CONTRA COSTA SUPERIOR COURT

MARTINEZ, CALIFORNIA
DEPARTMENT: 36
HEARING DATE: 06/21/21

The tentative ruling will become the Court's ruling unless by 4:00 p.m. of the court day preceding the hearing, counsel or self-represented parties call the department rendering the decision to request argument and to specify the issues to be argued. Calling counsel or self-represented parties requesting argument must advise all other affected counsel and self-represented parties by no later than 4:00 p.m. of his or her decision to appear and of the issues to be argued. Failure to timely advise the Court and counsel or self-represented parties will preclude any party from arguing the matter. (*Local Rule* 3.43(2).) CourtCall will **NOT** be used by D-36. Zoom is approved for all hearings except Issue Conferences and Trial. **Department 36's telephone number is: (925) 608-1136.**

NOTE: In order to minimize the risk of miscommunication, Dept. 36 prefers and encourages fax or email notification to the department of the request to argue and specification of issues to be argued – with a STRONG PREFERENCE FOR EMAIL NOTIFICATION. Dept. 36's Fax Number is: (925) 608-2693. **Dept. 36's email address is: dept36@contracosta.courts.ca.gov.** Warning: this email address is not be used for any communication with the department except as expressly and specifically authorized by the Court. Any emails received in contravention of this order will be disregarded by the Court and may subject the offending party to sanctions.

Submission of Orders After Hearing in Department 36 Cases

The prevailing party must prepare an order after hearing in accordance with CRC 3.1312. The order must include appearances. If the tentative ruling becomes the Court's ruling, a copy of the Court's tentative ruling **must be attached to the proposed order** when submitted to the Court for issuance of the order.

1. TIME: 9:00 CASE#: MSC17-00746
CASE NAME: SHAHAN VS. SAFEWAY
HEARING ON MOTION FOR SEPARATE TRIAL ON THE ISSUE OF LIABILITY
FILED BY SAFEWAY INC.
**** TENTATIVE RULING: ****

Safeway's motion for a separate trial on the issue of liability is hereby dropped from calendar. Safeway may refile the motion after the hearing on any subsequent motion for summary judgment, or if Safeway does not file another motion for summary judgment. Please see Line 2.

2. TIME: 9:00 CASE#: MSC17-00746
CASE NAME: SHAHAN VS. SAFEWAY
HEARING ON MOTION FOR SUMMARY JUDGMENT
FILED BY SAFEWAY INC.
**** TENTATIVE RULING: ****

Safeway's Motion for Summary Judgment is denied without prejudice based on CCP § 437c (e) and (h), plaintiff's request for leave to amend her complaint, and the possibility that a reasonable trier of fact could find that there was a third fall in the Produce Department,

which occurred before the two falls shown near the check stand in the video that Safeway produced. (*See* Undisputed Material Fact No. 8; Disputed Material Fact Nos. 1, 2, 9, 11; Nikolskaya Declaration; Discharge Summary from John Muir Medical Center attached as Ex. B to the N. Shahan Decl.; the video that Safeway produced; and the documents showing that Safeway did not produce all video that plaintiff requested.)

Based on all the evidence the court has considered, in furtherance of justice (CCP § 473 (a)), plaintiff should be permitted to amend her complaint to allege that she actually fell three times, once in the produce department and twice later in the area by the check stand; and defendant should be permitted to file another motion for summary judgment based on that amended complaint. The trial date of July 19, 2021 is hereby vacated. A Case Management Conference is set for October 5, 2021 at 8:30 a.m.

Background

The court denies Safeway's request to take judicial notice of plaintiff's complaint as unnecessary. The complaint is part of the court's file, and it defines defendant's initial burden on this motion, whether the court takes judicial notice of it or not. The court grants defendant's request to take judicial notice of Judge Austin's 2019 order denying plaintiff's motion to amend her complaint. It takes judicial notice of the existence and contents of that order. On its own motion, the court also takes judicial notice of certain other matters in its file, as mentioned below.

Plaintiff filed an unverified Judicial Council form complaint through the Scarlett Law Group on April 25, 2017, alleging she fell at the Safeway store in Lafayette, California on June 25, 2015 due to some liquid that another customer had dropped on the floor near the check stand and that, as a result of the fall, plaintiff suffered a traumatic brain injury. Unknown Safeway employees then helped her to her feet, but did so negligently, causing her to suffer a syncope episode, a second fall, and further injuries. Plaintiff never spoke to an attorney at the Scarlett Law Group about the contents of the complaint. (Pltf's Decl., ¶ 6.)

On June 13, 2017, the Scarlett Law Group served a request for production of documents. Request Number 10 asks Safeway to produce "All . . . surveillance tapes depicting plaintiff while on the PREMISES prior to her fall while inside the PREMISES on June 29, 2015." (Ex. 1 to Cefalu Decl. filed 4/4/19.) Safeway objected to the request because plaintiff's former attorney used a form from a different case when drafting the request and the definition of "PREMISES" was a Hilton Hotel in San Francisco rather than the Safeway in Lafayette. (Ex. 2 to Cefalu Decl. filed 4/4/19.)

The Scarlett Law Group filed a motion to withdraw as plaintiff's attorney. Judge Fenstermacher signed an order on January 10, 2019 granting the motion. Plaintiff then represented herself for a time.

Plaintiff gave her deposition on March 22, 2019, while still representing herself. She testified that she truthfully reported to her doctors what happened: that she fell.

Q And then you fainted; correct?
A That's the only thing I remember.
Q Two falls?
A Yes. (Ex. 2 to Cefalu Decl., Pltf's Depo, p. 70.)

Plaintiff was also asked later in the deposition whether it was water or the "green thing" that caused her to fall, and she responded that she did not know what caused her to fall. (*Id*., p. 84.) These questions on page 84 of plaintiff's deposition evidently pertained to the testimony she gave on page 55 that, after picking up milk and some Jello, she was going to pick up something at the Produce Department "and that was it:" she remembers falling "only *at that one time*. I remember slipping on something that was water with a little bit of green." (Ex. A to N. Shahan Decl., Pltf's Depo., p. 55 (emphasis added).)

Plaintiff obtained a new attorney, Shun Chen. He filed a Substitution of Attorney on April 25, 2019.

On June 24, 2019, Chen filed a motion for leave to file a First Amended Complaint to allege that there had been a third, earlier fall in Safeway on June 25, 2015, before the falls near the check stand. Judge Austin denied that motion because plaintiff made an insufficient showing that permitting the amendment would be in the interests of justice. The motion was filed two years after the lawsuit was filed, plaintiff submitted no evidence of when she discovered the third fall or how she would prove it occurred based on her deposition testimony, and plaintiff's medical records consistently referenced only two falls. Judge Austin's order did not explicitly state whether the denial was with or without prejudice.

The moving papers that Chen filed in support of the motion did not say where the third fall had occurred or provide the testimony that plaintiff gave at page 55 of her deposition. He did not effectively argue it was the very traumatic brain injury that plaintiff had suffered which caused her to forget one or two falls, rather than that she was just making up a new fall with no basis to do so; and he did not point out how an early fall in the Produce Department and later falls near the check stand could be consistent with other evidence in the case. Also, while he apparently intended to argue the tentative ruling, he failed to request oral argument on time because he was on an airplane during the window for providing notice. Finally, it is not clear whether Judge Austin considered Chen's Reply Brief, which was filed late, on August 12, 2019, for a hearing on August 15, 2019. The brief was due on August 8, 2019.

On May 11, 2020, Chen served Inspection Demand, Set Number Three. (Ex. C to Chen Decl. filed 6/7/21.) Request Nos. 14-16 asked for all video at the store between 12:35 and 13:35 on the date of the incident, and the recordings by particular cameras, F and G, mentioned during the PMQ deposition of Safeway General Merchandising Manager, Vanessa Vironchi. Safeway responded there was no video beyond what was already produced. (*See* Ex. D to Chen Decl.)

Safeway filed the instant motion for summary judgment on April 1, 2021, on the grounds that the video it produced of plaintiff near the check stands shows no foreign substance on the floor, two Safeway employees found no foreign substance on the floor immediately after the accident, and the only conclusion a reasonable trier of fact could reach based on the video is

that Safeway was not negligent and did nothing to cause plaintiff to fall. Further, Safeway argues that plaintiff had a prior history of syncope (Opening Brief at 2:3), although it submits no evidence in support of this. Finally, Safeway argues that any claim there was a third fall is just speculation and that Judge Austin found there were only two falls.

Plaintiff opposes the motion arguing it is late, Safeway has failed to meet its initial burden and/or its ultimate burden of persuasion, and Safeway intentionally withheld nine minutes of video when plaintiff was in the Produce Department before she fell twice by the check stand. Therefore, plaintiff should be permitted to amend the complaint and raise the inference that the withheld video shows an earlier, third fall in the Produce Department, and that some negligence by Safeway caused that fall and the initial brain injury that caused the final two falls. Plaintiff also argues that Safeway knows its claim that plaintiff had a prior history of syncope is untrue because it has her Discharge Summary from John Muir, which treated her after the accident. That document states she had no such history. (*See* the paragraph numbered "4" on the page numbered "14" and "17 in Ex. B to the N. Shahan Decl.)

For purposes of the current motion, the points about the amendment and the alleged initial fall in the Produce Department are dispositive of the motion. Thus, they are all that need to be discussed. The court agrees that plaintiff should be permitted to amend her complaint to allege that fall, and that Safeway should be permitted to file a new motion for summary judgment based on the amended complaint if it wishes to do so.

