SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 10
Honorable Frederick S. Chung

Rachel Tien, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408-882-2210

DATE: March 5, 2024 TIME: 9:00 A.M.

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 courthouse is open: Department 10 is now fully open for in-person hearings, as of April 18, 2023. The court strongly prefers **in-person** appearances for all contested law-and-motion matters. For all other hearings (*e.g.*, case management conferences), the court strongly prefers either **in-person or video** appearances. Audio-only appearances are permitted but disfavored, as they cause significant disruptions and delays to the proceedings. Please use telephone-only appearances as a last resort.

Scheduling motion hearings: Please call 408-882-2430 between 8:30 a.m. and 12:30 p.m. (Mon.-Fri.) to reserve a hearing date for your motion *before* you file and serve it. You must then file your motion papers no more than five court days after reserving the hearing date, or else the date will be released to other cases.

CourtCall is no longer available: Department 10 uses Microsoft Teams for remote hearings. Please click on this link if you need to appear remotely, and then scroll down to click the link for Department 10: https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml. Again, the court strongly prefers in-person or video appearances. Telephonic appearances are a sub-optimal relic of a bygone era.

Recording is prohibited: As a reminder, most hearings are open to the public, but state and local court rules prohibit recording of court proceedings without a court order. This prohibition applies to both in-person and remote appearances.

Court reporters: Unfortunately, the court is no longer able to provide official court reporters for civil proceedings (as of July 24, 2017). If any party wishes to have a court reporter, the appropriate form must be submitted. See https://www.scscourt.org/general_info/court_reporters.shtml.

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	22CV409237	Dana Lyn Banks v. A Tool Shed, Inc. et al.	Click on LINE 1 or scroll down for ruling in lines 1-2.
LINE 2	22CV409237	Dana Lyn Banks v. A Tool Shed, Inc. et al.	Click on LINE 1 or scroll down for ruling in lines 1-2.
LINE 3	18CV338171	Isabel Morales v. Kia Motors America, Inc.	Click on LINE 3 or scroll down for ruling.
LINE 4	20CV374827	Jeanette Philippidis et al. v. Good Samaritan Hospital L.P. et al.	OFF CALENDAR
LINE 5	21CV391013	Elizabeth Gonzalez v. Rogelio Pena et al.	Click on LINE 5 or scroll down for ruling.
LINE 6	23CV415207	Isaac Hughes v. County of Santa Clara et al.	OFF CALENDAR
LINE 7	23CV419050	Bank of America, N.A. v. Kitty Luong	Motion to deem RFAs admitted: notice is apparently proper, and the motion is unopposed. The court finds good cause to GRANT the motion. Moving party to prepare proposed order.
LINE 8	23CV425445	Fortune Vieyra v. San Jose Day Nursery et al.	Motion for protective order: parties to appear. The motion was filed without a hearing date, and there is no notice of hearing in the file. If notice is not proper, which seems to be the case, the hearing will need to be continued.
LINE 9	19CV341719	Synchrony Bank v. Jorge Gonzalez	Motion to set aside default judgment and to dismiss the action with prejudice: notice is proper, and the motion is unopposed. Good cause appearing, the court GRANTS the motion, VACATES the default judgment, and DISMISSES the case with prejudice.

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LINE 10	19CV351252	Gregory Malley v. Bay Area Property Developers, LLC et al.	Click on LINE 10 or scroll down for ruling.
LINE 11	23CV423338	Insurance Company of the West v. Gonzalo Luis Jimenez et al.	Click on LINE 11 or scroll down for ruling.
LINE 12	23CV427645	David Simkins et al. v. Formation Group HB SPV, L.P. et al.	Application for *pro hac vice* renewal: parties to appear. If no party or third-party (*e.g.*, the State Bar) appears at the hearing to object to the application, the court will GRANT it.

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Calendar Lines 1-2
Case Name: *Dana Lyn Banks v. A Tool Shed, Inc. et al.*
Case No.: 22CV409237

I. BACKGROUND

This is a dispute over the rental of landscaping and construction equipment. Plaintiff Dana Banks, who is self-represented, rented equipment from defendant A Tool Shed, Inc. ("ATS") and now sues for breach of contract and related causes of action. She filed her complaint on December 29, 2022, naming three defendants: ATS, Robert H. Pedersen, and Rob W. Pedersen. The complaint states five causes of action: (1) Breach of Contract; (2) "Unauthorized charges to credit card on file with A Tool Shed,"; (3) Breach of the Implied Covenant of Good Faith and Fair Dealing; (4) "Unfair Debt Collection Action"; and (5) "Disparagement and Emotional Distress." Although there are three named defendants in the complaint, all five causes of action are asserted against only ATS.

There are also cross-complaints. On September 29, 2023, defendants filed a cross-complaint against Banks and Suretec Insurance Company ("Suretec"). This cross-complaint states five causes of action: (1) Breach of Contract (against Banks); (2) Account Stated (against Banks); (3) Open Book Account (against Banks); (4) Recovery Against Contractor's License Bond, (against Suretec, under Bus. & Prof. Code, § 7111); and (5) Recovery Against Contractor's License Bond (against Suretec, under Bus. & Prof. Code, § 7120). Suretec then filed its own cross-complaint against Banks and "Jardin Banks," an entity apparently owned by Banks, on November 2, 2023. This cross-complaint states four causes of action: (1) Express Indemnity; (2) Implied Indemnity; (3) Statutory Reimbursement (citing Civ. Code, § 2847); and (4) Contribution.

Currently before the court are two matters: (1) a combined demurrer and motion to strike portions of the complaint, filed by defendants, and (2) a "Motion for Judgment and Sanctions," filed by Banks. Banks filed an untimely opposition to the demurrer and motion to strike on February 26, 2024; it was supposed to be filed by no later than February 21, 2024, nine court days before the hearing. In addition, it appears to have been filed without a proof of service. In their reply brief, defendants complain that it was not served on them. Although the court is not required to consider late-filed and improperly served papers, it will exercise its discretion to consider the late opposition, particularly as defendants have filed a reply. Defendants filed a timely opposition to Banks's motion for judgment and sanctions on February 21, 2024.

