SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 6
Honorable Evette D. Pennypacker, Presiding

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

DATE: September 19, 2023 TIME: 9:00 A.M.

TO REQUEST 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.)

IN PERSON HEARINGS: The Court strongly prefers in person appearances for contested law and motion matters. We are open and look forward to seeing you in person again.

VIRTUAL HEARINGS: Whenever feasible, please use video when appearing for your hearing virtually through Microsoft Teams. To attend virtually, 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

TO HAVE YOUR HEARING REPORTED: 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

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	21CV385527	Michael Darden vs The Board of Trustees of the Leland Stanford University et al	Plaintiff's Demurrer to Defendants' Answer is OVERRULED. Please scroll down to line 1 to review full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.
2	21CV392393	M.K. et al vs ROMAN CATHOLIC BISHOP OF SAN JOSE (DIOCESE) et al	Defendants' Demurrer is SUSTAINED with 20 days leave to amend. Please scroll down to Lines 2, 3 and 13 to review full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.
3	21CV392393	M.K. et al vs ROMAN CATHOLIC BISHOP OF SAN JOSE (DIOCESE) et al	Defendants' Demurrer is SUSTAINED with 20 days leave to amend. Please scroll down to Lines 2, 3 and 13 to review full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.

4	22CV403948	SJC Funeral Care, Inc. vs Claire Owens et al	Defendants' Demurrer to the First, Second and Fifth Causes of action is SUSTAINED WITHOUT LEAVE TO AMEND. Defendants' Demurrer to the Third, Fourth and Sixth Causes of action is SUSTAINED WITH 10 DAYS LEAVE TO AMEND. Please scroll down to Line 4 to review full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.
5	22CV401085	Joel Landa et al vs General Motors LLC, a Delaware Limited Liability Company	Plaintiffs' Motion to Compel Further Responses to Requests for Production of Documents (Set One) and For Sanctions is GRANTED, IN PART. GM is ordered to produce documents sufficient to show its 2018-2019 policy and procedures for evaluating buy-back requests under the Song-Beverly act within 20 days of service of the final order. Plaintiffs' motion to compel and for sanctions is otherwise DENIED. Please scroll down to Line 5 to review full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.
6	22CV403306	Jennifer Reynolds et al vs General Motors LLC	Plaintiffs' Motion to Compel Further Responses to Requests for Production of Documents (Set One) and For Sanctions is GRANTED, IN PART. GM is ordered to produce documents sufficient to show its 2021 policy and procedures for evaluating buy-back requests under the Song-Beverly act within 20 days of service of the final order. Plaintiffs' motion to compel and for sanctions is otherwise DENIED. Please scroll down to Line 6 to review full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.
7	22CV400211	Environmental Health Advocates, Inc. vs Forma Brands LLC, a California limited liability company et al	Rocky C. Tsai's and Ropes & Gray LLP's Motion to Withdraw as counsel for Forma Brands LLC is GRANTED. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to use proposed order on file.
8	22CV404353	Huang Family vs City of Cupertino et al	This matter is continued to September 21, 2023 to join with Plaintiff's other pending motion.
9	22CV404353	Huang Family vs City of Cupertino et al	This matter is continued to September 21, 2023 to join with Plaintiff's other pending motion.
10	2014-1-CV-264065	C. Berg, Et Al Vs Metaview Wholesale Investments, Lp, Et Al	John D. van Loben Sels' and Andrew P. Holland's Motion to Withdraw as counsel for Metaview Wholesale Investments, LLC is GRANTED. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to use order on file.
11	20CV372268	American Express National Bank et al vs MICHAEL URCIA	Plaintiff's Motion to vacate settlement is GRANTED. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Moving party to prepare formal order. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Moving party to prepare formal order.

12	21CV392393	M.K. et al vs ROMAN CATHOLIC BISHOP OF SAN JOSE (DIOCESE) et al	Defendants' Demurrer is SUSTAINED with 20 days leave to amend. Please scroll down to Lines 2, 3 and 13 to review full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.

oo0oo

Calendar Line 1
Case Name: *Darden v. The Board of Trustees of the Leland Stanford Junior University*
Case No.: 21CV385527

Before the Court is Plaintiff's demurrer to Defendants' answer to the Third Amended Complaint ("TAC"). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Factual Background

This is an action for negligent misrepresentation brought by self-represented Plaintiff, Michael Darden, against several defendants. Darden's original complaint was filed on July 8, 2021. The operative Third Amended Complaint ("TAC"), filed on December 2, 2022, states single cause of action for negligent misrepresentation arising from the termination of Plaintiff's employment on July 29, 2019. (See TAC at ¶ 4.)

The original Complaint, the First Amended Complaint ("FAC"), the Second Amended Complaint ("SAC"), and the Third Amended Complaint (TAC) list seven defendants: the Board of Trustees of the Leland Stanford Junior University, Jane Duperrault, Lawrence Chu, M.D., Norma Leavitt, Susan Hoerger, Marc Tessier—Lavigne, and Ronald Pearl (collectively, "Defendants").

Darden alleges the following misrepresentations:

1. Job Advertisement's Admittedly Outdated Job Description - published on December 5, 2018, viewed by Plaintiff in March 2019.

2. Written Job Offer's Admittedly Outdated Job Description and Requested Start Date -emailed to Plaintiff on May 24, 2019.

3. Complaint Handling Statements - Defendant Norma Leavitt's verbal assertions to Plaintiff on July 22, 2019.

4. Job Termination Statements - Defendants Normal Leavitt and Dr. Lawrence's verbal assertions to Plaintiff on July 29, 2019; and

5. Statements about Defendant's Handling of Plaintiff's Wrongful Termination Concerns-emailed to Plaintiff in August 2019.

The Court overruled Defendants' demurrer to Plaintiff's TAC by order filed and served on May 17, 2023. Defendants filed their answer to the TAC on June 16, 2023; to which Plaintiff demurs without a motion to strike.

II. Procedural Issues

A. Untimely Answer to TAC

California Rules of Court, rule 3.1320(j) provides: "Unless otherwise ordered, defendant has 10 days to answer or otherwise plead to the complaint or the remaining causes of action … following the overruling of the demurrer." Accordingly, May 29, 2023, was the deadline for Defendants to file their answer. Defendants filed their answer on June 16, 2023, thus rendering it untimely. However, the proper procedure to challenge this late filing would have been a motion to strike. (Code Civ. Proc § 436(b) [a party may move to strike an entire pleading if it is untimely filed or otherwise in violation of a court order]; see also, Cal. Rules of Court Rule 3.1320(i).)

Plaintiff did not file a motion to strike, which must be filed and heard at the same time as his demurrer. (Code Civ. Proc § 435, subdivision (b)(3); California Rules of Court 329; see also Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2002) PP 7:159 to 7:162, pp. 7-58.1 to 7-59; 5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, §970, p. 434.)

Accordingly, the Court will consider Defendants' answer to the Third Amended Complaint. The Court observes that Plaintiff has also been attempting to seek default against Defendants. Default is improper where the defendant has answered.

B. Request for Judicial Notice

Plaintiff's request for judicial notice of Defendants' discovery responses is DENIED. First, Plaintiff fails to comply with California Rule of Court 3.1113(l), which states: "Any request for judicial notice must be made in a separate document listing the specific items for which notice is requested and must comply with rule 3.1306(c)." Next, discovery responses are not the proper subject of judicial notice. (See Evid. Code § 452)

II. Legal Standard

"A party against whom an answer has been filed may object, by demurrer as provided in Section 430.30, to the answer upon any one or more of the following grounds: (a) the answer does not state facts sufficient to constitute a defense, and (b) the answer is uncertain. As used in this subdivision, "uncertain" includes ambiguous and unintelligible." (Code of Civil Pro. §430.20(a)-(b).) "The answer to a complaint shall contain: (1) The general or specific denial of the material allegations of the complaint controverted by the defendant. (2) A statement of any new matter constituting a defense." (Code of Civil Proc. §431.20(b)(1)-(2).)

