SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 6
Honorable Evette D. Pennypacker, Presiding

David Criswell, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2160

DATE: April 2, 2024 TIME: 9:00 A.M.

RECORDING COURT PROCEEDINGS IS PROHIBITED

FOR ORAL ARGUMENT: **Before 4:00 PM today you must notify the:**

(1) Court by calling (408) 808-6856 and

(2) Other side by phone or email that you plan to appear at the hearing to contest the ruling

(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

FOR APPEARANCES: The Court strongly prefers in person appearances. If you must appear virtually, please use video. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 6:
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

FOR COURT REPORTERS: The Court does **not** provide official court reporters. If you want a court reporter to report your hearing, you must submit the appropriate form, which can be found here:
https://www.scscourt.org/general_info/court_reporters.shtml

FOR YOUR NEXT HEARING DATE: Please reserve your next hearing date using Court Schedule—an online scheduling tool that can be found on the Santa Clara County court website.

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1-2	21CV387570	Aegis Security Insurance Company vs Friendly Wholesalers of California dba SeeMoCars et al	Arrow's Demurrer is SUSTAINED WITHOUT LEAVE TO AMEND. Arrow's Motion to Strike is GRANTED. Scroll to lines 1-2 for complete ruling. Court to prepare formal order.
3-4	21CV392393	M.K. et al vs ROMAN CATHOLIC BISHOP OF SAN JOSE (DIOCESE) et al	Defendants' Motion to Strike is DENIED and Defendants' Demurrer is OVERRULED. Scroll to lines 3-4 for complete ruling. Court to prepare formal order.
5	24CV428658	Phuong Vu vs Sonni Vu	Sonni Vu's Motion to Quash is GRANTED. A notice of motion with this hearing date and time was served by U.S. mail on February 28, 2024. Plaintiff did not oppose the motion. "[T]he failure to file an opposition creates an inference that the motion [] is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) Although Plaintiff is self-represented, self-represented litigants are entitled to the same, but no greater, consideration than other litigants and attorneys. (*County of Orange v. Smith* (2005) 132 Cal.App.4th 1434, 1444; *Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 543 (self-represented litigants "are held to the same standards as attorneys" and must comply with the rules of civil procedure); see also *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985.) Defendant is also correct that the proofs of service in the court docket do not demonstrate proper service of the summons and complaint. For example, Plaintiff cannot serve by substitute service without first demonstrating diligent attempts to serve Defendant personally. Accordingly, Defendant's motion to quash is GRANTED. Court to prepare formal order.
6	20CV373055	Dr. John Kelley vs City of San Jose et al	Bay Area Trench's Motion for Summary Judgment is DENIED. Scroll to line 6 for complete ruling. Court to prepare formal order.
7	21CV380291	CITY OF CUPERTINO vs JENNIFER CHANG	This motion is continued to April 9, 2024 at 9 a.m. in Department 6 to be heard with Plaintiff's motion for leave to file an amended complaint.
8	20CV372467	Qinghua Liu et al vs Shuwei Feng et al	Plaintiff's Motion to Compel Defendants' Outreach and Escort person most knowledgeable deposition is GRANTED. Defendants' only opposition to this motion to compel is that there is stipulation to the close of fact discovery. First, despite the language in the stipulation attached as Exhibit A to Defendants' opposition, the Court observes that its order continuing the trial date to December 12, 2024 states: ""All fact and expert discovery is to be calculated from the new December 16, 2024 trial date." The Court will amend this order to comport with the parties' stipulation. However, even if the Court's order granting the continuance did not say that, the Court would grant this motion. Plaintiff did seek this deposition before the fact discovery cut off, but Defendants strung Plaintiff along with the promise of new deposition dates that never came. Defendants cannot promise discovery will be forthcoming, fail to produce that discovery, then rely on the close of fact discovery to shield themselves from ever producing that discovery. Accordingly, Defendants are ordered to produce a person most knowledgeable for deposition within 20 days of service of this formal order. Plaintiff's notice seeks fees and costs, but Plaintiff fails to submit any evidence regarding those fees and costs, thus the Court is not in a position to award them. Court to prepare formal order.

9	22CV407677	Scott Johnson vs Silicon Valley Restaurants Group LLC	Plaintiff's motion to enforce settlement is DENIED. Plaintiff's motion asks the Court to enter judgment in accordance with the terms of the parties' settlement agreement pursuant to Code of Civil Procedure section 664.6. However, for the Court to enforce the terms of the settlement agreement by entering judgment under Code of Civil Procedure section 664.6, the parties must first expressly stipulate for the court to do that and then communicate that express stipulation to the Court. (*Sayta v. Chu* (2017) 17 Cal.App.5th 960, 963.) Plaintiff did not provide the Court with the parties' settlement agreement, and there is no stipulation in the docket indicating the parties agreed for the Court to be able to enter judgment pursuant to section 664.6. Thus, the Court does not have authority to enter judgment as Plaintiff request. Without an express stipulation communicated to the Court, Plaintiff has a breach of contract claim. Court to prepare formal order.
10-11	2015-1-CV-279969	T. Schweikert vs Las Brisas Homewowners Association (HOA), et al	Pursuant to the parties' March 4, 2024 stipulation, this matter is returned to department 20, and these motions are CONTINUED to April 11, 2024 at 9 a.m. in department 20.
12	21CV392714	CELIA PULUC vs BOZO MARTINOVICH et al	The Minor's Compromise is APPROVED. The Court will use the order on file.
13	21CV391444	CHO, M.D. vs. WOODSPRING CONDOMINIUM ASSOCIATION	OSC Regarding Dismissal For Plaintiff's Failure to Appear will be heard at 10:00 a.m. at the same time of the case management conference.

Calendar Lines 1-2
Case Name: *Aegis Security Insurance Co. v. Friendly Wholesalers of California dba SeeMoCars, et al.*
Case No.: 21CV387570

Before the Court is cross-defendant Affinity Home Enterprises Inc. DBA Arrow Pacific Insurance Services' ("Arrow") demurrer to cross-complainant Azzam Abdo's third amended cross-complaint ("TACC") and motion to strike portions contained therein. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This is an action for fraud and unfair business practices. According to the TACC, cross-defendant Jalal Shreim ("Jalal") was the sole shareholder, president, and CEO of Friendly Wholesalers of California ("FWC"), formerly a successful rug business in San Jose.[1] (TACC, ¶¶ 2, 4.) Cross-defendant Mohamad Shreim ("Mohamad), is Jalal's son and he was the sole proprietor of SeeMoCars, a used car dealership. (TACC, ¶ 3.) SeeMoCars was evicted from its location and Mohamad asked his father for help. (*Ibid*.) As a result, Jalal and FWC acquired SeeMoCars, which operated under FWC's DMV permit. (TACC, ¶ 14.) Jalal and FWC borrowed money from Abdo but once they realized they could not pay the money back, they asked Abdo if they could convert the loans into investments. (TACC, ¶ 15.) The only term for the conversion was that Abdo would be the president of SeeMoCars, and Jalal would continue to be the president of the rug business. (TACC, ¶ 16.)

In mid-August 2015, Abdo and Jalal had a disagreement about Mohamad's role at SeeMoCars, which resulted in Abdo's resignation as well as his demand to have his name removed from all FWC documents and the return of all the money. (TACC, ¶ 18.) Jalal accepted Abdo's resignation and agreed to pay the money back, however, he subsequently breached the agreement and did not return Abdo's money or remove his name from FWC documents. (*Ibid*.)

