SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 10
Honorable Frederick S. Chung

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

DATE: February 1, 2024 TIME: 9:00 A.M.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.

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

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

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

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

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

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	22CV409130	P.L. v. Los Gatos-Saratoga Union High School District	Click on LINE 1 or scroll down for ruling.
LINE 2	23CV416988	Susan Wallman v. Kia Motors America, Inc.	Click on LINE 2 or scroll down for ruling in lines 2-3.
LINE 3	23CV416988	Susan Wallman v. Kia Motors America, Inc.	Click on LINE 2 or scroll down for ruling in lines 2-3.
LINE 4	19CV351252	Gregory Malley v. Bay Area Property Developers, LLC et al.	Click on LINE 4 or scroll down for ruling.
LINE 5	22CV407300	JPMorgan Chase Bank N.A. v. Juan Porras	Motion to deem RFAs admitted: notice is proper, and the motion is unopposed. Good cause appearing, the court GRANTS the motion. Moving party to prepare formal order.
LINE 6	22CV393460	Henry Lippincott v. Arash Hassibi et al.	Click on LINE 6 or scroll down for ruling in lines 6-7.
LINE 7	22CV393460	Henry Lippincott v. Arash Hassibi et al.	Click on LINE 6 or scroll down for ruling in lines 6-7.
LINE 8	22CV396514	Jane Doe v. Robert Hicks et al.	OFF CALENDAR
LINE 9	22CV405057	William Dresser v. Michelle Gomez	Click on LINE 9 or scroll down for ruling.
LINE 10	23CV415836	Jin Zhang v. Zhichao Lu et al.	This case has been reassigned to Department 20. Please check with the clerk's office for a new hearing date.
LINE 11	23CV415836	Jin Zhang v. Zhichao Lu et al.	See LINE 10 above.

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LINE 12	23CV424226	Wells Fargo Bank, National Association v. SHP Middlefield, LLC	Motion for appointment of receiver: the motion is unopposed, but the court does not understand the proof of service that plaintiff filed in this case. The court is concerned about the adequacy of notice. Parties to appear.
LINE 13	21CV391267	Ryder Kirk v. Big E Cafe, Inc.	Petition for approval of compromise of minor's claim: parties to appear, either in person or by MS Teams, in accordance with CRC 7.952.

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Calendar Line 1
Case Name: *P.L. v. Los Gatos-Saratoga Union High School District*
Case No.: 22CV409130

I. BACKGROUND

This is a negligence action based on sexual abuse of a minor brought by plaintiff P.L. ("P.L." or "Plaintiff"). P.L. filed the original complaint on December 15, 2022 and asserted six causes of action against unnamed Doe defendants. The complaint alleged that P.L. is now over forty years old and that she was sexually assaulted by a teacher (referred to as "Perpetrator") when she was sixteen years old. (See Complaint at ¶¶ 4 and 7.) This occurred during the 1982-1983 school year. (See *id.* at ¶ 16.) The complaint alleged that the action was "brought pursuant to C.C.P § 340.1(q) as amended by Assembly Bill 218, effective January 1, 2020, reviving the statute of limitations within a three-year window for civil claims of childhood sexual assault." (Complaint at ¶ 2.) The Complaint also alleged that P.L.'s lawsuit was exempt from the claim presentation requirements of the Government Tort Claims Act. (*Id.* at ¶ 3.)

The operative first amended complaint ("FAC"), filed on June 13, 2023 after P.L. acquired new counsel, states five causes of action against defendant Los Gatos-Saratoga Union High School District ("District") and various Doe defendants. These are: (1) Negligence; (2) Negligent Hiring, Retention and Supervision of an Unfit Employee; (3) Negligent Infliction of Emotional Distress ("NIED"); (4) Negligent Failure to Warn, Train, or Educate; and (5) Negligence Per Se in Violation of the Child Abuse Reporting Act (Pen. Code, § 11164 et seq.).

The FAC refers to P.L. as "Jane Doe." The "Perpetrator" of the assaults is now identified as Mark Bradburn, a teacher at Los Gatos High School. (See FAC at ¶ 24.) The FAC alleges that the action is timely under "Civil Code" section 340.1(q) and that P.L. has complied with the requirements of "Civil Code" section 340.1(g) et seq. (See *id.* at ¶ 11.) These references are obviously to the Code of Civil Procedure rather than to the Civil Code.

Currently before the court is a demurrer to the FAC by the District, filed on August 10, 2023. P.L. filed her opposition on January 19, 2024.

II. REQUESTS FOR JUDICIAL NOTICE

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

A. P.L.'s Request

P.L. submits a request for judicial notice of 19 documents, attached as Exhibits 1-19, with the opposition to the demurrer. Exhibit 1 is a copy of an Assembly Floor Analysis for AB

218. Exhibits 2-19 are copies of orders from various California superior courts. P.L. asserts that notice of all 19 documents may be granted under Evidence Code section 452, subdivision (h). (See Request at p. 5:9-10.) The request states that judicial notice of the other trial court orders is requested "only to the extent" that the court "grants Defendant's apparent request for judicial notice regarding a single decision decided the other way." (Request at p. 5:20-21.) The request also notes in footnote No. 1 that while the District's supporting memorandum mentions a request for judicial notice, no request was filed with the District's demurrer.

The court DENIES P.L.'s request, as Evidence Code section 452, subdivision (h), does not apply to any of the submitted documents. (See *Gould v. Md. Sound Indus*. (1995) 31 Cal.App.4th 1137, 1145 ["Judicial notice under Evidence Code section 452, subdivision (h), is intended to cover facts which are not reasonably subject to dispute and are easily verified. These include, for example, facts which are widely accepted as established by experts and specialists in the natural, physical, and social sciences which can be verified by reference to treatises, encyclopedias, almanacs and the like or by persons learned in the subject matter."].)

Had P.L. requested judicial notice of the trial court orders under Evidence Code section 452, subdivision (d) (court records), notice would still have been granted only as to the existence and dates of the orders, not as to the correctness of their rulings or the truth of their factual findings. (See *Sosinsky v. Gran*t (1992) 6 Cal.App.4th 1548, 1565; *Fowler v. Howell* (1996) 42 Cal.App.4th 1746, 1749; *Kilroy v. State of Calif*. (2004) 119 Cal.App.4th 140, 145-148; *Barri v. Workers' Comp. Appeals Bd*. (2018) 28 Cal.App.5th 428, 437-438.) The existence of these orders is ultimately not material to the issues before the court, particularly as this court has already seen the same issues multiple times, presented by the same defendants' counsel in virtually identical fashion, with large swaths of text in these briefs cut and pasted from other briefs. (See *Bolanos v. Superior Court* (2008) 169 Cal.App.4th 744, 761 [a written trial court ruling has no precedential value]; *In re Marriage of Shaban* (2001) 88 Cal.App.4th 398, 409 [there is no "horizontal stare decisis"].)

B. District's Request

With its reply, the District submits a request for judicial notice of three documents, two of which were referred to but not filed with its opening memorandum. These documents are attached as Exhibits A-C to the request. Exhibit A, referred to as "Exh. B" in the District's memorandum, is a copy of an Assembly Floor Analysis" for AB 218. The District contends this can be noticed pursuant to Evidence Code section 452, subdivision (c). The court GRANTS this request, particularly given that P.L. has also requested judicial notice of the assembly floor analysis for AB 218. Legislative committee reports and bill analyses constitute cognizable legislative history materials for purposes of judicial notice. (See *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 31-37 (*Kaufman*) [discussing categories of documents that constitute cognizable legislative history for purposes of judicial notice].) "Preliminarily, we note that resort to legislative history is appropriate only where statutory language is ambiguous . . . . 'If there is no ambiguity in the language, we presume the Legislature meant what it said, and the plain meaning of the statute governs.'" (*Id.* at p. 29.) *Kaufman* instructs that parties moving for judicial notice of legislative history materials are not required to demonstrate the need to resort to a statute's legislative history at the time of the request. (*Id*. at p. 30.)

Exhibits B and C are copies of two superior court orders from a judge in the Contra Costa County Superior Court. Exhibit B is referred to "Exh. C" in the District's memorandum. The District asserts that notice can be taken of these two orders pursuant to Evidence Code section 452, subdivision (d) (court records). The court GRANTS this request but only as to the existence and dates of these orders, for the same reasons noted above. The orders cannot be noticed as to the correctness of their rulings or the truth of their factual findings. As also noted above, the existence of these orders is not entitled to significant weight, given that this court has already addressed these same issues multiple times.

III. DEMURRER TO THE COMPLAINT

A. General Standards

The court, in ruling on a demurrer, treats it "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp*. (1983) 35 Cal.3d 197, 213-214.) Allegations are not accepted as true on demurrer if they contradict or are inconsistent with facts judicially noticed. (See *Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1474 [rejecting allegation contradicted by judicially noticed facts]; see also Witkin, *California Evidence* (5th Ed., 2012) 2 Judicial Notice §3(3) ["It has long been established in California that allegations in a pleading contrary to judicially noticed facts will be ineffectual; i.e., judicial notice operates against the pleader."].)

Where a demurrer is to an amended complaint, the Court "may consider the factual allegations of prior complaints, which a plaintiff may not discard or avoid by making contradictory averments, in a superseding, amended pleading." (*Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1034, internal quotations omitted; see also *Larson v. UHS of Rancho Springs, Inc*. (2014) 230 Cal.App.4th 336, 343 [noting "well-established precedent" allowing "courts to consider omitted and inconsistent allegations from earlier pleadings when ruling on a demurrer"]; *Doe v. United States Youth Soccer Assoc.* (2017) 8 Cal.App.5th 1118, 1122 [citing *Berg & Berg*].)

