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Superior Court of California,
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11/18/2021 at 03:41:00 PM
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SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Diego
STREET ADDRESS: 325 South Melrose Drive
MAILING ADDRESS:
CITY AND ZIP CODE: Vista, 92081
BRANCH NAME: North County

PLAINTIFF/PETITIONER: Let Them Breathe, et al.
DEFENDANT/RESPONDENT: Governor Gavin Newsom, et al.

NOTICE OF ENTRY OF JUDGMENT OR ORDER

CASE NUMBER:
37-2021-00031385-CU-WM-NC

(Check one): [x] **UNLIMITED CASE** (Amount demanded exceeded $25,000) [ ] **LIMITED CASE** (Amount demanded was $25,000 or less)

TO ALL PARTIES :

1. A judgment, decree, or order was entered in this action on *(date)*: November 12, 2021

2. A copy of the judgment, decree, or order is attached to this notice.

Date: November 18, 2021

Elizabeth N. Lake
(TYPE OR PRINT NAME [x] ATTORNEY [ ] PARTY WITHOUT ATTORNEY)

(SIGNATURE)

Form Approved for Optional Use
Judicial Council of California
CIV-130 [New January 1, 2010]

PLAINTIFF/PETITIONER: Let Them Breathe, et al. DEFENDANT/RESPONDENT: Governor Gavin Newsom, et al.	CASE NUMBER: 37-2021-00031385-CU-WM-NC

PROOF OF SERVICE BY FIRST-CLASS MAIL
NOTICE OF ENTRY OF JUDGMENT OR ORDER

(NOTE: You cannot serve the* Notice of Entry of Judgment or Order *if you are a party in the action. The person who served the notice must complete this proof of service.)

1. I am at least 18 years old and **not a party to this action.** I am a resident of or employed in the county where the mailing took place, and my residence or business address is *(specify):*
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   600 W. Broadway, Suite 1800
   San Diego, CA 92101

2. I served a copy of the *Notice of Entry of Judgment or Order* by enclosing it in a sealed envelope with postage fully prepaid and *(check one):*
   a. ☐ deposited the sealed envelope with the United States Postal Service.
   b. ☒ placed the sealed envelope for collection and processing for mailing, following this business's usual practices, with which I am readily familiar. On the same day correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service.

3. The *Notice of Entry of Judgment or Order* was mailed:
   a. on *(date):* November 18, 2021
   b. from *(city and state):* San Diego, CA

4. The envelope was addressed and mailed as follows:

   a. Name of person served: Lee M. Andelin, Esq.
      Street address: 160 Chesterfield Drive, Suite 201
      City: Cardiff-by-the-Sea
      State and zip code: CA 92007

   b. Name of person served:
      Street address:
      City:
      State and zip code:

   c. Name of person served:
      Street address:
      City:
      State and zip code:

   d. Name of person served:
      Street address:
      City:
      State and zip code:

   ☐ Names and addresses of additional persons served are attached. *(You may use form POS-030(P).)*

5. Number of pages attached: _____

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: November 18, 2021

Adriana Silva
(TYPE OR PRINT NAME OF DECLARANT)

(SIGNATURE OF DECLARANT)

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
NORTH COUNTY

MINUTE ORDER

DATE: 11/12/2021 TIME: 11:31:00 AM DEPT: N-27

JUDICIAL OFFICER PRESIDING: Cynthia A. Freeland
CLERK: Michael Garland
REPORTER/ERM: Not Reported
BAILIFF/COURT ATTENDANT:

CASE NO: **37-2021-00031385-CU-WM-NC** CASE INIT.DATE: 07/22/2021
CASE TITLE: **Let Them Breathe vs Newsom [IMAGED]**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Writ of Mandate

EVENT TYPE: Demurrer / Motion to Strike

APPEARANCES

The Court, having taken the above-entitled matter under submission on November 8, 2021, and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as attached hereto and incorporated herein:

Let Them Breathe et al v. Gavin Newsom et al

The demurrer of Defendants Gavin Newsom, in his official capacity as Governor of the State of California, Department of Public Health of the State of California (CDPH), Dr. Tomás Aragón, in his official capacity as Director and State Public Health Officer of the Department of Public Health of the State of California, Dr. Mark Ghaly, in his official capacity as Secretary of the Department for Health and Human Services of the State of California, and Dr. Naomi Bardach, in her official capacity as Successful Schools Team Lead and Safe Schools for All Team Lead for the Department of Health and Human Services of the State of California (collectively, "Defendants") to the First Amended Complaint ("FAC") of Plaintiffs Let Them Breathe and Reopen California Schools (collectively, "Plaintiffs") ***is sustained without leave to amend***.

A demurrer tests the legal sufficiency of a pleading. (*See McKell v. Wash. Mut., Inc.* (2006) 142 Cal. App. 4th 1457, 1469.) When reviewing a demurrer, the court "give[s] the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Blank v. Kirwan* (1985) 39 Cal. 3d 311, 318.) The court "treats the demurrer as admitting all material facts properly pleaded. The court does not, however, assume the truth of contentions, deductions or conclusions of law." (*Durell v. Sharp Healthcare* (2010) 183 Cal. App. 4th 1350, 1358.) The court's analysis is limited to the complaint, exhibits attached to the complaint and incorporated by reference, and matters properly subject to judicial notice. (*See Performance Plastering v. Richmond Am. Homes of Cal., Inc.* (2007) 153 Cal. App. 4th 659, 665; *Thorburn v. Dept. of Corrections* (1998) 66 Cal. App. 4th 1284, 1287-1288; *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal. App. 4th 968, 994.) "[C]ourts may – and, indeed, must – disregard allegations that are contrary to judicially noticed facts and documents." (*Schep v. Capital One, N.A.* (2017) 12 Cal.App.5th 1331, 1338.) In this case, as more fully described herein, Plaintiffs' operative pleading fails to state facts upon which the asserted causes of action may be maintained.