In *Walsh v. West Valley Mission Community College Dist.* (1998) 66 Cal.App.4th 1532 (*Walsh*), the Court of Appeal explained the difference between denials and affirmative defenses:

> Under Code of Civil Procedure section 431.30, subdivision (b)(2), the answer to a complaint must include '[a] statement of any new matter constituting a defense.' The phrase 'new matter' refers to something relied on by a defendant which is not put in issue by the plaintiff. Thus, where matters are not responsive to essential allegations of the complaint, they must be raised in the answer as 'new matter.' Where, however, the answer sets forth facts showing some essential allegation of the complaint is not true, such facts are not 'new matter,' but only a traverse.

(*Walsh,* 66 Cal.App.4th at 1546 (internal citations and quotations omitted).)

The answer must aver facts as carefully and with as much detail as the facts which constitute the cause of action and which are alleged in the complaint. (See *FPI Development, Inc. v. Nakashimi* (1991) 231 Cal.App.3d 367, 384.) "[W]hether an answer states a defense is governed by the same principles which are applicable in determining if a complaint states a cause of action." (*South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 732.) In the case of a demurrer to the answer, as distinguished from a demurrer to the complaint, the defect in question need not appear on the face of the answer. (*Id.* at 733.) The determination of the sufficiency of the answer requires an examination of the complaint because its adequacy is with reference to the complaint it purports to answer. This requirement, however, does not mean that the allegations of the complaint, if denied, are to be taken as true, the rule being that the demurrer to the answer admits all issuable facts pleaded therein and eliminates all allegations of the complaint denied by the answer. Another rule, particularly applicable to the case of a demurrer to the answer, is that each so-called defense must be considered separately without regard to any other defense. Accordingly, a separately stated defense or counterclaim which is sufficient in form and substance when viewed in isolation does not become insufficient when, upon looking at the answer as a whole, that defense or counterclaim appears inconsistent with or repugnant to other parts of the answer. (*Ibid*.)

Plaintiff is self-represented, which is sometimes referred to as appearing in propria persona. "[W]hen a litigant is appearing in propria persona, he is entitled to the same, but no greater, consideration that other litigants and attorneys. Further, the in propria persona litigant is held to the same restrictive rules of procedures as an attorney." (*Burnete v. La Cases Dana Apartments* (2007) 148 Cal.App.4th 1262, 1267; *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 985 ["A doctrine generally requiring or permitting exceptional treatment of parties who represent themselves would lead to a quagmire in the trial courts and would be unfair to the other parties to litigation."].)

IV. Analysis

Plaintiff demurs to Defendants' answer on the grounds: (1) the answer fails to allege sufficient facts, (2) the answer fails to allege "new matters", and (3) Defendants have acted in bad faith.

A. Failure to Allege Sufficient Facts

Code of Civil Procedure section 430.60 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." California Rule of Court 3.1320 requires that "each ground of demurrer [] be in a separate paragraph and must state whether it applies to the entire complaint, cross-complaint, or answer, or to specific causes of action or defenses." And California Rule of Court 3.1112 (d)(4) requires that the party challenging a pleading state the specific portion that is challenged.

Plaintiff fails to meet these requirements. Plaintiff generally states that "*several if not all* of Defendants' Answer's 'Affirmative Defenses,' because Defendants' lawyers included no sufficient facts alleged 'carefully … with … detail,…' are furthermore improper". (Demurrer, p. 4 (emphasis added).) Plaintiff also refers to 4 out of 20 of Defendants' affirmative defenses to demonstrate why the answer is

insufficient. However, without specifying the objectionable grounds for each specific affirmative defense, the Court is left to make its own assumption, which it is not authorized to do.

Further, to the extent that Plaintiff relies on *FPI Development, Inc*., that case is distinguishable. *FPI Development* stands for the general proposition that mere allegations in a pleading are insufficient to withstand summary judgment. It does not require a heightened pleading standard for affirmative defenses in an answer.

B. Failure to Allege New Matter & Bad Faith

Plaintiff argues that several if not all of Defendants' affirmative defenses fail to create new issues, are simply denials that contradict existing cause of action and are irrelevant to his claims. Plaintiff also asserts Defendants have provided "vacuous answers" to his complaint and insufficient answers to his discovery requests.

There are only three valid grounds for demur to an answer: (1) failure to state facts sufficient to constitute a defense; (2) uncertainty; or (3) failure to state whether a contract alleged in the answer is written or oral. (Code Civ. Proc., § 430.20.)

Setting aside Plaintiff's fatal failure to specify each objectionable affirmative defense, Plaintiff's assertions of bad faith and deficiency of "new matter" are not proper grounds to sustain his demurrer.

Accordingly, Plaintiff's demurrer to Defendants' answer is OVERRULED.

oo0oo

Calendar Line 2, 3 and 13
Case Name: *M.K. et al. v. Roman Catholic Bishop of San Jose, et al.*
Case No.: 21CV392393

Defendants St. Aloysius Retreat House ("St. Aloysius") and California Friends of the Sacerdotal International Fraternity of Saint Pius X, Inc. ("St. Pius") (collectively, "Defendants") demur to plaintiff M.K.'s first amended complaint ("FAC"). St. Pius also joins in St. Aloysius' demurrer.[1] Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This action arises out of alleged sexual abuse suffered by Plaintiff when she was a student at St. Aloysius. (FAC, ¶ 28.) In 1997, when Plaintiff was four years old, she participated in school related and after-school activities at St. Aloysius. (FAC, ¶¶ 28, 29.) Father Benedict Van Der Putten ("Van Der Putten") was a priest at St. Aloysius and he sexually abused and assaulted Plaintiff multiple times from 1997 to 1999, when Plaintiff was six years old. (FAC, ¶ 30.) St. Aloysius staff members left Plaintiff alone with Van Der Putten on multiple occasions and he sexually abused her while she was under his supervision, authority, and control. (FAC, ¶¶ 32, 33.) No action was taken, no investigation was completed, and Van Der Putten continued to sexually abuse and assault Plaintiff. (FAC, ¶ 33.)

Plaintiff initiated this action on December 17, 2021 asserting claims for negligence and negligent retention and supervision. On April 21, 2023, Plaintiff filed her FAC[2], asserting: (1) negligence against St. Aloysius; (2) negligence against Order; (3) negligence against DOES 4 through 25 (St. Pius); (4) negligent hiring, retention, and supervision against St. Aloysius; (5) negligent hiring, retention, and supervision against Order; and (6) negligent hiring, retention, and supervision against DOES 4 through 25 (St. Pius).

On June 22, 2023, St. Aloysius filed its demurrer. On August 7, 2023, St. Pius filed its demurrer. Plaintiff opposes.

II. St. Aloysius' Demurrer

St. Aloysius demurs to the FAC on the ground that the first and fourth causes of action do not allege sufficient facts to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).) St. Pius joins the demurrer.

A. First Cause of Action: Negligence

"An action in negligence requires a showing that the defendant owed the plaintiff a legal duty, that the defendant breached the duty, and that the breach was a proximate or legal cause of injuries suffered by the plaintiff." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673.) "The issue of whether a legal duty exists is an issue of law, not an issue of fact for the jury." (*Kentucky Fried*

[1] St. Pius is the legal name for St. Aloysius, thus both designations represent the same entity.
[2] The FAC named Society of St. Pius X, San Jose, California, Inc. ("Order") as a defendant, however, Plaintiff requested its dismissal on June 29, 2023. The same day, Plaintiff filed an amendment to the FAC, which identified Order as DOE 3 and St. Pius as DOE 4.

Chicken of California, Inc. v. Superior Court (1997) 14 Cal.4th 814, 819.) The existence and scope of a duty of care is a question of law for the court even at the pleading stage. (See *Melton v. Boustred* (2010) 183 Cal.App.4th 521, 531.

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

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

1. Whether St. Aloysius Had a Special Relationship with Plaintiff

A special relationship between the defendant and the victim is one that "gives the victim a right to expect" protection from the defendant, while a special relationship between the defendant and the dangerous third party is one that "entails an ability to control [the third party's] conduct." (*Regents, supra,* 4 Cal.5th at p. 619.) The "common features" of a special relationship include "an aspect of dependency in which one party relies to some degree on the other for protection" and the other party has "superior control over the means of protection." (*Id*. at pp. 620-621.)

