SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 18b
Honorable Shella Deen, Presiding
Thomas Duarte, Courtroom Clerk
191 North First Street, San Jose, CA 95113

DATE: September 3, 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

****Please specify the issue to be contested when calling the Court and Counsel****

LAW AND MOTION TENTATIVE RULINGS

FOR APPEARANCES: Department 18 is fully open for in-person hearings. The Court strongly prefers **in-person** appearances for all contested law and motion matters. For all other hearings, the Court strongly prefers either **in-person or video** appearances. If you must appear virtually, you must use video. 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. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 18:
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

SCHEDULING MOTION HEARINGS: Please go to https://reservations.scscourt.org or 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.

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https://www.scscourt.org/general_info/court_reporters.shtml

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.

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LAW AND MOTION TENTATIVE RULINGS

LINE #	CASE #	CASE TITLE	RULING
LINE 1	24CV432747	Chunlei He vs Siheon Lee et al	**Demurrer**. A notice of motion with the hearing date and time was electronically served on June 4, 2024. Any opposition was due on August 20, 2024. Plaintiff failed to oppose the motion. "[T]he failure to file an opposition creates an inference that the motion or demurrer is meritorious." (*Sexton v. Super Ct*. (1997) 58 Cal.App.4th 1403, 1410.) Good cause appearing, Defendants' demurrer is SUSTAINED WITH LEAVE TO AMEND. Moving party to prepare the formal order.
LINE 2	24CV435105	Salvatore Bonina vs Eri Matsushita et al	**Demurrer.** Scroll down to Lines 2 and 3 for Tentative Ruling.
LINE 3	24CV435105	Salvatore Bonina vs Eri Matsushita et al	**Motion to Strike.** Scroll down to Lines 2 and 3 for Tentative Ruling.

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LAW AND MOTION TENTATIVE RULINGS

LINE 4	22CV402853	Gonzalez Edgar et al vs Ryan Barnhart et al	**Motion for Summary Judgment/ Adjudication**. A notice of settlement was filed on June 28, 2024. This motion is therefore MOOT and is ordered OFF CALENDAR.

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LAW AND MOTION TENTATIVE RULINGS

LINE 5	23CV417150	Yelena KolodjiI et al vs David Dietrich	**Motion to Compel (Document Request).** Plaintiff Yelena Kolodji's motion to compel Defendant David Dietrich to provide supplemental responses to Request for Production of Documents Nos. 1 and 3-9, and for monetary sanctions in the amount of $7,671.50 to be paid by Defendant and/or his counsel, on the grounds that Defendant's responses do not adequately include code-compliant language or adequate substantive responses. Defendant filed an opposition. On June 17, 2024, Defendant's counsel stated by email that *if* Plaintiff needed an extension to the deadline, Plaintiff's counsel *could let him know*. No extension was granted. Likewise, the June 18, 2024, correspondence does not reflect any extension to file a motion compel. The July 7 correspondence also does not "establish" a motion to compel deadline or any open extension. A motion to compel a further response to request for production of documents must be filed within 45 days after service of verified responses; failure to do so waives the right to have the Court compel a response. (Code Civ. Proc., §2031.310(c), *Standon Co. v. Superior Court* (1990) 225 CA3d 898, 902. The parties may extend the 45-day limit by written stipulation (Code Civ. Proc., §2031.310 (c). That did not occur here. As such, the motion to compel and request for sanctions are DENIED. Defendant to prepare the order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 6	23CV417150	Yelena KolodjiI et al vs David Dietrich	**Motion to Compel (Form Interrogatories).** This motion is DENIED, for the same reasons set forth in Tentative Ruling for Line 5. Defendant to add this ruling to the order for Line 5.

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LAW AND MOTION TENTATIVE RULINGS