B. The Basis for the District's Demurrer

The District challenges the entire FAC on the ground that "AB 218 retroactively strips statutory governmental immunity from public entities, in violation of Article XVI, § 6 of the California Constitution, which expressly prohibits gifts of public funds where there is no enforceable claim, even if there is a moral or equitable obligation. To the extent that AB 218 is unconstitutional as applied to public entities, P.L. does not have a viable claim against [District]." (August 10, 2023 Notice of Demurrer and Demurrer at p. 2:1-6, brackets added.)

The District also demurs to the FAC's third and fourth causes of action "on the additional basis that there is no independent tort of Negligent Infliction of Emotional Distress, as this allegation is encompassed in the tort of negligence, which is already asserted through P.L.'s first cause of action. Second, there is no viable tort for Negligent Failure to Warn,

Train, or Educate against a public school district." (Notice of Demurrer and Demurrer at p. 2:9-13.)

In its supporting memorandum, the District attempts to raise an additional argument that is not set forth in its notice of demurrer—*i.e.*, that because P.L. did not comply with the Government Tort Claims Act's "claim presentation" requirement, sovereign immunity bars her claims against the District. (See Memorandum at pp. 5:19-8:19 generally.) Because this was not raised in the notice of demurrer and demurrer, it is not properly before the court. The argument would be unpersuasive even if it had been properly raised, as the amendments introduced by AB 218 to the Code of Civil Procedure and the Government Code make it clear that the claim presentation requirement does not apply to claims involving childhood sexual assault, as discussed below. (See Code Civ. Proc., § 340.1, subds. (a), (q), (r) & (s); Gov. Code, § 905, subds. (m) & (p).)

C. The Merits of the District's Demurrer

1. The Claim Presentation Requirement, AB 218, and Code of Civil Procedure section 340.1

Under the Government Claims Act, "no person may sue a public entity or public employee for 'money or damages' unless a timely written claim has been presented to and denied by the public entity." (*County of Los Angeles v. Superior Court* (2005) 127 Cal.App.4th 1263, 1267.) To be timely, the claim generally must be presented to the particular entity within six months of accrual of the injury. (*A.M. v. Ventura Unified School Dist.* (2016) 3 Cal.App.5th 1252, 1257.) Absent an applicable exception, "failure to timely present a claim for money or damages to a public entity bars a plaintiff from filing suit against that entity bars a plaintiff from filing a lawsuit against that entity." (*State of California v. Superior Court* (2004) 32 Cal.4th 1234, 1239.)

There are a number of exceptions to the presentation requirement, set forth in Government Code section 905, including an exception for claims for damages from childhood sexual abuse brought under Code of Civil Procedure section 340.1. (See Gov. Code, § 905, subd. (m).) Before the passage of AB 218, Code of Civil Procedure section 340.1 permitted such claims to be brought "within eight years of the date the plaintiff attains the age of majority or within three years of the date the plaintiff discovers or reasonably should have discovered that psychological injury of illness occurring after the age of majority was caused by the sexual abuse, whichever period expires later." The Legislature significantly changed this in October 2019 with AB 218. Among other things, AB 218 lengthened the time within which an action for damages resulting from "childhood sexual assault" could be brought from 8 years to 22 years from the date the plaintiff attains the age of majority or from three years to five years from the date the plaintiff "discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual assault." (See Code Civ. Proc., § 340.1(a).) AB 218 also amended Government Code section 905 by deleting from subdivision (m) the language that provided an exception only for claims arising from conduct occurring on or after January 1, 2009—instead allowing the exception to apply without any date restriction—and adding Government Code section 905, subdivision (p), which made this change retroactive.

Code of Civil Procedure section 340.1, subdivision (q), now states: "Notwithstanding any other law, any claim for damages described in paragraphs (1) through (3), inclusive, of subdivision (a) that has not been litigated to finality and that would otherwise be barred as of January 1, 2020, because the applicable statute of limitations, claim presentation deadline, or any other time limit had expired, is revived, and these claims may be commenced within three years of January 1, 2020. A plaintiff shall have the later of the three-year time period under this subdivision or the time period under subdivision (a) as amended by the act that added this subdivision."

Code of Civil Procedure section 340.1, subdivision (r), now states: "The changes made to the time period under subdivision (a) as amended by the act that amended this subdivision in 2019 apply to and revive any action commenced on or after the date of enactment of that act, and to any action filed before the date of enactment, and still pending on that date, including any action or causes of action that would have been barred by the laws in effect before the date of enactment."

Code of Civil Procedure section 340.1, subdivision (s), now states: "Notwithstanding any other law, including Chapter 1 of Part 3 of Division 3.6 of Title 1 of the Government Code (commencing with Section 900) and Chapter 2 of Part 3 of Division 3.6 of Title 1 of the Government Code (commencing with Section 910), a claim for damages described in paragraphs (1) through (3), inclusive, of subdivision (a), is not required to be presented to any governmental entity prior to the commencement of an action."

Government Code section 905, subdivision (m), now exempts "[c]laims made pursuant to Section 340.1 of the Code of Civil Procedure for the recovery of damages suffered as a result of childhood sexual assault" from claim presentation requirements under the Government Code. Government Code section 905, subdivision (p), now states: "The changes made to this section by the act that added this subdivision are retroactive and apply to any action commenced on or after the date of enactment of that act, and to any action filed before the date of enactment and still pending on that date, including any action or causes of action that would have been barred by the laws in effect before the date of enactment."

These statutes are all presumed constitutional. "'The courts will presume a statute is constitutional unless its unconstitutionality clearly, positively, and unmistakably appears; all presumptions and intendments favor its validity.' The party arguing unconstitutionality has the burden of proof." (*Donorovich-Odonnell v. Harris* (2015) 241 Cal.App.4th 1118, 1134-1135, internal citation omitted.)

The amended language of these statutes makes very clear the Legislature's determination that claims like those alleged in the FAC here are not subject to claim presentation requirements and cannot reasonably be considered barred by any sovereign immunity associated with such requirements. Even if the court were to accept the District's argument that the claims presentation requirement constitutes an "immunity"—rather than just another iteration of a prescriptive period that limits the timeframe in which claims may be brought, like a statute of limitations—the District has failed to present any authority for the proposition that the Legislature may not modify any "immunity" under the Tort Claims Act whenever it wants to. The Tort Claims Act, after all, is simply another legislative act, just like AB 218, and there is nothing about amending it that is of constitutional dimension.

In *Coats v. New Haven Unified School Dist.* (2020) 46 Cal.App.5th 415, the Court of Appeal noted (in a different context involving claims made by a foster mother) that it was aware of "no reason the Legislature should be any less able to revive claims in this context as it expressly did in Assembly Bill 218." (*Coats,* 46 Cal.App.5th at 428.) The Court also confirmed the retroactive application of the AB 218 amendments: "In the face of a revival provision expressly and unequivocally encompassing claims of childhood sexual abuse previously barred for failure to present a timely government claim, it is clear we must reverse the trial court's judgment and remand for further proceedings on appellants' complaint." (*Id*. at pp. 430-431.)

2. AB 218 and the Gift Clause

Article XVI, § 6 of the California Constitution, colloquially referred to as the "gift clause," prohibits the Legislature from making "any gift or authoriz[ing] the making of any gift, or any public money or thing of value to any individual, municipal or other corporation." The term "gift" is defined as including "all appropriations of public money for which there is no authority or enforceable claim," even if there is a moral or equitable obligation. (*Jordan v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 431, 450, (*Jordan*).) Thus, "[a]n appropriation of money by the legislature for the relief of one who has no legal claim . . . must be regarded as the gift within the meaning of that term, as used in this section, and it is none the less a gift that a sufficient motive appears for its appropriation, if the motive does not rest upon a valid consideration." (*Ibid*.)

a) AB 218 is Not an "Appropriation"

The court rejects the District's constitutional challenge for at least two reasons. First and foremost, AB 218 is not a "gift" because it is not an "appropriation of money." (*Jordan*, *supra*, 100 Cal.App.4th at p. 450.) AB 218 does not allocate any public money to anyone—it merely removes a time bar that previously existed for claims of childhood sexual abuse. The claimant must still prove liability for that abuse in a court of law. As a result, the present situation is entirely distinguishable from the situations described in the cases cited by the District—*Bourn v. Hart* (1892) 93 Cal. 321,326-328 (*Bourn*); *Conlin v. Board of Supervisors of the City and County of San Francisco* (1893) 99 Cal. 17, 21 (*Conlin*); *Powell v. Phelan* (1903) 138 Cal. 271; *Jordan*, *supra*, 100 Cal.App.4th at p. 441—all of which involved an appropriation of specific sums of money, or an identification of a specific fund, for specific recipients.[1] In contrast to those cases, there is no "appropriation" here—there is no sum of money or fund set aside of designated for a specific use—and so there is no "gift."

As P.L. points out in her opposition (at pp. 11:23-12:24 generally), AB 218 did not create a new tort liability that never existed before. It merely removed a procedural barrier (previously enacted by the very same California Legislature) against bringing those claims in court. Thus, the case of *Chapman v. State* (1894) 104 Cal. 690, 696, though ancient, is directly on point. In *Chapman*, the California Supreme Court held that the Legislature's provision of a judicial remedy for claims that could previously only be brought before the State Board of Examiners was not a violation of the gift clause because it did not create any *new liability*:

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[1] The District also cites dictum from *Heron v. Riley* (1930) 209 Cal. 507, which has no application here.