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

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

Here, Van Der Putten was a priest that was employed, controlled, and/or supervised by each of the Defendants. (FAC, ¶ 2.) He acted as Defendants' agent, subject to their direction, control, and supervision. (*Ibid*.) Thus, Defendants had the ability to control his conduct and there was a special relationship between Van Der Putten and Defendants. (See *Regents, supra,* 4 Cal.5th at p. 619.)

Plaintiff was a student at St. Aloysius and she participated in Defendants' school-related and after-school activities. (FAC, ¶ 28-29.) Plaintiff was 4 years old when the alleged abuse started. (FAC, ¶ 31.) The acts of sexual abuse and assault occurred on the St. Aloysius premises. (FAC, ¶ 31.) While Plaintiff participated in the activities, Defendants had "superior control over the means of protection." (*Regents, supra,* 4 Cal.5th at pp. 620-621.) Defendants, through its teachers and priests, assumed responsibility for the safety of the students in their care. (See *United States Youth Soccer, supra,* 8 Cal.App.5th at p. 1130.) Thus, there was a special relationship between Defendants and Plaintiff because of her participation in the school related and after-school activities. (See *Regents, supra,* 4 Cal.5th at p. 625.)

2. The *Rowland* Factors

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

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

Although detailed specificity is not required for alleging negligence, the FAC fails to allege any particular facts regarding how Defendants knew or should have known about Van Der Putten's alleged conduct. Instead, the FAC contains only conclusory allegations regarding foreseeability. (FAC, ¶¶ 35-39.) Plaintiff's conclusory allegations are not sufficient to withstand demurrer. (See *E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1324 (*E-Fab*); see also *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 [stating that a demurrer admits all properly pleaded allegations, but not contentions, deductions, or conclusions of fact or law]; compare *Brown, supra,* 40Cal.App.5th at pp. 1097-1098 [sexual molestation by coaches was reasonably foreseeable to the governing body, even though they had no knowledge of prior sexual misconduct by a specific coach because plaintiff alleged the governing body "regularly received complaints from athletes or their parents regarding improper sexual conduct by coaches" and it was aware "that female taekwondo athletes…were frequently victims of sexual

molestation by their coaches]; see also *United States Youth Soccer, supra,* 8 Cal.App.5th at pp. 1132, 1135 [youth soccer association could reasonably foresee minors might be sexually abused by their coaches where the associations "were aware that sexual predators were drawn to their organization in order to exploit children and that there had been prior incidents of sexual abuse of children in their programs."].) Without alleged facts for knowledge, Defendants also could not have taken steps to decrease the risk of sexual assault and avert the harm. Therefore, the *Rowland* factors are not satisfied.

Thus, Defendants' demurrer to the first cause of action is SUSTAINED with 20 days leave to amend.

B. Fourth Cause of Action: Negligent Hiring, Retention, and Supervision

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

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

As the Court stated above, besides conclusory allegations, Plaintiff fails to allege any facts establishing how Defendants knew or should have known that hiring Van Der Putten would create a particular risk or harm or of Van Der Putten's conduct. (See *E-Fab, supra,* 153 Cal.App.4th 1308, 1324.) Thus, the demurrer to the fourth cause of action is SUSTAINED with 20 days leave to amend.

III. St. Pius' Demurrer

St. Pius demurs to the FAC on the ground that the third and sixth causes of action fail to allege sufficient facts to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

A. Request for Judicial Notice

St. Pius requests judicial notice of the following items:

(1) Articles of Incorporation, filed on February 4, 1975 (Exhibit 1);
(2) Grant Deed, recorded on August 15, 1991 (Exhibit 2);
(3) Statement of Information, filed on January 3, 2023 (Exhibit 3); and
(4) Fictitious Business Name Statement, recorded on September 15, 2019 (Exhibit 4).

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

Item two is a proper item for judicial notice as the Court may take judicial notice of property records under Evidence Code section 452, subdivision (c) and (h). (See *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 264, disapproved of on other grounds by *Yvanova v. New Century Mortg. Corp.* (2016) 62 Cal.4th 919 [stating that "a court may take judicial notice of the fact of a document's recordation, the date the document was recorded and executed, the parties to the transaction reflected in a recorded document, and the document's legally operative language, assuming there is no genuine dispute regarding the document's authenticity. From this, the court may deduce and rely upon *the legal effect* of the recorded document, when that effect is clear from its face" (emphasis added)].)

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

B. Third Cause of Action: Negligence

St. Pius simply incorporated St. Aloysius' arguments. As the Court stated above, Plaintiff fails to sufficiently allege a duty to protect arising from a special relationship. (*Brown, supra,* 11 Cal.5th at p. 209.) Thus, the demurrer to the third cause of action is SUSTAINED with 20 days leave to amend.

C. Sixth Cause of Action: Negligent Hiring, Retention, and Supervision

Similarly, St. Pius simply incorporated St. Aloysius' arguments. As the Court stated above, Plaintiff fails to allege facts establishing how Defendants knew or should have known that hiring Van Der Putten would create a particular risk of harm or of Van Der Putten's conduct. (See *E-Fab, supra,* 153 Cal.App.4th 1308, 1324.) Thus, the demurrer to the sixth cause of action is SUSTAINED with 20 days leave to amend.

oo0oo

Calendar Line 4
Case Name: *SJC Funeral Care, Inc. v. Claire Owens, et al.*
Case No.: 22CV403948

Defendants Claire Owens ("Owens")[3] and Dee's Group II, LLC ("Dee's Group") (collectively, "Defendants") demur to Plaintiff SJC Funeral Care, Inc.'s Second Amended Complaint ("SAC"). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background

This action arises from an alleged breach of contract regarding property. Plaintiff leased property located at 600 South Second Street and 617 South Third Street in San Jose (the "Premises"). (SAC, ¶ 15.) The Property has always functioned as a funeral home. (SAC, ¶ 16.)

The lease was signed between Plaintiff and the original lessors on August 1, 2007. (SAC, ¶ 16.) The lease was modified in October or November 2007. (SAC, ¶ 17.) Plaintiff made all rental payments for the first four years of the Lease and there were no objections to the timing or amount during these years or in the fifth year. (SAC, ¶¶ 21-22.) During the sixth year of the Lease, Plaintiff continued to make rental payments for nearly 10 years without any objection. (SAC, ¶ 25.)

The Lease contains two options: an option to purchase the Premises ("Paragraph 39") and an option to renew the Lease for up to 10 years ("Paragraph 2(f)"). (SAC, ¶ 26.) In 2020, Plaintiff communicated its intent to exercise the option to purchase under Paragraph 39. (SAC, ¶ 31.) On April 5, 2022, Plaintiff proposed four potential appraisers. (SAC, ¶ 33.) On April 19, 2022, defense counsel emailed Plaintiff's counsel and consented to the use of Carneghi-Nakasako & Associates for the appraisal. (SAC, ¶ 35.) In this communication, Defendants raised, for the first time, objections about Plaintiff's rental payments. (*Ibid*.)

The Appraisal Report was issued on May 31, 2022, within the time period required by Paragraph 39. (SAC, ¶ 37.) On June 21, 2022, Defendants attempted to reject the Appraisal. (SAC, ¶ 53.) The Lease does not permit any party to "reject", appeal, or otherwise request a subsequent appraisal. (SAC, ¶ 56.) On June 30, 2022, Defendants suggested Plaintiff engage another appraiser to determine the valuation of the Premises for the option to purchase. (SAC, ¶ 58.) Plaintiff demanded that Defendants honor the terms of the Lease but Defendants rejected the demand. (SAC, ¶¶ 59-60.)

On September 6, 2022, Defendants disputed Plaintiff's right to purchase the Premises under Paragraph 39. (SAC, ¶ 61.) They claimed Plaintiff's rights under Paragraph 39 had been "terminated, waived, or forfeited". (*Ibid*.) They claimed the rights were terminated by: (1) an alleged failure to pay timely rent; (2) because of alleged defects with the Appraisal; and (3) failure to set a closing date for the purchase of the Premises. (*Ibid*.) On September 15, 2022, Plaintiff agreed to pay the hold over rent under protest and a specific reservation of the right to receive all amounts paid after the exercise of the option to purchase, either as damages or as a set-off against the purchase price. (*Ibid*.) At that time, Plaintiff also exercised its right to renew the Lease, pursuant to Paragraph 2(f) of the Lease. (SAC, ¶¶ 63-64.) Defendants have refused to honor Plaintiff's exercise of its right to renew by claiming the Lease

[3] Owens is the Trustee of the A. Alan Alameda Bypass Trust established under the A. Alan Alameda and Elisabeth D. Alameda Family Trust Agreement (the "Alameda Trust"), dated September 8, 2003.

has been terminated. (SAC, ¶ 65.) Defendants have accepted "hold over" rent, which includes a 20% premium, to which Defendants are not entitled. (*Ibid*.)