Discussion

Safeway's motion depends heavily on the declaration of Vanessa Vironchi, its General Merchandising Manager. Vironchi states that she viewed all video of plaintiff in the store, she and another employee inspected the floor where plaintiff fell by the check stand, and neither of them saw any foreign substance on the floor. She also states or implies that when she viewed the video that Safeway had immediately after the accident, she did not see plaintiff fall in the Produce Department or anywhere other than by the check stands. However, Safeway never produced video of plaintiff in the Produce Department and has indicated it has no video of plaintiff in the store other than when plaintiff was by the check stands.

The court has sustained objections to Vironchi's statement about what the other employee saw. It has also sustained an objection to Vironchi's statements about what she saw on the video of plaintiff in the Produce Department. That video qualifies as a "writing" under Evidence Code section 250. Vironchi is thus giving oral testimony concerning the contents of that writing. Under Evidence Code section 1523, such oral testimony is admissible only "if the proponent does not have possession or control of a copy of the writing and the original is lost or has been destroyed without fraudulent intent on the part of the proponent of the evidence." Safeway has failed to state why it no longer has possession of the video of plaintiff in the Produce Department, so it has failed to lay the foundation for Vironchi to give oral testimony about what that video showed. Safeway has therefore failed to meet an initial burden to prove plaintiff did not fall in the Produce Department if it had such a burden. Safeway's motion asserts that plaintiff had no such fall and, for various reasons, plaintiff cannot prove she did.

Safeway's motion relies on the premise that Judge Austin already put this issue to rest by "finding" there were only two falls. However, Judge Austin did not "find" there were only two falls or which two falls they were. He merely found that the attempt to allege a third fall was a sham amendment, based on the evidence and argument presented.

In light of the current theory that the third fall occurred in the Produce Department before the other falls, evidence cited in Judge Austin's order takes on a new significance.

For instance, Judge Austin's order states:

> A record from her emergency room visit on June 29, 2015, four days after the accident reads, "Per pt, she initially slipped on fall and hit back of head. Pt got in line to pay, started walking backwards and had witnessed syncopal episode . . ." (Cefalu Decl., Exs. 5, 6, 7.) On July 6, 2015 she again mentioned only two falls to her primary care provider: "She slipped on something green. Hit the back of her head. No loss of consciousness. She was helped to her feet but then lost her balance and fell backwards hitting her head again, this time causing a . . . loss of consciousness." (*Id*., Ex. 8.)

The June 29, 2015 emergency room record is consistent with an interpretation that plaintiff first fell somewhere away from the check stand and a second time later, when she got in line to pay for her groceries. Further, if that is what this record means, it also means that plaintiff did not mention the final fall near the check stand. One could conclude based on the video Safeway produced that by the time of the final fall plaintiff had already suffered some type of brain injury which, among other things, caused her to have no memory of that fall, leaving the two falls of which she *did* have a memory as the one before she reached the check stand and the one suffered at it.

The July 6, 2015 medical record is also consistent with a possible original fall in the Produce Department, where one might find lettuce or some other green substance on the floor, and with the testimony that plaintiff gave on page 55 of her deposition, where in fact she says she can recall only *one* fall, the first one, in the Produce Department.

Further, plaintiff now argues she had no reason to be in the Produce Department for nine minutes unless something unusual occurred there; and she presents evidence from a neurologist that she walked and acted one way before she left the check stand area to go to the Produce Department and another when she returned to the check stand area from the Produce Department nine minutes later. Exactly what the video shows and whether it provides a basis for the expert's opinions is for the trier of fact.

All this provides a basis for the court to reach a different conclusion than was made before about whether leave to amend should be granted. And that new conclusion is bolstered by the evidence that Safeway did not produce the video of plaintiff's time in the Produce Department. The court does not need to make any findings or draw any conclusions now about Safeway's motives in failing to produce that video. All that is important is that plaintiff requested

the video, and Safeway did not produce it. At best that would leave Safeway as the sole witness (through its employee Vironchi) to what that video shows if the court had permitted Vironchi's oral testimony about the contents of that writing, and leaving *no* evidence of what the video shows on the evidentiary ruling the court has made sustaining the objection to this part of Vironchi's declaration.

Evidence Code section 412 states:

> If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust.

Safeway could have produced video proving that plaintiff did not fall in the Produce Department, but it has not done so. Therefore, the court and any trier of fact is permitted to view any statement by Vironchi that she saw no fall in the Produce Department with distrust. That, by itself, would be a sufficient basis to deny Safeway's motion for summary judgment had the court permitted Vironchi's sworn statement on this point.

Safeway may argue that Evidence Code section 412 does not apply because Safeway innocently failed to copy all video to the disk, thinking that plaintiff was claiming she fell by the check stand and nowhere else. Whether it is no longer "within [Safeway's] power . . . to produce stronger and more satisfactory evidence" (Evid. C. § 412) for innocent rather than suspect reasons has not been established on this motion. Presumably, it will be after the complaint is amended if Safeway chooses to move for summary judgment again.

Even if section 412 is inapplicable, other principles also permit the court to deny the motion for summary judgment. In pertinent part, CCP § 437c (e) states, "summary judgment may be denied in the discretion of the court if the only proof of a material fact offered in support of the summary judgment is an affidavit or declaration made by an individual who was the sole witness to that fact . . ." So even if Safeway did nothing wrong in failing to preserve video of plaintiff in the Produce Department, if plaintiff's memory is impaired, Vironchi is now the sole witness to what occurred in the Produce Department. The court would deny the motion for summary judgment for that reason, if it had admitted Vironchi's Declaration on this point. Also, even if Safeway's spoliation of this evidence was merely negligent rather than intentional, the court still rules, for purposes of this motion at least, that an inference can be drawn that the missing video contained something helpful to plaintiff and harmful to Safeway, i.e., that plaintiff did fall in the Produce Department due to a foreign substance on the floor. (*See Reeves v. MV Transportation, Inc. (2010) 186 Cal.App.4th 666, 681-682*.)

The court could have denied the motion for all those reasons if it had permitted Vironchi to say the video of the Produce Department showed no fall there. But it did not allow that part of her declaration, so it denies the motion as well because there is no evidence to establish plaintiff did *not* fall in the Produce Department before falling by the check stand.

Safeway argues it had no burden to produce any evidence, let alone stronger and more satisfactory evidence, regarding a fall not mentioned in plaintiff's complaint. That is a fair point

and is why the court is permitting plaintiff leave to amend (based on new evidence and the new interpretation of previously existing evidence) and Safeway the opportunity to file a new motion for summary judgment.

The court may grant a continuance and/or leave to amend in response to a motion for summary judgment. (*See* CCP § 437c (h); *Kirby v. Albert D. Seeno Construction Co*. (1992) 11 Cal.App.4th 1059, 1069; *Atkinson v. Elk Corp*. (2003) 109 Cal.App.4th 739, 760-761.)

On the facts before it, the court concludes the just outcome is to allow plaintiff leave to amend and Safeway to file another motion for summary judgment.

Plaintiff's Objections to Safeway's Request for Judicial Notice

Moot or overruled, in light of the rulings the court made at the outset of this ruling.

Evidentiary Objections

The following rulings are without prejudice to renewal of the objections by motions in limine or at the time of trial.

Plaintiff's Objections

1 – Sustained. Lack of foundation; Evid. C. § 1523 (b).
2 – Sustained.
3 – Sustained.
4 – Overruled. Construed as stating that Vironchi inspected the area of the falls depicted on the video that Safeway produced.
5 – Overruled as to the first sentence. Sustained as to the second.
6 – Sustained. See no. 1. Vironchi is essentially testifying to the contents of the missing portions of video without a proper foundation for doing so under Evidence Code section 1523 (b).
7 – Sustained.
8 – Sustained.
9 – Overruled.

Defendant's Objections

1 – Overruled. Dr. Nikolskaya states she is a neurologist and her practice includes evaluating patients who have fallen or have a history of falls. While the foundation laid for the opinions objected to is thin, it is sufficient for the opinions to be admissible on this motion.
2 – Overruled.
3 – Overruled.
4 – Overruled.

5 – Overruled. General training as a doctor may be sufficient expertise for these opinions. (*See Miller v. Silver* (1986) 181 Cal.App.3d 652, 660-661; *Lattimore v. Dickey* (2015) 239 Cal. App. 4th 959, 969-970; *Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 35, 37-39, overruled on other grounds by *Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536, 543 and cases cited therein.)

6 – Overruled.

7 – Overruled.

8 – Overruled.

3. TIME: 9:00 CASE#: MSC20-00076
CASE NAME: DITTMORE VS. BRENTWOOD USD
HEARING ON MINOR'S COMPROMISE
**** TENTATIVE RULING: ****

A petition to approve or disapprove a minor's compromise may be decided by the superior court, ex parte, in chambers. (*Pearson v. Superior Court*, (2012) 202 Cal.App.4th 133.) In considering the petition, the Court has a duty to protect the minor's interests. (*Williams v. Superior Court* (2007) 147 Cal.App.4th 36, 49 ["in this role the court has the inherent authority to make decisions in the best interests of the child, even if the parent objects"].) After careful review of the settlement agreement, the attachments (pictures, and surgery estimate) the Court approves the Minor's compromise. Appearance is not required.