Recommendations versus Mandates

Initially, Defendants argue that any challenge to those portions of the "COVID-19 Public Health Guidance for K-12 Schools in California, 2021-22 School year (K-12 Guidance) (July 12, 2021)" (the "Guidance") that are "recommendations only," namely the challenges to the testing strategies for K-12 campuses and the challenges to the quarantine protocols for individuals in close contact to a confirmed COVID-19 case while involved in school activities, fails as a matter of law. Defendants posit that it is not possible for recommendations, which school districts remain free to implement or not, to cause concrete injury to Plaintiffs that can be attributed to Defendants. Given this, to the extent that Plaintiffs' causes of action are based on recommendations, Defendants contend that those causes of action fail as a matter of law. In response, Plaintiffs essentially request the Court to consider all pertinent aspects of the Guidance, even those couched as "recommendations," as mandates. The Court respectfully must decline Plaintiffs' request for several reasons.

Preliminarily, the Defendants have requested that the Court take judicial notice of the Guidance, which is attached as Exhibit 2 to the Defendants' Index of Exhibits, and the COVID-19 Public Health Guidance for K-12 Schools in California, 2021-22 School year (K-12 Guidance) (September 22, 2021), which is attached as Exhibit 3 to the Defendants' Index of Exhibits. While Plaintiffs object to Defendants' Request for Judicial Notice and request that the Court deny Defendants' request for judicial notice of ***all*** documents therein listed (*See* Plaintiffs' Opposition to Defendants' Request for Judicial Notice in Support of Defendants' Demurrer), the Court expressly is authorized to take judicial notice of official

acts of the legislative, executive, and judicial departments of the United States and of any state of the United States. (*See* Cal. Evid. Code § 452(c).) To this point, by challenging the Guidance in their Petition for Writ of Mandate, Plaintiffs implicitly (if not explicitly) concede that the Guidance is an official act of a state governmental department.

Moreover, at the hearing on this matter, the Court expressed its confusion over Plaintiffs' objection to the Court taking judicial notice of, among other documents, the Guidance.[1] While Plaintiffs did not attach copies of the Guidance to the operative pleading, they, in footnote 4 on page 7 of the FAC, provided the URL link from which the Guidance can be accessed, thus rendering it part of the FAC as material that the Court can consider in ruling on the demurrer. As such, the Court can and does take judicial notice of the existence of the Guidance[2] as well as the facts contained therein, *i.e.* that the testing strategies and quarantine protocols are identified therein as "recommendations." (*See e.g. Elmore v. Oak Valley Hosp. Dist.* (1988) 204 Cal.App.3d 716, 722.)

To the extent that the specific language in the Guidance differs from the allegations levied in Plaintiffs' FAC, the language in the Guidance, namely that the testing strategies and the quarantine protocols are recommendations, must be given precedence over the language in the complaint. (*See Moran v. Prime Healthcare Mgmt., Inc.* (2016) 3 Cal.App.5th 1131, 1145-46.) As such, to the extent that Plaintiffs' causes of action challenge the recommended testing strategies and quarantine protocols by now characterizing the recommendations as mandates, Plaintiffs' current argument is contrary to the pleadings.

Plaintiffs nonetheless argue that what the Defendants identify as "recommendations" are "de facto mandatory because school districts are worried about the consequences from the CDPH and the State Board of Education if the guidelines are not followed, and the insurance companies insuring schools are requiring schools to follow CDPH guidelines." (Plaintiffs' Opposition to Defendants' Demurrer to First Amended Complaint for Injunctive and Declaratory Relief ("Plaintiffs' Opposition"), p. 13, fn 5.) The operative pleading, however, contains no allegation that the school districts are worried about the consequences from the CDPH and the State Board of Education if the guidelines are not followed, and it contains no allegation that the insurance companies insuring schools are requiring schools to follow CDPH guidelines.

Plaintiffs' "de facto mandate" argument also is undermined by the specific allegations in the FAC. Notably, Plaintiffs argue in their Opposition to the Demurrer that "Dr. Aragon also referred to the guidelines as "requirements." For this proposition, Plaintiffs refer to paragraph 14 of the FAC. The

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[1] As the Court further explained at the hearing, the objections were perplexing because Plaintiffs, in connection with their Motion for Preliminary Injunction, request that the Court take judicial notice of the Guidance and several other documents that are the subject of the Defendants' Request for Judicial Notice in Support of Defendants' Demurrer. (*See* Request for Judicial Notice of Documents in Support of Plaintiffs' Motion for Preliminary Injunction, p. 2.) As explained by Plaintiffs' counsel, however, Plaintiffs object to the Court taking judicial notice of the accuracy of any purported scientific facts set forth in the Guidance as opposed to the Guidance itself.

[2] Defendants request that the Court take judicial notice of a number of additional documents, to which Plaintiffs also object. Because the Court concludes that Plaintiffs have failed to plead facts sufficient to support any of the causes of action alleged in the FAC, any additional documents that are the subject of the Defendants' request for judicial notice are irrelevant to the Court's analysis on the demurrer. Consequently, and for purposes of the demurrer, the Court declines to take judicial notice of any documents other than the Guidance.

quote attributed to Dr. Aragón, however, does not support Plaintiffs' argument. More specifically, paragraph 14 of the FAC reads as follows:

> Defendant Dr. Aragón issued a new public health order, effective June 15, 2021, providing, in relevant part: "All individuals must continue to follow the requirements in the current COVID-19 Public Health Guidance for K-12 Schools in California.... I will continue to monitor the scientific evidence and epidemiological data and will amend this guidance as needed by the evolving public health conditions and recommendations issued by the CDC and other public health authorities."

(FAC, ¶ 14.) As pled, Dr. Aragon's quote cannot be read to conflate the word "requirements" with "guidelines" or, more importantly, "recommendations."

Of more significance, the remainder of the quote attributed to Dr. Aragón renders Plaintiffs' current "de facto mandate" argument simply untenable. As Plaintiffs further allege in paragraph 14:

> The order continues: "The California Department of Public Health will continue to offer public health recommendations and guidance related to COVID-19." However, ***aside from mandatory guidance applicable to face coverings, "mega events," and schools, "all other public health guidance related to COVID-19, issued by the California Department of Public Health, will not be mandatory***.