> We are entirely satisfied that plaintiff's cause of action, as alleged in the complaint, arises upon contract, and that the liability of the state accrued at the time of its breach; that is, when the coal was lost through the negligence of the officers in charge of the state's wharf, although there was then no law giving to the plaintiff's assignors the right to sue the state therefor. At that time the only remedy given the citizen to enforce the contract liabilities of the state, was to present the claim arising thereon to the state board of examiners for allowance, or to appeal to the legislature for an appropriation to pay the same; but the right to sue the state has since been given by the act of February 28, 1893, and in so far as that act gives the right to sue the state upon its contracts, the legislature did not create any liability or cause of action against the state where none existed before. The state was always liable upon its contracts, and the act just referred to merely gave an additional remedy for the enforcement of such liability, and it is not, even as applied to prior contracts, in conflict with any provision of the constitution.

(*Ibid*.) This is sufficient reason by itself to overrule the demurrer on the ground that AB 218 is unconstitutional.

In its reply brief, the District reiterates its argument that because the government claim presentation requirement is "substantive" in nature and supposedly an "element" of the cause of action, AB 218's retroactive exemption of sexual assault claims from the claim presentation requirement constitutes the creation of a *new* liability that did not exist before. The court finds this argument to be unpersuasive. It is based on a misapplication of *Shirk v. Vista Unified School District* (2007) 42 Cal.4th 201 (*Shirk*) (cited in the District's opening brief), which described claim presentation requirements as "substantive" in its effort to divine the California Legislature's intent as to whether sexual assault claims were exempt from those requirements. The Legislature overruled that (mis)reading of its intent with the enactment of Government Code section 905, subdivision (m), the following year, in 2008. (*Rubenstein v. Doe No. 1* (2017) 3 Cal.5th 903, 914 [observing that the Legislature "overruled" *Shirk*].) And it was further overruled by AB 218, which made the exemption retroactive by adding section 905, subdivision (p). The District entire demurrer is based on this alleged distinction between "substantive" claim presentation requirements and "procedural" statutes of limitations, and yet it repeatedly fails to explain how the exemption of sexual abuse claims from the former by the Legislature can be an unconstitutional "appropriation" but the exemption of sexual abuse claims from the latter cannot, when, as a practical matter, they each operate as a time bar in exactly the same manner. Indeed, the District fails to address the Supreme Court's post-*Shirk* decision in *Quarry v. Doe I* (2012) 53 Cal.4th 945, 980, which noted that "the distinction between procedural and substantive rules is not particularly helpful" when it comes to determining whether statutes are retroactive or impinge upon "vested rights." The District's entire demurrer is a house of cards built on a foundation that consists of nothing more than an unexplained (and unpersuasive) semantic distinction.

b) AB 218 Serves a Public Purpose

Second, even if AB 218 could somehow be construed to provide for an "appropriation," the court finds that its amendments to Code of Civil Procedure section 340.1 and Government Code section 905 are directed to a public purpose. "It is well settled that the primary question to be considered in determining whether an appropriation of public funds is to be considered a gift is whether the funds are to be used for a public or private purpose. If they are to be used for a public purpose, they are not a gift within the meaning of this constitutional prohibition."

(*California Teachers Assn. v. Board of Trustees* (1978) 82 Cal.App.3d 249, 257; see also *Teachers' Retirement Board v. Genest* (2007) 154 Cal.App.4th 1012, 1036.) "The benefit to the state from an expenditure for a 'public purpose' is in the nature of consideration and the funds expended are therefore not a gift even though private persons are benefited therefrom. The determination of what constitutes a public purpose is primarily a matter for legislative discretion, which is not to be disturbed by the courts so long as it has a reasonable basis." (*County of Alameda v. Janssen* (1940) 16 Cal.2d 276, 281, internal citations omitted; see also *Paulson v. Abdelnour* (2006) 145 Cal.App.4th 400, 419.)

Here, in the event that P.L. prevails in her lawsuit, the benefits of such a result would not be limited to P.L. herself. The stated purpose of AB 218 is, in addition to allowing more victims of childhood sexual abuse to be compensated for their injuries, to "help prevent future assaults by raising the costs for [harm caused by childhood sexual abuse]" and to serve "as an effective deterrent against individuals and entities who have chosen to protect perpetrators of sexual assault over victims." (See *X.M. v. Superior Court* (2021) 68 Cal.App.5th 1014, 1027, quoting Off. Of Assem. Floor Analyses, Analysis of Assem. Bill No. 218 (2019-2020 Reg. Sess.) as amended Aug. 30, 2019, p. 2.) The prevention of future assaults on students in public schools by school employees is a benefit to the public as a whole, which contrasts sharply with the narrow scope of benefits conferred in the gift clause cases cited by the District. Therefore, any liability that may ultimately result from this case or similar cases involving childhood sexual assault serves a public purpose and does not qualify as a gift within the meaning of the "gift clause" of Article XVI, section 6 of the California Constitution.

In its reply, the District argues that AB 218 cannot serve a public purpose because it "imposes liability for an unenforceable claim." (Reply at p. 7:13-27.) But the District's claim of "unenforceability" is based solely on the notion that P.L. did not comply with the government claim presentation requirement within six months of the date her claim originally accrued. The District is simply bootstrapping the same meritless argument that government claim presentation requirements are "substantive" in nature into this analysis of public purpose.

The court OVERRULES the District's demurrer to the FAC "on the basis that AB 218 retroactively strips governmental immunity from public entities, in violation of Article XVI, § 6 of the California Constitution."

3. The District's Demurrer to the Third and Fourth Causes of Action

The District asserts that the third cause of action (negligent infliction of emotional distress) is not an independent tort and is already encompassed in the FAC's first cause of action for negligence. The District asserts that the fourth cause of action (negligent failure to warn, train or educate), is a common law claim that cannot be asserted against a public entity, which is only liable pursuant to statute.

In response, P.L. states: "While Plaintiff does not view these challenges as substantively meaningful, Plaintiff agrees to withdraw these causes of action with the understanding that they are already encompassed in Plaintiff's remaining causes of action." (Opposition at p. 17:10-12.) Based on this withdrawal, the court SUSTAINS the demurrer to the third and fourth cause of action without leave to amend.

IV. CONCLUSION

The court sustains the demurrer to the third and fourth causes of action. The court overrules the demurrer to the FAC as a whole.

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Calendar Lines 2-3
Case Name: *Susan Wallman v. Kia Motors America, Inc.*
Case No.: 23CV416988

I. BACKGROUND

This is a "lemon law" action brought under the Song-Beverly Consumer Warranty Act by plaintiff Susan Wallman against defendant Kia Motors America, Inc. ("Kia"), based on Wallman's acquisition of a 2017 Kia Sorrento that allegedly suffered from defects in its "Theta II" engine—*e.g.*, stalling while in operation and a non-collision engine fire, among other problems.

The original and still-operative complaint "for statutory violations," filed on May 30, 2023, states five causes of action: (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); (4) Breach of the Implied Warranty of Merchantability; and (5) Fraud (*i.e.*, alleging that Kia committed fraud by allowing the subject vehicle to be sold "without disclosing that the Subject Vehicle and its 2.4L GDI engine was defective and susceptible to sudden and catastrophic failure"; Complaint at ¶ 109.)

According to the complaint, Wallman "leased and/or purchased" the subject vehicle. (Complaint at ¶¶ 57-58, 110c, 112, 113-114.) "On or about November 09, 2016, Plaintiff entered into a warranty contract with Defendant regarding a 2017 Kia Sorrento . . . which was manufactured and or distributed by Defendant." (*Id.* at ¶ 6.) This contract allegedly included a "bumper to bumper warranty," a "powertrain warranty," and an "emissions warranty." (*Id.* at ¶ 7.) Wallman states that she acquired the vehicle on November 9, 2016. (*Id.* at ¶ 6.)

Currently before the court is a demurrer to and motion to strike portions of the complaint, filed by Kia on August 24, 2023. Wallman filed oppositions on January 19, 2024.

II. DEMURRER

A. General Standards

The court, in ruling on a demurrer, treats it "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688 (*Piccinini*), 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*).) A plaintiff is not ordinarily required to allege "'each evidentiary fact that might eventually form part of the plaintiff's proof . . . .' [Citation.]" (*Ferrick v. Santa Clara University* (2014) 231 Cal.App.4th 1337, 1341.)

The court considers only the pleading under attack, any attached exhibits, and any facts or documents for which judicial notice is properly requested. The court cannot consider extrinsic evidence in ruling on a demurrer or motion to strike. Thus, the court has considered

the two declarations from Kia's counsel, Leanna Vault, only to the extent they discuss the meet-and-confer efforts required by statute.

B. Summary of Kia's Demurrer

Kia makes several challenges to the complaint. It demurs to all five causes of action on the ground of uncertainty. It contends that the first, second, and third causes of action alleging violations of the Song-Beverly Act are time-barred by the four-year stature of limitations in Commercial Code section 2725, subdivision (1). It also contends that the first and second causes of action fail to state sufficient facts because Wallman "has not made a pleading adequately describing a contract/warranty." (See August 24, 2023 Notice of Demurrer and Demurrer at pp. 2:15, 2:23-24.) It contends that the third cause of action fails to state sufficient facts because that cause "fails to identify any facility relevant to Plaintiff's claims" or "what literature or replacement parts supposedly were unavailable." (Notice of Demurrer and Demurrer at p. 3:1-3.)

Kia asserts that the fourth cause of action fails to state sufficient facts because it "does not plead specific facts to support the allegation that vehicle was not merchantable, as defined under Civ. Code § 1792.1." (Notice of Demurrer at p. 3:12-13.) Notably, the fourth cause of action does not allege a breach of the implied warranty for fitness for a particular purpose, which is all Civil Code section 1792.1 describes. (Section 1792 describes the warranty of merchantability.)

