SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

(Dept 16 is now hearing cases that were formerly in Dept 2)

Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 12-07-23 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear by video.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.
The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

TO CONTEST THE RULING: Before 4:00 p.m. 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 and contest the ruling
(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

TO APPEAR AT THE HEARING: The Court strongly prefers in person appearances. If you must appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to Department 16.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

TO SET YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. Phone lines are now open for you to call and reserve a date before you file your motion. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Where to call for your hearing date: 408-882-2430 When you can call: Monday to Friday, 8:30 am to 12:30 pm

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

COURT REPORTERS: The Court no longer provides official court reporters. If any party wants a court reporter, the appropriate form must be submitted. See court website for policy and forms.

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	22CV401826 Hearing: Demurrer	Stuart Kirchick vs Allied Telesis, Inc. et al	See Tentative Ruling. The Court will prepare the final order.
LINE 2	23CV414776 Motion: Strike	KIM DIAZ et al vs EQUITY RESIDENTIAL MANAGEMENT, LLC et a	See Tentative Ruling. The Court will prepare the final order.
LINE 3	23CV414776 Hearing: Demurrer	KIM DIAZ et al vs EQUITY RESIDENTIAL MANAGEMENT, LLC et al	See Tentative Ruling. The Court will prepare the final order.
LINE 4	19CV349044 Motion: Summary Judgment/Adjudication	Leslie Nellett vs FORD MOTOR COMPANY et al	See Tentative Ruling. Defendant Ford shall submit the final order within 10 days.

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The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

LINE 5	23CV413337 Motion: Admissions Deemed Admitted	AMERICAN EXPRESS NATIONAL BANK vs SHAUKAT SHAMIM et al	Notice appearing proper, the unopposed motion to deem requests for admissions set one requests 1-9 admitted and for sanctions in the amount of $360 is GRANTED. The failure to file a written opposition "'creates an inference that the motion or demurrer is meritorious.'" *Sexton v. Superior Court* (1997) 58 Cal.App.4th 1403, 1410. Defendant shall pay the sanctions within 20 days of the final order. Plaintiff shall submit the final order within 10 days.
LINE 6	18CV339157 Hearing: Motion for A/F after special mtn strike	Spielbaur Law Office v Midland Funding, LLC et al	See Tentative Order. Defendants shall submit the final order within 10 days.
LINE 7	18CV339157 Hearing: Motion A/F after Appeal of Atty fee award	Spielbaur Law Office v Midland Funding, LLC et al	See Tentative Order. Defendants shall submit the final order within 10 days.
LINE 8	20CV366503 Motion: Order imposing issue, terminating and monetary sanctions	Spartan Tank Lines, Inc vs Anna Le et al	Notice appearing proper, Plaintiff's unopposed motion for issue sanctions for those issues set out in the List of Facts for Issue Sanctions Regarding Fraudulent Transfer, Nos. 1-86 (filed 8/28/23) is GRANTED. Plaintiff shall submit the final order.
LINE 9	23CV417611 Motion: Change of Venue	Ventana Development Company, Inc., a California corporation et al vs Ernest Gudel	See Tentative Ruling. Plaintiffs shall submit the final order.

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

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Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.
The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

LINE 10	23CV419904 Motion: Order for prejudgment possession	Santa Clara Valley Transportation Authority vs Salvador Torres et al	Given the stipulation the Court grants the Motion. The Cout will sign the order as submitted by Plaintiff and also intends to sign the submitted order for withdrawal of deposit.
LINE 11			
LINE 12			

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Calendar Line 1
Case Name: *Kirchick v. Allied Telesis, Inc., et al.*
Case No.: 22CV401826

I. Factual and Procedural Background[1]

Plaintiff Stuart Kirchick ("Plaintiff") brings this action against defendants Allied Telesis, Inc. ("ATI"), Allied Telesis Holdings K.K. ("ATKK"), and Does 1-10 (collectively, "Defendants").

Plaintiff was hired as Senior Legal Counsel for ATI on December 1, 2011 at a rate of $60,000 annually and full benefits. (Second Amended Complaint ("SAC"), ¶ 12.) In addition to his employment at ATI, Plaintiff maintained his own private law practice. (*Ibid*.)

In or around 2013, ATI became involved in litigation against another company. (SAC, ¶ 13.) Plaintiff was involved in managing outside counsel, consulting with outside counsel and ATI executives, researching areas of law for discussion with outside counsel, participating in witness and export depositions, participating in mediations, and having settlement discussions with the other company's general counsel. (*Ibid*.)

In 2020, it was determined that ATKK was the proper plaintiff for the other litigation, not ATI. (SAC, ¶ 14.) Plaintiff was heavily involved in the litigation and "[a]s the case geared up for trial, ATI and ATKK asked [Plaintiff] to ramp up his time and assist the outside counsel in successfully prosecuting the litigation." (*Ibid*.) Thereafter, ATI and ATKK entered into an agreement with Plaintiff which included, inter alia, an agreement to pay Plaintiff a monthly, contingent, recoverable bonus draw of $15,000 ("the draw"). (*Id.* at ¶ 16.)

On or about September 2020, Ash Padwal ("Mr. Padwal"), ATI's Chief Risk Officer and Board Member of ATKK, told Plaintiff that ATKK was paying out too much in legal fees to outside counsel and could no longer pay the draw promised in the 2020 plan. (SAC, ¶ 17.) However, Mr. Padwal assured Plaintiff he would be getting a substantial bonus when litigation concluded. (*Ibid*.)

In January 2021, Plaintiff called Mr. Padwal to tell him he could not continue to take resources away from his law practice while working on the other litigation without a draw unless he could count on a bonus. (SAC, ¶ 18.) Mr. Padwal told Plaintiff that ATKK CEO

[1] As the Court previously granted motions to seal in this case, this ruling excludes allegations redacted from the pleadings and is therefore not a complete version of the facts alleged by Plaintiff. The court has nonetheless considered the redacted allegations in connection with its review of the instant motion.

Takayoshi Oshima wanted Plaintiff to continue in the litigation and he would "ensure Plaintiff would be compensated for his continued close involvement[.]" (*Ibid*.)

In February 2021, ATI presented Plaintiff with another compensation agreement with the same compensation bonus offered except that Plaintiff was no longer receiving a monthly draw. (SAC, ¶ 19.) Plaintiff agreed to this "because the litigation was looking more likely to conclude in [ATKK's] favor and Plaintiff anticipated being paid a substantial bonus." (*Ibid*.) Plaintiff signed this plan in May 2021 when "it was contemplated that the litigation would resolve or commence trial in 2021." (*Id*. at ¶ 20.) However, due to COVID-19 delays in July 2021, there were no available courtrooms in Santa Clara County for the underlying case to proceed to trial. (*Id*. at ¶ 21.)

On December 13, 2021, the case was set for trial but was then continued to January 10, 2022 at the request of ATKK based on travel difficulties and because they did not want to remain in the United States while the Court was in recess in December. (SAC, ¶ 21.) As the trial date neared, Plaintiff set aside most of his other work to focus on the litigation, anticipating the substantial bonus. (*Id*. at ¶ 22.)

On December 27, 2021, mediation between ATKK/ATI failed and Plaintiff prepared for trial. (SAC, ¶ 23.) Mr. Padwal assured Plaintiff that he would speak with him about his bonus and everyone should remain focused on the trial. (*Ibid*.) Mr. Padwal's conduct and statements assured Plaintiff he would be paid his bonus so he focused on litigation rather than negotiating a bonus renewal. (*Ibid*.)

During the first week of January 2022, Plaintiff had repeated conversations with Mr. Padwal, wherein Mr. Padwal said that he should keep working hard to get the case settled because of the bonus agreements. (SAC, ¶ 24.) Relying on the assurances that ATI and ATKK would pay his bonus if the litigation was successful, Plaintiff continued to work on the case. (*Id*. at ¶ 25.)

In or around February 2022, Plaintiff inquired about his bonus payment to Mr. Padwal, who told Plaintiff "the decision on the bonus was up to [the] team in Japan at ATKK." (SAC, ¶ 28.) Then in May 2022, Defendant offered to pay Plaintiff a substantially smaller bonus if he executed a release of claims. (*Id*. at ¶ 29.) Plaintiff informed Defendants that asking him to sign a release of disputed wages was a misdemeanor and refused to sign the release. (*Ibid*.) Mr. Padwal ultimately told Plaintiff ATKK was not willing to honor the bonus plan and would only pay him $350,000. (*Id*. at ¶ 30.) Plaintiff remains an employee of Defendant but still has not been paid his earned bonus. (*Id*. at ¶ 32.)

On July 18, 2022, Plaintiff filed his initial complaint against Defendants. Defendants demurred to the first, second, and third causes of action. On February 6, 2023, this Court (Hon. Rosen) issued its order sustaining the demurrer to the three causes of action with 20 days' leave to amend.[2] Plaintiff then filed his FAC on February 24, 2023 and Defendants again demurred to the first, second, and third causes of action. On July 11, 2023, the Court (Hon. Adams) issued its ordering sustaining the demurrer to the first and third causes of action with 10 days' leave to amend and overruling the demurrer to the second cause of action.

On July 21, 2023, Plaintiff filed his SAC, alleging the following causes of action against all Defendants:

1) Failure to Pay Wages;
2) Breach of Contract;
3) Breach of Implied Covenant of Good Faith and Fair Dealing;
4) Fraud – Intentional Misrepresentation;
5) Fraud – False Promise;
6) Promissory Estoppel; and
7) Negligent Misrepresentation.

On August 22, 2023, Defendants filed a demurrer to the SAC's first and third causes of action. Plaintiff opposes the motion.

II. Demurrer

a. Legal Standard

"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.) The only issue involved in a demurrer is whether the complaint, as it stands, unconnected with extraneous matters, states a cause of action. (*Griffith v. Department of Public Works* (1956) 141 Cal.App.2d 376, 381.)

b. First Cause of Action – Failure to Pay Earned Bonus/Wages – Violation of Labor Code §§ 200, 204, 206, 210, and 218

[2] The Court overruled the demurrer on the basis of uncertainty.

Defendants contend that Plaintiff's first cause of action for failure to pay wages fails to state sufficient facts to constitute a cause of action.[3]

i. Labor Code section 200

Defendants first argue there is no private right of action under Labor Code section 200. (Demurrer, p. 6:9-10.) The Court notes, for the third time, that Labor Code section 200 does not create a private right of action, as the section merely defines the terms wages and labor. (See July 11 Order, p. 5:11-12; Feb. 6 Order, p. 7:5-6.) Thus, there can be no cause of action pursuant to Labor Code section 200.

ii. Labor Code section 218

Defendants argue that Labor Code section 218 "does not provide a private right of action itself." (Demurrer, p. 6:13-14.)