4. TIME: 9:00 CASE#: MSC21-00076
CASE NAME: VALDIVA VS. AYALA
HEARING ON DEMURRER TO 1st Amended COMPLAINT
FILED BY ARMANDO AYALA
**** TENTATIVE RULING: ****

Defendant Armando Ayala's demurrer to the First Amended Complaint **is sustained with leave to amend.** The allegations in Second Cause of Action for Accounting fail to state facts sufficient to constitute a cause of action (Code Civ. Proc., § 430.10(e).)

If Plaintiff elects to amend, the amended complaint shall be filed and served on or before July 12, 2021.

Background

Plaintiff Adriana Valdivia and Defendant Armando Ayala each own an undivided one-half interest, as tenants in common, in Subject Property located at 935 Kilkenny Way in Pinole. Plaintiff alleges she was compelled to vacate the Property on May 15, 2019. Defendant has occupied the Property exclusively since Plaintiff vacated the Property. Before this action was

filed, Plaintiff demanded that Defendant cooperate in liquidating the Property, but Defendant has refused. Plaintiff filed this action for partition and accounting.

Demurrer

Defendant Armando Ayala demurs to the Second Cause of Action for Accounting on the grounds the cause of action fails to state facts sufficient to constitute a cause of action (CCP § 430.10(e),(g)) and the cause of action is uncertain (CCP § 430.10(f),)

Demurrer Standard

A demurrer raises issues of law, not fact, regarding the form or content of the opposing party's pleading. (*Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994.) For purposes of a demurrer, all properly pleaded facts are admitted as true. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) "If the complaint states a cause of action under any theory, regardless of the title under which the factual basis for relief is stated, that aspect of the complaint is good against a demurrer." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38.) The demurrer is sustained if the complaint fails to state a cause of action under any possible legal theory. (*Sheehan v. San Francisco 49ers, Ltd.* (2009) 45 Cal.4th 992, 998.)

Second Cause of Action (Accounting)

Plaintiff alleges she was compelled to vacate the family home on May 15, 2019, resulting in Defendant occupying the Property exclusively. As Plaintiff and Defendant each own an undivided one-half interest in the Property, Plaintiff alleges she should be awarded one-half of the fair rental value, plus interest, while the Property has been in Defendant's exclusive possession.

"An action for an accounting has two elements: (1) "that a relationship exists between the plaintiff and defendant that requires an accounting" and (2) "that some balance is due the plaintiff that can only be ascertained by an accounting." [Citation] The action carries with it an inherent limitation; an accounting action 'is not available where the plaintiff alleges the right to recover a sum certain or a sum that can be made certain by calculation.' [Citation.]" (*Sass v. Cohen* (2020) 10 Cal.5th 861, 869 [272 Cal.Rptr.3d 836, 477 P.3d 557].)

Defendant demurs on the ground Plaintiff has not alleged facts supporting the elements for an accounting cause of action. First, Plaintiff had not alleged a relationship warranting an accounting. Plaintiff has alleged a cohabitation agreement. Plaintiff cites no law to support her position that the relationship amounted to a fiduciary relationship. In response, Plaintiff argues the parties had a fiduciary relationship because of their cohabitation agreement, which required

each of them to repose trust in the other to take care of the concerns in connection with property.

"A cause of action for an accounting requires a showing that a relationship exists between the plaintiff and defendant that requires an accounting, and that some balance is due the plaintiff that can only be ascertained by an accounting. (*Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 179.) The Court agrees Plaintiff has not alleged facts showing a fiduciary relationship. "However, a fiduciary relationship between the parties is not required to state a cause of action for accounting. All that is required is that some relationship exists that requires an accounting. [Citation.] The right to an accounting can arise from the possession by the defendant of money or property which, because of the defendant's relationship with the plaintiff, the defendant is obliged to surrender."
(*Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 179-180.)

Secondly, Defendant argues that even if the relationship qualifies as one warranting an accounting, Plaintiff has failed to demonstrate "the accounts are so complicated they cannot be determined through an ordinary action at law." (*Fleet v. Bank of America N.A.* (2014) 229 Cal.App.4th 1403, 1413.) Defendant asserts the allegations in the FAC demonstrates no accounting is needed. Plaintiff alleges a minimum rental value of $1,500 per month. (FAC, ¶ 15.) Defendant argues the FAC alleges all the facts necessary for calculation of the account. The purpose of accounting is to discover evidence. (*Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 163.) The information needed for the calculations is within Plaintiff's knowledge already. Plaintiff has not alleged facts showing some balance is due that can only be ascertained by an accounting. "If a complaint sets forth all the facts necessary for the calculation of an account between the parties, recovery may be had in an action at law. [Citation.] A suit for an accounting will not lie where it appears from the complaint that none is necessary or that there is an adequate remedy at law." (*St. James Church of Christ Holiness v. Superior Court of Los Angeles County* (1955) 135 Cal.App.2d 352, 359.)

Plaintiff opposes the demurrer on this point, arguing Paragraph 14 of the Second Cause of Action for accounting puts Defendant on notice of potential issues to be litigated arising out of the financial agreement between the parties. Some of the potential issues include: whether Defendant derived income from third party boarders; whether Defendant was negligent in maintaining the property, which would warrant a deduction on his side of the ledger; whether Defendant has encumbered the Property with liens; and whether Plaintiff's services in terms of child care, cooking, cleaning and other domestic work constitute a valuable benefit to Defendant which should be accounted for as an offset. Plaintiff argues she must be allowed discovery into matters of which Defendant has unique knowledge, such as any liens he may have placed on the Property and income from boarders.

Additionally, Plaintiff argues the First Cause of Action for Partition has an element of compensatory adjustment based on the financial agreement between the parties. The Court has statutory authority under CCP § 872.10, in the partition action, to determine accounts and make order necessary or incidental to carrying out the purposes of the partition. CCP § 872.140

provides, "The court may, in all cases, order allowance, accounting, contribution, or other compensatory adjustment among the parties according to the principles of equity."

While Plaintiff argues the reasons for accounting based on some need for compensation adjustment, those allegations are lacking in the First Amended Complaint. The Second Cause of Action gives Defendant notice of potential liability for one-half of the fair rental value during the period she was ousted for the home.

Even if Plaintiff alleges these reasons stated in her Opposition for an accounting, Plaintiff also has to allege facts showing Plaintiff has a lack of access to information that Defendant has, which is necessary to determine liability for damages. "An accounting is a 'species of disclosure, predicated upon the plaintiff's legal inability to determine how much money, if any, is due.' [Citation.] Thus, the purpose of the accounting is, in part, to discover what, if any, sums are owed to the plaintiff, and an accounting may be used as a discovery device."(*Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 180.)

"In short, the underpinning of an accounting action is an information asymmetry between the parties, an asymmetry that generally favors the defendant but never the plaintiff." (*Sass v. Cohen* (2020) 10 Cal.5th 861, 869-870.) "In other words, the defendant in an accounting action possesses information unknown to the plaintiff that is relevant for the computation of money owed." (*Sass v. Cohen* (2020) 10 Cal.5th 861, 869.) As Plaintiff has not alleged facts showing such asymmetry of information, Plaintiff has not alleged facts sufficient to state a cause of action for accounting.

5. TIME: 9:00 CASE#: MSL17-03265
CASE NAME: NATIONWIDE VS. GARTRELL
HEARING ON MOTION TO/FOR VACATE DISMISSAL AND ENFORCE SETTLEMENT FILED BY NATIONWIDE WEST LLC
**** TENTATIVE RULING: ****

Plaintiff seeks to enforce a stipulated settlement. On August 13, 2018, the parties entered into a settlement agreement. Defendant agreed to pay $7,174.84. Defendant paid $1,380 and then stopped making payments. On April 15, 2020, Plaintiff filed a motion for entry of Judgment pursuant to terms of the stipulated settlement agreement.

The balance now due is the principal sum of $5,794.84, interest of $2,067.09, attorney's fees of $897.69 and court costs of $365.00, for a total of $9,124.62.

All conditions for a judgment pursuant to Code of Civil Procedure section 664.6 have been met. Accordingly, the motion is granted. The Court will sign the entry of judgment for $9,124.62.

6. TIME: 9:00 CASE#: MSL17-05055
CASE NAME: REED VS. HUTCHINSON
HEARING ON MOTION FOR INTERLOCUTORY JUDGMENT OF PARTITION
FILED BY DENNIS REED, FAUSTINA REED
**** TENTATIVE RULING: ****

This unopposed motion is granted with a revision of the realtor's commission. For undeveloped property, this commission should be no more than 3%. If Plaintiff chooses to contest the revision, please come prepared with supporting documentation for the requested "up to 6% commission." Plaintiff is further ordered to pay the appropriate fees for reclassification of this case to an unlimited jurisdiction case.

7. TIME: 9:00 CASE#: MSL19-04529
CASE NAME: CLARK VS. ONSTAR LLC
HEARING ON MOTION TO COMPEL RESPONSE TO REQUEST FOR PRODUCTION
FILED BY ONSTAR LLC
**** TENTATIVE RULING: ****

Defendant has filed a motion to compel responses from Plaintiff to Defendant's Special Interrogatories, Set One and Request for Production of Documents, Set One. Defendant has further requested sanctions against Plaintiff. No opposition has been received by the court.

On August 31, 3030 Defendant served its first set of special interrogatories and its first set of requests for productions on Plaintiff. After Plaintiff's failure to respond, and attempts to meet and confer failed, Defendant sought a hearing with the court's Discovery Facilitator. After participation in a hearing with the Discovery Facilitator, Plaintiff was ordered to serve responses to Defendant's First Set of Special Interrogatories and First Set of Requests for Production by April 12, 2021.