II. REQUEST FOR JUDICIAL NOTICE

"Judicial notice may not be taken of any matter unless authorized or required by law." (Evid. Code, § 450.) A precondition to judicial notice in either its permissive or mandatory forms is that the matter to be noticed be relevant to the material issue before the court. (*Silverado Modjeska Recreation and Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 307, citing *People v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 422, fn. 2.) It is the court, and not the parties, that determines relevance. Evidence Code section 453, subdivision (b), requires a party seeking notice to "[furnish] the court with sufficient information to enable it to take judicial notice of the matter."

In support of their opposition to Banks's motion, defendants have submitted a request for judicial notice of "the court's entire file in this matter and official records therein," pursuant to Evidence Code section 452, subdivision (d). (See Request at p. 2:2-4.) The court denies this overbroad and unmanageable request. Defendants do not explain how any portion of the court's file in this case, much less the entirety of it, is necessary to a resolution of these motions.

III. DEMURRER TO THE COMPLAINT

A. General Standards

The court, in ruling on a demurrer, treats it "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp*. (1983) 35 Cal.3d 197, 213-214.)

The court considers only the pleading under attack, any attached exhibits, and any facts or documents for which judicial notice is properly requested. The court cannot consider extrinsic evidence in ruling on a demurrer or motion to strike. The court has considered the declaration of Liam O'Connor, counsel for defendants, to the extent that it describes the required meet-and-confer efforts. Although the court is not required to consider the declaration from Banks that was submitted with her late-filed opposition, the court again exercises its discretion to do so, as it appears that this declaration contains the heart of her arguments, rather than her "opposition" itself.

As noted above, plaintiff Banks is self-represented. Self-represented litigants are entitled to the same, but no greater, consideration than other litigants and attorneys. (*County of Orange v. Smith* (2005) 132 Cal.App.4th 1434, 1444.) Self-represented litigants "are held to the same standards as attorneys" and must comply with the rules of civil procedure. (*Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 543; see also *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985 ["A doctrine generally requiring or permitting exceptional treatment of parties who represent themselves would lead to a quagmire in the trial courts, and would be unfair to the other parties to litigation."].)

B. Discussion

Defendants challenge all five causes of action in the complaint on the ground that these causes fail to state sufficient facts against the individual defendants, Robert H. Pedersen and Rob W. Pedersen. Defendants assert that "all of the allegations of wrongful conduct are addressed solely to Defendant ATS, and [they demur] because of the lack of verified allegations as against the Individual Defendants . . . ." (Notice of Demurrer and Demurrer at p. 2:8-10.)

Defendants are correct. The five attachments to Banks's form complaint each state that the cause of action is alleged against "A Tool Shed, Inc." only. Banks's late-filed opposition

asserts that "[t]he facts of the complaint are more than sufficient for all causes of action against A Tool Shed, Inc., Robert H. Pedersen, President CEO, Rob W. Pedersen, Vice President." (Notice of Opposition at p. 2:6-8.) This is unpersuasive. The court sees nothing in the complaint that alleges any individual liability on the part of either Robert Pedersen or Rob Pedersen. Indeed, the individual defendants are hardly even mentioned, except for an allegation that they contacted Banks on behalf of ATS. This allegation, without more, is not enough. Nor is it enough, contrary to Banks's apparent view, that "the complaint clearly names" them as defendants. (Notice of Opposition at p. 2:1-4.) The whole point of this demurrer is that the complaint "names" them without setting forth sufficient factual allegations against them. The court therefore sustains the demurrer under Code of Civil Procedure section 430.10, subdivision (e).

It is a plaintiff's responsibility to explain how a defect identified by a demurrer can be cured. (See *Shaeffer v. Califia Farms, LLC* (2020) 44 Cal.App.5th 1125, 1145 ["The onus is on the plaintiff to articulate the 'specifi[c] ways' to cure the identified defect, and absent such an articulation, a trial or appellate court may grant leave to amend 'only if a potentially effective amendment [is] both apparent and consistent with the plaintiff's theory of the case. [Citation.]'"].) Banks has not requested leave to amend, nor has she identified any possible basis under which an amendment of the complaint might be sufficient. It is not apparent to the court how any of the causes of action could be properly cured. Nevertheless, because this is the first pleading challenge, the court grants 10 days' leave to amend.

The demurrer is SUSTAINED, with 10 days' leave to amend.

IV. MOTION TO STRIKE PORTIONS OF THE COMPLAINT

A. General Standards

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

A motion to strike may be brought against a portion of a cause of action that is purportedly defective—for example, because it seeks an improper remedy. (See *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680.) At the same time, as courts have observed, "we have no intention of creating a procedural 'line item veto' for the civil defendant." (*Id*. at p. 1683.) Rule 3.1322(a) of the California Rules of Court requires that "[a] notice of motion to strike a portion of a pleading must quote in full the portions sought to be stricken except where the motion is to strike an entire paragraph, cause of action, count or defense. Specifications in a notice must be numbered consecutively."

B. Discussion

Defendants' combined notice of demurrer and notice of motion to strike fails to comply with Rule 3.1322(a), as it does not quote *any* of "the portions sought to be stricken," much less *all* of them. The notice states that defendants "move to strike Plaintiff's requests for punitive damages and damages for 'emotional distress' as set forth in the Complaint," but there are multiple such references in the complaint. (Notice of Demurrer and Demurrer/Notice of Motion and Motion at p. 2:18-19.) Even though the complaint is relatively short, defendants must provide an opposing party with sufficient notice that *precisely* identifies what they seek to strike.

The court therefore DENIES the motion to strike.

V. BANKS'S MOTION FOR JUDGMENT AND SANCTIONS

Banks contends that defendants' counsel "lied" about whether ATS was properly served. As punishment for this claimed misrepresentation, Banks asks the court: to find that ATS is in default; to award judgment to Banks; to award punitive damages to Banks; to sanction counsel for ATS; and to dismiss ATS's cross-complaint and "Motion to Demurrer." (See Motion at p. 1:27-2:8.)

The court must deny this motion for at least two reasons. First, the court does not have any evidentiary basis upon which to make a finding that counsel lied about proper service on ATS. No evidence has been submitted with the motion, and there is no proof of service in the file showing service of the summons and complaint on ATS (as opposed to on ATS's counsel, which is usually insufficient (see *Abers v. Rohrs* (2013) 217 Cal.App.4th 1199, 1209).) As a purely factual matter, Banks has not established that counsel lied.