"Section 218 does not . . . create a private right of action for every penalty set forth in sections 200 through 244. Rather, it provides a wage claimant a private right of action for any penalty 'due to him under the article.' . . . As stated in *Dunlap v. Superior Court* (2006) 142 Cal.App.4th 330 [], 'section 218 empowers a wage claimant to sue directly to recover any wages or penalties personally due [to] the employee under Article 1.'"[4] (*Noe v. Superior Court* (2015) 237 Cal.App.4th 316, 339-340.) "In other words, the statute only establishes a private right of action to enforce Labor Code provisions within the article that provide for a penalty payable to the affected employee." (*Id*. at p. 340.) Therefore, where a Labor Code section provides that civil penalties are payable to the employee, section 218 establishes a private right of action to enforce it. (*Ibid*.)

iii. Labor Code section 204

"As observed by the California Supreme Court more than 70 years ago 'the sole purpose of [Labor Code] section 204 is to require an employer of labor who comes within its terms to maintain two regular pay days each month, within the dates required in that section.'" (*See's Candy Shops, Inc. v. Superior Court* (2012) 210 Cal.App.4th 889, 904-905 (*See's Candy*), citing *In Re Moffett* (1937) 19 Cal.App.2d 7, 13.)

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[3] Defendants' demurrer makes arguments regarding Labor Code sections 201, 202, 203; however, these sections are not alleged in the first cause of action. (See Demurrer, p. 6:21-25.) Accordingly, the Court declines to address these sections.

[4] Article 1 includes sections 200 through 244 of the Labor Code.

Defendants contend the SAC does not allege any facts that Plaintiff did not receive his monthly or bimonthly paycheck, a portion of his salary, or even his monthly draw. (Demurrer, pp. 6:28-7:1.) Defendants further argue the SAC does not allege that Plaintiff achieved the specific result required by the written bonus agreement and additionally, wages are not due when they are disputed. (*Id.* at p. 7:3-5.)

The SAC asserts a violation of Labor Code section 204, subdivision (b)(1), which states, in relevant part, that "all wages earned for labor in excess of the normal work period shall be paid no later than the payday for the next regular payroll period." (Labor Code, § 204, subd. (b)(1); SAC, ¶ 35.) Plaintiff alleges that his non-discretionary bonus became payable to him on February 15, 2022, but that to date, Defendants have not paid Plaintiff the bonus. (SAC, ¶ 35.)

The language of section 204 does not provide for a penalty payable to the affected employee. Additionally, there is no further language contained in section 204 that indicates the Legislature intended to create a private right of action. (See *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 89 ["When regulatory statutes provide a comprehensive scheme for enforcement by an administrative agency, as with the Labor Code, courts ordinarily conclude that the Legislature intended the administrative remedy to be exclusive unless the statutory language or legislative history clearly indicates an intent to create a private right of action"][internal quotations omitted].) As explained above, a private right of action exists where the Labor Code section specifies that civil penalties or wages are due to the employee. (Labor Code, § 218.) "'Despite section 204's use of the word 'wages,' section 204 does not provide for the payment of any wages nor create any substantive right to wages. The only right furthered by the section is the timely payment of wages.'" (*See's Candy, supra,* 210 Cal.App.4th at p. 905.)

In opposition, Plaintiff asserts that the Labor Code is to be construed liberally in favor of the protection of employees and that he has sufficiently alleged each element of CACI 2700[5] to state a claim for failure to pay wages in violation of the Labor Code. (Opposition, p. 14:1-9, citing *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5th 858, 865 (*Ferra*).) *Ferra* is unhelpful here for several reasons. First, the case involves a class action and is an appeal of the trial court's grant of a motion for summary adjudication as opposed to demurrer. (*Id.* at p. 858;

[5] As the Court has previously explained, while 2 CACI 2700 provides the essential factual elements for non-payment of wages, the Labor Code sections must still be applicable to state a cause of action. (See July 11 Order, p. 6:7-15.)

see also *Pinter-Brown v. Regents of University of California*, 48 Cal.App.5th 55, 99 [purpose of summary adjudication is to "dispose of one more issues before trial so that the parties may focus on the questions remaining"].) Next, *Ferra* involves Labor Codes not relevant in this case, including Labor Code sections 226.7 and 510. (*Id.* at p. 858.) Finally, the Supreme Court addressed the proper calculation of premium pay for noncompliant meal or rest breaks and nondiscretionary incentive payments. (*Ibid*.) While the *Ferra* Court did state that the Labor Code was to be "'liberally construe[d] . . . to favor the protection of employees[,]'" the Court went on to explain that it does so when a statute's language "is susceptible of more than one reasonable interpretation." (*Id.* at p. 865.) Here, it is clear that the Legislature did not intend a private right of action under Labor Code section 204. Thus, *Ferra* is inapposite.

Accordingly, Plaintiff cannot maintain a private cause of action under Labor Code section 204.

iv. Labor Code section 206

Defendants argue Plaintiff cannot state a cause of action under Labor Code sections 206 and 206.5 because the SAC alleges there is a dispute over whether wages were owed to Plaintiff and disputed wages are not considered "due." (See Demurrer, p. 7:15-23, citing *Estrada v. Royalty Carpet Mills, Inc.* (2022) 76 Cal.App.5th 685, 708 (*Estrada*).)

Labor Code section 206.5 prevents an employer from requiring the execution of a release of a claim or right on account of wages due, or to become due. (Labor Code, § 206.5, subd. (a); *Estrada*, *supra*, 76 Cal.App.5th at pp. 707-708.) Section 206.5 is to be read along with section 206, "which states that in wage disputes, 'the employer shall pay . . . all wages, or parts thereof, conceded by him to be due, leaving to the employee all remedies he might otherwise be entitled to as to any balance claimed." (*Estrada*, *supra*, at p. 708, citing Labor Code, § 206, subd. (a).) "Together, these statutes 'prohibit employers from coercing settlements by withholding wages concededly due. . . . Wages are not considered 'due' and unreasonable under Labor Code section 206.5, unless they are required to be paid under Labor Code section 206.'" (*Id.* at p. 708.)

Plaintiff does not address *Estrada* in his opposition.[6] Instead, Plaintiff asserts that "in violation of Labor Code §206.5, Defendants sought to pay Plaintiff a portion of the bonus if he

[6] Plaintiff does not address Defendant's section 206.5 argument as it relates to the first cause of action for Labor Code violations, but does addresses section 206.5 in conjunction with his third cause of action.

signed a release of claims about the *disputed* wages." (Opposition, p. 15:16-17 [emphasis added].) Plaintiff cites *Wasito v. Kazali* (2021) 68 Cal.App.5th 422, 427 (*Wasito*) to support his argument that it is a violation of Labor Code section 206.5 to require Plaintiff to sign a release in order to be paid the undisputed amount of wages. (See Opposition, p. 16:8-14.) Neither party appears to dispute this holding. However, the SAC specifically alleges that he was "ask[ed] . . . to sign a release over *disputed* wages . . . and he refused to sign the release." (SAC, ¶ 29 [emphasis added].) The SAC further alleges that Defendants' attorney "falsely told Plaintiff that signing a release of a disputed wage claim was not a violation of law." (*Ibid*.) Thus, *Wasito*, which holds in part that it is a Labor Code violation to require an employee to sign a release related to *undisputed* wages is inapposite here.

The SAC goes on to allege that "Defendants conceded that wages were due to Plaintiff but offered to pay him significantly less . . . if he signed a release of claims in violation of California Labor Code §206.5." (SAC, ¶ 36.) This general allegation contradicts the previous specific allegations that Plaintiff was asked to sign a release over disputed wages. (See *Perez v. Golden Empire Transit Dist*. (2012) 209 Cal.App.4th 1228, 1235 ["California courts have adopted the principle that specific allegations in a complaint control over an inconsistent general allegation. . . . Under this principle, it is possible that specific allegations will render a complaint defective when the general allegations, standing alone, might have been sufficient"]; *Chen v. PayPal, Inc.* (2021) 61 Cal.App.5th 559, 571-572 ["It is well established that in the context of a demurrer, specific allegations control over more general ones"].) Moreover, that Defendants offered to settle for less than the total wages Plaintiff claims to be owed is not necessarily a concession that wages were due. When a bona fide dispute exists, the disputed amounts are not 'due,' and the bona fide dispute can be voluntarily settled with a release and a payment – ***even if the payment is for an amount less than the total wages claimed by the employee.***' . . . In other words, 'wages are not 'due' if there is a good faith dispute as to whether they are owed.'" (*Estrada, supra,* 76 Cal.App.5th at p. 708 [emphasis added]; see also *Watkins v. Wachovia Corp.* (2009) 172 Cal.App.4th 1576, 1587 [stating same].)

That said, even if Plaintiff sufficiently alleged that Defendants conceded wages were due but asked him to sign a release over those wages, "there is no private right of action under Labor Code § 206.5." (*Brokaw v. Qualcomm, Inc.* (S.D.Cal. Feb. 27, 2002, No. 01-CV-1172-L(LAB)) 2002 U.S.Dist.LEXIS 27809, at *18; see also Labor Code, § 206.5, Notes to Decisions ["Lab C § 206.5 . . . does not provide employees a private right of action"].) Section

206.5 merely voids a release of a claim between the employer and employee. (See Labor Code, § 206.5, subd. (a).)

As such, Plaintiff cannot state a private cause of action under Labor Code sections 206 and 206.5.

v. Labor Code section 210

As for Labor Code section 210, Defendants assert that it is derivative of Plaintiff's other wage claims and provides for penalties only when an employer has failed to pay earned wages due as part of a labor commissioner claim. (Demurrer, p. 7:25-27.) Plaintiff does not address this argument in opposition. (See *Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 529 [failure to challenge a contention in a brief results in the concession of that argument].)

Labor Code section 210 states, in relevant part:

> **(a)** In addition to, and entirely independent and apart from, any other penalty provided in this article, every person who fails to pay the wages of each employee as provided in Sections 201.3, 204, 204b, 204.1, 204.2, 204.11, 205, 205.5, and 1197.5, shall be subject to a penalty . . .
> . . .
> **(b)** The penalty shall either be recovered by the employee as a statutory penalty pursuant to Section 98 or by the Labor Commissioner as a civil penalty through the issuance of a citation or pursuant to Section 98.3.

(Labor Code, § 210.)

Section 98 authorizes the Labor Commissioner to investigate complaints made by employees and provide a hearing in any action recover wages or penalties. (See Labor Code, § 93, subd. (a).) The SAC contains no allegations that Plaintiff filed a complaint with the Labor Commissioner for Labor Code violations. Further, Plaintiff cannot state a private cause of action for violations of Labor Code section 204, as explained above. (See also *Johnson v. Hewlett-Packard Co.* (N.D.Cal. 2011) 809 F.Supp.2d 1114, 1136 ["There is nothing in section 204 or 210 that indicates, in 'clear understandable, unmistakable terms,' that a private right of action[] exists for violations of section 204"].) Thus, section 210 is inapplicable in this case.

Based on the foregoing, the demurrer to the first cause of action for various Labor Code violations is SUSTAINED.

c. Third Cause of Action – Breach of Implied Covenant of Good Faith and Fair Dealing

Defendants argue that Plaintiff's assertion that 1) Defendants continued the trial date to January 2022 and then 2) offered to settle Plaintiff's disputed wage claim are insufficient to plead a breach of implied covenant cause of action. (Demurrer, p. 8:7-8, 13-17.)