Plaintiff initiated this action on August 29, 2022 asserting (1) breach of contract; (2) breach of the covenant of good faith and fair dealing; (3) specific performance; and (4) declaratory relief. On October 7, 2022, Plaintiff filed its FAC asserting: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) specific performance; and (4) declaratory relief. Defendants demurred to the FAC, which the Court sustained with leave to amend by order dated April 4, 2023.

On May 3, 2023, Plaintiff filed its SAC, which asserts: (1) breach of contract-option to purchase; (2) breach of contract-excused performance; (3) breach of contract-option to renew; (4) breach of the implied covenant of good faith and fair dealing; (5) specific performance; and (6) declaratory relief. On June 20, 2023, Defendants filed the instant demurrer, which Plaintiff opposes.

II. Request for Judicial Notice

Defendants request judicial notice of the following four items:

(1) Declaration of Richard D. Nakasako in support of Plaintiff's petition to confirm arbitration award;

(2) Nakasako's Supplemental Declaration;

(3) Defendants' Memorandum of Points and Authorities in Support of Real Parties in Interest's Motion for Admission of New Evidence filed on June 5, 2023;

(4) Defense Counsel Rachel Thomas' Declaration in Support of Real Parties in Interest's Motion for Admission of New Evidence.

Each item is a court record which may be the proper subject of judicial notice. (See Evid. Code, § 452, subd. (d).) However, the Court may only take judicial notice of relevant material. (See *Mangini v. R. J. Reynolds Tobacco* (1994) 7 Cal.4th 1057, 1063, overruled on another ground in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1258 [only relevant material may be judicial noticed].) Further, "[a] court cannot by means of judicial notice convert a demurrer into an incomplete evidentiary hearing in which the demurring party can present documentary evidence and the opposing party is bound by what that evidence appears to show." (*Fremont Indemnity Co. v. Fremont General Corp*. (2007) 148 Cal.App.4th 97, 114-115.) And, even if the Court were to take judicial notice of these court documents, it could only take judicial notice of the existence of the documents, not the truth of the statements therein. (See *Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, 374-375 ["With respect to any and all court records, the law is settled that "the court will not consider the truth of the document's contents unless it is an order, statement of decision, or judgment."].)

Defendants offer Nakasako's declarations because they contain inconsistent statements by a party and they contain facts and propositions not reasonably subject to dispute. (See Evid. Code, § 452, subd. (h).) However, Nakasako is not a party in this matter, thus his statements cannot bind Plaintiff.

The parties also hotly dispute the facts contained in Nakasako's declarations. Defendants fail to state the relevance of the third and fourth items. Thus, Defendants' request for judicial notice is DENIED.

III. Demurrer

Defendants demur to each cause of action on the grounds that they fail to state sufficient facts. (Code Civ. Proc., § 430.10, subd. (e).)

A. Legal Standard for a Demurrer

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

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

1. Sham Pleading

Generally, after an amended pleading is filed, the original pleading is superseded. (*Vallejo Development Co. v. Beck Development Co.* (1994) 24 Cal.App.4th 929, 946.) Courts will assume the truth of the factual allegations in the amended pleading for purposes of demurrer. (*Owen v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 383 (*Owen*).) However, under the sham pleading doctrine, "admissions in an original complaint… remain within the court's cognizance and the alteration of such statements by amendment designed to conceal fundamental vulnerabilities in a plaintiff's case will not be accepted.'" (*Lockton v. O'Rourke* (2010) 184 Cal.App.4th 1051, 1061.) The purpose of the doctrine is to "enable the courts to prevent an abuse of process. [Citation.]" (*Hanh v. Mirda* (2007) 147 Cal.App.4th 740, 751.) "[W]here a party files an amended complaint and seeks to avoid the defects of a prior complaint either by omitting the facts that rendered the complaint defective or by pleading facts inconsistent with the allegations of prior pleadings," the court may examine the prior complaint to ascertain whether the amended pleading is merely a sham. (*Owen, supra,* 198 Cal.App.3d at 384.)

"In these circumstances, the policy against sham pleading permits the court to take judicial notice of the prior pleadings and requires that the pleader explain the inconsistency. If he fails to do so,

the court may disregard the inconsistent allegations and read into the amended complaint the allegations of the superseded complaint." (*Ibid*.) A pleading cannot be summarily dismissed if the sham pleading doctrine applies as the pleader must be given the opportunity to provide an explanation for the incompatible pleadings. (See *Owens*, *supra* [pleader must be given opportunity to explain inconsistency]; see also *Deveny v. Entropin, Inc*. (2006) 139 Cal.App.4th 425-426 [sham pleading doctrine is inapplicable where pleader offers plausible explanation for amendment].)

Defendants argue the SAC is a sham pleading because it alleges the As Is appraisal sets forth the fair market value of the property. Defendants largely rely on the Nakasako's declaration in support of this point. However, the Court has denied the request for judicial notice of those documents. Moreover, it appears to the Court that the SAC is not pleading inconsistent facts but rather attempting to address the deficiencies addressed by the Court in the order sustaining the demurrer to the FAC. Additionally, in the prior pleading, Plaintiff alleged that the As Is appraisal was sufficient for the fair market value. Thus, the SAC is not a sham pleading, and Defendants' demurrer on this ground is OVERRULED.

2. Unclean Hands

To establish unclean hands, it must be established that a plaintiff seeking relief is "tainted with inequitableness or bad faith relative to the matter in which he seeks relief. (See *Camp v. Jeffer, Mangels, Butler,& Marmaro* (1995) 35 Cal.App.4th 436, 446.) The conduct which is sufficient to invoke the doctrine includes, "any conduct that violates conscience, or good faith, or other equitable standards of conduct…" (*Kendall-Jackson Winery Ltd. v. Superior Court* (1999) 76 Cal.App.4th 970, 979 (*Kendal-Jackson Winery*).) Although a general demurrer does not ordinarily reach affirmative defenses, it "will lie where the complaint 'has included allegations that *clearly* disclose some defense or bar to recovery.'" (*Casterson v. Superior Court* (2002) 101 Cal.App.4th 177, 183.)

Here, it does not appear Plaintiff's conduct reaches the level necessary to invoke the unclean hands doctrine. (See *Kendall-Jackson Winery, supra,* 76 Cal.App.4th at p. 979.) Thus, Defendants' demurrer on this ground is OVERRULED.

3. First and Second Causes of Action: Breach of Contract-Option to Purchase and Excused Performance

To allege a cause of action for breach of contract, a plaintiff must allege (1) the contract, (2) the plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff. (*Bushell v. JPMorgan Chase Bank N.A.* (2013) 220 Cal.App.4th 915, 921 (*Bushell*).)

"Where a complaint is based on a written contract which it sets out in full, a general demurrer to the complaint admits not only the contents of the instrument but also any pleaded meaning to which the instrument is reasonably susceptible." (*Aragon-Haas v. Family Security Ins. Services, Inc*. (1991) 231 Cal.App.3d 232, 239 (*Aragon*); see also *Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 229.) Where an ambiguous contract is the basis of an action, it is proper, if not essential, for a plaintiff to allege its own construction of the agreement. So long as the pleading does not place a clearly erroneous construction upon the provisions of the contract, in passing upon the

sufficiency of the complaint, we must accept as correct plaintiff's allegations as to the meaning of the agreement. (*Aragon*, *supra*, 231 Cal.App.3d at p. 239.)