Second, even if the court were to find that counsel lied, the court is still not aware of any legal authority that provides for the drastic relief sought in this motion. The only authority cited in the motion is Business and Professions Code section 6068 ("Duties of an Attorney"). Banks does not explain how this code section supports her requests. While section 6068 does describe the various duties of an attorney at law, it does not provide for any of the remedies requested by Banks. Rather, it simply notes that an attorney may be disciplined for failing to comply with these duties. Discipline by the State Bar of California is a completely separate matter from remedies awarded by a court in a civil action. It is the moving party's responsibility to support and develop their arguments, not the court's. (See *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106 [court is not required to examine undeveloped claims, nor to make arguments for the parties].) Banks does not meet this responsibility.

As there is no apparent factual basis for the motion, nor any legal basis for the relief requested, the court DENIES the motion.

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Calendar Line 3
Case Name: *Isabel Morales v. Kia Motors America, Inc.*
Case No.: 18CV338171

I. BACKGROUND

This is a "lemon law" action under the Song-Beverly Consumer Warranty Act by plaintiff Isabel Morales against defendant Kia Motors America, Inc. (which is apparently now known as Kia America, Inc. but will be referred to herein as "Kia") and Doe defendants.

A. Allegations of the First Amended Complaint

On or about March 2, 2013, Morales purchased a 2013 Kia Sorento ("Subject Vehicle") manufactured and/or distributed by Kia. (First Amended Complaint ("FAC"), ¶6.) Morales received an express written warranty which, among other things, covered the Theta 2.0-liter and 2.4-liter direct injection engines ("2.0L and/or 2.4L GDI Engine") and transmission. (FAC, ¶ 7.) According to the complaint, during the warranty period, the Subject Vehicle contained or developed defects that substantially impaired the use, value, or safety of the Subject Vehicle. (FAC, ¶ 8.)

Kia allegedly knew since 2010, if not earlier, that the 2011-2016 Kia Optima, 2011-2016 Kia Sportage, 2012-2016 Kia Sorento, and other vehicles equipped with the 2.0L and/or 2.4L GDI Engine contain one or more design or manufacturing defects (defined in the complaint as "the Engine Defect"), which results in the restriction of oil flow through the connecting rod bearings, as well as to other vital areas of the engine. (FAC, ¶¶ 15, 18-22.) The Engine Defect causes the vehicle to experience catastrophic engine failure and/or stalling while in operation. (*Ibid*.; see also ¶ 23.) Notwithstanding their knowledge of the Engine Defect, Kia and Hyundai Motor America, Kia's largest shareholder, advertised the quality of the new "Theta 2" engines to consumers. (FAC, ¶¶ 11-12 and 16-17.)

Prior to Morales's acquisition of the Subject Vehicle, Kia knew that the 2.4L GDI Engine installed on the Subject Vehicle was defective but failed to disclose this fact to Morales at the time of sale and thereafter. (FAC, ¶¶ 24-25, 37, and 43.) Kia knew about the Engine Defect based on consumer complaints, its issuance of technical service bulletins ("TSBs"), pre-production and post-production testing data, aggregate warranty data, warranty repair and parts replacements data, patent applications acknowledging problems with the engine, and durability testing. (FAC, ¶¶ 26-27 and 29-33.)

Despite knowing of the Engine Defect and its safety risks since 2010, Kia concealed the defective nature of the Subject Vehicle from its sales representatives and Morales. (FAC, ¶ 34.) Kia continued to place defective vehicles into the stream of commerce with actual knowledge that the 2.0L and 2.4L GDI Engines could fail and put vehicle operators at risk of death. (FAC, ¶ 35.) The Engine Defect is not a matter that is known to the general public. (*Ibid*.)

Morales discovered Kia's conduct alleged herein at or around the time she requested a buyback or restitution of the Subject Vehicle from Kia, in or around March 2018. (FAC, ¶ 47.) Kia did not provide restitution to Morales. (*Id*.)

B. Procedural History

Morales filed her original complaint on November 20, 2018, stating the following causes of action:

(1) Violation of Subdivision (d) of Civil Code Section 1793.2
(2) Violation of Subdivision (b) of Civil Code Section 1793.2
(3) Violation of Subdivision (a)(3) of Civil Code Section 1793.2
(4) Breach of Express Written Warranty
(5) Breach of the Implied Warranty of Merchantability
(6) Fraud by Omission
(7) Fraudulent Inducement – Intentional Misrepresentation

Kia filed a demurrer to the third through seventh causes of action, as well as a motion to strike Morales's request for punitive damages. After a hearing on April 19, 2019, this court (Judge Zayner) overruled the demurrer to the third, fourth, sixth, and seventh causes of action and sustained it with leave to amend as to the fifth cause of action on the basis of the four-year statute of limitations. Judge Zayner denied the motion to strike.[1] In overruling the demurrer to the sixth and seventh causes of action, Judge Zayner noted that Kia's argument based on the economic loss rule was "without merit."[2]

Morales filed the operative FAC, stating six causes of action, on April 19, 2019. The FAC abandoned the cause of action for breach of implied warranty, and the fraud by omission and fraudulent inducement claims became the fifth and sixth causes of action. Kia filed an answer to the FAC on May 17, 2019.

Currently before the court is a motion for summary judgment, or in the alternative, summary adjudication, by Kia.

II. KIA'S MOTION FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION

A. General Standards

The pleadings limit the issues presented for summary judgment or summary adjudication, and such a motion may not be granted or denied based on issues not raised by the pleadings. (See *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health Ins*. (2010) 181 Cal.App.4th 60, 73 ["the pleadings determine the scope of relevant issues on a summary judgment motion"].) "A moving party seeking summary judgment or adjudication is not required to go beyond the allegations of the pleading,

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[1] The court takes judicial notice of the April 19, 2019 minute order pursuant to Evidence Code section 452(d).
[2] Kia now repeats this argument in this summary judgment motion and continues to advance it in other cases, including cases before the undersigned. The court takes judicial notice of its own February 1, 2024 order rejecting this same argument, advanced by the same counsel on behalf of the same client, in *Wallman v. Kia Motors America, Inc.* (Case No. 23CV416988), under Evidence Code section 452, subdivision (d). At a certain point, a meritless argument, repeatedly advanced with voluminous boilerplate text that is cut and pasted from other briefs, becomes a frivolous argument; and at a certain point, a frivolous argument, repeatedly advanced with voluminous boilerplate text cut and pasted from other briefs, becomes a sanctionable argument.

with respect to new theories that could have been pled, but for which no motion to amend or supplement the pleading was brought, prior to the hearing on the dispositive motion." (*Jacobs v. Coldwell Banker Residential Brokerage Co*. (2017) 14 Cal.App.5th 438, 444.)

