SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 6
Honorable Evette D. Pennypacker, Presiding

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

DATE: March 12, 2024 TIME: 9:00 A.M.

RECORDING COURT PROCEEDINGS IS PROHIBITED

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

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

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

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

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

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

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

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	21CV387570	Aegis Security Insurance Company vs Friendly Wholesalers of California dba SeeMoCars et al	Parties are ordered to appear, and Defendant/Cross-Complainant Azzam Abdo is ordered to show cause why he should not be sanctioned for his failure to appear at the hearing on his motion for reconsideration.
2	21CV387570	Aegis Security Insurance Company vs Friendly Wholesalers of California dba SeeMoCars et al.	Cross-Defendants' Demurrers are SUSTAINED and Motions to Strike are GRANTED WITHOUT LEAVE TO AMEND. Please scroll down to lines 2-4, & 16 for full tentative ruling. Court to prepare formal order. Moving parties to prepare form of judgment for Court's review and signature.
3	21CV387570	Aegis Security Insurance Company vs Friendly Wholesalers of California dba SeeMoCars et al	See line 2, above.
4	21CV387570	Aegis Security Insurance Company vs Friendly Wholesalers of California dba SeeMoCars et al	See line 2, above.
5	23CV425328	Wilmington Savings Fund Society, FSB vs PARTHESHKUMAR BRAHMBHATT	Defendant's Motion to Quash is DENIED. Please scroll down to line 5 for full tentative ruling. Court to prepare formal order.
6	2013-1-CV-247406	P. Kleidman Vs N. Shah, Et Al	Cross-complainants' motions for summary judgment are GRANTED. Please scroll down to lines 6-11 for full tentative ruling. Court to prepare formal order. Moving parties to prepare form of judgment as indicated.
7	2013-1-CV-247406	P. Kleidman Vs N. Shah, Et Al	See line 6, above.
8	2013-1-CV-247406	P. Kleidman Vs N. Shah, Et Al	See line 6, above.
9	2013-1-CV-247406	P. Kleidman Vs N. Shah, Et Al	See line 6, above.
10	2013-1-CV-247406	P. Kleidman Vs N. Shah, Et Al	See line 6, above.
11	2013-1-CV-247406	P. Kleidman Vs N. Shah, Et Al	See line 6, above.
12	23CV422367	DONALD BAILEY vs Ford Motor Company et al	Plaintiff's Motion to Compel Further Responses to Request for Production is DENIED. Please scroll down to line 12 for full tentative ruling. Court to prepare formal order.

13	23CV422598	JPMorgan Chase Bank, N.A. vs Karla Iniguez	JPMorgan Chase Bank, N.A. Motion for Order that Matters in Request for Admission of Truth of Facts be Admitted is GRANTED. A notice of motion with this hearing date was served on Defendant by regular mail on January 29, 2024. Defendant failed to file an opposition. "[T]he failure to file an opposition creates an inference that the motion [] is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) There is also good cause to grant this motion. Plaintiff served requests for admission on Defendant by mail on November 14, 2023. To date, Defendant served no responses. A party served with Requests for Admission must serve a response within 30 days. (Code of Civ. Pro. §2033.250.) When a party fails to respond—even in the face of a motion to have the matters in the Requests for Admission deemed admitted—as Defendant has done here, the Court must order the Requests for Admission deemed admitted. (Code of Civ. Pro. §2033.280(c); *St. Mary v. Superior Court* (2014) 223 Cal.App.4th 762, 775-776.) Such a "deemed admitted" order establishes that the nonresponding party has responded to the requests for admission by admitting the truth of the matters contained in the requests. (*Id.*) Accordingly, Plaintiff's motion is granted, and the matters set forth in Plaintiff's requests for admission are deemed admitted. Court to prepare formal order.
14	19CV355396	Jane Doe vs Keith Crawford et al	Loma Kay Flowers' Motion to Set Aside Order Granting Summary Judgment is DENIED. Please scroll down to line 14 for full tentative ruling. Court to prepare formal order.
15	21CV385340	Ruentien Lu vs The City of Saratoga	Defendant Smart Communication Systems, LLC Motion to Set Aside Default is DENIED. Please scroll down to line 15 for full tentative ruling. Court to prepare formal order.
16	21CV387570	Aegis Security Insurance Company vs Friendly Wholesalers of California dba SeeMoCars et al	Defendant's Motion for Sanctions is GRANTED. Please scroll down to lines 2-4, & 16 for full tentative ruling. Court to prepare formal order.
17	23CV422621	MICHAEL HERTZ vs MARK A. OLIVEREZ et al	Plaintiff's motion for interlocutory judgment for partition and appointment of referee and case management conference is GRANTED. The Court continued this hearing to permit the parties to confer regarding a stipulation; a stipulation will not be forthcoming. The Court considered a further continuance to a date after Defense counsel's motion to withdraw. However, on this record, Plaintiff's motion must be granted. In a partition action, the court must find (1) the plaintiff has a right to partition; (2) determine the ownership interests of the parties; and (3) direct the manner of partition. (Code Civ. Pro. §§872.710, 872.910.) If plaintiff has a right to partition and the ownership interests of the parties are indisputable, the court "shall" appoint a partition referee. (Code Civ. Pro. §872.010.) "A co-owner of property has an absolute right to partition unless barred by a valid waiver." (*Orien v. Lutz* (2017) 16 Cal.app.5th 957; Code Civ. Pro. §872.710(b); *Bacon v. Wahrhaftig* (1950) 97 Cal.App.2d 599, 603; *American Medical International, Inc. v. Feller* (1976) 59 Cal.App.3d 1008, 1013; *Miranda v. Miranda* (1947) 81Cal.App.2d 61, 68.) Defendant does not deny that he owns a 50% interest in the subject property. (See Answer, ¶4.) Plaintiff's verified complaint attaches documentation making clear Plaintiff owns the other 50% of the property. There is no allegation regarding waiver. Accordingly, the Court must grant partition. Court will prepare a formal order with this ruling. Plaintiff is ordered to submit a form of interlocutory judgment and order appointing a partition referee.

18	23CV427524	Swift Financial, LLC as Servicing Agent for WebBank vs Venkatapathi Rayapati et al	Plaintiff Swift Financial, LLC's Petition to Confirm Arbitration Award is presently before the Court. The Court is unable to locate a proof of service demonstrating that Defendant was served with either the petition or the notice of motion to confirm the arbitration award. As set forth in the petition, Defendant must be served with the petition; Defendant must also be served with the notice of motion to confirm the award. Accordingly, this motion is off calendar. Plaintiff can notice this motion for hearing once valid service of the petition has been completed. A status conference is ordered for July 11, 2024 at 10 a.m. in Department 6.
19	24CV429353	Midland Credit Management Inc. vs Alexander Garcia	Defendant Alexander Garcia's motion to compel arbitration is GRANTED. A notice of motion with this hearing date was served on Plaintiff by regular mail on February 1, 2024. Plaintiff failed to file an opposition. "[T]he failure to file an opposition creates an inference that the motion [] is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) Defendant also provides a copy of the parties' credit agreement, which includes an arbitration provision. This is prima facie evidence of the existence of an arbitration agreement, which evidence Plaintiff fails to refute. (*Condee v. Longwood Management Corp.* (2001) 88 Cal. App. 4th 215, 218; *Gamboa v. Northeast Community Clinic* (2021) 72 Cal. App. 5th 158, 165 (once moving party produces prima facie evidence of a written arbitration agreement by attaching the agreement or summarizing the terms in a motion to compel, the opposing party bears the burden of producing evidence to challenge the authenticity of the agreement.); California Rules of Court, Rule 371.) On this record, the Court is required to send this matter to arbitration. (Code Civ. Pro. § 1281.2 ("the court shall order a matter to arbitration if it determines that there is an agreement to arbitrate and (1) the agreement has not been waived or (2) the agreement has not been revoked."); *Cinel v. Barna* (2012) 206 Cal.App.4th 1383, 1389.) Court to prepare formal order.
20	22CV393546	San Joo et al vs Kristen White	Noah Joo's Minor's Compromise Claim is APPROVED. Court to use form of order on file.
21	22CV393546	San Joo et al vs Kristen White	Evan Joo's Minor's Compromise Claim is APPROVED. Court to use form of order on file.

Calendar Lines 2-4, & 16
Case Name: *Aegis Security Insurance Co. v. Friendly Wholesalers of California dba SeeMoCars, et al.*
Case No.: 21CV387570

Before the Court is cross-defendant United Auto Credit Corporation's ("UACC") demurrer to cross-complainant Azzam Abdo's third amended cross-complaint (TACC); (2) cross-defendants Aegis Security Insurance Company's ("Aegis"), Jomax LLC dba Jomax Recovery Services' ("Jomax"), and Martin Ginsberg's (Ginsberg) (collectively, the "Jomax defendants") motion to strike the TACC; (3) defendant Hudson Insurance Company's ("Hudson") motion to strike the TACC; and (4) Hudson's motion for sanctions against Abdo. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This is an action for fraud and unfair business practices. According to the TACC, cross-defendant Jalal Shreim ("Jalal") was the sole shareholder, president, and CEO of Friendly Wholesalers of California ("FWC"), formerly a successful rug business in San Jose.[1] (TACC, ¶¶ 2, 4.) Cross-defendant Mohamad Shreim ("Mohamad), is Jalal's son and he was the sole proprietor of SeeMoCars, a used car dealership. (TACC, ¶ 3.) SeeMoCars was evicted from its location and Mohamad asked his father for help. (*Ibid*.) As a result, Jalal and FWC acquired SeeMoCars, which operated under FWC's DMV permit. (TACC, ¶ 14.) Jalal and FWC borrowed money from Abdo but once they realized they could not pay the money back, they asked Abdo if they could convert the loans into investments. (TACC, ¶ 15.) The only term for the conversion was that Abdo would be the president of SeeMoCars, and Jalal would continue to be the president of the rug business. (TACC, ¶ 16.)

In mid-August 2015, Abdo and Jalal had a disagreement about Mohamad's role at SeeMoCars, which resulted in Abdo's resignation as well as his demand to have his name removed from all FWC documents and the return of all the money. (TACC, ¶ 18.) Jalal accepted Abdo's resignation and agreed to pay the money back, however, he subsequently breached the agreement and did not return Abdo's money or remove his name from FWC documents. (*Ibid*.)

[1] As some individuals share surnames, the Court will refer to them by their first names for purposes of clarity. No disrespect is intended. (*Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1136, fn. 1.)

On June 1, 2015, Hudson's first surety bond became effective and on October 7, 2016, it was cancelled. (TACC, ¶ 6.) On October 11, 2016, Hudson issued another surety bond, which Abdo signed for on Jalal's behalf, through cross-defendant Arrow Pacific Insurance Services ("Arrow"), which was cancelled on November 11, 2016, upon discovery its first surety bond for FWC was cancelled days earlier. (TACC, ¶¶ 6, 13, 57.) Hudson never billed Abdo or made any claims for either of the surety bonds before June 2, 2022, when it demanded a payment of $120,072 for its surety bonds. (*Ibid*.) On November 21, 2016, Aegis issued a surety bond, which Abdo signed for on Jalal's behalf, to FWC. (TACC, ¶¶ 7, 58.) Aegis never billed Abdo or made any claims against him until August 20, 2021. (*Ibid*.)

On May 1, 2017, two months before the termination of Abdo's relationship with FWC, UACC and FWC entered into an agreement where FWC would only sell vehicles that have marketable titles, complete the necessary forms to perfect a valid and enforceable security interest for UACC, and take all actions and forward signed documents to public officials responsible for issuing the certificate of title or registration within 30 days from the contract date. (TACC, ¶ 19.) FWC, Mohamad, and Jalal represented that no vehicle would be sold or financed without title. (*Ibid*.)

On July 18, 2017, UACC purchased a retail installment sale contract for Ms. Riley, FWC failed to perfect UACC's first priority security interest in the purchased vehicle, and FWC failed to deliver the title, registration, and license plates for the vehicle, which made it illegal to drive. (TACC, ¶ 20.) In 2019, Ms. Riley sued FWC, Aegis, and UACC. (TACC, ¶ 23.) Aegis reached a settlement with her, but it never tendered any demand or claim to Abdo until this lawsuit was filed. (*Ibid*.)

On August 21, 2021, Aegis filed the underlying complaint against FWC and Abdo for breach of contract and common counts for amount sustained in connection with a Commercial Bond Application and Indemnity Agreement.