Code of Civil Procedure sections 2031.300(c) (production of documents) and 2030.290(c) (interrogatories) require sanctions, under specified circumstances, against a party "who unsuccessfully makes or opposes a motion to compel[.]" "The court may award sanctions under the Discovery Act in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided to the moving party after the motion was filed. (California Rule of Court 3.1348(b).)

Therefore, this Court compels Plaintiff to serve all responsive documents to Defendant's Request for Production of Documents Set One and, as well, respond to Defendant's Form Interrogatories, Set One, without any objection to the interrogatories, including one based on privilege or on the protection for work product as Plaintiff has hereby waived such objections by his failure to timely respond to the Special Interrogatories and Requests for Production. (Code Civ. Proc., § 2030.290(a) ["The party to whom the interrogatories are directed waives any right to exercise the option to produce writings under Section 2030.230, as well as any objection to the interrogatories, including one based on privilege or on the protection for work product under

Chapter 4 (commencing with Section 2018.010)"].) Sanctions in the amount of $2557.50 ($1,555 - requests for production; $1002.50 - special interrogatories) are to be paid by Plaintiff to Defendant's counsel within 15 days of receipt of notice of this decision.

8. TIME: 9:00 CASE#: MSL19-04529
CASE NAME: CLARK VS. ONSTAR LLC
HEARING ON MOTION TO COMPEL RESPONSE TO SPECIAL INTERROGS, SET 1
FILED BY ONSTAR LLC
**** TENTATIVE RULING: ****

Please refer to ruling on Line 7.

9. TIME: 9:00 CASE#: MSL20-00249
CASE NAME: BANK OF AMERICA VS. BASBAS
HEARING ON MOTION FOR ORDER THAT MATTERS IN BE DEEMED ADMITTED
FILED BY BANK OF AMERICA, N.A.
**** TENTATIVE RULING: ****

Counsel for Plaintiff has informed the Court (by email) that Plaintiff is withdrawing the motion. Next appearance is June 22, 2021 for a Case Management Conference.

10. TIME: 9:00 CASE#: MSL20-02067
CASE NAME: GRASSY SPRAIN VS. SAVAR
HEARING ON MOTION TO VACATE DEFAULT AND ALLOW FOR FILING OF ANSWER
FILED BY CHRISTINA SAVAR
**** TENTATIVE RULING: ****

This is a debt collection case that was filed on April 27, 2020. Defendant was served on October 14, 2020. Defendant failed to respond to the Complaint and on November 25, 2020 a Default Judgment was entered. On April 20, 2021, Defendant filed this motion to vacate the default and allow for filing of answer to the complaint. California Code of Civil Procedure section 473 permits this court to allow a party to be relieved from judgment due to mistake, inadvertence, surprise or excusable neglect. Defendant's declaration reveals Defendant mistakenly misconstrued the legal paperwork as inaccurately served on her and, hence, Defendant deemed it unnecessary to respond.

Plaintiff objects to the motion based on numerous contacts between Plaintiff's office and the Defendant, which, Plaintiff asserts, confirms that Defendant was aware of the debt and the lawsuit. There is a conflict of assertions, which, when viewing the totality of the circumstances leaves a doubt as to Defendant's mistaken belief about the case. Because the law strongly favors trial and disposition on the merits, any doubts in applying CCP § 473 (relief from

judgment taken by mistake, inadvertence, surprise, or excusable neglect), must be resolved in favor of the party seeking relief from default. (*Parage v. Couedel* (1997), 60 Cal. App. 4th 1037).

The default is vacated and Defendant is ordered to file her Answer on or before July 21, 2021.

11. TIME: 9:00 CASE#: MSL20-04455
CASE NAME: JPMORGAN CHASE VS. GARRITY
HEARING ON MOTION TO/FOR JUDGMENT ON THE PLEADINGS FILED BY JPMORGAN CHASE BANK,
**** TENTATIVE RULING: ****

Plaintiff has filed a motion for judgment on the pleadings asserting that the answer admits all allegations in the Complaint and does not state facts sufficient to constitute a defense to the Complaint. The Answer is entirely devoid of defenses and the Defendant admits that all facts alleged in the Complaint are true. The standard for granting a motion for judgment on the pleadings is essentially the same as that applicable to a general demurrer. (*Burnett v. Chimney Sweep* (2004) 123 Cal.App.4th 1057, 1064.) As a consequence, it may be granted if, from the pleadings, together with matters that may be judicially noticed, it appears that a party is entitled to judgment as a matter of law. (Code Civ. Proc. § 438 (d); *Saltarelli & Steponovich v. Douglas* (1995) 40 Cal.App.4th 1, 5; Weil & Brown, Civ. Pro. Before Trial (The Rutter Group) p. 7:292.) This unopposed motion is granted for the reasons cited in the moving papers.

12. TIME: 9:00 CASE#: MSL20-05981
CASE NAME: P.W. STEPHENS VS. BAINS
HEARING ON MOTION TO DEEM COMPLAINT FILED ON 10/14/2020 FILED BY P.W. STEPHENS ENVIRONMENTAL, INC.
**** TENTATIVE RULING: ****

Plaintiff submitted its complaint to the Court for filing on October 14, 2020. Due to delays from the court' limited operations due to the Emergency Orders issued in response to the COVID-19 pandemic, and, as well, an erroneous rejection of the Complaint, the Court file-stamped the Complaint on December 24, 2020. This motion seeks to have the Court deem the Complaint filed on October 14, 2020, "If a document is presented to the clerk's office for filing in a form that complies with the rules of court, the clerk's office has a ministerial duty to file it." (*Voit v. Superior Court* (2011) 201 Cal.App.4th 1285, 1287) Even if the document contains defects, the clerk's office should file it and notify the party that the defect should be corrected." This motion is granted and the Complaint is deemed to have been filed on October 14, 2020.

13. TIME: 9:00 CASE#: MSL20-06045
CASE NAME: REGIONAL ACCEPTANCE VS. TIMMS
HEARING ON WRIT OF POSSESSION AFTER HEARING
FILED BY PLAINTIFF
**** TENTATIVE RULING: ****

Plaintiff has filed an application for pre-trial writ of possession. There is no proof of service on the defendant on file with the Court. Cal Code Civ. Proc § 512.050. Lacking proof of service, this court continues this matter to August 2, 2021 at 9:00 a.m. to give Plaintiff additional time to effectuate service.

14. TIME: 9:00 CASE#: MSL21-00163
CASE NAME: MARTINEZ VS. SELECT PORTFOLIO
HEARING ON DEMURRER TO COMPLAINT
FILED BY NATIONAL DEFAULT SERVICING CORPORATION, et al.
**** TENTATIVE RULING: ****

In this unopposed demurrer, the court takes judicial notice of Exhibits 1-8 in the request for Judicial Notice filed by Defendants, including the deed of trust recorded in the official records of the Contra Costa County Recorder on March 14, 2007, DOC-2007-0074571-00, executed Promissory note and deed of trust, DOC-2007-0074571-00, three notices of default, recorded on December 14, 2009, March 1, 2011 and March 25, 2020 with the Contra Costa County Register, the loan modification agreement executed on June 3, 2011, the notice of default (recorded March 25, 2020), the Notice of Trustee's Sale recorded on November 19, 2020, and the trustee's deed upon sale recorded on January 26, 2021.

The Demurrer is sustained with leave to amend as to all causes of action. Some (likely all) of the causes of action alleged here do not appear to be viable, but since this is the first demurrer decided by the Court and leave to amend is liberally granted, the Court has given Plaintiff leave to amend. Plaintiff is ordered to file his amended complaint within 30 days of service of notice of this ruling.

15. TIME: 9:00 CASE#: MSN21-0330
CASE NAME: CHO VS. DIRECTOR FOR THE DMV
HEARING ON PETITION FOR WRIT OF MANDATE
FILED BY PETITIONER
**** TENTATIVE RULING: ****

Michael Cho's Petition for Writ of Mandate/Review **is denied.** Petitioner has not met his burden of convincing the court the decision of the DMV's Administrative Per Se hearing is contrary to the weight of the evidence.

Background

On November 20, 2020, Contra Costa Deputy Sheriff Officer Kevin Escover responded to an automobile collision in Danville at approximately 8:09 p.m. Petitioner Michael Cho's vehicle had veered into a parked car. Petitioner admitted to drinking three glasses of wine prior to driving. According to Officer Escover, Petitioner showed objective signs of intoxication and performed poorly on the field sobriety tests. The preliminary alcohol screening (PAS; roadside breathalyzer) showed a BAC level of .15 and .13. (Arrest Report, p. 3 of 4.) Petitioner Michael Cho was arrested for an alleged violation of Vehicle code § 23152 (driving under the influence).

After the arrest, Petitioner was transported to the Danville Police station, where the Chemical Test Admonishment was read. According to the report, Officer Escover read the chemical test admonition from the DS-367 form. (Arrest Report, p. 4; DS 367, p.1 (reverse).) Petitioner agreed to take a breath test. Officer Escover discovered that the breath test was unavailable. Petitioner was informed that he would have to submit to a blood test because it was the only available test. Officer Escover states Petitioner refused to submit to a blood test. Officer Escover was therefore compelled to prepare a warrant for the blood draw. Petitioner's driver's license was suspended pursuant to Vehicle Code § 13353. Petitioner made a timely request for hearing.

Administrative Hearing

The DMV automatically reviews the suspension order. (California Vehicle Code Section 13353(d). The standard of review is preponderance of the evidence, and the department bears the burden of proof. (*Lake v. Reed* (1997) 16 Cal.4th 448, 455.)

