SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 20 (will be heard in Department 6)
Honorable Evette D. Pennypacker, Presiding (for Hon. Socrates Manoukian)

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

DATE: June 6, 2024 TIME: 9:00 A.M.

RECORDING COURT PROCEEDINGS IS PROHIBITED

THIS CALENDAR WILL BE CALLED IN DEPARTMENT 6. IF YOU PLAN TO ATTEND REMOTELY, PLEASE USE THE DEPT. 6 TEAMS LINK FROM THE COURT WEBSITE.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

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

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

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

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

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

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

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

LINE #	CASE #	CASE TITLE	RULING
1, 5	23CV418757	Jiayan Li et al vs Ting Hong et al	Mahpour's demurrer is overruled and Plaintiff's motion to compel and for sanctions is GRANTED. Scroll to lines 1, 5 for complete ruling. Court to prepare formal order.
2, 3	23CV428147	Dwayne Harris vs Ben Yadegar	Defendant's demurrer is sustained with 10 days leave to amend. Plaintiff's motion to strike is DENIED. Scroll to lines 2, 3 for complete ruling. Court to prepare formal order. Parties are ordered to appear at the hearing.
4	22CV397057	Sylvia Armas et al vs DS Cargo Inc. et al	Defendants' motion for summary judgment is GRANTED. Scroll to line 4 for complete ruling. Court to prepare formal order.
6	21CV376675	NIEVES CADAOAS et al vs ARELLANO AND IBRAHIM LLC et al	The Court has reviewed the record and does not see good cause to reopen discovery for either party. Neither party presented any evidence in support of this motion to explain why they have not completed discovery—Plaintiff never once explains why it has taken over five months to act on this discovery or to make this request, and Defendant fails to explain why, if they believed the case was not adequately prepared for trial, they have not earlier requested to re-open discovery. However, to avoid another request for trial continuance and because the parties agree, the Court will GRANT the request to reopen fact and expert discovery for both parties. All pre-trial dates and cut offs will now be calculated from the October 28, 2024 trial date. No further continuances of trial or pre-trial dates will be granted absent clear and convincing evidence of extremely exceptional circumstances. Court to prepare formal order.
7	21CV384636	SARAH GRYDER et al vs FORD MOTOR COMPANY et al	Off calendar.
8	23CV412237	Stephen and Kim McNulty vs Jeffrey Nguyen et al	Woody Wu's and SAC Attorneys, LLP's motion to be relieved as counsel for Thien (Mike) Doan is WITHDRAWN by moving party non May 28, 2024 and is therefore OFF CALENDAR.
9	23CV416938	Bharat Patel vs Dilip Patel et al	On May 7, 2024, the parties filed a stipulation which permits Defendants Dilip Patel, Devyani Patel, and Gaurang J. Patel to file a cross-complaint, thus this motion is moot and off calendar. If Defendants have not done so already, they are ordered to file the cross-complaint as a separate document to ensure clarity of the court file within 10 days of the June 6, 2024 hearing originally set for this motion. These orders will be reflected in the minutes.
10	23CV422404	BEYOND BELIEF, INC. vs HD SUPPLY, INC.	She & McIntyre and Marc L. Shea's motion to be relieved as counsel for Beyond Belief, Inc. and Jarek Jez is GRANTED. However, a company, regardless of corporate form, cannot represent itself in civil litigation in California. (See *Clean Air Transp. Sys. v. San Mateo County Transit Dist.* (1988) 198 Cal. App. 3d 576, 578 ("[A] corporation is a distinct legal entity, separate from its shareholders and officers. The rights and liabilities of corporations are distinct from the persons composing it. Thus, a corporation cannot appear in court except through an agent."); *Ferruzzo v. Superior Court* (1980) 104 Cal. App. 3d 501, 503 ("The rule is clear in this state that, with the sole exception of small claims court, a corporation cannot act in propria persona in a California state court."); *Merco Constr. Engineers, Inc. v. Municipal Court* (1978)21 Cal. 3d 724, 727 ("the Legislature cannot constitutionally vest in a person not licensed to practice law the right to appear in a court of record in behalf of another person, including a corporate entity.") Accordingly, the June 25, 2024 case management conference is VACATED AND RESET to August 27, 2024 at 10:00 a.m. in Department 20, when Beyond Belief, Inc. is ordered to appear and show cause why its case should not be dismissed for failure to obtain counsel. Court to use proposed order on file.
11	21CV377473	Alayna Tran vs San Jose Healthcare System, L.P. et al et al	The request for an amended order approving minor's compromise is GRANTED. Court to use amended order on file.

Calendar lines 1, 5
Case Name: *Jiayan Li, et al. v. Ting Hong, et al.*
Case No.: 23CV418757

Before the Court is Defendant Morad Mahpour demurrer to Plaintiffs' First Amended Complaint and Plaintiff's motion to compel. Pursuant to California Rule of Court 3.1308, the Court issues its tentative rulings.

I. Background

In or about November 2022, Plaintiff Jiayan Li was a college student from China looking for housing. (First Amended Complaint ("FAC"), ¶¶1 and 8.) In or about December 2022, Plaintiff Xing Chen was a single father from China looking for housing. (FAC, ¶¶2, 9.) Plaintiffs Li and Chen speak primarily Mandarin. (FAC, ¶¶1-2.)

Defendants Ting Hong and Morad Mahpour advertised through AirBnB that they had authority to rent rooms at 555 Stanford Avenue in Palo Alto ("Property"), a multi-family residence, owned by defendant Mahpour. (FAC, ¶¶3, 4, and 10.) Plaintiffs Li and Chen each separately responded at different times to these advertisements by contacting Hong regarding renting a room at the Property. (FAC, ¶11.)

In early December 2022, Li and Hong, who represented herself as a landlord, negotiated in Mandarin and agreed Li would rent one bedroom (room M) at the Property for one year at $2,200 per month with a $2,200 security deposit ("Li Lease"). (FAC, ¶12.) Although negotiated in Mandarin, the Li Lease was written entirely in English. (*Id.*) Hong did not provide Li with a Mandarin translation as required by Civil Code section 1632. (*Id.*) The term of the Li Lease began on December 26, 2022. (*Id.*) Li and Hong signed the Li Lease on December 29, 2022. (*Id.*)

On December 5, 2022, pursuant to Hong's instructions, Li sent Hong the $2,200 security deposit through PayPal. (FAC, ¶13.) Hong falsely claimed she did not receive the payment. (*Id.*) Relying on Hong's statement that she did not receive the payment, Li sent an additional $2,200 to Hong on December 7, 2022 via Zelle. (*Id.*) On December 29, 2022, Li sent Hong $2,200 via Zelle as rent. (*Id.*) Thereafter, despite being overpaid, Hong claimed Li owed a month's rent. (*Id.*)

In early January 2023, Chen and Hong agreed that Chen would rent rooms (rooms G and H) at the Property for one year at $2,000 per month with a security deposit of $2,000. (FAC, ¶14.) Although

the terms were negotiated in Mandarin, the lease ("Chen Lease") was written solely in English and Hong did not provide Chen with a Mandarin translation as required by Civil Code section 1632. (*Id.*)

On April 18, 2023, Li provided Hong with written notice that the front door to the Property was sticking to the point where it became difficult for Li to enter or exit the Property. (FAC, ¶15.) Hong responded by telling Li that she was the only one to ever complain and that if she wanted it fixed, Li would have to pay the cost of repair. (*Id.*)

Hong repeatedly demanded Chen contact her. (FAC, ¶16.) Hong told Chen that if he did not wish to respond, he was welcome to walk away from his lease and vacate the Property. (*Id.*) Hong asked Chen what time [plaintiff Li] generally leaves and returns to the Property. (*Id.*) Chen responded that this was none of Hong's business. (*Id.*) In retaliation, Hong told Chen she would not be responsible for any future issues at the Property and Chen and his child could find a new place to live at the end of his lease. (FAC, ¶17.)