On January 24, 2022, Abdo filed his cross-complaint and on July 20, 2022, Abdo filed a first amended cross-complaint ("FACC") alleging: (1) Breach of Implied Contract; (2) Unlawful, Unfair, or Fraudulent Business Practices, Business & Professions Code, § 17200, et seq.; (3) Fraud, Deceit and Concealment; (4) Negligent Misrepresentation; (5) Intentional Misrepresentation; (6) Violation of the

Rosenthal Fair Debt Collection Practices Act, Civil Code, § 1788, et seq.; (7) Elder Abuse; and (8) Interpleader.

On December 21, 2022, the Court issued an order (the "December 21 Order"), which:

(1) Sustained Aegis' demurrer to the second, third, fourth, fifth, and sixth causes of action WITHOUT LEAVE TO AMEND and concluded the seventh cause of action was moot as to Aegis;

(2) Sustained Hudson's demurrer to the second, third, fourth, fifth, seventh, and eighth causes of action with 10 days leave to amend;

(3) Overruled Hudson's demurrer to the sixth cause of action on the ground it failed to state a claim;

(4) Sustained Jomax defendants' demurrer to the second and sixth cause of action with 10 days leave to amend; and

(5) Sustained Ginsberg's demurrer to the eighth cause of action with 10 days leave to amend.

On December 27, 2022, Abdo filed his SACC realleging the same claims. On October 10, 2023, the Court issued an order (the "October 10 Order"), which:

(1) Sustained Aegis' demurrer to the seventh and eighth causes of action WITHOUT LEAVE TO AMEND;

(2) Granted Aegis' motion to strike the second, third, fourth, fifth, and sixth causes of action WITHOUT LEAVE TO AMEND;

(3) Sustained Hudson's demurrer to the second, third, fourth, fifth, sixth, seventh, and eighth causes of action WITHOUT LEAVE TO AMEND; and

(4) Sustained Jomax defendant's demurrer to the second, sixth, and eighth causes of action WITHOUT LEAVE TO AMEND.

On October 13, 2023, the Court issued its order (the "October 13 Order"), which:

(1) Overruled Arrow's demurrer for lack of duty;

(2) Sustained Arrow's demurrer to the second, third, fourth, fifth, and seventh causes of action with 30 days leave to amend;

(3) Sustained Arrow's demurrer to the eighth cause of action WITHOUT LEAVE TO AMEND;

(4) Concluded Arrow's motion to strike was moot; and

(5) Sustained UACC's demurrer to the second, third, fourth, fifth, and seventh causes of action with 30 days leave to amend.

On November 7, 2023, Abdo filed an TACC, asserting: (1) Breach of Implied Contract; (2) Unlawful, Unfair, or Fraudulent Business Practices, Business & Professions Code, § 17200, et seq.; (3) Fraud, Deceit and Concealment; (4) Negligent Misrepresentation; (5) Intentional Misrepresentation; (6) Violation of the Rosenthal Fair Debt Collection Practices Act, Civil Code, § 1788, et seq.; and (7) Financial Elder Abuse.

On January 31, 2024, UACC filed its demurrer. On February 14, 2024, Aegis and Hudson filed their respective motions. On February 28, 2024, Abdo filed a fourth amended cross-complaint ("4ACC"). On February 29, 2024, Abdo filed his opposition to the instant motions.

II. Preliminary Issues

A. Untimely Opposition

Code of Civil Procedure section 1005, subdivision (b), requires all opposing papers to be filed and served at least nine court days before the hearing. Here, the opposition was due on February 28, 2024, however Abdo did not file his opposition until February 29, 2024.

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

There appears to be no prejudice to the cross-defendants, however, Abdo is admonished to comply with court rules and procedures with respect to future filings, as the Court may decline to consider future papers that are not filed and served on time. (See *Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 765 ["[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."].)

B. Improper 4ACC

On February 28, 2024, Abdo filed his 4ACC "pursuant to Code of Civil Procedure [section] 472, (a)."

Code of Civil Procedure section 472, subdivision (a), provides,

> A party may amend its pleading once without leave of the court at any time *before the answer, demurrer, or motion to strike is filed*, or *after a demurrer or motion to strike is filed but before the demurrer or motion to strike* is heard if the amended pleading is filed and served no later than the date for filing an opposition to the demurrer or motion to strike. A party may amend the pleading after the date for filing an opposition to the demurrer or motion to strike, *upon stipulation of the parties*. The time for responding to an amended pleading shall be computed from the date of service of the amended pleading.

(Code Civ. Proc., § 472, subd. (a) [emphasis added].)

In this matter, the pleading has already been amended several times. Abdo did not seek leave of Court to file the 4ACC nor is there a stipulation between the parties for the amended pleading. Abdo also improperly added claims for fraudulent concealment, promise without the intent to perform, breach of fiduciary duty, general negligence, and gross negligence. (See *Patrick v. Alacer Corp.* (2008) 167 Cal.App.4th 995, 1015 [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*] [emphasis added].) Thus, the 4ACC was improperly filed and the TACC is still the controlling pleading.

III. UACC's Demurrer

UACC demurs to the second, third, fourth, fifth, and seventh causes of action on the grounds they are uncertain and they fail to allege sufficient facts to state a claim. (Code Civ. Proc., § 430.10, subd. (e) & (f).)

A. Legal Standard for a Demurrer

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

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

B. Analysis

1. Uncertainty

Uncertainty is a disfavored ground for demurrer; it is typically sustained only where the pleading is so unintelligible and uncertain that the responding party cannot reasonably respond to or recognize the claims alleged against it. (See *Khoury v. Maly's of Cal, Inc.* (1993) 14 Cal.App.4th 612, 616 (*Khoury*).) "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." (*Ibid*.)

"[U]nder our liberal pleading rules, where the complaint contains substantive factual allegations sufficiently apprising defendant of the issues it is being asked to meet, a demurrer for uncertainty should

be overruled or plaintiff given leave to amend. (*Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 139, fn. 2.)

UACC identified uncertainty as a basis for its demurrer for each claim, but it only offers specific arguments as to the second and seventh causes of action. The Court will address the uncertainty arguments as to those claims; UACC's demurrer to the third, fourth, and fifth causes of action on the basis of uncertainty is OVERRULED.

2. Third Cause of Action: Fraud, Deceit, and Concealment

The elements of fraud, which gives rise to the tort of deceit are: (a) a misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage. (*Lazar v. Superior Ct* (1996) 12 Cal.4th 631, 638.)

Although the claim is titled "Fraud, Deceit, and Concealment,", UACC points out the only allegation against it is that it "concealed and failed to disclose that they were selling and financing vehicles that could not be registered with the DMV. (TACC, ¶ 66.)

The elements of fraud based on concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiffs, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiffs, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damages. (*Jones v. ConocoPhillips* (2011) 198 Cal.App.4th 1187, 1198 (*Jones*).)

"To maintain a cause of action for fraud through nondisclosure or concealment of facts, there must be allegations demonstrating that the defendant was under a legal duty to disclose those facts. (*Los Angeles Memorial Coliseum Commission, et al. v. Insomniac, Inc. et al.* (2015) 233 Cal.App.4th 803, 831.) "There are four circumstances in which nondisclosures or concealment may constitute actionable fraud: (1) where 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. (*LiMandri v. Judkins* (1997) 52 CalApp.4th 326, 336, quoting *Heliotis v. Schuman* (1986) 181 Cal.App.3d 646, 651.)

As the Court noted in the October 10 Order, Abdo fails to plead his concealment claim with the specificity to state a cause of action against UACC. (October 13 Order, p. 13.) Abdo was granted leave to amend because he provided certain facts in the opposition to the previous motion that might have supported the claim. However, Abdo provides no such facts regarding UACC in the TACC, thus, Abdo again fails to allege this claim with the requisite specificity. (*Linear Technology Corp. v. Applied Materials, Inc.* (2007) 152 Cal.App.115, 132 [fraud, including concealment, must be pleaded with specificity].)

Abdo's opposition offers no substantive response to the arguments raised in the demurrer or request leave to maned; Abdo simply states that he filed his 4ACC. (*Camsi IV v. Hunter Technology Corp*. (1991) 230 Cal.App.3d 1525, 1542 (*Camsi IV*) ["absent an effective request for leave to amend in specified ways," it is an abuse of discretion to deny leave to amend "only if a potentially effective amendment were both apparent and consistent with the plaintiff's theory of the case"]; *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349 (*Goodman*) ["Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading"], quoting *Cooper v. Leslie Salt Co*. (1969) 70 Cal.2d 627, 636 (*Cooper*); *Hendy v. Losse* (1991) 54 Cal.3d 723, 742 (*Hendy*) ["the burden is on the plaintiff… to demonstrate the manner in which the complaint might be amended"].) Accordingly, UACC's demurrer to the third cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

3. Fourth Cause of Action: Negligent Misrepresentation

"The elements of a negligent misrepresentation are '(1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage.' Negligent misrepresentation does not require knowledge of falsity, unlike a cause of action for fraud." (*Tindell v. Murphy* (2018) 22 Cal.App.5th 1239, 1252.)

Abdo alleges UACC, FWC, and Jalal concealed and failed to disclose that they would not sell or finance vehicles that do not have titles. (TACC, ¶ 69.) He further alleges, in reliance on those

representations, he signed the indemnities. (*Ibid*.) However, the indemnity agreements were signed in 2016, whereas UACC did not enter a contract with FWC until May 1, 2017. (TACC, ¶¶ 19, 45, 57.) Moreover, Abdo fails to identify any specific misrepresentation, negligent or fraudulent, by UACC to him. As a result, Abdo fails to state sufficient facts to state a negligent misrepresentation cause of action. Thus, UACC's demurrer to the fourth cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

4. Fifth Cause of Action: Intentional Misrepresentation

The elements of intentional misrepresentation are: (1) a misrepresentation; (2) knowledge of its falsity; (3) the defendant's intent to induce the plaintiff's reliance on the misrepresentation; (4) the plaintiff's actual and justifiable reliance; and (5) resulting damage. (*Chapman v. Skype, Inc.* (2013) 220 Cal.App.4th 217, 230-231 (*Chapman*).)

Abdo alleges UACC (along with the other cross-defendants) made false statements, assertions, and representations to Abdo (see TACC, ¶ 76), however, he fails to identify *any* misrepresentations by UACC to him. The only allegation involving UACC is, "Jalal, FWC, UACC concealed that they would sell and finance vehicles without titles, contrary to their statements." (TACC, ¶ 76.) Abdo fails to state any specific misrepresentations by UACC *to him*. Thus, UACC's demurrer to the fifth cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

5. Second Cause of Action: Unlawful, Unfair, or Fraudulent Business Acts and Practices

a. <u>Uncertainty</u>

UACC argues the claim is uncertain because it is unable to ascertain what unlawful act it committed in violation of the UCL. The Court is not persuaded by this argument because Abdo's UCL claim is predicated upon UACC's alleged violation of the Consumer Legal Remedies Act ("CLRA"), codified in Civil Code section 1750, et seq. Therefore, the claim is not so uncertain that UACC cannot reasonably respond to it. (See *Khoury, supra,* 14 Cal.App.4th at p. 616.) Thus, UACC's demurrer to the second cause of action on the basis of uncertainty is OVERRULED.

b. <u>Failure to State a Claim</u>

"The UCL defines 'unfair competition' to 'mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising' and any act prohibited by [Business and Professions Code] section 17500." (*Searle v. Wyndham Int'l* (2002) 102 Cal.App.4th 1327, 1332-1333 (*Searle*).) "Section 17200 'is not confined to anticompetitive business practices, but is also directed towards the public's right to protection from fraud, deceit, and unlawful conduct. Thus, California courts have consistently interpreted the language of section 17200 broadly." (*South Bay Chevrolet v. General Motor Acceptance Corp.* (1999) 72 Cal.App.4th 861, 877-878 [internal citations omitted].) "The statute prohibits 'wrongful business conduct in whatever context such activity might occur.'" (*Searle, supra*, 102 Cal.App.4th at p. 1333.)

Abdo alleges UACC, FWC, and Jalal engaged in fraudulent, deceptive, unlawful, and unfair business practices because they entered into an agreement where FWC would only sell vehicles with good marketable titles, that FWC would complete necessary forms to performed UACC's security interest, and it would forward the documents to the responsible public officials. (TACC, ¶ 19.) On July 18, 2017, UACC purchased a retail installment sale contract ("Risk Agreement") for Ms. Riley's vehicle but FWC failed to perfect UACC's first priority security interest and failed to deliver the title, registration, and license plates, which made the vehicle illegal to drive. (TACC, ¶ 20.) The Risk agreement included the following language,

> NOTICE: ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

(TACC, ¶ 21.)

