Summary Judgment or Adjudication As To Plaintiff’s First, Second, Third Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, Fifteenth, Sixteenth, Seventeenth, and Eighteenth Causes of Action Should Be Denied Because Triable Issues of Fact Exist Regarding The Identity of Plaintiff’s Employer

1. Genuine Issues of Triable Fact Exist as to Whether Defendant Vincent Bitetto Was Operating His Business As “Bitetto Tow & Service Center, Inc. (a non-existent corporation), “Bitetto Tow & Service, Inc.” (a dissolved corporation) or “Bitetto Tow & Service Center”

Defendant Vincent Bitetto contends that at no point from July 9, 2004 has he done business in his personal capacity “doing business as” Bitetto’s Tow & Service Center, Inc., or under any “dba” name similar to Bitetto’s Tow & Service Center, Inc. (*Defendants’ Compendium of Exhibits*,

1 Declaration of Vincent Bitetto (“*Bitetto Decl.*” ¶ 4)). This is simply false.

2 Despite the formation of a corporate entity, in 2004, known as “Bitetto’s Tow and Service
3 Center, Inc.”, the evidence shows Defendant Vincent Bitetto operated his towing business under the
4 following names during Plaintiffs’ employment: “**Bitetto Tow & Service Center, Inc.**”, “**Bitetto**
5 **Tow & Service, Inc.**”, and “**Bitetto Tow and Service Center**”. (AMF Nos. 1, 2, 5).

6
7 **1. “Bitetto Tow & Service Center, Inc.”**

8 Defendant Vincent Bitetto operated his business using the name of a **non-existent**
9 **corporation**: “Bitetto Tow & Service Center, Inc.” (*Chowdhary Decl.* ¶¶ 12, 15, 17, 20, 22, 23, 25;
10 *Ibarra Decl.* ¶¶ 2, 3, 4; *Pltfs. Compendium of Exhibits, Exh. 11* (“*City of Anaheim Tax Cert. No.*
11 *BUS2005-00623*”), *Exh. 13* (“*Bitetto Time Sheet Forms*”), *Exh. 14* (“*Bitetto Road Service*
12 *Forms*”), *Exh. 18* (“*Website, www.bitettoanaheim.com*”), *Exh. 20* (“*General Work Rules*”), *Exh.*
13 *21*, (“*Form W-2*”), *Exh. 23* (“*Ibarra paycheck deduction*”), *Exh. 25* (“*Bitetto Uniform Policy*”),
14 *Exh. 26* (“*Meal Period Agmt.*”), *Exh. 28* (“*City of Riverside, Business Search Result*”).

15 Pursuant to the California Secretary of State, the business entity known as “Bitetto Tow &
16 Service Center, Inc.” does not exist. (*Chowdhary Decl.* ¶ 11; *Pltfs. Compendium of Exhibits, Exh.*
17 *10* (“*CA Secretary of State “Business Search - Results”*; *Plaintiffs’ Request for Judicial Notice, ¶*
18 *3*)).

19 However, despite no record of this corporate entity on file with the California Secretary of
20 State, Defendant Vincent Bitetto continues to operate in the City of Anaheim, under the non-
21 existent corporation name of “Bitetto Tow & Service Center, Inc.”, as its Owner. (*Chowdhary*
22 *Decl. ¶ 12*; *Pltfs. Compendium of Exhibits, Exh. 11* “*City of Anaheim Business License Record/Tax*
23 *Certificate Status*”); *Plaintiffs’ Request for Judicial Notice, ¶ 4*).

24 Defendants’ *own* business records, during the time of Plaintiffs’ employment, reflect
25 business operations in the name of this non-existent corporate entity (*Ibarra Decl.* ¶¶ 2-3;
26 *Chowdhary Decl.* ¶¶ 17, 20, 22, 23; *Pltfs. Compendium of Exhibits, Exh. 13* (“*Time Sheet Forms*”),
27 *Exh. 14* (“*Road Service Forms*”), *Exh. 20* (“*General Work Rules*”), *Exh. 21* (“*Form W-2*”), *Exh.*
28 *23* (“*Ibarra paycheck deduction*”), *Exh. 25* (“*Bitetto Uniform Policy*”), *Exh. 26* (“*Meal Period*

1 *Agmt.*”).

2 Moreover, even at the time of filing this current opposition, Defendants’ website
3 www.Bitettoanaheim.com clearly identifies the business as the non-existent corporation, “Bitetto
4 Tow and Service Center, Inc.” (*Chowdhary Decl.* ¶ 15; *Pltfs. Compendium of Exhibits, Exh. 18*).