On May 6, 2023, at Hong's direction, a handyman entered Li's room while she was not there. (FAC, ¶18.) When Chen asked the handyman what he was doing, the handyman claimed he was sent by Hong to take pictures of Li's room. (*Id.*) When Li returned home that day, she discovered that cash in excess of $20,000 and a copy of the Li Lease were missing. (FAC, ¶19.) Li did not receive notice from defendants that someone would need access to her room on May 6, 2023. (*Id.*) Later that same day, Hong wrote to Chen stating that Li owed her rent, to mind his own business, and if he wanted to be a "hero," she would kick both him and Li out of the Property. (FAC, ¶20.) Defendants threatened Chen with eviction in retaliation for notifying Li that the handyman had entered her room when she was not present. (*Id.*)

On May 13, 2023, Hong caused to be served on Li a three-day notice to quit. (FAC, ¶21.) Hong rescinded the three-day notice by accepting rent from Li for the month of June. (FAC, ¶22.)

On May 15, 2023, Li sent Hong, through her attorney, a mold inspection report which found highly elevated levels of fungal spores as well as evidence of mold known to cause negative health effects. (FAC, ¶23.) Defendants have not addressed the mold infestation. (*Id.*)

On May 30, 2023, Hong sent a text message to Chen advising him that if he had a problem with mold and other related habitability issues, he needed to contact the "landlord," which plaintiffs understood to refer to defendant Mahpour. (FAC, ¶24.)

On July 12, 2023, Chen notified Hong that there was a termite infestation at the Property's kitchen. (FAC, ¶27.) Hong responded that it was unlawful for Chen to contact her and to contact her attorney instead. (*Id.*) Throughout plaintiffs' tenancy, the Property was and continues to be infested with insects. (*Id.*) As a result, plaintiffs have suffered multiple bug bites. (FAC, ¶28.)

On July 14, 2023, Hong caused to be served on plaintiffs three-day notices to pay or quit. (FAC, ¶29.) To date, defendants have not done anything to address the Property's insect infestation, malfunctioning door, or elevated mold and fungus. (FAC, ¶30.)

On July 3, 2023, Li and Chen filed a complaint against Hong.

On August 27, 2023, Li and Chen filed the operative FAC against defendants Hong and Mahpour asserting:

(1) Breach of Contract

(2) Conversion

(3) Tortious Breach of Warranty of Habitability

(4) Tortious Breach of Quiet Enjoyment

(5) Infliction of Emotional Distress

(6) Negligence

(7) Retaliation [against defendant Hong]

(8) Violation of the California Translation Act [against defendant Hong]

(9) Unfair Business Practices

On March 15, 2024, Mahpour filed the motion now before the court, a demurrer to Li and Chen's FAC.

II. Demurrer

A. Meet and confer.

Effective January 1, 2016, Code of Civil Procedure section 430.41 requires a demurring party to meet and confer with the party who filed the challenged pleading to seek informal resolution of the

demurring party's objections. (Code Civ. Proc., § 430.41, subd. (a).) Specifically, "If an amended complaint, cross-complaint, or answer is filed, the responding party shall meet and confer again with the party who filed the amended pleading before filing a demurrer to the amended pleading." (*Ibid*.) The meet and confer must be conducted in person or by telephone, and must address each cause of action to be included in the demurrer. (*Ibid*.) "The parties shall meet and confer at least five days before the date the responsive pleading is due." (Code Civ. Proc., §430.41, subd. (a)(2).) If these efforts fail, the demurring party must file and serve a declaration regarding the meet and confer process with the demurrer. (Code Civ. Proc., § 430.41, subd. (a)(3).)

Li and Chen assert that Mahpour did not comply with the requirements of Code of Civil Procedure section 430.41 in that the defendant Mahpour did not conduct meet and confer efforts "in person or by telephone" and did not "address each cause of action to be included in the demurrer." The court agrees that Mahpour did not adequately meet and confer. However, a court may not sustain a demurrer based on the insufficiency of the meet and confer process. (Code Civ. Proc., §430.41, subd. (a)(4).) To avoid wasting any further judicial resources, the court will address the merits of the demurrer. The court reminds all parties that they should not treat Code of Civil Procedure section 430.41 as a procedural hurdle but should **undertake these** obligations with sincerity and good faith.

B. Procedural deficiencies.

Li and Chen also contend Mahpour failed to comply with California Rules of Court, rule 3.1113, subdivision (a), which states, "A party filing a motion, except for a motion listed in rule 3.1114, must serve and file a supporting memorandum. The court may construe the absence of a memorandum as an admission that the motion or special demurrer is not meritorious and cause for its denial and, in the case of a demurrer, as a waiver of all grounds not supported." "The memorandum must contain a statement of facts, a concise statement of the law, evidence and arguments relied on, and a discussion of the statutes, cases, and textbooks cited in support of the position advanced." (Cal. Rules of Court, rule 3.1113, subd. (b).)

Plaintiffs are correct that Mahpour did not separately file a memorandum of points and authorities in support of his demurrer. However, to avoid wasting any further judicial resources, the

court will treat the argument and citations discussed in the document captioned, "Demurrer of Defendant Morad Mahpour," as Mahpour's memorandum of points and authorities and consider it accordingly.

Plaintiffs also take issue with Mahpour's failure to comply with Code of Civil Procedure section 430.60 which states, "A demurrer shall distinctly specify the grounds upon which any of the objections to the complaint, cross-complaint, or answer are taken. Unless it does so, it may be disregarded." (See also Cal. Rules of Court, rule 3.1320, subd. (a) ("Each ground of demurrer must be in a separate paragraph and must state whether it applies to the entire complaint, cross-complaint, or answer, or to specified causes of action or defenses.") Although not written using the same language as the enumerated grounds for demurrer identified at Code of Civil Procedure section 430.10, Mahpour does specify the basis for his objections to the complaint. Thus, the Court will consider Mahpour's grounds for demurrer. For future reference, Mahpour should comply with the Code of Civil Procedure and California Rules of Court.

C. Mahpour's demurrer to Li and Chen's FAC is OVERRULED.

1. First cause of action (breach of contract); third cause of action (tortious breach of warranty of habitability); and fourth cause of action (tortious breach of quiet enjoyment).

Mahpour argues he is not liable for breach of contract because plaintiffs Li and Chen allege only that they entered contracts with Hong. (See FAC, ¶¶12 and 14.)[1] Citing *Collum v. Pope & Talbot, Inc.* (1955) 135 Cal.App.2d 653, 656 which states "The general rule is that privity of contract is required in an action for breach of either express or implied warranty", Mahpour contends there are no allegations to support his privity of contract. However, Mahpour overlooks (or ignores) the allegations found at FAC paragraphs 6, 7, and 10 where plaintiffs allege that Mahpour is the owner of the Property and Hong was Mahpour's agent and/or a "property manager for the Property … responsible for … entering into rental agreements, … and communicating with tenants."

"An agent represents his principal for all purposes within the scope of his actual or ostensible authority, and all the rights and liabilities which would accrue to the agent from transactions within such

[11] Although plaintiffs allege that copies of the Li Lease and Chen Lease are attached as exhibits to the FAC, no such leases are attached.

limit, if they had been entered into on his own account, accrue to the principal." (Civ. Code, §2330.) "An instrument within the scope of his authority by which an agent intends to bind his principal, does bind him if such intent is plainly inferable from the instrument itself." (Civ. Code, §2337.) "Generally, an allegation of agency is an allegation of ultimate fact and is, of itself, sufficient to avoid a demurrer." (*Garton v. Title Ins. & Trust Co.* (1980) 106 Cal.App.3d 365, 376.) Here, Li and Chen have made such an allegation of agency at paragraph 6 of the FAC.

Accordingly, Mahpour's demurrer to the first cause of action of Li and Chen's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for breach of contract is OVERRULED.

For the same reason, Mahpour's demurrer to the third and fourth causes of action of Li and Chen's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for breach of implied warranty of habitability and quiet enjoyment is OVERRULED.