Abdo alleges UACC violated Civil Code section 1770 by: (1) demanding payments even though UACC could not perform under the Risk Agreement; (2) failing to file paperwork with the DMV which would quiet title, register the vehicle, and have license plates issued so that the

vehicle can be driver; and (3) failing to comply with the holder clause in the Risk agreement. (TACC, ¶ 22.)

The Court is not persuaded by UACC's argument that Abdo has no standing to recover under the CLRA because Abdo is not seeking to recover under the CLRA, rather, it appears he's using the alleged CLRA violations to recover under the UCL.

Nevertheless, Section 1770 prohibits 28 enumerated unfair or deceptive acts "undertaken by any person in a transaction intended to result or that results in the sale or lease of goods or services to any consumer." (See Civ. Code, § 1770, subd. (a).) Abdo fails to identify which subdivisions UACC violated, he fails to allege *any facts* in support of the alleged violations, and it is unclear to the Court whether any of the alleged violations fall under the CLRA. As a result, Abdo fails to allege unfair business practices *by UACC* under the CLRA. To the extent Abdo predicates this claim on his fraud claims, the UCL claim fails as a matter of law because the demurrer has been sustained to the fraud claims. (See *Krantz v. BT Visual Images, LLC* (2001) 89 Cal.App.4th 164, 178 [stating that the viability of a UCL claim stands or falls with the antecedent substantive causes of action].) Thus, UACC's demurrer to the second cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

6. Seventh Cause of Action: Financial Elder Abuse

a. <u>Uncertainty</u>

UACC argues the claim is uncertain because Abdo does not allege what type of elder abuse he suffered. This argument is without merit because the claim is titled "Financial Elder Abuse" and the allegations pertain to financial matters. Moreover, the pleading is not so uncertain that UACC cannot reasonably respond to it. (See *Khoury, supra,* 14 Cal.App.4th at p. 616.) Thus, UACC's demurrer to the seventh cause of action on the basis of uncertainty is OVERRULED.

b. **<u>Failure to State a Claim</u>**

Financial abuse of an elder or dependent adult occurs when a person or entity does any of the following:

(1) Takes, secretes, appropriates, obtains, retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.

(2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.

(3) Takes, secrets, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult by undue influence, as defined in Section 15610.70.

(Welf. & Inst. Code, § 15610.30, subd. (a).)

"A person or entity shall be deemed to have taken, secreted, appropriated, obtained, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains the property and the person or entity knew or should have known that this conduct is likely to be harmful *to the elder or dependent adult*." (Welf. & Inst. Code, § 15610.30, subd. (b) [emphasis added].)

"For purposes of this section, a person or entity takes, secretes, appropriates, obtains, or retains real property when an elder or dependent adult is deprived of any property right, including by means of an agreement, donative transfer, or testamentary bequest, regardless of whether the property is held directly or by a representative of an elder or dependent adult." (Welf. & Inst. Code, § 15610.30, subd. (c).)

Financial elder abuse claims, like other statutory claims, must be pled with particularity. (See *Covenant Care, Inc. v. Super. Ct.* (2004) 32 Cal.4th 771, 790 [financial elder abuse claims must be pled with particularity]; see also *Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 407, 410.)

The only allegation pertaining to UACC is Abdo "was defrauded when Jalal, FWC, and UACC concealed that they would sell and finance vehicles without titles and would honor being holder to RISK." (TACC, ¶ 94.) Critically, there are no allegations that UACC took, secreted, obtained, retained, or appropriated Abdo's real or personal property. (See Welf. & Inst. Code, § 15610.30, subds. (a) - (c).)

As a result, Abdo fails to allege sufficient facts to state this claim. Thus, UACC's demurrer to the seventh cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

7. Damages

UACC also demurs on the ground that it did not engage in any conduct which resulted in damages to Abdo. The Court declines to consider this alternative ground as the demurrer has been sustained in its entirety for the reasons stated above.

IV. The Jomax Defendant's Motion to Strike

Aegis moves to strike causes of action two through seven asserted against it. Jomax and Ginsberg move to strike the second and sixth causes of action. On February 29, 2024, Abdo filed a request for dismissal of Jomax and Ginsberg. Thus, the Court will focus on Aegis' arguments.

A. Legal Standard

A court may strike out any irrelevant, false, or improper matter asserted in a pleading. (Code of Civil Procedure, § 436, subdivision (a).) A court may also strike out all or any part of a pleading not filed in conformity with the laws of the State of California. (Code of Civil Procedure, § 436, subdivision (b).) The grounds for a motion to strike shall appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice. (Code of Civil Procedure, § 437, subdivision. (a).)

"As with demurrers, the grounds for a motion to strike must appear on the face of the pleading under attack, or from matter which the court may judicially notice." (Weil & Brown, et al., California Practice Guide: Civil Procedure Before Trial (The Rutter Group 2022) ¶ 7:168, p. 7(l)-76 citing Code of Civil Procedure, § 437.) "Thus, for example, defendant cannot base a motion to strike the complaint on affidavits or declarations containing extrinsic evidence showing that the allegations are 'false' or 'sham.' Such challenges lie only if these defects appear on the face of the complaint, or from matters judicially noticeable." (Id. at ¶ 7:169, pp. 7(l)-75 to 7(l)-76.)

"In passing on the correctness of a ruling on a motion to strike, judges read allegations of a pleading subject to the motion to strike as a whole, all parts in their context, and assume their truth." (Clauson v. Super. Ct. (1998) 67 Cal.App.4th 1253, 1255.) "In ruling on a motion to strike, courts do not read allegations in isolation." (Ibid.)

B. Analysis

Aegis moves to strike the second, third, fourth, fifth, sixth, and seventh causes of action because they are not in conformity with the Court's order and because Abdo filed his TACC without leave of Court.

Aegis' argument is well taken as the October 10 Order sustained Aegis' demurrer and granted the motion to strike these claims *without leave to amend*. (See October 10 Order, p. 15.) Therefore, the TACC is not drawn or filed in conformity with this Court's order. (See Code Civ. Proc., § 436, subd. (b); see also *Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509, 528 [Section 436, subdivision (b), authorizes the striking of a pleading to improprieties in its form or in the procedures pursuant to which it was filed. This provision is commonly invoked to challenge pleadings filed in violation of a deadline, court order, or requirement of prior leave of court].)

Thus, Aegis' motion to strike the second, third, fourth, fifth, sixth, and seventh causes of action is GRANTED WITHOUT LEAVE TO AMEND.

V. Hudson's Motion to Strike

A. Analysis

Similarly, Hudson moves to strike the TACC because it was filed in violation of the Court order.

The October 10 Order sustained Hudson's demurrer to the second, third, fourth, fifth, sixth, seventh, and eighth causes of action in the SACC WITHOUT LEAVE TO AMEND. (See October 10 Order, p. 15.) Therefore, the TACC is filed in violation of the Order. Thus, Hudson's motion to strike the TACC as to it is GRANTED WITHOUT LEAVE TO AMEND.

VI. Hudson's Motion for Sanctions

Hudson moves for sanctions pursuant to Code of Civil Procedure section 128.7 against Abdo for filing the TACC in violation of a court order, with the improper purpose to harass Hudson or needlessly increase in the cost of litigation.[2]

Section 128.7(b) provides that an attorney or unrepresented party who presents a pleading, motion, or similar paper to the court is impliedly certifying that: (1) it is not being presented primarily

[2] Hudson requests judicial notice of the Court's October 10 Order, which is granted pursuant to Evidence Code section 452, subdivision (d).

for an improper purpose (e.g., to harass or cause unnecessary delay or needless increase in the cost of litigation), (2) the claims, defenses, and other legal contentions asserted are warranted by existing law or by a nonfrivolous argument for the extension or change in existing law, (3) any factual contentions have "evidentiary support" or, if specifically so identified, are likely to have evidentiary support after reasonable opportunity for further investigation or discovery, and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on lack of information or belief. (Code Civ. Proc. § 128.7, subd. (b).) Section 128.7 sanctions should be "made with restraint" and are not mandatory even if a claim is frivolous. (*Peake v. Underwood* (2014) 227 Cal.App.4th 428, 448.) "When determining whether sanctions should be imposed, the issue is not merely whether the party would prevail on the underlying factual or legal argument. Instead, courts should apply an objective test of reasonableness, including whether 'any reasonable attorney would agree that the claim is totally and completely without merit.'" (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.)

"Section 128.7 applies only in limited circumstances. It 'authorizes trial courts to impose sanctions to check abuses in the filing of pleadings, petitions, written notices of motions or similar papers.'" (*Musaelian v. Adams* (2009) 45 Cal.4th 512, 514.) Under that authority, trial courts may issue sanctions, including monetary and terminating sanctions, against a party for filing a complaint that is legally or factually frivolous. (Code Civ. Proc., § 128.7, subds. (b)–(d); *Ponce v. Wells Fargo Bank* (2018) 21 Cal.App.5th 253, 263–264.) "A claim is factually frivolous if it is 'not well grounded in fact' and is legally frivolous if it is 'not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.' In either case, to obtain sanctions, the moving party must show the party's conduct in asserting the claim was objectively unreasonable. A claim is objectively unreasonable if 'any reasonable attorney would agree that [it] is totally and completely without merit.' (*Bucur v. Ahmad* (2016) 244 Cal.App.4th 175, 189 (*Bucur*)[198 Cal. Rptr. 3d 127].)" (*Kumar v. Ramsey* (2021) 71 Cal. App. 5th 1110, 1120 [internal citations omitted] (*Kumar*).)

A. Safe Harbor Waiting Period

Code of Civil Procedure section 128.7 ("Section 128.7"), subdivision (c), authorizes a trial court, after "notice and a reasonable opportunity to respond," to impose an "appropriate sanction" upon an

attorney, law firm, or party who has engaged in conduct the court determines to be a violation of any of the provisions set forth in subdivision (b) of that section. A motion for sanctions under Section 128.7 cannot be filed until 21 days after it has been served on the party against whom sanctions are sought. (Code Civ. Proc., § 128.7, subd. (c)(1).) This so-called "safe harbor" waiting period allows the party being served the opportunity to correct the violations. (See *Barnes v. Department of Corrections* (1999) 74 Cal.App.4th 126, 132.)

Counsel for Hudson, Mark A. Vaughn submits a declaration, stating he served the proposed motion to Abdo on November 17, 2023. (Vaughn Decl., ¶ 2; Exh. 1.) The motion was filed on February 14, 2024. Thus, Hudson complied with the safe harbor requirement.

B. Analysis

The October 10 Order sustained Hudson's demurrer to the all the causes of action asserted against it without leave to amend. (October 10 Order, p. 15.) On November 7, 2023, Abdo filed his TACC, which again alleges the same claims against Hudson. Therefore, it appears Abdo filed an amended pleading containing legally frivolous claims against Hudson. (See *Bucur, supra,* 244 Cal.App.4th at p. 189.) Thus, Hudson meets its burden here to show the pleading was "totally and completely without merit" as to Hudson. (See *Kumar, supra,* 71 Cal.App.5th at p. 1126.) On November 14, 2023, after he filed the TACC, Abdo was informed by Vaughn that he asserted the claims against Hudson, in violation of the October 10 Order. (See Vaughn Decl. in Support of MTS, Exh. 1.) Subsequently, Hudson requested Abdo voluntarily dismiss the claims against it, however, Abdo declined to do so. (Vaughn Decl., Exh. 2.) It appears Abdo may have confused the December 21 Order regarding the FACC with the October 10 Order regarding the SACC. (See Vaughn Decl., Exh. 3 [Abdo's December 17, 2023, email citing the December 21 Order overruling Hudson's demurrer to the sixth cause of action in the FACC as the October 10 Order to the SACC].) However, on December 22, 2023, Vaughn sent Abdo the October 10 Order, explained that Hudson's demurrer to the SACC was sustained without leave to amend, and requested Abdo dismiss Hudson from the SACC, which he refused to do.

As Abdo fails to oppose this motion, he fails to make any showing that the sanctions are not proper. (See *Kumar, supra,* 71 Cal.App.5th at p. 1126 ["the evidentiary burden to escape sanctions

under section 128.7 is light"].) Moreover, Abdo continues to pursue frivolous claims despite the Court's October 10 Order. As a result, sanctions are warranted.