5
6 **2. “Bitetto Tow & Service, Inc.”**

7 During Plaintiff’s employment, Defendant Bitetto also conducted business under the name
8 of a **dissolved corporation**, “Bitetto Tow & Service, Inc.” (*Chowdhary Decl.* ¶¶ 13, 14, 16, 19;
9 *Pltfs. Compendium of Exhibits, Exhs. 16, 17, 19, 22*).

10 Pursuant to the California Secretary of State, “Bitetto Tow & Service, Inc.” was dissolved as
11 a corporate entity on 04/18/2001. (*Chowdhary Decl.* ¶ 10; *Pltfs. Compendium of Exhibits, Exh. 9*).

12 However, the evidence indicates that Defendant Vincent Bitetto, as the entity’s purported
13 owner, has continued business operations in the name of the dissolved entity for over thirteen
14 years¹. Moreover, the name of the dissolved corporation was also used on company personnel
15 documents during Plaintiff’s employment. (*Chowdhary Decl.* ¶ 16, *Pltfs. Compendium of Exhibits,*
16 *Exh.19 “Payment Adjustment Form”*).

17
18 **3. “Bitetto Tow & Service Center”**

19 Finally, the evidence shows that Defendant Vincent Bitetto also conducted business under
20 the name “Bitetto Tow & Service Center” (*Ibarra Decl.* ¶ 4; *Chowdhary Decl.* ¶¶ 13, 18; *Pltfs.*
21 *Compendium of Exhibits, Exhs. 15, 16*). In fact, during Plaintiff’s employment, this was the
22 business name reflected on Bitetto’s tow trucks.²

23 ///

24 ///

25
26 ¹ As of the date of this opposition, Defendants’ Facebook and Yelp pages clearly identify the
27 business under the name of the dissolved entity, “Bitetto Tow & Service, Inc.” (AMFs 1, 2,
28 5); *See Pltfs. Compendium of Exhibits, Exhs. 17 and 22*.

² *Chowdhary Decl.* ¶ 13; *Pltfs. Compendium of Exhibits, Exh. 16*.

1 A civil action may be maintained only against a legal person, that is, a natural person or an
2 artificial or quasi-artificial person. **A nonentity is incapable of suing or being sued.** *Oliver v.*
3 *Swiss Club Tell*, 222 Cal. App. 2d 528, 35 Cal. Rptr. 324 (1st Dist. 1963) (emphasis added).

4 The foregoing clearly demonstrates that Plaintiff’s purported employer was conducting
5 business as a non-existent, or dissolved corporation, from 2004 to the date of Plaintiff’s complaint.
6 Accordingly, the present action was brought by Plaintiffs against Defendant Vincent Bitetto *dba*
7 Bitetto Tow & Service Center.

8 By conducting business after 2004, as a non-existent corporate entity and a dissolved
9 corporation, it is axiomatic that Defendant Bitetto did not avail himself of the corporate protections
10 provided by law and should not be allowed to assert them now, to evade responsibility for
11 Plaintiffs’ claims under the *Labor Code* and *FEHA*.

12 **2. Genuine Issues of Triable Material Fact Exist as to Whether Defendant**
13 **Vincent Bitetto Controlled Plaintiff’s “Wages, Hours or Working**
14 **Conditions”**

15 “[N]o generally applicable rule of law imposes on anyone other than an employer the duty
16 to pay wages.” *Martinez v. Combs* (2010) 49 Cal.4th 35, 49. The wage order defines the
17 employment relationship. *Id.* at p. 62. The wage order’s definition of employment embodies three
18 alternative definitions: 1) to exercise control over the wages, hours or working conditions; or 2) to
19 suffer or permit to work; or 3) to engage, thereby creating a common law employment relationship.
20 *Id.* at p. 64.

21 Under California law, the question of whether an employment relationship exists is
22 generally reserved for the trier of fact. This remains true where the evidence, though not in conflict,
23 permits conflicting inferences. A court may decide the existence of an employment relationship as
24 a matter of law only if the evidence and inferences support one reasonable conclusion. *Brassinga v.*
25 *City of Mountain View* (1998) 66 Cal.App.4th 195, 201. There are triable issues of material fact as
26 to whether Defendant Bitetto employed Plaintiffs.

1 a. **Vincent Bitetto is an “Employer” under Wage Order #9**

2 Plaintiff’s employment relationship is governed by *Industrial Welfare Commission Wage*
3 Order # 9, "Transportation Industry". Wage Order # 9 defines an "Employer" as follows:

4 **"Any person as defined in Section 18 of the Labor Code, who directly or indirectly, or**
5 **through an agent or other person, employs or exercises control over the wages, hours, or**
6 **working conditions of any person."** IWC Wage Order No. 9, § 2(G), (emphasis added).