The moving party bears the initial burden of production to make a prima facie showing that there are no triable issues of material fact. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850 (*Aguilar*).) A motion for summary judgment or adjudication shall be granted only if it completely disposes of an entire cause of action, an affirmative defense, a claim for damages, or an "issue of duty." (See Code Civ. Proc., § 437c, subd. (f)(1); *McClasky v. California State Auto. Ass'n* (2010) 189 Cal.App.4th 947, 975 ["If a cause of action is not shown to be barred in its entirety, no order for summary judgment—or adjudication—can be entered."].)

The moving party's declarations and evidence will be strictly construed in determining whether they negate or disprove an essential element of a plaintiff's claim "in order to resolve any evidentiary doubts or ambiguities in plaintiff's (or opposing party's) favor." (See *Atkins v. St. Cecilia Catholic School* (2023) 90 Cal.App.5th 1328, 1344-1345, citing *Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 64, parentheses added.) While the same standards of admissibility govern both, the opposition declarations are liberally construed while the moving party's evidence is strictly scrutinized. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) The evidence must be liberally construed in support of the opposing party, resolving any doubts in favor of that party. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.) The moving party may generally not rely on additional evidence submitted with its reply papers. (See *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-38 ["The general rule of motion practice . . . is that new evidence is not permitted with reply papers. This principle is most prominent in the context of summary judgment motions . . . ."]; see also *Nazir v. United Airlines, Inc*. (2009) 178 Cal.App.4th 243, 252.)

"A defendant moving for summary judgment bears the initial burden of showing that a cause of action has no merit by showing that one or more of its elements cannot be established or that there is a complete defense. Once the defendant has met that burden, the burden shifts to the plaintiff 'to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto.' 'There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.'" (*Madden v. Summit View, Inc*. (2008) 165 Cal.App.4th 1267, 1272 [internal citations omitted].)

B. The Basis for Kia's Motion

Kia argues that the first cause of action fails because "an authorized repair facility repaired each warranted defect in one repair attempt"; that the second and third causes of action fail because Morales has "no evidence" of actual damages (second cause of action) or of insufficient literature or replacement parts (third); that the fourth cause of action fails because Kia "complied with its obligations" under the warranty; that the fifth cause of action fails because Morales cannot establish a "special or transactional" relationship with Kia, active concealment, or damages; and that the sixth cause of action fails because Morales has "no evidence" of intentional misrepresentation. (Notice of Motion at p. 2:3-20.) Kia also repeats the incorrect argument that the fifth and sixth cause of action are barred by the economic loss rule. (*Ibid.*)

Kia's motion is supported by two declarations. One is from Esperanza Puentes Jaimes, an "Escalated Case Administrator" at Kia, who authenticates Exhibits 1-12 to Kia's packet of documentary evidence. The other is from Kia's counsel, Mikaela Jackson, who authenticates Exhibits 13-15.

C. Analysis

For the reasons set forth below, the court DENIES Kia's motion for summary judgment or summary adjudication in its entirety. As a general matter, Kia conflates a factually weak case (or what it believes to be a factually weak case) with one in which there are no material factual disputes. Those are two different things.

1. First and Fourth Causes of Action

As noted above, the basis upon which Kia seeks summary judgment or adjudication as to the first cause of action for violation of Civil Code section 1793.2, subdivision (d), is that each warranted defect was repaired in one repair attempt. Section 1793.2(d) provides that if a manufacturer or its representative fails to service the subject goods to conform to the applicable warranties after a reasonable number of attempts, it is required either to (1) replace the goods, or (2) "reimburse the buyer in an amount equal to the purchase price paid by the buyer, less that amount directly attributable to use by the buyer prior to the discovery of the nonconformity." (Civ. Code, § 1793.2, subd. (d)(1).) "'Attempts' is plural. The statute does not require the manufacturer to make restitution or replace a vehicle if it has had only one opportunity to repair that vehicle." (*Silvio v. Ford Motor Co.* (2003) 109 Cal.App.4th 1205, 1208 [citing Civ. Code, § 1793.2, subd. (d)].)

The Song-Beverly Act "is a remedial measure intended for the protection of consumers and should be given a construction consistent with that purpose. [Citations.]" (*Oregel v. American Isuzu Motors, Inc*. (2001) 90 Cal.App.4th 1094, 1103.) "[T]he only affirmative step the Act imposes on consumers is to 'permit[] the manufacturer a reasonable opportunity to repair the vehicle.' [Citation.] Whether or not the manufacturer's agents choose to take advantage of the opportunity, or are unable despite that opportunity to isolate and make an effort to repair the problem, are matters for which the consumer is not responsible." (*Id*. at pp. 1103-1104.) As the opposition points out, "[t]he reasonableness of the number of repair attempts is a question of fact to be determined in light of the circumstances." (*Robertson v. Fleetwood Travel Trailers of California, Inc.* (2006) 144 Cal.App.4th 785, 799.)[3]

Kia contends that each time Morales brought the Subject Vehicle in for service, it was for a different, *sui generis* problem that had no relation to any prior or subsequent issue, and

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[3] With 24 pages of text, the opposition violates Rule 3.1113(d) of the California Rules of Court, particularly as large swaths of it are single-spaced rather than double-spaced. Also, significant portions of the opposition and the opposing separate statement that were filed with the court are redacted (multiple *pages* of the opposition brief). Morales did not seek prior leave of court to file an opposition in excess of the page limits or to redact portions of her papers. No notice of filing under seal was submitted until February 26, 2024—*i.e.*, days after filing, which is not how it is supposed to be done. The court has exercised its discretion to consider the opposition despite these shortcomings; at the same time, the court has not considered any unpublished California decisions cited by Morales.

that each issue was resolved in one visit. (See Memorandum at pp. 5:24-7:2 ["The record shows that Plaintiff has never returned for a repeat concern."].) Kia's argument against the first cause of action depends almost entirely upon the declaration of Esperanza Puentes Jaimes. (See Separate Statement of Undisputed Material Facts ("UMFs") Nos. 1-30.)[4] The Puentes Jaimes declaration does not actually state that all of the "concerns" for which Morales brought in the Subject Vehicle for service were unrelated and that none could be considered a "repeat concern."