The person may then request an administrative hearing pursuant to Vehicle Code 13558. (California Vehicle Code Section 13353(e).) "The only issues at the hearing on an order of suspension or revocation pursuant to Section 13353 or 13353.1 shall be those facts listed in paragraph (1) of subdivision (b) of Section 13557." (Veh. Code, § 13558(c).)

The issues listed in Veh. Code § 13557(b)(1) are:

(A) The peace officer had reasonable cause to believe that the person had been driving a motor vehicle in violation of Section 23136, 23140, 23152, 23153, or 23154.

(B) The person was placed under arrest or, if the alleged violation was of Section 23136, that the person was lawfully detained.

(C) The person refused or failed to complete the chemical test or tests after being requested by a peace officer.

(D) Except for the persons described in Section 23612 who are incapable of refusing, the person had been told that his or her privilege to operate a motor

vehicle would be suspended or revoked if he or she refused to submit to, and complete, the required testing.

Once the DMV establishes its prima facie case by presenting documents, the driver must produce affirmative evidence of the nonexistence of the presumed facts sufficient to shift the burden of proof back to the DMV. (*Roze v. Department of Motor Vehicles* (2006) 141 Cal.App.4th 1176, 1183.) "'The licensee must show, "through cross-examination of the officer or by the introduction of affirmative evidence that official standards were in any respect not observed …." [Citation.]" (*Ibid*.)

"If the DMV hearing officer finds that each issue is established by a preponderance of the evidence, the person's driver's license is suspended. (§ 13557, subd. (b)(1), (b)(2).) (*Grundy v. Gourley* (2003) 110 Cal.App.4th 20, 24.)

The Administrative Per Se Hearing was conducted on January 25, 2021, before Hearing Officer J. Costa. Petitioner was represented by Counsel David Larkin at the hearing. At issue was whether Cho refused to take or failed to complete a chemical test or tests after being requested to do so by a peace officer. Petitioner contended he agreed to take a chemical breath test and submitted to a blood test. The Department relied on the following evidence at the hearing:

1. Exhibit A: Officer's Statement (DS 367);
2. Exhibit B: Narrative Police Report
3. Exhibit C: Accident Report
4. Exhibit D: Petitioner's Driving Record.

Petitioner objected to the admissibility of these documents. The Hearing Officer overruled the objections.

On February 5, 2021, the DMV issued its Notification of Findings and Decision. The Hearing Officer found that: 1) there was reasonable cause to believe that Petitioner Cho was driving a vehicle under the influence of alcohol; 2) Petitioner was lawfully placed under arrest for a violation of Vehicle Code § 23152; 3) Petitioner was told that his driving privileges would be revoked if he failed to take the chemical test; 4) Petitioner refused or failed to take the chemical test after being requested to do so by a peace officer.

The Hearing Officer determined Petitioner's agreement to take the chemical breath test was irrelevant because Petitioner "was required to take the only remaining test, the blood test, at the request of Deputy Escover under the law once he was informed that the breath test was not available and the only option was the blood test." The evidence to support this determination was Mr. Cho's testimony confirming the events and the Arrest Report.

Petition for Writ Review

Petitioner Michael Cho petitions this Court for a Writ of Mandate pursuant to CCP § 1085, directed to Respondent Steven Gordon, Director of the Department of Motor Vehicles. Petitioner alleges he has substantial right to the performance of Respondent's duty in compliance with Veh. Code § 13559 and Veh. Code 13353 *et seq*. Petitioner further states the application is made pursuant to CCP § 1094.5 on the ground that the Respondent's decision to suspend Petitioner's license is invalid as the findings are not supported by the weight of the evidence, thus constituting a prejudicial abuse of discretion. Petitioner maintains he has no plain, speedy and adequate remedy at law. Petitioner seeks to set aside the suspension and order his driver's license reinstated and returned to him. Petition also seeks recovery of his attorney's fees and costs.

Petitioner contends he was denied due process of law when the Department of Motor Vehicle arbitrarily and capriciously entered an Order suspending his license to drive without lawful authority to do so. Petitioner contends the weight of the evidence does not support the suspension of his license. Petitioner asserts he was fully cooperative, took responsibility, admitted to drinking and driving, and submitted to a voluntary preliminary breath test and subsequent blood test.

Standard of Review

Vehicle Code § 13559(a) vests in the court of competent jurisdiction in the person's county of residence which has jurisdiction to review the DMVs' decisions. Where the petition for a writ of administrative mandate follows an order of suspension, the superior court is required to determine, based on the exercise of its independent judgment, whether the weight of the evidence supports the administrative decision. (*Morgenstern v. Department of Motor Vehicles* (2003) 111 Cal.App.4th 366, 372.)

"In reviewing the administrative record, the court makes its own determination about the credibility of the witnesses." (*Ibid*.) However, "In exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence." (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817.)

The court's review shall be on the record of the hearing and the court shall not consider other evidence. (Cal. Veh. Code §13559(a).) "If the court finds that the department exceeded its constitutional or statutory authority, made an erroneous interpretation of the law, acted in an arbitrary and capricious manner, or made a determination which is not supported by the evidence in the record, the court may order the department to rescind the order of suspension or revocation and return, or reissue a new license to, the person." (*Ibid*.)

Analysis

If a person refuses the officer's request to submit to, or fails to complete a chemical test or tests, the department shall suspend the person's driving privilege for one year or revoke the person's privilege for two or three years depending on the violations and the person's history of suspension. (Cal. Vehicle Code § 13353.)

"[T]he burden rests on the complaining party to convince the court that the board's decision is contrary to the weight of the evidence' [Citation.]… plainly casts upon 'the complaining party' (and not the administrative agency) a burden of proof or persuasion, and not a mere burden of production or of coming forward with evidence." (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 820.) Petitioner has not met his burden.

Here, Petitioner maintains the DMV Hearing Officer made an erroneous determination that Petitioner had been lawfully arrested and refused to take a chemical test after a lawful admonishment. Petitioner maintains the DMV relied on documents with conflicting information. Petitioner argues the DS 367 form prepared by Officer Escover is insufficient to support the administrative action against Petitioner.

First, Officer Escover used two different forms for the Chemical Test Admonishment, which led to confusion on the part of Petitioner. Petitioner clearly agreed to take a breath test. There is no evidence the Officer took any steps to correct the admonishment after he learned the breath test machine was not working and Petitioner was required to take a blood test. Petitioner argues the licensee had no way of understanding the consequences for his hesitation in regards to the blood test after having given his consent to the breath test. Petitioner argues the licensee cannot be bound by an insufficient admonishment. The Officer failed in his duty to ensure the licensee actually understood the admonishment. (*Thompson v. Department of Motor Vehicles* (1980) 107 Cal.App.3d 354.)

California Evidence Code provides: "It is presumed that official duty has been regularly performed." "'[W]here it is established that the matters reported are the direct observations and within the personal knowledge of the reporting officer, a sworn 367 report introduced at a [DMV administrative per se hearing] is presumed trustworthy, based upon the officer's duty under [Vehicle Code] sections 13353 and 23158.2 to report the facts of an arrest for drunk driving and an incident blood-alcohol test.' [Citation.]" (*Molenda v. Department of Motor Vehicles* (2009) 172 Cal.App.4th 974, 1003.)

Here, the DS 367 states that the chemical test admonition was read to Petitioner at 21:18 p.m. The Form also indicates the breath test was unavailable because the machine was not working. On page 4 of 4 of the Arrest Report, Officer Escover states he read the Chemical Test Admonishment on page 2 of the DMV Admin Per Se form. After Cho stated he would submit to the breath test, the officer discovered the breath test machine was not working. Cho was informed of this and that he was required to submit to the only other available test, a blood test, to which Cho said "no."

Petitioner's own sworn testimony is consistent with the Officer's sworn statement on the DS 367 form. At the hearing, Petitioner state he said "no" to the blood test. (AR, Transcript,

15:25-16:14.) Respondent argues that it is clear Petitioner refused to submit to a blood test after he was told the breath test machine was not working. "Such refusal constitutes a valid basis for suspension of [his] driver's license." (*Barrie v. Alexis* (1984) 151 Cal.App.3d 1157, 1161.) Petitioner submit no evidence to support a different conclusion.

Although Petitioner agreed to a breath test, Petitioner did not submit to the only chemical test available until compelled to do so with a warrant. "It has long been settled that compliance with the implied consent law consists of completing, not merely attempting one of the three blood alcohol tests offered." (*Cole v. Dep't of Motor Vehicles* (1983) 139 Cal.App.3d 870, 875.) Here the breath test could not be completed. "Once an arrestee has voluntarily submitted to a chemical test, he must complete the test (or choose one that he is able to complete) or face the very strong possibility that his conduct will be construed as a refusal." (*Ibid*.)

Petitioner believes he produced affirmative evidence that he was fully cooperative and submitted to a breath and blood test. Petitioner is referring to PAS screening test taken in the field, which is not the same as the chemical test required under Vehicle Code § 13353. As to the blood test, it was administrated pursuant to a warrant after Petitioner said "no." "[T]he determining factor is not the state of mind of the arrested driver but the fair meaning to be given his response to the demand he submit to a chemical test. (*Barrie v. Alexis* (1984) 151 Cal.App.3d 1157, 1161.) "It is the initial refusal which forms the basis for suspension of the driver's license under section 13353." (*Barrie* at p.1162.) "[The] fact that a blood sample ultimately was obtained and the test completed is of no significance." (*Cole v. Dep't of Motor Vehicles* (1983) 139 Cal.App.3d 870, 875.)