7 This definition is meant to reach situations where multiple entities control different aspects
8 of the employment relationship. *Martinez, supra*, 49 Cal.4th at p. 59. The definition is “broad
9 enough to reach through straw men and other sham arrangements to impose liability for wages on
10 the actual employer.” *Id.* at p. 71.

11 “The employer...is the party who hires the employee and benefits from the employee’s
12 work, and this it is the employer to whom liability should be affixed for any unpaid wages.” *Futrell*
13 *v. Payday California, Inc.* (2010) 190 Cal.App.4th 1419, 1432. In *Futrell*, the court held that that a
14 payroll processing company sued for unpaid wages was not an employer because it did not “control
15 the hiring, firing, and day-to-day supervision of workers supplying the labor.” *Id.* at p. 1433.

16 Here, Defendant Vincent Bitetto controlled hiring and firing decisions. (*Pltfs. Compendium*
17 *of Exhibits, Exh. 2, Saldana Depo. 38:14-40:1, 151:14-152:20, 153:7-154:6, 154:17-156:9,*
18 *163:20-166:1; Exh. 4, Ibarra Depo. 186:20-187:17, 188:7-19, 194:22-196:23; Exh. 5, Ivado Depo.*
19 *136:1-8); Exh. 30, Bekken Decl. ¶ ¶ 5-6; Exh. 31 “Saldana Letter”). Moreover, Bitetto had the
20 right to discipline employees and did so, at times, using force. (*Pltfs. Compendium of Exhibits,*
21 *Exh. 2, Saldana Depo. 139:4-18; Exh. 5, Blanco Depo. 136:1-8).**

22 Strong evidence of the right to control is shown by the right to discharge the worker.
23 *Isenberg v. California Employment Stabilization Commission* (1947) 30 Cal. 2d 34, 39. Here, it is
24 undisputed that Vincent Bitetto had the right to discharge workers. (*Pltfs. Compendium of Exhibits,*
25 *Exh. 4, Ibarra Depo. 185:6-186:5, 194:22-196:23; Exh. 2, Saldana Depo. 38:14-40:1; 151:14-*
26 *152:20; 153:7-154:6; 154:17-156:9; Exh. 7; Exh. 5, Ivado Depo. 136:1-8); Exh. 30, Bekken Decl.*
27 *¶ ¶ 5-6).*

28

1 Further evidence of Bitetto’s control over Plaintiffs’ wages, hours, or working conditions is
2 evinced by the fact that Defendant Bitetto exercised control over formulating compensation plans
3 for employees, approving wages and pay increases. (*Pltfs. Compendium of Exhibits, Exh. 7,*
4 *Sweeter Depo. 143:10-14; 195:5-7; 200:18-201:1*). Bitetto also exercised control over drivers’
5 schedules and job assignments. (*Pltfs. Compendium of Exhibits, Exh. 2, Saldana Depo. 76:1-17;*
6 *81:18-82:3; 82:16-22*).

7 After Plaintiffs complained and objected to unlawful pay practices and discrimination, to
8 Defendant Bitetto, Plaintiffs’ working conditions worsened - resulting in suspension, reduced
9 assignments, picking up trash from the yard, and ultimately termination. (*Pltfs. Compendium of*
10 *Exhibits, Exh. 2, Saldana Depo. 139:4-18; Exh. 3, Ronquillo Depo. 32:25-33:15; Exh. 5, Blanco*
11 *Depo. 194:23-195:5, 183:23-184:10, 185:8-16, 185:21-188:1, 188:2-18, 188:23-189:12, 190:3-*
12 *12*). (AMF Nos. 1, 2, 5).

13 Accordingly, triable issues of material fact exist regarding whether Defendant Bitetto
14 exercised control over Plaintiffs’ wages, hours and working conditions.