(*Id.*, emphasis added.)[3]

Finally, Plaintiffs cite no legal authority for the proposition that governmental recommendations become mandates because of the actions of third parties such as insurance companies insuring schools. Given this, the Court's analysis as to whether the Guidance can form the basis for Plaintiffs' nine causes of action, unless otherwise specifically noted herein, is limited to an analysis of that portion of the Guidance that contains the mask mandate.

Legal Analysis of the Causes of Action

The demurrer to the first cause of action for Violation of Article III, Section 3 of the California Constitution must be sustained. In their first cause of action, Plaintiffs essentially argue that Defendant Gavin Newsom (the Governor), through his March 2020 declared state of emergency under the Emergency Services Act (ESA), and the California Department of Public Health (CDPH) and the Defendant state health officials, through the Guidance, "are exercising a quintessentially legislative function in

[3] When the issue of recommendation versus mandate was addressed at the hearing, Plaintiffs requested that, to the extent that the Defendants are conceding that the testing strategies and the quarantine protocols are recommendations, the Court issue an order clarifying that the testing strategies and quarantine protocols were recommendations that school districts were free to disregard. In response to the Court's effort to confirm Defendants' position, Defendants' counsel reiterated the Defendants' position that the testing strategies and quarantine protocols are recommendations only. This, coupled with the plain language of the Guidance, further resolves the issue for the Court that the testing strategies and the quarantine protocols are recommendations, not mandates.

violation of the California Constitution." (FAC, ¶ 133.) This argument, however, has been considered and rejected by several courts.

Notably, the California Supreme Court generally has explained:

> "[A]lthough it is charged with the formulation of policy," the Legislature "properly may delegate some quasi-legislative or rulemaking authority." [Citation.] "For the most part, delegation of quasi-legislative authority . . . is not considered an unconstitutional abdication of legislative power." [Citation.] "The doctrine prohibiting delegations of legislative power does not invalidate reasonable grants of power to an administrative agency, when suitable safeguards are established to guide the power's use and to protect against misuse." [Citation omitted.] Accordingly, "[a]n unconstitutional delegation of authority occurs only when a legislative body (1) leaves the resolution of fundamental policy issues to others or (2) fails to provide adequate direction for the implementation of that policy." [Citations.]"

(*Gerawan Farming, Inc. v. Agricultural Labor Relations Bd.* (2017) 3 Cal.5th 1118, 1146-47 quoting *Carson Mobilehome Park Owners' Assn. v. City of Carson* (1983) 35 Cal.3d 184, 190; see also *Sims v. Kernan* (2018) 30 Cal.App.5th 105, 110.) Against this backdrop, a constitutional challenge of the ESA has been rejected because the appropriate safeguards and direction have been given by the Legislature.

More specifically, in ruling on the constitutionality of the ESA, a California appellate court recently held that the ESA, and more specifically section 8627, is not an unconstitutional delegation of legislative power. (*See Newsom v. Sup. Ct. of Sutter County* (2021) 63 Cal.App.5th 1099, 1118, *rev. denied* Aug. 11, 2021.) In so concluding, the appellate court found that the Legislature, in enacting the ESA, included in the Act not only the appropriate level of standards to guide implementation but also the requisite safeguards to protect against arbitrariness. The appellate court noted that the purpose of the Act, which was to ensure that all governmental agencies tasked with providing emergency service functions are coordinated, furnished standards to guide implementation of section 8627. (*Id.*, at 1115-16.) Moreover, the court found that:

> [t]he Governor's obligation under the Emergency Services Act to terminate the emergency and thereby nullify orders issued under his emergency powers as soon as conditions warrant, as well [as] the Legislature's authority to terminate the emergency at any time with the same effect, provides a safeguard for the delegation of quasi-legislative authority in section 8627.

(*Id.*, at 1116.) Given this, Plaintiffs' current challenge to the Defendants' actions pursuant to the ESA fails as a matter of law.

To avoid this conclusion, Plaintiffs argue that Defendants have inaccurately characterized Plaintiffs' first cause of action. Plaintiffs argue that, contrary to Defendants' argument, Plaintiffs do not challenge the Governor's initial declaration of emergency under the ESA or the authority of the Defendant health officials to issue public health orders. Instead, Plaintiffs argue in their opposition to the demurrer that

their challenge is to "the duration and scope of Defendants' assumption of legislative authority." (Plaintiffs' Opposition, p. 7, ll. 7-8.) Plaintiffs' argument necessarily fails for two reasons.

First, to the extent that Plaintiffs contend that they are not challenging the initial declaration of emergency under the ESA or the constitutionality of the ESA, Plaintiffs' contention is contrary to the operative pleadings' specific allegations. In particular, Plaintiffs allege the following:

> ***the Emergency Services Act itself, both facially and as applied here, violates the California Constitution*** to the extent it purports to vest in the governor for an indefinite period of time and without limitation, upon his own declaration of a state of emergency, "complete authority over all agencies of the state government and the right to exercise within the area designated all police power vested in the state by the Constitution and laws of the State of California" to "promulgate, issue, and enforce such orders and regulations as he deems necessary.

(FAC, ¶ 136 (emphasis added).) Contrary to what Plaintiffs assert in their opposition, the emphasized language expressly challenges the constitutionality of the ESA, which is the Act that provided the Governor with the authority to declare the initial emergency and to authorize governmental agencies to issue a mandate like that challenged in this case. Plaintiffs' challenge, as set forth above, is contrary to the legal precedent cited above, by which the constitutionality of the ESA already has been determined.

Second, to the extent that Plaintiffs contend that their first cause of action is, in actuality, a challenge to the scope and duration of Defendants' assumption of legislative authority, Plaintiffs' challenge conflates the constitutionality of the ESA with the Governor's proper exercise of his authority and/or duties under the ESA. In other words, to the extent that Plaintiffs' challenge to the CDPH's operative "Guidance" is that the Governor has violated the ESA by failing to terminate the declared emergency and any orders promulgated as a result because conditions no longer warrant the state of emergency, the Plaintiffs, in fact, are asking the Court to usurp powers bestowed upon the executive branch by virtue of the ESA and to usurp powers bestowed upon the Legislature, which always has had the authority to end the emergency declared by the Governor. As California Government Code § 8629 provides:

> [t]he Governor shall proclaim the termination of a state of emergency at the earliest possible date that conditions warrant. ***All of the powers granted the Governor by this chapter with respect to a state of emergency shall terminate when the state of emergency has been terminated by proclamation of the Governor or by concurrent resolution of the Legislature declaring it at an end.***

(Emphasis added.)