Kia contends that the fifth cause of action fails to state sufficient facts because it does not adequately plead a fraud claim against a corporate defendant, it fails "to establish the existence of a duty to disclose[,] and [it] further fails to allege any damages independent of the breach of warranty, making her damages purely economic and barred by the economic loss rule." (Notice of Demurrer at p. 4:4-11.) Finally, Kia contends that the fifth cause of action is time-barred under the three-year limitations period set forth in Code of Civil Procedure section 338, subdivision (d).

C. Discussion

1. Uncertainty

"'[D]emurrers for uncertainty are disfavored, and are granted only if the pleading is so incomprehensible that a defendant cannot reasonably respond.' 'A demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures.'" (*A.J. Fistes Corp. v. GDL Best Contractors, Inc.* (2019) 38 Cal.App.5th 677, 695, internal citations omitted.) In this case, while the complaint is certainly replete with generic boilerplate, it is apparent from Kia's specific arguments that it understands perfectly well what each cause of action at least attempts to allege and that there is no true uncertainty on Kia's part. Nor does the court find anything in the complaint that is truly incomprehensible. The court therefore OVERRULES Kia's blanket demurrer to all five causes of action on the ground of uncertainty.

2. Failure to State Sufficient Facts

a) The Song-Beverly Act (First, Second, and Third Causes of Action)

Kia argues that the first three causes of action are time-barred. "A complaint showing on its face the cause of action is barred by the statute of limitations is subject to general demurrer." (*Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 Cal.App.4th 990, 995.) The running of the statute must appear clearly and affirmatively from the dates alleged—it is not enough that the complaint might be barred. (*Committee for Green Foothills v. Santa Clara County Board of Supervisors* (2010) 48 Cal.4th 32, 42.) "Generally, the limitations period starts running when the last element of a cause of action is complete." (*NBCUniversal Media, LLC v. Super. Ct.* (2014) 225 Cal.App.4th 1222, 1231.)

An action for damages under the Song-Beverly Act is generally governed by the four-year limitations period for breaches of warranty in sales contracts, set forth in Commercial Code section 2725. (*Jensen v. BMW of North America, Inc*. (1995) 35 Cal.App.4th 112, 132; *Krieger v. Nick Alexander Imports, Inc*. (1991) 234 Cal.App.3d 205, 213-215 [noting that the special statute of limitation in section 2725 controls over the general provisions of Code of Civil Procedure section 338(a)].) Commercial Code section 2725, subdivision (1), states that "[a]n action for breach of contract for sale must be commenced within four years after the cause of action has accrued." Commercial Code section 2725, subdivision (2) further provides that "[a] cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach." (Cal. U. Com. Code, § 2725, subds. (1) & (2).) "A breach of warranty occurs when tender of delivery is made, *except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the times of such performance the cause of action accrues when the breach is or should have been discovered*." (Cal. U. Com. Code, § 2725, subd. (2), emphasis added.)

The italicized language above is often referred to as the "future performance" exception. This exception is to be narrowly construed and applies "only when the seller has expressly agreed to warrant its product for a specific and defined period of time." (*Cardinal Health 301, Inc. v. Tyco Electronics Corp*. (2008) 169 Cal.App.4th 116, 130 (*Cardinal*); see also *Carrau v. Marvin Lumber & Cadar Co*. (2001) 93 Cal.App.4th 281, 291 [stating that where an express warranty is made that extends for a specific period of time, "the policy reasons behind strict application of the limitations period do not apply . . ."].) At the same time, "the argument that a warranty necessarily extends to future performance merely because it contains promises regarding the manner in which the goods will perform after tender of deliver[y]" has been rejected by the courts. (*Cardinal*, *supra*, 169 Cal.App.4th at p. 131.) Moreover, "[b]ecause an implied warranty is one that arises by operation of law rather than by an express agreement of the parties, courts have consistently held it is not a warranty that explicitly extends to future performance of the goods . . . ." (*Id*., at p. 134, internal citations and quotations omitted.)

Kia argues that because Wallman leased or purchased her 2017 Kia Sorento on November 9, 2016, the same date the complaint alleges that she entered into a warranty agreement with Kia, all three Song-Beverly Act claims are time-barred by several years. Kia

contends that suit had to be brought by November 2020, but it was not filed until May 30, 2023. (See Memorandum at p. 7:12-17.)

Regarding these three causes of action, the opposition argues that the complaint does not affirmatively disclose a statute of limitations defense because it refers to repairs occurring in 2020 and 2022. (See Opposition at p. 4:24-26, citing Complaint at ¶¶ 62-67.) This brief reference to generic allegations of repair work in the complaint—*i.e.*, for "various concerns, including engine concerns"—is not sufficient and not persuasive. The general rule is that statutory causes of action, which includes alleged violations of the Song-Beverly Act, must be pleaded with particularity. (See *Lopez v. Southern California Rapid Transit District* (1985) 40 Cal.3d 780, 795; *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790.) While this is not the same level of detail required for fraud claims, simply repeating the provisions of a statute or the legal elements of a cause of action does not meet this standard. The court agrees with Kia that the first, second, and third causes of action lack necessary detail relating to this plaintiff, this subject vehicle, and this defendant. The paragraphs referring to repairs are so generic and repetitive in nature that they fail to rebut the statute of limitations issue.

Indeed, the court finds that the tolling and delayed discovery allegations in the complaint are so bland, generic, and conclusory that they are legal and factual conclusions that cannot be accepted as true on demurrer. (See Complaint at ¶¶ 70-86.) (*Piccinini*, *supra*, 226 Cal.App.4th at p. 688.) They completely lack particularity. "When a plaintiff relies on a theory of fraudulent concealment, delayed accrual, equitable tolling, or estoppel to save a cause of action that otherwise appears on its face to be time-barred, he or she must specifically plead facts which, if proved, would support the theory." (*Mills v. Forestex Co*. (2003) 108 Cal App 4th 625, 641 (*Mills*).) "In order to rely on the discovery rule for delayed accrual of a cause of action, '[a] plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence.' In assessing the sufficiency of the allegations of delayed discovery, the court places the burden on the plaintiff to 'show diligence'; '*conclusory allegations will not withstand demurrer*.'" (*Fox v. Ethicon Endo-Surgery, Inc*. (2005) 35 Cal.4th 797, 808, internal citations omitted, emphasis added (*Fox*).) To be entitled to the benefit of the delayed discovery rule, a plaintiff must specifically plead the *time* and *manner* of discovery and show the following: 1) the plaintiff had an excuse for late discovery; 2) the plaintiff was not at fault in discovering facts late; 3) the plaintiff did not have actual or presumptive knowledge to be put on inquiry; and 4) the plaintiff was unable to make earlier discovery despite reasonable diligence. (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1319, 1324-1325.)

Because all of the foregoing specificity is missing from the complaint, the court SUSTAINS Kia's demurrer to the first, second, and third causes of action on the basis of the statute of limitations. The complaint admits that Wallman entered into a warranty contract with Kia on or about November 9, 2016, and the opposition admits that this was also the date Wallman acquired the subject vehicle. The complaint was not filed until May 30, 2023, nearly seven years later, and it does not adequately allege any form of tolling or delayed discovery. The court also agrees with Kia's argument that these three causes of action are not currently alleged with the level of specificity required for statutory claims and therefore fail to state sufficient facts.

A plaintiff bears the burden of demonstrating that an amendment would cure the defect identified on demurrer. (See *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081; *Shaeffer v. Califia Farms, LLC* (2020) 44 Cal.App.5th 1125, 1145 ["The onus is on the plaintiff to articulate the 'specifi[c] ways' to cure the identified defect, and absent such an articulation, a trial or appellate court may grant leave to amend 'only if a potentially effective amendment [is] both apparent and consistent with the plaintiff's theory of the case. [Citation.]'"].) Wallman has not met this burden, as the opposition simply makes a general request for leave to amend if the court sustains the demurrer.

Nevertheless, the court GRANTS Wallman 10 DAYS' LEAVE TO AMEND the first, second, and third causes of action, given that this is the first pleading challenge in this case.

Wallman is reminded that that when a demurrer is sustained with leave to amend, the leave must be construed as permission to the pleader to amend the causes of action to which the demurrer has been sustained, not to add entirely new causes of action. (*Patrick v. Alacer Corp.* (2008) 167 Cal.App.4th 995, 1015.) To raise claims entirely unrelated to those originally alleged requires either a new lawsuit or a noticed motion for leave to amend. "Following an order sustaining a demurrer or a motion for judgment on the pleadings with leave to amend, the plaintiff may amend his or her complaint only as authorized by the court's order. The plaintiff may not amend the complaint to add a new cause of action without having obtained permission to do so, unless the new cause of action is within the scope of the order granting leave to amend." (*Zakk v. Diesel* (2019) 33 Cal.App.5th 431, 456, citing *Harris v. Wachovia Mortgage, FSB* (2010) 185 Cal.App.4th 1018, 1023.)

b) Fourth Cause of Action (Implied Warranty of Merchantability)

While not alleged as a violation of the Song-Beverly Act, the fourth cause of action is expressly based on the Act, as it references Civil Code sections 1791.1, 1794, and 1794.5. (See Complaint at ¶¶ 102-106.) The fourth cause alleges that "[a]t the time of sale, the subject vehicle contained one or more latent defect(s) set forth above. The existence of the said defect(s) constitutes a breach of the implied warranty because the Vehicle (1) does not pass without objection in the trade under the contract description, (2) is not fit for the ordinary purposes for which such goods are used, (3) is not adequately contained, packaged and labelled, and (4) does not conform to the promises or affirmations of fact made on the contained or label." (Complaint at ¶ 106.)