"The cause of action for breach of implied covenant of good faith and fair dealing is based on the principle that 'every contract contains an implied covenant of good faith and fair dealing providing that no party to the contract will do anything that would deprive another party of the benefits of the contract.'" (*Miller v. Zurich American Ins. Co.* (2019) 41 Cal.App.5th 247, 257.) "[A]llegations which assert such a claim must show that the conduct of the defendant, whether or not it also constitutes a breach of a consensual contract term, demonstrates a failure or refusal to discharge contractual responsibilities, prompted not by an honest mistake, bad judgment or negligence but rather by a conscious and deliberate act, which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement." (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395.) "If the allegations do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated." (*Ibid*.)

i. Continuance of Trial

Defendants argue that the SAC admits the trial date was continued to January 2022 due to travel difficulties and December holidays. (Demurrer, p. 8:17-18.) In opposition, Plaintiff asserts that the reason the case did not resolve by the end of 2021 "was based solely on the conduct of Defendants for their own purposes without regard to their obligations to Plaintiff." (Opposition, p. 15:4-7.)

While the SAC does allege that "Defendants were the ones that requested a trial continuance . . . thereby frustrating Plaintiff's ability to conclude the litigation by the end of 2021" (SAC, ¶ 55), the SAC also alleges the trial was continued due to COVID-19 delays, travel difficulties, and Court holidays (SAC, ¶ 21.) For the same reasons as the Court explained in the July 11 Order, the SAC does not sufficiently allege that Defendants intended to unfairly frustrate Plaintiff's right to receive the benefits of the agreement, but that due to outside circumstances the trial needed to be continued to January 10, 2022. (See July 11 Order, p. 10, "Continuance of Trial.")

ii. Release of Claims

The Court's prior order sustained the demurrer to the third cause of action on this basis as Plaintiff failed to allege a statutory violation with sufficient particularity. (July 11 Order, p. 11:11-14.) Plaintiff amended his SAC to allege violations of Labor Code sections 206 and 206.5. (SAC, ¶ 57.) However, as stated above, the allegations pertaining to these two Labor Code sections are insufficient and, in any event, there can be no private cause of action under them. Thus, Plaintiff cannot base his third cause of action on these statutory violations.

Accordingly, the demurrer to the third cause of action is SUSTAINED.

III. Leave to Amend

While "[i]t is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory[] [a]nd it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment," the burden is still on the plaintiff to demonstrate the manner in which the complaint might be amended; otherwise, if no liability exists as a matter of law, a demurrer without leave to amend should be sustained. (*Gutkin v. Univ. of S. Cal.* (2002) 101 Cal.App.4th 967, 976; see also *Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 618 [to satisfy plaintiff's burden of proving a reasonable possibility of amendment he "must show in what manner he can amend . . . and how that amendment will change the legal effect of his pleading by clearly stating not only the legal basis for the amendment, but also the factual allegations to sufficiently state a cause of action"][internal quotations omitted].)

In this case, Plaintiff has not requested leave to further amend his pleading and thus, fails to indicate in what manner he would be able to amend his pleading to cure its deficiencies. Further, Plaintiff has been given two opportunities to amend his pleading, per this Court's prior orders, and has failed to cure such defects. (See *Davies v. Sallie Mae, Inc.* (2008) 168 Cal.App.4th 1086, 1097 [appellate court determined trial court did not abuse its discretion in sustaining demurrer without leave to amend after plaintiff had two previous opportunities to amend the complaint].) Thus, for the foregoing reasons, leave to amend is DENIED.

IV. Conclusion and Order

The demurrer is SUSTAINED in its entirety without leave to amend. The Court shall prepare the final Order.

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Calendar Lines 2 and 3
Case Name: *Kim Diaz, et al. v. Equity Residential Management, LLC*
Case No.: 23-CV-414776

Demurrer and Motion to Strike to the Complaint by Defendant Equity Residential Management, LLC

Factual and Procedural Background

This is an action primarily for violations of the Investigative Consumer Reporting Agencies Act ("ICRAA") and invasion of privacy.

According to the complaint, defendant Equity Residential Management, LLC ("Equity") manages and operates 1235 Wildwood Avenue in Sunnyvale, California and the Lex Apartments in San Jose (collectively, "Subject Properties"), as well as multiple other residential complexes throughout the State of California. (Complaint at ¶ 17.) Plaintiffs Kim Diaz, Brittany Jensen, Kayla Angerman, Akhil Koul, Chika Ofodu, Guadalupe Fuentes, Luis Heras, Joanne Hurlston, Karan Ghuman, Melissa Butler, and Gwendolynne Grey (collectively, "Plaintiffs") are prospective tenants of the Subject Properties. (Id. at ¶¶ 1-11.)

In the past two years, Plaintiffs applied for housing at the Subject Properties. (Complaint at ¶ 23.) In doing so, Plaintiffs completed a mandatory multi-page "Application," which included a release of information permitting defendants to get private and personal information from third parties about Plaintiffs as required for all applications. (Ibid.)

In particular, defendant Equity required Plaintiffs to complete an "Application" and to consent to release of information. (Complaint at ¶ 25.) Plaintiffs completed the required "Application" that included a consent to release of information and submitted it to Equity. (Id. at ¶ 27.)

During processing of Plaintiffs' applications, defendant Equity requested and obtained investigative consumer reports about Plaintiffs without complying with the mandatory requirements, disclosures and authorizations under the ICRAA. (Complaint at ¶¶ 24, 32-37.) For example, Equity concealed from Plaintiffs the nature and type of the investigative consumer reports it would procure about them, the date the reports would be procured, the entity or entities which would provide the reports, and Plaintiffs' rights regarding investigative consumer reports. (Id. at ¶ 32.)

On April 18, 2023, Plaintiffs filed the operative complaint against defendant Equity alleging causes of action for: (1) violations of the ICRAA; (2) invasion of privacy; and (3) declaratory relief.

On August 16, 2023, defendant Equity filed the motions presently before the court, a demurrer and motion to strike portions of the complaint. Plaintiffs filed written opposition to the motions.

A further case management conference and order to show cause for failure to appear are also set for December 7, 2023.[7]

Demurrer to the Complaint

Defendant Equity argues the second and third causes of action are subject to demurrer for failure to allege sufficient facts. (Code Civ. Proc., § 430.10, subd. (e).)

Legal Standard

"In reviewing the sufficiency of a complaint against a general demurer, we are guided by long settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. We also consider matters which may be judicially noticed.' " (*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.)

"The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. The court does not, however, assume the truth of contentions, deductions or conclusions of law. … [I]t is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment." (*Gregory v. Albertson's, Inc.* (2002) 104 Cal.App.4th 845, 850.)

Failure to State A Cause of Action

" 'The absence of any allegation essential to a cause of action renders it vulnerable to a general demurrer. A ruling on a general demurrer is thus a method of deciding the merits of the cause of action on assumed facts without a trial.' [Citation.] 'Conversely, a general demurrer will be overruled if the complaint contains allegations of every fact essential to the statement of a cause of action, regardless of mistaken theory or imperfections of form that make it subject to special demurrer.' [Citation.]" (*Morris v. JPMorgan Chase Bank, N.A.* (2022) 78 Cal.App.5th 279, 291-292 (*Morris*).)

"A complaint, with certain exceptions, need only contain a 'statement of the facts constituting the cause of action, in ordinary and concise language' [citation] and will be upheld ' "so long as [it] gives notice of the issues sufficient to enable preparation of a defense." ' [Citation.] '[T]o withstand a demurrer, a complaint must allege ultimate facts, not evidentiary facts or conclusions of law.' [Citation.]" (*Morris, supra,* 78 Cal.App.5th at p. 292.)

Second Cause of Action: Invasion of Privacy

[7] Plaintiffs filed written opposition to the order to show cause on October 23, 2023.

"The elements of a common law invasion of privacy claim are intrusion into a private place, conversation, or matter, in a manner highly offensive to a reasonable person. [Citation.] In determining the existence of 'offensiveness,' one must consider: '(1) the degree of intrusion; (2) the context, conduct and circumstances surrounding the intrusion; (3) the intruder's motives and objectives; (4) the setting into which the intrusion occurs; and (5) the expectations of those whose privacy is invaded.' [Citation.]" (*Mezger v. Bick* (2021) 66 Cal.App.5th 76, 86-87 (*Mezger*).)

" 'Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right. Thus, the extent and gravity of the invasion is an indispensable consideration in assessing an alleged invasion of privacy.' [Citation.] The impact on the plaintiff's privacy rights must be more than 'slight or trivial.' [Citation.]" (*Mezger, supra,* 66 Cal.App.5th at p. 87.)

Furthermore, "the plaintiff in an invasion of privacy case must have conducted himself or herself in a manner consistent with an actual expectation of privacy, i.e., he or she must not have manifested by his or her conduct a voluntary consent to the invasive actions of defendant. If voluntary consent is present, a defendant's conduct will rarely be deemed 'highly offensive to a reasonable person' so as to justify tort liability." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 26 (*Hill*).)

The second cause of action alleges in relevant part that:

> ¶ 55: By acting and failing to act as herein alleged, the Defendants have violated the ICRAA and invaded the Plaintiffs' rights of privacy by obtaining investigative consumer reports about the Plaintiffs without complying with mandatory requirements under the ICAA for getting investigative reports about the Plaintiffs.
>
> ¶ 56: In applying for residential tenancy at Defendants' property, Plaintiffs each had an expectation of privacy, which Defendants, and each of them, intentionally and improperly obtained investigative consumer reports about the Plaintiffs.
>
> ¶ 57: Defendants' acts and omissions as described herein would be highly offensive to a reasonable person.

(Complaint at ¶¶ 55-57.)

Here, defendant Equity persuasively argues there is no claim stated for invasion of privacy as Plaintiffs voluntarily consented to the release of their private and personal information when they submitted their applications in connection with the Subject Properties. (See Complaint at ¶¶ 23-25, 27.) As stated above, where voluntary consent is present, a defendant's conduct will rarely be deemed "highly offensive to a reasonable person" to justify tort liability. (*Hill, supra,* 7 Cal.4th at p. 26.) Plaintiffs appear to concede this point as they fail to address the consent argument in their opposition to the motion. (See *Sehulster Tunnels/Pre-Con v. Traylor Brothers, Inc.* (2003) 111 Cal.App.4th 1328, 1345, fn. 16 [failure to address point is "equivalent to a concession"].)

Therefore, the demurrer to the second cause of action is SUSTAINED WITH 15 DAYS LEAVE TO AMEND for failure to state a claim. (See *City of Stockton v. Super. Ct.* (2007) 42 Cal.4th 730, 747 [if the plaintiff has not had an opportunity to amend the pleading in response to a motion challenging the sufficiency of the allegations, leave to amend is liberally allowed as a matter of fairness, unless the pleading shows on its face that it is incapable of amendment].)

Third Cause of Action: Declaratory Relief

Code of Civil Procedure section 1060, which governs actions for declaratory relief, provides: "Any person interested under a written instrument …, or under a contract, or who desires a declaration of his or her rights or duties with respect to another …may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action … for a declaration of his or her rights and duties in the premises, including a determination of any question of construction or validity arising under the instrument or contract."