2. Second cause of action (conversion).

Mahpour contends there are no allegations that he "was in any way part of the alleged conversion" or "linking Defendant Mahpour to this tenancy in any way." Mahpour's argument overlooks (or ignores) FAC paragraph 6 where Li and Chen allege Hong was Mahpour's agent and Mahpour "authorized and consented … and/or ratified the wrongful acts of" defendant Hong.[2] "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.)

Accordingly, Mahpour's demurrer to the second cause of action of Li and Chen's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for conversion and on the ground that the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is OVERRULED.

[2] "A principal is responsible for no other wrongs committed by his agent than those mentioned in the last section, unless he has authorized or ratified them, even though they are committed while the agent is engaged in his service." (Civ. Code, §2339.)

3. Fifth cause of action (infliction of emotional distress).

For the same reasons discussed above regarding the second cause of action, Mahpour's demurrer to the second cause of action of Li and Chen's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for infliction of emotional distress and on the ground that the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is OVERRULED.

4. Sixth cause of action (negligence).

For the same reasons discussed, Mahpour's demurrer to the sixth cause of action of Li and Chen's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for negligence[3] and on the ground that the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is OVERRULED.

5. Ninth cause of action (unfair business practices).

For the same reasons discussed, Mahpour's demurrer to the ninth cause of action of Li and Chen's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for unfair business practices and on the ground that the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is OVERRULED.

III. Plaintiff Jiayan Li's Motion to Compel Defendant Mahpour's Discovery Responses and for Sanctions is GRANTED.

On January 30, 2024, about four months after acknowledging service of the summons and complaint, Li served the following discovery on Mahpour by electronic mail: Form Interrogatories (Set One), Special Interrogatories (Set One), and Request for Production of Documents (Set One). To date, Mahpour has not responded to this discovery, sought an extension, or otherwise addressed the discovery with Plaintiff in any way.

Instead, Mahpour's counsel argues that because he is a solo practitioner with a busy practice, the demurrer had not yet been heard at the time the discovery was served, it is still very early in the case,

[3] See also Civ. Code, §2338 ("Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his willful omission to fulfill the obligations of the principal.")

and there is thus no need for responses to this discovery now and no prejudice if it comes later, this failure to engage in the discovery process is excusable neglect, Mahpour should be excused from responding to the discovery until after the demurrer is heard, and no sanctions should be imposed. The Court does not agree.

None of counsel's cited reasons excuses a wholesale failure to respond to discovery or to even take the time to seek an extension to permit counsel in a busy solo practice more time to prepare responses. Nor was leave sought either through stipulation or court order to postpone discovery until after the demurrer was heard. Counsel's apparent deliberate decision to do nothing to respond to this discovery even after being peppered with emails regarding the discovery was a miscalculation.

Mahpour is ordered to produce verified, code compliant responses, without objections—which are now waived—to each set of discovery within 20 days of service of this formal order. Mahpour and his counsel are further jointly and severally ordered to pay Plaintiff $1600 in sanctions for the preparation of this motion to compel. While the Court finds $400 per hour reasonable for this market and case type, a motion to compel where no responses have been served is a straightforward motion requiring minimal preparation, and the compensable hours have accordingly been reduced.

Calendar Line 2
Case Name: *Dwayne Scott Harris v. Ben Yadegar, et al.*
Case No.: 23CV428147

Before the Court is the demurrer to first amended complaint ("FAC") of Dwayne Scott Harris and Harris's motion to strike. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

Plaintiff Dwayne Scott Harris, a self-represented litigant[4], alleges generally he had a contract with Ben Yadegar, an individual doing business as Express Credit Motors also known as The Signature Motors, LLC ("Yadegar"), and that Yadegar was obligated to disclose issues concerning smog and registration to Plaintiff but instead intentionally misrepresented and/or concealed material facts from Plaintiff thereby breaching his contract with Plaintiff.[5]

On December 27, 2023, Plaintiff filed a 36-page complaint against Yadegar captioned, "Complaint Fraud – Intentional Misrepresentation – Intentional Concealment[;] Implied Conduct of Fraud."

On March 12, 2024, Plaintiff filed the operative 45-page FAC. The caption identifies the following causes of action:

(1) Breach of written contract

(2) Actual fraud

(3) Intentional misrepresentation

(4) Negligent misrepresentation

(5) Promissory fraud

Accompanying the filing of the FAC, Plaintiff separately filed two documents containing exhibits in support of the FAC. [Plaintiff's FAC also alleges that exhibits 1 – 15 filed earlier (January 9, 2024) in connection with the original complaint "will remain the same." See page 2, lines 15 – 16.]

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[4] Although a judge should ensure that self-represented litigants are not being misled or unfairly treated (see *Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1284), self-represented litigants are not entitled to special treatment regarding the Rules of Court or Code of Civil Procedure. "[W]e cannot disregard the applicable principles of law and accord defendant any special treatment because he instead elected to proceed in propria persona. [Citations.]" (*Stein v. Hassen* (1973) 34 Cal. App. 3d 294, 303.) "A litigant has a right to act as his own attorney [citation] 'but, in so doing, should be restricted to the same rules of evidence and procedure as is required of those qualified to practice law before our courts.'" (*Lombardi v. Citizens Nat'l Trust & Sav. Bank* (1955) 137 Cal.App.2d 206, 208-209.)

[5] See page 3 to Plaintiff's FAC.

On April 18, 2024, Yadegar and The Signature Motors, LLC dba Express Credit Motors (erroneously sued as Yadegar's fictitious business name; hereafter, "TSM") filed the motion now before the court, a demurrer to Plaintiff's FAC.

II. Plaintiff's Late Opposition

Plaintiff's opposition brief is untimely. Code of Civil Procedure section 1005, subdivision (b) states, "All papers opposing a motion … shall be filed with the court and a copy served on each party at least nine court days … before the hearing." Based on a hearing date of June 6, 2024 and the court holiday on May 27, 2024, Plaintiff's opposition had to be filed and served no later than May 23, 2024. Plaintiff did not file an opposition until May 29, 2024, three court days late.

California Rules of Court, rule 3.1300(d) states, "No paper may be rejected for filing on the ground that it was untimely submitted for filing. If the court, in its discretion, refuses to consider a late filed paper, the minutes or order must so indicate." Since the court has discretion to consider a late filed paper, since defendants have not shown any real prejudice from the late filing, and to avoid the expenditure of any further judicial resources, the court will overlook this this procedural deficiency and consider the opposition on its merits. However, Plaintiff is placed on notice that the court may disregard any further late filings.

III. Defendants Yadegar and TSM's demurrer to Plaintiff's FAC is SUSTAINED, in part, and OVERRULED, in part.

Yadegar and TSM understand Plaintiff's FAC concerns his purchase of a 2012 Ford E250 vehicle ("Subject Vehicle"). "In or about, late September of 2018 in the evening hours, The Plaintiff, Dwayne Scott Harris, Had visited Express Credit Motors, aka The Signature Motors LLC, a Local used car dealership … [with] the Intention to lease and purchase a used Vehicle." (FAC, page 18, lines 15 – 18.) At that time, Plaintiff purchased a vehicle but it had a cracked windshield "which was not visible the night before." (FAC, page 18, lines 23 – 24.) In or about October 2018, defendant Yadegar agreed to exchange the vehicle with a broken windshield for the Subject Vehicle. (FAC, page 19, lines 10 – 19.) A copy of the sales contract for the subject vehicle is attached as exhibit 16 to Plaintiff's separately filed exhibits to the FAC. Defendants point out the sales contract is dated October 30, 2018.

A. Breach of contract.

Defendants demur initially on the ground that the first cause of action for breach of contract is barred by the applicable statute of limitations. A court may sustain a demurrer on the ground of failure to state sufficient facts if "the complaint shows on its face the statute [of limitations] bars the action." (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1315.) A demurrer is not sustainable on statute of limitations grounds if there is only a possibility that the cause of action is time-barred; the defense must be clearly and affirmatively apparent from the allegations of the pleading [and matters of which the court may properly take judicial notice]. (*Id.*, at pp. 1315-1316.)[6] When evaluating whether a claim is time-barred, the court must determine: (1) which statute of limitations applies, and (2) when the claim accrued. (*Id.*, at p. 1316.)

