UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants.

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

ORDER GRANTING MOTION TO DISMISS

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

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

I.

BACKGROUND

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

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

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

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

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

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

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

II.

LEGAL STANDARD

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

III.

DISCUSSION

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

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

A. Plaintiffs Do Not Adequately Plead A FEHA Claim

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Plaintiffs Do Not Adequately Plead An Unruh Violation

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Plaintiffs Do Not Adequately Plead Intrusion Upon Seclusion

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

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

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

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

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

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

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

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

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

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

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

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

D. Plaintiffs Fail to Allege UCL Standing

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

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

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

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

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

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

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

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

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

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E. Leave to Amend

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

IV.

CONCLUSION

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

IT IS SO ORDERED.

Dated: January 25, 2021

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