"A complaint for declaratory relief must demonstrate: (1) a proper subject of declaratory relief, and (2) an actual controversy involving justiciable questions relating to the rights or obligations of a party. [Citation.] The 'proper subject' of declaratory relief are set forth in Code of Civil Procedure section 1060 and other statutes. [Citations.] The 'actual controversy' requirement concerns the existence of [a] *present* controversy relating to the legal rights and duties of the respective parties pursuant to contract [citation], statute or order. [Citation.] Where the allegations of the complaint reveal the controversy to be conjectural, anticipated to occur in the future, or an attempt to obtain an advisory opinion from the court, the fundamental basis of declaratory relief is lacking. [Citations.]" (*Brownfield v. Daniel Freeman Marina Hospital* (2009) 208 Cal.App.3d 405, 410.)

The declaratory relief claim alleges in pertinent part:

> ¶ 60: An actual controversy has arisen and now exists between Plaintiffs and the Defendants regarding the legality and effect of the Defendants' Application, which Plaintiffs contend violates the ICRAA. Defendants demand all leases must be renewed or re-certified, and because the same forms are always used, which authorizes the Defendants to obtain investigative consumer reports about the Plaintiffs, a judicial determination is necessary to prevent the Defendants' continued violations of the ICRAA.
>
> (Complaint at ¶ 60.)

Defendant Equity persuasively contends there is no actual and present controversy to state a cause of action for declaratory relief. This is because, as pointed out in the moving papers, the alleged ICAA violations pertain to the application process prior to execution of the lease. (See Demurrer at p. 8:13-21.) The declaratory relief claim addresses Equity's alleged demand that all leases be renewed or re-certified. But there are no allegations to suggest that Plaintiffs have executed any present leases with respect to the Subject Properties. Nor are there any facts demonstrating Plaintiffs intend to renew any such leases in the future that require submitting a new application in connection with the Subject Properties. Thus, the pleaded allegations are conjectural in nature and fail to state a valid claim for declaratory relief.

Consequently, the demurrer to the third cause of action is SUSTAINED WITH 15 DAYS LEAVE TO AMEND for failure to state a claim.

Motion to Strike Portions of the Complaint

Defendant Equity also moves to strike allegations in the complaint related to injunctive relief and punitive damages.

Legal Standard

A court may strike out any irrelevant, false, or improper matter asserted in a pleading. (Code Civ. Proc., § 436, subd. (a).) A court may also strike out all or any part of a pleading not filed in conformity with the laws of the State of California. (Code Civ. Proc., § 436, subd. (b).) The grounds for a motion to strike shall appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice. (Code Civ. Proc., § 437, subd. (a).)

Irrelevant matter includes "immaterial allegations." (Code Civ. Proc., § 431.10, subd. (c).) "An immaterial allegation in a pleading is any of the following: (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; (3) A demand for judgment requesting relief not supported by the allegations of the complaint or cross-complaint." (Code Civ. Proc., § 431.10, subd. (b).)

"As with demurrers, the grounds for a motion to strike must appear on the face of the pleading under attack, or from matter which the court may judicially notice." (Weil & Brown, et al., *California Practice Guide: Civil Procedure Before Trial* (The Rutter Group 2023) ¶ 7:168, p. 7(l)-77 citing Code Civ. Proc., § 437.) "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.' Such challenges lie only if these defects appear on the face of the complaint, or from matters judicially noticeable." (Id. at ¶ 7:169, p. 7(l)-78.)

"In passing on the correctness of a ruling on a motion to strike, judges read allegations of a pleading subject to the motion to strike as a whole, all parts in their context, and assume their truth." (*Clauson v. Super. Ct.* (1998) 67 Cal.App.4th 1253, 1255.) "In ruling on a motion to strike, courts do not read allegations in isolation." (*Ibid.*)

Injunctive Relief

Defendant Equity moves to strike the following allegations related to injunctive relief:

> ¶ 53: Plaintiffs are also entitled to permanent injunctive relief against all Defendants and their heirs, executors, transferees and assigns, and declaratory relief to the following effect with any such injunction running with the land: …
>
> First Cause of Action Prayer for Relief at No. 7: For equitable relief and restitution to the extent available under the law.

First Cause of Action Prayer for Relief at No. 8: Such other and further relief as this Court may determine to be just and proper at law or in equity.

(See Complaint at ¶ 53; First Cause of Action Prayer for Relief at Nos. 7-8.)

The remedy for injunctive relief is requested in connection with the first cause of action for violations under the ICRAA. Those remedies are set forth in Civil Code section 1786.50 which provides:

> (a) An investigative consumer reporting agency or user of information that fails to comply with any requirement under this title with respect to an investigative consumer report is liable to the consumer who is the subject of the report in an amount equal to the sum of all the following:
>
> (1) Any actual damages sustained by the consumer as a result of the failure or, except in the case of class actions, ten thousand dollars ($10,000), whichever sum is greater.
> (2) In the case of any successful action to enforce any liability under this chapter, the costs of the action together with reasonable attorney's fees as determined by the court.
>
> (b) If the court determines that the violation was grossly negligent or willful, the court may, in addition, assess, and the consumer may recover, punitive damages.
> (c) Notwithstanding subdivision (a), an investigative consumer reporting agency or user of information that fails to comply with any requirement under this title with respect to an investigative consumer report shall not be liable to a consumer who is subject of the report where the failure to comply results in a more favorable investigative consumer report than if there had not been a failure to comply.

(Civ. Code, § 1786.50.)

As pointed out in the moving papers, remedies for violations under the ICRAA do not include injunctive relief. (See *Poinsignon v. Imperva, Inc.* (N.D. Cal. 2018) 2018 U.S. Dist. LEXIS 60161 at p. *12 [injunctive relief is not available under the ICRAA]; see also *The Travelers Indemnity Co. of Connecticut v. Navigators Specialty Ins. Co.* (2021) 70 Cal.App.5th 341, 362, fn. 16 ["We may cite and rely upon unpublished federal court decisions as persuasive authority."].) In opposition, Plaintiffs argue they are entitled to seek injunctive relief against the threatened infringement of their rights, citing *Southern Christian Leadership Conference v. Al Malaikah Auditorium Co.* (1991) 230 Cal.App.3d 207. (See OPP at p. 8:19-23.) That case however is unavailing as the appellate court did not address whether the remedy of injunctive relief is available for violations under the ICRAA. (See *Stamps v. Super. Ct.* (2006) 136 Cal.App.4th 1441, 1456 [cases are not authority for propositions not considered].) Nor do Plaintiffs direct the court to any legal authority which allows for injunctive relief under the ICRAA.

Accordingly, the motion to strike paragraph 53 and the Prayer for Relief at Nos. 7-8 is GRANTED WITHOUT LEAVE TO AMEND. (See *Berkeley Police Assn. v. City of Berkeley* (1977) 76 Cal.App.3d 931, 942 ["[W]here the nature of plaintiff's claim is clear, but under

substantive law no liability exists, leave to amend should be denied, for no amendment could change the result."].)

Punitive Damages

Defendant Equity also moves to strike the allegations for punitive damages found in paragraphs 38, 40, and 51 of the complaint, paragraph 4 of the first cause of action in the prayer for relief, and paragraph 3 of the second cause of action in the prayer for relief. Equity asserts the complaint fails to allege sufficient facts of malice, oppression, or fraud to support punitive damages. In addition, the complaint does not allege that any offending conduct was carried out by or authorized by Equity's senior management.

"In order to state a prima facie claim for punitive damages, a complaint must set forth the elements as stated in the general punitive damage statute, Civil Code section 3294. These statutory elements include allegations that the defendant has been guilty of oppression, fraud, or malice. 'Malice' is defined in the statute as conduct 'intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.' 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. 'Fraud' is 'an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.' " (*Turman v. Turning Point of Central California, Inc*. (2010) 191 Cal.App.4th 53, 63, internal citations omitted.)

Also, "[u]nder Civil Code section 3294, subdivision (b), punitive damages can properly be awarded against a corporate entity as a principal, because of an act by its agents, if the corporate employer authorized or ratified wrongful conduct. Ratification is shown if an officer, director, or managing agent of the corporation has advance knowledge of, but consciously disregards, authorizes, or ratifies an act of oppression, fraud, or malice." (*Pulte Home Corp. v. American Safety Indemnity Co.* (2017) 14 Cal.App.5th 1086, 1124.)

"In determining whether a complaint states facts sufficient to sustain punitive damages, the challenged allegations must be read in context with the other facts alleged in the complaint. Further, even though certain language pleads ultimate facts or conclusions of law, such language when read in context with the facts alleged as to defendants' conduct may adequately plead the evil motive requisite to recovery of punitive damages." (*Monge v. Super. Ct.* (1986) 176 Cal.App.3d 503, 510.)

As stated above, a plaintiff may recover punitive damages for violations under the ICRAA where conduct was deemed grossly negligent or willful. (Civ. Code, § 1786.50, subd. (b).)

As a preliminary matter, the motion to strike paragraph 3 of the second cause of action in the prayer for relief is moot given the court's ruling sustaining the demurrer for reasons explained above.

And, while defendant Equity moves to strike paragraphs 38 and 40 in the complaint, Plaintiffs also include allegations related to punitive damages in paragraph 39 which provides:

> At all times herein, all Defendants did not want the tenants or prospective tenants to know about or have access to any confidential consumer reports about them, but wanted to manage and run the property free of any restrictions, questions or inquiries by tenants of information contained in any reports on them. Accordingly, Defendants' conduct and violations of the ICRAA was and is willful and grossly negligent. Defendants acted in deliberate or reckless disregard of their obligations and the rights of the Plaintiffs. Defendants willful conduct is reflected by, among other things, the following facts: (a) Defendants are large corporations with access to legal advice and have retained counsel who have advised Defendants that they must comply with California Civil Code sections 1786 to 1786.60; (b) Defendants required a purported authorization to perform credit and background checks in the process of screening Plaintiffs for 1235 Wildwood Avenue and the Lex Apartments, which, although defective, evidences Defendants' awareness of and willful failure to follow the governing laws concerning such authorizations; and (c) the plain language of the statute unambiguously indicates that inclusion of a box to check to request copies of reports is required, and that the disclosure form must contain the name, address, and phone number of the investigative consumer reporting agency conducting the investigation.
>
> (Complaint at ¶ 39.)

Defendant Equity argues allegations in paragraph 39 do not amount to malice, oppression, or fraud to support punitive damages. (See Motion at p. 3:12-21.) But this contention is not persuasive as Equity relies on the general punitive damages statute under Civil Code section 3294. Section 3294 conflicts with the more specific statute outlined in Civil Code section 1786.50, subdivision (b) which applies to claims for violations under the ICRAA and requires only a showing of gross negligence or willfulness for punitive damages. (See *Ebaugh v. Rabkin* (1972) 22 Cal.App.3d 891, 894 [under section 3294, mere negligence, even gross negligence is not sufficient to justify an award of punitive damages].) The instant motion falls short as it fails to consider whether Equity's alleged conduct constitutes gross negligence or willfulness to maintain a claim for punitive damages. And the more specific statute, section 1786.50 prevails over the more general punitive damages statute in section 3294. (See *DeJung v. Super. Ct.* (2008) 169 Cal.App.4th 533, 546 ["where a general statute conflicts with a specific statute the specific statute controls the general one"].)