> Code of Civil Procedure section 128.7, subdivision (d), provides,
>
> A sanction imposed for violation of subdivision (b) *shall be limited to what is sufficient to deter repetition of this conduct* or comparable conduct by others similarly situated. Subject to the limitations in paragraphs (1) and (2), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty to the court, or if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney's fees and expenses incurred as a direct result of the violation.

(Code Civ. Proc., § 128.7, subd. (d) [emphasis added].)

Hudson requests non-monetary sanctions in the form of striking the TACC and monetary sanctions for attorney's fees and costs incurred in filing this motion, appearing at the hearing for the same, opposing the motion for reconsideration, and appearing at the case management conference on December 12, 2023. (Motion for Sanctions, p. 3:27 - p. 4:4.) Hudson's motion to strike the TACC has been granted for reasons stated above. Hudson provides no explanation or basis for its request for attorney's fees and costs related to opposing the motion for reconsideration or appearing at the case management conference on December 12, 2023. It appears monetary sanctions in the form of attorney's fees and costs incurred in filing the instant motion and appearing at the hearing are sufficient to deter repetition of this conduct. (See Code Civ. Proc., § 128.7, subd. (d).) Thus, the motion for sanctions is GRANTED and Vaughn is directed to submit a declaration stating the time spent on the instant motion, the hearing appearance, and his hourly rate so that the Court can determine the amount of reasonable attorney's fees and costs.

Calendar line 5
Case Name: *DONALD BAILEY vs Ford Motor Company et al*
Case No.: 23CV422367

Before the Court is Plaintiff's motion to Compel Further Responses to Requests for Production of Documents. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This is a lemon law case. Plaintiff Donald Bailey alleges he entered a warranty contract with Ford Motor Company ("FMC") when he purchased a 2021 Ford F150 on or about February 24, 2021. (Complaint, ¶9.) Bailey alleges "[d]effects and nonconformities to warranty manifested themselves within the applicable express warranty period, including but not limited to, transmission defects, infotainment defects, body defects; among other defects and non-conformities. Plaintiff filed this action on September 7, 2023, asserting various statutory claims, fraudulent inducement, and negligent repair.

Plaintiff now seeks to compel FMC to produce further documents in response to Plaintiff's Request Nos. 1, 3, 12, 15, 17, 19, 31, 36, 43, 45, 46, 56, 57, 58, 68, 69, 73, 76, 77, 78, 79, 80, 82, and 83. FMC opposes. Most of these requests relate to alleged defects in the sync system, which Plaintiff defines as follows:

> The term "SYNC DEFECT(S)" shall mean one or more defect(s) within the sync system of the FORD F150 vehicles equipped within the sync system as the SUBJECT VEHICLE that can result in (1) system freezing and/or becoming unresponsive to commands, (2) malfunction of touch or voice commands, (3) display error messages, (4) blurry, distorted or unreadable screen, (5) the malfunction and/or failure of the infotainment system which controls the vehicle's safety, navigation, communications, display screen, back-up camera, radio and climate control; as well as any other similar concerns identified in the repair history for the SUBJECT VEHICLE.

FMC submits declarations from two individuals familiar with FMC's databases and document retention and storage, which explain that FMC does not keep documents regarding the sync system in one place and that producing the materials Plaintiff requests would be unduly burdensome.

II. Legal Standard and Analysis

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

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

Plaintiff argues the documents it seeks regarding FMC's internal investigation and analysis of are likely to lead to the discovery of admissible evidence regarding FMC's knowledge of the defect which, presumably, relates to the "willful" requirement for a civil penalty. With respect to willfulness, one court has opined that "[a] decision made without the use of reasonably available information

germane to that decision is not a reasonable, good faith decision." (*Kwan v. Mercedes-Benz of North America, Inc.* (1996) 23 Cal.App.4th 174, 186.) Some factors the court (or jury) may consider when making a willfulness determination include:

1. Whether the manufacturer knew the vehicle was a lemon (*Lukather v. General Motors, LLC* (2010) 181 Cal. App. 4th 1041, 1051-52);
2. Whether the manufacturer or its representative was provided with a reasonable period of time or reasonable number of attempts to repair the vehicle (*Jensen v. BMW of N. Am., Inc.* (1995) 35 Cal.App.4th 112, 136);
3. Whether the manufacturer knew the vehicle had not been repaired within a reasonable time or after a reasonable number of attempts (*Jensen v. BMW of N. Am., Inc.* (1995) 35 Cal.App.4th 112, 136);
4. The lengths the manufacturer or its representative went through to and diagnose and repair the vehicle's problems (*Ramos v. FCA US LLC* (2019) 385 F. Supp. 3d 1056, 1072);
5. Whether the vehicle usually operated normally while in the shop for diagnosis and repair (*Ramos v. FCA US LLC* (2019) 385 F. Supp. 3d 1056, 1072);
6. Whether the manufacturer had reasonable suspicions that the purchaser had tampered with the vehicle (*Ramos v. FCA US LLC* (2019) 385 F. Supp. 3d 1056, 1072);
7. Whether the manufacturer had a written policy on the statutory requirement to repair or replace the vehicle (*Jensen v. BMW of N. Am., Inc.* (1995) 35 Cal.App.4th 112, 136);
8. Whether the manufacturer knew the purchaser had requested replacement or restitution (*Lukather v. General Motors, LLC* (2010) 181 Cal. App. 4th 1041, 1051-52);
9. Whether the manufacturer actively discouraged the purchaser from requesting replacement or restitution (*Lukather v. General Motors, LLC* (2010) 181 Cal. App. 4th 1041, 1051-52);
10. Whether the manufacture relied on reasonably available and germane information when deciding whether to offer to replace or pay restitution (*Kwan v. Mercedes-Benz of North America, Inc.* (1996) 23 Cal.App.4th 174, 186);
11. Whether the purchaser made multiple unsuccessful requests for replacement or restitution (*Ramos v. FCA US LLC* (2019) 385 F. Supp. 3d 1056, 1072);

12. Whether the manufacturer's offer to pay restitution was a lowball offer or for an incorrect amount (*Ramos v. FCA US LLC* (2019) 385 F. Supp. 3d 1056, 1072).

A close study of the above categories reveals that the primary focus is on the vehicle at issue in a particular case—not sweeping discovery regarding other customers' complaints. *Donlen v. Ford Motor Co.* (2013) 217 Cal.App.4th 138 and *Doppes v. Bently Motors, Inc.* (2009) 174 Cal.App.4th 967 does not change this analysis. Neither of those cases directly addressed a trial court's discovery orders in a lemon law case. *Donlen* finds the trial court did not commit error when it denied the manufacturer's motion in limine to exclude evidence of other customer complaints about the same transmission model in plaintiff's vehicle at issue in that case. *Doppes* examined the trial court's granting of terminating sanctions against the manufacturer for its repeated failure to comply with the trial court's discovery orders. Neither opinion examines a trial court's need to weigh the amount at issue in any given case against the cost of expansive discovery sought, which this Court is called to do on a motion to compel. (Code Civ Proc § 2019.030(a)(2) ("The court shall restrict the frequency or extent of use of a discovery method. . . if it determines. . . The selected method of discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, and the importance of the issues at stake in the litigation.").)

First, FMC has not waived its objections or the attorney-client privilege. FMC timely served written responses to Plaintiff's requests in which it identified what documents it would produce and what it found objectionable. Plaintiff's complaint that FMC's objections are "boilerplate" is strange given that, based on the number of lemon law cases the undersigned Court has on its docket, Plaintiffs in these cases serve the identical set of document requests in each case. Further, if FMC had not submitted declarations describing the burden it would suffer if ordered to produce the requested documents, Plaintiff would have complained that FMC's burden argument was not supported.

Next, Plaintiff's definition is vague and grossly overbroad. The definition of "Sync Defect" includes the phrases "one or more" and "similar concerns" and refers to the vehicle repair history. Taken at face value, this definition could potentially touch every document in FMC regarding this make and model. FMC's objections are therefore well taken.

This is a lemon law case about a single vehicle. Plaintiff does not deny that it has already received documents about the specific vehicle at issue. Plaintiff fails to meet its burden with specific facts to justify the extensive additional discovery it seeks. Accordingly, Plaintiff's motion to compel is DENIED.

Calendar line 5
Case Name: *Wilmington Savings Fund Society, FSB v. Partheshkumar Brahmbhatt*
Case No.: 23CV425328

Before the Court is Specially Appearing defendant Parthesh Brahmbhatt's motion to quash service for improper service. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

III. Background

This action arises out of an alleged breach of guaranty. Plaintiff Wilmington Savings Fund Society, FSB ("Wilmington"), as trustee for Residential Mortgage Aggregation Trust ("Lender") alleges on February 10, 2022, Lender's predecessors-in-interest entered into a loan agreement (the "Loan") for up to $3,262,500.00. (Complaint, ¶ 7.) The borrower executed a secured note (the "Note") in which they agreed to pay the original lender the principal amount of $3,262,500.00 plus interest, costs, and attorneys' fees. (Complaint, ¶ 8.) To secure payment under the Loan and Note, the borrower pledged to the original lender all its rights, title, and interest in real property located on 945-947 Minnesota Street in San Francisco (the "Property") and other property. (Complaint, ¶ 9.)

In connection with the loan, Brahmbhatt executed the guaranty, which guaranteed full payment of all indebtedness and performance of all other obligations of the borrower. (Complaint, ¶¶ 10-11.) On April 18, 2023, the original lender assigned the loan to Churchill Funding I LLC which assigned the loan to Lender on the same day. (Complaint, ¶¶ 16-17.) The borrower and Brahmbhatt defaulted under the Loan. (Complaint, ¶ 18.) Brahmbhatt failed and continues to fail to pay the outstanding balance due under the guaranty. (*Ibid*.)

On October 25, 2023, Wilmington initiated this action, asserting a claim for breach of guaranty. On January 17, 2024, Brahmbhatt filed the instant motion, which Wilmington opposes.

IV. Legal Standard

Where a defendant moves to quash based on improper service of the summons and complaint, the burden is on the plaintiff to prove the validity of service by a preponderance of the evidence. (See *Boliah v. Superior Court (Bijan Fragrances, Inc.)* (1999) 74 Cal.App.4th 984, 991.) In meeting this burden, the filing of a proof of service creates a rebuttable presumption that service was proper, so long as the proof of service complies with applicable statutory requirements. (*Dill v. Berquist*

Construction Co. (1994) 24 Cal.App.4th 1426, 1442 (*Dill*); see also *Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1205.)

"A defendant is under no duty to respond in any way to a defectively served summons. It makes no difference that defendant had actual knowledge of the action. Such knowledge does not dispense with statutory requirements for service of summons." (*Kappel v. Bartlett* (1988) 200 Cal.App.3d 1457, 1466.) Notice does not substitute for proper service; until statutory requirements are satisfied, the court lacks jurisdiction over a defendant. (*Ruttenberg v. Ruttenberg* (1997) 53 Cal.App.4th 801, 808 (*Ruttenberg*).) The statutory provisions regarding service of process are liberally construed to effectuate service and uphold the jurisdiction of the court if actual notice has been received by the defendant; substantial compliance is sufficient. (*Dill, supra,* 24 Cal.App.4th at p. 1436.) Substantial compliance means actual compliance in respect to the substance essential to every reasonable objective of the statute. (*Id.* at 1439.)

V. Analysis

On February 23, 2024, Wilmington submitted a declaration of due diligence from Uriel Carmona, which detailed six attempts at personal service on Brahmbhatt at 1051 Paintbrush Drive in Sunnyvale (the "Residence") by Nationwide Legal, LLC ("Nationwide") on:

(1) November 9, 2023, at 6:50 P.M.;

(2) November 11, 2023, at 11:40 A.M.;

(3) November 12, 2023, at 8:02 A.M.;

(4) November 15, 2023, at 7:55 P.M.;

(5) November 18, 2023, at 7:59 A.M.; and

(6) November 19, 2023, at 9:40 P.M.

Nationwide was unable to effectuate service on Brahmbhatt. Subsequently, Pete Guglielmino, a private investigator, was hired to conduct surveillance and serve Brahmbhatt. (Opp., p. 3:17-19.) Through his investigation, he discovered (1) Brahmbhatt also goes by the names of "Parthesh Manoj Brahmbhatt" and "Parthesh Kumar"; (2) he owns a 2015 Land Rover, which was observed outside the Property on November 30, 2023; and (3) the Property is vested in the name of "Manoj Kumar and

Bhavikaben Brahmbhatt, husband and wife, as joint tenants." (Opp., p. 3:21-26; Beyer Decl., ¶¶ 5-7; Guglielmino Decl., ¶ 3-4.)