LINE 7	23CV422100	IVAN OMAR MANCILLAGREZ et al vs EAST WEST BUILDING SERVICES, LLC et al	**Motion for Stay, Motion to Quash and Motion for Protective Order.** Defendant Judith Cayton's motion to stay the deposition of the custodian of records for El Camino Medical Health Network, to quash Plaintiffs' notice of deposition pursuant to Code Civ. Proc., §2025.410 subd. (c), for a protective order pursuant to Code Civ. Proc., §2025.420 subd. (a) and $1200 in sanctions. Plaintiffs oppose the motion. Defendant has not shown good cause: Defendant cannot seek a blanket stay, protective order and seek to quash an entire request for production; no effort was made to carve out those documents that are relevant or reasonably calculated to lead to the discovery of admissible evidence. A blanket grant of the motions is neither appropriate, nor warranted. Further, Defendant has failed to comply with necessary motion requirements, by failing to file a separate statement; what she did eventually file was late and completely devoid of the required legal and factual reasons that support any grant of these motions. The meet and confer efforts were also inadequate. Plaintiffs were agreeable to reasonable modifications to, and limitations of, the records sought, but Defendant refused to meet and confer, instead choosing to seek blanket motions. Defendant's motions are DENIED, without prejudice. The request for sanctions is DENIED. Moving party to prepare the order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 8	23CV411134	NICHOLE CRAIG vs ADVOCACY DEVELOPMENT PARTNERS, LLC et al	**Motion to Withdraw as Attorney.** Motion of Stalwart Law Group, APC to be relieved as counsel for Plaintiff Nichole Craig. Notice of hearing was given to Plaintiff Craig by mail service on July 5, 2024, at Plaintiff Craig's last known address. No opposition was filed. A failure to oppose a motion may be deemed a consent to the granting of the motion. CRC Rule 8.54c. Failure to oppose a motion leads to the presumption that Plaintiff client has no meritorious arguments. (See *Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal. App. 3d 481, 489.) Moving party has met its burden of proof. Good cause appearing, the Motion is GRANTED. The Order will take effect upon the filing and service of the executed order of this Court. Moving party to prepare the formal order after hearing, to include the upcoming October 29, 2024 trial setting conference.

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LAW AND MOTION TENTATIVE RULINGS

LINE 9	23CV416339	Cathay Bank vs RPRO152N3, LLC, et al	**Motion to Withdraw as Attorney.** Motion of Breck Milde to be relieved as counsel for Defendant RPRO 152N3, LLC., brought on shortened time. Notice of hearing was given to Defendant by mail service on August 24, 2024, at its last known address. No opposition by the client was filed. A failure to oppose a motion may be deemed a consent to the granting of the motion. CRC Rule 8.54c. Failure to oppose a motion leads to the presumption that Plaintiff client has no meritorious arguments. (See *Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal. App. 3d 481, 489.) However, an opposition was filed by Plaintiff. Plaintiff filed its motion for summary adjudication on April 11, 2024, to be heard on August 1, 2024. Just over *4 weeks ago*, at new defense counsel Breck Milde's *ex parte* request, the hearing date was continued to allow him to get up to speed on the case and prepare an opposition to the summary judgment motion. The motion was continued to October 8, 2024 to enable him to do so. Good cause not shown by the moving party; the motion is DENIED, without prejudice. Moving party to prepare the formal order after hearing.

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LAW AND MOTION TENTATIVE RULINGS

LINE 10	23CV421823	Sonia Ramirez-Miranda vs Santa Clara Valley Transportation Authority	**Motion to Withdraw as Attorney.** Motion of Attorney Kevin Kunde to be relieved as counsel for Plaintiff Sonia Ramirez-Miranda. No proof of service filed for notice of the hearing to Plaintiff. Motion is therefore DENIED, without prejudice. Moving party to prepare the order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 11	24CV428600	IVAN MILAN PANTIC vs SANTA CLARA COUNTY SHERIFF	**Motion for Judgment of Dismissal**. Defendant County of Santa Clara's motion for an order granting a judgment of dismissal with prejudice, pursuant to Code of Civil Procedure section 581(f)(2). The Court sustained the County's demurrer to the complaint with 30 days leave to amend, and Plaintiff Ivan Milan Pantic failed to amend the complaint by that deadline. The motion was served on June 12, 2024. No opposition was filed. A failure to oppose a motion may be deemed a consent to the granting of the motion. CRC Rule 8.54c. Failure to oppose a motion leads to the presumption that Plaintiff has no meritorious arguments. (See *Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal. App. 3d 481, 489.) Moving party has met its burden of proof. Good cause appearing, the Motion is GRANTED. (*Wells v. Marina City Properties, Inc*. (1981) 29 Cal.3d 781, 785; Code of Civil Procedure section 581(f)(2)). Moving party to prepare the judgment dismissing the complaint with prejudice.

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LAW AND MOTION TENTATIVE RULINGS

LINE 12	24CV430363	Marie Arnold vs California Public Employee Retirement System (CALPERS)	**Motion for Default Judgment.** This motion is rendered MOOT and ordered OFF CALENDAR as the default, on which this motion is based, was not entered (Request for Entry of Default, August 7, 2024). Defendant to prepare order.