Finally, defendant Equity seeks to strike the punitive damages allegations as Plaintiffs do not allege such conduct was carried out or authorized by Equity's senior management. In support, Equity relies on Civil Code section 3294, subdivision (b) which states:

> An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.
>
> (Civ. Code, § 3294, subd. (b).)

Section 3294, subdivision (b) however refers to the general punitive damages statute and requires ratification, authorization, and advance knowledge by an officer or managing agent of the corporation with respect to malice, oppression or fraud. But, as explained above, that is not the standard as the operative statute under section 1786.50, subdivision (b) requires only gross negligence or willfulness to obtain punitive damages. Furthermore, unlike section 3294, section 1786.50 does not set forth any additional pleading standard with respect to a corporate defendant as it relates to punitive damages. Nor does Equity direct this court to any legal authority addressing the pleading requirements of a corporate defendant in connection with punitive damages under section 1786.50 and this court is aware of none. Thus, the court finds the punitive damages allegations are sufficient for pleading purposes.

Therefore, the motion to strike the punitive damages allegations in paragraphs 38, 40, and 51 of the complaint and paragraph 4 of the first cause of action in the prayer for relief is DENIED.

Disposition

The demurrer to the second and third causes of action in the complaint is SUSTAINED WITH 15 DAYS LEAVE TO AMEND for failure to state a claim.

The motion to strike paragraph 53 and the prayer for relief at nos. 7-8 is GRANTED WITHOUT LEAVE TO AMEND.

The motion to strike paragraph 3 of the second cause of action in the prayer for relief is MOOT.

The motion to strike the punitive damages allegations in paragraphs 38, 40, and 51 of the complaint and paragraph 4 of the first cause of action in the prayer for relief is DENIED.

The court will prepare the Order.

- oo0oo -

Calendar line 4

Case Name: *Nellett v. Ford Motor Co., et al.*
Case No.: 19CV349044

This is an action for violations of the Song-Beverly Consumer Warranty Act and for concealment of material facts from plaintiff Leslie Nellett ("Plaintiff") regarding her purchase of a used 2008 Ford F250 Super Duty ("subject vehicle").

According to the allegations of the first amended complaint ("FAC"), on July 11, 2011, Plaintiff purchased the subject vehicle, receiving an express written warranty from defendant Ford Motors Company ("FMC") that included that, in the event a defect developed with the subject vehicle during the warranty period, Plaintiff could deliver the subject vehicle for repair services and the subject vehicle would be repaired. (See FAC, ¶ 8.) During the warranty period, the subject vehicle had: defects related to the engine; defects causing EGR cooler failure; oil cooler failure; radiation failure; fuel injector failure; coolant entering the engine ventilation system; blown head gaskets; warped head bolts; loss of power; defects causing storage of diagnostic trouble codes (DTCs) P0087, P0088, P012E, P0480, P0404 and P012F; defects causing coolant leaks; defects causing the radiator to leak; defects requiring radiator replacement; defects causing rust flakes in fuel; defects causing check engine light (CEL), battery light and wrench light activation; defects requiring replacement of radiator hoses; defects requiring replacement of coolant and water; defects causing loss of oil cooler flow; defects causing failure and/or replacement of the oil cooler; defects requiring cooling system flush; defects requiring installation of loom; defects causing the thermostat to stick open; defects causing failure of the thermostat; defects causing loss of fan speed sensor signal; defects causing HVAC to blow cold instead of hot; defects causing a door actuator to be stuck in the hot position; defects causing failure of the door actuator; defects causing the underhood vacuum pump to run all the time; defects causing air filter clogging; defects causing EGR valve sticking; defects causing failure of the EGR valve; defects causing vacuum line leaking; defects causing failure of the intake housing; defects requiring engine reassembly; defects causing loss of electrical; defects causing non-start' defects causing the alternator to internally short to ground; defects causing battery discharge; defects causing batteries not to retain charge; defects causing failure of the alternator; defects causing failure of the batteries; defects causing leaking of the turbo up-pipe; defects causing failure of up-pipe bolts; defects causing fuel to leak; defects causing hydro boost leaking; defects causing low coolant; defects requiring reprogramming of modules; defects causing signs of radiator and/or EGR cooler seeping; defects causing failure of the vacuum harness; and/or any other defects described in the repair history for the subject vehicle. (See FAC, ¶ 9.)

On July 7, 2014, with approximately 60,704 miles on the odometer, Plaintiff presented the subject vehicle to FMC's authorized repair facility at Future Ford Lincoln of Roseville, located at 650 Auto Mall Dr. in Roseville, for concerns related to the subject vehicle lacking power and the check engine light being on. (See FAC, ¶ 21.) Defendants' technician found Diagnostic Trouble Codes ("DTC") P0087 and P088 stored and then performed TSB 12-07-07. (*Id*.) Additionally, the technician found rust flakes in the fuel sample and low coolant and determined that the radiator was leaking at both tanks and needed updated radiator hoses. (*Id*.) The technician replaced the radiator, the upper radiator hose, the lower radiator hose and replaced the coolant. (*Id*.)

On October 10, 2015, with about 83,915 miles on the odometer, Plaintiff presented the subject vehicle to FMC's authorized repair facility at defendant Victory Automotive Group dba Harrold Ford ("Harrold") for concerns related to the subject vehicle displaying the check engine/malfunction indicator light and DTC P012E stored. (See FAC, ¶ 22.) Defendants' technician determined that the oil cooler was starting to lose flow causing the DTC and malfunction indicator light to turn on. (*Id*.) The technician replaced the oil cooler and performed a cooling system flush. (*Id*.)

On October 22, 2015, with about 84,181 miles on the odometer, Plaintiff presented the subject vehicle to Harrold again for concerns related to the subject vehicle displaying the check engine/malfunction indicator light and DTC P0128, P0480, and P0528 stored. (See FAC, ¶ 23.) The technician determined that the thermostats were malfunctioning and replaced the thermostats and verified that they were working properly. (*Id*.)

On September 20, 2016, with about 101,847 miles on the odometer, Plaintiff presented the subject vehicle to Harrold for concerns related to the subject vehicle displaying the check engine/malfunction indicator light and DTC P012F, P115A, and POOB7 stored. (See FAC, ¶ 24.) The technician determined that the thermostat was stuck and that the subject vehicle had a coolant leak from the radiator. (*Id*.) The technician then replaced the thermostats, replaced the radiator and filled the cooling system with coolant. (*Id*.)

On September 30, 2016, with about 102,052 miles on the odometer, Plaintiff presented the subject vehicle to Harrold for concerns related to the subject vehicle displaying the check engine/malfunction indicator light and DTC P012F, P115A, and POOB7 stored. (See FAC, ¶ 25.) The technician determined that the oil cooler was restricted and replaced the oil cooler and flushed the cooling system. (*Id*.)

On November 8, 2016, with about 104,217 miles on the odometer, Plaintiff presented the subject vehicle to Harrold for concerns related to the subject vehicle displaying the oil pressure indicator light. (See FAC, ¶ 26.) The technician determined that the oil pressure switch was leaking internally, and installed a new switch. (*Id*.)

On April 17, 2017, with about 112,851 miles on the odometer, Plaintiff presented the subject vehicle to Harrold for concerns related to the subject vehicle's HVAC system blowing cold air instead of hot air. (See FAC, ¶ 27.) The Defendants' technician determined that the door actuator was stuck in the full hot position and replaced the actuator. (*Id*.)

On August 31, 2017, with about 119,290 miles on the odometer, Plaintiff presented the subject vehicle to Harrold for concerns related to the subject vehicle running hot and causing the fan to run. (See FAC, ¶ 28.) The technician found DTC P012F, P115A and POOB7 stored. (*Id*.) After determining that the coolant level was low and coolant was leaking from the EGR cooler hose clamp, the technician tightened the clamp and filled the cooling system. (*Id*.)

On December 27, 2017, with about 126,088 miles on the odometer, Plaintiff presented the subject vehicle to Harrold for concerns related to the subject vehicle displaying the check engine/malfunction indicator light and DTC P04040 stored. (See FAC, ¶ 29.) The technician determined that the EGR valve was malfunctioning and installed a new EGR valve, new intake housing and a new vacuum harness. (*Id*.)

On May 21, 2018, Plaintiff presented the subject vehicle to Harrold for concerns related the subject vehicle's failure to start and loss of all electrical power. (See FAC, ¶ 30.) The technician determined that the alternator was shorting and that the batteries would not retain a charge, and thus installed a new alternator and replaced both batteries. (*Id*.)

On July 16, 2018, with about 137,438 miles on the odometer, Plaintiff presented the subject vehicle to Harrold for concerns related to the subject vehicle displaying the check engine/malfunction indicator light. (See FAC, ¶ 31.) The technician found DTC P012F stored and determined that the oil cooler was malfunctioning. (*Id*.) The technician installed a new oil cooler, flushed the cooling system, replaced the coolant, and replaced the oil and filter. (*Id*.)

Despite Defendants' representations that the engine was repaired and not defective, Plaintiffs thereafter continued to experience symptoms of the subject vehicle's defects including the engine defect. (See FAC, ¶ 32.) Plaintiff discovered Defendants' wrongful conduct shortly before filing the initial complaint, as the subject vehicle continued to exhibit symptoms of the engine defect following Defendants' authorized repair facilities' unsuccessful attempts to repair it. (See FAC, ¶ 33.) Plaintiff had no way of knowing about Defendants' deception with regards to the engine defect. (See FAC, ¶ 34.) Defendants concealed the engine defect, minimized the scope, cause, and dangers of the defect with inadequate recalls, and refused to investigate, address, and remedy the defect as it pertains to all Ford F250 Super Duty vehicles. (See FAC, ¶ 43.) If Plaintiff knew about these defects at the time of sale, Plaintiff would not have purchased the subject vehicle or would have paid substantially less for it. (See FAC, ¶¶ 79, 88.)

On August 12, 2021, Plaintiff filed a first amended complaint against FMC and Harrold (collectively, "Defendants"), asserting causes of action for:

1) Violation of Civil Code § 1793.2, subd. (d) (against FMC);
2) Violation of Civil Code § 1793.2, subd. (b) (against FMC);
3) Violation of Civil Code § 1793.2, subd. (a)(3) (against FMC);
4) Breach of express written warranty (against FMC);
5) Breach of the implied warranty of merchantability (against FMC);
6) Fraud by omission (against FMC);
7) Negligent repair (against Harrold); and,
8) Violation of the Consumer Legal Remedies Act (Civ. Code §§ 1750, et seq.) (against FMC).

Defendant FMC moves for summary judgment, or, in the alternative, for summary adjudication of each cause of action.

FORD MOTOR COMPANY'S MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE, FOR SUMMARY ADJUDICATION OF CAUSES OF ACTION

Defendant's burden on summary judgment

"A defendant seeking summary judgment must show that at least one element of the plaintiff's cause of action cannot be established, or that there is a complete defense to the cause of action. … The burden then shifts to the plaintiff to show there is a triable issue of material

fact on that issue." (*Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72; internal citations omitted; emphasis added.)