Here, it was determined that Petitioner refused to submit to or failed to complete a chemical test. Petitioner has not met his burden of demonstrating the weight of the evidence does not support this decision.

Next, Petitioner's argues that he produced affirmative evidence to shift the burden of proof back to the DMV at the hearing. Petitioner claims the DMV relied on the presumption under Evidence Code § 664 given to the Officer's report and DS 367 form to support its prima facie case. Petitioner argues that little weight should be given to these documents because of the errors.

For example, Officer Escover wrote "Yes; Breath test unavailable" on the DS 367 form where he recorded Petitioner response to the question, "Will you take a Breath Test? Including the words, "breath test unavailable" was clearly not Petitioner's response. The Officer also made other errors on the form, including putting his information where it required information of other officers. Officer Escover did not mark the box which provides: "When Applicable: Since the breath and blood tests are unavailable." Also, the Officer Escover checked two boxes on the DS 367 form upon which the suspension was based - both 0.08% BAC Chemical Test Results and Chemical Test Refusal. Petitioner considered this conflicting.

Petitioner's argument is not convincing. Despite the "errors," the form clearly indicates that Cho was informed that the breath test was not available and he refused the blood test. Cho confirmed this at the administrative hearing. Petitioner's "affirmative evidence" was not

sufficient shift the burden back to the DMV. This court's April 9, 2021 order staying license suspension pending outcome of writ of mandate is set aside and Petitioner's driver's license is suspended for one year from June 21, 2021.

16. TIME: 10:00 CASE#: MSL20-00351
CASE NAME: CAPITAL ONE VS. TING
COURT TRIAL - (1 HOUR) SHORT CAUSE / 0 DAY(S)
**** TENTATIVE RULING: ****

Parties to appear and be ready for short cause trial. Failure to appear may result in the imposition of sanctions.

17. TIME: 1:30 CASE#: MSC19-01246
CASE NAME: MORAIS VS. CITY OF RICHMOND
HEARING ON DEMURRER TO 2ND AMENDED COMPLAINT
FILED BY CITY OF RICHMOND, et al.
**** TENTATIVE RULING: ****

The demurrer filed by the City of Richmond, Richmond Police Officer Mark Shanks, and Richmond Code Enforcement Officer Kevin Tisdell ("defendants") is **sustained with leave to amend**. Any amended complaint shall be filed and served on or before July 6, 2021.

Background

In June 2018, Paolo Morais ("plaintiff"), a tow truck driver, was injured while he was participating in a nuisance abatement project in the City of Richmond. The owner of the property had hired plaintiff's employer to remove vehicles, boats, and sheds from the property. At the time, two public safety officers from the City of Richmond were present as well, "securing and rendering safe" the abatement project, specifically with respect to "unauthorized occupant issues." Plaintiff was shot by a loaded and unattended rifle inside a shed when he "proceeded to remove the shed."

Plaintiff filed his complaint against the City of Richmond ("City") and the property owner, defendant Gray 1 Forest Green, LLC, on June 19, 2019. He later added the individual officers after he sought and obtained court-ordered relief from his failure to present a timely claim to the City. (Declaration of Christina M. Forst in Support of Defendants' Demurrer, "Forst Decl.," ¶3.) After multiple delays and issues with service, plaintiff filed a second amended complaint ("SAC") in December of 2020 which alleges one cause of action for general negligence against the officers based on Government Code section 820(a) and vicarious liability against the City. (See Request for Judicial Notice, Ex. C.)

Following efforts to meet and confer with plaintiff and some uncertainty as to whether plaintiff would again amend the complaint (see Forst Decl., ¶ 33), defendants filed the instant

general demurrer pursuant to Code of Civil Procedure, § 430.10 (e). They contend the SAC does not state facts sufficient to constitute a cause of action against the individual officers because they have no duty to ensure the safety of private property, and, in part because of this same reason, the facts are also insufficient to constitute a cause of action against the City. They further argue both the officers and the City are statutorily immune against liability for plaintiff's claims.

Plaintiff opposes the demurrer, asserting that the officers created a special relationship that gave rise to a duty to make the abatement project area safe.

Request for Judicial Notice

Defendants request judicial notice of four documents: the original complaint, the first amended complaint, the SAC, and the register of actions in this matter. The request is unopposed and is **granted**.

Discussion

"The function of a demurrer is to test the sufficiency of the complaint as a matter of law." (*Holiday Matinee, Inc. v. Rambus, Inc*. (2004) 118 Cal.App.4th 1413, 1420.) A complaint "is sufficient if it alleges ultimate rather than evidentiary facts" (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 550), but the plaintiff must set forth the essential facts of his or her case "with reasonable precision and with particularity sufficient to acquaint [the] defendant with the nature, source and extent" of the plaintiff's claim. (*Doheny Park Terrace Homeowners Assn., Inc. v. Truck Ins. Exchange* (2005) 132 Cal.App.4th 1076, 1099.) Legal conclusions are insufficient. (*Id*. at 1098–1099; *Doe, supra,* at p. 551, fn. 5.) The Court "assume[s] the truth of the allegations in the complaint, but do[es] not assume the truth of contentions, deductions, or conclusions of law." (*California Logistics, Inc. v. State of California* (2008) 161 Cal.App.4th 242, 247.) "The existence and scope of duty are legal questions for the court." (*Merrill v. Navegar, Inc*. (2001) 26 Cal.4th 465, 477.) In ruling on a demurrer, a court considers the face of the pleading attacked and matters subject to judicial notice. (Code Civ. Proc. § 430.30(a).)

1. Existence of Duty

Under the Government Claims Act (Gov. Code, § 810 et seq.), there is no common law tort liability for public entities in California; instead, such liability must be based on statute. (Gov. Code, § 815, subd. (a) ["Except as otherwise provided by statute: [¶] … A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity … ."]; *Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 899; see *Williams v. Horvath* (1976) 16 Cal.3d 834, 838 ["intent of the act is not to expand the rights of plaintiffs in suits against governmental entities, but to confine potential governmental liability to rigidly delineated circumstances"].)

Government Code section 820(a) provides: "Except as otherwise provided by statute (including Section 820.2), a public employee is liable for injury caused by his act or omission to the same extent as a private person."

The elements of negligence are well established and include a legal duty to use due care, a breach of such legal duty, and the breach as the proximate or legal cause of the resulting injury. (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917.) While each person has a general duty to exercise reasonable care for the safety of others (Civ. Code, § 1714, subd. (a)), duty is not an immutable fact of nature, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 572, fn. 6; see also *Rice v. Center Point, Inc.* (2007) 154 Cal.App.4th 949, 958 [discussion of policy factors considered in finding duty or lack thereof].)

Parties here agree that, as a rule, there is no duty to come to the aid of another person and one cannot be held liable in tort unless some special relationship is created with the plaintiff which gives rise to a duty to act. (*Williams v. State of California* (1983) 34 Cal.3d 18, 23.) Parties also agree that the special relationship can be created where (1) failure to exercise such care increases the risk of such harm, or (2) the harm is suffered because of the other's reliance upon the undertaking. (*Ibid*.) These rules apply to private citizens and law enforcement officers alike. (*Id*. at 24; see also *Von Batsch v. Am. Dist. Tel. Co.* (1985) 175 Cal.App.3d 1111, 1122.)

Here, parties differ as to whether the special relationship exception exists, warranting imposition of a duty.

Plaintiff's allegations are conclusory in this respect. Plaintiff claims that "by implied and expressed acts" the officers assured plaintiff of "protection in the safe removal of items from the property." The question remains as to what acts allegedly created an expectation. The Court disagrees with plaintiff that it is "common knowledge" that belongings left in a residence would lead to plaintiff being shot by an unattended weapon. And nothing suggests the officers increased the risk to plaintiff through their actions, as in *Mann v. State of California* (1977) 70 Cal. App. 3d 773.

How the officers allegedly induced plaintiff to rely on their protection, or how plaintiff relied, are unclear. The SAC does not set forth any particular promises by the officers to ensure the plaintiff's safety. Any representation that plaintiff allegedly relied on should be within his knowledge and capable of being included in his allegations. Depending on the promise, this could still be insufficient to create a duty.

Weighing against plaintiff's position that the exception definitively applies here, the special relationship rule is narrow, to be applied in a "limited class of unusual cases." (*Minch v. Department of California Highway Patrol* (2006) 140 Cal.App.4th 895, 905.) Any implication to the contrary that may have been suggested in the cases cited by plaintiff, has been rejected. (See *Minch, supra,* 140 Cal.App.4th at 905 [rejecting broad interpretation of rule from *Mann, supra,* 70 Cal. App. 3d 773]; *Whitcombe v. County of Yolo* (1977) 73 Cal.App.3d 698, 704-705 [rejecting special relationship rule and limiting *Hartzler v. City of San Jose* (1975) 46 Cal.App.3d 6 as not adequately supported].)

Regardless of how it is framed (ensuring a safe environment, securing the area, safe removal of items from the property, etc.), the duty sought to be imposed here requires a special

relationship. The Court concludes no such relationship exists and accordingly, the demurrer is sustained.

While the analysis need not continue, in the interest of judicial economy, the following discussion is provided to address the immunity argument by defendants.