On December 14, 2023, a proof of service was filed, which included a declaration of due diligence from Guglielmino. He attempted personal service on Brahmbhatt at Residence on the following days:

(1) November 30, 2023, at 11:00 A.M.;

(2) December 2, 2023, at 1:15 P.M.; and

(3) December 2, 2023, at 2:20 P.M.

(Guglielmino Decl., p. 2.)

Wilmington meets its burden here of showing reasonable diligence in attempting to personally serve Brahmbhatt as it shows nine (9) attempts at the Residence, at least three by Guglielmino. (See *American Express Centurion Bank v. Zara* (2011) 199 Cal.App.4th 383, 389 (*American Express*) [stating "[t]wo or three attempts to personally serve a defendant at a proper place ordinarily qualifies as 'reasonable diligence'"]; see also *Stafford v. Mach* (1998) 64 Cal.App.4th 1174, 1182 [stating "[o]rdinarily… two or three attempts at personal service at a proper place should fully satisfy the requirement of reasonable diligence and allow substitute service to be made"].)

Wilmington must show there was effective substitute service. Code of Civil Procedure section 415.20, subdivision (b), provides,

> Substitute service… is accomplished by 'leaving a copy of the summons and complaint at the person's dwelling house, usual place of abode, usual place business, or usual mailing address other than a United States Postal Service post office box, in the presence of a competent member of the household or a person apparently in charge of his or her office, place of business, or usual mailing address… at least 18 years of age, who shall be informed of the contents thereof and by thereafter mailing a copy of the summons and of the complaint by first-class mail, postage prepaid to the person to be served at the place where a copy of the summons and complaint were left. [citing Code Civ. Proc., § 415.20, subd. (b).]

(*American Express, supra,* 199 Cap.App.4th at p. 389.)

Code of Civil Procedure section 417.10, subdivision (a), requires that the proof of service "recite or in other manner show the name of the person to whom a copy of the summons and of the complaint were delivered, and, if appropriate, his or her title or the capacity in which he or she served." (Code Civ. Proc., § 417.10, subd. (a).) However, because people often refuse to give their true names to process servers, it is not essential that the name shown on the proof of service be the recipient's true legal name. (See *Trackman v. Kenney* (2010) 187 Cal.App.4th 175, 184 (*Trackman*) [stating that "minor deficiencies will not be allowed to defeat service" and that "[g]iven the widespread practice of using a description (e.g., 'gate guard') or fictitious name (e.g., "Linda Doe"), and the California Supreme Court's holding that the service statutes should be liberally construed (see [*Pasadena Medi-Center Associates v. Super. Ct. of Los Angeles County* (1973) 9 Cal.3d 773, 778]), we see no reason to insert into the statue a requirement that the *true legal name* be used"].)

After his previous three attempts, Guglielmino attempted service again on December 10, 2023. (Guglielmino Decl., ¶ 9.) He observed Brahmbhatt's vehicle and two vehicles registered to Manoj Kumar in front of the Residence. (Guglielmino Decl., ¶ 10.) He observed a woman approaching one of the vehicles registered to Kumar, which was parked in the driveway. (Guglielmino Decl., ¶ 11.) She was about 5'2", approximately 70 years old, weighing approximately 105 pounds and of Indian descent. (*Ibid*.) *She stated* her name was Manoj Kumar. (*Ibid* [emphasis added].) Guglielmino showed then gave the documents to her, she received them, and she told him that *Brahmbhatt was inside the house*. (Guglielmino Decl., ¶ 12 [emphasis added].) He then observed the woman hand the documents to an unidentified woman, who then returned to the residence with the documents in her hand. (*Ibid*.) On December 12, 2023, he mailed the documents to the Residence. Thus, Plaintiff establishes a presumption that it effectuated proper substitute service on Brahmbhatt.

Once a plaintiff establishes the presumption there was proper service, a defendant must rebut that presumption to maintain their motion to quash. (*Rodriguez v. Cho* (2015) 236 Cal.App.4th 742, 750.)

Brahmbhatt states he lives at the residence but splits his time with another rental in Fremont. (Brahmbhatt Decl., ¶ 6.) He also states his mother's name is Bhavika Brahmbhatt, not Manoj Kumar. (Brahmbhatt Decl., ¶ 4.) As the Court noted above, the woman identified herself as Manoj Kumar. Brahmbhatt states he became aware of the complaint when he received the mailed copy from his

neighbor on January 11, 2024, however, he doesn't offer any explanation regarding the documents taken into the Residence on December 10, 2023, or the fact that Guglielmino was informed he was inside the Residence at the time. Bhavika Brahmbhatt declares, she doesn't have "knowledge as to [who] was served with the papers." (Bhavika Brahmbhatt Decl., ¶ 4.) However, neither Brahmbhatt nor Bhavika offers *any facts* in support or any conflicting facts to Guglielmino's declaration such as a different description of her appearance to establish that Guglielmino did not talk to her or leave the documents with her. Brahmbhatt's contention that there is no woman by the name of Manoj Kumar is not sufficient to rebut the presumption that the declaration is otherwise accurate. (See *Trackman, supra,* 187 Cal.App.4th at p. 184.) Brahmbhatt does not offer any other argument that the service was improper. Thus, the motion to quash is DENIED.

Calendar Lines 6-11
Case Name: *Peter Kleidman v. Nitin Shah, et. al. and related cross claims*
Case No.: 2013-1-CV247406

Before the Court are Cross-complainants (1) David Becker & Becker Legal Group LLC's motion for summary judgment, (20 Sherwood Partners, LLC's, Sherwood Management, LLC's, and Feevt (Assignment for the Benefit of Creditors) LLC's motion for summary judgment, (3) Bernie Murphy's motion for summary judgment, (4) Nitin Shah's, Don Cook's and EJ Von Schaumburg's motion for summary judgment, (5) Michael Maidy's, Timothy Cox's, Martin Pichinson's motion for summary judgment, and (6) Feeva Technology Inc.'s motion for summary judgment, against Cross-Defendant, Peter Kleidman. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This is an action for breach of settlement agreement allegedly entered to resolve lawsuit Cross-Defendant Kleidman filed in 2013. According to the Cross-Complaint brought by Nitin Shah, Don Cook, EJ Von Schaumburg, Feeva Technology ("Feeva"), Michael Maidy, Timothy Cox, Martin Pichinson, Bernie Murphy, Sherwood Management, LLC, Sherwood Partners, LLC ("Sherwood"), FeevT (Assignment for the Benefit of Creditors), LLC ("FeevT"), Estate of Robert Quist, David Becker, Becker Legal Group, LLC, and Bridge and Post, Inc., in November 2010, technology startup Feeva ran out of funds and went out of business. (Cross-Complaint, ¶ 1.)

Feeva wound down via an assignment for the benefit of creditors, and ownership of its assets and liabilities was transferred to FeevT, overseen by Sherwood, and sold to the highest bidder, Bridge and Post, Inc. Mr. Kleidman was minority investor in Feeva, and filed the underlying complaint in June 2013, alleging that Feeva did not obtain a reasonably equivalent value for its assets when it sold them to FeevT. (Cross-Complaint, ¶ 2.) After nearly two years of litigation, and before the adjudication of motions to dismiss the then-pending fourth amended complaint, the parties settled the action and signed a formal settlement agreement on March 25, 2015 (the "Settlement Agreement"). (*Id*.) Instead of honoring his obligations under the Settlement Agreement, Mr. Kleidman tried to revoke the Settlement Agreement on March 30, 2015, stating that he had "changed his mind." (Cross-Complaint, ¶ 3.)

In April 2015, the Cross-Complainants, believing Mr. Kleidman was bound by the Settlement Agreement, filed a joint motion to enforce it under the Code of Civil Procedure section 664.6. (Cross-

Complaint, ¶ 4.) Kleidman opposed the motion, arguing Section 664.6 was inapplicable because "not all the parties themselves signed the purported [settlement] agreement." In May 2015, the Court granted Cross-Complaints' motion to enforce, ordered Mr. Kleidman to comply with the Settlement Agreement, and entered judgment of dismissal of the fourth amended complaint with prejudice.

Mr. Kleidman appealed that judgment, and, on June 29, 2020, the Court of Appeal reversed the judgment, reasoning the trial court erred in granting the motion to enforce the Settlement Agreement under Section 664.6 because not all parties had signed it The action was remanded to this Court, where Cross-Complainants filed their Cross-Complaint on September 14, 2021, asserting breach of the Settlement Agreement and declaratory relief. Mr. Kleidman's demurrer to the Cross-Complaint was overruled by order dated March 7, 2022.

II. Legal Standard

Motions for summary judgment are governed by Code of Civil Procedure section 437c, which allows a party to "move for summary judgment in an action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding." (Code Civ. Proc. § 437c(a)(1).) The function of a motion for summary judgment or adjudication is to allow a determination as to whether an opposing party cannot show evidentiary support for a pleading or claim and to enable an order of summary dismissal without the need for trial. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 843.) Code of Civil Procedure section 437c(c) requires "the trial judge to grant summary judgment if all the evidence submitted, and 'all inferences reasonably deducible from the evidence' and uncontradicted by other inferences or evidence, show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (*Adler v. Manor Healthcare Corp.* (1992) 7 Cal.App.4th 1110, 1119.)

"The function of the pleadings in a motion for summary judgment is to delimit the scope of the issues; the function of the affidavits or declarations is to disclose whether there is any triable issue of fact within the issues delimited by the pleadings." (*Juge v. County of Sacramento* (1993) 12 Cal.App.4th 59, 67, citing *FPI Development, Inc. v. Nakashima* (1991) 231 Cal. App. 3d 367, 381-382.) As to each claim framed by the complaint, the defendant moving for summary judgment must satisfy the initial burden of proof by presenting facts to negate an essential element, or to establish a defense. (Code Civ.

Proc. § 437c(p)(2); *Scalf v. D. B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1520.) Defendant may satisfy this burden by showing that the claim "cannot be established" because of the lack of evidence on some essential element of the claim. (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 574, 590.) Defendant must present evidence and not simply point out that plaintiff does not possess and cannot reasonably obtain needed evidence. (*Aguilar, supra*, 25 Cal.4th at 865-66.) Thus, a moving defendant has two means by which to shift the burden of proof under the summary judgment statute: "The defendant may rely upon factually insufficient discovery responses by the plaintiff to show that the plaintiff cannot establish an essential element of the cause of action sued upon. [Citation.] [Or a]lternatively, the defendant may utilize the tried and true technique of negating ('disproving') an essential element of the plaintiff's cause of action." (*Leyva v. Garcia* (2018) 20 Cal.App.5th 1095, 1103.)

Until the moving defendant has discharged its burden of proof, the opposing plaintiff has no burden to come forward with any evidence. Once the moving defendant has discharged its burden as to a particular cause of action, however, the plaintiff may defeat the motion by producing evidence showing that a triable issue of one or more material facts exists as to that cause of action. (Code Civ. Proc. §437c(p)(2).) Courts "liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party." (*Dore v. Arnold Worldwide, Inc*. (2006) 39 Cal.4th 384, 389.)

III. Request for Judicial Notice

Cross-Complainants, ask the Court to take Judicial Notice of:

> Ex. 1 - Northern District of California's order in *Kleidman v. U.S. Specialty Insurance Company*, 2015 WL 556409 (N.D. Cal. February 10, 2015) dismissing Kleidman's lawsuit against U.S. Specialty Insurance Company on, among other things, the grounds that Kleidman lacks standing to challenge U.S. Specialty's assumption of Feeva's defense and appointment of Kaufhold Gaskin LLP.
>
> Ex. 2 - Northern District of California's order in *Kleidman v. Murphy et al*., 2023 WL 6232562 (N.D. Cal. September 25, 2023), finding that Kleidman a vexatious litigant and dismissing Kleidman's complaint against Bernie Murphy, Jonathan

Gaskin, Michael Maidy, Martin Pichinson, Timothy Cox, Sherwood Partners, Inc., U.S. Specialty Insurance Company, Leslie Quist, Chief Justice Guerro, Administrative Presiding Justice Lui, and Administrative Presiding Justice Greenwood because Kleidman's repetitive claims were barred by res judicata.