15 **C. Summary Judgment or Adjudication As To Plaintiff’s Eleventh Cause of**
16 **Action Should Be Denied Because Triable Issues of Fact Exist As As To**
17 **Whether Defendant Vincent Bitetto Encouraged, Assisted or Paticipated In**
18 **the Continued Harassment of Plaintiffs**

19 The California Fair Employment and Housing Act (“FEHA”) prohibits harassment and
20 discrimination based on race and disability. *Cal. Govt. Code* § 12940 *et seq.* Harassment includes,
21 but is not limited to, “verbal epithets or derogatory comments...,” and “consists of conduct outside
22 the scope of necessary job performance, conduct presumably engaged in for personal gratification,
23 because of meanness or bigotry, or for other personal motives.” *Janken v. GM Hughes Electronics,*
24 46 Cal. App.4th 55 (1996). Further, “[h]arassment of an employee by an employee other than an
25 agent or supervisor shall be unlawful if the entity, or its agents, or supervisors, knows or should
26 have known of this conduct to take immediate and appropriate corrective action.” *Doe v. Capital*
27 *Cities* (1996) 50 Cal. App.4th 1038, 1046 (quoting Cal. Govt. Code § 12940 (h)(1)). (Citing *Kelly*
28 *Zurian v. Wohl Shoe Co,* (1994) 22 Cal. App.4th 397, 415; *Fisher v. San Pedro Peninsula Hospital*
(1989) 214 Cal. App.3d 590, 608).

1 Defendants cite *Fiol v. Doellstedt* (1996) 50 Cal. App.4th 1318 for support that Plaintiff's
2 failure to prevent harassment claim fails. *Fiol* made clear that a supervisor cannot be held liable
3 for failure to take effective action in response to an employee's alleged harassment of a subordinate.
4 However, Defendants' analysis of the *Fiol* ignores the fact that if a supervisor makes even the
5 slightest effort to foster or participate in the harassment, the supervisor may be held liable under the
6 express provisions of the FEHA [Cal. Gov. Code §12940(i)] which make it unlawful for any
7 "person to aid, abet, incite, compel, or coerce the doing of any acts forbidden under this part, or to
8 attempt to do so."

9 Here, there are genuine issues of triable material fact as to whether Defendant Vincent
10 Bitetto *directly* engaged in harassment based on Plaintiff Saldana's disability and denied
11 reinstatement after Plaintiff Saldana's disability leave. In this regard, Defendant Bitetto refused
12 Plaintiff Saldana to come back to work after the expiration of Plaintiff's disability leave. (Pltfs.
13 Compendium of Exhibits, Exh. 2, Saldana Depo. 38:21-24). (AMF Nos. 31 and 32).

14 Moreover, the evidence shows Plaintiff made complaints regarding unlawful pay practices,
15 racial discrimination in the workplace and unsafe working conditions. Despite being on notice of
16 Plaintiffs' allegations, Defendant Vincent Bitetto, as the owner, failed to investigate Plaintiff's
17 complaints and discipline the harassers – in fact the pattern of harassment and retaliation got worse
18 and Plaintiff was terminated by Defendant Bitetto. (AMF Nos. 32, 42, 43, 44 and 54).

19 On October 29, 2013 Plaintiffs' counsel, Robert J. Bekken, prior to filing the present
20 lawsuit, put Vincent Bitetto on notice of Plaintiffs' allegations and demanded that all unlawful and
21 discriminatory conduct cease with immediate effect, and Plaintiff Saldana be paid and treated in
22 accordance with applicable state and federal laws. Mr. Bekken was assured by Defendant Vincent
23 Bitetto that the matter would be looked into and Plaintiff Saldana would be treated in accordance
24 with the law. (Pltfs. Compendium of Exhibits, Exh.30, Bekken Decl. ¶¶ 3, 4, 5). (AMF Nos. 31
25 and 32).

26 Notwithstanding Defendants' knowledge of Plaintiff's complaints, the pattern of
27 discrimination and retaliation continued against Saldana, and after returning from disability leave,
28 was told by Defendant Bitetto that he could only get a job with the company if trained for and

1 obtained a Class A license – at Plaintiff’s own expense. (*Pltfs. Compendium of Exhibits, Exh. 2,*
2 *Saldana Depo. 38:14-40:1, 153:3-154:2, 162:24-163:21*). Moreover, upon Plaintiff Saldana’s
3 termination, Plaintiff received a text message from his former supervisor at Bitetto Tow stating that
4 Plaintiff would still be working with Defendants “if it wasn’t for you [Plaintiff] being on disability
5 [sic].” (*Pltfs. Compendium of Exhibits, Exh. 32*). (AMF Nos. 31 and 32).

6 Consequently, summary judgment is not appropriate on this claim either as a genuine issue
7 exists as to whether Defendant Vince Bitetto made even the slightest effort to foster or participate in
8 the harassment.