Paragraph 39 of the Lease, provides:

> Option to purchase. Provided it is not in material default under this Lease, Tenant shall have the option to purchase the Premises at the end of term of the Lease for the then fair market value of the Premises, as determined by appraisal. The tenant shall notify the Landlord of its election to exercise the option at least one hundred eighty (180) days prior to the end of the term of the Lease. The appraisal shall be prepared by an appraiser mutually agreed to by Tenant and Landlord at Tenant's expense and shall be completed not more than one hundred twenty (120) days prior to the expiration of the term of the Lease.

(SAC, ¶ 26; Exh. 9.)

Defendants argue Plaintiff's failure to obtain a "fair market value" appraisal as required by Paragraph 39 establishes its nonperformance. (Defendants' MPA, p.7:6-7.) In opposition, Plaintiff argues there is no obligation for it to obtain a "fair market value" appraisal under the Lease.

The express terms of Paragraph 39 requires Plaintiff to (1) notify Defendants of its election to exercise the option 180 days before the end of the term of the Lease and (2) pay for the appraisal by a mutually agreed upon appraiser. (See SAC, ¶ 26.) The Lease provided a procedure in case the parties could not agree on an appraiser and in the event the appraisers' valuations differed by more than 10%. (*Ibid*.)

As the Court noted in the previous demurrer, the Lease does not define "fair market value". Code of Civil Procedure section 1263.320, which defines "fair market value" in the eminent domain context, provides:

> (a) The fair market value of the property taken is the highest price on the date of the valuation that would be agreed to by a seller, be willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purpose for which the property is reasonably adaptable and available.
>
> (b) The fair market value of property taken for which there is no relevant, comparable market is its value on the date of valuation as determined by any method of valuation that is just and equitable.

(Code Civ. Proc., § 1263.320.)

Defendants argue the Appraisal is for the "As Is Fee Simple" valuation of the Premises and not for the highest and best use, therefore, the Appraisal establishes Plaintiff's nonperformance. The Appraisal is included as Exhibit 9 to the SAC, thus it is properly considered on this demurrer. (See

SCEcorp v. Superior Court (1992) 3 Cal.App.4th 673, 677.) The Appraisal states, "it is an extraordinary assumption and limiting condition of this Appraisal Report that valuation of the subject property is *based on continued use of the existing building improvements*." (SAC, Exh. 9, p. 5, emphasis added.)

"While the 'allegations [of a complaint] must be accepted as true for purposes of demurrer,' the 'facts appearing in exhibits attached to the complaint will also be accepted as true, and if contrary to the allegations in the pleading, will be given precedence.'" (*Brakke v. Economic Concepts, Inc.* (2013) 213 Cal.App.4th 761, 767 (*Bakke*); see also *SC Manufactured Homes, Inc. v. Liebert* (2008) 162 Cal.App.4th 68, 83 (*SC Manufactured Homes*) ["[i]f the allegations in the complaint conflict with the exhibits, we rely on and accept as true the contents of the exhibits"].)

Plaintiff argues the Appraisal complies with Paragraph 39 because the Appraisal Report states, "the purpose of the attached Appraisal Report is to estimate the current ***As Is*** fee simple market value of an undivided 100 percent ownership interest in the subject property per language contained in Section 39 titled "Option" within [the Lease]". (SAC, 38; Exh. 9.) Plaintiff further argues the Appraisal Report contemplated the market value of the Premises both as vacant (for redevelopment) and as improved before it concluded the highest and best use was as is. (SAC, ¶ 40-46; Exh. 9, p. 21.)

The Appraisal Report defines "market value" as follows:

> The most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently, knowledgeably and assuming the price is not affected by undue stimulus. Implicit in this definition are the consummation of a sale as of a specified date and the passing of the title from seller to buyer under conditions whereby:
>
> 1. buyer and seller are typically motivated;
>
> 2. both parties are well informed or well advised, and acting in what they consider their own best interest;
>
> 3. a reasonable time is allowed for exposure in the open market;
>
> 4. payment is made in terms of cash in U.S. dollars or in terms of financial arrangements comparable thereto; and
>
> 5. the price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.

(SAC, ¶ 39; Exh. 9, p. 3, subd. (G).)

The Appraisal Report defines "highest and best use" as "the reasonably probable use of property that results in the highest value." (SAC, Exh. 9, p. 21.) It analyzes the highest and best use for the Premises as if vacant and as improved. (*Ibid*.) It concludes the highest and best use of the Premises, as if vacant, is "some type of commercial or mixed-use ground floor retail/upper floor commercial or residential development." (*Id*. at p. 23.) It further concludes that the market value conclusion for the

Premises as a redevelopment site, without accounting for demolition costs, was $ 3,740,00. (SAC, Exh. 9, 24.)

In analyzing the Premises as improved, the Appraisal Report concludes the market value of the Premises was $3,850,000, stating:

> As compared to the valuation of the subject property as a redevelopment site, the existing improvements continued to contribute value to the property in excess of land value only. Therefore, based on the subject's physical, locational, and economic characteristics, its highest and best use, as improved, is considered to be interim use of the existing funeral home building improvements until redevelopment is financially feasible.

(SAC, Exh. 9, p. 25.)

Plaintiff alleges and argues the limitation identified in the Appraisal was not actually applied in the valuation of the analysis. (SAC, ¶ 49; Opp. p. 7: 4-6.) However, the Appraisal report states that they were applied, thus, such facts will be given precedence over allegations in the SAC. (See *Brakke, supra,* 213 Cal.App.4th at p. 767 (*Bakke*); see also *SC Manufactured Homes, supra,* 162 Cal.App.4th at p. 83.)

Moreover, in addition to the express limitations, the Appraisal Report also states the "intended use/users of the Appraisal Report is for exclusive use by Bay Area Development Company, the U.S. Small Business Administration, and participating 1st mortgage lender Heritage Bank of Commerce for loan underwriting… ***The Appraisal Report should not be used or relied upon by any other parties for any reason***." (SAC, Exh. 9, p. 2.) Plaintiff alleges the Bay Area Development Company was its agent. (SAC, ¶ 36.) However, Plaintiff fails to offer any explanation regarding the statement in the Appraisal Report, limiting its use or any argument to justify its reliance on it. Thus, the limiting language takes precedence over allegations in the SAC. (See *Brakke, supra,* 213 Cal.App.4th at p. 767 (*Bakke*); see also *SC Manufactured Homes, supra,* 162 Cal.App.4th at p. 83.) As a result, Plaintiff fails to allege performance. (See *Bushell, supra,* 220 Cal.App.4th at p. 921.)

Plaintiff alleges it is excused from performance by a temporary impossibility. Plaintiff argues that any error within the Appraisal is Defendants' responsibility because they picked the appraiser. Plaintiff further argues it did not assume the risk of erroneous performance by an appraiser because the appraiser was selected by both parties.

> Impracticability of performance or frustration of purpose that is only temporary suspends the obligor's duty to perform while the impracticability or frustration exists but does not discharge his duty or prevent it from arising unless his performance after the cessation of the impracticability or frustration would be materially more burdensome than had there been no impracticability or frustration.

(Rest.2d Contracts, § 261.)

Plaintiff alleges it started "the process of having the property appraised." (SAC, ¶ 36.) Plaintiff further alleges it (through its agent) engaged the appraiser to perform an "As Is" appraisal for the "exclusive use by Bay Area Development Company, the U.S. Small Business Administration, and

participating 1st mortgage lender Heritage Bank of Commerce for loan underwriting." (SAC, Exh. 9.) Plaintiff fails to allege performance would be more burdensome than if there had been no impracticability or frustration. Therefore, Plaintiff fails to allege excuse from performance. (See *Bushell, supra,* 220 Cal.App.4th at p. 921.)

To avoid a forfeiture and improper windfall to Defendants, Plaintiff contends the Court should utilize its equitable authority under Civil Code section 3275, which provides:

> Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in the case of grossly negligent, willful, or fraudulent breach of duty.

(Civ. Code, § 3275; see also *Holiday Inns of America, Inc. v. Knight* (1969) 70 Cal.2d 327, 330 (*Holiday Inns*).)