Calendar Lines 2 & 3
Case Name: *Bonina v. Breakthrough Physical Therapy, Inc., et al.*
Case No.: 24CV435105

Before the court is Defendants Breakthrough Physical Therapy, Inc. and Eri Matsushita's Demurrer and Motion to Strike Plaintiff Salvatore Bonina's Complaint. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background

In 2020, Plaintiff Salvatore Bonina ("Plaintiff") sought physical therapy with Defendant Breakthrough Physical Therapy, Inc. ("Defendant Breakthrough") and Eri Matsushita ("Defendant Matsushita") (collectively, "Defendants"). (Complaint at ¶ 11.) During a visit in August or September of 2020, Defendant Matsushita informed Plaintiff that she would perform a manipulation of Plaintiff's neck, even though she was not authorized to perform this technique. (Complaint at ¶ 12.) Plaintiff alleges that Defendant Matsushita did not advise Plaintiff to relax his neck even though his neck was tense and contracted. (*Ibid.*) Plaintiff further alleges that Defendant Matsushita "suddenly and violently twisted Plaintiff's head and neck to this side causing Plaintiff immediate and extraordinary pain." (*Ibid.*)

Plaintiff believes the type of manipulation performed was a chiropractic procedure, even though Defendant Matsushita was not a licensed chiropractor and did not have any formal training or certification to perform this type of manipulation. (Complaint at ¶ 13.) Plaintiff alleges that Defendants did not obtain his consent to perform a neck manipulation, he was not informed of the risks, was not required to sign any forms, and was not asked to disclose any health conditions or injuries that could be exacerbated by the neck manipulation. (Complaint at ¶ 14.) Moreover, Plaintiff alleges that Defendants did not ask Plaintiff to waive liability for this type of procedure. (*Ibid.*)

Immediately following this incident, Plaintiff alleges he began to experience pre-syncopal/syncopal episodes defined by "dizziness, lightheadedness, tunnel vision, fear, in addition to pain," and would lose consciousness and fall to the ground on a weekly to bi-weekly basis, with no medical history of doing so in the past. (Complaint at ¶¶ 15, 16.) Plaintiff returned to Defendants' location and advised of the symptoms he was experiencing. (Complaint at ¶ 17.) Plaintiff alleges:

> Upon being informed, Matsushita appeared visibly frightened and did not provide a response. Defendant Matsushita knew, or should have known, that the symptoms Plaintiff reported were caused by the neck manipulation, that Plaintiff was at serious risk of harm, and he required immediate medical attention. Despite the foregoing knowledge, Defendant Matsushita intentionally chose to conceal and/or withhold that information at Plaintiff's risk.

(*Ibid.*)

Plaintiff sought subsequent treatment through Defendant Bay Area Imaging or Morgan Hill Imaging and underwent an MRI. (Complaint at ¶ 19.) Plaintiff alleges that the MRI revealed that his "left vertebral artery was significantly compressing his medulla" but that Defendant Dr. Renu Chundru Liu ("Dr. Liu") of Bay Area Imaging failed to identify these conditions or notify his neurologist. (Complaint at ¶ 20.) Thereafter, Plaintiff sought care with a cardiologist and underwent surgery with a cardiac electrophysiologist to have a pacemaker placed. (Complaint at ¶ 22.) Despite the placement of the pacemaker, Plaintiff alleges that he continued to experience the above-described episodes. (Complaint at ¶ 23.)

Plaintiff sought further care with neurologist, Dr. Gary K. Steinberg of Stanford Medicine. (Complaint at ¶ 23.) Plaintiff alleges that "[i]n May of 2023, Plaintiff's healthcare providers informed him that his left vertebral artery was significantly compressing his medulla and this compression was the cause of his pre-syncopal/syncopal episodes, the symptoms related to those episodes, as well as the issues related to his heart." (Complaint at ¶ 24.) Plaintiff alleges that on August 28, 2023, he was informed by Dr. Steinberg through e-mail that the compression was caused by the 2020 neck manipulation: "'When you had the manipulation of your neck it caused the artery to be pushed against your brain stem causing the symptoms you were experiencing . . . .'" (Complaint at ¶ 25.) Plaintiff alleges that prior to this, he was not aware that the compression and pre-syncopal/syncopal episodes were caused by the manipulation of his neck performed by Defendant Matsushita in 2020. (*Ibid.*)

Thereafter, Plaintiff underwent neurosurgery with Dr. Steinberg to treat the compression allegedly caused by the neck manipulation performed by Defendants. (Complaint at ¶ 26.) Plaintiff reported the incident to the Physical Therapy Board of California on

September 16, 2023, and has been in discussions with Defendants ever since. (Complaint at ¶¶ 27, 28.)

Plaintiff filed suit on April 11, 2024, alleging four causes of action. Plaintiff has alleged the first cause of action for negligence, second cause of action for battery, and third cause of action for intentional infliction of emotional distress against Defendants Breakthrough Physical Therapy, Inc. and Eri Matsushita. Plaintiff alleges the fourth cause of action for medical malpractice against Defendants Bay Area Imaging Consultants Medical Group, Inc. and Dr. Renu Chundru Liu. Defendants Bay Area Imaging Consultants Medical Group and Dr. Liu filed their Answer to the Complaint on April 30, 2024.