9 **D. Summary Judgment or Adjudication As To Plaintiff’s Eleventh Cause of**
10 **Action Should Be Denied Because Triable Issues of Fact Exist As To**
11 **Whether Defendants’ Conduct Was Severe and Pervasive**

12 The FEHA prohibits harassment of an employee on the basis of race, disability, and age.
13 Cal. Gov. Code §12940(j). A hostile work environment claim can be sustained by either severe or
14 pervasive harassment that “alters the conditions of [the victim's] employment and creates an abusive
15 working environment.” 2 Cal. Code Regs. §7287.6(b)(1). “[W]hether an environment is ‘hostile’ or
16 ‘abusive’ can be determined only by looking at all the circumstances. These may include the
17 frequency of the discriminatory conduct; its severity; whether it is physically threatening or
18 humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an
19 employee's work performance ... [N]o single factor is required.” *Harris v. Forklift Systems, Inc.*
20 (1993) 510 U.S. 17, 23. Thus, multiple incidents are not required - a single incident may suffice.
21 *Id.*; *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1045; see also *Ellison v. Brady* (9th Cir.
22 1991) 924 F.2d 872, 877-878 (dictum). A plaintiff’s deposition testimony alone is enough to raise
23 triable issues as to whether she suffered actionable harassment. *Valdez v. Clayton Industries* (2001)
24 88 Cal.App.4th 1162, 1175-1176.

25 Plaintiff Saldana’s made multiple complaints related to racial harassment, safety conditions
26 and unlawful pay practices. (*Pltfs. Compendium of Exhibits, Exh. 2, Saldana Depo. 96:21-97:14,*
27 *168:4-11, 156:12-16*). Defendants did not adhere to their own policies and procedures with respect
28 to racial abuse and discrimination directed against Hispanic employees. (*Pltfs. Compendium of*
Exhibits, Exh. 2, Saldana Depo. 168:4-11; Exh. 20, “General Work Rules”). (AMF Nos. 42, 43 and

1 44).

2 One of the alleged harassers, James Vest, a mechanic and driver employed by Defendant
3 Bitetto, testified that he could have referred to Plaintiffs as “**Fucking Mexicans**” and “**Beaners**”.
4 (*Pltfs. Compendium of Exhibits, Exh. 6, Vest Depo. 78:17-79:24*).

5 **Q.** *So your testimony is, you could have called someone beaners, you don’t think*
6 *you did, but you could have done it, you just don’t remember. Is that your*
7 *testimony?*

8 **A.** *Right. I – anything is possible. I could have done that. We’ve had a few*
9 *heated conversations.* (*Pltfs. Compendium of Exhibits, Exh. 6, Vest Depo. 79:4-9*).

10 During his deposition on March 23, 2015, James Vest also conceded that it was possible that
11 he [Vest] said, “**Why do these Mexicans have to be here?**” (*Pltfs. Compendium of Exhibits, Exh.*
12 *6, Vest Depo. 82:1-6*).

13 Notwithstanding the above testimony, James Vest did not recall being written up by Bitetto
14 management for making any anti- national origin comments or anti-Mexican comments at work.
15 (*Pltfs. Compendium of Exhibits, Exh. 6, Vest Depo. 84:8-12*).

16 Here, Plaintiff has presented evidence of conduct and remarks that clearly establish a hostile
17 working environment. (AMF Nos. 42, 43, 44).

18 **E. Summary Judgment or Adjudication As To Plaintiff’s Tenth and Eleventh**
19 **Causes of Action Should Be Denied Because Triable Issues of Fact Exist As**
20 **To Whether Plaintiff Exhausted His Administrative Remedies with the**
21 **DFEH**

22 **1. Plaintiff Filed Timely and Detailed Complaints with the DFEH**
23 **Providing Notice to Defendants**

24 Before filing a civil action alleging FEHA violations, an employee must exhaust his or her
25 administrative remedies with DFEH. Specifically, the employee must file an administrative
26 complaint with DFEH identifying the conduct alleged to violate FEHA. At the conclusion of the
27 administrative process, which may or may not include an investigation or administrative remedies,
28 DFEH generally issues the employee a right-to-sue notice. *Medix Ambulance Service, Inc. v.*
Superior Court (2002) 97 Cal.App.4th 109, 116.

1 A FEHA action is timely if (1) a plaintiff files a charge with either EEOC or the DFEH
2 within one year of the alleged unlawful act, and (2) commences the suit within one year of receiving
3 a right to-sue-notice. *Cal. Gov. Code Sec. 12960.*

4 Moreover, what is submitted to the DFEH “must not only be construed liberally in favor of
5 plaintiff, it must be construed in light of what might be uncovered by a reasonable investigation.”
6 *Nazir v. United Airlines, Inc.* (2009) 178 CA4th 243, 268, 100 CR3d 296, 318 (emphasis added);
7 see also *Wills v. Sup.Ct.* (2011) 195 CA4th 143, 157-159, 125 CR3d 1, 12-14.