"Under the implied merchantability warranty, 'every sale of consumer goods that are sold at retail in this state shall be accompanied by the manufacturer's and the retail seller's implied warranty that the goods are merchantable.'" (*Brand v. Hyundai Motor America* (2014) 226 Cal.App.4th 1538, 1545 [quoting Civ. Code § 1792].) "The warranty '"arises by operation of law"' and therefore applies despite its omission from a purchase contract. [Citations.]" (*Id.*) "Merchantability, as pertinent here, means that the goods '[p]ass without objection in the trade under the contract description,' and are 'fit for the ordinary purposes for which such goods are used.'" (*Ibid.*, quoting Civ. Code § 1791.1, subd. (a).) To assert a breach of implied warranty claim properly, a plaintiff must allege a breach of warranty, occurring while the warranty is valid, and bring suit within the limitations period. (See *Mexia v. Rinker Boat Co., Inc.* (2009) 174 Cal.App.4th 1297, 1306 (*Mexia*).) The "implied warranty of merchantability may be

breached by a latent defect undiscoverable at the time of sale." (*Id*. at p. 1304.) Thus, if a product is sold with a latent defect, the implied warranty is breached "by the existence of the unseen defect, not by its subsequent discovery." (*Id*. at p. 1305.)

Kia does not argue that this cause of action is time-barred, but rather that it fails to state sufficient facts because it is a statutory claim. The opposition does not address Kia's argument; instead, it discusses the *Mexia* decision and appears to suggest that *Mexia* allows for delayed discovery of breach of an implied warranty. (See Opposition at p. 5:2-14.)[2] This is both incorrect and not responsive to the argument in Kia's demurrer that the claim must be pled with particularity because it is based on an alleged statutory violation. Just as with the tolling and delayed discovery allegations of the complaint, the court agrees with Kia that the complaint's allegations relating to the implied warranty of merchantability are also bland, generic, and conclusory rather than sufficiently particular.

The court SUSTAINS the demurrer to the fourth cause of action WITH 10 DAYS' LEAVE TO AMEND.

c) Fifth Cause of Action (Fraud by Omission)

Kia makes several arguments against the fifth cause of action, which alleges that Wallman's acquisition of the subject vehicle was induced by Kia's fraudulent omission or concealment of the claimed engine defect. "The elements of fraudulent concealment are: (1) the defendant concealed or suppressed a material fact; (2) the defendant was under a duty to disclose the fact to the plaintiff; (3) the defendant intentionally concealed or suppressed the fact with the intent to defraud the plaintiff; (4) the plaintiff was unaware of the fact and would not have acted as he or she did if the plaintiff had known of the concealed or suppressed fact; and (5) as a result of the concealment or suppression of the fact, the plaintiff sustained damage." (*Burch v. CertainTeed Corp*. (2019) 34 Cal.App.5th 341, 348, citing *Bigler-Engler v. Breg, Inc*. (2017) 7 Cal.App.5th 276, 310-311 (*Bigler*).) "With respect to concealment, there are four circumstances in which nondisclosure or concealment may constitute actionable fraud: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts. The latter three circumstances presuppose the existence of some other relationship between the plaintiff and defendant in which a duty to disclose can arise. This relationship has been described as a transaction, such as that between seller and buyer, employer and prospective employee, doctor and patient, or parties entering into any kind of contractual arrangement." (*Id*. at pp. 349-350, internal quotations and citations omitted.)

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[2] *Mexia* held that latent defects that exist in the first year after tender of delivery, even if they do not manifest until after the first year, can be a basis for a breach of implied warranty claim, so long as the claim is filed within four years of the date of sale. (*Mexia, supra*, 174 Cal.App.4th at pp. 1306-1307, fn. 6.) It cannot be read as stating that a breach of implied warranty claim accrues upon discovery of the alleged breach. *Mexia* did not articulate or purport to apply a delayed discovery rule, because resort to such a rule was unnecessary in that case: the action was filed within four years of the date of purchase of the item (a boat) that contained the latent defect. Here, Wallman's complaint was *not* filed within four years of her acquiring the subject vehicle.

(1) Statute of limitations

Kia first argues that the fifth cause of action is time-barred because the statute of limitations began running when Wallman acquired the vehicle. (Memorandum at p. 9:3-15.) The limitations period for this claim is three years under Code of Civil Procedure section 338, subdivision (d). Under that statute, a claim for fraud accrues on the date of "discovery, by the aggrieved party, of the facts constituting the fraud." (Code Civ. Proc., § 338, subd. (d); *Britton v. Girardi* (2015) 235 Cal.App.4th 721, 734.) The facts constituting the fraud here are the sale of the subject vehicle to Wallman in November 2016 without disclosure of the engine defect allegedly known to Kia.

"'Although the statute does not expressly provide that the claim will accrue based upon either actual or inquiry notice of the claimant, California courts have long construed it in such a fashion.' As our Supreme Court has long held, under Code of Civil Procedure section 338, subdivision (d), a 'plaintiff must affirmatively excuse his [or her] failure to discover the fraud [or mistake] within three years after it took place, by establishing facts showing that he [or she] was not negligent in failing to make the discovery sooner and that he [or she] had no actual or presumptive knowledge of facts sufficient to put him [or her] on inquiry.'" (*Krolikowski v. San Diego City Employees' Retirement System* (2018) 24 Cal.App.5th 537, 561-562, internal citations omitted.)

Here, Wallman's opposition argues that discovery of the fraud is a question of fact and that the complaint sufficiently alleges facts describing a later discovery. For example, the opposition points to the complaint's allegations that Wallman "discovered" Kia's "wrongful conduct . . . shortly before filing this Complaint." (Complaint at ¶¶ 69 and 71.) These paragraphs are incorporated by reference into the fifth cause of action. The court finds that these paragraphs are pure boilerplate—they fail to say anything specific about the circumstances of Wallman's discovery of fraud. They could easily have been lifted from complaints filed in any number of Song-Beverly cases without changing a single word—indeed, paragraphs 69 and 71 themselves are identical to each other in their generic phrasing. They are redundant. The court concludes that these allegations regarding delayed discovery and tolling are factual conclusions rather than factual statements and are not to be accepted as true on demurrer. (See *Mills* and *Fox*, *supra*.) "[O]nce properly pleaded, belated discovery is question of fact." (*Bastian v. County of San Luis Obispo* (1988) 199 Cal.App.3d 520, 527.) In its present form, the complaint does not come close to pleading delayed discovery properly and therefore does not "affirmatively excuse" Wallman's failure to discover the alleged fraud within three years.

The court SUSTAINS Kia's demurrer to the fifth cause of action WITH 10 DAYS' LEAVE TO AMEND, based on the statute of limitations.

(2) Economic Loss Rule

Kia also argues that the fifth cause of action is barred by the economic loss rule. This is incorrect. While the demurrer to the fifth cause of action has been sustained on statute of limitations grounds, the court will briefly address the economic loss rule.

California permits recovery of tort damages in certain types of contract cases where the duty giving rise to tort liability "is either completely independent of the contract or arises from

conduct which is both intentional and intended to harm," such as where the contract was fraudulently induced. (See *Erlich v. Menezes* (1999) 21 Cal.4th 543, 552 ("*Erlich*").) Kia asserts that the only exception to the rule is fraud claims based on *affirmative* misrepresentations, citing *Robinson Helicopter Co. v. Dana Corp.* (2004) 34 Cal.4th 979, 988 ("*Robinson*"). (See Memorandum at pp. 13:20-16:11.) This lengthy argument mischaracterizes the *Robinson* decision, which simply carved out *an* exception to the economic loss rule and did not purport to limit the circumstances in which tort damages (economic or otherwise) could be available in contract cases. As already set out in *Erlich*, those circumstances included fraudulent inducement of contract. (See *Erlich*, *supra*, 21 Cal.4th at 552; *Robinson*, *supra*, at pp. 989-990 [citing *Erlich* for the proposition that tort damages for fraudulent inducement of contract are not barred by the economic loss rule]; see also *Harris v. Atlantic Richfield Co.* (1993) 14 Cal.App.4th 70, 78 ["when one party commits a fraud during the contract formation or performance, the injured party may recover in contract and tort"].)

In addition to acknowledging that fraudulent inducement of contract had already been excepted from the economic loss rule, *Robinson* expressly did not address whether, in situations other than fraudulent inducement of contract, fraudulent conduct based on omissions or concealment would be exempt from the economic loss rule. (See *Robinson*, *supra*, 34 Cal.4th at p. 991 ["Because Dana's affirmative intentional misrepresentations of fact (i.e., the issuance of the false certificates of conformance) are dispositive fraudulent conduct related to the performance of the contract, we need not address the issue of whether Dana's intentional concealment constitutes an independent tort."] & pp. 1000-1001 (dis. opn. of Werdegar, J.) ["The majority disavows any views on application of the economic loss rule to fraudulent concealment, leaving the issue to the Court of Appeal on remand. [Citation] On remand, the Court of Appeal will have a choice between applying the economic loss rule to bar recovery, thereby setting up a distinction between deceit by misrepresentation on the one hand and deceit by nondisclosure on the other, or holding that nondisclosure can also be tortious. The issue ultimately will have to be decided, in this or a future case."].) Kia's interpretation of *Robinson* runs afoul of the general rule that "cases are not authority for propositions not considered." (*People v. Ault* (2004) 33 Cal.4th 1250, 1268 fn. 10; see also *Styne v. Stevens* (2001) 26 Cal.4th 42, 57 [an opinion is not authority for a point not raised, considered, or resolved therein].)