2. Immunity

Pursuant to Government Code § 821.4, public employees cannot be held liable for injury caused by their failure to make an inspection of private property, or for making an inadequate or negligent inspection of such property, for the purpose of determining whether the property "contains or constitutes a hazard to health or safety." The public entity on behalf of which the employees act is similarly not liable for such injuries. (Gov. Code, § 818.6.)

Plaintiff does not address these immunity rules except to argue their application is premature. The SAC alleges the firearm was "found" *after* it discharged. It would appear that, regardless of whether it should have been found earlier, the inspection immunity applies.

Leave to Amend

Defendants request that the demurrer be sustained without leave to amend. They argue that there has already been three iterations of the pleading over the past two years wherein plaintiff has attempted to plead around the problems discussed herein. Liberality in permitting amendment is the rule, and if there is any reasonable possibility that a plaintiff can state a good cause of action, it is error to deny leave to amend. (*Von Batsch, supra,* 175 Cal.App.3d at p. 1119.) Because this is the first contested demurrer, the Court declines to speculate as to whether plaintiff has a permissible theory that may be asserted.

18. TIME: 9:01 CASE#: MSC19-01396
CASE NAME: FIDELITY & DEPOSIT VS. DIABLO
HEARING ON MOTION FOR SUMMARY ADJUDICATION ON CROSS-COMPLAINT FILED BY FIDELITY AND DEPOSIT COMPANY OF MARYLAND
**** TENTATIVE RULING: ****

Before the Court is a motion for summary adjudication ("MSA") filed by Cross-Defendant Fidelity and Deposit Company of Maryland ("Cross-Defendant" or "F&D"). The MSA relates to Diablo Contractors, Inc. ("Diablo Contractors"), Deborah K. Brandt, and Arthur Brandt (collectively "Cross-Complainants") Cross Complaint ("XC") for (1) breach of contract, (2) breach of the covenant of good faith and fair dealing, (3) rescission, (4) lost profits, and (5) elder abuse.

Cross-Defendant moves for summary adjudication pursuant to Code of Civil Procedure § 437c against the causes of action for (3) rescission and (5) elder abuse on several grounds.

For the following reasons, the Court grants-in-part and denies-in-part Cross-Defendant's motion for summary adjudication.

Standard

Code of Civil Procedure ("CCP") §§ 437c(o)(1) and 437c(p)(2) provide the relevant legal standard for deciding the MSA. Section 437c(o)(1) provides, in relevant part:

> A cause of action has no merit if one or more of the elements of the cause of action cannot be separately established, even if that element is separately pleaded.

Section 437c(p)(2) provides, in relevant part:

> A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto. The plaintiff or cross-complainant shall not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.

The party moving for summary judgment has the burden of persuasion to show there is no triable issue of material fact and thus it is entitled to judgment as a matter of law. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850.) Only if the moving party successfully meets this burden does the burden shift to the opposing party to make its own prima facie showing of the existence of a triable issue of material fact. (*Ibid*.; see also *Chern v. Bank of America* (1976) 15 Cal.3d 866, 873.) The scope of the defendant's initial burden is defined by the pleadings. (See *580 Folsom Assocs. v. Prometheus Dev. Co*. (1990) 223 Cal. App. 3d 1, 18.)

Evidentiary Objections

The Court need only rule on those objections to evidence that were material to the disposition of the MSJ. (See CCP § 437c(q).)

Cross-Complainants' objections to the lack of Declaration of Timothy Jacobson are not well-taken; there is a clear clerical error and the obvious reference is to the Declaration of Paul Grego in Support of Motion for Summary Adjudication on Cross-Complaint. These objections are overruled.

Request for Judicial Notice

Cross-Defendant's unopposed request for judicial notice is granted. Evid. Code §§ 452, 453.

Brief Factual Background

This suit is related to a public works project where Defendant Diablo Contractors Inc. was the prime contractor. F&D and Diablo Contractors entered into an Indemnity Agreement, pursuant to which F&D issued several construction performance and payment bonds. (Grego Decl. ¶ 4, Ex. 1; UMF 2-4.)

The public works project became troubled. Diablo Contractors informed F&D that it was unable to "continue to pay for labor and materials to correct [Caltrans'] breaches and the numerous DOT design defects for which [Caltrans] refused to take responsibility." (UMF 7.) By early 2015, it became apparent to Diablo Contractors that the costs of the project would soon exceed its financial ability to continue to perform the work. (UMF 8.) Diablo Contractors informed F&D of its financial condition. (UMF 9.)

Thereafter, on March 20, 2015 Diablo Contractors, as principal, and Arthur Brandt and Deborah Brandt, as indemnitors, executed a written Financing and Collateral Agreement with F&D. (UMF 11; see also Grego Decl. ¶ 7, Ex. 5.) On March 13, 2015, Diablo Contractors executed an Assignment From Principal to Surety of Contract Rights and Proceeds (the "Assignment"). (UMF 14; see also Grego Decl. ¶ 8, Ex. 6.)

The parties dispute the conditions under which they entered into the above agreements and their ultimate validity.

Analysis

Rescission (3d cause of action)

Cross-Defendant moves for summary adjudication on this cause of action on the grounds that the Financing and Collateral Agreement (Grego Decl. at ¶ 7, Ex. 5) and Assignment (*Id*. at ¶ 8, Ex. 6) provide new consideration. Cross-complainant opposes on the grounds that under Civil Code § 1689(b)(1) and (b)(2) a contract may be rescinded if either: (1) there was some sort of mistake or duress, or (2) if the contract lacked consideration by one party and that F&D has not shown that there was no duress and/or that there was adequate consideration. On reply, Cross-Defendant argues that there was consideration for both the Assignment and the Finance Agreement and that there was no coercion or undue influence.

"A contract is extinguished by its rescission." (Civ. Code, § 1688.) Both the grounds for rescission and the means by which parties may rescind their contract are governed by statute. (See Civ. Code § 1688 *et seq*.)

"Rescission is available as a remedy under California law if a mistake of fact material to a contract has been shown." (Civ. Code. §§ 1577, 1689 (b)(1).) "A defendant in a contract dispute who is claiming unilateral mistake of fact must establish the following facts to obtain rescission of the contract: (1) the defendant made a mistake regarding a basic assumption upon which the defendant made the contract; (2) the mistake has a material effect upon the agreed exchange of performances that is adverse to the defendant; (3) the defendant does not bear the risk of the mistake; and (4) the effect of the mistake is such that enforcement of the contract would be unconscionable." (*Donovan v. RRL Corp*. (2001) 26 Cal. 4th 261, 282.)

Failure of consideration also authorizes rescission. (Civ. Code § 1689(b)(2); *Bliss v. California Cooperative Producers* (1947) 30 Cal.2d 240, 248; *Wyler v. Feuer* (1978) 85 Cal.App.3d 392, 403-404; *Taliaferro v. Davis* (1963) 216 Cal.App.2d 398, 411.)

The Cross-Complaint alleges that "DCI and the Brandts were wrongfully induced and coerced under financial duress ... by F&D to enter the agreements attached as Exhibits 3 [the Financing and Collateral Agreement] and 4 [the Assignment] to the F&D Complaint." (XC ¶ 36.) They further allege that "DCI and the Brandts were mistaken as to their need to enter [into] those two agreements of which F&D was fully aware of their mistake, which belief was caused solely by

the actions and inducement of F&D." (*Id*.) Finally, Cross-Complainants allege that "neither of those two agreements contained additional consideration as all parties duties and rights had already been spelled out by the agreements attached as Exhibits 1 and 2 to the F&D Complaint[.]" (*Id*.)

Cross-Defendant's motion for summary judgment is premised on the issue of failure of consideration. Cross-Defendant's moving papers do not address Cross-Complainants' allegation that they were wrongfully induced and coerced to enter into the Financing and Collateral Agreement as well as the Assignment and that they were mistaken as to their need to enter into the agreements. (See XC at ¶ 36.). As a consequence, the motion would not dispose of the entire cause of action. There can be no summary adjudication of less than an entire cause of action. (Code Civ. Proc., § 437c, subd. (f)(1) ["A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty."].) Even assuming *arguendo* that Cross-Defendant is correct and the prior agreements between the parties did not require F&D to advance new funds, and that consideration for the new agreements was the advancement of $9 million dollars, that does not dispose of Cross-Complainants' other alleged basis for rescission: that they executed the Financing and Collateral Agreement and Assignment under duress and under the mistaken belief that they needed to enter into the subsequent agreements.

Cross-Defendant's arguments on reply regarding undue influence or coercion are inadequate as they have not met their initial burden with respect to showing that the entire cause of action has no merit.

Cross-Defendant's motion for summary adjudication as to the third cause of action for rescission is denied. The motion would not dispose of the entire cause of action, but only one branch of a cause of action. It is therefore impermissible under Code of Civil Procedure § 437c(f)(1).

Elder Abuse (5th cause of action)

Cross-Defendant moves for summary adjudication on the fifth cause of action on the grounds that it is barred by the applicable statute of limitations.

As a threshold issue, the corporate entity Diablo Contractors, Inc. does not meet the definition of "elder" in Welfare & Institutions Code § 15610.27 and is not protected by the statute.

Cross-Complainant's cause of action for elder abuse under Welfare & Institutions Code § 15610.30 is governed by the four-year statute of limitations in § 15657.7. Cross-Complainant's elder abuse claim is predicated on Cross-Defendant's alleged "wrongful use of leverage to manipulate and coerce the Brandts to sign further agreements (those attached as Exhibit 3 and 4 to the F&D Complaint), which were also made with the intent to defraud the Brandts of their hard earned life savings." (XC at ¶ 46.) The Cross-Complaint does not have any allegations of delayed discovery.