When asked specifically during the hearing for legal authority that would empower this Court to substitute its own assessment for that of the Governor or the Legislature by determining that conditions warrant termination of the declared state of emergency, Plaintiffs referred the Court to California Code of Civil Procedure section 1085. Plaintiffs specifically argued that the Governor's termination of the state of emergency is a ministerial act, and section 1085 authorizes a superior court to compel the

performance of an act required by the law. Plaintiffs' characterization of the Governor's duty under the ESQ, however ignores all of the language of the Act.

While the actual signing of an order terminating the state of emergency may be a ministerial act, that act is dependent upon the Governor's assessment of conditions giving rise to the state of emergency, which is not a ministerial act. In other words, the ministerial act of which Plaintiffs speak only occurs after the Governor, in his discretion, concludes that the conditions that gave rise to the state of emergency no longer warrant the declaration. Writs of mandate may issue to enforce a nondiscretionary duty to act or when there has been an abuse of discretion when the facts support only one decision. (*See Hendrix v. Sup. Ct.* (2011) 191 Cal.App.4th 889, 893; *San Diego Gas & Elec. Co. v. Sup. Ct. (Harris)* (2007) 146 Cal.App.4th 1545, 1549.) The petitioner bears the burden of showing an abuse of discretion or that there was a mandatory duty to act in a particular way, not involving judgment or discretion. (*See Arnold v. Williams* (1963) 222 Cal.App.2d 193, 1967-67.)

In this case, while Plaintiffs conclude in their FAC that conditions no longer exist to warrant the continued state of emergency, without an explanation of what defines an "emergency," the FAC contains allegations that support a conclusion to the contrary and/or that support the notion that the Governor's continued declaration could not be an abuse of discretion. Notably, Plaintiffs, in their Opposition to Defendants' Request for Judicial Notice, argue that "***[b]ecause the COVID-19 pandemic is still unfolding***, data is constantly being updated and changing . . .." (Plaintiffs' Opposition to Defendants' Request for Judicial Notice in Support of Defendants' Demurrer, p. 3 (emphasis added).) By acknowledging the pandemic is "still unfolding," Plaintiffs undermine their conclusion that conditions no longer warrant a state of emergency. If the situation is "still unfolding," how could the Governor's failure to terminate the state of emergency constitute an abuse of discretion?

Moreover, notwithstanding the fact that the number of hospitalizations may have decreased and that there may be less mortalities in children as a result of COVID-19 than in adults, Plaintiffs acknowledge (which acknowledgement must be taken as true for purposes of the demurrer) that COVID-19 cases continue to surge, including among children, albeit perhaps with less impact on the hospitals and with less fatalities. (*See* FAC, ¶50 (wherein Plaintiffs acknowledge that there was a surge in infections during July and August 2021, which reached a peak of over 16,000 cases per day, 6,000 more cases per day than when cases peaked in July 2020); ¶ 54 (wherein Plaintiffs acknowledge that the CDC and American Academy of Pediatrics have recently acknowledged that more children are getting infected due to the Delta variant).) The Court can and does take judicial notice of the fact that the CDC, in a report through August 21, 2021, revealed that the Delta variant, at least as of that time, was the cause of 96.75% of COVID-19 cases in California, which is consistent with the Plaintiffs' allegations. (*See* Defendants' RJN, Ex. 7.) Additionally, in the two weeks ending on September 16, 2021, there was a 9% increase in child COVID-19 cases. (*See* Defendants RJN, Ex. 27.)[4] Finally, Plaintiffs acknowledge that there have been COVID-19 transmissions in school settings. (FAC, ¶¶ 67-69.)

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[4] Plaintiffs object to the Court taking judicial notice of the truth of the contents of Exhibits 7 and 27 attached to Defendants' Index of Exhibits. Plaintiffs argue "[t]hough Defendants' request for judicial notice appropriately requests judicial notice of documents published by the CDC, FDA, CDPH, and CHHS, and executive orders of the governor of California, Defendants are only entitled to judicial notice of the publications of those documents and the information contained therein and are not entitled to judicial notice of the truth of that information." (Plaintiffs' Opposition to Defendants' Request for Judicial Notice in Support of Defendants' Demurrer, p. 2.) In

Plaintiffs' concessions support this Court's conclusion that it, as a matter of law, does not have the authority to grant the relief Plaintiffs seek, namely directing the Governor to terminate the declared state of emergency and revoke any laws promulgated thereunder. Indeed, the California Supreme Court, when faced with the exact same request in August 2021, denied a petition for peremptory writ of mandate in the first instance and application for stay. (*See Orange County Board of Education, et al v. Newsom*, S270319 (2021).)

This Court simply is not in a position to second-guess the Governor's or the Legislature's determination of when the declared state of emergency is no longer warranted. Indeed, Plaintiffs, during the hearing, could not provide the Court with a list of the conditions that the Governor determined warranted the declared state of emergency or legal authority for the factors to be considered by this Court to determine whether conditions warranting a state of emergency still exist. As aptly put by the United States Supreme Court:

> [t]he precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." Jacobson v. Massachusetts, 197 U.S. 11, 38, 25 S.Ct. 358, 49 L.Ed. 643 (1905). When those officials "undertake[] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." Marshall v. United States, 414 U.S. 417, 427, 94 S.Ct. 700, 38 L.Ed.2d 618 (1974).

(*South Bay United Pentecostal Church v. Newsom* (2020) 590 U.S. ___ [207 L.Ed.2d 154, 140 S.Ct. 1613].) In sum, the Court does not have the authority to determine when conditions warrant a termination of the state of emergency.