Defendants Breakthrough Physical Therapy, Inc. and Erin Matsushita filed their Demurrer and Motion to Strike on June 3, 2024. Plaintiff filed his opposition to Defendants' Demurrer on August 19, 2024. Defendants filed their reply on August 26, 2024. The Court addresses the arguments raised therein.

II. Discussion

a. Procedural Matters

i. *Timeliness*

"A person against whom a complaint or cross-complaint has been filed may, within 30 days after service of the complaint or cross-complaint, demur to the complaint or cross-complaint." (Code Civ. Proc., § 430.40, subd. (a).)[1] Even if a demurrer is untimely filed, the Court has discretion to hear the demurrer so long as its action ". . . 'does not affect the substantial rights of the parties.' [Citations.]" (See *McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 281-282.)

"Any party, within the time allowed to respond to a pleading may serve and file a notice of motion to strike the whole or any part thereof." (§ 435, subd. (b)(1); see also Cal. Rules of Court, rule 3.1322, subd. (b).) "The term 'pleading' means a demurrer, answer, complaint, or cross-complaint." (§ 435, subd. (a)(2).) Unless extended by stipulation or court order, a defendant's answer is due within 30 days after service of the complaint. (See § 412.20, subd. (a)(3).)

[1] All further undesignated statutory references are to the Code of Civil Procedure.

As noted above, the Complaint was filed on April 11, 2024. The effective date of service on these Defendants is April 25, 2024. (Notice of Acknowledgement filed April 25, 2024.) The Demurrer and Motion to Strike in the instant action were served on June 3, 2024, or at least a week past the deadline. Although it is unclear from the moving party's declaration and papers whether an extension of time to file the responsive pleading was granted, Plaintiff has opposed Defendants' motions without raising timeliness as an issue. Therefore, even if the motions are untimely, the Court's consideration of the demurrer and motion to strike would not affect the substantial rights of the parties.

ii. *Meet and Confer*

"Before filing a demurrer pursuant to this chapter, the demurring party shall meet and confer in person or by telephone with the party who filed the pleading that is subject to demurrer for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised in the demurrer." (§ 430.41, subd. (a).) "As part of the meet and confer process, the demurring party shall identify all of the specific causes of action that it believes are subject to demurrer and identify with legal support the basis of the deficiencies." (§ 430.41, subd. (a)(1).) A party moving to strike some or all of a complaint is required to engage in meet and confer efforts prior to the filing of a motion to strike. (§ 435.5, subd. (a).) "Any determination by the court that the meet and confer process was insufficient shall not be grounds to overrule or sustain a demurrer." (§ 430.41, subd. (a)(4).)

Counsel for Defendants states that the parties met and conferred by letter and telephone. (Declaration of Shirley Carpenter Bridwell ["Bridewell Decl."] at ¶¶ 3, 4.) Counsel attaches her correspondence with Plaintiff's counsel, which includes the initial meet and confer letter setting forth the legal basis for bringing the Demurrer and Motion to Strike. (See Bridwell Decl., Exhibit A.) The Court is satisfied that legal basis for the claimed deficiencies within the pleadings were discussed between the parties, whereby an agreement could not be reached. Accordingly, the Court will reach the merits of the Demurrer.

b. Demurrer

i. *Legal Standard*

A demurrer must distinctly specify the grounds upon which a pleading is objected to; a demurrer lacking such specification may be disregarded. (§ 430.60.) Defendants object to the Complaint pursuant to Code of Civil Procedure section 430.10, subdivisions (e) and (f).

As relevant to the instant case, "[t]he party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on any one or more of the following grounds: . . . (e) The pleading does not state facts sufficient to constitute a cause of action." (§ 430.10, subd. (e).) A demurrer may be utilized by "[t]he party against whom a complaint [ ] has been filed" to object to the legal sufficiency of the pleading as a whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (§§ 430.10, 430.50, subd. (a).)

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

A party against whom a complaint has been filed may also object by demurrer as provided in Section 430.30 to the pleading on the grounds that the pleading is uncertain. (§ 430.10, subd. (f).) "As used in this subdivision, 'uncertain' includes ambiguous and unintelligible." (*Ibid.*) A "[d]emurrer for uncertainty will be sustained only where the complaint is so bad that the defendant cannot reasonably respond; i.e. he or she cannot

reasonably determine what issues must be admitted or denied, or what counts or claims are directed against him." (*Khoury v. Maly's of Calif., Inc.* (1993) 14 Cal.App.4th 612, 616.)

ii. *The Demurrer is SUSTAINED with Leave to Amend.*

Defendants maintain that the entirety of the Complaint as alleged against them is barred by the statute of limitations. As stated above, Plaintiff has alleged causes of action for negligence, battery, and intentional infliction of emotional distress against these Defendants.

The statute of limitations for professional negligence against a healthcare provider is codified under Code of Civil Procedure section 340.5 as follows: "In an action for injury or death against a healthcare provider based upon such person's alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first." (§ 340.5.)