"The 'tried and true' way for defendants to meet their burden of proof on summary judgment motions is to present affirmative evidence (declarations, etc.) negating, as a matter of law, an essential element of plaintiff's claim." (Weil et al., Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2007) ¶ 10:241, p.10-91, *citing Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 334; emphasis original.) "The moving party's declarations and evidence will be strictly construed in determining whether they negate (disprove) an essential element of plaintiff's claim 'in order to avoid unjustly depriving the plaintiff of a trial.'" (*Id*. at § 10:241.20, p.10-91, *citing Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107.)

"Another way for a defendant to obtain summary judgment is to 'show' that an essential element of plaintiff's claim cannot be established. Defendant does so by presenting evidence that plaintiff 'does not possess and cannot reasonably obtain, needed evidence' (because plaintiff must be allowed a reasonable opportunity to oppose the motion.) Such evidence usually consists of admissions by plaintiff following extensive discovery to the effect that he or she has discovered nothing to support an essential element of the cause of action." (*Id*. at ¶ 10:242, p.10-92, *citing Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854-855.)

Defendant's arguments

Defendant moves for summary judgment, arguing that: as to the first through fifth causes of action, the new motor vehicle protections of the Song-Beverly Act do not provide protections for used vehicles such as Plaintiff's subject vehicle and Plaintiff cannot identify any unrepaired nonconformity that arose during the warranty period; as to the sixth and eighth causes of action, FMC did not have a duty to disclose because there is no evidence of a transactional relationship between Plaintiff and FMC and Plaintiff did not incur any damages during the warranty period, and the economic loss rule bars the fraud claims.

Plaintiff's request for judicial notice

In opposition to the motion for summary judgment, Plaintiff requests judicial notice of the legislative history for the 2007 addition of Civil Code section 1795.8. The request is GRANTED. (Evid. Code § 452, subds. (c), (h).)

First through fifth causes of action

With respect to the first through fifth causes of action, FMC argues that "Plaintiff's express warranty claims under the Song-Beverly Act (asserting a duty on the part of Defendant manufacturer to repurchase or replace the vehicle if a substantial impairment could not be repaired within a reasonable number of attempts) depend on Plaintiff's ability to prove that the vehicle was a 'consumer good' purchased by Plaintiff as a 'new motor vehicle within the meaning of the Act." (Def.'s memorandum of points and authorities in support of motion for summary judgment ("Def,'s memo"), p.11:19-23.) FMC cites to *Rodriguez v. FCA US, LLC* (2022) 77 Cal.App.5th 209, which the California Supreme Court stated that the opinion "may be cited, not only for its persuasive value, but also for the limited purpose of establishing the

existence of a conflict in authority that would in turn allow trial courts to exercise discretion under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456 [20 Cal. Rptr. 321, 369 P.2d 937], to choose between sides of any such conflict." (*Rodriguez v. FCA US, LLC* (2022) 295 Cal.Rptr.3d 351.) In opposition, Plaintiff argues that "[i]t has long been the law in California—under *Jensen* [*v. BMW of North America, Inc*. (1995) 35 Cal.App.4th 112] and its progeny—that 'used' car owners are entitled to the protections of the Song-Beverly Consumer Warranty Act… [as] a 'used' car purchased from a retail seller with a balance remaining on its manufacturer's warranty is considered a 'new motor vehicle' within the meaning of the SBA, and thus is entitled to its protections." (Pl.'s opposition to motion for summary judgment ("Opposition"), p.4:15-17.)

The Song-Beverly Consumer Warranty Act

In *Cummins, Inc. v. Super. Ct. (Cox)* (2005) 36 Cal.4th 478, the California Supreme Court stated:

> The Song-Beverly Consumer Warranty Act was enacted to address the difficulties faced by consumers in enforcing express warranties. Consumers frequently were frustrated by the inconvenience of having to return goods to the manufacturer for repairs and by repeated unsuccessful attempts to remedy the problem. [Citation.] The Act protects purchasers of consumer goods by requiring specified implied warranties, placing strict limitations on how and when a manufacturer may disclaim those implied warranties, and providing mechanisms to ensure that manufacturers live up to the terms of any express warranty.

(*Cummins, Inc. v. Super. Ct. (Cox)* (2005) 36 Cal.4th 478, 484.)

As is relevant here, "[t]he 1987 amendment… of [Civil Code] section 1793.2 addressed continuing problems experienced by automobile buyers in enforcing the refund-or-replace remedy." (*Id*. at p.486.) "It gave the buyer of a new motor vehicle the option of selecting reimbursement rather than a replacement vehicle, and specified in detail how the amount of reimbursement is to be calculated." (*Id*.)

The Act's definition of "new motor vehicle"

Section 1793.2 provides that "[i]f the manufacturer or its representative in this state is unable to service or repair a new motor vehicle, as that term is defined in paragraph (2) of subdivision (e) of Section 1793.22, to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle in accordance with subparagraph (A) or promptly make restitution to the buyer in accordance with subparagraph (B)." (Civ. Code § 1793.2, subd. (d)(2).) In turn, Civil Code section 1793.22, subdivision (e)(2) states that "'new motor vehicle' means a new motor vehicle that is bought or used primarily for personal, family, or household purposes… [but] also means a new motor vehicle with a gross vehicle weight under 10,000 pounds that is bought or used primarily for business purposes by a person, including a partnership, limited liability company, corporation, association, or any other legal entity, to which not more than five motor vehicles

are registered in this state… the chassis, chassis cab, and that portion of a motor home devoted to its propulsion… a dealer-owned vehicle and a "demonstrator" or other motor vehicle sold with a manufacturer's new car warranty." (Civ. Code § 1793.22, subd. (e)(2) ("demonstrator" is in turn, defined as "a vehicle assigned by a dealer for the purpose of demonstrating qualities and characteristics common to vehicles of the same or similar model and type").)

Jensen

In *Jensen v. BMW of North America, Inc*. (1995) 35 Cal.App.4th 112 (hereinafter, "*Jensen*"), "Jensen leased a 1988 BMW 528e from Stevens Creek BMW Motorsport in Santa Clara in January 1989… [i]n response to a newspaper ad for BMW demonstrators…." (*Id*. at p.119.) The salesman told Jensen the car had been used as a demonstrator for the dealership… [had] 7,565 miles at the time of the lease… [and] also said she would get the 36,000-mile warranty on top of the miles already on the car, and gave her the warranty booklet." (*Id*.) "Unknown to Jensen, Stevens Creek BMW obtained the car at the Atlanta Auto Auction the month before… [and i]t had been owned by the BMW Leasing Corporation and registered in New Jersey." (*Id*. at p.120.) A few weeks after owning the car, Jensen had a brake problem that made the car shake violently. (*Id*.) Jensen took the car in for repair on multiple occasions, but the dealership was unable to solve the brake problem. (*Id*.) Thus, Jensen demanded a refund of her original down payment, lease payments and other fees, or replacement of the car with credit for the original down payment and lease payments. (*Id*.) BMW was unwilling to cede to Jensen's demands and Jensen filed a complaint alleging violation of the Song-Beverly Act. (*Id*.)

BMW argued that "or other motor vehicle sold with a manufacturer's new car warranty" was a clarifier word of "demonstrator," not its own category of vehicles to be considered as a a "new motor vehicle" under the Act. (*Id*. at p.122.) The *Jensen* court concluded that "section 1793.22 includes cars sold with a balance remaining on the new motor vehicle warranty [as that] is consistent with the Act's purpose as a remedial measure… [and] is also consistent with the Department of Consumer Affairs' regulations which interpret the Act to protect 'any individual to whom the vehicle is transferred during the duration of a written warranty.'" (*Id*. at p.126.)

Dagher

In *Dagher v. Ford Motor Co*. (2015) 238 Cal.App.4th 905, the court noted that "[t]he Act treats new motor vehicles somewhat differently from used motor vehicles" and that "the Act's definition of consumer goods is qualified by section 1795.5… [which] limited provisions for an express warranty to be sold and enforced for used goods (or used vehicles): 'Notwithstanding the provisions of subdivision (a) of Section 1791 defining consumer goods to mean 'new' goods, the obligation of a distributor or retail seller of used consumer goods in a sale in which an express warranty is given shall be the same as that imposed on manufacturers under this chapter [with some stated exceptions, involving who shall maintain sufficient service and repair facilities within this state, and the duration of any implied warranties].'" (*Id*. at p.921.) In fact, *Jensen*, *supra*, cited section 1795.5, to note that "[d]efective used cars are addressed by a separate section of the Act." (*Jensen*, *supra*, 35 Cal.App.4th at p.123, fn.2.) The *Dagher* court then noted that "the holding in *Jensen*, *supra*, 35 Cal.App.4th 112, hinged upon the circumstance that the subject vehicle had been leased to the plaintiff by the dealer, while it retained a balance on the manufacturer's new motor vehicle warranty." (*Dagher*,

supra, 238 Cal.App.4th at p.922.) "'Section 1793.22, subdivision (e)(2), defines a 'new motor vehicle' as 'a new motor vehicle which is used or bought for use primarily for personal, family, or household purposes,' and it also includes 'a 'demonstrator' or other motor vehicle sold with a manufacturer's new car warranty,' by the dealer… Jensen was therefore entitled to the protections of the Act because that more specific definition of the 'consumer good' was controlling over the general provisions of section 1791, subdivision (a)." (*Id*.) "It was likewise crucial to the holding in *Jensen* that the dealer fit the section 1791, subdivision (l) definition of a 'seller' that "engages in the business of selling or leasing consumer goods to retail buyers," thus allowing application of the Act." (*Id*.) "In *Jensen*, the court's focus was mainly on the nature of the vehicle (a demonstrator), and on the seller (lessor), a dealer." (*Id*.) "Plaintiff cannot persuasively rely on the statement in *Jensen*, *supra*, 35 Cal.App.4th at page 126, that the protections of section 1793.22 may extend to all 'cars sold with a balance remaining on the manufacturer's new motor vehicle warranty,' in support of his claim that coverage for him is required by the Act's remedial purpose." (*Id*.) "The plaintiff in our case is not the same kind of 'subsequent purchaser' who bought or leased an essentially 'new' vehicle directly from a dealer, as discussed in *Jensen*, and he is not entitled to the same coverage by the Act." (*Id*. at pp.922-923 (also distinguishing Jensen, stating that "[i]n *Jensen*, the vehicle qualified as new because she acquired it from the dealer, at retail, under warranty").)