Defendants assert, without opposition from Plaintiff, that the statute of limitations for a breach of written contract cause of action is four years. (Code Civ. Proc., §337.) Defendants contend that the cause of action accrued upon the date of sale which is identified in an exhibit to Plaintiff's FAC as October 30, 2018. Since Plaintiff did not commence his complaint and this cause of action until December 27, 2023, more than five years after the date of sale, defendants contend Plaintiff's first cause of action is barred.

"[A] cause of action for breach of contract ordinarily accrues at the time of breach regardless of whether any substantial damage is apparent or ascertainable." (*Menefee v. Ostawari* (1991) 228 Cal.App.3d 239, 246.) "Ordinarily, a cause of action for breach of contract accrues on the failure of the promisor to do the thing contracted for at the time and in the manner contracted." (*Waxman v. Citizens Nat. Trust & Savings Bank of Los Angeles* (1954) 123 Cal.App.2d 145, 149.) Defendants mistakenly assert that the cause of action for breach of contract accrues upon the date of the contract. As such, defendants have not sufficiently demonstrated that the FAC, on its face, is necessarily barred by the statute of limitations.

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[6] See also *Heshejin v. Rostami* (2020) 54 Cal.App.5th 984, 992-993: "'[A] demurrer based on an affirmative defense will be sustained only where the face of the complaint discloses that the action is necessarily barred by the defense.'" (*Stella v. Asset Management Consultants, Inc.* (2017) 8 Cal.App.5th 181, 191 [213 Cal. Rptr. 3d 850]; accord, *Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1191 [151 Cal. Rptr. 3d 827, 292 P.3d 871] [application on demurrer of affirmative defense of statute of limitations based on facts alleged in a complaint is a legal question subject to de novo review]; *Favila v. Katten Muchin Rosenman LLP* (2010) 188 Cal.App.4th 189, 224 [115 Cal. Rptr. 3d 274] ["'It must appear clearly and affirmatively that, upon the face of the complaint [and matters of which the court may properly take judicial notice], the right of action is necessarily barred.'"].)

Defendants demur alternatively to the first cause of action on the ground that the pleading is uncertain in that Plaintiff has failed "to articulate his claims for breach of contract … in a cogent manner."[7] On this point, the court agrees. Plaintiff's FAC does not identify what particular provision(s) of the sales contract has been breached by defendants Yadegar and/or TSM. In various places in the FAC, Plaintiff alleges defendants breached their contract with Plaintiff "by [their] conduct(s) of fraud." However, fraud is and has been pleaded here as a separate cause of action. Unless Plaintiff identifies a particular provision(s) of the contract, it is unclear to this court how the act of fraud also amounts to a breach of contract.

Accordingly, Yadegar and TSM's demurrer to the first cause of action of Plaintiff's FAC on the ground that the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is SUSTAINED with 10 days leave to amend.

B. Fraud.

Plaintiff's FAC alleges that he and his wife took the Subject Vehicle "for a test drive, and the engine Light was on, and Was notice. Upon returning from the test drive … [Plaintiff] was concerned About the engine lights on, and asked the Defendant, Ben Yadegar to disclose, The information about The vehicle … Ben Yadegar was pushing on The Plaintiff, Dwayne Scott Harris. The Defendant, had failed to disclose any and all issues causing the Engine lights on, including Smog And Registration issues. …. The defendant, Ben Yadegar, had Assured, The Plaintiff … and his wife … that there are no Preexisting issues with [the Subject Vehicle]. … Ben Yadegar, et al, stated there were no problems, with, the [Subject V]ehicle … before signing the contract."[8]

Defendants acknowledge Plaintiff has attempted to plead delayed discovery and did not become aware of problems with the Subject Vehicle until August 7, 2023. Defendants argue, nevertheless, that such allegations of delayed discovery are belied by allegations found elsewhere in the FAC.

However, the difficulty the court is having with assessing the merits of defendants' argument is that Plaintiff's FAC is not drafted in a cogent manner which leads the court to defendants' alternative

[7] See page 17, lines 26 – 28 of the Memorandum of Points and Authorities in Support of Demurrer to FAC of Dwayne Scott Harris.
[8] See page 19, line 24 to page 20, line 9 of the FAC.

argument which is that Plaintiff's fraud causes are uncertain and/or not pleaded with the requisite specificity.

"The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638 (*Lazar*).) "Fraud actions are subject to strict requirements of particularity in pleading. … Accordingly, the rule is everywhere followed that fraud must be specifically pleaded." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216.) "The pleading should be sufficient to enable the court to determine whether, on the facts pleaded, there is any foundation, prima facie at least, for the charge of fraud." (*Commonwealth Mortgage Assurance Co. v. Superior Court* (1989) 211 Cal.App.3d 508, 518.) The *Lazar* court did not comment on how these particular allegations met the requirement of pleading with specificity in a fraud action, but the court did say that "this particularity requirement necessitates pleading facts which 'show how, when, where, to whom, and by what means the representations were tendered.' A plaintiff's burden in asserting a claim against a corporate employer is even greater. In such a case, the plaintiff must 'allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." (*Lazar, supra,* 12 Cal.4th at p. 645.)

It is not clear from the FAC what Plaintiff alleges constitutes fraud. From what the court can gather, Plaintiff alleges some irregularity about the Subject Vehicle's registration and smog certification. However, it is not clear to this court that the alleged fraud is limited to registration and smog certification of the Subject Vehicle. Plaintiff's FAC also alleges defendant Yadegar failed to disclose "defective parts," without specifying what those defective parts are.[9] Without a clear understanding of what Plaintiff's fraud allegations encompass, the court cannot make a determination with respect to whether the entirety of Plaintiff's fraud claim(s) are necessarily barred by the statute of limitations.

Moreover, pleading delayed discovery also requires specificity.

[9] See page 20, line 2 of Plaintiff's FAC.

> In order to rely on the discovery rule for delayed accrual of a cause of action, "[a] plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence." [Citation.] In assessing the sufficiency of the allegations of delayed discovery, the court places the burden on the plaintiff to "show diligence"; "conclusory allegations will not withstand demurrer." [Citation.]
>
> Simply put, in order to employ the discovery rule to delay accrual of a cause of action, a potential plaintiff who suspects that an injury has been wrongfully caused must conduct a reasonable investigation of all potential causes of that injury. If such an investigation would have disclosed a factual basis for a cause of action, the statute of limitations begins to run on that cause of action when the investigation would have brought such information to light. In order to adequately allege facts supporting a theory of delayed discovery, the plaintiff must plead that, despite diligent investigation of the circumstances of the injury, he or she could not have reasonably discovered facts supporting the cause of action within the applicable statute of limitations period.

(*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 808 – 809.)

Plaintiff's allegations do not meet this standard. Plaintiff alleges he discovered the facts constituting fraud on August 7, 2023 "in the office of CA DMV" "during The Plaintiff making the : Payments of registration penalty fees. The Defendant did not smog the Vehicle in question … prior to the registration of the vehicle."[10] Absent are any facts explaining whether and why Plaintiff was unable to have made earlier discovery and what reasonably diligent efforts Plaintiff made to discover the fraud.

Accordingly, Yadegar and TSM's demurrer to the second, third, fourth, and fifth causes of action of Plaintiff's FAC on the ground that the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is SUSTAINED with 10 days leave to amend. Yadegar and TSM's demurrer to Plaintiff's FAC is

[10] See page 8, line 16 and page 9, lines 11 – 13 of Plaintiff's FAC.

otherwise OVERRULED without prejudice to them renewing their argument following amendment, if any.

IV. "Motion to Strike"

Plaintiff filed a motion to strike portions of Defendant's demurrer to his FAC. A motion to strike in this context is not proper. Plaintiff's opposition was the appropriate tool to respond to Defendant's demurrer. Accordingly, Plaintiff's "motion to strike" is DENIED.