Arrow is a broker, agent, and/or representative of Aegis Security Insurance Company ("Aegis") and Hudson Insurance Company ("Hudson") which sells surety bonds to dealerships such as FWC. (TACC, ¶ 5.) Myron Sanchez ("Sanchez") was a manager at Arrow who handled FWC's issues related to surety bonds. (*Ibid*.) On June 1, 2015, Hudson's first surety bond became effective and on October

[1] As some individuals share surnames, the Court will refer to them by their first names for purposes of clarity. No disrespect is intended. (See *Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1136, fn. 1.)

7, 2016, it was cancelled. (TACC, ¶ 6.) On October 11, 2016, Hudson issued another surety bond, which Abdo signed for on Jalal's behalf, through Arrow and the surety bond was cancelled on November 11, 2016, upon discovery its first surety bond for FWC was cancelled days earlier. (TACC, ¶¶ 6, 13, 57.) Hudson never billed Abdo or made any claims for either of the surety bonds before June 2, 2022, when it demanded a payment of $120,072 for its surety bonds. (*Ibid*.) On November 21, 2016, Aegis issued a surety bond, which Abdo signed for on Jalal's behalf, to FWC. (TACC, ¶¶ 7, 58.) Aegis never billed Abdo or made any claims against him until August 20, 2021. (*Ibid*.)

On August 21, 2021, Aegis filed the underlying complaint against FWC and Abdo for breach of contract and common counts for amount sustained in connection with a Commercial Bond Application and Indemnity Agreement.

On January 24, 2022, Abdo filed his cross-complaint and on July 20, 2022, Abdo filed a first amended cross-complaint ("FACC") alleging causes of action for: (1) Breach of Implied Contract; (2) Unlawful, Unfair, or Fraudulent Business Practices, Business & Professions Code, § 17200, et seq.; (3) Fraud, Deceit and Concealment; (4) Negligent Misrepresentation; (5) Intentional Misrepresentation; (6) Violation of the Rosenthal Fair Debt Collection Practices Act, Civil Code, § 1788, et seq.; (7) Elder Abuse; and (8) Interpleader. On December 27, 2022, Abdo filed his SACC realleging the same claims.

On October 13, 2023, the Court issued its order (the "October 13 Order"), which:

(1) Overruled Arrow's demurrer for lack of duty;

(2) Sustained Arrow's demurrer to the second, third, fourth, fifth, and seventh causes of action with 30 days leave to amend;

(3) Sustained Arrow's demurrer to the eighth cause of action WITHOUT LEAVE TO AMEND;

(4) Concluded Arrow's motion to strike was moot; and

(5) Sustained UACC's demurrer to the second, third, fourth, fifth, and seventh causes of action with 30 days leave to amend.

On November 7, 2023, Abdo filed his TACC, which asserts: (1) Breach of Implied Contract; (2) Unlawful, Unfair, or Fraudulent Business Practices, Business & Professions Code, § 17200, et seq.; (3) Fraud, Deceit and Concealment; (4) Negligent Misrepresentation; (5) Intentional Misrepresentation; (6)

Violation of the Rosenthal Fair Debt Collection Practices Act, Civil Code, § 1788, et seq.; and (7) Financial Elder Abuse.

On February 28, 2024, Arrow filed the instant motions, Abdo opposes the demurrer but not the motion to strike.

II. Improper 4ACC

On February 28, 2024, Abdo filed his 4ACC "pursuant to Code of Civil Procedure [section] 472, (a)."

Code of Civil Procedure section 472, subdivision (a), provides,

> A party may amend its pleading once without leave of the court at any time *before the answer, demurrer, or motion to strike is filed*, or *after a demurrer or motion to strike is filed but before the demurrer or motion to strike* is heard if the amended pleading is filed and served no later than the date for filing an opposition to the demurrer or motion to strike. A party may amend the pleading after the date for filing an opposition to the demurrer or motion to strike, *upon stipulation of the parties*. The time for responding to an amended pleading shall be computed from the date of service of the amended pleading.

(Code Civ. Proc., § 472, subd. (a) [emphasis added].)

Here, Abdo has already amended the pleading several times. Abdo did not seek leave of Court to file the 4ACC nor is there a stipulation between the parties for the amended pleading. Moreover, Abdo has improperly added claims for fraudulent concealment, promise without the intent to perform, breach of fiduciary duty, general negligence, and gross negligence. (See *Patrick v. Alacer Corp.* (2008) 167 Cal.App.4th 995, 1015 [when a demurrer is sustained with leave to amend, the leave *must be* construed as permission to the pleader to amend the causes of action to which the demurrer has been sustained, <u>*not to add entirely new causes of action*</u>] [emphasis added].) Thus, the 4ACC was improperly filed and the TACC is still the controlling pleading.

III. Demurrer

A. Legal Standard for a Demurrer

"The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in [Code of Civil Procedure s]ection 430.30, to the pleading on any one or more of the following grounds: . . (e) The pleading does not state facts sufficient to constitute a cause of action, (f) The pleading is uncertain." (Code Civ. Proc., § 430.10, subds. (e), & (f).) A demurrer may be utilized by "[t]he party against whom a complaint [ ] has been filed" to object to the legal sufficiency of the pleading as a whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).)

The court in ruling on a demurrer treats it "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214.) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

Arrow demurs to the second, third, fourth, fifth, and seventh causes of action on the grounds they are uncertain, time-barred, and/or they fail to allege sufficient facts to state a claim. (See Code Civ. Proc., § 430.10, subd. (e) & (f).)

B. Analysis

1. Uncertainty

Uncertainty is a disfavored ground for demurrer; it is typically sustained only where the pleading is so unintelligible and uncertain that the responding party cannot reasonably respond to or recognize the claims alleged against it. (See *Khoury v. Maly's of Cal, Inc.* (1993) 14 Cal.App.4th 612, 616 (*Khoury*).) "A demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain,

because ambiguities can be clarified under modern discovery procedures." (*Ibid*.) "[U]nder our liberal pleading rules, where the complaint contains substantive factual allegations sufficiently apprising defendant of the issues it is being asked to meet, a demurrer for uncertainty should be overruled or plaintiff given leave to amend. (*Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 139, fn. 2.)

Arrow identified uncertainty as a basis for demurrer for each claim, however it only offers specific argument on this point as to the third and fifth cause of action. Even then Arrows simply contends that Abdo's allegations are non-specific to Arrow and vague. Although Abdo groups Cross-Defendants together at times throughout the pleading, Arrow's contention is without merit as Abdo also specifies allegations against Arrow. (See TACC, ¶¶ 5, 34, 37, 39, 45, 57, 58.)[2] The TACC is also not so unintelligible that Arrow cannot reasonably respond to it. (See *Khoury, supra,* 14 Cal.App.4th at 616.) Thus, the Arrow's demurrer on the basis of uncertainty is OVERRULED.

2. Lack of Duty

Arrow demurs to the entire TACC on the ground it, an insurance broker, did not owe a duty to Abdo, who signed an application for a surety bond.

"Ordinarily, an insurance agent assumes only those duties normally found in any agency relationship. This includes the obligation to use reasonable care, diligence, and judgment in procuring the insurance requested by an insured. The mere existence of such a relationship imposes no duty on the agent to advise the insured on specific insurance matters. 'An agent may point out to [the insured] the advantages of additional coverage, but he is under no obligation to do so; nor is the insured under obligation to respond.'" (*Jones v. Grewe* (1987) 189 Cal.App.3d 950, 954 (*Jones*) [internal citations omitted].)