In *Holiday Inns,* the plaintiffs had an option to purchase, which could be exercised by giving written notice by a particular date and making an initial payment of $10,000, with four additional $10,000 payments in each subsequent year, unless the option was exercised or cancelled before the next payment became due. (*Holiday Inns*, 70 Cal.2d 327 at 328.) The cancellation provision applied where the parties mutually understood that failure to make payments on or before the prescribed date would automatically cancel the option without further notice. (*Ibid*.) The plaintiffs made the first three payments but the defendant refused to accept the fourth payment after it was received one day late. (*Id*. at p. 329.) The plaintiffs argued they should have been relieved from default under Section 3275. The Supreme Court agreed and reasoned that the plaintiffs were not seeking to extend the period during which the option can be exercised but only to secure relief from the provision making time of the essence in tendering the annual payments. (*Id*. at p. 330.)

Holiday Inns is distinguishable. To exercise the option to purchase the Premises, Plaintiff had to obtain an appraisal for the fair market value of the Premises. Plaintiff obtained an As Is appraisal for use only by a lender. Thus, Plaintiff failed to comply with Paragraph 39. Plaintiff seeks relief from having failed to obtain a fair market value appraisal. Such relief is substantially different than seeking relief from making a payment just one day late as was the case in *Holiday Inns.*

To obtain leave to amend, "Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading." (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349 [citations omitted].) "Plaintiffs have the burden to show how they could further amend their pleadings to cure the defects." (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 411 [citations omitted].) Here, Plaintiff requests leave to amend but fails to show how it would do so.

Thus, the demurrer to the first and second causes of action is SUSTAINED without leave to amend.

4. Third Cause of Action: Breach of Contract-Option to Renew

"The interpretation of a contract is a question of law unless the interpretation turns on the credibility of extrinsic evidence." (*Sierra Vista Regional Medical Center v. Bonta* (2003) 107 Cal.App.4th 237, 245; See also *Consolidated Theatres, Inc. v. Theatrical Stage Employees Union* (1968) 69 Cal.2d 713, 724 [Generally, "It is . . . solely a judicial function to interpret a written instrument unless the interpretation turns on the credibility of extrinsic evidence."])

Paragraph 2(f) of the Lease, titled Option to Renew, provides:

> Tenant, provided it is not in material default under this Lease, will have the option of renewing this lease for two (2) further consecutive terms of five (5) years each (the "Renewal Term"). All terms of such renewal lease shall be the same as the Lease with the exception of the right of renewal which right shall not be included as a term of the second Renewal term and the further exception of the amount of rent to be paid. Such option shall be exercised by Tenant serving written notice upon Landlord not less than *six (6) months* prior to the expiration of the term of the Renewal Term in question, as the case may be. The rental rate shall be determined using the adjustment provisions of Section 2(b) of this Lease with each lease year of any Renewal Term being deemed a subsequent/succeeding year for purposes of the determination and adjustment of the rental rate.

(SAC, Exh. 1, emphasis added.)

Defendants argue the claim fails because Plaintiff's notice was untimely. Plaintiff alleges and argues there was no requirement for advanced notice prior to the expiration of the initial term of the Lease, but rather notice was required before the expiration of the first renewal term. (See SAC, ¶ 30; Opp., p. 25-7:2.)

The plain language of Paragraph 2(f) refers to the two consecutive five year renewal terms as the "Renewal Term". (See SAC, Exh. 1.) It further states that the option shall be exercised upon service of written notice "no less than six months prior to the expiration of the term of the *Renewal Term* in question, as the case may be." (*Ibid*.) As a result, Plaintiff claims there is ambiguity as to whether "prior to the expiration of the term of the Renewal Term" includes the original Lease term and urges the Court to accept its' interpretation that there is no notice requirement. Such an interpretation would be a "clearly erroneous construction" of the provision, which mandates written notice to exercise the option. (See SAC, Exh. 1 ["such *option* shall be exercised by…"]; see also *Aragon*, *supra*, 231 Cal.App.3d at p. 239.) Moreover, the requirement to serve written notice six months prior to the end of the original lease term is consistent with the notice requirement under Paragraph 39. Thus, it appears to the Court that there was a notice requirement prior to the end of the original Lease term.

On September 15, 2022, Plaintiff exercised its right to renew the Lease. (SAC, ¶ 63.) Plaintiff contends the end of the Lease was December 15, 2022.[4] (SAC, ¶ 64.) Whether the Lease ended on

[4] This is based on Exh. 1, which reflects an annotation by the lease term stating that the term ends on December 15, 2022. Although, Defendants contend the handwritten part is invalid because there are no initials of the signatories or any other confirmation by the handwritten notes. (MPA, p. 11, fn. 8.) Defendants further contend that the annotation does not appear

September 15 or December 15, Plaintiff's written notice on September 15 is untimely. Thus, Plaintiff fails to allege performance pursuant to Paragraph 2(f). (See *Bushell, supra,* 220 Cal.App.4th at p. 921.)

Plaintiff alleges Defendants should be equitably estopped from claiming untimeliness as to Paragraph 2(f). (SAC, ¶ 96.) Defendants argue the argument must be disregarded because it fails to allege factual allegations. (MPA, 12:3-4.)

"Generally speaking, four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury." (*Honeywell v. Workers' Comp. Appeals Bd.* (2005) 35 Cal.4th 24, 37 [internal citations and quotation marks omitted] (*Honeywell*).)

Plaintiff alleges Defendants agreed to proceed with the option to purchase under Paragraph 39. (SAC, ¶ 36.) It further alleges Defendants only claimed the option to purchase was "terminated, waived, or forfeited" after the time to exercise the option to renew had run. (*Ibid*.) Plaintiff alleges it relied on Defendants' agreement to proceed with the Appraisal under Paragraph 39, as a waiver of any claim that the right to purchase the Premises had been terminated. (*Ibid*.) If Defendants had raised the issues prior to agreeing to the Appraisal then Plaintiff would have notified Defendants of its exercise of the right to renew at an earlier date. (*Ibid*.) Plaintiff fails to allege Defendants intended for their conduct to be acted on. (See *Honeywell, supra,* 35 Cal.4th at p. 37.) However, it appears to the Court that Plaintiff may be able to allege the elements of equitable estoppel. Thus, the demurrer to the third cause of action is SUSTAINED with 10 days leave to amend.

5. Fourth Cause of Action: Breach of the Implied Covenant of Good Faith and Fair Dealing

"The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349 (*Guz*).) "The covenant thus cannot 'be endowed with the existence independent of its contract underpinnings.' It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of the agreement. (*Id.* at p. 350.) Where a breach of an actual term is alleged, a separate implied covenant claim, based on the same breach is superfluous. (*Id.* at p. 327.) A breach of implied covenant of good faith and fair dealing involves something beyond the breach of the contractual duty itself. (*Howard v. American National Fire Insurance Company* (2010) 187 Cal.App.4th 498, 528 (*Howard*); see also *California Shoppers, Inc. v. Royal Globe Insurance Company* (1985) 175 Cal.App.3d 1, 54.)

A plaintiff "must show that the conduct of the defendant, whether or not it also constitutes a breach of a consensual contract term, demonstrates a failure or refusal to discharge contractual responsibilities, prompted not by honest mistake, bad judgement, or negligence but rather by a conscious and deliberate act, which unfairly frustrates the agreed common purposes and disappoints the reasonable

---

on the lease attached to the Appraisal. (*Ibid*.) If the annotation is to be disregarded, the Lease states the term ended on September 15, 2022.

expectations of the other party thereby depriving that party of the benefits of the agreement." (*Careau & Co. v. Sec. Pac. Bus. Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1394 (*Careau & Co.*).)

Plaintiff alleges the following "conscious and deliberate acts" by Defendants to "frustrate the agreed common purposes and disappoint the reasonable expectations" (*Careau & Co, supra,* 222 Cal.App.3d at p. 1394):

(1) Failing to timely disclose the purported letter of intent, dated June 1, 2020, from CBRE to allegedly buy the Premises as-is for $8.5 million;

(2) Belatedly asserting failure to make rent payments after fifteen years of rent payments made without objection;

(3) Proposing a purported appraiser as a neutral appraiser after, on information and belief, first consulting with him, concerning his opinion of value for the Premises before offering him as an "independent" appraiser;

(4) Claiming entitlement to unilaterally select an appraiser outside the scope of the Lease and without providing any disclosures of any actual or potential conflicts based on any current or former business relationships their selected appraiser has or had with Defendants or their agents or legal counsel;

(5) Giving Plaintiff an ultimatum to purchase the Premises for $25.4 million instead of $3.85 million, and to do so in a matter of days;

(6) Intentionally delaying disclosure of Defendants' contention regarding Plaintiff's right to exercise its option to purchase; and

(7) Representing to Plaintiff that they consent to the appraisal while never having an intention to honor any appraisal performed or proceed with any transaction based on the appraisal.