The opposition disputes the type and length of the applicable warranty for the Subject Vehicle, and it also disputes Kia's characterization of the problems Morales experienced. "Plaintiff presented the vehicle at least eight (8) times during the express warranty for concerns regarding the Vehicle, including but not limited to, consistent abnormal tapping and cracking noises, oil and coolant leaks, overheating issues, harsh jerking when stopped, and an engine seizure, which is a common symptom of the alleged engine defect. Further, despite multiple repair opportunities during the warranty period, Plaintiff continues to experience defects in the Vehicle to this day, including the Engine defect." (Opposition at pp. 12:24-13:2, internal citations omitted.)

Morales's opposition is supported by two declarations. The first is from counsel Daniel Law, which authenticates attached Exhibits 1-38. The second is from Morales herself, which authenticates attached Exhibits 1-7 (these are different documents from those attached to the Law declaration with overlapping numbers). Morales cites both declarations in her responsive separate statement. Morales disputes UMF Nos. 20 and 29 and responds to several other UMFs as "incomplete," based on the parties' disagreements regarding the type and length of the applicable warranty, the number of repair visits that occurred, Kia's characterization of those visits, and Kia's selective use of Morales's deposition testimony. The Morales declaration disputes the type and length of warranty the Puentes Jaimes declaration claims she had, disputes the number of repair visits and the cause of those visits. Morales also states that "despite multiple opportunities during the express warranty period to conform the Vehicle to warranty, I continue[] to experience defects in the Subject Vehicle to this day, including engine defects, such as failures to start." (Morales Decl. at ¶ 17.)

Where declarations or testimony submitted by both sides conflict on material facts, the court cannot weigh the evidence in ruling on a motion for summary judgment. (See *Reid v. Google, Inc*. (2010) 50 Cal.4th 512, 540 (*Reid*).) "Typically in summary judgment litigation, equally conflicting evidence requires a trial to resolve the dispute." (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 881.)

Assuming for purposes of argument that the evidence Kia cites in support of UMF Nos. 1-30 is sufficient to meet its initial summary judgment/adjudication burden as to the first cause of action, a trier of fact could still reasonably conclude from the evidence presented by Morales that several of the problems in the Subject Vehicle for which she sought service were related to

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[4] Kia's separate statement does not comply with Rule of Court 3.1350(d), which requires UMFs in statements supporting motions for summary judgment to be consecutively numbered throughout. Strictly speaking, Kia's statement is only sufficient to support the alternative motion for summary adjudication. The court has considered the statement despite this shortcoming. The court's power to deny summary judgment outright for failure to comply with Rule of Court 3.1350 is discretionary, not mandatory. (See *Holt v. Brock* (2022) 85 Cal.App.5th 611, 619, citing *Truong v. Glasser* (2009) 181 Cal.App.4th 102, 118.)

each other—*e.g.*, oil and engine problems consistent with the alleged Engine Defect that were covered by the applicable warranty but were not fully resolved by Kia even after a reasonable number of attempts. The court therefore DENIES Kia's motion for summary judgment or summary adjudication as to the first cause of action. There remains a material factual issue as to whether "an authorized repair facility repaired each warranted defect in one repair attempt."

For the same reason, the court also DENIES Kia's motion for summary judgment or summary adjudication as to the fourth cause of action for breach of express written warranty. As Kia acknowledges, the outcome of the motion as to the first cause of action determines the outcome as to the fourth cause of action. (See Memorandum at p. 8:18-22.)

2. Second and Third Causes of Action

As noted above, the motion as to the second and third causes of action is based on the assertion that Morales has "no evidence" to support certain elements of these causes. To obtain summary judgment or summary adjudication on the basis that a plaintiff has no evidence to establish an essential element of a claim, a moving defendant must support such a motion with discovery admissions or other admissible evidence showing that "plaintiff does not possess, and cannot reasonably obtain, needed evidence." (*Aguilar*, *supra*, 25 Cal.4th at pp. 854-855.) It is not enough for a moving defendant to show merely that a plaintiff currently "has no evidence" on a key element of plaintiff's claim. The moving defendant must also show that plaintiff cannot reasonably that evidence to support her claim. (See *Gaggero v. Yura* (2003) 108 Cal.App.4th 884, 891, citing *Aguilar* ["[T]he absence of evidence to support a plaintiff's claim is insufficient to meet the moving defendant's initial burden of production. The defendant must also produce evidence that the plaintiff cannot reasonably obtain evidence to support his or her claim."].) "Such evidence may consist of the *deposition testimony of the plaintiff's witnesses*, the plaintiff's *factually devoid discovery responses*, or *admissions by the plaintiff in deposition or in response to requests for admission* that he or she has not discovered anything that supports an essential element of the cause of action." (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 110 [emphasis added and citing *Aguilar*].) Demonstrating that a plaintiff does not have, and cannot get, essential evidence presupposes that the defendant thoroughly explored the plaintiff's case through discovery.

A party moving for summary judgment or adjudication on the basis of an opponent's lack of evidence fails to satisfy its burden of proof by producing discovery responses that do *not* exclude the possibility that the opposing party may possess or may reasonably obtain evidence sufficient to establish their claim. (See *Scheiding v. Dinwiddie Const. Co.* (1999) 69 Cal.App.4th 64, 80-81 [court may not infer that plaintiff lacks evidence on a point that the defendant does not pursue in discovery]; *Gulf Ins. Co. v. Berger, Kahn, Shaffton, Moss, Figler, Simon & Gladstone* (2000) 79 Cal.App.4th 114, 134-136 ["[T]o grant summary judgment, the court must be able to infer from the record that the plaintiff could produce no other evidence on the disputed point."]; *Weber v. John Crane, Inc.* (2006) 143 Cal.App.4th 1433, 1441-1442 ["A motion for summary judgment is not a mechanism for rewarding limited discovery; it is a mechanism allowing the early disposition of cases where there is no reason to believe that a party will be able to prove its case."].)