This argument is procedurally improper as this ground for demurrer was not raised in the notice of motion. (See Cal. Rules of Court, rule 3.1112(d)(3); *Luri v. Greenwald* (2003) 107 Cal.App.4th 1119, 1125 ["A basic principle of motion practice is that the moving party must specify for the court and the opposing party the grounds upon which that party seeks relief]; see also *Gonzalez v. Super. Ct.*

[2] This is not an exhaustive list of allegations against Arrow.

(1987) 189 Cal.App.3d 1542, 1545 [it is elemental that a notice of motion must state in writing the 'grounds upon which it will be made.'"].)

The Court also rejected this argument in its prior order, stating, "the argument fails as duty is not an element of any of the challenged claims on demurrer. Furthermore, cases like *Jones* and others cited in the moving papers address primarily duty in the context of negligence claims which are not at issue on this motion." (October 13 Order, p. 7.) Arrow demurs to the same claims and offers identical argument on this point, therefore, the Court declines to depart from its prior order. Thus, the demurrer to the TACC on the basis that Arrow does not owe a duty to Abdo is OVERRULED.

3. Third Cause of Action: Fraud, Deceit, and Concealment

The elements of fraud, which gives rise to the tort of deceit are: (a) a misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage. (*Lazar v. Superior Ct* (1996) 12 Cal.4th 631, 638.)

Abdo alleges on October 11, 2016, Abdo informed Sanchez that Hudson's surety bond would be signed on behalf of Jalal, who would assume sole responsibility for the surety bond and Sanchez acknowledged, confirmed Abdo's understanding, and did not disclose any information to the contrary. (TACC, ¶ 57.) Sanchez's confirmation and acknowledgement induced Abdo to sign Hudson's surety bond, which Hudson approved and issued effective October 17, 2016. (*Ibid*.) On November 3, 2016, Arrow informed FWC that Hudson was cancelling the bond and offered to find a replacement. (TACC, ¶ 58.) Arrow emailed a Filled-Out Application from Aegis to FWC through Sanchez. (*Ibid*.) Abdo again informed Arrow and Sanchez that he would be signing on behalf of Jalal. (*Ibid*.) Sanchez again confirmed and acknowledged that Jalal was the responsible party. (*Ibid*.) The acknowledgement and confirmation of *Abdo's* representations regarding his responsibilities or lack thereof does not constitute a misrepresentation by Arrow or Sanchez without *any specific facts* as to the alleged acknowledgement and confirmation. Thus, Abdo fails to allege any misrepresentation by Arrow (or Sanchez) regarding the bond's responsibility. (See *West v. JP Morgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 793 ["Fraud must be pleaded with specificity rather than with 'general and conclusory allegations'"].) To the extent Abdo relies on the Filled-Out Application (TACC, ¶ 45), it does not constitute a

misrepresentation to Abdo. Moreover, Abdo concedes the information did not reflect him and "therefore he thought that the information in the Filled-Out Application was for Jalal or obtained from him or his son." (*Ibid*.) Thus, Abdo does not allege any misrepresentations to him by Sanchez regarding the Filled-Out Application.

Abdo also alleges this claim based on concealment.

The elements of 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 plaintiffs, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiffs, (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 damages. (*Jones v. ConocoPhillips* (2011) 198 Cal.App.4th 1187, 1198 (*Jones*).)

"To maintain a cause of action for fraud through nondisclosure or concealment of facts, there must be allegations demonstrating that the defendant was under a legal duty to disclose those facts. (*Los Angeles Memorial Coliseum Commission, et al. v. Insomniac, Inc. et al.* (2015) 233 Cal.App.4th 803, 831.) "There are four circumstances in which nondisclosures or concealment may constitute actionable fraud: (1) where the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts. (*LiMandri v. Judkins* (1997) 52 CalApp.4th 326, 336, quoting *Heliotis v. Schuman* (1986) 181 Cal.App.3d 646, 651.)

Abdo alleges Sanchez did not reveal or disclose any information contrary to the fact that Jalal would be the only one responsible for the surety bond. (TACC, ¶¶ 57, 58.) In arguing Arrow had a duty to disclose, Abdo relies on *Marketing West, Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 612-613 (*Marketing West*), which stated,

> Although one may be under no duty to speak as to a matter, if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he

tells but also not to suppress or conceal any facts within his knowledge which materially qualify those stated. If he speaks at all he must make a full and fair disclosure.

(*Id.* at p. 613, quoting *Roger v. Warden* (1942) 20 Cal.2d 296, 289.)

Abdo's reliance on the principle articulated in *Marketing West, supra*, is unavailing because he fails to allege what Sanchez said to him that would constitute providing some information that would oblige Sanchez to disclose all other facts which materially qualify the limited facts disclosed. Thus, Arrow persuasively argues there are no facts to support a duty (or duty to disclose) to support a claim for concealment. Moreover, the concealment claim has not been alleged with the requisite specificity to state a cause of action. (See *Dhital v. Nissan North America, Inc.* (2022) 84 Cal.App. 5th 828, 843, 844 ["Fraud, including concealment, must be pleaded with specificity"].)

Abdo requests leave to amend his claim, however, he fails to state how he can do so. (See *Camsi IV v. Hunter Technology Corp*. (1991) 230 Cal.App.3d 1525, 1542 (*Camsi IV*) ["absent an effective request for leave to amend in specified ways," it is an abuse of discretion to deny leave to amend "only if a potentially effective amendment were both apparent and consistent with the plaintiff's theory of the case"]; *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349 (*Goodman*) ["Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading"], quoting *Cooper v. Leslie Salt Co*. (1969) 70 Cal.2d 627, 636 (*Cooper*); *Hendy v. Losse* (1991) 54 Cal.3d 723, 742 (*Hendy*) ["the burden is on the plaintiff… to demonstrate the manner in which the complaint might be amended"].) Thus, Arrow's demurrer to the third cause of action is SUSTAINED WITHOUT LEAVE TO AMEND. Having sustained the demurrer on this ground, the Court declines to address the statute of limitations argument.

4. Fourth Cause of Action: Negligent Misrepresentation

"The elements of a negligent misrepresentation are '(1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage.' Negligent misrepresentation does not require knowledge of falsity, unlike a cause of action for fraud." (*Tindell v. Murphy* (2018) 22 Cal.App.5th 1239, 1252.)

Abdo alleges Arrow's statements or misrepresentations/concealments induced him to act or refrain from acting in the way he did. (TACC, ¶ 70.) However, as the Court stated above, Abdo fails to allege specific facts regarding misrepresentations made to him *by Arrow or Sanchez*. (See *Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1166 (*Daniels*), overruled in part on a different ground in *Sheen v. Wells Fargo Bank, N.A.* (2022) 12 Cal.5th 905, 919 ["Causes of action for intentional and negligent misrepresentation sound in fraud and, therefore each element must be pleaded with specificity"].) Therefore, Abdo fails to state sufficient facts to state a negligence misrepresentation claim. Thus, Arrow's demurrer to the fourth cause of action is SUSTAINED WITHOUT LEAVE TO AMEND. Having sustained the demurrer on this ground, the Court declines to address the statute of limitations argument.

5. Fifth Cause of Action: Intentional Misrepresentation

The elements of intentional misrepresentation are: (1) a misrepresentation; (2) knowledge of its falsity; (3) the defendant's intent to induce the plaintiff's reliance on the misrepresentation; (4) the plaintiff's actual and justifiable reliance; and (5) resulting damage. (*Chapman v. Skype, Inc.* (2013) 220 Cal.App.4th 217, 230-231 (*Chapman*).)