The demurrer to the second cause of action for violation of the ESA, which is alleged only against the Governor, also is sustained. Plaintiff's second cause of action is premised on the following syllogism: (1) the Governor is obligated under the ESA to proclaim the termination of a state of emergency at the earliest possible date conditions warrant, (2) "[t]here is no longer any justification for Defendant Governor Newsom to hold onto his extraordinary powers," therefore (3) Defendant Newsom's failure to terminate the declaration of emergency violates the ESA. (FAC, ¶ 142.) As set forth above, however, because the ESA is not an unconstitutional delegation of legislative powers, and because the ESA defines who has the ability to determine when conditions no longer justify the declaration of a state of

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support of this argument, Plaintiffs point to differences between CDC reports of COVID cases and the CDPH's report of COVID cases as of October 7, 2021. (*Id.*, p. 3.) From this, Plaintiffs conclude "[t]he more than five-fold increase in the rate reported by CDC demonstrates the impropriety of taking judicial notice of the truth or accuracy of the information contained within the sources relied upon by the Defendants." (*Id.*, p. 3.) Interestingly, however, Plaintiffs in their FAC refer to statistics published by the CDC as the basis for allegations regarding case rates and deaths reported, and Plaintiffs rely on the same agencies' reports and data to support their position that conditions no longer warrant a state of emergency. (FAC, ¶¶ 39-40 (fns. 8 & 9), ¶ 47, fn. 12, ¶ 54, fn 22.) Plaintiffs cannot have it both ways – they cannot use the data/records as a sword and a shield. In any event, the Court's ruling is not dependent upon judicial notice being taken of Exhibits 7 or 27 to the Defendants' Index of Exhibits. The Court merely refers to these exhibits as further support for the concessions in Plaintiffs' own pleading.

emergency, the Court lacks the authority to substitute the Plaintiffs' or its own judgment for that of the Governor. Additionally, the Court lacks the authority to compel the Governor to "declare the termination of his March 4, 2020 declaration of a state of emergency for COVID-19 and all subsequent orders promulgated pursuant to that declaration," as alleged by Plaintiffs in paragraph 143 of the FAC.

The demurrer to the third cause of action for violation of the Administrative Procedure Act ("APA") also is sustained. Plaintiffs allege that the Governor's waiver of the APA's application to public health directives and the issuance of the Guidance is unlawful because: (1) Defendants' failure to follow the APA "is not justified by the declared state of emergency," and (2) "Defendant Governor Newsom's declaration of a state of emergency is invalid . . .." (FAC, ¶ 151.) These allegations, however, when considered against the totality of Plaintiff's allegations and the current state of the law, fail to state a cause of action.

As set forth more fully above, Plaintiffs cannot and do not deny that COVID-19 and the health risks associated with it continue to exist. Indeed, they acknowledge the continued existence and spread of the virus. Moreover, Plaintiffs do not dispute that the ESA expressly grants the Governor the power to suspend any regulatory statute if it would "prevent, hinder, or delay the mitigation of the effects of the emergency." (Cal. Gov. Code § 8571.) Instead, the Plaintiffs argue, as they did in response to the demurrer to the first and second causes of action, that the initial basis for the emergency declaration and subsequently issued rules and regulations like the Guidance no longer exists because there has been a decline in the number of COVID-19 related cases, hospitalizations and deaths and because of the low level of spread of the virus among children. (*See* Plaintiffs' Opposition, p. 9, ll. 10-14.) To reiterate, however, Plaintiffs provide no authority for the proposition that their assessment of the current state of COVID-19 and whether it rises to the level of an emergency or their assessment of the need for continued measures to combat the virus can be substituted for that of the Governor or the Legislature. By virtue of the ESA, that authority has been vested in the Governor and the Legislature. Until the state of emergency is terminated, there can be no violation of the APA as alleged by Plaintiffs to the extent that it has been suspended pursuant to the ESA.

As is evident from Plaintiffs' pleading, the viability of Plaintiff's third cause of action is premised on a finding that the ESA, which pursuant to California Government Code section 8571 authorizes the Governor to suspend regulatory statutes where "strict compliance . . . would in any way prevent, hinder, or delay the mitigation of the effects of the emergency", is unconstitutional[5]. Because the current state of the law is contrary to Plaintiffs' position,[6] the third cause of action fails as a matter of law.

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[5] Plaintiffs seemed to suggest at the hearing that whether the ESA is constitutional depends upon the facts of each case in which the Act is challenged. To this point, the Plaintiffs further seemed to suggest that the appellate court's decision in *Newsom v. Sup. Ct of Sutter County, supra*, holding that the ESA is constitutional, should not govern this Court's ruling because several months have passed since that appellate case was decided. The Court must reject Plaintiffs' suggestions. A legislative act is either constitutional or it is not, and a determination of constitutionality by a higher court should be dispositive of that issue, particularly, where, as in this case, the California Supreme Court has denied review.

[6] In their demurrer, Defendants argue that, even if the Governor had not waived the APA's application to public health directives, "the challenged guidance falls squarely within the health officer and CDPH's authority to take measures to prevent the spread of the communicable disease, . . . ". (Defendants' Memorandum of Points and Authorities in Support of Demurrer, p. 14, ll. 5-6.) While this argument may provide a basis for defeating Plaintiffs' contention that the Guidance at issue exceeded the general scope of the CDPH's authority, the Court need not

The demurrer to the fourth cause of action for violation of California Education Code section 48900 is sustained. Section 48900 of the Education Code provides, in pertinent part, as follows:

> [a] pupil shall not be suspended from school or recommended for expulsion, unless the superintendent of the school district or the principal of the school in which the pupil is enrolled determines that the pupil has committed an act as defined pursuant to any of subdivisions (a) to (r), inclusive: ... (k) (1) Disrupted school activities or otherwise willfully defied the valid authority of supervisors, teachers, administrators, school officials, or other school personnel engaged in the performance of their duties.... (3) Except as provided in Section 48910, commencing July 1, 2020, a pupil enrolled in kindergarten or any of grades 1 to 5, inclusive, shall not be suspended for any of the acts specified in paragraph (1), and those acts shall not constitute grounds for a pupil enrolled in kindergarten or any of grades 1 to 12, inclusive, to be recommended for expulsion. (4) Except as provided in Section 48910, commencing July 1, 2020, a pupil enrolled in any of grades 6 to 8, inclusive, shall not be suspended for any of the acts specified in paragraph (1). This paragraph is inoperative on July 1, 2025." (Ed. Code § 48900.)