<u>*Rodriguez*</u>

In *Rodriguez v. FCA US, LLC* (2022) 77 Cal.App.5th 209, the court noted that "no California court has addressed whether a used car purchased from a retail seller unaffiliated with the manufacturer qualifies as a 'new motor vehicle' simply because there is some balance remaining on the manufacturer's warranty." (*Id*. at p.223.) The *Rodriguez* plaintiffs "argue[d] *Jensen* is on point, but we find the case easily distinguishable… [as] *Jensen* involved a lease by a manufacturer-affiliated dealer who issued a full new car warranty along with the lease." (*Id*.) The *Rodriguez* court stated that "[t]hough we think *Jensen* was correctly decided, we agree with *Dagher* that its statement about 'the Act's coverage for subsequent purchasers of vehicles with a balance remaining on the express warranty, must be read in light of the facts then before the court, and are limited in that respect.'" (*Id*. at p.224, quoting *Dagher*, *supra*, 238 Cal.App.5th at p.923.) Given that [*Jensen*'s] facts included a car leased with a *full* manufacturer's warranty issued by the manufacturer's representative, the court was not asked to decide whether a used car with an unexpired warranty sold by a third party reseller qualifies as a 'new motor vehicle.'" (*Id*. at p.224.) The court then concluded that "the phrase 'other motor vehicles sold with a manufacturer's new car warranty' refers to cars sold with a full warranty, not to previously sold cars accompanied by some balance of the original warranty." (*Id*. at p.225.)

<u>FMC meets its initial burden to demonstrate that the subject vehicle is not a "new motor vehicle" under the Song-Beverley Act; in opposition, Plaintiff does not demonstrate the existence of a triable issue of material fact.</u>

Here, the subject vehicle was first sold to a consumer in 2009. (See Pl.'s separate statement of undisputed material facts in opposition to motion for summary judgment, no. ("UMF") 2.) Over two years later, in July 2011, Plaintiff purchased the vehicle from Camping World RV Sales. (See UMF 3.) The subject vehicle had 9,948 miles on the odometer. (See UMF 4.) When sold to the initial buyer, the subject vehicle came with a limited warranty which covered engine defects for five years after the warranty start-date or 100,000 miles—

whichever occurred first—and provided that during this coverage period, authorized FMC dealers would repair, replace or adjust all parts on the vehicle that were defective in factory-supplied materials or workmanship, bumper to bumper coverage for three years or 36,000 miles—whichever occurred first—and powertrain coverage for five years or 60,000 miles. (See UMFs 5-6.) The five year engine warranty began on February 16, 2009 and ended at the latest in February 2014. (See UMFs 7-8, 28.) Plaintiff was working in sales at Camping World when it took the truck in on trade; Camping World RV Sales is not an authorized dealer, is not permitted to sell new vehicles manufactured by FMC and does not have a contractual relationship with FMC. (See UMFs 9-10.) Ford did not issue a new warranty in connection with Plaintiff's purchase of the vehicle. (See UMF 23.)

The Court agrees with *Rodriguez'*s reasoning that the phrase "other motor vehicles sold with a manufacturer's new car warranty" refers to cars sold with a full warranty, not to previously sold cars accompanied by some balance of the original warranty and that the subject vehicle does not otherwise qualify as a "new motor vehicle" under the Song-Beverly Act. Like *Rodriguez*, Plaintiff here acquired a used truck from an unauthorized dealer. FMC meets its initial burden to demonstrate that Plaintiff's causes of action under the Song-Beverly Act are without merit.

Plaintiff devotes the majority of its opposition relying on *Jensen* and criticizing *Rodriguez*. (See Opposition, pp.4:12-28, 5:1-28, 6:1-28, 7:1-28, 8:1-28, 9:1-28, 10:1-28, 11:1-28, 12:1-6.) However, as stated above, the Court agree with *Rodriguez*'s reasoning as applied to the facts of this case.

Plaintiff then attempts to suggest that a triable issue of material facts exists as to its first five causes of action because he presented the subject vehicle for repairs at FMC's authorized repair facility for warranty repairs on four occasions. (See Opposition, p.12:8-20.) Indeed, FMC presented evidence that Plaintiff presented the vehicle for service on October 26, 2011, with approximately 18,194 miles on the odometer, for concerns related to wind noise from the sunroof while driving at freeway speeds. (See UMFs 24-25.) The issue was addressed by making an adjustment to the sunroof and Plaintiff did not complain of a further malfunction to the sunroof, admitting that the dealership "fixed it the first time." (See UMFs 26-27.) As to the other three times that Plaintiff presented the subject vehicle for warranty repairs, these were done after February 2014, and were thus outside the warranty period. (See UMFs 28-39.) Plaintiff fails to demonstrate the existence of a triable issue of material fact as to whether the subject vehicle is a "new motor vehicle" under the Song-Beverly Act.

<u>FMC also meets its initial burden to demonstrate that it did not refuse to service or repair the subject vehicle under the Song-Beverley Act; in opposition, Plaintiff fails to demonstrate the existence of a triable issue of material fact.</u>

FMC also argues that the first five causes of action lack merit because Plaintiff is unable to identify any unrepaired nonconformity that arose during the warranty period. (See Def.'s memo, p.14:7-28, 15:1-28.) Section 1793.2, subdivision (d)(2) provides liability to repair or replace "[i]f the manufacturer or its representative in this state is unable to service or repair a new motor vehicle, as that term is defined in paragraph (2) of subdivision (e) of Section 1793.22, to conform to the applicable express warranties after a reasonable number of attempts…." (Civ. Code § 1793.2, subd.(d)(2).) As stated above, FMC presented evidence that Plaintiff presented the vehicle for service in October 2011, and Plaintiff admitted that he

did not suffer any further malfunction of that issue as the dealership fixed it the first time. (See UMFs 24-27.) However, even if the issue was not fixed, in *Silvio v. Ford Motor Co*. (2003) 109 Cal.App.4th 1205, the court stated that "[a] single attempt does not meet the statutory threshold" under section 1793.2, subdivision (d)(2). (*Silvio*, *supra*, 109 Cal.App.4th at p.1209.) FMC meets its initial burden to demonstrate that the first through fifth causes of action also lack merit on the ground that it did not refuse to service or repair the subject vehicle under the Song-Beverly Act.

In opposition, as previously stated, Plaintiff presented evidence of other repairs outside the warranty period; however, those repairs do not demonstrate the existence of a triable issue of material fact.

Accordingly, defendant FMC's motion for summary adjudication of the first through fifth causes of action is GRANTED.

Plaintiff's objection to paragraph 6 of the Won declaration is OVERRULED.

Plaintiff's objections to the Push declaration are OVERRULED.

Sixth and eighth causes of action

Defendant FMC argues that the sixth and eighth causes of action lack merit because it did not have a duty to disclose to Plaintiff as it was not involved in any transaction with him, Plaintiff did not suffer any damages during the warranty period as alleged, and fraud by omission causes of action are barred by the economic loss rule.

<u>FMC meets its initial burden to demonstrate that it did not have a duty to disclose and Plaintiff fails to demonstrate the existence of a triable issue of material fact.</u>

"The 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." (*Bigler-Engler v. Breg, Inc*. (2017) 7 Cal.App.5th 276, 310-311.) "There are 'four circumstances in which nondisclosure or concealment may constitute actionable fraud: (1) when 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.'" (*Id*. at p.311, quoting *LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 336-337.) "Where, as here, a fiduciary relationship does not exist between the parties, only the latter three circumstances may apply." (*Bigler-Engler*, *supra*, 7 Cal.App.5th at p.311.) "These three circumstances, however, 'presuppose[] the existence of some other relationship between the plaintiff and defendant in which a duty to disclose can arise.'" (*Id*., quoting *LiMandri*, *supra*, 52 Cal.App.4th at pp. 336–337.) "A duty to disclose facts arises only when the parties are in a relationship that gives rise to the duty, such as 'seller and buyer, employer and prospective employee, doctor and patient, or parties entering into any kind of contractual arrangement.'"

(*Bigler-Engler*, *supra*, 7 Cal.App.5th at p.311, quoting *Hong Soo Shin v. Oyoung Kong* (2000) 80 Cal.App.4th 498, 509.) "Our Supreme Court has described the necessary relationship giving rise to a duty to disclose as a 'transaction' between the plaintiff and the defendant: 'In transactions which do not involve fiduciary or confidential relations, a cause of action for non-disclosure of material facts may arise in at least three instances: (1) the defendant makes representations but does not disclose facts which materially qualify the facts disclosed, or which render his disclosure likely to mislead; (2) the facts are known or accessible only to defendant, and defendant knows they are not known to or reasonably discoverable by the plaintiff; (3) the defendant actively conceals discovery from the plaintiff.'" (*Bigler-Engler*, *supra*, 7 Cal.App.5th at p.311, quoting *Warner Constr. Corp. v. L.A*. (1970) 2 Cal.3d 285, 294; see also *LiMandri*, *supra*, 52 Cal.App.4th at p.337 (stating that "[a]s a matter of common sense, such a relationship can only come into being as a result of some sort of transaction between the parties… a duty to disclose may arise from the relationship between seller and buyer, employer and prospective employee, doctor and patient, or parties entering into any kind of contractual agreement… [a]ll of these relationships are created by transactions between parties from which a duty to disclose facts material to the transaction arises under certain circumstances").) "Such a transaction must necessarily arise from direct dealings between the plaintiff and the defendant; it cannot arise between the defendant and the public at large." (*Bigler-Engler*, *supra*, 7 Cal.App.5th at p.312.)

In support of its assertion that it did not have a transaction with Plaintiff, FMC submits portions of Plaintiff's deposition testimony in which Plaintiff states that: he was looking for maybe six months to a year for a used truck (see UMF 11); Plaintiff's research consisted of talking to customers about the tow vehicles they used to pull their RVs (see UMF 12); Plaintiff did not do any internet research because he "ha[s] a life" and he "don't care about all that stuff… [j]ust because it's on the Internet does[n't] mean it's true either" (see UMF 13); he did not read magazines to learn about Ford trucks as "the only magazine I ever read was a Bass Masters fishing magazine" (see UMF 13); there was no advertising that swayed his decision to buy a Ford (see UMF 14); he did not speak to any salespeople about Ford trucks because he's "not a big fan of car salesmen" (see UMF 15); he was not provided any information from any Ford dealership in the six- month to one-year period before he bought the Ford truck as "whatever is in the brochure didn't mean anything to me" (see UMF 14 (also stating that "did I pick up a brochure? No")); he "absolutely" did not recall seeing any displays, posters, signs hanging up any of the dealerships that swayed his decision to purchase a Ford truck (see Def.'s compendium of evidence, exh. D ("Pl.'s depo"), p.54:12-15); prior to the purchase of the truck, Plaintiff did not have any conversations with FMC about its trucks (see UMF 16); Plaintiff knew when he saw the vehicle, he was going to buy it because it fit what he was looking for at the time—a white, F-250, diesel, with low miles (see UMF 18); Plaintiff took the truck home and showed it to his wife and kept it overnight (see UMF 19); his wife liked it (see UMF 20); Plaintiff then drove it back the next day and said that he wanted it (see UMF 21); and, he completed the purchase that day (see UMF 22). FMC meets its initial burden to demonstrate that there was no transaction such that it had a duty to disclose.