The statute of limitations for personal injury, including battery and intentional infliction of emotional distress is codified under Code of Civil Procedure section 335.1 as follows: "Within two years: An action for assault, battery, or injury to, or for the death of, an individual caused by the wrongful act or neglect of another." (*Wassmann v. South Orange County Community College Dist.* (2018) 24 Cal.App.5th 825, 852-853 [noting that intentional infliction of emotional distress has a two-year statute of limitations under § 335.1].)

A plaintiff must bring a cause of action within the limitations period as soon as it accrues. (Code of Civ. Proc., § 312.) A cause of action accrues at "the time when the cause of action is complete with all of its elements." (*Nogart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397 (*Nogart*).) An exception to the general rule of accrual is the "discovery rule", which "postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action." (*Nogart, supra,* 21 Cal.4th at p. 397.) "[A] plaintiff discovers the cause of action when he at least suspects a factual basis, as opposed to a legal theory for its elements, even if he lacks knowledge thereof[.]" (*Ibid.*) As best summarized by the California Supreme Court in *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110 (*Jolly*):

> Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong

> to her. . . . [T]he limitations period begins once the plaintiff " "has notice or information of circumstances to put a reasonable person on *inquiry* . . ."" A plaintiff need not be aware of the specific "facts" necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore, an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her.

(*Ibid.* [emphasis in original] [internal citations omitted].) "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, 809 (*Fox*).)

Since the injury occurred in August or September 2020 and Plaintiff filed suit on April 11, 2024, the injury happened more than three years prior to Plaintiff filing his Complaint. . Plaintiff seeks the benefit of the one-year rule under section 340.5 and argues that he did not discover that his injuries were caused by the neck manipulation performed by Defendants until August 28, 2023. In support of his position, Plaintiff relies on several cases, including *Fox, supra.*

In *Fox*, the plaintiff underwent gastric bypass surgery, followed by exploratory surgery, which revealed a perforation at the stapled closure of the small intestine, causing fluid to leak into her abdominal cavity. (*Fox, supra,* 35 Cal.4th at pp. 803-804.) The doctor from whom the plaintiff sought treatment failed to identify a cause for the perforation in is operative report. (*Id.* at p. 804.) The plaintiff did not learn of the leak at the stapled closure of her small intestine until after filing suit and deposing the doctor. (*Ibid.*) The plaintiff there attempted to amend the complaint to include a products liability cause of action against the manufacturer of the stapler. (*Id.* at p. 805.) The manufacturer demurred on the grounds that the statute of limitations had expired. (*Ibid.*) In reviewing the authorities discussed above, the California Supreme Court determined that the facts that the plaintiff sought to add her to her complaint support that she did not suspect nor have any reason to discover any facts supporting a cause of action for products liability prior to deposing her treating physician. (*Id.* at p. 811.)

The remaining cases discussed by Plaintiff in his opposition further support the notion that delayed discovery is a factual inquiry. For example, in *Kilburn v. Pineda* (1982) 137 Cal.App.3d 1046, 1049-1050, the Court of Appeal reversed judgment and found the claim timely on the grounds that no evidence was present to show that the plaintiff's pain was caused by the defendant's failure to exercise due care, there was no evidence the plaintiff terminated her relationship with the doctor because she believed he committed malpractice, and admission of a mistake is not enough to permit the inference of breach of duty. Likewise, in *Brown v. Bleiberg* (1982) 32 Cal.3d 426, 436, the court held on appeal from a grant of summary judgment, that whether there has been a belated discovery of the cause of action was a question of fact because neither of plaintiff's contacts with other physicians inquiring about the condition of her feet suggested malpractice on the part of the defendant who had performed the surgery in the first place.

While the Court finds these cases instructive for articulating the principles and application of the discovery rule, the facts alleged in the Complaint are more analogous to those in *Jolly* and its progeny. These authorities were best summarized in *Knowles v. Superior Court* (2004) 118 Cal.App.4th 1290 (*Knowles*) as follows:

> In *Jolly*, the plaintiff knew that her mother had taken the synthetic drug estrogen diethylstilbestrol (DES). (*Jolly, supra,* 44 Cal.3d at p. 1107.) The plaintiff also suspected, by 1978, that DES was a defective product and that it was a cause of the plaintiff's cancer. (*Id*. at p. 1108.) However, the plaintiff delayed legal action because she did not know the identity of the DES manufacturer. (*Ibid*.) In 1980, the Supreme Court decided *Sindell v. Abbott Laboratories* (1980) 26 Cal.3d 588, which held that a plaintiff could state a claim without knowing the actual manufacturer of the DES at issue in the plaintiff's particular case. The plaintiff in *Jolly* sued in 1981. The trial court granted a defense summary judgment motion based on the statute of limitations. On review, the *Jolly* court rejected the notion that a plaintiff must have knowledge of specific facts establishing misconduct in order to discover a cause of action. (*Jolly, supra*, 44 Cal.3d at pp. 1110-1111.) Instead, the *Jolly* court held that a plaintiff discovers her cause of action when she suspects negligence: "Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her. … plaintiff need not

be aware of the specific 'facts' necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her." (*Ibid*., fn. omitted.)