Abdo alleges Arrow made false statements, assertions, and representations to him. (TACC, ¶ 76.) However, as the Court stated above, Abdo fails to specify what those alleged misrepresentations were. (See *Daniels, supra,* 246 Cal.App.4th at p. 1166.) Therefore, Abdo fails to allege sufficient facts to state this claim. Thus, Arrow's demurrer is SUSTAINED WITHOUT LEAVE TO AMEND. Having sustained the demurrer on this ground, the Court declines to address the statute of limitations argument.

6. Second Cause of Action: Unlawful, Unfair, or Fraudulent Business Acts and Practices

"The UCL defines 'unfair competition' to 'mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising' and any act prohibited by [Business and Professions Code] section 17500." (*Searle v. Wyndham Int'l* (2002) 102 Cal.App.4th 1327, 1332-1333 (*Searle*).) "Section 17200 'is not confined to anticompetitive business practices, but is also directed towards the public's right to protection from fraud, deceit, and unlawful conduct. Thus, California courts have consistently interpreted the language of section 17200 broadly." (*South Bay*

Chevrolet v. General Motor Acceptance Corp. (1999) 72 Cal.App.4th 861, 877-878 [internal citations omitted].) "The statute prohibits 'wrongful business conduct in whatever context such activity might occur.'" (*Searle, supra*, 102 Cal.App.4th at p. 1333.)

Abdo groups the Cross-Defendants' conduct together, but as relevant to Arrow, he alleges it engaged in unfair and unlawful business practices when it: (1) deliberately failed to disclose any information contrary to what they represented regarding only Jalal being responsible for the surety bonds; (2) misrepresented its authority to negotiate the final terms of the transaction; and (3) concealed vital facts about Abdo's responsibility or potential responsibility towards the surety bonds. (TACC, ¶¶ 38, 42, 44.) As a result, he was damaged by $2,000 per month since 2018, totaling $96,000. (TACC, ¶ 46.)

Under the UCL, an "unlawful" business activity includes anything that can properly be called a business practice and that at the same time is forbidden by law. (*Smith v. State Farm Mutual Automobile Ins. Co.* (2001) 93 Cal.App.4th 700, 717-718.) "Virtually any law—federal, state, or local—can serve as a predicate for an action under [Section 17200]." (*Id*. at p. 718.) "It is fairly said that section 17200 'borrows' violations of other laws and treats them as 'unlawful practices' independently actionable under the unfair competition law." (*Ibid*.)

Abdo alleges Arrow violated Civil Code Section 1770, subdivision (a)(16) and (18), which provide, "the unfair methods of competition and unfair or deceptive acts or practices listed in this subdivision undertaken by any person in a transaction intended to result or that results in the sale or lease of goods or services to any consumer are unlawful: (16) Representing that the subject to a transaction has been supplied in accordance with a previous representation when it has not; and (18) Misrepresenting the authority of a salesperson, representative, or agent to negotiate the final terms of a transaction with a consumer." (Civ. Code, § 1770, subd. (a)(1) & (18).)

However, Abdo fails to allege any misrepresentation by Sanchez regarding *his authority to negotiate* the final terms of the transaction. Moreover, while he alleges a violation of Civil Code section 1770, subdivision (a)(16), it appears Abdo alleges that both transactions had the same issues (i.e., that the same misrepresentation was made regarding both surety bonds) thus, they were in accordance with one another. (See TACC, ¶¶ 57, 58.) Thus, Abdo fails to allege any violation of law to support his

claim. (See *Khoury, supra,* 14 Cal.App.4th at p. 619 ["A plaintiff alleging unfair business practices under this statute must state with reasonable particularity the facts supporting the statute elements of the violation"].)

To the extent Abdo bases this claim on his fraud claims, the UCL claim fails as a matter of law because the demurrer has been sustained to the fraud claims. (See *Krantz v. BT Visual Images, LLC* (2001) 89 Cal.App.4th 164, 178 [stating that the viability of a UCL claim stands or falls with the antecedent substantive causes of action].) Thus, Arrow's demurrer to the second cause of action is SUSTAINED WITHOUT LEAVE TO AMEND. Having sustained the demurrer on this ground, the Court declines to address the statute of limitations argument.

7. Seventh Cause of Action: Financial Elder Abuse

> Financial abuse of an elder or dependent adult occurs when a person or entity does any of the following:
>
> (1) Takes, secretes, appropriates, obtains, retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.
>
> (2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.
>
> (3) Takes, secrets, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult by undue influence, as defined in Section 15610.70.

(Welf. & Inst. Code, § 15610.30, subd. (a).)

"A person or entity shall be deemed to have taken, secreted, appropriated, obtained, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains the property and the person or entity knew or should have known that this conduct is likely to be harmful *to the elder or dependent adult*." (Welf. & Inst. Code, § 15610.30, subd. (b) [emphasis added].)

"For purposes of this section, a person or entity takes, secretes, appropriates, obtains, or retains real property when an elder or dependent adult is deprived of any property right, including by means of

an agreement, donative transfer, or testamentary bequest, regardless of whether the property is held directly or by a representative of an elder or dependent adult." (Welf. & Inst. Code, § 15610.30, subd. (c).)

Financial elder abuse claims, like other statutory claims, must be pled with particularity. (See *Covenant Care, Inc. v. Super. Ct.* (2004) 32 Cal.4th 771, 790 [financial elder abuse claims must be pled with particularity]; see also *Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 407, 410.)

This claim is based on Arrow's alleged representations regarding the surety bonds. However, Abdo fails to allege Arrow took, secreted, obtained, retained, or appropriated Abdo's real or personal property. (See Welf. & Inst. Code, § 15610.30, subds. (a) - (c).) Thus, Arrow's demurrer to the seventh cause of action is SUSTAINED WITHOUT LEAVE TO AMEND. Having sustained the demurrer on this ground, the Court declines to address the statute of limitations argument.

IV. Motion to Strike

On October 18, 2023, the Court (Hon. Manoukian) granted Arrow's motion to strike the request for restitution and punitive damages from the SACC. (See October 18, 2023, Order.)[3] Abdo also failed to file an opposition. "[T]he failure to file an opposition creates an inference that the motion or demurrer is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410; see also Cal. Rule of Ct., rule 8.54(c) ["[a] failure to oppose a motion may be deemed a consent to granting the motion."])

Thus, Arrow's motion to strike is GRANTED.

[3] The Court adopted a proposed order by Arrow, which was filed by the Court on October 20, 2023.