8 Here, Plaintiff Saldana filed an extensive and timely complaint with the Department of Fair
9 Employment & Housing (“DFEH”), on November 22, 2013, delineating his former employer’s
10 discrimination, harassment and retaliation in violation of Cal. Gov. Code Sec. 12940. (*Chowdhary*
11 *Decl. ¶ 27; Pltfs. Compendium of Exhibits, Exh. 34, pg. 4*). (AMF Nos. 29).

12 Plaintiff Saldana’s DFEH complaint clearly alleges that he experienced discrimination,
13 harassment and retaliation throughout the course of his employment with Defendants. In addition,
14 Plaintiff’s DFEH complaint identifies the basis of said conduct based on his being a member of a
15 protected class, his Color, Disability, Engagement in Protected Activity, Family Care or Medical
16 Leave, Medical Condition and National Origin - including language use restrictions, Race.
17 (*Chowdhary Decl. ¶ 29; Pltfs. Compendium of Exhibits, Exh. 36, Pg. 4*). (AMF No. 29).

18 **F. The Remaining Causes of Action Should Be Denied Because of The Triable**
19 **Issues of Material Fact Raised Above**

20 **1. Plaintiff’s Sixteenth Cause of Action for Violations of §§ 98.6 and**
21 **1102.5 et seq. – Internal Reporting**

22 Plaintiff Blanco made multiple complaints to his employer regarding safety violations,
23 unsafe working conditions, and Defendants’ failure to correct unsafe and hazardous conditions.
(AMF No. 54).

24 Prior to the California State Legislature’s amendments to *Labor Code* § 1102.5, in 2014, the
25 statute provided, in pertinent part, “[a]n employer may not retaliate against an employee for
26 disclosing information to a government or law enforcement agency, where the employee has reasonable
27

1 cause to believe that the information discloses a violation of a state or federal statute, or a violation of
2 noncompliance with a state or federal statute.” *Labor Code* §1102.5(b).

3 Prior to the 2014 amendment, Courts had liberally construed their interpretation of this statute
4 and extended its applicability to protect employees that suffer retaliation for complaints made to **their**
5 **own employer**. See *Collier v. Superior Court*, 228 Cal. App. 3d 1117, 1124-25 (1991) (holding that the
6 provisions of California Labor Code Section 1102.5(b) extend to those instances where employees
7 report illegal conduct to their employers).

8 Moreover, a public policy basis for a wrongful discharge action has been recognized where an
9 employee is discharged after complaining to his or her employer about working conditions or practices
10 which the employee reasonably believes to be "illegal, unethical or unsafe." *Collier v. Superior Court*
11 (1991) 228 Cal. App. 3d 1117, 1123, *Hentzel v. Singer Co.* (1982) 138 Cal. App. 3d 290, 298; *Foley v.*
12 *Interactive Data Corp.* (1988) 47 Cal. 3d 654, 670. (emphasis added).

13 In sum, Labor Code Section 1102.5 evinces a strong public interest in encouraging employee
14 reports of illegal activity in the workplace. *Collier*, supra at 1123. Here, Plaintiff’s complaints served
15 not only the interests of his employer, but also the public interest. (AMF No. 54).

16 **2. Violation of Business Professions Code 17200 et. seq.**

17 As a result of the triable issues raised above and the undisputed nature of the allegations in
18 the complaint regarding Defendants’ violations of the California *Labor Code*, this cause of action
19 must also proceed and cannot be dismissed on summary judgment or adjudication.
20

21 **3. Plaintiff’s Fifteenth Cause of Action - Wrongful Termination in**
22 **Violation of Public Policy**

23 Finally, there are triable issues as to whether the motivating factor for Plaintiffs’ discharge
24 was retaliation for their complaints against the public policy contained in, but not limited to, the
25 *Labor Code*, *Gould v. Maryland Sound Industries, Inc.* 31 Cal. App. at 1148, 1150, the *Fair*
26 *Employment and Housing Act*, and *Cal-OSHA* statutes and regulations. (AMF Nos. 31, 32, 42, 43,
27 44, and 54).
28

1 **G. If the Court Grants Summary Adjudication As To The Causes of Action**
2 **Disputed Above, Plaintiff Requests An Opportunity to Amend the Complaint**
3 **In Order To Render Substantial Justice Between The Parties**

4 Movants contend that Plaintiff's alter ego allegations are fatally deficient. However, *Platt v.*
5 *Billingsley* (1965) 234 Cal.App.2d 577 provides support for Plaintiff's position that the Complaint
6 was properly plead with respect to alter ego allegations (i.e., that the only requirement, from a
7 pleading standpoint, is to ensure that the alter ego doctrine is placed in issue).