(FAC, ¶ 161.) The exclusion referenced in the Guidance, however, is neither a suspension nor an expulsion as contemplated by section 48900, a conclusion that is supported by various statutory provisions that differentiate between exclusion for public health reasons, on the one hand, and suspension or expulsion for disciplinary reasons on the other. (*See e.g.* Cal. Educ. Code § 48205(a)(2); Health & Safety Code §§ 120230, 120335.)

Plaintiffs nonetheless argue that there is no law by which schools legally can exclude students based on a failure to mask, which argument they contend supports the notion that the exclusion at issue in this case is of the type contemplated by section 48900. The Court respectfully must disagree. As prescribed by the Health & Safety Code, among other codes, the CDPH is empowered to take action to prevent the spread of disease, which includes preventative measures in the school setting. As a result, Plaintiffs have failed to state a cause of action for violation of California Education Code section 48900, and Defendants' demurrer to this cause of action is sustained.

Defendants' demurrer to the fifth cause of action for violation of California Education Code sections 51746 and 51747 is sustained. Plaintiffs' fifth cause of action, in summary, alleges that schools are implementing the Guidance in a way that: (1) forces children into independent study without compliance with prescriptions set forth in sections 51747, and (2) deprives children forced into the remote learning or independent study program of school facilities that otherwise must be provided to them by virtue of California Education Code section 51746. (*See* FAC, ¶¶ 168-172.) There simply is no language in the Guidance, however, that requires, directs, or otherwise authorizes schools to force students into an independent study program, a fact confirmed by Plaintiffs' allegations in paragraph 21

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assess the propriety of this argument because Plaintiffs do not dispute that the Governor has the ability to suspend any regulatory statute, including the APA, to the extent that it prevents, hinders or delays the mitigation of the effects of the declared emergency.

of the FAC. Moreover, as discussed above, a cause of action for violation of a statute cannot lie where the alleged malfeasance is a recommendation.

Defendants' demurrer to the sixth cause of action for violation of Education Code section 49050 also is sustained. California Education Code section 49050 provides, in pertinent part, that: "[n]o school employee shall conduct a search that involves: (a) Conducting a body cavity search of a pupil manually or with an instrument." Plaintiffs allege that Defendants, by issuing the Guidance, have violated this proscription because the guidelines "encourage schools to implement a program to test healthy schoolchildren for COVID-19," which encouragement violates section 49050 "to the extent that the guidelines would require school personnel to perform COVID-19 testing on children through use of a nasopharyngeal swab." (FAC, ¶ 177.) Again, the Court must respectfully disagree that these allegations are sufficient to state a cause of action. To the contrary, the allegations support Defendants' position that Plaintiffs, in actuality, are challenging a "recommendation."

To this point, Plaintiffs specifically allege "[t]hough Defendants' testing guidelines purport to be recommendations, virtually all schools in California are rigidly following the Defendants' testing guidelines, without any adjustment for individual or local circumstances." (FAC, ¶ 178.) Plaintiffs' reference to "virtually all schools in California" is significant as an implicit concession that it is not all schools, which undermines any "de facto mandate" argument. Plaintiffs' allegations also highlight that their issue, whether it is a legally valid challenge or not, is not with Defendants' recommendation but with what third parties have chosen to do with that recommendation. This, again, is insufficient to state a cause of action against *Defendants*.

Defendants' demurrer to the seventh cause of action for Violation of Right to Privacy (Cal. Const. Art. I, Sec. 1) is sustained. The seventh cause of action, which is predicated upon the Guidance as it encourages schools to implement COVID-19 testing (FAC ¶ 187), fails for the same reasons that Plaintiffs' sixth cause of action fails.

Defendants' demurrer to the eighth cause of action for Violation of Article IX of the California Constitution also is sustained. While education is not a fundamental right under the United States Constitution, the California Supreme Court has held that education is a "fundamental interest." (*See Serrano v. Priest* (1971) 7 Cal.3d 584, 608-09.) To this point, Article IX of the California Constitution sets forth the strong public policy underlying the need of the Legislature to encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement." (Cal. Const., Art. IX, § 1.) Section 5 of that same Article further provides, "[t]he Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year . . .." (*See* FAC, ¶ 192.)

Against this backdrop, Plaintiffs allege that:

> [b]y preventing all students from returning to school for in-person instruction unless they wear a mask at all times while indoors and unless they submit to COVID-19 testing, Defendants, through their decisions and actions cited herein, have interfered, to the detriment of California schoolchildren and their families, with the state's "system of common schools by which a free school shall be kept up and supported in each district at least six months in every year . . . ."

(FAC, ¶ 194.) Plaintiffs further allege that: (1) the government's interest in slowing the spread of the virus does not justify an infringement upon California students' constitutional right to a quality education and (2) the Defendants' actions are significantly broader than necessary to serve the government interest in slowing the spread of the virus. (*Id.*, ¶¶ 195-197.) These allegations, however, when considered against applicable legal precedent, fail to state a viable cause of action.

"To determine whether a person's liberty interest for purposes of substantive due process has been violated, the court must balance his or her liberty interest against the relevant state interests." (*Love v. State Department of Education* (2018) 29 Cal.App.5th 980, 989 citing *Cruzan v. Director, Missouri Dept. of Health* (1990) 497 U.S. 261, 279.) If the challenged law purports to burden or otherwise deny constitutionally protected rights or otherwise sufficiently infringes upon a constitutional or fundamental right, then courts must employ heightened or strict scrutiny. (*See Serrano, 18 Cal.3d at 768; Butt v. State of California* (1992) 4 Cal.4th 668, 685-86.) Under strict scrutiny, the challenged law will only pass muster if: (1) there is a compelling state interest that justifies the law and (2) the law is narrowly tailored to promote the compelling interest. (*See Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 952; *Hartzell v. Connell* (1984) 35 Cal.3d 899, 921.)