Calendar Lines 3-4
Case Name: *M.K. et al. v. Roman Catholic Bishop of San Jose, et al.*
Case No.: 21CV392393

Before the Court is defendant California Friends of the Sacerdotal International Fraternity of Saint Pius X, Inc.'s ("St. Pius") and St. Aloysius Retreat House's ("St. Aloysius") (collectively, "Defendant") demur to plaintiff M.K.'s third amended complaint ("TAC") and motion to strike portions contained therein.[4] Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background

This is action arises out of alleged sexual abuse suffered by Plaintiff when she was a student at St. Aloysius. (TAC, ¶ 28.) In 1997, when Plaintiff was four years old, she participated in school related and after-school activities at St. Aloysius. (TAC, ¶¶ 30.) Father Benedict Van Der Putten ("Van Der Putten") was a priest at St. Aloysius and he sexually abused and assaulted Plaintiff multiple times from 1997 to 1999, when Plaintiff was six years old. (*Ibid*.) Van Der Putten's inappropriate behavior included being physically touchy with the children in the presence of other workers, nuns, teachers, and parents. (TAC, ¶ 31.) Also, he picked Plaintiff up in the presence of employees during camp, gave her gifts, and openly isolated her during summer camp activities for one-on-one hikes. (*Ibid*.) St. Aloysius staff members left Plaintiff alone with Van Der Putten on multiple occasions and he sexually abused her while she was under his supervision, authority, and control. (TAC, ¶ 33.) Van Der Putten's inappropriate behavior was well known at St. Aloysius as multiple children reported Van Der Putten's inappropriate behavior long before he sexually assaulted and abused Plaintiff. (TAC, ¶ 34.) Despite the foregoing, no action was taken, no investigation was completed, and Van Der Putten continued to work at St. Aloysius and sexually abused Plaintiff. (TAC, ¶ 36.)

Plaintiff initiated this action on December 17, 2021, asserting negligence and negligent retention and supervision. On April 21, 2023, Plaintiff filed her FAC, asserting (1) negligence against St. Aloysius; (2) negligence against St. Pius; (3) negligence against DOES 4 through 25; (4) negligent hiring, retention, and supervision against St. Aloysius; (5) negligent hiring, retention, and supervision

[4] St. Aloysius is the fictitious business name through which St. Pius operates. In the notice of demurrer, St. Pius states its brings the motion "individually and d/b/a St. Aloysius" and refers to themselves as "Defendant", thus the Court will refer to them as one entity, except where otherwise stated. (See Notice of Demurrer, p. 1:24-26.)

against St. Pius; and (6) negligent hiring, retention, and supervision against DOES 4 through 25. On September 19, 2023, the Court issued its order sustaining Defendants' demurrers with leave to amend. On October 4, 2023, Plaintiff filed her SAC, which asserted the same claims. On December 21, 2023, the Court issued its order sustaining Defendants' demurrers, with leave to amend.

On January 10, 2024, Plaintiff filed her TAC, which asserts claims for (1) negligence against St. Aloysius; (2) negligence against St. Pius; (3) negligence against DOES 5 through 25; (4) negligent hiring, retention, and supervision against St. Aloysius; (5) negligent hiring, retention, and supervision against St. Pius; and (6) negligent hiring, retention, and supervision against DOES 5 through 25. On February 5, 2024, Defendant filed the instant motions which Plaintiff opposes.

II. Request for Judicial Notice

Defendant requests judicial notice of the following items:

(1) The Articles of Incorporation, filed on February 4, 1975 (Exhibit 1);

(2) The Grant Deed, recorded on August 15, 1991 (Exhibit 2);

(3) The Statement of Information, filed on January 3, 2023 (Exhibit 3); and

(4) The Fictitious Business Name Statement, recorded on September 15, 2019 (Exhibit 4).

The Court may take judicial notice of items one and four because they are official acts of the state. (Evid. Code, § 452, subd. (c) & (h); *Friends of Shingle Springs Interchange, Inc. v. County of El Dorado* (2011) 200 Cal.App.4th 1470, 1484, fn. 12 (taking judicial notice of articles of incorporation); *Jones v. Goodman* (2020) 57 Cal.App.5th 521, 528, fn. 6 (taking judicial notice of articles of incorporation from California Secretary of State's website); *Santa Barbara County Coalition Against Automobile Subsidies v. Santa Barbara County Assn. of Governments* (2008) 167 Cal.App.4th 1229, 1234, fn. 3 (taking judicial notice of articles of incorporation and fictitious business name statement); see also *Cody F. v. Falletti* (2001) 92 Cal.App.4th 1232, 1236, fn. 2 (taking judicial notice of articles of incorporation, stating that it was a proper subject of judicial notice).)

The Court may take judicial notice of property records under Evidence Code section 452, subdivision (c) and (h). (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 264, disapproved of on other grounds by *Yvanova v. New Century Mortg. Corp.* (2016) 62 Cal.4th 919 [stating that "a court may take judicial notice of the fact of a document's recordation, the date the

document was recorded and executed, the parties to the transaction reflected in a recorded document, and the document's legally operative language, assuming there is no genuine dispute regarding the document's authenticity. From this, the court may deduce and rely upon *the legal effect* of the recorded document, when that effect is clear from its face" (emphasis added)].)

The Court will take judicial notice of item three to the extent that the statement of information was filed with the state, but not for the truth of the matters asserted therein. (Evid. Code, subd. (h).) Pursuant to the above, Defendant's request for judicial notice is GRANTED.

III. Demurrer

A. Legal Standard

"The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in [Code of Civil Procedure s]ection 430.30, to the pleading on any one or more of the following grounds: . . . (e) The pleading does not state facts sufficient to constitute a cause of action, (f) The pleading is uncertain." (Code Civ. Proc., § 430.10, subds. (e) & (f).) A demurrer may be utilized by "[t]he party against whom a complaint [ ] has been filed" to object to the legal sufficiency of the pleading as a whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).)

The court treats a demurrer "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214 (*Committee on Children's Television*).) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

Defendant demurs to the TAC on the ground that the first, second, fourth, and fifth causes of action do not allege sufficient facts to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

1. First and Second Causes of Action: Negligence

"An action in negligence requires a showing that the defendant owed the plaintiff a legal duty, that the defendant breached the duty, and that the breach was a proximate or legal cause of injuries suffered by the plaintiff." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673.) "The issue of whether a legal duty exists is an issue of law, not an issue of fact for the jury." (*Kentucky Fried Chicken of California, Inc. v. Superior Court* (1997) 14 Cal.4th 814, 819.) The existence and scope of a duty of care is a question of law for the court even at the pleading stage. (See *Melton v. Boustred* (2010) 183 Cal.App.4th 521, 531.

As a general rule, there is no duty to control the conduct of another or to warn those endangered by such conduct. (*Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, 619 (*Regents*).) However, this rule is not absolute. (See *Brown v. USA Taekwondo* (2021) 11 Cal.5th 204, 215 (*Brown*).) "Under some circumstances, a defendant may have an affirmative duty to protect the plaintiff from harm at the hands of a third party, even though the risk of harm is not of the defendant's own making." (*Ibid*.)

In *Brown*, the California Supreme Court established a two-step inquiry to determine whether a defendant has a legal duty to take action to protect a plaintiff from injuries caused by a third party: "[f]irst, the court must determine whether there exists a special relationship between the parties or some other set of circumstances giving rise to an affirmative duty to protect. Second, if so, the court must consult the facts described in *Rowland v. Christian* (1968) 69 Cal.2d 108 (*Rowland*) to determine whether relevant policy considerations counsel limiting that duty. (*Brown, supra,* 11 Cal.5th at 209.)

a. Whether Defendants Had a Special Relationship with Plaintiff

A special relationship between the defendant and the victim is one that "gives the victim a right to expect" protection from the defendant, while a special relationship between the defendant and the dangerous third party is one that "entails an ability to control [the third party's] conduct." (*Regents, supra,* 4 Cal.5th at 619.) The "common features" of a special relationship include "an aspect of

dependency in which one party relies to some degree on the other for protection" and the other party has "superior control over the means of protection." (*Id*. at pp. 620-621.)