(SAC, ¶ 101.)

The Court has already determined that Plaintiff cannot state a claim for relief related to Paragraph 39 because Plaintiff failed to perform or allege facts sufficient to support an allegation of an excuse for non-performance. However, if Plaintiff is able to allege Defendants are equitably estopped from asserting non-performance in relation to the third cause of action, the above allegations may support breach of the covenant of good faith and fair dealing. Defendants' demurrer to the fourth cause of action is therefore SUSTAINED with 10 days leave to amend.

6. Fifth Cause of Action: Specific Performance

Specific performance is a remedy for breach of contract, not a standalone cause of action. (See *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 905; *Shoker v. Superior Court* (2022) 81 Cal.App.5th 271, 283 ["specific performance is a remedy for breach of contract"].) "To obtain specific performance after a breach of contract, a plaintiff must generally show: '(1) the inadequacy of his legal

remedy; (2) an underlying contract that is both reasonable and supported by adequate consideration; (3) the existence of a mutuality of remedies; (4) contractual terms which are sufficiently definite to enable the court to know what it is to enforce; and (5) a substantial similarity of the requested performance to that promised in the contract.'" (*Real Estate Analytics, LLC v. Vallas* (2008) 160 Cal.App.4th 463, 472.)

This claim is based on Defendants' alleged breach of contract under Paragraph 39. As the Court discussed above, Plaintiff fails to sufficiently allege the claim for breach of contract for Paragraph 39. It thus follows that the claim for specific performance fails. Thus, the demurrer to the fifth cause of action is SUSTAINED without leave to amend.

7. Sixth Cause of Action: Declaratory Relief

Code of Civil Procedure Section 1060, which governs declaratory relief, states: "Any person interested under a written instrument, excluding a will or a trust, or under a contract, or who desires a declaration of his or her rights or duties with respect to another … may, in cases of actual controversy relating to legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a declaration of his or her rights and duties in the premise, including a declaration of any questions or construction or validity arising under the instrument or contract. He or she may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of these rights or duties, whether or not further relief is or could be claimed at this time." (Code Civ. Proc. § 1060.)

The fundamental basis of declaratory relief is the existence of an actual and present controversy over a proper subject. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79.) "A general demurrer to a cause of action for declaratory relief must be overruled as long as an actual controversy is alleged; the pleader need not establish it is entitled to a favorable judgment." (*Ludgate Ins. Co. v. Lockheed Martin Corp.* (2000) 82 Cal.App.4th 592, 606.) A general demurrer is usually not an appropriate method for testing the merits of a declaratory relief action, because the plaintiff is entitled to a declaration of rights even if it is adverse to the plaintiff's interest. (*Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734, 752.)

Plaintiff's declaratory relief claim here is based on the breach of contract claims. The demurrer has been sustained as to all breach of contract claims. Thus, Defendants' demurrer to the sixth cause of action is SUSTAINED with 10 days leave to amend.

oo0oo

Calendar Line 5
Case Name: *Joel Landa et al vs General Motors LLC, a Delaware Limited Liability Company*
Case No.: 22CV401085

Before the Court is Plaintiff's Motion to Compel Further Responses to Request for Production of Documents (Set One). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background

This is a lemon law case in which Plaintiffs Joel Landa and Luis Esparza assert (1) violation of the Song-Beverly Act – breach of express warranty, (2) violation of the Song-Beverly Act – breach of implied warranty, and (3) violation of the Song-Beverly Act section 1793.2 against General Motors, LLC ("GM"). Plaintiffs claim a 2018 Chevrolet Silverado ("Vehicle") they purchased on May 27, 2019 was delivered with "serious defects and nonconformities to warranty and developed other serious defects and nonconformities to warranty including, but not limited to, engine, electrical, emission, suspension, and transmission system defects." (Complaint, ¶18.)

Plaintiffs further allege that "Vehicle was not fit for the ordinary purpose for which such goods are used because it was equipped with one or more defective vehicle systems/components", "did not measure up to the promises or facts stated on the container or label because it was equipped with one or more defective vehicle systems/components", "was not of the same quality as those generally accepted in the trade because it was sold with one or more defective vehicle systems/components which manifested as engine, electrical, emission, suspension, and transmission system defects." (Complaint, ¶¶33-36.)

Plaintiffs also allege "Defendant's authorized facilities did not conform the [] Vehicle to warranty within 30 days and/or commence repairs within a reasonable time, and GENERAL MOTORS LLC has failed to tender the subject vehicle back to Plaintiff in conformance with its warranties within the timeframes set forth in Civil Code section 1793(b)." (Complaint, ¶49.)

For these alleged wrongs, Plaintiffs seek general, special and actual damages; recission of the purchase contract and restitution of all monies paid; diminution in value; incidental and consequential damages; civil penalties; prejudgment interest; and reasonable attorney's fees and cost of suit.

Plaintiffs now move to compel GM to produce documents related to: (1) Plaintiffs' Vehicle (Request Nos. 1-15); (2) Defendant's warranty and repurchase policies, procedures, and practices (Request Nos. 16-31); and Defendant's knowledge of the same or similar defects in other vehicles of the same year, make, and model (Request Nos. 32-37).

GM claims it has already produced all documents in its possession, custody or control related to the Vehicle in response to Request Nos. 1-3, 5, 8-9, 11-12, 34-35, and 37 and that the remaining requests are overbroad in that they do not specify any specific defect but instead force GM to interpret what that means and seek documents about other consumers and other vehicles not at issue here and are therefore irrelevant in the Song-Beverly context.

II. Legal Standard

Discovery is generally permitted "regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." (Cal. Code Civ. Pro. § 2017.010.) Everything that is relevant to the subject matter is presumed to be discoverable. (*Id.*) The Discovery Act further declares that "the court shall limit the scope of discovery" if it determines that the burden, expense, or intrusiveness of that discovery "clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." (Code Civ. Pro. § 2017.020(a); *Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 383-385.) The California Supreme Court teaches in *Greyhound* that the judge exercising discretion to limit discovery should construe disputed facts liberally in favor of discovery; reject objections such as hearsay that only apply at trial; permit fishing expeditions (within limits), avoid extending limitations on discovery, such as privileges; and, whenever possible, impose only partial limitations rather than denying discovery entirely. (*Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 383-385; *see also Tylo v. Superior Court* (1997) 55 Cal.App.4th 1379, 1386.)

The party to whom a request for production of documents has been directed can make one of three responses: (1) a statement that the party will comply with the demand, (2) a representation that the party lacks the ability to comply, or (3) an objection. (Code Civ. Pro. §2031.210(a).) A party may move for an order compelling a further response to a document demand on the ground that (1) an objection is without merit or too general, (2) a statement of compliance with the demand is incomplete, or (3) a representation of inability to comply is inadequate, incomplete, or evasive. (Code Civ. Pro. §2031.210(a).) A party seeking to compel is required to "set forth specific facts showing good cause justifying the discovery sought by the demand." (Code Civ. Pro. §2031.210(b)(1); *Kirkland v. Superior Court* (2002) 95 Cal.App.4th 92, 98.) This burden may be satisfied by a fact-specific showing of relevance. (*TBG Ins. Services Corp. v. Superior Court* (2002) 96 Cal.App.4th 443, 448.) Information is relevant to the subject matter of the action if it might reasonably assist a party in evaluating the case, preparing for trial, or facilitating settlement. (*Gonzalez v. Superior Court* (1995) 33 Cal.App.4th 1539, 1546.)