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

Numerous California courts have recognized this aspect of the *Robinson* decision. (See *County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 328-329 ("*County of Santa Clara*") ["The first part of the *Robinson* opinion was concerned with whether Dana's wrongful conduct constituted tortious conduct, not whether the economic loss rule applied to it. It was only *after* the court held that Dana's conduct was a tort independent of Dana's breach of

contract that the court addressed the application of the economic loss rule. The analysis that followed suggested that fraud *itself* is immune from application of the economic loss rule because fraud is particularly blameworthy and therefore unlike both contract causes of action *and* products liability causes of action."], internal citation omitted, emphasis in original.) While *County of Santa Clara* involved affirmative misrepresentations, it focused, like several other California courts, on whether the fraudulent activity was intentional or negligent rather than the form that the fraudulent activity took (*i.e.*, misrepresentations versus concealment).

The parties note that the California Supreme Court has certified the question presented by the U.S. Court of Appeals for the Ninth Circuit as to whether fraudulent concealment claims are exempt from the economic loss rule. (See *Rattagan v. Uber Technologies, Inc.* (9th Cir. 2021) 19 F.4th 1188, 1193.) This case is still pending in the Supreme Court, and there is no indication as to what (or when) the final ruling may be. Until such time as the high court changes the longstanding principles set forth above in California law, however, this court must apply those principles and hold that the economic loss rule does not bar the recovery of tort damages (economic or otherwise) for fraudulent inducement of contract, regardless of whether that inducement was through deliberate concealment/omission or affirmative misrepresentation.

(3) Insufficient Specificity

Given that the court has sustained the demurrer to the fifth cause of action on the basis of the statute of limitations, it is not necessary to address in detail Kia's additional argument that the cause of action contains insufficient specificity, at least at this time. Nevertheless, the court notes (for the parties' future reference) that several of the points raised by Kia are unpersuasive.

First, it is true that, as a general rule, each element in a fraud cause of action must be pleaded with specificity. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645; *Cadlo v. Owens-Illinois, Inc.* (2004) 125 Cal.App.4th 513, 519.) This specific pleading requirement is significantly relaxed in the case of fraud by concealment or omission, however, because "[h]ow does one show 'how' and 'by what means' something didn't happen, or 'when' it never happened, or 'where' it never happened?" (*Alfaro v. Community Housing Improvement System & Planning Ass'n., Inc*. (2009) 171 Cal.App.4th 1356, 1384.) Additionally, one of the purposes of the specificity requirement is to provide "notice to the defendant, to furnish the defendant with certain definite charges which can be intelligently met." (*Committee, supra*, 35 Cal.3d at p. 216, internal quotations omitted.) Therefore, when "it appears from the nature of the allegations that the defendant must necessarily possess full information concerning the facts of the controversy, even under strict rules of common law pleading, one of the canons [is] that less particularity is required when the facts lie more in the knowledge of the opposite party . . . ." (*Id.*, at p. 217; see also *Bushell v. JPMorgan Chase Bank, N.A.* (2013) 220 Cal.App.4th 915, 931 ["plaintiffs did not have to specify the . . . personnel who prepared these documents because that information is uniquely within . . . [defendant's] knowledge"].)

Here, the complaint alleges a direct contractual relationship between the parties (the warranty contract). The complaint alleges a buyer-seller relationship in which Kia had exclusive knowledge of material facts not known to Wallman (the engine defect), which it concealed/omitted while making other representations that did not disclose the engine defect.

The complaint also alleges that Wallman interacted with sales representatives and considered Kia's advertisements or other marketing materials "prior to purchasing" the subject vehicle and would not have done so if Kia had revealed the engine defect. (Complaint at ¶ 58.)

Contrary to what Kia argues, a defendant's knowledge and intent to deceive are facts that may be generally pled in support of a fraud claim. (See 5 Witkin, *Cal. Procedure* (5th Ed., 2019) Pleading §§726, 728 ["Intent, like knowledge, is a fact. Hence, the averment that the representation was made with the intent to deceive the plaintiff, or any other general allegation with similar purport, is sufficient."])

Finally, Kia's argument that a direct relationship between itself and Wallman is required to establish a duty to disclose in support of the fraud claim, citing *Bigler*, *supra*, is unpersuasive. (See Memorandum at p. 19:16-23.) *Bigler* did not involve a pleading challenge, but rather an appeal of a jury verdict, and it did not say anything about pleading requirements. The complaint's allegations regarding Wallman's interactions with sales representatives and reliance on written marketing materials from Kia are to be accepted as true on demurrer, as is the allegation that Wallman would not have purchased the subject vehicle had she known of the engine defect. Wallman's ability to provide these allegations are irrelevant on demurrer. These allegations contrast significantly with the situation in *Bigler*, where the Court of Appeal found that the manufacturer of a medical device "did not transact with [plaintiff] or her parents in any way. Plaintiff obtained her Polar Care device from Oasis, based on a prescription written by Chao, all without [defendant's] involvement. The evidence does not show that [defendant] knew—prior to this lawsuit—that [plaintiff] was a potential user of the Polar Care device, that she was prescribed the Polar Care device, or that she used the Polar Care device. The evidence also does not show that [defendant] directly advertised its products to consumers such as [plaintiff] or that it derived any monetary benefit directly from [plaintiff's] individual rental of the Polar Care device." (*Bigler*, *supra*, 7 Cal.App.5th at p. 314.)

III. MOTION TO STRIKE

A. General Standards

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

A motion to strike may be brought against a portion of a cause of action that is purportedly defective—*e.g.*, because it seeks an improper remedy. (See *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680.) Nevertheless, as courts have observed, "we have no intention of creating a procedural 'line item veto' for the civil defendant." (*Id*. at p. 1683.)

B. Discussion

Kia seeks to strike the following portions of the complaint: paragraphs 37 and 38 (part of the complaint's general allegations); paragraph 90 (part of the first cause of action); paragraph 98 (part of the second cause of action); paragraph 101 (part of the third cause of action); and paragraph 110 (part of the fifth cause of action). Kia also seeks to strike portions of the complaint's prayer that request a civil penalty pursuant to Civil Code section 1794(c) or (e), punitive damages and prejudgment interest. (See August 24, 2023 Notice of Motion and Motion at pp. 2:2-3:22.)

Kia lists three bases for striking these portions of the complaint: (1) that Wallman's complaint "does not state facts sufficient to constitute a cause of action for fraud by omission"; (2) that the "prayer for punitive damages lacks required specificity"; and (3) that it "does not meet the pleading standard for punitive damages." (See Notice of Motion at p. 1:23-28.)

A failure to state sufficient facts is not a basis for a motion to strike under Code of Civil Procedure section 436. There is also no requirement that a complaint's *prayer* be pled with specificity, regardless of the remedy being requested and so this is not a basis for a motion to strike. That leaves only Kia's claim that Wallman's complaint "does not meet the pleading standard for punitive damages" as a basis for the motion.

The motion to strike paragraphs 90, 98, 101, and 110 is DENIED as MOOT in light of the court's ruling sustaining the demurrer to first, second, third, and fifth causes of action with leave to amend. The motion to strike portions of the prayer is also DENIED as MOOT for the same reason. Even if it were not moot, the motion to strike portions of the prayer because they lack specificity would be denied, as specific pleading in a prayer is not required. A request for punitive damages in a prayer also does not have to be expressly associated with a particular cause of action, as Kia claims, as the pleading is read as a whole.

The motion to strike the general allegations in paragraphs 37 and 38, alleging Kia's knowledge of the claimed engine defect, is DENIED. Kia has failed to demonstrate that these allegations are irrelevant, false, or improper. As noted above, general allegations of a defendant's knowledge and intent to deceive are sufficient to support a fraud cause of action, and in any event, the demurrer to the fifth cause of action has been sustained with leave to amend.

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Calendar Line 4
Case Name: *Gregory Malley v. Bay Area Property Developers, LLC et al.*
Case No.: 19CV351252

I. BACKGROUND

This is an action arising from an alleged breach of an assignment agreement brought by plaintiff Gregory Malley, as successor-in-interest to HJL Development, Inc. ("HJL"), against defendants Bay Area Property Developers ("BAPD"), Lee Newell, and Blake Peters (collectively, "Defendants"). Newell is alleged to be President of the corporate entity that was BAPD's managing member during the relevant time period. Peters is alleged to have been BAPD's vice president during the relevant time period.

The original and still-operative complaint, filed on July 15, 2019, states six causes of action: (1) Fraud (concealment); (2) Fraud (intentional misrepresentation); (3) Fraud (false promise); (4) Breach of Contract (breach of the assignment agreement); (5) Breach of the Covenant of Good Faith and Fair Dealing (alleging that BAPD "unfairly interfered with HJL's right to receive the benefit of the assignment agreement"); and (6) Violation of the Unfair Competition Law.

Defendants filed a joint answer to the complaint on December 6, 2019, denying "each and every" allegation of the complaint.

Currently before the court is a motion for summary adjudication filed by Malley on November 17, 2023.[3] Any timely opposition to this motion was required to be filed by January 18, 2024. (See Code Civ. Proc., § 437c, subd. (b)(2).) Defendants filed a one-page "opposition" on January 23, 2024, which contained no argument or authorities, and which was already five days late. It stated that Defendants were relying on a memorandum of points and authorities, but the court has not received any such memorandum. "A trial court has broad discretion under rule 3.1300(d) of the California Rules of Court to refuse to consider papers served and filed beyond the deadline without a prior court order finding good cause for late submission." (*Bozzi v. Nordstrom, Inc*. (2010) 186 Cal.App.4th 755, 765.) In this case, there was nothing for the court to consider. The court therefore considers this motion to be unopposed.[4]

This matter is set for trial on March 25, 2024.