"California courts have frequently recognized special relationships between children and their adult caregivers that give rise to a duty to prevent harms caused by the intentional or criminal conduct of third parties." (*Doe v. United States Youth Soccer Assn., Inc.* (2017) 8 Cal.App.5th 1118, 1129 (*United States Youth Soccer*).) Courts have found special relationships between a church and a minor child where the child was dropped off at a church for catechism classes by the child's parents (see *Doe v. Roman Catholic Archbishop of Los Angeles* (2021) 70 Cal.App.5th 657); a church and its campers where the church acted as a daycare provider (see *Doe v. Superior Court* (2015) 237 Cal.App.4th 239, 246); and a church and its minor members where the church assigned the child to perform field service, which was a church-sponsored activity, alone with an abusive member (see *Conti v. Watchtower Bible & Tract Society of New York, Inc.* (2015) 235 Cal.App.4th 1214, 1217, 1235 [stating "[Plaintiff] was harmed during a church-sponsored activity, and defendants' control over that activity placed them in special relationships with [Defendant] and [Plaintiff] thus requiring them to take reasonable steps to prevent the harm from occurring."].)

"The existence of such a special relationship puts the defendant in a unique position to protect the plaintiff from injury. The law requires the defendant to use this position accordingly." (*Brown, supra*, 11 Cal.5th at 220.) Where there is a special relationship between the defendant and a minor, the obligation to provide protection and assistance may include a duty to protect the minor from third party abuse. (*Id*. at 220.)

Van Der Putten was a priest that was employed, controlled, and/or supervised by Defendant. (TAC, ¶ 4.) He acted as Defendant's agent, subject to its direction, control, and supervision. (*Ibid*.) Thus, Defendant had the ability to control his conduct and there was a special relationship between Van Der Putten and Defendant. (*Regents, supra,* 4 Cal.5th at 619.)

Plaintiff was a student at St. Aloysius and she participated in Defendant's school-related and after-school activities. (TAC, ¶ 28-29.) Plaintiff was 4 years old when the alleged abuse started. (TAC, ¶ 30.) The acts of sexual abuse and assault occurred on the St. Aloysius premises. (*Ibid*.) While Plaintiff participated in the activities, Defendant had "superior control over the means of protection."

(*Regents, supra,* 4 Cal.5th at 620-621.) Defendant, through its teachers and priests, assumed responsibility for the safety of the students in their care. (*United States Youth Soccer, supra,* 8 Cal.App.5th at 1130.) Thus, there was a special relationship between Defendant and Plaintiff because of her participation in the school related and after-school activities. (*Regents, supra,* 4 Cal.5th at 625.)

b. The *Rowland* Factors

The second step in the *Brown* framework is to consult the *Rowland* factors to determine whether relevant policy considerations counsel limiting that duty. (*Brown, supra*, 11 Cal.5th at 209.) The *Rowland* factors are "the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved. (*Rowland, supra,* 69 Cal.2d at 113.)

"The *Rowland* factors fall into two categories. The first group involves foreseeability and the related concepts of certainty and the connection between plaintiff and defendant. The second embraces the public policy concerns of moral blame, preventing future harm, burden, and insurance availability. (*Regents, supra*, 4 Cal.5th at 629.) "The most important factor to consider in determining whether to create an exception to the general duty to exercise ordinary care… is whether the injury in question was ***foreseeable***." (*Ibid*, emphasis original.) "The duty analysis [under *Rowland*] is categorical, not case specific." (*Ibid.*)

Plaintiff alleges Van Der Putten was touchy with the children at the camp, he picked Plaintiff up and gave her gifts, and took her on one-on-one hikes. (TAC, ¶ 31.) Plaintiff further alleges that his inappropriate behavior was well known and multiple children reported said behavior to Defendant, long before Van Der Putten sexually assaulted and abused Plaintiff. (TAC, 34.) On September 11, 1997, Defendant wrote a letter to Van Der Putten, stating:

> The accusations made against you are serious. They are made to your superior by a fellow priest who takes them seriously. Consequently, you need to take each one separately, and answer the accusations as to whether it is true or false. See if there is any

part of truth, or where the accusation might have come from. Point out, if you can, the context out of which they might have been taken. Finally give your opinion on the issues raised, so that there can be no doubt as to where you stand.

(TAC, ¶ 35.)

The following day, Defendant wrote him saying they had a problem with his "familiarity with the smaller girls (7-9 years), all wanting to be next to you, because you take them by the hand, and allow them to lean against you. They also made remarks about your touching and squeezing older girls, of being too familiar during the conferences, of passing by the cabins in the evenings, passing by the swimming pool while the girls are swimming, and of joining in the game with the older girls (thus obliging the sisters to leave)." (TAC, ¶ 36.)

Based on these allegations, it appears Defendant was on notice of Van Der Putten's behavior such that the injury to Plaintiff was foreseeable. Furthermore, Plaintiff was injured, Defendant's conduct was connected to her injury, and policy supports prevention of future harm. Although Defendant may be burdened by the imposition of a duty to exercise care with resulting liability for breach, the *Rowland* factors do not support limiting the duty. Defendant fails to provide any authority that requires a heightened pleading standard for negligence, nor does Defendant offer any other arguments regarding this claim. Plaintiff sufficiently alleges facts to state a claim for negligence. (See TAC, ¶¶ 53-70.) Thus, the demurrer to the first and second causes of action is OVERRULED.

2. Fourth and Fifth Causes of Action: Negligent Hiring, Retention, and Supervision

To state a claim for negligent hiring, training, and/or retention, Plaintiff must allege: (i) defendant hired or retained an employee; (ii) who is incompetent or unfit; (iii) defendant had reason to believe undue risk of harm would exist because of the employment; and (iv) resulting harm. (*Frederico v. Super. Ct.* (1997) 59 Cal.App.4th 1207, 1213-1214.)

"California case law recognizes the theory that an ***employer*** can be liable to a third person for negligently hiring, supervising, or retaining an unfit employee. Liability is based upon the facts that the employer knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materializes." (*Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1054 (emphasis added, internal citations omitted); see also CACI, No. 426.)

"'An employer may be liable to a third person for the employer's negligence in hiring or retaining an employee who is incompetent or unfit.' 'Liability for negligent hiring … is based upon the reasoning that if an enterprise hires individuals with characteristics which might pose a danger to customers or other employees, the enterprise should bear the loss caused by the wrongdoing of its incompetent or unfit employees.' Negligence liability will be imposed on an employer if it 'knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materializes.'" (*Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1139 [internal citations omitted]; see also *Federico v. Superior Court* (1997) 59 Cal.App.4th 1207.)

As the Court stated above, Plaintiff sufficiently alleges that Defendant had notice of Van Der Putten's behavior such that it knew or should have known of the particular risk (inappropriate behavior with the children) and that Van Der Putten engaged in such behavior. Defendant does not raise any other arguments regarding this claim. Plaintiff alleges sufficient facts to state this claim. (See TAC, ¶¶ 80-101.) Thus, the demurrer to the fourth and fifth causes of action is OVERRULED.

IV. Motion to Strike

Defendant moves to strike paragraphs 35 and 36 from the TAC.