8 Notwithstanding the decision in *Platt*, to the extent that the Court finds the alter ego
9 allegations in Plaintiffs' Complaint deficient, Plaintiff requests leave to amend the complaint. Had
10 the causes of action been properly addressed in a demurrer, Plaintiff would have addressed the
11 concerns and amended the complaint in order to correct the errors in the pleading. Importantly, if
12 the Court grants leave to amend, the underlying facts of this case will remain unchanged and
13 Defendants will not be prejudiced.

14 California courts have held that amendments to pleadings should be granted liberally with
15 the object of affording every litigant his day in court and to render substantial justice between
16 parties. *Kauffman v. Bobo & Wood*, 99 Cal.App.2d 322 (Cal. Ct. App. 1950). This well-known rule
17 aims to further the preferred policy that cases should be decided on their merits. *Cardenas v. Elston*,
18 259 Cal. App. 2d 232 (Cal. Ct. App. 1968); *see also Klopstock v. Superior Court of San Francisco*,
19 17 Cal. 2d 13 (1941). Thus, if justice will be served by permitting amendment, and the rights of the
20 other parties will not be prejudiced, it is error to refuse permission to amend. Further, if the refusal
21 to amend prevents a party from asserting a meritorious claim, denying leave to amend is not only
22 error, it is an abuse of discretion. *Morgan v. Superior Court of Los Angeles County*, 172 Cal. App.
23 2d 527 (Cal. Ct. App. 1959).

24 *Code of Civil Procedure* §576 authorizes “[a]ny judge, at any time before or after
25 commencement of trial, in the furtherance of justice, and upon such terms as may be proper” to
26 “allow the amendment of any pleading...” Further, a trial court has complete power to allow
27 amendment of pleadings at any time before entry of judgment. *Bank of America v. Superior Court*
28 (1942) 20 Cal. 2d 697, 702, 128 P.2d 357.

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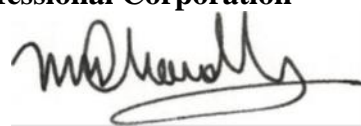
In order to render substantial justice to the parties, Plaintiff respectfully requests an opportunity for leave to file an Amended Complaint to correct any construed deficiencies with respect to Plaintiff's alter ego allegations.

IV. CONCLUSION

Based on the foregoing, Plaintiff respectfully request that this Court deny Defendants' motion for summary judgment or adjudication.

DATED: May 28, 2015

**BEKKEN LAW GROUP
LAW OFFICES OF MANBIR S. CHOWDHARY,
A Professional Corporation**



By: _____

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13 Attorneys for All Plaintiffs

14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
15 **COUNTY OF ORANGE**

16 LUIS SALDANA, an individual; MICHAEL
17 ANDREW RONQUILLO, an individual;
18 RAMIRO IVAN IBARRA, and individual;
19 CARLOS IVADO BLANCO, an individual,

20 Plaintiffs,

21 vs.

22 VINCENT BITETTO, an individual, DBA
23 BITETTO TOW SERVICE CENTER, RANDI
24 BITETTO, an individual, SHANNON JONES,
25 an individual, DUSTIN SWEETER, an
26 individual, JAVIER CHAVEZ, an individual;
27 and DOES 1 through 50 inclusive,

28 Defendants.

ELECTRONICALLY FILED
Superior Court of California,
County of Orange

05/28/2015 at 04:59:00 PM

Clerk of the Superior Court
By e Clerk, Deputy Clerk

) Case No. 30-2012000537578-CU-BC-CJC

)
) [Hon. William D. Cluster]

) **PLAINTIFFS' REQUEST FOR**
) **JUDICIAL NOTICE IN OPPOSITION**
) **TO DEFENDANTS' MOTION FOR**
) **SUMMARY JUDGMENT, OR IN THE**
) **ALTERNATIVE, SUMMARY**
) **ADJUDICATION**

) Date: June 11, 2015
) Time: 1:30 p.m.
) Dept.: C-18

) [Filed concurrently with Plaintiffs'
) Memorandum of Points and Authorities;
) Plaintiffs' Consolidated Compendium of
) Exhibits; Declaration of Manbir S.
) Chowdhary; Declaration of Robert J. Bekken;
) Declaration of Ivan Ibarra; Separate Statement
) of Disputed and Additional Material Facts]

1 TO ALL DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that PLAINTIFFS LUIS SALDANA, MICHAEL
3 RONQUILLO, IVAN IBARRA, and CARLOS IVADO BLANCO (collectively, “Plaintiffs”)
4 hereby respectfully request that the Court take judicial notice of the following records, pursuant
5 to California *Evidence Code* sections 452 and 453, in support of their Opposition to Defendants’
6 Motion for Summary Judgment, or in the Alternative, Summary Adjudication against all
7 Plaintiffs.