Kia's argument as to the second and third causes of action relies upon the Puentes Jaimes declaration and portions of Exhibits 14 and 15 to its packet of documentary evidence.

(See Separate Statement, "Issue 2" and "Issue 3.") None of these UMFs address the notion that Morales has "no evidence" to support the elements of the second and third causes of action. Again, it is the "golden rule" of summary judgment and summary adjudication that all material facts must be set forth in the separate statement. (*United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 337 (*Garcin*); see also *Parsons v. Estenson Logistics, LLC* (2022) 86 Cal.App.5th 1260, 1265, fn. 5 ["'*[A]ll* material facts must be set forth in the separate statement.'"] [emphasis in original, quoting *Garcin*].)

The evidentiary material submitted with Kia's motion does not establish that Morales currently lacks or cannot reasonably obtain evidence of actual damages (as to the second cause of action) or insufficient literature or replacement parts (as to the third). Indeed, her separate statement does not even appear to mention literature or replacement parts anywhere.

The portions of Exhibit 14 upon which Kia relies (excerpts from Morales's deposition testimony) also do not establish that Morales does not currently have or cannot reasonably obtain, evidence of actual damages or insufficient literature or replacement parts. Exhibit 15, a copy of the installment sales contract for the Subject Vehicle, does not in itself establish anything about the state of Morales's evidence. In its supporting memorandum, Kia argues that because Morales referred Kia to her "document production" in discovery responses, the sales contract she produced establishes that she has no other evidence of damages. (See Memorandum at p. 2:14-18.[5]) This is not persuasive. (See *Bayramoglu v. Nationstar Mortgage LLC* (2020) 51 Cal.App.5th 726, 733-734 ["[W]e cannot infer an absence of facts merely because plaintiffs, relying on section 2030.230, told Nationstar that it could find the necessary facts in certain specified documents. And that is true, we find, even if plaintiffs' reliance on section 2030.230 was misplaced."].) In this case, Kia chose not to bring a motion to compel further discovery responses. "Having declined to follow that remedy, [defendant cannot] use plaintiffs' misplaced reliance on section 2030.230 to satisfy its own burden of production on its motion for summary judgment." (*Id.* at p. 734.)

Even assuming arguendo that the Puentes Jaimes declaration and Exhibits 14 and 15 to the packet of documentary evidence were sufficient to make a prima facie showing that Morales had "no evidence" to support her claims, the opposition evidence—the Morales and Law declarations and the attached exhibits—which dispute the type of warranty, the length of warranty, and whether the issues with the Subject Vehicle were resolved, would demonstrate that triable issues of material fact remain as to whether Morales has or can reasonably obtain evidence. Again, where declarations or testimony submitted by both sides conflict on material facts, the court cannot weigh the evidence in ruling on a motion for summary judgment. (See *Reid, supra*, 50 Cal.4th at p. 540.) Summary judgment or adjudication as to the second and third causes of action is therefore denied.

3. Fifth and Sixth Causes of Action

Summary judgment or summary adjudication as to the fifth and sixth causes of action is also insufficiently supported in Kia's motion. Although Kia argues that Morales cannot show "active concealment" (fifth cause of action) and has "no evidence" of "intentional

[5] This portion of Kia's memo cites to UMFs that are only listed in support of judgment/adjudication of the fifth and sixth causes of action.

misrepresentation" (sixth cause of action), Kia fails to establish an absence of triable issues on these points.

The fifth cause of action is based on Kia's alleged allowing of the Subject Vehicle to be sold without disclosing the engine defect—*i.e.*, fraudulent concealment. (See FAC at ¶¶ 78-85.) The sixth cause of action is based on Kia's affirmative representations in its marketing materials as to the quality of "Theta 2" engine, while concealing its knowledge of the Engine Defect from members of the public like Morales. (See FAC at ¶¶ 86-94.)

"The elements of fraudulent concealment are: (1) the defendant concealed or suppressed a material fact; (2) the defendant was under a duty to disclose the fact to the plaintiff; (3) the defendant intentionally concealed or suppressed the fact with the intent to defraud the plaintiff; (4) the plaintiff was unaware of the fact and would not have acted as he or she did if the plaintiff had known of the concealed or suppressed fact; and (5) as a result of the concealment or suppression of the fact, the plaintiff sustained damage." (*Burch v. CertainTeed Corp*. (2019) 34 Cal.App.5th 341, 348, citing *Bigler-Engler v. Breg, Inc*. (2017) 7 Cal.App.5th 276, 310-311 (*Bigler*).) "With respect to concealment, 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. The latter three circumstances presuppose the existence of some other relationship between the plaintiff and defendant in which a duty to disclose can arise. This relationship has been described as a transaction, such as that between seller and buyer, employer and prospective employee, doctor and patient, or parties entering into *any kind of contractual arrangement*." (*Id*. at pp. 349-350, internal quotations and citations omitted, emphasis added.)

In this case, Kia argues that there is no special or transactional relationship between it and Morales, yet at the same time, Kia does not dispute the existence of a vehicle warranty, which is a contractual relationship that can give rise to a duty to disclose. (The parties do dispute the type and length of that warranty, which is a separate issue.) In addition, Kia has not attempted to dispute its alleged exclusive knowledge of the "Engine Defect" or failure to disclose it while making representations as to quality of the engine through advertising to consumers, including Morales.

Kia's argument that the *Bigler* decision supports a finding that it owed no duty to disclose to Morales—based on the absence of a transactional relationship—is unpersuasive. (See Memorandum at pp. 9:20-10:13.) As Kia is likely aware, the facts of *Bigler* are easily distinguishable from the facts of this case and most likely *all* lemon law cases. In *Bigler*, the Court of Appeal held that a defendant manufacturer of a medical device did not owe a duty to disclose because it:

> . . . did not transact with [plaintiff] or her parents in any way. Plaintiff obtained her Polar Care device from Oasis, based on a prescription written by Chao, all without [defendant's] involvement. The evidence does not show that [defendant] knew—prior to this lawsuit—that [plaintiff] was a potential user of the Polar Care device, that she was prescribed the Polar Care device, or that she used the Polar Care device. The evidence also does not show that [defendant]

> directly advertised its products to consumers such as [plaintiff] or that it derived any monetary benefit directly from [plaintiff's] individual rental of the Polar Care device.