Calendar line 3
Case Name: *Sylvia Armas, et al. v. DS Cargo Inc., et al.*
Case No.: 22CV397057

Before the Court is Defendants' motion for summary judgment, or alternatively, summary adjudication. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This consolidated action is comprised of two cases: (1) *Sylvia Armas v. DS Cargo Inc., et al.* (Santa Clara County Superior Court, Case No. 22CV397057) ("First Action"); and (2) *Ivan Caballero v. DS Cargo Inc., et al.* (Santa Clara County Superior Court, Case No. 22CV398261) ("Second Action"). This action is for negligence and wrongful death arising from a traffic collision.

Plaintiff Sylvia Armas is Ivan Caballero, Jr.'s ("Decedent") mother and his successor in interest. (Complaint in First Action ("Complaint"), ¶¶ 3, 28.) Plaintiff Ivan Caballero ("Caballero Sr.") is Decedent's father and his successor in interest. (Complaint in Second Action, ¶¶ 1, 31.)

On August 5, 2021, Decedent was traveling westbound along Highway 152, approaching the intersection of Cameron Boulevard. (Complaint, ¶ 9.) At the same time, Salah Ziada was travelling in the opposite direction, eastbound along Highway 152. (*Ibid*.) Ziada's vehicle and the Decedent's vehicle collided, causing serious injury and ultimately Decedent's death. (Complaint, ¶¶ 1, 10.)

According to the Complaint, Ziada failed to exercise reasonable care and drove the vehicle at a speed greater than reasonable under the circumstances. (Complaint, ¶ 10.) Defendant DS Cargo Inc. ("DS Cargo") owned or controlled the vehicle driven by Ziada, and Ziada was operating the vehicle within the course and scope of his employment with DS Cargo. (Complaint, ¶ 11.) DS Cargo knew or should have known that Ziada was unfit to operate the vehicle. (*Ibid*.)

Armas initiated this action on April 14, 2022, asserting: (1) negligence, and (2) wrongful death. On May 9, 2022, Caballero Sr. filed the complaint in the Second Action, also asserting: (1) negligence, and (2) wrongful death. On July 2, 2022, the Court (Hon Manoukian) consolidated the First and Second Actions, designating the First Action as the lead case. On September 28, 2022, Armas filed an amendment to the Complaint, adding DGA Services dba JIT Transportation ("JIT") as a party.

On March 21, 2024, Ziada, DS Cargo, and JIT (collectively, "Defendants") filed a motion for summary judgment, or alternatively, summary adjudication. Plaintiffs oppose.[11]

II. Request for Judicial Notice

Defendants request judicial notice of two incident reports prepared by the Gilroy Police Department regarding the collision, citing Evidence Code, sections 452, subdivisions (c) and (h), and 453. The Court may take judicial notice of official acts and facts and propositions that are not reasonably subject to dispute and capable of immediate and accurate determination. (Evid. Code, § 452, subds. (c), (h).)

However, accident reports are generally inadmissible as evidence pursuant to Vehicle Code section 20013: "No such accident report shall be used as evidence in any trial, civil or criminal, arising out of an accident, except that the department shall furnish upon demand of any person who has, or claims to have, made such a report or upon demand of any court, a certificate showing that a specified accident has or has not been made to the department solely to prove a compliance or failure to comply with the requirement that such report be made to the department." (See also *Kramer v. Barnes* (1963) 212 Cal.App.2d 440, 446-447 [police report and affidavit purporting to give evidentiary value to such a report both inadmissible in support of motion for summary judgment]; see also *Petricka v. Dept. of Motor Vehicles* (2001) 89 Cal.App.4th 1341, 1345, fn. 1 [improper for trial court to take judicial notice of police report or its attachments].)

The request for judicial notice is DENIED.

III. Evidentiary Objections

A. Plaintiffs' Objections

Plaintiffs object to Defendants' Separate Statement of Undisputed Material Facts ("Defendants' UMF") and certain of Defendants' submitted evidence.

The Court need not rule upon the objections because they do not comply with Rule of Court 3.1354 ("Rule 3.1354"). The rule requires two documents to be submitted when evidentiary objections are made: the objections; and a separate proposed order on the objections, both of which must be in one

[11] On May 24, 2024, plaintiff Armas filed substantive papers in opposition to Defendants' motion, and plaintiff Caballero Sr. filed a two-page "Opposition and Joinder" asserting that the Plaintiffs' interests are mutually aligned and incorporating the Armas opposition papers by reference.

of the two approved formats set forth in the rule. (*Joshi v. Fitness International* (2022) 80 Cal.App.5th 814, 830, fn. 9 [trial court did not rule on written objections to evidence in summary judgment motion because of failure of comply with Rule 3.1354]; *Vineyard Spring Estates v. Super Ct.* (2004) 120 Cal.App.4th 633, 642 [trial courts must rule on evidentiary objections only when presented in the 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 3.1354 and need not give objecting party a second chance at filing properly formatted papers].)

Here, Plaintiffs' objections do not comply with Rule 3.1354 because there is no separate proposed order on the objections in an approved format. Consequently, the Court declines to rule on the evidentiary objections.[12] Objections not ruled upon are preserved for appellate review. (Code Civ. Proc., § 437c, subd. (q); *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 532.)

B. Defendants' Objections

Defendants object to portions of two declarations submitted by Plaintiffs. Objections 1 through 6 pertain to the declaration of Stephen M. Casner, and objections 7 through 10 concern the declaration of Jeffrey S. Bonsall.

Objections 1, 2, 4, 5, 7, 8, and 10.

OVERRULED: The deficiencies go to the weight rather than the admissibility of the evidence.

Objection 3, paragraph 15 of the declaration of Stephen Casner.

SUSTAINED: Fails to state facts on which estimations are based, fails to state manner in which estimations were calculated.

Objection 6, paragraph 23 of the declaration of Stephen Casner.

SUSTAINED: Speculation.

Objection 9, paragraph 17(D) of the declaration Jeffrey Bonsall.

SUSTAINED: Speculation; no factual basis for opinion provided.

[12] While the Court does not rule on Plaintiffs' evidentiary objections for the reasons stated, it notes that Defendants have improperly relied upon their own interrogatory responses. The Court has not considered this evidence. (See Code Civ. Proc., § 2030.410 ["the propounding party or any party other than the responding party may use an answer or part of an answer to an interrogatory only against the responding party"]; see also *Great American Ins. Cos. v. Gordon Trucking, Inc.* (2008) 165 Cal.App.4th 445, 450 ["the responding party may not use its own interrogatory responses in its own favor"].)

IV. Legal Standard

Any party may move for summary judgment. (Code of Civ. Proc., § 437c, subd. (a); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) The motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code of Civ. Proc., § 437c, subd. (c); *Aguilar, supra*, 25 Cal.4th at p. 843.) The object of the summary judgment procedure is "to cut through the parties' pleadings" to determine whether trial is necessary to resolve the dispute. (*Aguilar, supra*, 25 Cal.4th at p. 843.)

> Summary adjudication works the same way, except it acts on specific causes of action or affirmative defenses, rather than on the entire complaint. A summary adjudication is properly granted only if a motion therefor completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty. Motions for summary adjudication proceed in all procedural respects as a motion for summary judgment.

(*Hartline v. Kaiser Foundation Hospitals* (2005) 132 Cal.App.4th 458, 464, internal citations omitted; see also Code Civ. Proc., § 437c, subd. (f).)

The party moving for summary judgment "bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact." (*Aguilar, supra*, 25 Cal.4th at p. 850; see also Evid. Code, § 110.) "A prima facie showing is one that is sufficient to support the position of the party in questions. (*Aguilar, supra*, 25 Cal.4th at p. 851.)