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[3] The filing of the notice of motion by itself on October 9, 2023 did not constitute the filing of the motion. The motion is deemed filed upon the submission of the required supporting papers, which occurred here on November 16, 2023. This still constitutes sufficient notice for a February1, 2024 hearing date. (See Code Civ. Proc., § 437c, subd. (a)(2); Cal. Rules of Court, rules 3.1112(a); 3.1350(c).)

[4] Code of Civil Procedure section 437c(b)(2) "forbids the filing of any opposition papers less than 14 days prior to the scheduled hearing, and case law has been strict in requiring good cause to be shown before late filed [opposition] papers will be accepted" in a summary judgment proceeding. (*Hobson v. Raychem Corp*. (1999) 73 Cal.App.4th 614, 625, disapproved on other grounds in *Colmenares v. Braemar Country Club, Inc*. (2003) 29 Cal.4th 1019, 1031, fn. 6.) Defendants did not seek prior leave of court to file a late opposition.

II. MALLEY'S MOTION FOR SUMMARY ADJUDICATION

A. General Standards for Summary Judgment or Adjudication

The pleadings limit the issues presented for summary judgment or adjudication, and such a motion may not be granted based on issues not raised by the pleadings. (See *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health Ins.* (2010) 181 Cal.App.4th 60, 73 ["[T]he pleadings determine the scope of relevant issues on a summary judgment motion."].) "The issues to be addressed in a summary adjudication motion are framed by the pleadings." (*County of Los Angeles v. Super. Ct.* (2009) 181 Cal.App.4th 218 226.)[5]

The moving party bears the initial burden of production to make a prima facie showing that there are no triable issues of material fact. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850 (*Aguilar*).) A motion for summary judgment or adjudication shall be granted only if it completely disposes of an entire cause of action, an affirmative defense, a claim for damages, or an "issue of duty." (See Code Civ. Proc., § 437c, subd. (f)(1); *McClasky v. California State Automobile Association* (2010) 189 Cal.App.4th 947, 975 ["If a cause of action is not shown to be barred in its entirety, no order for summary judgment—or adjudication—can be entered."].) Summary adjudication of general "issues" or of facts is not permitted. (See *Raghavan v. The Boeing Company* (2005) 133 Cal.App.4th 1120, 1136 (*Raghavan*).) Code of Civil Procedure section 437c, subdivision (t), makes clear that the only means by which a party may seek summary adjudication of part of a cause of action or of an issue other than an "issue of duty" is by submitting a joint stipulation of the parties to the court, specifying the issue(s) to be adjudicated, which the court must then approve before the motion can be filed.

The moving party's declarations and evidence will be strictly construed in determining whether they negate or disprove an essential element of a plaintiff's claim "in order to resolve any evidentiary doubts or ambiguities in plaintiff's (or opposing party's) favor." (See *Atkins v. St. Cecilia Catholic School* (2023) 90 Cal.App.5th 1328, 1344-1345 (*Atkins*), citing *Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 64, parentheses added.) While the same standards of admissibility govern both, the opposition declarations are liberally construed while the moving party's evidence is strictly scrutinized. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) The evidence must be liberally construed in support of the opposing party, resolving any doubts in favor of that party. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.

Neither party can rely on its own pleadings (even if verified) as evidence to support or oppose a motion for summary judgment or summary adjudication. (See *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 720, fn. 7; *Roman v. BRE Properties, Inc*. (2015) 237 Cal.App.4th 1040, 1054; *California Public Records Research, Inc. v. County of Yolo* (2016) 4 Cal.App.5th 150, 182 (*Public Records Research*).)

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[5] This basic principle applies directly to the present motion because the complaint does not contain any alter ego allegations regarding any of the defendants, and yet the motion seeks a "summary adjudication" as to "Plaintiff's alter ego claims against Defendants Newell and Peters, who are both officers of Defendant BAPD." (Memorandum at p. 9:17-18.)

Where a plaintiff has moved for summary judgment or adjudication, he or she has the burden of showing that there is no defense to a cause of action. (Code Civ. Proc., § 437c, subd. (a).) That burden can be met if the plaintiff has proved each element of the cause of action entitling him or her to judgment on that cause of action. If the plaintiff meets this burden, it is up to the defendant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. (Code Civ. Proc., § 437c, subd. (p)(1); *Professional Collection Consultants v. Lauron* (2017) 8 Cal.App.5th 958, 965.) "A plaintiff moving for summary adjudication meets its burden if it proves each element of the cause of action." (*Quidel Corp. v. Superior Court* (2020) 57 Cal.App.5th 155, 163.) "If the plaintiff meets its burden, the defendant must set forth specific facts showing a triable issue of material facts exist[s]." (*Id*. at p. 164.)

B. Merits of the Motion

Malley states that he seeks summary adjudication as to the fourth cause of action for breach of contract "against Defendants [BAPD], Lee Newell and Blake Peters . . . for there is no triable issue of material fact and Defendants have no defense, and there is no triable issue of fact regarding the alter ego allegations relating to this claim." He also seeks summary adjudication as to the fifth cause of action for breach of the implied covenant of good faith and fair dealing "against Defendants; for there is no triable issue of material fact and Defendants have no defense, and there is no triable issue of fact regarding the alter ego allegations relating to this claim." (October 9, 2023 Notice of Motion at pp. 1:27-2:6.)[6]

As an initial matter, the court DENIES summary adjudication of any "alter ego allegations" relating to the fourth and fifth causes of action. As noted above, Malley is bound by his complaint on a summary adjudication motion, and there are no alter ego allegations in the fifth or sixth causes of action, or anywhere else in the complaint. To pursue an alter ego theory here, Malley would have had to amend his pleading. Even if the complaint actually included alter ego allegations, summary adjudication of such a general issue or fact would not be permitted. (See *Raghavan*, *supra*, 133 Cal.App.4th at p. 1136.)

The complaint's fourth cause of action for breach of contract alleges that BAPD and Malley's predecessor, HJL, entered into a written "Assignment Agreement" in July 2015, that HJL performed all of its duties under the Assignment Agreement, that all conditions for BAPD's performance were met, and that BAPD breached the Assignment Agreement by not assigning to HJL the entirety of its rights under a property purchase agreement ("PSA") and by removing all contingencies in connection with this PSA. (See Complaint at ¶¶ 9, 47-50.)

The complaint's fifth cause of action for breach of the implied covenant of good faith and fair dealing alleges that BAPD owed HJL a duty "by virtue of entering into the Assignment Agreement," that HJL performed all of its duties under the Assignment Agreement, that all conditions for BAPD's performance had occurred, and that "BAPD unfairly interfered with HJL's right to receive the benefits of the Assignment Agreement." (See Complaint at ¶¶ 53-57.)

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[6] The notice of motion mistakenly refers to these two causes of action as the fifth and sixth.

The fourth and fifth causes of action are both: (1) based solely on the Assignment Agreement, and (2) based solely on alleged breaches by BAPD. There are no allegations anywhere in the complaint that *Newell* or *Peters* were parties to the Assignment Agreement or that they themselves breached any term of the Assignment Agreement. The only evidence of the Assignment Agreement is a document submitted as Exhibit 3 to Malley's declaration. This document, which is not signed by anyone on behalf of Malley's predecessor, HJL, confirms that the only parties to the purported Assignment Agreement were BAPD and HJL. Peters did not sign the document. Newell signed the document only in his capacity as President of "New Cities Land Company, Inc.," identified as BAPD's managing member. The document does not otherwise refer to Newell and it does not refer to Peters at all.

The court DENIES Malley's motion for summary adjudication of the fourth and fifth causes of action as against both Peters and Newell for failure to meet the initial burden. Plaintiff is bound by his complaint, and the complaint does not allege that Peters or Newell were parties to the Assignment Agreement or breached any of its terms. Non-parties to a contract cannot be liable for a breach of its terms or for a breach of the implied covenant of good faith and fair dealing implied into that contract.

The court also DENIES the motion for summary adjudication of the fourth and fifth causes of action as against BAPD for failure to make the initial showing of the absence of any triable issue of material fact.

In order to prove a breach of contract, a plaintiff must establish: (1) the existence of a contract; (2) plaintiff's performance or excuse for nonperformance; (3) a defendant's breach; and (4) damage to Plaintiff resulting from that breach. (See *Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 228, citing *Careau & Co. v. Security Pacific Business Credit, Inc*. (1990) 222 Cal.App.3d 1371, 1388.)

Malley cannot rely on the complaint's allegations to establish that BAPD and HJL entered into the "Assignment Agreement." Again, the allegations in a complaint are not "evidence." (See *Public Records Research, supra*, 4 Cal.App.5th at p. 182.) Defendants' answer denies all material allegations of the complaint, which includes the allegations regarding the Assignment Agreement. The only evidence cited by Malley to establish the execution and validity of the Assignment Agreement is Exhibit 3 to Malley's declaration. (See Plaintiff's Undisputed Material Fact No. 8, citing Paragraph 6 of the Malley declaration, which refers to Exhibit 3; see also Plaintiff's Memorandum at p. 5:18-19.) As noted above, the document submitted as Exhibit 3 is not signed by anyone on behalf of HJL. It is signed only by BAPD. Moreover, Malley does not explain how he has personal knowledge of an agreement to which he was not a party, for an entity of which he is only the "successor-in-interest." He states that his wife was the President of HJL, and that he "communicated" with BAPD on behalf of HJL. These statements are ambiguous and incomplete; they are insufficient to establish a foundation for the Assignment Agreement that he purports to authenticate. This principle applies even more starkly with respect to the alleged PSA between BAPD and HJL. (Malley Decl., Exhibit 1.) How does Malley have sufficient personal knowledge to authenticate this exhibit? The moving papers, including his declaration, do not answer this question.