A. Legal Standard

Under Code of Civil Procedure section 436, a court may strike out any irrelevant, false, or improper matter inserted into any pleading or strike out all or part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court. (Code Civ. Proc., § 436.) The grounds for a motion to strike must appear on the face of the challenged pleading or from matters of which the court may take judicial notice. (Code Civ. Proc., § 437, subd. (a); see also *City and County of San Francisco v. Strahlendorf* (1992) 7 Cal.App.4th 1911, 1913.) In ruling on a motion to strike, the court reads the complaint as a whole, all parts in their context, and assumes the truth of all well-pleaded allegations. (See *Turman v. Turning Point of Central California, Inc.* (2010) 191 Cal.App.4th 53, 63 (*Turman*), citing *Clauson v. Super. Ct.* (1998) 67 Cal.App.4th 1253, 1255.) "Thus, for example, defendant cannot base a motion to strike the complaint on affidavits or declarations containing extrinsic evidence showing that the allegations are 'false' or 'sham.'" (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2020) 7.169.)

A motion to strike portions of a complaint or petition may be brought on the ground that the allegations at issue are "irrelevant" or "improper." (Code Civ. Proc., § 436, subd. (a).) Irrelevant matter includes (1) an allegation that is not essential to the statement of a claim or defense, (2) an allegation that is neither pertinent to nor supported by an otherwise sufficient claim or defense, and (3) a demand for judgment requesting relief not supported by the allegations of the complaint or cross-complaint. (See Code Civ. Proc., § 431.10, subds. (b), (c).) Generally speaking, motions to strike are disfavored and cannot be used as a vehicle to accomplish a "line item veto" of allegations in a pleading. (*PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1683 (*PH II, Inc.*).) However, where irrelevant allegations are "scandalous, abusive, disrespectful and contemptuous," they should be stricken from the pleading. (*In re Estate of Randall* (1924) 194 Cal. 725, 731.)

"While under Code of Civil Procedure section 436, a court at any time may, in its discretion, strike portions of a complaint that are irrelevant, improper, or not drawn in conformity with the law, matter that is essential to a cause of action should not be struck and it is error to do so. Where a whole cause of action is the proper subject of a pleading challenge, the court should sustain a demurrer to the cause of action rather than grant a motion to strike." (*Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1281, internal citations omitted.)

B. Analysis

Defendant contends paragraphs 35 and 36 are taken out of context and do not include the contents of a prior letter sent by Defendant, which is attached to Defendant's motion. However, the Court cannot consider evidence outside of the pleading, except for matters that can be judicially noticed. (Code Civ. Proc., § 437, subd. (a).) The exhibit has not been judicially noticed. Because the deficiency does not appear on the face of the pleading or from matters that have been judicially noticed, the motion to strike is DENIED.

Calendar Line:
Case Name: *Dr. John Kelley v. City of San Jose, et.al. and related cross-claims*
Case No.: 20CV373055

Before the Court is Defendant and Cross-complainant, Bay Area Trenchless' ("BAT") motion for summary judgment against Plaintiff Dr. John Kelley's complaint. Pursuant to the California Rule of Court, Rule 3.1308, the Court issues its tentative ruling.

I. Background

On October 15, 2019, Plaintiff was riding his bicycle to the top of San Felipe Road and back. As he rode outbound (toward the hills) he noted there was road work marked by orange cone on the shoulder of the road and noticed a steel plate across the outbound lanes. On the ride back, Plaintiff was traveling 25 mph when he got to the condition and saw that the steel plate across the inbound lanes did not fully cover the trench and left two shallow cutouts on either side of the asphalt. (Plaintiff's Response to Defendant's Separate Statement of Undisputed Material Facts ("RSSUF") Nos. 2, 3, 6.) Aside from an orange cone on the shoulder of the inbound lane, there were no written signs warning of the roadwork ahead or that there was uneven pavement. (Kelley Decl. Exhibits 2-6.) To avoid the condition, Plaintiff attempted to jump/"bunny hop" over the opening. When he landed at the far side of the trench, his rear wheel failed to clear the cutout and hit the back edge, flattening his tire. He did not fall, nor did he suffer any injuries because of the accident. (RSSUF Nos. 7, 8.)

On October 18, 2019, Plaintiff took his bike to Bicycle Express LLC ("BEX"), for inspection, assessment, and necessary repairs. (RSSUF No. 9.) The bicycle was returned to BEX the following day when the rear tire became flat again and consequently the tube of the tire was replaced (RSSUF No. 10.)

On October 24, 2019, Plaintiff again went on a ride on San Felipe Road, and road repairs were complete. This time, as he started downhill on his return trip, Plaintiff felt the bicycle's rear wheel lock up, which caused him to lose control of the bike and sustain severe injuries when it crashed. (RSSUF No. 12.)

On November 4, 2020, Plaintiff filed a lawsuit against the City of San Jose, County of Santa Clara, BAT, and BEX, alleging negligence and dangerous condition of public property. (RSSUF ¶ 1.)

II. Legal Standard

Motions for summary judgment are governed by Code Civ. Proc. § 437c, which allows a party to "move for summary judgment in an action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding." (C.C.P. § 437c(a)(1).) The function of a motion for summary judgment or adjudication is to allow a determination as to whether an opposing party cannot show evidentiary support for a pleading or claim and to enable an order of summary dismissal without the need for trial. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 843.) Code Civ. Proc. § 437c(c) requires "the trial judge to grant summary judgment if all the evidence submitted, and 'all inferences reasonably deducible from the evidence' and uncontradicted by other inferences or evidence, show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (*Adler v. Manor Healthcare Corp.* (1992) 7 Cal.App.4th 1110, 1119.)

"The function of the pleadings in a motion for summary judgment is to delimit the scope of the issues; the function of the affidavits or declarations is to disclose whether there is any triable issue of fact within the issues delimited by the pleadings." (*Juge v. County of Sacramento* (1993) 12 Cal.App.4th 59, 67, citing *FPI Development, Inc. v. Nakashima* (1991) 231 Cal. App. 3d 367, 381-382.) As to each claim framed by the complaint, the defendant moving for summary judgment must satisfy the initial burden of proof by presenting facts to negate an essential element, or to establish a defense. (Code Civ. Pro. § 437c(p)(2); *Scalf v. D. B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1520.) Defendant may satisfy this burden by showing that the claim "cannot be established" because of the lack of evidence on some essential element of the claim. (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 574, 590.) Defendant must present evidence and not simply point out that plaintiff does not possess and cannot reasonably obtain needed evidence. (*Aguilar, supra*, 25 Cal.4th at 865-66.) Thus, a moving defendant has two means by which to shift the burden of proof under the summary judgment statute: "The defendant may rely upon factually insufficient discovery responses by the plaintiff to show that the plaintiff cannot establish an essential element of the cause of action sued upon. [Citation.] [Or a]lternatively, the defendant may utilize the tried and true technique of negating ('disproving') an essential element of the plaintiff's cause of action." (*Leyva v. Garcia* (2018) 20 Cal.App.5th 1095, 1103.)

Until the moving defendant has discharged its burden of proof, the opposing plaintiff has no burden to come forward with any evidence. Once the moving defendant has discharged its burden as to a particular cause of action, however, the plaintiff may defeat the motion by producing evidence showing that a triable issue of one or more material facts exists as to that cause of action. (Code Civ. Proc. §437c(p)(2).) Courts "liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party." (*Dore v. Arnold Worldwide, Inc*. (2006) 39 Cal.4th 384, 389.)

III. Request for Judicial Notice

BAT's request for judicial notice of the Vehicle Code § 21202, is GRANTED pursuant to Evid. Code §452 (a).

IV. Evidentiary Objections

Plaintiff's objections are SUSTAINED as to Catherine Adams' declaration paragraphs 6, 7, 8, 9, 10, and 11.