(*Bigler*, *supra*, 7 Cal.App.5th at p. 314.) By contrast, Kia is a distributor (and/or manufacturer) of motor vehicles that does directly advertise its products to consumers such as Morales. In addition, Morales has alleged and testified at her deposition that she did in fact rely, at least in part, on advertising by Kia in deciding to purchase the Subject Vehicle. As a result, while *Bigler* may be applicable to companies that are similarly situated to the medical device company defendant in that case, it does not apply to defendants such as Kia that advertise directly to consumers, issue warranties directly to consumers, and derive monetary benefits directly from sales to those consumers.

Moreover, Kia fails to establish that Morales has "no evidence" to support her causes of action for the same reasons it fails to establish a lack of evidence as to the second and third causes of action. (See UMF Nos. 31-45.)

Next, Kia repeats the argument that the fifth and sixth causes of action are both barred by the economic loss rule. As both Judge Zayner and the undersigned have previously determined, this is incorrect as a matter of law.[6]

California permits recovery of tort damages in certain types of contract cases where the duty giving rise to tort liability "is either completely independent of the contract or arises from conduct which is both intentional and intended to harm," such as where the contract was fraudulently induced. (See *Erlich v. Menezes* (1999) 21 Cal.4th 543, 552 ("*Erlich*").) Kia argues that this "exception" (to the general rule that tort damages are not available in contract cases) applies only to fraud claims based on *affirmative* misrepresentations, citing *Robinson Helicopter Co. v. Dana Corp.* (2004) 34 Cal.4th 979, 988 ("*Robinson Helicopter*"). (See Memorandum at pp. 15:5-19:15.) Kia's lengthy argument mischaracterizes the *Robinson Helicopter* decision, which simply carved out *an* exception to the economic loss rule and did not purport to limit the circumstances in which tort damages (economic or otherwise) could be available in contract cases. As already explained in *Erlich*, those circumstances include fraudulent inducement of contract. (See *Erlich*, *supra*, 21 Cal.4th at 552; *Robinson Helicopter*, *supra*, at pp. 989-990 [citing *Erlich* for the proposition that tort damages for fraudulent inducement of contract are not barred by the economic loss rule]; see also *Harris v. Atlantic Richfield Co.* (1993) 14 Cal.App.4th 70, 78 ["when one party commits a fraud during the contract formation or performance, the injured party may recover in contract and tort"].) Morales correctly notes this in her (overlong) opposition brief. (See Opposition at pp. 21:25-22:10 [citing *Erlich*].)

In addition to acknowledging that fraudulent inducement of contract had already been excepted from the economic loss rule, *Robinson Helicopter* expressly did not address whether, in situations other than fraudulent inducement of contract, fraudulent conduct based on omissions or concealment would be exempt from the economic loss rule. (See *Robinson Helicopter*, *supra*, 34 Cal.4th at p. 991 ["Because Dana's affirmative intentional

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[6] Whether the economic loss rule applies here is a question of law for the court and does not depend upon the evidence put forward by the parties.

misrepresentations of fact (i.e., the issuance of the false certificates of conformance) are dispositive fraudulent conduct related to the performance of the contract, we need not address the issue of whether Dana's intentional concealment constitutes an independent tort."] & pp. 1000-1001 (dis. opn. of Werdegar, J.) ["The majority disavows any views on application of the economic loss rule to fraudulent concealment, leaving the issue to the Court of Appeal on remand. [Citation] On remand, the Court of Appeal will have a choice between applying the economic loss rule to bar recovery, thereby setting up a distinction between deceit by misrepresentation on the one hand and deceit by nondisclosure on the other, or holding that nondisclosure can also be tortious. The issue ultimately will have to be decided, in this or a future case."].) Kia's interpretation of *Robinson Helicopter* also runs afoul of the general rule that "cases are not authority for propositions not considered." (*People v. Ault* (2004) 33 Cal.4th 1250, 1268 fn. 10; see also *Styne v. Stevens* (2001) 26 Cal.4th 42, 57 [opinion is not authority for a point not raised, considered, or resolved therein].)

Robinson Helicopter itself suggests there is no meaningful distinction between fraudulent concealment (or omission) and fraudulent misrepresentation for purposes of the economic loss rule, because both theories are concerned with *intentional conduct*. (See *Robinson Helicopter, supra,* 34 Cal.4th at p. 990 [noting that California courts have found exceptions to the economic loss rule where a defendant's conduct was committed "intending or knowing that such a breach will cause severe, unmitigable harm in the form of mental anguish, personal hardship, or substantial consequential damages" and "[f]ocusing on intentional conduct gives substance to the proposition that a breach of contract is tortious only when some independent duty arising from tort law is violation"] & p. 1001 (dis. opn. of Werdegar, J.) ["[I]f the majority's decision is taken to its logical conclusion, then deceit by nondisclosure is a tort independent of any breach, just like deceit by misrepresentation."].)

Numerous California courts have recognized this aspect of the *Robinson Helicopter* decision. (See *County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 328-329 ("*County of Santa Clara*") ["The first part of the *Robinson* opinion was concerned with whether Dana's wrongful conduct constituted tortious conduct, not whether the economic loss rule applied to it. It was only *after* the court held that Dana's conduct was a tort independent of Dana's breach of contract that the court addressed the application of the economic loss rule. The analysis that followed suggested that fraud *itself* is immune from application of the economic loss rule because fraud is particularly blameworthy and therefore unlike both contract causes of action *and* products liability causes of action."] [internal citation omitted, emphasis in original].) While the *County of Santa Clara* decision involved affirmative misrepresentations, it focused, like several other California courts, on whether the fraudulent activity was intentional or negligent rather than the form that the fraudulent activity took (*i.e.*, misrepresentations versus concealment).

As Kia acknowledges (Memorandum at p. 15:5, fn. 1) the California Supreme Court has certified the question presented by the U.S. Court of Appeals for the Ninth Circuit as to whether fraudulent concealment claims are exempt from the economic loss rule. (See *Rattagan v. Uber Technologies, Inc.* (9th Cir. 2021) 19 F.4th 1188, 1193.) This case is still pending in the Supreme Court, and there is no indication as to what (or when) the final ruling may be. Until such time as the high court radically changes the longstanding principles set forth above in California law, however—*if* that ever happens—this court must apply those principles and hold that the economic loss rule does not bar the recovery of tort damages

(economic or otherwise) for fraudulent inducement of contract, regardless of whether that inducement was through deliberate concealment/omission or affirmative misrepresentation.