If the moving party makes the necessary initial showing, the burden of production shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (c); *Aguilar, supra*, 25 Cal.4th at p. 850.) A triable issue of material fact exists "if, and only if, the evidence would allow of reasonable trier of fact to find the underlying facts in favor of the party opposing the motion in accordance with the applicable standard of proof. [Citation.]" (*Aguilar, supra*, 25 Cal.4th at p. 850.) If the party opposing summary judgment presents evidence demonstrating the existence of a disputed material fact, the motion must be denied. (*Id*. at p. 843.)

A defendant may obtain summary judgment by showing that the plaintiff cannot establish at least one element of a cause of action. (*Aguilar, supra*, 25 Cal.4th at. p. 853.) "The defendant negates the

element of the cause of action by establishing that the plaintiff neither has, nor reasonably can obtain, the evidence required to support it. [Citation.]" (*Gray v. La Salle Bank, N.A.* (2023) 95 Cal.App.5th 932, 947.) A defendant can meet their burden of production in one of three ways: (1) by presenting affirmative evidence that negates an essential element; (2) by submitting evidence that the plaintiff does not have and cannot reasonably obtain needed evidence; or (3) that there is a complete defense to the cause of action. (*Ibid.*) If the moving defendant meets their initial burden of production, "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 and set forth the specific facts showing that a triable issue of material fact exists as to that cause of action. [Citations.]" (*Ibid.*, internal punctuation and citations omitted; see also Code Civ. Proc., § 437c, subd. (o)(2); see also *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 780.)

Throughout the process, the trial court "must consider all of the evidence and all of the inferences drawn therefrom." (*Aguilar, supra*, 25 Cal.4th at p. 856.) The moving party's evidence is strictly construed, while the opponent's is liberally construed. (*Id*. at 843.)

Summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty. (Code Civ. Proc. § 437c, subd. (f)(1); *McClasky v. California State Auto. Ass'n* (2010) 189 Cal.App.4th 947, 975 ["[i]f a cause of action is not shown to be barred in its entirety, no order for summary judgment – or adjudication – can be entered."].) Summary adjudication of general "issues" or of facts is not permitted. (See *Raghavan v. The Boeing Company* (2005) 133 Cal.App.4th 1120, 1136.)

V. The Parties' Undisputed Material Facts

According to Defendants' undisputed material facts, Highway 152 is an east-west roadway with two lanes in each direction, divided by a raised island, with a posted speed limit of 45 miles per hour. (Defendants' UMF, No. 1.) On August 5, 2021, Ziada was traveling eastbound on Highway 152 in a tractor-trailer in the outside eastbound lane. (Defendants' UMF, No. 2.) At around 11:20 p.m., after traveling three-fourths of a mile past Cameron Boulevard, Ziada noticed the Decedent's vehicle driving headlong into oncoming traffic in his lane and directly in front of his vehicle. (Defendants' UMF, No. 3.)

Ziada attempted to stop and turn his wheel to the left before the Decedent's vehicle collided with his vehicle (the "Incident"). (Defendants' UMF, No. 4.) Ziada estimates that he was driving 40 to 50 miles per hour. (Defendants' UMF, No. 5.) Ziada was not using his phone or looking at it for any reason during the ten minutes leading up to the Incident. (Defendants' UMF, No. 6.) Ziada was only able to see at best about 50 to 100 feet in front of him at the time of the Incident, even with his headlights on. (Defendants' UMF, No. 7.)

Ziada did not know where the Decedent's vehicle came from until it was directly in front of him. (Defendants' UMF, No. 8.) Ziada estimates that about two to four seconds elapsed between him seeing the Decedent's vehicle and the impact. (Defendants' UMF, No. 9.) After seeing the Decedent's vehicle, Ziada slammed on his brakes and turned his steering wheel to the left, believing it was the only thing he could do to avoid the collision. (Defendants' UMF, No. 10.) Ziada did not steer to the right because there was a double fence on that side, and he decided the left side was safer. (Defendants' UMF, No. 11.)

Officer Michael Cupak of the Gilroy Police Department responded to the scene. (Defendants' UMF, No. 12.) Officer Rene Arbizu of the Gilroy Police Department Major Accident Investigations Team also reported to the scene. (Defendants' UMF, No. 14.)

At the time of the Incident, Ziada was driving from his place of employment with JIT. (Defendants' UMF, No. 16.) DS Cargo owns the tractor-trailer that Ziada was driving, which was being leased to JIT. (Defendants' UMF, No. 17.) Ziada began working as a truck driver in 2005 with Contract Transportation Services ("CTS") and received a two-week training at the start of his employment. (Defendants' UMF, No. 18.) After JIT acquired CTS, Ziada reapplied for his position and completed a background check and a drug test. (Defendants' UMF, No. 19.) Ziada was one of the drivers JIT hired after interviewing the former CTS drivers. (Defendants' UMF, No. 20.) He was subject to a road test with one of JIT's drivers, who noted no imperfections with Ziada's driving proficiency. (Defendants' UMF, No. 21.)

David Butcher, JIT's Vice President of Operations and General Manager, was directly involved in hiring Ziada. (Defendants' UMF, No. 22.) Nothing came back on Ziada's background check to give JIT pause, and Ziada had no violations or points in his driving record. (Defendants' UMF, Nos. 23-24.)

JIT enrolls new hires in the California Pull Notice Program, which sends the employee's driving records to JIT annually. (Defendants' UMF, No. 25.) JIT drivers are subject to random drug testing. (Defendants' UMF, No. 26.)

According to Butcher, other than the Incident, Ziada has had no violations or accidents since his date of hire by JIT, and he has never been involved in a collision with the trucks he drove for JIT. (Defendants' UMF, Nos. 27-28.) Ziada has been involved in only one minor incident with his personal vehicle: in 2019, someone backed their car into his, causing a slight scratch. (Defendants' UMF, Nos. 29-30.) Ziada participates in required monthly safety meetings and ongoing training by JIT. (Defendants' UMF, No. 31.) In or around 2019, Ziada began training other drivers. (Defendants' UMF, No. 32.) He has never been suspended or reprimanded during his employment by JIT. (Defendants' UMF, No. 33.)

Before the Incident, Ziada inspected the truck, which he had been driving for about a year, and did not notice anything wrong with it. (Defendants' UMF, No. 34.) Butcher reviewed all of Ziada's employment records at JIT and believes that Ziada is one of JIT's best drivers. (Defendants' UMF, No. 35.)

Nancy Grugle, Ph.D., the Defendants' human factors expert, opined that the Decedent violated Ziada's reasonable expectancy and the rules of the road, creating an unreasonably dangerous condition in which Ziada did not expect to encounter a wrong-way driver and was forced to take evasive action. (Defendants' UMF, No. 39.) Dr. Grugle also opined that Ziada's decision to brake and steer to the left was reasonable because the Decedent violated Ziada's reasonable expectancy by driving in the wrong direction, because Ziada could not predict what Decedent would do next, and because the area to the left was a clear path of travel at the time. (Defendants' UMF, No. 40.)

Plaintiffs rely upon three expert declarations in support of their opposition to Defendants' motion. (See, generally, Plaintiffs' Separate Statement in Opposition to Defendants' Motion, Plaintiffs' Responses to Undisputed Material Facts ("Plaintiffs' UMF"), Fact Nos. 1-40, and Plaintiffs' Additional Material Facts ("Plaintiffs' AMF"), Fact Nos. 1-37.)

Jeffrey Bonsall, an accident reconstructionist, states that he reviewed the Event Data Report from the Volvo truck that defendant Ziada was driving ("Volvo EDR"). (Declaration of Jeffrey Bonsall

("Bonsall Decl."), ¶¶ 2, 7, 10.) According to Bonsall, the Volvo EDR shows that the Volvo was stopped 45.5 seconds before the impact, that it accelerated to a speed of 50.3 miles per hour at 17.5 second before impact. (*Ibid.*) Bonsall says that from 17.5 seconds before the impact to the moment of impact, the Volvo was travelling over the posted speed limit of 50 miles per hour, and further that Ziada made no evasive maneuver until the brakes were applied approximately 0.25 seconds prior to impact. (*Ibid.*)

Bonsall states that he personally inspected the site of the Incident and observed a 50 miles per hour speed limit sign for the eastbound traffic, located to the west of the area of impact. (Bonsall Decl., ¶ 12.) The roadway in both directions leading to the area of impact was primarily flat. (Bonsall Decl., ¶ 14.) According to the California Commercial Driver Handbook, a move to the right would be the best option when confronted by an oncoming vehicle. (Bonsall Decl., ¶ 16.)