In *Norgart, supra,* 21 Cal.4th 383, the Supreme Court applied the discovery rule as defined by *Jolly, supra,* 44 Cal.3d 1103, to bar a wrongful death cause of action brought in 1991 by a parent against a pharmaceutical company that had manufactured a drug the parent alleged contributed to his daughter's suicide in 1985. The *Norgart* court explained that the parent was suspicious of the cause of his daughter's death shortly after she died: "Leo admitted that, '[a]t or around the time of Kristi's death,' he suspected that 'something wrong' had happened to her to cause her death: he 'thought' that 'there had to be some reason, other than just herself, that would cause her to commit suicide,' that 'there had to be some other force or action upon her that caused her to commit suicide … .' He thereby impliedly admitted—to quote *Jolly*—that he 'suspect[ed] … that someone ha[d] done something wrong' to cause her death. (*Jolly v. Eli Lilly & Co., supra,* 44 Cal.3d at p. 1110.) He also admitted that, prior to mid-1986, he had formed a belief that an 'individual or individuals … did something wrong to [her] that caused her to take her own life,' and had begun to contemplate bringing an action for wrongful death. He further admitted that the 'individual or individuals' in question were her husband Steven, for what he suspected was physical abuse, and her psychiatrist Dr. Apostle, for what he suspected was professional negligence. He thereby expressly admitted—to quote *Jolly* again—that he 'suspect[ed] … that someone,' indeed two specific persons, 'ha[d] done something wrong' to cause her death. (*Jolly v. Eli Lilly & Co., supra*, 44 Cal.3d at p. 1110.)" (*Norgart, supra,* 21 Cal.4th at pp. 405–406.)

Thus, in *Norgart, supra,* 21 Cal.4th 383, the court held that the plaintiff's suspicions of negligence as a contributing factor in his daughter's suicide triggered the statute of limitations, even though the plaintiff did not suspect the precise manner by which the wrongdoing occurred. (*Id.* at p. 406.) The court did not focus on when the plaintiff became suspicious that the pharmaceutical company had been negligent.

Similarly, in *Dolan v. Borelli* (1993) 13 Cal.App.4th 816 (*Dolan*), the Court of Appeal applied *Jolly, supra,* 44 Cal.3d 1103, in concluding that the statute of limitations set forth in section 340.5 barred a medical malpractice action brought by a

> patient against a doctor who had performed surgery to eliminate pain associated with carpal tunnel syndrome. (*Dolan, supra,* 13 Cal.App.4th at p. 819.) In *Dolan,* the doctor told the patient that she should be free from pain within 60 days after the surgery. (*Id*. at p. 820.) However, when the patient continued to experience pain more than 60 days after the surgery, she believed the doctor had performed the surgery improperly. (*Ibid*.) The patient consulted another physician who performed a second operation. The precise nature of the initial physician's negligence was revealed during the second surgery. (*Ibid*.) The Court of Appeal rejected the patient's argument that the statute of limitations began to run from the date of the second operation. The court reasoned, "As discussed in *Jolly*, the essential inquiry is when did [the patient] suspect [the first doctor] was negligent, not when did she learn precisely how he was negligent." (*Dolan*, *supra*, 13 Cal.App.4th at p. 824.)
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> In *Rivas v. Safety-Kleen Corp*. (2002) 98 Cal.App.4th 218, 226 (*Rivas*), the court noted that in 1991, the plaintiff was diagnosed with a malfunctioning kidney and was told by his doctor to avoid contact with a solvent, Safety-Kleen, which was used at his workplace. In 1996, the plaintiff submitted a workers' compensation claim that attributed his disease to exposure to toxic fumes, gases, and liquids at work. (*Ibid*.) In 1998, the plaintiff filed a personal injury lawsuit against the manufacturer of Safety-Kleen. (*Ibid*.) The plaintiff claimed the statute of limitations did not bar his action because, pursuant to the discovery rule, the limitations period did not begin to run "until the injured party has been explicitly informed by his doctors that a certain substance or product caused the medical disorder or has had an opportunity to personally review medical records specifying the cause of the disorder." (*Id*. at. p. 228.) The *Rivas* court rejected this claim and held that "the fact that [the plaintiff] filed a workers' compensation claim in September 1996 based on exposure to toxic chemicals at work is definitive proof that he had a suspicion that 'someone ha[d] done something wrong to [him]' long before his civil complaint was filed in April 1998. (*Jolly v. Eli Lilly & Co., supra,* 44 Cal.3d at p. 1110)." (*Rivas, supra,* 98 Cal.App.4th at p. 229.)