If, however, the challenged law does not sufficiently implicate a constitutional right and/or a suspect classification is not involved, then courts must analyze the law under the rational basis test. Under the rational basis test, the law shall pass muster if:

> there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.

(*Whitlow v. Cal. Dept. of Educ.* (S.D. Cal. 2016) 203 F.Supp.3d 1079, 1087 quoting *Nordlinger* v. *Hahn* (1992) 505 U.S. 1, 11.)

In this case, Plaintiffs fail to allege how a mask mandate contained within the Guidance undermines the creation, implementation and/or perpetuation of a system of common schools or otherwise violates children's constitutional right to attend school. Indeed, the Guidance explains that all schools should ensure access to alternative education opportunities for any student excluded, which is designed to facilitate/ensure all students' access to the system of common schools.

Moreover, while there is a fundamental right to an education, courts routinely have permitted the exclusion of students who refuse to comply with public health and safety measures designed to prevent the spread of communicable diseases, measures far more invasive than a mask mandate. (*See e.g. French v. Davidson* (1904) 143 Cal. 658*; Love v. State Dept. of Education, supra*; *Brown v. Smith* (2018) Cal.App.5th 1135, 1147.) For example, in *French v Davidson* (1904) 143 Cal. 658, the California Supreme Court, in determining whether a legislative act to encourage and provide for a general vaccination in the state of California was constitutional, observed:

> [t]he legislature no doubt was of the opinion that the proper place to commence in the attempt to prevent the spread of contagion was among the young, where they were kept together in considerable

> numbers in the same room for long hours each day. It needs no argument to show that, when it comes to preventing the spread of contagious diseases, children attending school occupy a natural class by themselves, more liable to contagion, perhaps, than any other class that we can think of. This effort to prevent the spread of contagion in a direction where it might do the most good was for the benefit and protection of all the people, and there is in it no element of class legislation. It in no way interferes with the right of the child to attend school, provided the child complies with its provisions. Police regulations generally interfere with the liberty of the citizen in one sense. To arrest a man for a breach of the peace is an interference with his liberty. It is no valid objection to a police regulation that it prevents a person from doing something that he wants to do or that he might do if it were not for the regulation. When we have determined that the act is within the police power of the state, nothing further need be said. The rest is to be left to the discretion of the law-making power. It is for that power to say whether vaccination shall be had as to all school children who have not been vaccinated all the time, or whether it shall be resorted to only when smallpox is more than ordinarily prevalent and dangerous.

(*French v. Davidson* (1904) 143 Cal. 658, 662.)

In *Brown v. Smith*, the court was presented with a challenge to Senate Bill No. 277, which eliminated a parent's ability to opt out of the vaccination requirements imposed on children based on parent's personal beliefs. In rejecting the challenge to Senate Bill No. 277 on the ground that it infringed upon Plaintiff's right to attend school, the *Brown* court explained as follows:

> *Serrano* struck down a public school financing scheme as violating equal protection guaranties 'because it discriminated against a fundamental interest--education--on the basis of a suspect classification--district wealth--and could not be justified by a compelling state interest under the strict scrutiny test thus applicable." (Butt v. State of California (1992) 4 Cal.4th 668, 682, 15 Cal.Rptr.2d 480, 842 P.2d 1240 [describing Serrano].)
>
> Plaintiffs cite *Serrano* to support their claim that Senate Bill No. 277 violates their constitutional right to attend school, but fail to explain its application here. There is no "suspect classification" underlying Senate Bill No. 277.

(*Brown v. Smith, supra*, at 1145-46.)

Finally, in *Love v. State Dept. of Education*, the California Court of Appeal, Third Appellate District court was presented with similar challenges to Senate Bill No. 277 and also rejected the challenge for reasons similarly stated in *Brown*. (*Love v. State Dept. of Education, supra*, at 994-95.)

In this case, the Guidance, like the vaccination laws at issue in *French, Brown,* and *Love*, does not prevent a child from attending school for in-person instruction so long as the child complies with the mask mandate. Consequently, the burden the Guidance places on Plaintiffs' educational opportunities through imposition of a mask mandate does not sufficiently implicate a constitutional right so as to warrant strict scrutiny analysis.

Plaintiffs do not dispute that the State has a legitimate interest in protecting health and safety by mandating public health measures, which measures can include masks. Indeed, Plaintiffs concede in documents filed with this Court that "[s]lowing the spread of COVID-19 is arguably a compelling interest." (Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction, p. 10, l. 17.) Courts have held "[t]he adoption of measures for the protection of the public health is universally conceded to be a valid exercise of the police power of the State." (*Love v. Superior Court* (1990) 226 Cal.App.3d 736, 740.) Plaintiffs also do not dispute that the State's interest in mandating public health measures for school children consistently has been recognized by federal and state courts. (*See e.g. Jacobson v. Commonwealth of Massachusetts* (1905) 197 U.S. 11, 32; *Vernonia School Dist. 47J v. Acton* (1995) 515 U.S. 646, 656; *French v. Davidson* (1904) 143 Cal. 658, 662; *Thor v. Superior Court* (1993) 5 Cal.4th 725.) Finally, Plaintiffs acknowledge through the allegations in the FAC that: (1) children have been diagnosed with COVID-19, with even more being affected by the Delta variant, (2) children have died as a result of COVID-19, and (3) COVID-19 has been transmitted in the school setting. Defendants' response, among others, to this problem is to mandate masks in the K-12 school setting.

The Guidance explains the rationale for the mask mandate and the mandate's relationship to the strong governmental interest in preventing the spread of disease and protecting the health and safety of the public. More specifically, the Guidance explains that:

> [m]asks are one of the most effective and simplest safety mitigation layers to prevent in-school transmission of COVID-19 infections and to support full time in-person instruction in K-12 schools. SARS-CoV-2, the virus that causes COVID-19, is transmitted primarily by aerosols (airborne transmission), and less frequently by droplets. Physical distancing is generally used to reduce only droplet transmission, whereas masks are of the most effective measures for source control of **both** aerosols and droplets. Therefore, masks best promote both safety and in-person learning by reducing the need for physical distancing. . .. Universal masking indoors in K-12 schools is recommended by the American Academy of Pediatrics and by the CDC in their Guidance for COVID-19 Prevention in K-12 schools (updated July 27, 2021.)