Bonsall formed the following opinions: Ziada had ample time to take an analytical approach to attempt to mitigate the collision; it is more likely that Ziada would have been able to mitigate the severity of the Incident had he been driving the posted speed limit and been attentive to the road ahead; there was approximately 980 feet and 5.9 seconds available from the moment the Decedent's vehicle was fully visible to the moment of impact; Ziada could have braked within 4.4 seconds prior to the collision; and the shoulder to the right of Ziada was 8.5 feet wide and sufficient to accommodate the width of the Volvo truck. (Bonsall Decl., ¶ 17.)

Stephen Casner, Ph.D., a human factors expert, reviewed data extracted from two data recorders installed on each vehicle involved in the collision. (Declaration of Stephen M. Casner, Ph.D., ¶¶ 2, 4, 5.) At the moment of impact, the speed of the Decedent's vehicle was steady at 57 miles per hour. (Casner Decl., ¶ 11.) Dr. Casner states that the brakes of Ziada's truck were applied approximately 0.25 seconds before impact, at which time the speed of the truck was 57.8 miles per hour. (Casner Decl., ¶ 12.) Ziada had the cruise control feature engaged before and during the impact. (*Ibid.*) There is no data to document lateral movements (i.e., swerving) by either vehicle. (Casner Decl., ¶ 13.) Ziada reports swerving just before the impact, and the collision patterns show that the two vehicles met at an angle, rather than head on. (*Ibid.*)

Dr. Casner states that a last-second swerving and braking maneuver with no observable deceleration during a period of two to five seconds prior to a head-on impact is unusual and an indicator

of driver distraction. (Casner Decl., ¶ 17.) The use of cruise-control is understood to be associated with reduced driver attention. (*Ibid.*)

Dr. Casner states that the Decedent lived near the scene of the crash and frequently used that portion of the highway to visit his girlfriend who lived a few miles away. (Casner Decl., ¶ 19.) Dr. Casner believes one can assume that the Decedent was familiar with the highway, and it is unlikely that he was surprised or confused by the median in the roadway. (*Ibid*.) Dr. Casner considered the possibility that the Decedent intentionally drove his car into opposite-direction traffic. (Casner Decl., ¶ 20.) Dr. Casner opined that the Decedent's speed of 57 miles per hour along with his use of a seatbelt suggests an intent to avoid harm rather than to cause it. (*Ibid.*) Dr. Casner said another explanation for Decedent's driving the wrong way on a divided highway is that he had drifted into the early stages of sleep. (Casner Decl., ¶ 21.)

Paul Herbert, a commercial motor vehicle safety and compliance expert, states that truck drivers are trained to avoid endangering other drivers on the roadway, regardless of the direction of travel. (Declaration Paul Herbert ("Herbert Decl."), ¶¶ 2, 4, 7.) It is easier to maneuver to turn right off the road than to turn left into traffic. (Herbert Decl., ¶ 8.) Truck drivers are instructed to use the shoulder as an "escape route" if there is any trouble rather than other lanes of traffic. (Herbert Decl., ¶ 9.)

Herbert states that truck drivers are trained to follow industry standards of care pertaining to a minimum of 15 seconds in "Eye Lead Time." (Herbert Decl., ¶ 10.) In Herbert's opinion, if Ziada had been practicing the basic industry standards for operating such a commercial vehicle, he would have seen the Decedent before he was in front of him. (*Ibid.*) Herbert further opines that: "[a]bsent a significant degree of inattentiveness, Ziada would have seen what needed to be seen and reacted to what needed to be reacted to in sufficient time for him to avoid crashing into Decedent." (*Ibid.*)

VI. Analysis

The pleadings determine the scope of relevant issues on a summary judgment motion. (*Hutton v. Fidelity National Title* (2013) 213 Cal.App.4th 486, 493.) Here, the first cause of action is for negligence and the second cause of action is for wrongful death based on Defendants' alleged negligence. (Complaint, ¶¶ 12, 26, 29.)

"Wrongful death is a statutorily created cause of action for pecuniary loss brought by heirs against a person who causes the death of another by a wrongful act or neglect. It is original in nature and does not represent a right of action that the deceased would have had if the deceased had survived the injury. [Citations.]" (*Jacoves v. United Merchandising Corp.* (1992) 9 Cal.App.4th 88, 105.) "In any action for wrongful death resulting from negligence, the complaint must contain allegations as to all the elements of actionable negligence. Negligence involves the violation of a legal duty imposed by statute, contract or otherwise, by the defendant to the person injured, e.g., the deceased in a wrongful death action." (*Ibid.*, internal punctuation and citations omitted.)

Accordingly, both the first and second causes of action require Plaintiffs to establish the elements of negligence. "The elements of cause of action for negligence are well established. They are '(a) a *legal duty* to use due care; (b) a *breach* of such legal duty; [and] (c) the breach is the *proximate or legal cause* of the resulting injury.' [Citation.]" (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917-918, quoting and citing *Evan F. v. Hughson United Methodist Church* (1992) 8 Cal.App.4th 828, 834, italics in original.)

The Complaint relies on a different theory of liability for each defendant: (A) Negligence [Ziada]; (B) Negligent Hiring [JIT]; and (C) Negligent Entrustment [DS Cargo]. (Complaint, ¶¶ 10-13;September 28, 2022 Amendment to Complaint identifying JIT as a defendant.)

A. Negligence

Defendants contend Plaintiffs are unable to establish the elements of breach and causation in their prima facie case for negligence. (Mot., p. 6, lns. 22-23.) Plaintiffs argue there are triable issues of fact regarding Ziada's negligence. (Plaintiffs' Opposition to Defendants' Motion ("Opp."), p. 12, ln. 3.)

Civil Code section 1714 states: "Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself." (Civ. Code, § 1714, subd. (a).) "In this state, the general rule is that all persons have a duty to use ordinary care to prevent others from being injured as the result of their conduct. [Citations.]" (*Randi W. v. Muroc Joint Unified School District* (1997) 14 Cal.4th 1066, 1077.)

"It is axiomatic that a defendant cannot be held liable in tort for an injury he or she did not cause. There are two widely recognized tests for determining whether a defendant's conduct in fact caused the plaintiff's injury: Whether the injury would not have occurred *but for* the defendant's conduct, and whether the defendant's conduct was *substantial factor* in bringing about the injury. [Citations.]" (*Brookhouser v. State of California* (1992) 10 Cal.App.4th 1665, 1677.) "The mere fact that an accident happened ... is not sufficient, of course, to establish defendants' negligence. The burden rested upon plaintiffs to establish that some act or omission on the part of defendants was the proximate cause of the accident." (*Farmer v. Fairbanks* (1945) 71 Cal.App.2d 70, 80.)

Here, Defendants meet their initial burden by presenting facts that Ziada acted as a reasonable driver would under the circumstances, and further, that the proximate cause of the collision was the Decedent's vehicle going the wrong way on a divided highway, recklessly driving into oncoming traffic. Defendants present Ziada's deposition testimony that he was driving eastbound on Highway 152 in the right lane, not using his phone, and saw Decedent's vehicle going the wrong way. (Defendants' UMF, Nos. 1-3.) Ziada first saw the Decedent's vehicle about two to four seconds before the impact. (Defendants' UMF, No. 9.) Ziada attempted to avoid the collision by braking and turning the wheel all the way to the left. (Defendants' UMF, Nos. 4, 10.)