Ex. 3 - Appellant, Peter Kleidman's, Opening Brief filed February 20, 2019, in Appellate Case Nos. H042565; H0431723; H044049, admitting that he signed the Settlement Agreement.

Ex. 4 - Court of Appeal of the State of California, Sixth Appellate District's unpublished Opinion in Appellate Case No. H041738 filed April 27, 2021.

Ex. 5 - The Complaint filed on June 28, 2021, in *Kleidman v. Hon. Franklin D. Elia, et al*, Santa Clara Superior Court Case no. 21- CV-384873.

Ex. 6 - The Order in *Bridge and Post, Inc. v. Verizon Communications, Inc.,* Case Nos. 3:17-CV094 JAG and 3:17-CV710 JAG in the Eastern District of Virginia, invalidating the patents.

Mr. Kleidman objects to judicially noticing exhibits 1, 2, and 6 on the grounds that these documents are not embraced in the pleadings. Mr. Kleidman's objection fails to comply with the California Rules of Court, Rule 3.1354(b), which requires all written objections to evidence to be served and filed separately from the other papers in support of or in opposition to the motion. However, the Court, in its discretion and in the interest of justice, will consider the merit of Mr. Kleidman's objection.

The Court may properly take judicial notice of the records of any court of record of any state of the United States. (Evid. Code, § 452, subd. (d).) Judicial notice is taken of the existence of a factual finding in a proceeding, but not of the truth of that finding. (*Fowler v. Howell* (1996) 42 Cal.App.4th 1746, 1749; Evid. Code, §§ 452, subds. (c) & (d), 459, subd. (a).) A court may take judicial notice of [another] court's action, *but may not use it to prove the truth of the facts found and recited*. [Citations.]" (*O'Neill v. Novartis Consumer Health, Inc.* (2007) 147 Cal.App.4th 1388, 1405, italics added.) Furthermore, "when courts take judicial notice of the existence of court documents, the legal effect of the results reached in orders and judgments may be established." (*Linda Vista Village San Diego Homeowners Assn., Inc. v. Tecolote Investors, LLC* (2015) 234 Cal.App.4th 166, 185)

Accordingly, Cross-complainants' requests are GRANTED. The Court will take judicial notice of (1) the fact that these cases and documents were filed, (2) of any judicial findings, and (3) of the legal effect of the results reached in orders.

VI. Analysis

Cross-complainants seek to enforce the parties' Settlement Agreement. Yet, Mr. Kleidman contends the Agreement is invalid because Mrs. Gaskin's, Murphy's, Cook's, and Martini's signatures, executed in purported representative capacities, were unauthorized and not binding on the represented people.

A. Breach of the Settlement Agreement

"A settlement agreement is a contract, and the legal principles [that] apply to contracts generally apply to settlement contracts. (*Stewart v. Preston Pipeline, Inc.* (2005) 134 Cal.App.4th 1565, 1585.) The necessary elements for breach of contract are: (1) existence of a valid contract; (2) Cross-complainant's full performance of their obligations under the contract; (3) Cross-Defendant's breach of the contract; and (4) resultant damages. (See, *Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1178.) Therefore, to prevail on their motion for summary judgment, Cross-complainants must present prima facie evidence for each element of a breach of contract claim.

Establishing existence of a contract "requires parties capable of contracting, their consent, a lawful object, and a sufficient cause of consideration." (*J.B.B. Investment Partners Ltd. v. Fair* (2019) 37 Cal.App.5th 1, 9 [citing Civ. Code, § 1550].) "Mutual assent is determined under an objective standard applied to the outward manifestations or expressions of the parties, i.e., the reasonable meaning of their words and acts, and not their unexpressed intentions or understandings." (*Serafin v. Balco Properties Ltd., LLC* (2015) 235 Cal.App.4th 165, 173 (internal citations omitted). "Mutual assent usually is manifested by an offer communicated to the offeree and an acceptance communicated to the offeror." (*Donovan v. RRL Corp*. (2001) 26 Cal.4th 261, 270-271.)

Cross-complainants assert the Settlement Agreement is a valid and enforceable contract because:

(1) Parties are individuals, limited liability companies, and private corporations that are legally capable of contracting.

(2) Individuals who participated in the mediation and executed the Agreement were/are individuals who acted on their own behalf and/or as duly authorized representatives. Each Cross-complainant warranted, in section 13 of the Agreement, that he had obtained all necessary approvals or authorizations required to consummate the Agreement.

(3) Mr. Kleidman personally attended and participated in the full day mediation. He personally signed the Agreement after all other signatures were affixed. These outward manifestations establish his consent to the terms of the Agreement.

(4) At the time of signing the Agreement, Mr. Kleidman was fully aware that Don Cook signed on behalf of Bride and Post, Jonathan Gaskin signed on behalf of Feeva Technology, Al Martini signed on behalf of Robert Quist, Bernie Murphy signed on behalf of Sherwood Management, Sherwood Partners, and Feevt (Assignment for the Benefit of Creditors) LLC. Mr. Kleidman was aware these individuals were authorized to sign on behalf of their principals and did not dispute their authorization nor did he object to their execution of the Agreement. Any subsequent objections to their authority are waived.

(5) Cross-complainants signed and ratified the Agreement assenting to its terms and their obligations.

(6) Resolution of the litigation is a lawful object of the Agreement.

(7) Payment of $190,000.00 to Mr. Kleidman along with mutual promises and releases are sufficient consideration for dismissal of the ongoing litigation.

(8) Cross-complaints fulfilled their obligations by releasing their claims against Mr. Kleidman and disbursement of $190,000.00.

(9) Mr. Kleidman partially performed his obligation under the Agreement by providing his W-9 tax form. However, he breached the Agreement by refusing to fulfil his promised obligations to dismiss all complaints and to cease further legal actions against Cross-complainants. In fact, Mr. Kleidman has since engaged in multiple appeals and instigated additional actions involving the same issues, namely: *Kleidman v. Berine Murphy et.al.* (District Court case No. 22-CV-06355-HSG) and *Kleidman v. Elia, et.al.* (Superior Court case No. 21CV384873).

Cross-Complainants further argue Mr. Kleidman's asserts no legal grounds for rescission of the Agreement and cannot establish any supportive facts that his consent was given by mistake or obtained through duress, menace, fraud, or undue influence. Mr. Kleidman's email, sent on March 30, 2015, to Cross-complainants merely states, "I have changed my mind about the settlement and I hereby revoke what I signed on March 25, 2015. I am requesting that you do not send me any nasty comments or make any personal attacks - this goes especially to Jonathan and Ruth, who have made numerous personal attacks on me throughout this litigation." (Declaration of Mr. Gaskin, Ex. B)

Cross-complainants submit the following supportive evidence:

- Copy of the executed Settlement Agreement. (Declaration of Mr. Becker, Ex. A; Declaration of Mr. Cook, Ex. A; Declaration of Mr. Schaumburg, Ex. A; Declaration of Mr. Martini, Ex. A; Declaration of Mr. Shah, Ex. A)
- Declaration of Don Cook – testifying (a) he personally attended the mediation, (b) after full day of mediation, the parties reached an agreement, which was formalized in writing, (c) he personally signed the Agreement, (d) he was authorized to sign the Agreement on behalf of Bridge and Post, (e) he heard and saw Mr. Shaffer authorize Jonathan Gaskin to sign the Agreement on behalf of Feeva Technology Inc., (f) he heard and saw Mr. Quist authorize Al Martini to sign the Agreement on his behalf, (g) Mr. Kleidman was the last person to sign the Agreement and did not dispute nor did he object to his or Mr. Gaskin's authority to sign for their principals, (h) he performed his obligation under the Agreement and released his claims.
- Declaration of Timothy Cox – testifying (a) he authorized Michael Maidy, managing member of Sherwood Partners LLC and co-president of its successor entity Sherwood Partners Inc., to delegate authority to Bernie Murphy to attend the mediation and settle this claim, (b) he reviewed and agreed with the terms of the Agreement and thus ratified Mr. Murphy's execution, (c) he performed his obligations under the Agreement and released his claims.
- Declaration of EJ Von Schaumburg – testifying (a) he personally attended the mediation, (b) after a full day of mediation, the parties reached an agreement to settle this entire matter, which was formalized in writing, (c) he personally signed the Agreement, (d) Mr. Shah and he, as majority shareholders of Bridge and Post, authorized Don Cook to sign the Agreement on its

behalf, (e) he saw and heard Mr. Quist authorize Al Martini to sign the Agreement on his behalf, (d) he saw and heard Mr. Shaffer authorize Jonathan Gaskin to sign the Agreement on behalf of Feeva Technology, Inc., (e) Mr. Kleidman was the last person to sign the Agreement and did not dispute nor did he object to the Mr. Cook, Mr. Martini, and Mr. Gaskin signing on behalf of their principals, (f) he performed his obligations under the Agreement and released his claims against the parties.

- Declaration of Michael Maidy – testifying (a) he authorized Bernie Murphy to attend the mediation and settle this action on his behalf, (b) he obtained timothy Cox's consent to have Bernie Murphy represent him at the mediation and settle this matter on his behalf, (c) as the managing member of Sherwood Partners LLC and co-president of its successor entity, Sherwood Partners Inc., he authorized Bernie Murphy to attend the mediation and execute any settlement agreement resulting from the mediation on behalf of these entities, (d) as the manager of Feevt (assignment for the benefit of creditors) LLC, he authorized Bernie Murphy to attend the mediation and execute a resulting settlement agreement, (e) he reviewed the Agreement, agreed to its terms, and ratified Mr. Murphy's execution, (f) he, Sherwood Partners LLC, Sherwood Partners Inc., and Feevt (assignment for the benefit of creditors) LLC performed their obligations under the Agreement and released their claims.
- Declaration of Alan Martini – testifying (a) he personally attended the mediation with his client Mr. Quist, (b) after the parties agreed to the terms of the agreement and while those terms were being reduced to writing, Mr. Quist had to leave the mediation and thus authorized him to sign the Agreement on his behalf, (c) Mr. Kleidman was the last person signing the Agreement and he did not dispute nor did he object to my authority to sign the Agreement on behalf of Robert Quist, (d) after Mr. Kleidman changed his mind about the Agreement, Robert Quist signed a declaration ratifying his previous instruction and authorization for me to sign the Agreement on his behalf.
- Declaration of Bernie Murphy – testifying (a) he personally attended the mediation, (b) he was authorized by Michael Maidy, Martin Pichinson, Sherwood Partners LLC, Sherwood Partners Inc., Feevt (assignment for the benefit of creditors) LLC, and Timothy Cox to execute any

settlement agreement resulting from the mediation on his behalf, (c) at the time of signing the Agreement, Mr. Kleidman did not dispute nor did he object to his authority to sign the Agreement on behalf of his principals, (d) he performed his obligation under the Agreement by releasing his claims against all parties.

- Declaration of Martin Pichinson - testifying he (a) authorized Bernie Murphy to attend the mediation and settle this action on his behalf, (b) reviewed the Settlement Agreement, agreed with its terms, and ratified Mr. Murphy's execution, (c) fulfilled his obligation under the Agreement and released his claims against the parties.
- Declaration of Nitin Shah – testifying he (a) personally attended the mediation, (b) personally signed the Agreement, (c) as director of Bridge and Post and a majority shareholder authorized Don Cook to sign the Agreement on behalf of Bridge and Post, (d) heard and saw Robert Quist authorize Al Martini to sign the Agreement on his behalf, (e) heard and saw Steve Shaffer authorized Jonnathan Gaskin to sign the Agreement on behalf of Feeva Technology, (f) observed Mr. Kleidman was the last party to sign the Agreement, (g) fulfilled his obligation under the Agreement and released his claims against all parties.
- Declaration of Jonathan Gaskin – testifying (a) he is a partner at the law firm of Kaufhold Gaskin Gallagher LLP, (b) Feeva Technology's insurer, USSIC, appointed the law firm to represent Feeva and its insured directors and officers including Mr. Shah, Mr. Cook, and Mr. Schaumburg in this action, (c) he was authorized by Mr. Shaffer, as USSIC's representative, and Mr. Shah, the last CEO and director of Feeva Technology to sign the Agreement on behalf of Feeva Technology, (d) he signed the Agreement as Feeva's "legal representative", (e) at the time of signing the Agreement, Mr. Kleidman did not dispute nor did he object to his authority to sign on behalf of Feeva, (f) after the Agreement was fully executed, Mr. Kleidman provided Sherwood Partners and USSIC with his W-9 tax form, (g) five days after the execution of the Agreement, Mr. Kleidman sent an email purporting to revoke the Agreement because he had changed his mind, (h) USSIC and Sherwood Partner's insurer sent the requisite settlement checks for $190,000.00 to Mr. Kleidman, (i) Mr. Kleidman has breached the Agreement by refusing to

dismiss his suits, has engaged in number of appeals, and has filed additional lawsuits to invalidate the Agreement.