III. EVIDENTIARY OBJECTIONS

Kia has submitted objections to the Morales and Law declarations with its reply. As these objections do not comply with Rule of Court 3.1354, the court will not rule on them. Rule of Court 3.1354 requires the filing of two documents, evidentiary objections and a separate proposed order on the objections, and both must be in one of the two approved formats set forth in the Rule. The court is not required to rule on objections that are not fully compliant. (See *Vineyard Spring Estates v. Super. Ct*. (2004) 120 Cal.App.4th 633, 642 [trial courts only have duty to rule on evidentiary objections presented in proper format]; *Hodjat v. State Farm Mutual Automobile Ins. Co*. (2012) 211 Cal.App.4th 1 [trial court not required to rule on objections that do not comply with Rule of Court 3.1354 and not required to give objecting party a second chance at filing properly formatted papers].) Objections that are not ruled upon are preserved for appellate review. (See Code Civ. Proc., § 437c, subd. (q).)

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Calendar Line 5
Case Name: *Elizabeth Gonzalez v. Rogelio Pena et al.*
Case No.: 21CV391013

Plaintiff Elizabeth Gonzalez moves to compel further responses to requests for production of documents from defendant Piazza's Fine Foods, Inc. ("Piazza's"), under Code of Civil Procedure section 2031.310. As with Gonzalez's motion for discovery sanctions, which the court decided last week (February 27, 2024), both sides' papers are filled with unnecessary arguments and facts. The court has reviewed the requests for production and now rules as follows:

Requests for Production Nos. 64-69: The court agrees with Piazza's that the scope of these requests is overbroad and unreasonable on their face. Nevertheless, because Piazza's failed to meet and confer adequately with Gonzalez regarding the requests, the court will narrow the scope of all six of these requests to the following: "*All documents received by Gary Piazza, Rick Piazza, or John Piazza before January 18, 2020 regarding any claims of sexual harassment or sexual assault against Rogelio Pena*." Piazza's shall supplement its responses to provide a statement of compliance with respect to this revised request. In addition, to the extent that Piazza's withholds any responsive documents on the basis of privilege, Piazza's will provide a privilege log to Gonzalez within 30 days of the date of this order. GRANTED IN PART AND DENIED IN PART.

Request for Production No. 74: The court sees no relevance or potential relevance of any documents responsive to this request. The profitability of the Palo Alto deli department has no discernible relationship whatsoever to the causes of action for sexual harassment, constructive discharge, IIED, battery, or negligence in this case. At the same time, the court also disagrees with Piazza's that these requests are related to a claim for punitive damages. The profitability of one section of one branch of Piazza's business has little to no significance to a punitive damages claim, which focuses on the "profits" or "financial condition" of a defendant as a whole (Civ. Code, § 3295, subd. (a)), not the profits of a small segment of the defendant's business. DENIED.

Request for Production No. 76: Having already ruled on Gonzalez's motion for discovery sanctions concerning the lost video, the court sees no need for and no value in this document request. There may be some pertinent information to be obtained via deposition testimony (or possibly an interrogatory) regarding the lost video—if these discovery methods have not already been attempted—but "documents of every form which mention any attempt to discovery what happened" strikes the court as completely useless. DENIED.

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Calendar Line 10
Case Name: *Gregory Malley v. Bay Area Property Developers, LLC et al.*
Case No.: 19CV351252

Plaintiff Gregory Malley brings a motion for leave to amend the complaint, more than four and a half years after the complaint was originally filed. Defendants Bay Area Property Developers ("BAPD"), Lee Newell, and Blake Peters (collectively, "Defendants") oppose.[7] The original trial date in this case was March 25, 2024, but the court vacated that date and set a new trial setting conference on April 9, 2024 as a result of the medical unavailability of defendant Newell for at least four months.

The court GRANTS the motion and orders Malley to file his amended complaint within 10 days of this order.

The essence of the proposed amendment is the addition of the allegation that Newell and Peters are alter egos of BAPD. Defendants argue that Malley waited too long to propose this amendment and should have known at least a year ago that he might want to make it, based on the discovery taken in the case. The court agrees with Defendants that this proposed amendment comes exceedingly late in the proceedings. Indeed, the precipitating event for this motion appears to have been the court's February 1, 2024 order on Malley's motion for summary adjudication, which the court denied, based at least in part on the fact that the complaint failed to allege that Newell and Peters were alter egos of BAPD.

Nevertheless, the court also finds that Defendants have failed to show any prejudice arising from the proposed amendment. The court expresses no view whatsoever regarding the merits of the proposed amended pleading—it finds only that its timing, though exceedingly late, is still not prejudicial to Defendants, given that the trial will likely be reset for a date that as nine or ten months from now.

Based on the foregoing, the motion is granted.

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[7] Malley points out that Defendants' opposition was filed a day late (and a corrected version filed two days late), and that this is the second time in a row that Defendants have filed late papers. Notwithstanding the tardiness of the opposition, the court will exercise its discretion consider it. At the same time, the court admonishes Defendants that there is no guarantee that the court will consider another late filing if this continues to occur.

Calendar Line 11
Case Name: *Insurance Company of the West v. Gonzalo Luis Jimenez et al.*
Case No.: 23CV423338

This is a timely motion for reconsideration, filed by plaintiff Insurance Company of the West, of the court's order granting entry of judgment on a confession of judgment. Plaintiff points out that under Code of Civil Procedure section 1132, subdivision (a), a judgment by confession obtained on or after January 1, 2023 is "unenforceable" and "may not be entered in any superior court." In this case, the confession of judgment was signed by defendants on January 11, 2023, ten days after January 1, 2023, making it unenforceable.

Although it does not appear that this motion was served on the defendants, the court finds good cause to grant it and to vacate the judgment against the defendants, both under Code of Civil Procedure section 1008, as well as Code of Civil Procedure section 473, subdivision (d).

The motion is GRANTED, and judgment is VACATED. The court sets this matter for a case status review on July 25, 2024 at 10:00 a.m. in Department 10.

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