V. Analysis

For this motion, BAT accepts its own negligence set in motion a series of events that led to Plaintiff's second accident and injuries. (Motion, p. 9) However, BAT contends its liability was eliminated, as a matter of law, by Plaintiff's and BEX's intervening and superseding conduct.

The elements of a cause of action for negligence are well established. They are "(a) a legal duty to use due care; (b) a breach of such legal duty; [and] (c) the breach as the proximate or legal cause of the resulting injury." (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917.) Causation includes both actual cause and proximate cause. A defendant's negligence is the actual cause of the plaintiff's injury if it is a substantial factor in bringing about the harm. (*Tribeca Companies, LLC v. First American Title Insurance Company* (2015) 239 Cal.App.4th 1088, 1102-03; *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1052-53.)

"A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about." (Rest. 2d Torts, § 440.) A superseding cause relieves a defendant from tort liability for a plaintiff's injuries, only if both the intervening act and the results of the act are not

foreseeable. "[W]hat is required to be foreseeable is the general character of the event or harm … not its precise nature or manner of occurrence." (*Bigbee v. Pacific Tel. & Tel. Co*. (1983) 34 Cal.3d 49, 57–58.) In California the doctrine requires more than mere negligence on the part of the intervening actor. "[T]he fact that an intervening act of a third person is done in a negligent manner does not make it a superseding cause if a reasonable man knowing the situation existing when the act of the third person is done would not regard it as highly extraordinary that the third person so acted or the act is a normal response to a situation created by the defendant's conduct and the manner in which the intervening act is done is not extraordinarily negligent." (*Perez v. VAS S.p.A.,* (2010) 188 Cal. App. 4th 658, 680-81.) "Whether an intervening force is superseding or not generally presents a question of fact but becomes a matter of law where only one reasonable conclusion may be reached. [Citation.]" (*Chanda v. Federal Home Loans Corp*. (2013) 215 Cal.App.4th 746, 756.)

Here, BAT argues:

1. Plaintiff was negligent because (a) he saw the obvious condition of the road on his way out on his ride, (b) on the way back, he failed to be alert to the upcoming hazard, (c) he rode in the center of the lane, below the 35 mph speed limit, in violation of the Vehicle Code section 21202, ensuring he would encounter the hazardous condition, (d) he unsuccessfully attempted to jump over the trench instead of breaking, and (e) pursuant to Evidence Code section 669, Plaintiff's failure to exercise due care is presumed by his violation of the applicable Vehicle Code.
2. BAT could not have foreseen that a bicycle rider would ride in the center lane, at 25 mph in violation of Vehicle Code section 21202. Had Plaintiff rode his bicycle at the speed limit of 35 mph, he likely would have cleared the condition.
3. BEX was negligent in repairing Plaintiff's bicycle as contended in Plaintiff's verified discovery responses.
4. BEX is the only party which had the opportunity to correct any damage that might have caused the bicycle to lock up during the second accident.
5. BAT could not reasonably foresee BEX would negligently inspect and repair any damage that would have led to the second accident.

In support of its argument, BAT submits the following evidence:

- Exhibit A – A true copy of the complaint and its attached exhibits.
- Exhibit B – Photographs of the road condition taken immediately after Plaintiff's first accident.
- Exhibit C – Copy of a Google map depicting the accident site.
- Exhibit D – Copy of the City of San Jose's Resolution setting the speed limits on San Felipe Road.
- Exhibit E – Copy of Plaintiff's verified responses to BEX's special interrogatories.
- Exhibit F – Excerpts from deposition testimony of Dr. Kelley.

Based on this record, BAT fails to meet its burden of showing Plaintiff's and BEX's conduct were intervening and superseding causes of Plaintiff's injuries.

BAT bears the initial burden of proving Plaintiff was negligent as a matter of law. BAT mainly relies on the Vehicle Code section 21202 and the City's speed limit resolution to establish Plaintiff's negligence. But neither Vehicle Code section 21202 nor the City's resolution mandate Plaintiff to travel at 35 mph on San Felipe Road. The speed limit, by its definition, establishes the maximum allowable speed at a particular location; it is not a requirement for drivers, motorists, or bicyclists to maintain that speed. Therefore, Plaintiff was not presumably negligent for merely traveling at 25 mph.

Vehicle Code § 21202(a) also requires a person operating a bicycle on a roadway to ride as close as practicable to the right-hand curb or edge of the road when travelling at a speed less than the normal speed of traffic moving in the same direction at that time. (Vehicle Code § 21202(a).) An exception to this requirement is "when [it is] reasonably necessary to avoid conditions (including, but not limited to, fixed or moving objects, vehicles, bicycles, pedestrians, animals, surface hazards, or substandard width lanes) that make it unsafe to continue along the right-hand curb or edge, subject to the provisions of Section 21656. For purposes of this section, a 'substandard width lane' is a lane that is too narrow for a bicycle and a vehicle to travel safely side by side within the lane." (Vehicle Code § 21202(a)(3).) Simply stated, if conditions allow, a bicyclist is required to ride as close to the right-hand side of the road when riding at a slower speed than of the moving traffic. BAT submits no evidence showing (1) the moving speed of the traffic at the time of Plaintiff's first accident, (2) Plaintiff rode his bike slower than the moving speed of the traffic at the time, or (3) conditions of the road made it safe for Plaintiff to ride along the right-hand curb. BAT's argument that Plaintiff could see and/or was aware of the road's

condition shortly prior to the accident and improperly used the "bunny hop" method to jump the hazardous condition is unsupported by any submitted evidence, and, at most, raises a triable issue of fact. Since BAT fails to establish Plaintiff's negligence, its argument that Plaintiff's negligence was an unforeseeable superseding cause of his own injuries cannot be substantiated.

BAT also assumes BEX's negligence for this motion without providing any foundation or supportive documents for such an assumption. BAT seems to rely on Plaintiff's discovery responses to BEX's special interrogatories No. 9 and 10, which set forth Plaintiff's legal contention that BEX was negligent. Such reliance is insufficient since legal contentions are not evidentiary facts for purposes of summary judgment. (See, *Tuchscher Develop. Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1240.) BAT fails to provide any independent evidence establishing BEX was negligent in inspecting and repairing Plaintiff's bicycle after the first accident. Since BAT fails to establish BEX's negligence, its argument that BEX's negligence was an unforeseeable superseding cause of Plaintiff's injuries cannot be substantiated.

Even if the Court were to assume Plaintiff's and BEX's negligence, BAT is required to prove that Plaintiff's and BEX's actions (1) were highly unusual and extraordinary to the situation presented so as not to be foreseeable, and (2) caused the kind of harm or injury that could not have reasonably been foreseen or expected. (*Bigbee v. Pacific Tel. & Tel. Co*., *supra*, 34 Cal.3d 49, 57–58.) BAT fails to do so. BAT submits no evidence that (1) Plaintiff's use of the middle lane to ride over the trench, especially when safety conditions prohibited use of the right-hand edge of the road, was unusual, (2) it was extraordinary for Plaintiff to seek BEX to repair the resulting damage to his bicycle, (3) it was unusual and extraordinary that BEX failed to repair the bicycle properly, and (4) Plaintiff's injuries were of a kind and degree so far beyond the risk BAT should have foreseen. On this record, the Court cannot conclude, as a matter of law, that Plaintiff's and BEX's conduct were unforeseeable intervening acts and superseding causes of Plaintiff's injuries eliminating BAT's liability.

Accordingly, BAT's motion for summary judgment is DENIED.