8
9 1. Record from the California Secretary of State website – <http://kepler.sos.ca.gov> showing
10 results of search for “**Bitetto**” returned 3 entity records. A true and correct copy of this
11 document attached as **Exhibit 8** to the contemporaneously-filed Plaintiffs’ Consolidated
12 Compendium of Exhibits. Plaintiffs request that the Court take judicial notice of this document
13 pursuant to California *Evidence Code* section 452, subdivision (c) [official acts of the Executive
14 Branch]; *El Ranch Unified School District v. National Education Association* (1983) 33 Cal. 3d
15 946, 950 fn. 6 [courts can take judicial notice of “orders, regulations, decisions and records of
16 state administrative agencies”]. Plaintiffs further request that the Court take judicial notice of
17 this document pursuant to California *Evidence Code* sections 452, subdivision (h) [facts that are
18 not reasonably subject to dispute].

19
20 2. Record from the California Secretary of State website – <http://kepler.sos.ca.gov> showing
21 dissolved status of **Bitetto Tow & Service, Inc.**, Entity No. C2310389. A true and correct copy
22 of this document attached as **Exhibit 9** to the contemporaneously-filed Plaintiffs’ Consolidated
23 Compendium of Exhibits. Plaintiffs request that the Court take judicial notice of this document
24 pursuant to California *Evidence Code* section 452, subdivision (c) [official acts of the Executive
25 Branch]; *El Ranch Unified School District v. National Education Association* (1983) 33 Cal. 3d
26 946, 950 fn. 6 [courts can take judicial notice of “orders, regulations, decisions and records of
27 state administrative agencies”]. Plaintiffs further request that the Court take judicial notice of
28 this document pursuant to California *Evidence Code* sections 452, subdivision (h) [facts that are
not reasonably subject to dispute].

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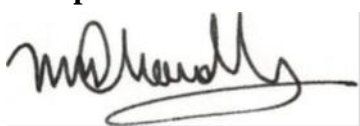
3. Record from the California Secretary of State website – <http://kepler.sos.ca.gov> showing results of search for **Bitetto Tow & Service Center, Inc.** returned no entity records. A true and correct copy of this document attached as **Exhibit 10** to the contemporaneously-filed Plaintiffs’ Consolidated Compendium of Exhibits. Plaintiffs request that the Court take judicial notice of this document pursuant to California *Evidence Code* section 452, subdivision (c) [official acts of the Executive Branch]; *El Ranch Unified School District v. National Education Association* (1983) 33 Cal. 3d 946, 950 fn. 6 [courts can take judicial notice of “orders, regulations, decisions and records of state administrative agencies”]. Plaintiffs further request that the Court take judicial notice of this document pursuant to California *Evidence Code* sections 452, subdivision (h) [facts that are not reasonably subject to dispute].

4. Record from the City of Anaheim Business License Division website – <https://www.anaheim.net/title/Planning+and+Building/Business+License+Division> for “**Bitetto Tow & Service Center, Inc.**”, Tax Certificate No.: BUS2005-00623, showing Status Active and identifying Owner as Vincent Bitetto. A true and correct copy of this document attached as **Exhibit 11** to the contemporaneously-filed Plaintiffs’ Consolidated Compendium of Exhibits. Plaintiffs request that the Court take judicial notice of this document pursuant to California *Evidence Code* section 452, subdivision (c) [official acts of the Executive Branch]; *El Ranch Unified School District v. National Education Association* (1983) 33 Cal. 3d 946, 950 fn. 6 [courts can take judicial notice of “orders, regulations, decisions and records of state administrative agencies”]. Plaintiffs further request that the Court take judicial notice of this document pursuant to California *Evidence Code* sections 452, subdivision (h) [facts that are not reasonably subject to dispute].

///
///

1 **DATED: May 27, 2015**

**LAW OFFICES OF MANBIR S. CHOWDHARY,
A Professional Corporation**



4 **By:** _____

**Manbir S. Chowdhary, Esq.
Attorneys for Plaintiffs
LUIS SALDANA, MICHAEL
RONQUILLO, IVAN RAMIRO IBARRA,
and CARLOS IVADO BLANCO**

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