The Assignment was executed on March 13, 2015 and the Financing and Collateral Agreement was executed on March 20, 2015. (UMF 11, 14; Grego Decl. ¶ 7, Ex. 5; ¶ 8, Ex. 6) (Although the Court notes that the Assignment was entered into by Diablo Contractors, Inc., alone; an improper plaintiff under the Elder Abuse statutes.) The Cross-Complaint was filed on August 6, 2019, nearly five months after the expiration of the four-year statute of limitations.

In opposition, Cross-Complainant argues that the elder abuse includes the recording of the three F&D liens against the Brandt's property and that if the filing date is calculated from the

date the last of the three deeds was recorded (April 28, 2016), then the cause of action is timely. (The Court notes that the opposition calculates the date of the time bar from the filing of the Complaint, without any authority to suggest that date of the Complaint is the appropriate measure in this case. To the extent that Cross-Complainants are relying on an implied relation back doctrine or something similar, they have failed to articulate it or support it with authority.)

It is unclear whether Cross-Complainant is making a delayed discovery or delayed injury argument. But, as Cross-Defendant notes, the request for the Deeds of Trust was made in connection with the agreements in March 2015. (Veis Decl. ISO MSA ¶ 3, Ex. 1.) Under § 15657.7 a cause of action for damages under § 15610.30 must be commenced "within four years after the plaintiff discovers or, through the exercise of reasonable, diligence, should have discovered, the facts constituting the financial abuse."

Generally, a "cause of action accrues "when [it] is complete with all of its elements"—those elements being wrongdoing, harm, and causation." (*Pooshs v. Philip Morris USA, Inc*. (2011) 51 Cal.4th 788, 797.) This is called the "'last element' accrual rule: ordinarily, the statute of limitations runs from 'the occurrence of the last element essential to the cause of action.' [Citations.]" (*Aryeh v. Canon Business Solutions, Inc*. (2013) 55 Cal.4th 1185, 1191 (*Aryeh*).)

Here, the requirement for the delivery of the deeds of trust was included in the parties' Financing and Collateral Agreement. The Financing and Collateral Agreement states that Diablo Contractors and the Brandts "have agreed to post and otherwise deliver to [F&D] the Collateral listed in Exhibit 3 (List of Collateral) for the purpose of discharging their obligations to the Surety." (Grego Decl. ¶ 7, Ex. 5 at § III(1).) Cross-Complainant Arthur Brandt describes this provision as follows: "[a]s part of that indemnity, F&D was given the ability to file liens against my personal property to secure as collateral to bonds it would continue to issue to DCI." (RJN Ex. 2 at ¶ 7 [Brandt Decl. ISO Opp. to Application for Right to Attach Order].)

As the Deeds of Trust were anticipated collateral of the Financing and Collateral Agreement, it is unclear how their recordation could be a separate injury under the Welfare and Institutions Code. Cross-complainant cannot credibly argue delayed discovery of the Deeds of Trust given that they were anticipated by the Financing and Collateral Agreement and requested in connection with that agreement in March of 2015. (Veis Decl. ISO MSA ¶ 3, Ex. 1.)

Furthermore, a deed of trust to secure a debt is a contract. The Brands executed one Deed of Trust on April 13, 2015 and the other two on June 10, 2015. (See RJN Ex. 2 [Brandt Decl. in Opp. to Application for Right to Attach Order] at Ex. 1.) As an executed contract, a deed is subject to the rules of interpretation applicable to contracts in general. (Civ. Code §§ 1040, 1066.) Furthermore, under Civil Code § 1217, "[a]n unrecorded instrument is valid as between the parties thereto and those who have notice thereof." While recording a deed of trust gives notice to others, it is not essential to its validity between the parties. (Civ. Code § 1217.) The Deeds of Trust were valid at the time of execution. Even assuming *arguendo* that the last act of Cross-Complainants' elder abuse claim is the execution of the Deeds of Trust, their Cross-Complaint was still filed more than four years after the last Deed of Trust was executed.

Cross-Defendant's motion for summary adjudication as to the fifth cause of action for Elder Abuse is granted.

19. TIME: 9:01 CASE#: MSC20-01946
CASE NAME: AMEZCUA VS. MERCEDES-BENZ
HEARING ON MOTION TO STRIKE PORTIONS OF PLAINTIFFS 1ST Amended COMPLAINT
FILED BY MERCEDES-BNEZ USA, LLC
**** TENTATIVE RULING: ****

Defendant's request to strike the punitive damages allegations is **granted without leave to amend.**

Punitive damages requires a showing of fraud, oppression or malice. (Civil Code section 3294.) The First Amended Complaint does not allege facts showing oppression or malice. Plaintiff's best opportunity to seek punitive damages is based on fraudulent concealment. As discussed in the Court's ruling on the demurrer, Plaintiffs have not alleged a claim for fraudulent concealment. Thus, Plaintiffs have not alleged facts supporting an award of punitive damages.

20. TIME: 9:01 CASE#: MSC20-01946
CASE NAME: AMEZCUA VS. MERCEDES-BENZ
HEARING ON DEMURRER TO 1ST AMENDED COMPLAINT
FILED BY MERCEDES-BENZ USA, LLC
**** TENTATIVE RULING: ****

Defendant's demurrer to the first amended complaint is **sustained without leave to amend as to the third cause of action.** Defendant shall file and serve its answer by July 6, 2021.

Plaintiffs are suing the Defendant alleging that the vehicle they purchased (or leased) is defective because the vehicle had issues with a bad odor coming from the air conditioning. (FAC ¶10.) There are some allegations about Defendant failing to disclose facts about a defective transmission. (FAC ¶¶43, 44.) Allegations about the transmission appear to have been made in error, as the FAC does not allege that the vehicle had a defective transmission. Plaintiffs do not discuss the transmission in their brief. In addition, the vast majority of the FAC relates to the bad odor and/or the air conditioning / HVAC system.

Defendant demurs to cause of action three in the first amended complaint for fraudulent concealment on several different grounds, including that the fraudulent concealment claims does not contain the level of detail required to plead fraud and does not allege circumstances giving rise to a duty to disclose.

"[T]he elements of a cause of action for fraud based on concealment are: ' "(1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must

have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage." ' " (*Kaldenbach v. Mutual of Omaha Life Ins. Co.* (2009) 178 Cal.App.4th 830, 850.)

There are various ways a duty to disclose arises; however, those situations usually include a fiduciary relationship or a transaction between the parties. (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 310-12.) Generally speaking, where "a sufficient relationship or transaction does not exist, no duty to disclose arises even when the defendant speaks. [Citations.]" (*Id*. at 312.) Plaintiffs purchased (or leased) the vehicle from a third party and thus, there was no transaction between Plaintiffs and Defendant.

Plaintiffs argue that the "general rule is that a product manufacturer's duty to consumers is limited to its warranty obligations unless there is a safety issue posed by the defect in question." (Opposition p. 4 (emphasis omitted).) *Daugherty v. American Honda Motor Co.* (2006) 144 Cal.App.4th 824 and *Bardin v. DaimlerChrysler Corp.* (2006) 136 Cal.App.4th 1255 do not support Plaintiffs' position. These cases involved claims under the Consumer Legal Remedies Act and in both cases (a defective engine and a defective exhaust system) the courts found there was no safety issue alleged. Since then, *Gutierrez v. Carmax Auto Superstores California* (2018) 19 Cal.App.5th 1234, 1260 concluded that "there is no independent duty to disclose [safety] concerns." There is a question about whether there is a duty to disclose safety issues under the CLRA. The Court need not answer this question, however, as the claim here relates to fraudulent concealment, not a CLRA violation. In addition, Plaintiffs do not allege facts showing a safety issue with the air conditioning / HCAV system.

It appears that Plaintiff may also be attempting to show a duty to disclose based on affirmative representations made by Defendants. There are some situations where "an affirmative statement may be so misleading that it may give rise to a fraud cause of action even where the relationship or transaction would be insufficient to give rise to a generalized duty to disclose. [Citations.]" (*Bigler-Engler, supra,* 7 Cal.App.5th at 312.)

In the FAC, Plaintiffs allege that they "reviewed marketing brochures, viewed television commercials touting the quality, luxury and refinements of Mercedes-Benz vehicles and in particular, the GLS450 line. The product brochure for the GLS450 stated in great detail the vehicle's numerous styling attributes, luxuries and cosmetic features and impressive performance." (FAC ¶37.) These allegations are insufficient to give rise to a duty to disclose information related to the air conditioning/HVAC system. In addition, the alleged representations are general and thus, lack the requirement specificity for fraud. (See, *Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009) 171 Cal.App.4th 1356, 1384 ["[i]f the duty to disclose arises from the making of representations that were misleading or false, then those allegations should be described.".)

For these reasons, the demurrer is sustained. This is the second time the Court has ruled on a demurrer as to the fraudulent concealment claim. Although Plaintiffs request leave to

amend, they do not explain what additional facts they can allege. " '[T]he burden is on the plaintiff to show in what manner he or she can amend the complaint, and how that amendment will change the legal effect of the pleading.' [Citation.]" (*Medina v. Safe-Guard Products, Internat., Inc.* (2008) 164 Cal.App.4th 105, 112, fn. 8 .) Therefore, the demurrer is sustained without leave to amend. If Plaintiffs have additional facts they can allege, they may contest the tentative ruling and be prepared to discuss those additional facts at the hearing.

Defendant's request for judicial notice is denied. No documents are attached to the request.