(Exhibit 2 to Defendants' Index of Exhibits, p. 13 (emphasis in original).) While Plaintiffs may disagree with the level of efficacy that masks have in preventing the spread of COVID-19, Plaintiffs' own allegations demonstrate that masks provide at least *some* level of protection against the virus, which supports the Defendants' position that there is, at a minimum, a rational relationship between the mask mandate and the articulated compelling state interest. (*See* FAC, ¶¶ 80-83, 86.)

Plaintiffs' disagreement with the level of efficacy of masks and the current state of the pandemic as it affects children does not render the Defendants' proffered reason for the mask mandate arbitrary or

irrational or otherwise provide this Court with the authority to substitute the Plaintiffs' opinions or this Court's assessment for that of the Defendants. To reiterate the point made above, courts should decline to second-guess public health officials' actions in an "'area[] fraught with medical and scientific uncertainties.'" (*County of Los Angeles Dept. of Public Health v. Sup. Ct.* (2021) 61 Cal.App.5th 478, 495 quoting *South Bay United Pentecostal Church v. Newsom* (2020) 590 U.S. ___ [207 L.Ed.2d 154, 140 S.Ct. 1613].) Consequently, the Guidance passes the rational basis test.

Even if strict scrutiny applied in this case, the Court must reach the same conclusion as to the constitutionality of the Guidance. As courts repeatedly have held and Plaintiffs themselves concede, the State has a compelling interest in fighting the spread of contagious diseases. (*See e.g., Brown v. Smith, supra*, at 1146; *Whitlow v. Cal. Bd of Educ.* (S.D. Cal. 2016) 203 F.Supp.3d 1079, 1089-90.) More specifically, courts have held that the state has a compelling interest in preventing the spread of COVID-19. (*See e.g., Roman Catholic Diocese of Brooklyn v. Cuomo* (2020) 141 S. Ct. 63, 67*; Slidewaters LLC v. Washington State Department of Labor Industries* (9th Cir. 2021) 4 F.4th 747.) By way of extension, the State has a compelling interest in minimizing the impact of contagious diseases like COVID-19 on children as those diseases may impact a child's ability to attend school. The Guidance is narrowly tailored to advance these interests and is less burdensome and more narrowly tailored than vaccine requirements that repeatedly have been upheld.

Defendants' demurrer to the ninth cause of action for violation of the Equal Protection Clause is sustained. The California Constitution, Article I, § 7(a) provides, in pertinent part, that "[a] person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws . . . ." "'The concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment.' [Citations.]" (*In re Eric J.* (1979) 25 Cal.3d 522, 531.) To be clear, however:

> "[t]he Equal Protection Clause does not forbid classifications. It simply keeps governmental decision makers from treating differently persons who are in all relevant respects alike." Nordlinger v. Hahn , 505 U.S. 1, 10, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992) (citing F.S. Royster Guano Co. v. Virginia , 253 U.S. 412, 415, 40 S.Ct. 560, 64 L.Ed. 989 (1920)). " 'Evidence of different treatment of unlike groups does not support an equal protection claim.' " Wright v. Incline Village Gen. Improvement Dist. , 665 F.3d 1128, 1140 (9th Cir. 2011).

(*Whitlow v. Cal. Dept. of Educ., supra*, at 1087.) As set forth above, classifications that do not implicate suspect classifications or fundamental constitutional rights "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." (*FCC v. Beach Communications, Inc.* (1993) 508 U.S. 307, 313.)

In this case, Plaintiffs allege that the mask mandate violates the Equal Protection Clause for the following reasons: (1) the mandate applies in all K-12 school settings but, in all other settings, fully vaccinated individuals, both adults and children, are not required to wear a mask . . ..", and (2) the mandate distinguishes between vaccinated and unvaccinated individuals, allowing for preferential treatment for vaccinated individuals. (FAC, ¶ 205.) These allegations, however, do not demonstrate disparate treatment between or among persons similarly situated. How are all individuals in a K-12 school setting similarly situated to a vaccinated adult in a restaurant? The mask mandate set forth in

the Guidance applies to all persons, regardless of age, race, gender, or vaccine status while those individuals are indoors in K-12 schools and, therefore, does not treat similarly situated individuals differently.

Moreover, to the extent that the Plaintiffs allege that disparate treatment of individuals based on vaccination status constitutes impermissible discrimination in violation of the equal protection clause, courts have rejected this argument. (*See e.g. Brown v. Smith, supra*, at 1147 ("we confine ourselves to pointing out that in 1094, our Supreme Court rejected a 14th Amendment challenge to the state's mandatory vaccine law, finding in it "no element of class legislation".) Furthermore, as set forth above, the Guidance passes both the rational basis test and strict scrutiny analysis, even if the Court had concluded such heightened scrutiny had been required. Consequently, Plaintiffs' allegations fail, as a matter of law, to state a claim for violation of the Equal Protection Clause.

In light of the foregoing, the Court sustains the Defendants' demurrer to the FAC. In determining whether to sustain the demurrer with or without leave to amend, the Court must determine whether there is a reasonable possibility that the defects can be cured by an amendment. (*See Aubry v. Tri-City Hosp. Dist.* (1992) 2 Cal. 4th 962, 967; *Blank v. Kirwan, supra,* at 318.) Because the demurrer to the various causes of action in this case is based upon established legal precedent, there are no facts that Plaintiffs could plead that would support their claims. As a result, the Court sustains Defendants' demurrer to Plaintiffs' first through ninth causes of action without leave to amend.

Defendants are directed to submit the appropriate judgment paperwork.

IT IS SO ORDERED.

Dated: November 12, 2021

Cynthia A. Freeland
Cynthia A. Freeland
Superior Court Judge