III. Analysis

In a Lemon Law case, documents regarding the Vehicle and its repair history are plainly relevant. GM does not dispute this, and claims it has produced all non-privileged documents in its possession, custody or control related to the Vehicle in response to Request Nos. 1-3, 5, 8-9, 11-12, 34-35, and 37. The Court has reviewed GM's responses to each of these requests and agrees that GM produced code-compliant responses. Plaintiff does not explain or otherwise justify its request that more documentation, such as emails or other electronically stored information, should be produced. Where, as here, the alleged defects are relatively general in nature and not specifically identified as related to a specific engine, part, or other system, for example, neither the manufacturer nor the Court is in a position to determine what, if any, additional documents other than those related to Vehicle might possibly lead to the discovery of admissible evidence. Accordingly, Plaintiffs' motion to compel further responses to Request Nos. 1-3, 5, 8-9, 11-12, 34-35, and 37 is DENIED.

Both parties characterize Request Nos. 16-32 as seeking documents relating to GM's internal

policies and procedures, including training materials, for how it generally handles other consumers' warranty claims and repurchase requests for other vehicles. The Court has reviewed Plaintiffs' Request Nos. 16-32 and agrees with GM that these are grossly overbroad. The Court also reviewed the record to determine whether Plaintiffs offered either to GM or the Court any narrowed list of items it felt it really needed in response to GM's overbreadth objections, and the Court saw no such proposed narrowing. Instead, Plaintiffs provide a voluminous separate statement that simply seeks production of "all documents" in response to each of these requests. The Court finds GM's objections to Request Nos. 16-32 have merit and therefore sustains them in large part. However, Plaintiffs are correct that certain, limited information concerning GM's policies for evaluating Lemon Law related requests are relevant to these cases. Accordingly, the Court orders GM to produce documents sufficient to show its 2018-2019 policy and procedures for evaluating buy-back requests under the Song-Beverly act within 20 days of service of this final order. Plaintiffs' motion to compel further responses to Request Nos. 16-32 is otherwise DENIED.

Plaintiffs' Request Nos. 33 and 36 seek GM's analysis, investigations, communications, and other documents related to other vehicles' conditions, defects, or nonconformities. The Court finds Request Nos. 33 and 36 fail to seek documents likely to lead to the discovery of admissible evidence regarding Plaintiffs' Vehicle. Accordingly, Plaintiffs' motion to compel further responses to Request Nos. 33 and 36 is DENIED.

Plaintiffs' request for sanctions is DENIED.

oo0oo

Calendar Line 6
Case Name: *Jennifer Reynolds et al vs General Motors LLC*
Case No.: 22CV403306

Before the Court is Plaintiff's Motion to Compel Further Responses to Request for Production of Documents (Set One) and Request for Sanctions. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background

This is a lemon law case in which Plaintiffs Jennifer Christine Reynolds and Alexander Keith Coronado allege they purchased a 2021 Chevrolet Corvette STI ("Vehicle") on or around March 19, 2021. In connection with that purchase, Plaintiffs allegedly entered a warranty contract with General Motors LLC ("GM"). Plaintiffs allege that during the warranty period, Vehicle manifested "[d]effects and nonconformities", "including but not limited to, the engine defects; the airbag defects; the break defects; the suspension defects; the infotainment defects; among other defects and nonconformities." (Complaint, ¶14.) Plaintiffs filed this lawsuit against GM on August 17, 2022, asserting (1) violation of Civil Code section 1793.2(d), (2) violation of Civil Code section 1793.2(b), (3) violation of Civil Code section 1793.2(a)(3), and (4) breach of the implied warranty of merchantability. Plaintiffs seek general, special and actual damages; restitution; consequential and incidental damages; civil penalties; prejudgment interest; and attorneys' fees and costs.

Plaintiffs now seek an order compelling GM to produce additional documents in response to numerous requests for production. GM counters that it has produced documents in its possession, custody, or control related to the Vehicle and some additional documents related to its policies and procedures, and Plaintiffs' requests for more are overbroad and not likely to lead to the discovery of admissible evidence.

II. Legal Standard

Discovery is generally permitted "regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." (Cal. Code Civ. Pro. § 2017.010.) Everything that is relevant to the subject matter is presumed to be discoverable. (*Id.*) The Discovery Act further declares that "the court shall limit the scope of discovery" if it determines that the burden, expense, or intrusiveness of that discovery "clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." (Code Civ. Pro. § 2017.020(a); *Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 383-385.) The California Supreme Court teaches in *Greyhound* that the judge exercising discretion to limit discovery should construe disputed facts liberally in favor of discovery; reject objections such as hearsay that only apply at trial; permit fishing expeditions (within limits), avoid extending limitations on discovery, such as privileges; and, whenever possible, impose only partial limitations rather than denying discovery entirely. (*Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 383-385; *see also Tylo v. Superior Court* (1997) 55 Cal.App.4th 1379, 1386.)

The party to whom a request for production of documents has been directed can make one of three responses: (1) a statement that the party will comply with the demand, (2) a representation that the

party lacks the ability to comply, or (3) an objection. (Code Civ. Pro. §2031.210(a).) A party may move for an order compelling a further response to a document demand on the ground that (1) an objection is without merit or too general, (2) a statement of compliance with the demand is incomplete, or (3) a representation of inability to comply is inadequate, incomplete, or evasive. (Code Civ. Pro. §2031.210(a).) A party seeking to compel is required to "set forth specific facts showing good cause justifying the discovery sought by the demand." (Code Civ. Pro. §2031.210(b)(1); *Kirkland v. Superior Court* (2002) 95 Cal.App.4th 92, 98.) This burden may be satisfied by a fact-specific showing of relevance. (*TBG Ins. Services Corp. v. Superior Court* (2002) 96 Cal.App.4th 443, 448.) Information is relevant to the subject matter of the action if it might reasonably assist a party in evaluating the case, preparing for trial, or facilitating settlement. (*Gonzalez v. Superior Court* (1995) 33 Cal.App.4th 1539, 1546.)

III. Analysis

The parties agree that documents related to the Vehicle are relevant in a Lemon Law case. GM contends it has produced all documents in its possession, custody, or control related to the Vehicle in response to Request Nos. 1, 3, and 8-11. The Court has reviewed these requests, GM's responses and Plaintiffs' reasons for requesting more information. The Court finds GM's responses are code-compliant and that Plaintiffs fail to identify what more information they believe should be produced. Accordingly, Plaintiff's motion to compel further responses to Request Nos. 1, 3, and 8-11 is DENIED.

Request Nos. 20, 23, 25-26, 31, 35, 41, 43, 85, 93 seek "all documents" related to the infotainment and engine used in the Vehicle—even if related to makes, models and years other than the Vehicle. The Court finds these requests to be grossly overbroad. There are numerous component parts and features to the infotainment and engine—Plaintiffs have not adequately narrowed their interpretation of defect or the types of documents they are seeking to facilitate a reasonable search for these materials. Accordingly, Plaintiff's motion to compel further responses to Request Nos. 20, 23, 25-26, 31, 35, 41, 43, 85, 93 is DENIED.

Request Nos. 125, 127-128, 131-133 seek GM's communications with "any governmental agency" concerning, not the Vehicle, but the infotainment system or engine used in the Vehicle without limit to the year, make or model of the vehicle or the type of alleged defect. The Court finds these requests to be overbroad, and Plaintiffs fail to adequately explain or justify production of this expanse of material. Accordingly, Plaintiffs' motion to compel further responses to Request Nos. 125, 127-128, 131-133 is DENIED.

Request Nos. 108, 110-111, 120, and 122 seek policy and procedure information for handling other consumers' complaint and/or buy back requests. The Court finds most of these requests to be overbroad. However, Plaintiffs are correct that certain, limited information concerning GM's policies for evaluating Lemon Law related requests are relevant to these cases. Accordingly, the Court orders GM to produce documents sufficient to show its 2021 policy and procedures for evaluating buy-back requests under the Song-Beverly act within 20 days of service of this final order. Plaintiffs' motion to compel further responses to Request Nos. 108, 110-111, 120, and 122 is otherwise DENIED.

Request Nos. 139, 144, and 146 seek performance standards for the infotainment system and documents regarding specified recalls. Plaintiffs generally state these requests will show GM's

knowledge of alleged defects, but they do not say how. Accordingly, Plaintiffs' motion to compel further responses to Request Nos. 139, 144, and 146 is DENIED.

Plaintiffs' request for sanctions is DENIED.

oo0oo