The court is required to construe the moving party's evidence on summary adjudication strictly, and to resolve any evidentiary doubts or ambiguities in the opposing party's favor.

(See *Atkins, supra*, 90 Cal.App.5th at pp. 1344-1345.) Malley's evidence does not establish that the Assignment Agreement was in fact executed (or finalized) as alleged, nor has he authenticated the purported PSA. Accordingly, he has not met his initial burden to establish all elements of the fourth cause of action for breach of contract. Because the implied covenant of good faith and fair dealing only comes into existence when the express contract is formed, Malley has also failed to meet his initial burden to establish all elements of the fifth cause of action. Both causes of action depend upon the validity of the Assignment Agreement. The implied covenant of good faith and fair dealing is limited to assuring compliance with the express terms of the contract actually made (if made) and cannot create obligations not contemplated by the purported contract. (See *Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 206.)

Even more critically, Malley's motion is dependent on the notion that BAPD breached the Assignment Agreement because BAPD did not have the authority to assign its rights in the PSA to HJL, but the only evidence he submits to support this idea is the bare language of the PSA itself, which states:

> **30. Assignment**: Buyer shall not assign all or any part of Buyer's interest in the Agreement without first having obtained the written consent of Seller. Such consent shall not be unreasonably withheld unless otherwise agreed in writing. Any total or partial assignment shall not relieve Buyer of Buyer's obligations pursuant to this Agreement unless otherwise agreed in writing by Seller (C.A.R. Form AOAA).

(Malley Decl., ¶ 4, Exhibit 1.) Malley submits no evidence that BAPD actually failed to obtain the Seller's consent pursuant to this provision. In addition, Malley submits no evidence that because of BAPD's alleged failure to obtain the Seller's consent, "escrow did not close on the Fallon property," and he "lost the entirety of the $250,000 deposit." These quotations come straight from Malley's Memorandum of Points and Authorities, but without a citation to any evidence. (Memorandum at p. 7:13-17.) The only evidence Malley attaches to his declaration to support the claim that the transaction on the "Fallon property" did not go through is a "Cancellation of Contract" that was allegedly signed by the Seller (again, no foundation has been laid for this document) on October 20, 2015, more than three months after the date of the Assignment Agreement. Nowhere on this document does it indicate that the cancellation was the result of a failure of BAPD to assign its rights to HJC. (Malley Decl., ¶ 12, Exhibit 4.) Thus, the only two bases for Malley's claim that BAPD failed to assign its rights in the PSA to HJC—and that this is the reason Malley lost his deposit—are: (1) Malley's unsupported hearsay allegations (Malley Decl., ¶¶ 11-12), and (2) attorney argument in the opening brief. These are plainly insufficient.

Because Malley's motion does not meet his initial burden of showing the absence of a triable issue of fact, the burden does not shift to Defendants, and so the lack of a timely opposition is irrelevant to the outcome of this motion.

The motion for summary adjudication is DENIED.

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Calendar Lines 6-7
Case Name: *Henry Lippincott v. Arash Hassibi et al.*
Case No.: 22CV393460

Defendants Joinedapp, Inc. and Arash Hassibi noticed two motions for February 1, 2024 in this court: (1) a motion for a new trial under Code of Civil Procedure section 657, and (2) a motion "to vacate" the court's November 28, 2023 order "pursuant to Code of Civil Procedure section 663." (See Notices, filed December 14, 2023.) But they have filed only one of these: the motion to vacate. Accordingly, the court takes OFF CALENDAR any motion for a new trial. The court would have done so in any event, given that this case has not even been to trial yet.

As for the motion "to vacate" the November 28, 2023 order, the court finds that it is a motion for reconsideration in disguise, and the court DENIES it. Under Code of Civil Procedure section 1008, a motion for reconsideration must be supported by a showing of "new or different facts, circumstances, or law." (Code Civ. Proc., § 1008, subds. (a) & (b).) As Lippincott points out, defendants have not made such a showing here. Instead, they largely reargue points that they previously made in opposition to the motion for sanctions. Most glaringly, they request a "do over" on the question of the reasonableness of the attorney's fees and costs previously awarded: *i.e.*, they ask that the court "order a rehearing to determine the reasonable amount conditioned on Plaintiff submitting supporting evidence demonstrating the reasonableness of the hourly rate, time spend, and nature of work performed . . . ." (Memorandum at pp. 12:27-13:2.) This is completely improper under section 1008.

The closest that defendants come to identifying anything "new" in the present motion is their argument that only defendant Joinedapp, Inc. was the "drafting party" of the parties' arbitration clause, not defendant Hassibi, and so the court's November 28, 2023 order erroneously lumps them together when it orders that "Defendants" pay sanctions. This is an argument that defendants could easily have raised in their original opposition to the motion for sanctions but didn't, and they provide no explanation for having failed to do so. Accordingly, this, too, is an inadequate basis for reconsideration. (See *Even Zohar Construction v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 839 ["Courts have construed section 1008 to require a party filing an application for reconsideration or a renewed application to show diligence with a satisfactory explanation for not having presented the new or different information earlier."].) Moreover, the court is persuaded by Lippincott's rebuttal that Code of Civil Procedure section 1280, subdivision (e), defines "drafting party" as including third-party beneficiaries of the arbitration agreement on the same side as the corporate party. In this case, the parties' arbitration agreements expressly provided that "any director, manager, partner, officer, employee, shareholder, member or agent of the Company" would be such a third-party beneficiary. (Opposition at p. 5:22-27.) That included Hassibi.

Finally, the court notes that defendants' effort to evade section 1008 and instead to apply section 663 appears to be based on the incorrect notion that the court has entered a final judgment in this case. Section 663 applies only to motions to vacate *judgments*, not interlocutory *orders*. The court's November 28, 2023 order awarding sanctions was the latter. Defendants contend that the court "improperly made findings on the merits . . . by summarily adjudicating a cause of action in Plaintiff's favor." (Memorandum at p. 1:9-11.) This is simply wrong. The matter is still ongoing; the court's November 28, 2023 order held that discovery must still be provided in this case; and no trial date has been set. The court has not

made any rulings on the merits of the case as a whole, and indeed, the court's November 28, 2023 order expressly followed the admonition set forth in Code of Civil Procedure section 1281.98, subdivision (c)(1), that any award of fees and costs "shall be without regard to any findings on the merits." (November 28, 2023 Order at p. 7:18-19.)

Even if Lippincott had the option, under section 1281.98, subdivision (b)(1), of bringing a motion for monetary sanctions *or* a separate action, he elected to file a motion in this case, and the court ruled on it. The fact that the request for sanctions could have been filed as a separate action, or the fact that Lippincott has asserted a cause of action that seeks similar sanctions, does not change the interlocutory nature of the November 28, 2023 order.[7]

The motion to vacate is DENIED.

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[7] In their reply, defendants misread the secondary authorities (*e.g.*, Weil & Brown, *California Practice Guide: Civil Procedures Before Trial*) in arguing that because monetary sanctions are ultimately enforceable as part of a money judgment, that means that any interlocutory sanctions order is necessarily a "final" judgment. (Reply at p. 1:10-21.) This argument is unfounded and illogical. Just because a sanctions order may *ultimately* be enforced as part of a final judgment does not mean that such a judgment has now been issued—any party seeking to enforce monetary sanctions as part of a judgment must still wait for the judgment to issue. That has not happened yet.

Calendar Line 9
Case Name: *William Dresser v. Michelle Gomez*
Case No.: 22CV405057

This is a motion to vacate the court's September 7, 2023 order confirming an arbitration award, as well as the court's September 8, 2023 entry of judgment. Respondent Michelle Gomez filed this motion on September 25, 2023, twelve days after petitioner William Dresser served notice of entry of the order and judgment, on September 13, 2023. Assuming that either Code of Civil Procedure section 1013 or Code of Civil Procedure section 1010.6 operated to extend Gomez's deadline to seek reconsideration of the order and judgment by at least two days, the court will construe this motion to vacate as a timely motion for reconsideration under Code of Civil Procedure section 1008.

For some inexplicable reason, Dresser has chosen not to respond to the motion presently before the court, even though he is expressly aware of it, and instead has responded only to an earlier petition to vacate the arbitration award that Gomez filed on June 16, 2023. (See Opposition at p. 4:1-5.) The court's September 7, 2023 order already considered and addressed that June 16, 2023 filing, and so Dresser's decision to respond to it now is useless to the court.

Nevertheless, despite the lack of a substantive opposition to the motion, the court denies it. Gomez fails to set forth any valid basis for reconsideration; she fails to set forth any "new or different facts, circumstances, or law." (Code Civ. Proc., § 1008, subds. (a) & (b).) Instead, she attempts to reargue the merits of the arbitration award and also attempts to reargue the points that she previously made in her previous filings—her June 16, 2023 petition to vacate and her July 28, 2023 motion to stay the proceedings. None of this is a basis for reconsideration.

To the extent that Gomez argues that her non-appearance at the September 7, 2023 hearing was the result of lack of notice, the court rejects this argument. (Motion at p. 8:15-18.) First, the hearing was originally set for August 24, 2023, but the court continued it to September 7, 2023 *at Gomez's request*. Therefore, her claim of lack of notice is not credible. Second, her non-appearance is not a basis for reconsideration: it is not "new or different facts, circumstances, or law." Indeed, the court does not see how her attendance at the hearing would have changed anything, given the multitude of written arguments that she has now filed (on June 16, 2023, July 28, 2023, and September 25, 2023), all of which the court has considered, and none of which entitle her to vacate the arbitration award.

The motion is DENIED.

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