(*Knowles, supra,* 118 Cal.App.4th at pp. 1295-1298.)

In *Knowles, supra,* the court there highlighted that "a person need not *know* of the actual negligent cause of an injury; mere *suspicion* of negligence suffices to trigger the limitation period." (*Id.* at p. 1295 [emphasis in original].) Upon discussing these authorities, the court further noted that "[w]e glean from *Jolly, supra,* 44 Cal.3d 1103 and its progeny that a plaintiff need not know the precise manner in which a wrongdoer was negligent in order to

discover his or her injury within the meaning of section 340.5. In the aftermath of *Jolly*, courts have rejected the argument that the limitations period does not begin to run until a plaintiff learns the specific causal mechanism by which he or she has been injured." (*Id.* at p. 1298 [citing *Rivas, supra,* 98 Cal.App.4th at p. 229; *Dolan, supra,* 13 Cal.App.4th at p. 824].) The court in *Knowles* determined that the wrongful death claims were barred by the statute of limitations because the plaintiffs there suspected negligence or wrongdoing immediately after their father's death even though they did not discover their cause of action against the treating physician two years later, upon speaking to a second consultant. (*Id.* at pp. 1298, 1301.)

"It is a plaintiff's *suspicion* of negligence, *rather* than an expert's *opinion,* that triggers the limitations period. The limitations period begins when the plaintiff's suspicions are aroused. The period is not affected by the plaintiff's diligence in finding facts to support this lawsuit." (*Knowles, supra,* 118 Cal.App.4th at p. 1300 [emphasis in original].) As noted in *Kleefeld v. Superior Court* (1994) 25 Cal.App.4th 1680, 1684, "a plaintiff's diligence *after* he has become suspicious of wrongdoing is not relevant to the running of the statute of limitations. Diligence is only relevant to determine when he *should* have suspected wrongdoing. Once a plaintiff actually has the requisite suspicion, the statute of limitations commences to run. It is not tolled by efforts to learn more about the matter short of filing suit."

"In order for the bar of the statute of limitations to be raised by demurrer, the defect must clearly and affirmatively appear on the face of the complaint; it is not enough that the complaint shows merely that the action may be barred." (*McMahon v. Republic Van & Storage Co., Inc.* (1963) 59 Cal.2d 871, 874.) In *Arroyo v. Plosay* (2014) 225 Cal.App.4th 279, 298 the Court of Appeal affirmed the trial court's sustaining of demurrer to the negligence cause of action without leave to amend because although the complaint was "somewhat ambiguous" as to when the limitations began to run, the plaintiffs there learned of the decedent's disfiguration as soon as he was pronounced dead. The court further noted that the filing of a mutilation action within the limitations period undoubtedly put the plaintiffs on notice of the facts giving rise to their negligence claim. (*Id.* at pp. 298-299.)

Plaintiff here argues that paragraph 25 of the Complaint indicates that the claims against these Defendants are timely. Therein, he alleges that on August 28, 2023, Dr.

Steinberg informed him that the neck manipulation performed in 2020 caused the symptoms he was experiencing. Plaintiff alleges that prior to this he "was not aware that the compression and pre-syncopal/syncopal episodes were caused of the SUBJECT INCIDENT." (Complaint at ¶ 25.) While paragraph 25 indicates that an expert opinion was rendered less than a year before the Complaint was filed (*ibid.*), the earlier paragraphs of the Complaint indicate that a suspicion of wrongdoing on the part of these Defendants arose sooner.

Plaintiff alleges that the circumstances were amiss on the day of the incident in August or September of 2020. In paragraph 12, he alleges that "Defendant MATSUSHITA informed PLAINTIFF that she was not supposed to perform this type of manipulation nor was she authorized to do so." (Complaint at ¶ 12.) He also alleges that Defendant Matsushita did not advise him to relax his neck, did not obtain his consent to perform the manipulation, was not informed of the risks associated with the manipulation, was not asked to sign any forms disclosing the risks of the manipulation, and was not asked to disclose any health conditions or injuries that would complicate the risks of this type of manipulation. (*Id.* at ¶ 14.)

Plaintiff also alleges that he believes the neck manipulation performed was in fact a chiropractic procedure. (Complaint at ¶ 13.) He alleges that at the time of the manipulation, he believes Defendant Matsushita was not a licensed chiropractor and was not certified, trained, or educated to perform this type of manipulation. (*Ibid.*) Although it is ambiguous whether Plaintiff knew Defendant Matsushita was not licensed to perform this manipulation at the time it was being performed, her statement to Plaintiff that she was not authorized to perform this type of manipulation is telling. (*Id.* at ¶ 12.) Subsequent facts in the Complaint suggest that his suspicion of wrongdoing as to these Defendants arose immediately after this visit, as discussed below.