- Declaration of Robert Quist – testifying (a) he personally attended the mediation and was present until the near end of the day when he had to leave, (b) before he left, he was fully apprised of the terms of the Agreement and authorized his attorney, Al Martini, his express authorization to sign the Agreement on his behalf, (c) his authorization was witnessed by the mediator, (d) he reviewed the written Agreement and ratified Mr. Martini's execution.
- Declaration of David Becker – testifying (a) he is the managing member of Becker Legal Group LLC, (b) he participated in the mediation by phone and received regular updates on the status of the negotiations from his attorney, (c) the Agreement was faxed to him for review and consent, (d) he signed the Agreement on behalf of himself and Becker Law Group LLC, (e) he and Becker Law Group have fulfilled their obligations under the Agreement and have released all parties.
- Mr. Kleidman's provided W-9 tax form provided pursuant to the Settlement Agreement. (Declaration of Mr. Gaskin, Ex. A)
- Copy of Mr. Kleidman's email sent on March 30, 2015, stating, "I have changed my mind about the settlement and I hereby revoke what I signed on March 25, 2015." (Declaration of Mr. Gaskin, Ex. B)
- Ratification Declaration of Martin Pichinson – ratifying Bernie Murphy's signing the Settlement Agreement for him
- Ratification Declaration of Tim Cox - ratifying Bernie Murphy's signing the Settlement Agreement for him.
- Ratification Declaration of Michael Maidy - ratifying Bernie Murphy's signing the Settlement Agreement for him.
- Copy of the docket in this case, showing Mr. Kleidman's continued litigation. (Declaration of Mr. Gaskin, Ex. G)
- Copy of the appellate docket in Kleidman v. Shah showing Mr. Kleidman's continued litigation. (Declaration of Mr. Gaskin, Ex. H)

- Copy of the docket in *Kleidman v. U.S. Specialty Ins. Co*. No. 15-15252 (9th Cir.) showing Mr. Kleidman's continued litigation. (Declaration of Mr. Gaskin, Ex. I)
- Copies of the docket in Kleidman v. Elia, showing Mr. Kleidman's continued litigation. (Declaration of Mr. Gaskin, Ex. J)
- Copy of the cover letter and the check for $95,000 from USSIC sent to Mr. Kleidman. (Declaration of Mr. Gaskin, Ex. K)
- Copy of the cover letter and the check for $95,000 from Sherwood Partners' insurer sent to Mr. Kleidman. (Declaration of Mr. Gaskin, Ex. L)
- Copy of the unpublished California Court of Appeal's decision in *Kleidman v. Feeva Tech., Inc.,* No. H041738, 2021 WL 1624979, at 2 (Cal. Ct. App. Apr. 27, 2021). (Declaration of Gaskin, Ex. M)
- Copy of the complaint filed in the *Kleidman v. Elia* (21Cv384873) action. (Declaration of Gaskin, Ex. N)
- Mr. Kleidman's answer to the Cross-Complaint in this action. (Declaration of Gaskin, Ex. O)
- Dismissal and vexatious litigant order from the Northern District of California in *Kleidman v. Murphy et.al*. action. (Declaration of Gaskin, Ex. P)

Viewing the evidence in the light most favorable to Mr. Kleidman, including the documents of which the Court has taken judicial notice, the Court finds Cross-complainants' evidence sufficient to meet their summary judgment burden as to their breach of contract claim. Having established a prima facie case for breach of the Agreement, the burden shifts to Mr. Kleidman to produce evidence establishing a triable issue of one or more material facts as to this claim.

Mr. Kleidman contends:

(1) He "judicially admits that the eleven putative representative-capacity signatures on the 3/25/15 Document do not validly bind the persons that the signers professed to represent and that the 3/25/15 Document is therefore not a valid agreement." Since the Court considered Cross-complainants' agency allegations as judicial admission, the Court should also consider his judicial admission and remove the rule that the signatures are invalid and the 3/25/15 Document is a valid agreement. (Opposition p. 7)

(2) Cross-complainants' memoranda fail to comply with Rule 3.1113(b) and should be rejected.

(3) The court's statements in *Boteler v. Conway* (1936) 13 Cal. App. 2d 79 are overly broad dictum that should not be followed in these circumstances. Boteler's decision is limited to its facts and applies only when there is a valid ratification. The facts here show Cross-complainants' ratifications of unlawful acts are invalid. (Opposition pp. 10-11)

(4) Pursuant to Civ. Code § 2307, an authority may be conferred by a precedent authorization or a subsequent ratification; not both. A subsequent ratification allows an unauthorized act to become authorized by adoption of this principal. Therefore, Mrs. Cox's, Maidy's, Pichinson's subsequent ratification of Mr. Murphy's execution of the Agreement and Mr. Quist's ratification of Martini's execution of the Agreement are admissions that there was no precedent authorization. Had there been a precedent authorization, there would have been no need for a subsequent ratification. (Opposition pp. 11-12)

(5) He revoked his settlement offer via his email sent on March 30, 2015, prior to the Cross-complainants' ratification of the unauthorized acts of Mr. Murphy and Mr. Martini. Therefore, the subsequent ratifications are invalid.

(6) The March 25, 2015, was in essence an offer and "upon signing the 3/25/15 Document, [he] acquired the right to revoke his offer to enter into the 3/25/15 Document." As such, he has standing to challenge Cross-complainants' ratifications. (Opposition pp.12-13)

(7) He has standing and the right to protect his interest from an unlawful ratification by invoking Civil Code § 2313. (Opposition p. 14)

(8) "The ratifications, if allowed, will prejudice him because he does not want to settle in accordance with the 3/25/15 Document because he believes he can achieve a better result in the underlying action." (Opposition p. 12, lines 24-26)

(9) There is no evidence that Feevt (Assignment for the Benefit of Creditors) LLC or Sherwood Management LLC authorized Mr. Maidy to delegate his authorization to sub-agent Mr. Murphy. Cross-Complainants' have failed to produce any evidence that Mr. Maidy's purported delegation to Mr. Murphy was compliant with Civil Code § 2349. Therefore, Murphy lacked authorization to sign on behalf of Feevt and Sherwood Management. At minimum, there is a triable issue of

fact as to whether Maidy legitimately delegated to Murphy the power to settle on behalf of Feevt and Sherwood Management. (Opposition pp. 16-17)

(10) Any prior rulings of this Court are immaterial since prior rulings are not binding prospectively. Furthermore, the Court's prior ruling on USSIC's authority to appoint Mr. Gaskin no longer applies here since it is Cross-complainant's burden to show Gaskin's authority this time. (Opposition p. 18)

(11) Prior appellate court's decision in H041738 is still subject to direct attack and therefore has no conclusive effect. Even if an order is affirmed on appeal, it is still possible that the matter can be further litigated in subsequent proceedings. (Opposition p. 19)

(12) Civil Code § 3388's remedy of specific performance is not applicable here since a valid agreement was not formed. (Opposition p. 19)

(13) The language in the 3/25/15 document is not evidence of its own validity. "[I]t would be absurd to find that the signatures were authorized merely because those representations appear in the 3/25/15 Document." (Opposition p. 20)

(14) His conduct was not consistent with consent to the Agreement. In fact, his rejection of the checks, appeals, and continued litigation show lack of consent. At most, all his conduct was consistent with making an offer to enter into an agreement and then changing his mind and timely revoking his offer. (Opposition p. 21)

(15) His lack of objection to the putative representatives' signatures, at the time the document was signed, is immaterial because he has years to file a declaratory relief claim challenging the validity of the agreement under the statute of limitation. Cross-complainants cannot prove that he intended to waive or relinquish any right. (Opposition pp. 21, 22)

(16) The Court cannot bind USSCI or decedent Quist's representative to the Agreement because they are not parties to this action. As such, it would be inequitable for this Court to bind him to the Document when USSCI and decedent Quist's representative cannot be similarly bound. (Opposition p. 24)

(17) There is no public policy favoring imposing contractual obligations on someone when there was no contract formation. (Opposition p. 25)

(18) Submitting his W-9 tax form to Cross-complainants is immaterial and cannot be considered as a partial performance. (Opposition p. 25)

In support of his contentions, Mr. Kleidman submits his declaration; in which he testifies:

- His March 30, 2015, email was not an acknowledgement that a contract had ever been formed. When he wrote that he had changed his mind about the settlement, he meant "proposed settlement." That is why he used "revoke" and not "rescind" in referring to the agreement.
- He was not informed of any attempted ratifications until after March 30, 2015, and after he revoked.
- He received checks totaling $190,000.00 but returned them.
- A valid contract was not formed because not all the eleven putative representative-capacity signatures validly bind the persons that the signers professed to represent.
- He does not want to settle in accordance with the terms of the 3/25/15 Document because he believes he can achieve a better result.
- By signing the Settlement Agreement, he did not intend to waive any rights to later challenge the validities of the signatures because he believed the deadline to do so was governed by the applicable statute of limitations.

The Court is not persuaded by Mr. Kleidman's arguments, and his reasoning is flawed. More importantly, fails to provide any evidence showing that a triable issue of facts exists as to Cross-complainants' breach of contract claim.

First, Mr. Kleidman's argument that Cross-complainants' memoranda should be rejected for failure to comport with Cal. Rule of Court, Rule 3.113(b), lacks merit. Cross-complainants have properly articulated their legal point and have submitted legal authorities supporting their reasoning.

Second, Mr. Kleidman reasons that the Agreement is not valid simply because he judicially admits it in his opposition. Mr. Kleidman alludes that the Court's refusal to accept his judicial admission will be discriminatory since the Court has already considered Cross-complainants' pleading allegations as judicial admission to their agency relationship. On September 19, 2023, this Court granting Sherwood witnesses' protective order against discovery, explained that Cross-complainants had made judicial

admissions ratifying the actions of their agents in the cross-complaint by alleging that the Agreement was fully executed "by each of the parties or their authorized representatives." These statements comprised an unequivocal concession of the truth of the matter and Cross-complainants could no longer claim that the individuals who signed the Agreement for them did not have authority to do so. "The allegations in a plaintiff's complaint constitute judicial admissions and are 'conclusive concessions of the truth of a matter and have the effect of removing it from the issues' so that a 'pleader cannot blow hot and cold as to the facts positively stated." (*CytoDyn of New Mexico, Inc. v. Amerimmune Pharmaceuticals, Inc.,* (2008) 160 Cal. App. 4th 288, 299 (internal citations and quotations omitted).) Here, Mr. Kleidman is not relying on any judicial admissions made by the Cross-complainants; instead, he is treating his own statement as an admission against Cross-complainants.

Third, Mr. Gaskin's authority has been decided, appealed, and affirmed by the Sixth District Court of Appeal, and it is "sufficiently firm to be accorded conclusive effect." (*Bus. Park, Inc. v. City of San Diego* (2006) 142 Cal. App. 4th 1538, 1564.) Under the law of the case doctrine, when an appellate court "'states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout [the case's] subsequent progress, both in the lower court and upon subsequent appeal ….'" (*Kowis v. Howard* (1992) 3 Cal.4th 888, 893; See also *People v. Barragan*, (2004) 32 Cal. 4th 236, 246.) Mr. Kleidman's contention that prior court rulings on this case are not binding prospectively since "it is still possible that the matter can be further litigated in subsequent proceedings" lacks merit. Mr. Kleidman did not appeal the Sixth District's opinion to the California Supreme Court. Consequently, he cannot relitigate this issue here or in any other subsequent proceedings.

Fourth, this Court, in its September 19, 2023, discovery order, determined that Mr. Kleidman, a third party, could not challenge the agency relationship among the Cross-complainants. (*Boteler v. Conway* (1936) 13 Cal. App. 2nd 79, 83 (*Boteler*).) Still, Mr. Kleidman insists that the "3/25/15 Document" is invalid because Cross-complainants cannot establish that Messrs. Murphy, Gaskin, and Martini were properly appointed as agents of their principals for the purpose of the settlement negotiations and agreement. Mr. Kleidman again argues that *Boteler* is inapplicable because it is factually distinguishable, its ruling is overly-broad, and it is nothing more than a non-binding dictum.