With these facts, Defendants meet their initial burden of negating the breach and causation elements. Their evidence establishes that Decedent's vehicle suddenly appeared going the wrong way, without warning and just a matter of seconds before the impact, leaving Ziada no realistic way to avoid the collision. Defendants' evidence shows both that Ziada reacted reasonably under the circumstances and that the collision and the Decedent's unfortunate death was caused by the Decedent's vehicle going the wrong way on a highway, rather than by any act or omission attributable to Ziada.

Plaintiffs assert that Ziada was speeding, using cruise control, and was inattentive. (Opp., p. 12, lns. 14-16.) Plaintiffs present evidence that Ziada was traveling faster than the speed limit in the seconds leading up to the impact. (Plaintiffs' AMF, Nos. 8, 12.) Plaintiffs also present expert opinion that Ziada had ample time to take an analytical approach, and that if he had been driving at the posted speed limit and been attentive to the road ahead that he would have been able to mitigate the severity of the impact. (Plaintiffs' AMF, Nos. 32-33.)

However, Plaintiffs do not dispute that the Decedent was going the wrong way on Highway 152, going headlong into oncoming traffic, but they assert Ziada still could have mitigated the impact. (Defendants' UMF, No. 3; Plaintiffs' UMF, No. 3.) In the Court's view, even accepting all reasonable inferences drawn from Plaintiffs' evidence, Plaintiffs do not present evidence that it is more likely than not that Ziada breached a duty owed to Decedent and that such breach was a proximate cause of the harm to Decedent. (*Aguilar*, *supra*, 25 Cal.4th at p. 856, fn. 26 ["[a]ssessing the sufficiency of the evidence to determine whether a reasonable juror could find that the plaintiff has satisfied his burden of persuasion is a traditional judicial function."], citation omitted.) When a plaintiff is required to prove a matter at trial by a preponderance of the evidence, in order to raise a triable issue of material fact on summary judgment, they must present evidence showing the matter to be more likely than not. (*Id.* at p. 857.) Plaintiffs have not met this burden here.

Plaintiffs reliance on the last clear chance doctrine is unavailing because that doctrine has been abolished. (*Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 828-829 (*Li*). "The *Li* court discussed the doctrines of last clear chance and assumption of risk as concepts that had operated to ameliorate the harshness of all or nothing contributory negligence scheme. Because it was replacing that scheme with the comparative negligence approach it abolished the last clear chance rule." (*Shin v. Ahn* (2007) 42 Cal.4th 482, 498, internal punctuation and citations omitted.) Plaintiffs' cited decisions in support of applying the last clear chance doctrine predate the 1975 *Li* decisions.

Defendants meet their initial burden by negating the breach and causation elements, and Plaintiffs fail to meet their burden of establishing a triable issue as to either of these elements. Accordingly, the motion for summary adjudication of the first and second causes of action, based on the alleged negligence of Ziada, is GRANTED.

B. Negligent Hiring

> An employer may be liable to a third person for the employer's negligence in hiring or retaining an employee who is incompetent or unfit. Negligence liability will be imposed upon the employer if it knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materializes. As such, California follows the rule set forth in the Restatement Second of Agency, section 213, which provides in

> pertinent part: "A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless: … [¶] (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others." Liability for negligent supervision and/or retention of an employee is one of direct liability for negligence, not vicarious liability.

(*Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 815 (*Delfino*), internal punctuation and citations omitted.)

Here, Plaintiffs allege the Defendants, "when acting as a principal, was negligent in the selection and hiring of each and every other Defendant as an agent, employee and/or joint venturer." (Complaint, ¶ 7.) Defendants first assert this theory should be adjudicated in DS Cargo's favor because DS Cargo did not employ Ziada and was simply the registered owner of the tractor-trailer leased to JIT at the time of the Incident.

In opposition, Plaintiffs assert there is no indication that DS Cargo did any inquiry to confirm that Ziada was licensed to drive. (Opp., p. 17, lns. 14-27, citing Veh. Code, § 14604[13], and *McKenna v. Beesley* (2021) 67 Cal.App.5th 552, 584 (*McKenna*).) *McKenna* is distinguishable because, there, the owner of the vehicle rented the vehicle directly to a driver without checking his driver's license, and it was undisputed that the driver was unlicensed. (*McKenna, supra*, 67 Cal.App.5th at pp. 559-560, 584.) Here, by contrast, Plaintiffs do not assert that Ziada was unlicensed. Moreover, DS Cargo leased its truck to JIT and did not employ Ziada or rent the truck directly to Ziada. Accordingly, there is no factual or legal basis for a negligent hiring theory against DS Cargo.

Defendants present evidence regarding JIT's hiring and employment of Ziada. (Mot., p. 12, lns. 7-23.) JIT had a background check run on Ziada, finding he had no violations or points on his driving record, and annually pulled his driving records. (Defendants' UMF, Nos. 19, 23-25.) Other than the subject Incident, Ziada has never had any accidents or violations during his employment with JIT. (Defendants' UMF, Nos. 27-28.) This evidence is sufficient to meet Defendants' burden to show

[13] Vehicle Code, section 14604, subdivision (a), states as follows in pertinent part: "No owner of a motor vehicle may knowingly allow another person to drive the vehicle upon a highway unless the owner determines that the person possesses a valid driver's license that authorizes the person to operate the vehicle."

Plaintiffs cannot establish that JIT knew or should have known that hiring Ziada created a particular risk of harm which later materialized. (See *Delfino, supra*, 145 Cal.App.4th at p. 815.)

Accordingly, the motion for summary adjudication of the first and second causes of action, based on DS Cargo and JIT's negligent hiring, retaining, and training of Ziada is GRANTED.

C. Negligent Entrustment

Defendants contend DS Cargo did not breach any duty to the Decedent as the owner of the truck driven by Ziada. (Mot., p. 12, lns. 24-25.) Plaintiffs assert there is no indication that DS Cargo did any inquiry to confirm that Ziada was licensed to drive. (Opp., p. 17, lns. 22-23.)

California is one of several states that recognizes the liability of an automobile owner who has entrusted a car to an incompetent, reckless, or inexperienced driver through the tort of negligent entrustment. (*Allen v.* Toledo (1980) 109 Cal.App.3d 415, 420.) To succeed on a negligent entrustment cause of action involving a motor vehicle, a plaintiff must plead and prove: (1) the driver was negligent in operating the vehicle, (2) the defendant was the owner of the vehicle operated by the driver, (3) the defendant knew or should have known, that the driver was incompetent or unfit to drive the vehicle, (4) the defendant permitted the driver to use the vehicle, and (5) the driver's incompetence or unfitness to drive was a substantial factor in causing harm to plaintiff. (*Jeld-Wen, Inc. v. Superior Court* (2005) 131 Cal.App.4th 853, 863-864.)

"Negligent entrustment is a common law liability doctrine, which arises in numerous factual contexts. In cases involving negligent entrustment of a vehicle, liability is imposed on a vehicle owner or permitter because of his own negligence and not the negligence of the driver." (*Ghezavat v. Harris* (2019) 40 Cal.App.5th 555, 559.)

Here, the undisputed material facts demonstrate there was no reason for either JIT or DS Cargo to believe that Ziada was incompetent or unfit to drive the vehicle. Accordingly, the motion for summary adjudication of the first and second causes of action, based on a negligent entrustment theory, is GRANTED.

D. The Sudden Emergency Doctrine

"Under the 'sudden emergency' or 'imminent peril' doctrine, a 'person who, without negligence on his part, is suddenly and unexpectedly confronted with peril, arising from either the actual presence,

or the appearance, of imminent danger to himself or others, is not expected or required to use the same judgment and prudence that is required of him in the exercise of ordinary care in calmer and more deliberate moments.'" (*Leo v. Dunham* (1953) 41 Cal.2d 712 [264 P.2d 1].)" (*Abdulkadhim v. Wu* (2020) 53 Cal.App.5th 298, 301-302.) Defendants contend this doctrine applies to all Plaintiffs' claims. Given the Court's rulings, it is not necessary for the Court to reach this affirmative defense.

Defendants' motion for summary judgment is GRANTED.