Plaintiff alleges he began experiencing pre-syncopal/syncopal episodes "directly following" the incident and had no medical history of these episodes prior to the neck manipulation. (Complaint at ¶¶ 15, 16.) The Complaint alleges that Plaintiff's suspicion of negligence arose upon experiencing these episodes and returning to Defendant Breakthrough's Sunnyvale location. (*Id.* at ¶¶ 15, 17.) Paragraph 17 alleges that he "advised MATSUSHITA of the symptoms he was experiencing following the neck manipulation. Upon being informed,

MATSUSHITA, appeared visibly frightened and did not provide a response. Defendants MATSUSHITA knew, or should have known, that the symptoms PLAINTIFF reported were caused by the neck manipulation, that PLAINTIFF was at serious risk of harm, and he required immediate medical attention." (*Id.* at ¶ 17.)

The paragraphs following paragraph 17 describe Plaintiff's diligence in understanding the wrongdoing for which he sought treatment. (Complaint at ¶¶ 18-25.) Plaintiff's diligence is irrelevant to the running of the statute of limitations. (*See Kleefeld, supra,* 25 Cal.App.4th at p. 1684.) Likewise, Dr. Steinger's expert opinion in confirming that the neck manipulation was responsible for the symptoms Plaintiff was experiencing does not trigger the limitations period. (*See Knowles, supra,* 118 Cal.App.4th at p. 1300.)

Thus, paragraphs 15 through 17 of the Complaint support that Plaintiff was suspicious of wrongdoing on either the day of the incident or at least upon returning to Defendant Breakthrough's Sunnyvale location to inform Defendant Matsushita of the symptoms he was experiencing. Plaintiff's observation of Defendant Matsushita's visible reaction upon hearing his symptoms, and allegations that Defendant Matsushita knew or should have known of the seriousness of his condition thereafter, further support that his suspicions arose more immediately after the subject visit in 2020. (Complaint at ¶ 17.)

While the exact date Plaintiff returned to Defendant Breakthrough's Sunnyvale location is not alleged in the Complaint, the sequence of events are described chronologically in the Complaint. It can be inferred that Plaintiff went back to Defendants' location sometime after August or September of 2020 and before February 26, 2021 when Plaintiff began seeking care for the treatment of the neurological issues he was experiencing after the incident. (Complaint at ¶ 18.) However, the mere inference that the complaint may be barred is not enough., as the defect raised by the statute of limitations must be clear on the face of the complaint. (*McMahon, supra.* 59 Cal.2d at p. 874.) Nevertheless, Plaintiff here must plead facts showing that the delayed discovery rule applies. The allegations here indicate more than just the mere possibility that the Complaint is time barred, but also fall short of being entirely clear either way on the face of the Complaint. Importantly, based on the allegations discussed above, it is also unclear that the Complaint can be amended to fit the discovery rule.

Although Plaintiff has not specifically stated how amendment can resolve the statute of limitations issue, the Court nonetheless finds leave to amend proper under these circumstances. "If the plaintiff has not had an opportunity to amend the complaint in response to the demurrer, leave to amend is liberally allowed as a matter of fairness, unless the complaint shows on its face that it is incapable of amendment. [Citations.]" (*City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 747.) As stated above, while it is unclear that the Complaint can be amended to fit the discovery rule, it is also unclear if the Complaint is incapable of amendment as the conclusion that the action is time barred is largely drawn from factual inferences. Since Plaintiff has not yet had any opportunity to amend the Complaint, leave to amend should be liberally allowed as a matter of fairness. In any event, factual issues may not be resolved on demurrer. (*See, e.g., TracFone Wireless, Inc. v. County of Los Angeles* (2008) 163 Cal.App.4th 1359, 1363, fn. 2.) The facts here as alleged are insufficient to support application of the discovery rule, but also do not rise to the level of clarity needed to resolve the issue of statute of limitations on demurrer.

The Court, therefore, SUSTAINS the demurrer with 20 days leave to amend. In light of this ruling, the Court need not reach Defendants' additional arguments in the Demurrer regarding the causes of action for battery and intentional infliction of emotional distress, specifically. The Motion to Strike is DENIED as moot.[2]

III. Conclusion

Defendant Breakthrough Physical Therapy, Inc. and Defendant Eri Matsushita's Demurrer is SUSTAINED with 20 days leave to amend and the Motion to Strike is DENIED as moot.

The Court will prepare the formal order.

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[2] The Court notes that Plaintiff filed a notice of non-opposition to the motion to strike so, in the event Plaintiff files an amended complaint, the court anticipates that the allegations subject to the motion to strike will not be included.