In opposition, Plaintiff relies on paragraph 5 of his own declaration in which he states that "[p]rior to purchasing the Subject Vehicle, I viewed Defendant's advertisements and marketing materials in various forms… [h]owever, none of Defendant's advertisements, information, marketing, nor sales representatives disclosed that the 2008 Ford F-250 suffers from an engine defect that can cause technical difficulties with operating the Subject Vehicle. Had Defendant disclosed to me the true nature of the defects in the Subject Vehicle and the

engine defect, I would not have purchased the Subject Vehicle." (Nellett decl. in opposition to motion for summary judgment, ¶ 5.) This statement in Plaintiff's declaration contradicts his deposition testimony and thus does not constitute substantial evidence supporting the existence of a triable issue of material fact. (See *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21; see also *Whitmire v. Ingersoll-Rand Co*. (2010) 184 Cal.App.4th 1078, 1087 (stating that "[w]here a declaration submitted in opposition to a motion for summary judgment clearly contradicts the declarant's earlier deposition testimony or discovery responses, the trial court may fairly disregard the declaration and 'conclude there is no substantial evidence of the existence of a triable issue of fact'").) FMC's objection to paragraph 5 of the Nellett declaration is SUSTAINED. Accordingly, Plaintiff fails to demonstrate a triable issue of material fact as to a duty to disclose.

FMC meets its burden to show that Plaintiff did not suffer any damages as a result of any unfair or deceptive act or practice in a transaction, and in opposition, Plaintiff fails to demonstrate the existence of a triable issue of material fact.

"The CLRA makes unlawful, in Civil Code section 1770, subdivision (a) … various 'unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer.'" (*Rubenstein v. The Gap, Inc*. (2017) 14 Cal.App.5th 870, 880-881.) "[T]he CLRA does not require lost injury or property, but does require damage and causation." (*Veera v. Banana Republic, LLC* (2016) 6 Cal.App.5th 907, 916, fn. 3.) "Under Civil Code section 1780, subdivision (a), CLRA actions may be brought 'only by a consumer 'who suffers any damage as a result of the use or employment' of a proscribed method, act, or practice." (*Id*.) "Accordingly, 'plaintiffs in a CLRA action [must] show not only that a defendant's conduct was deceptive but that the deception caused them harm.'" (*Id*.; see also N*elson v. Pearson Ford Co.* (2010) 186 Cal.App.4th 983, 1022 (stating that "[u]nder the CLRA, plaintiffs must show actual reliance on the misrepresentation and harm").)

Here, to the extent that the eighth cause of action is premised on the allegation that "Defendant Ford has refused to adequately repair certain defects and problems during the warranty period, resulting in owners having to personally incur the associated repair costs when the 6.4L Engines have failed after their warranties' expirations" (FAC, ¶ 73), as previously stated, FMC meets its burden to demonstrate that it has actually adequately repaired certain defects and problems during the warranty period. (See UMFs 24-39.) Plaintiff does not demonstrate the existence of a triable issue of material fact as to this issue.

Additionally, for reasons as already stated above, FMC demonstrates that it was not involved in a transaction with Plaintiff and Plaintiff likewise fails to demonstrate the existence of a triable issue of material fact.

Accordingly, FMC is also entitled to summary adjudication of the sixth and eighth causes of action.

In light of the above ruling, it is unnecessary to address the motion to the extent it is premised on the economic loss rule.

FMC's motion for summary judgment is GRANTED.

FMC's objections to paragraphs 8, 9, 14, 15, 16 and 23 of the Nellett declaration are SUSTAINED.

FMC's objection to paragraph 4 of the Tirmizi declaration is SUSTAINED.

FMC shall prepare the final Order.

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Calendar Lines 6 and 7
Case Name: *Spielbaur Law Office v. Midland Funding, LLC et al.*
Case No.: 18CV339157

Defendants Midland Funding LLC and Midland Credit Management, Inc. ("Defendants") bring two motions for attorney fees incurred while litigating appeals filed by Plaintiff. On August 14, 2023, Defendants filed for fees after appeal of the Merit Fee Award, requesting a total of $56,357.50 for its appellate work as well as for the present motion and reply. On October 9, 2023, Defendants filed for fees after appeal of the appellate fee award, requesting a total of $31,618,50 for its appellate work and the present motion.

Defendants claim that this Court should not consider Plaintiff's opposition to its August 14, 2023 motion because it was late. The opposition was due nine court days before the hearing set for December 7, 2023. CCP § 1005. The opposition was filed on November 27, 2023. The opposition was due on November 22, 2023, as November 23rd and November 24th were both holidays. Holidays and weekends are not included when calculating court days. Cal. Rule of Court 1.10. Defendants also claim that the Court should consider the October 9th motion unopposed, as Plaintiff failed to file any opposition to that motion. Courts have discretion to disregard late-filed papers. CRC 3.1300(d); see also *Rancho Mirage Country Club Homeowners Ass'n v. Hazelbaker* (2016) 2 Cal.App.5th 252, 262-63 (upholding refusal to consider late opposition where there was no attempt to seek leave to file or demonstrate good cause). Unopposed motions "'creates an inference that the motion or demurrer is meritorious.'" *Sexton v. Superior Court* (1997) 58 Cal.App.4th 1403, 1410.

On November 30, 2023, Plaintiff filed a response asking the Court to excuse its failure to file an opposition to the October 9th motion, contending that it was confused and thought the motion was simply a duplicate of the August 14th motion. Decl. of Spielbauer ¶ 3, attached to Response/Rebuttal. Plaintiff also claims that its reply of November 27, 2023 was only one day late, and asks the court to consider it. Response/Rebuttal p.2. Plaintiff asks the court to either continue the motions or to consider the November 27, 2023 opposition with respect to both motions.

The Court declines all the options suggested by Plaintiff. Plaintiff's November 27, 2023 opposition was not merely one day late, though filed eight court days before the hearing. The opposition was due November 22, 2023, giving Plaintiff significantly more time to reply and providing Defendants significantly less time to respond to the opposition. Moreover, Plaintiff did not seek leave to file late and does not provide any reason for why the opposition was late.

For these reasons, the Court declines to consider the opposition. Because the Court declines to consider the opposition with respect to the August 14th motion, it similarly declines to consider it for purposes of the October 9th motion. Plaintiff's confusion is not an excuse for failing to file a reply to Plaintiff's second motion. The motion was titled differently from the first, requests a different amount in fees, and is clearly a separate and distinct motion, as even a cursory review of it would reveal. Moreover, the opposition that Plaintiff did file was five days late and, as already stated, Plaintiff fails to provide any explanation for its failure to timely file.

Even if the Court were to consider the opposition, Plaintiff would not prevail. The evidence submitted by Defendants does not support a claim that the fees are excessive or inflated. The evidence does not support a claim of improper block billing. To the extent "attention to" is vague, Defendants have now adequately explained what it means by that expression and the Court finds the charges reasonable.

The Court GRANTS the motion for fees in the total amount of $56,357.50 for the Merits Fee Award appeal and the August 14, 2023 motion and reply, and $31,618.50 for the appeal of the appellate fee award and its October 9, 2023 motion. Plaintiff is ordered to pay Defendants $87,976 in attorney's fees within 20 days of the final order.

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Calendar line 9
Case Name: Ventana Development Corp. v. Ernest Gudel, et al
Case No.: 23CV417611

Defendant moves to transfer venue of this case to San Joaquin County pursuant to CCP § 392(a), or alternatively, § 397(c). Plaintiff opposes the motion. To prevail, Defendant must overcome the presumption that Plaintiffs have selected a proper venue and must show that Plaintiffs' venue selection is not proper under the statutory grounds. *Battaglia Enters., v. Superior Court* (2013) 215 Cal.App.4th 309, 313-14.

Both sides agree that for purposes of venue, the court should classify an action as "local" or "transitory," that to determine which kind of action a case is, the court should look to the "main relief" sought, and that if the main relief relates to rights in land that venue is proper where the land is. See Def's motion at p3 and Opp. at p13 ("True enough."). The parties dispute, however, what the main relief is.

Defendant claims that the action is local because the main relief sought is specific performance of the terms of a licensee agreement that includes the grant of mutual linkages, and hookups and cross-easements. Motion, p3. As Defendant states in his reply memorandum "the complaint . . . is primarily concerned with the development of the San Joaquin properties. The orders sought . . . [are] to compel the Defendant to continue forward in the development of Defendant's property granting interest in it to Plaintiff[s] to make the development of Plaintiffs' real property more lucrative to them." As such, Defendant argues that Plaintiffs' demands for damages are incidental to their main objective.

Plaintiffs contend that the action is "transitory" because it is primarily concerned with holding Defendant liable for its breach of his obligations under the Water License Agreement. Plaintiffs assert that they are not seeking "a determination of any right or interest in Defendant's property, including their rights or interest under the recorded license that [Defendant] granted to Plaintiffs for the 'purpose of providing water, maintaining and improving the wells and pipeline for each of the parcels.'" Opp. at p14.

In the Complaint, Plaintiffs state that mere economic redress is insufficient and they ask for specific performance. ¶ 41. Such performance includes requiring Defendants to deliver "access agreements, approvals, consents, easements or other documents and to perform all conditions necessary to obtain approval for and construction of the public water system described in the Water License Agreement." ¶42. Plaintiffs further want an order compelling Defendant to grant Plaintiffs access from Parcel Two to Parcel One. ¶45. In the prayer for relief, they again state that they want Defendant to do their part in "taking every action necessary to accomplish the development and construction of the public work system,"and "to grant Plaintffs access from Parcel Two to Parcel One." Complaint, ¶ 51, subparagraphs 4 and 5.

Defendant claims that the request for access seeks an easement burdening title to Defendant's real property, such that the main relief is an action in real property. But the potential for burdening Defendant's title in this manner is not sufficient to convert the action to a local or real property one. "[A]n action is transitory rather than local where the right to any real property sought by the plaintiffs depends upon the outcome of a controversy concerning a

personal obligation of the defendants, and the judgment rendered thereon would be one to enforce such an obligation." (*Neet v. Holmes* (1942) 19 Cal.2d 605, 611; see also *Ponderosa Sky Ranch v. Okay Improvements Corp.* (1962) 204 Cal.App.2d 227, 231 ("[if] plaintiff is entitled to an adjudication of its interest in the land, this will be only as a form of relief which may follow after plaintiff has established its alleged rights under the personal obligation which is in dispute.")). Here, the gravamen of the action turns on Defendant's obligations under the Water License Agreement, not on Defendant's title to the property. Moreover, any judgment affecting Defendant's interest in the San Joaquin County property would follow from the judgment establishing his obligations under the agreement. Because the action is transitory and based on contract, venue in Santa Clara County is proper, as that is where the contract was entered into. CCP 395(a); and see Opp. p.11:8-13. Defendant does not contest that the contract was made in Santa Clara County in his reply.

Defendant then claims that venue should occur in San Joaquin County pursuant to CCP § 397(c) for the convenience of the witnesses and the ends of justice. But a motion for change of venue must be supported by competent evidence. *Tutor-Saliba-Perini Joint Venture v. Superior Court* (1991) 233 Cal.App.3d 736 744. Here, Defendant has not provided any factual basis through declarations or other evidence to suggest venue should be changed based on witness convenience or other ends of justice. See *Buran Equip. Co. v. Superior Court* (1987) 190 Cal. App.3d 1662, 1667 (record was inadequate to sustain order for change of venue based on witness convenience where no declarations addressing that subject were filed).

Accordingly, the motion for change of venue is DENIED. The request of both parties for sanctions is DENIED. Plaintiffs shall submit the final order.

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