The Court is not persuaded. While Mr. Kleidman may disagree with the holding in *Boteler*, it does not change the general rule of agency that *Boteler* applied to its facts. "One who contracts with an agent or officer of, and acting for, a corporation generally cannot question his authority to bind the corporation. [Citation.] This is a general rule of agency. [Citation.] If an agent exceeds his authority his principal may complain but a third party may not." (*Boteler, supra,* at 83; see also *Flash Cleaners v. Columbia Appliance* (1957) 156 Cal.App.2d 455, 458 [holding "one dealing with a corporation's agent cannot question the agent's authority"].) Therefore, whether Messrs. Gaskin, Murphy, and Martini were properly appointed as agents is not a matter of Mr. Kleidman's concern. Furthermore, Feeva Technology, Inc., Sherwood Partners Inc., Sherwood Management LLC, Bride & Post Inc., Feevt (Assignment for the Benefit of Creditors) LLC, and decedent Robert Quist's representative have not repudiated Messrs. Gaskin's, Murphy's, and Martini's authority, and Mr. Kleidman cannot take unto himself the right to do so. Cross-complainants submit ample evidence of their agents' authority to negotiate and sign a settlement agreement on their behalf.

Fourth, undisputed evidence reveals Mr. Kleidman's consent to the Agreement and his intent to be bound by its terms at the time he signed it. Mr. Kleidman does not dispute that on March 25, 2015, he (1) attended a full day mediation, (2) agreed to terms of a settlement that was reduced to writing titled "SETTLEMENT AND RELEASE AGREEMENT" in bold letters, (3) signed the Agreement after all others had affixed their signatures, (4) did not dispute or object to the signatures, and (5) did not dispute or object to Messer's Gaskin's, Murphy's, and Martini's authority to sign on behalf of their principal. A contract was formed.

Mr. Kleidman's current subjective belief that the document was a communication of his offer and not a settlement agreement is irrelevant. "Mutual assent is determined under an objective standard applied to the outward manifestations or expressions of the parties, i.e., the reasonable meaning of their words and acts, and not their unexpressed intentions or understandings." (*Serafin v. Balco Properties Ltd., LLC* (2015) 235 Cal.App.4th 165, 173 (internal citations omitted). Even Mr. Kleidman's March 25, 2015, email informing Cross-complainants that he had "changed his mind about the settlement" contradicts his current argument since Mr. Kleidman refers to a settlement and not an offer. Mr. Kleidman's declared unwillingness to settle in accordance with the terms of the Settlement Agreement

"because [he] believe[s] [he] can achieve a better result on the underlying action commenced in 2013." Illustrates that buyer's remorse has prompted Mr. Kleidman's quest to invalidate the Settlement Agreement and not objective legal grounds.

Cross-complainants' motions for summary judgment are GRANTED. Cross-complainants are entitled to a judgment for specific performance of the Settlement Agreement. Cross-complainants are instructed to submit a proposed judgment that attaches and incorporates the Settlement Agreement and that includes language regarding the obligations of the parties, including dates by which each event must occur.

B. Declaratory Relief

To state a declaratory relief claim, the plaintiff must allege a proper subject of declaratory relief and an actual controversy involving justiciable questions relating to the party's rights or obligations. (See *Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 909.) The validity of a contract is a proper subject of declaratory relief. (See Code Civ. Proc., § 1060.) While declaratory relief operates prospectively, a proper action for declaratory relief can redress past wrongs. (*Travers v. Louden* (1967) 254 Cal.App.2d 926, 931.) However, Code of Civil Procedure section1061 permits a trial court to refuse to grant, in its discretion, declaratory relief "where its declaration or determination is not necessary or proper at the time under all the circumstances." (*C.J.L. Construction, Inc. v. Universal Plumbing* (1993) 18 Cal.App.4th 376, 389-390.)

As stated in the previous section, Cross-complainants submit ample evidence proving the validity of the Settlement Agreement and Mr. Kleidman's subsequent breach. The Court has granted Cross-Complainants' motion for summary judgment. As a result, it is unnecessary for the Court to make a declaration or further determination as to the validity of the Settlement Agreement.

Calendar line 14
Case Name: *Jane Doe vs Keith Crawford et al*
Case No.: 19CV355396

Before the Court is Loma Kay Flowers' Motion to Set Aside Order Granting Summary Judgment. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

Defendants Loma Kay Flowers and her related company, Equilibrium Dynamics, each moved for summary judgment of Plaintiff Jane Doe's complaint. Flowers' summary judgment hearing was set for January 16, 2024, and Equilibrium's was set for January 22, 2024. The Court granted both motions. Plaintiff now asks the Court to vacate its grant of summary judgment for Flowers pursuant to Code of Civil Procedure 473(b) because Plaintiff mistakenly filed her opposition to both motions late because she thought both motions were set for January 22, 2024. Plaintiff's request is denied.

While Plaintiff is correct that the Court declined to exercise its discretion to consider Plaintiff's late filed opposition because "it would be prejudicial to Defendant Flowers to consider these late filed papers, particularly when the matter has been pending for over four years", that was not the entire basis for the Court's ruling. The Court has before it the transcript of the radio broadcast, the contents of which are not disputed. Based on that transcript, the Court's order granting Flowers' summary judgment motion further states: "what was said in the radio broadcast is not disputed, and it is clear Dr. Flowers did not publicly disclose private facts about Plaintiff, Plaintiff has no evidence of an agreement between Dr. Flowers and Crawford to disclose Plaintiff's private information or intentionally inflict emotional distress, and there is no evidence that Dr. Flowers substantially assisted or encouraged Crawford. Crawford was the party disclosing private information, gratuitously repeating Plaintiff's full name, and deliberately disclosing her workplace and job title. Accordingly, summary judgment in favor of Dr. Flowers is appropriate."

In addition, the Court did consider Plaintiff's opposition to Equilibrium's motion for summary judgment, which is the same opposition Plaintiff asks the Court to consider now in connection with Flowers' summary judgment motion. Plaintiff also appeared for argument at the hearing on Equilibrium's motion, the Court explained the substantive basis for its ruling, and Plaintiff had the

opportunity to attempt to persuade the Court not to enter summary judgment. The Court was not persuaded and therefore entered the following final order:

> Equilibrium Dynamics' Motion for Summary Judgment came on for hearing before the Court on January 23, 2023. Pursuant to California Rule of Court 3.1308, the Court issued its tentative ruling on January 22, 2023. The parties appeared, and Plaintiff contested the Court's tentative ruling granting the motion.
>
> As the Court explained in more detail during argument, it is not persuaded Plaintiff has a case against Dr. Loma Kay Flowers or her company Equilibrium Dynamics. Even assuming Dr. Flowers is Equilibrium Dynamics' alter ego, Dr. Flowers did not make any statements about Plaintiff during the radio broadcast, and Plaintiff will be unable to obtain any evidence that Dr. Flowers—either in her individual capacity or as Equilibrium Dynamics—agreed with Crawford to disclose Plaintiff's health information over the radio in advance. Plaintiff's claims, if any, are against Crawford. Accordingly, the Court formally adopts its tentative ruling below.
>
> Equilibrium Dynamics' Motion for Summary Judgment is GRANTED. A notice of motion with this hearing date and time was served by electronic mail on November 2, 2023. No opposition was filed. However, even if the Court considers the late-filed opposition from Dr. Flowers in the context of this motion and the arguments made during the hearing, summary judgment for Equilibrium Dynamics must be granted.
>
> What was said in the radio broadcast is not disputed, and the transcript of that broadcast makes plain that no agent or employee of Equilibrium Dynamics publicly disclosed private facts about Plaintiff, Plaintiff has no evidence of and will not be able to obtain evidence of (because there was none) an agreement between an agent or employee of Equilibrium Dynamics and Crawford to disclose Plaintiff's private information or intentionally inflict emotional distress, and there is no evidence that an agent or employee of Equilibrium Dynamics substantially assisted or encouraged Crawford.
>
> Crawford was the party disclosing private information, gratuitously repeating Plaintiff's full name, and deliberately disclosing her workplace and job title. Based on the undisputed transcript of the broadcast, there can be no reasonable dispute that Dr. Flowers/ Equilibrium Dynamics appeared on the show to promote their work, and Crawford simply started talking about his former partner's health information. Plaintiff's argument that but-for Dr. Flowers' appearance, there would have been no show for Plaintiff's information to be disclosed in cannot, as a matter of law, create liability on behalf of Dr. Flowers or Equilibrium Dynamics. If Plaintiff's theory were correct, any guest speaker at any event could be imputed with the wrongdoing of the event's host. That is clearly not the law.
>
> Accordingly, summary judgment in favor of Equilibrium Dynamics is appropriate.

It is clear from this order that the Court did consider Plaintiff's opposition and oral argument and that Flowers and Equilibrium were treated with virtual identity in the context of these summary judgment motions. Thus, there is no basis for the Court to set aside its order granting summary judgment for either Flowers or Equilibrium. The Court finds no merit to Plaintiff's claims against either Dr. Flowers or Equilibrium as a matter of law. Thus, Plaintiff's motion to set aside is DENIED.

Dr. Flowers and Equilibrium are ordered to submit a form of judgment for the Court's review and signature. The form of judgment Equilibrium previously submitted was incomplete, as it included spaces to calculate fees and costs, which have not been determined. Dr. Flowers and Equilibrium can seek to later amend the judgment to include those items if litigation is necessary to ascertain those amounts.

Calendar line 15
Case Name: *Ruentien Lu vs The City of Saratoga*
Case No.: 21CV385340

Before the Court is Defendant Smart Communication Systems, LLC Motion to Set Aside Default. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

Plaintiff Ruentien Lu filed this action on July 7, 2021 alleging his June 27, 2020 bicycle accident was caused by a dangerous condition in the northbound bike lane of Saratoga Sunnyvale road. Plaintiff alleges Defendant City of Saratoga owned and was responsible for maintaining the roadway and contracted with Defendant MasTec North America, Inc. ("MasTec") to dig and/or maintain trenches or tunnels for electrical components near where Plaintiff's accident occurred. (Complaint, ¶¶10-11.) According to Plaintiff, MasTec contracted with Smart Communications Systems, LLC ("SCS") to assist and oversee the construction, including resurfacing the roadway at the accident location. (Complaint, ¶12.) The Complaint asserts premises liability, general negligence, and vicarious liability against all Defendants.

On May 23, 2022, the City of Saratoga filed a cross complaint against MasTec and SCS. Saratoga served its cross-complaint on SCS by personal service on Kristie Briggs in the SCS mail room on September 2, 2022. The City of Saratoga obtained default against SCS on March 27, 2023. The request for entry of default was mailed to SCS's registered agent when it was submitted to the court on March 27, 2023. SCS claims it only "became aware of the entry of default on or about November 29, 2023" after which it immediately sought counsel. (Declaration of Zobida McCorquodale, ¶7.)

II. Legal Standard and Analysis

Code of Civil Procedure section 437(b) states: "Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." (Code of

Civ. Pro. §473(b); *Huh v. Wang* (2007) 158 Cal. App. 4th 1406, 1414.) "[T]he defaulting party must submit sufficient admissible evidence that the default was actually caused by the attorney's error." (*Huh v. Wang* (2007) 158 Cal. App. 4th 1406, 1414, citing *Todd v. Thrifty Corp.* (1995) 34 Cal.App.4th 986, 991.)

"Section 473 is often applied liberally where the party in default moves promptly to seek relief, and the party opposing the motion will not suffer prejudice if relief is granted. [Citations.] In such situations "very slight evidence will be required to justify a court in setting aside the default." [Citations.] Moreover, because the law strongly favors trial and disposition on the merits, any doubts in applying section 473 must be resolved in favor of the party seeking relief from default [citations].'" (*Fasuyi v. Permatex, Inc.* (2008) 167 Cal. App. 4th 681, 695, quoting *McCormick v. Board of Supervisors* (1988) 198 Cal.App.3d 352, 359–360.) Thus, where the defaulted party moves quickly for relief and the other party is not prejudiced, "very slight evidence will be required to justify a court in setting aside the default.'" (*Fasuyi v. Permatex, Inc.* (2008) 167 Cal. App. 4th at 696 (internal citations and quotations omitted.)

The Court is mindful that the law strongly favors cases to be resolved on the merits, but there are several problems with SCS's request to set aside default here. First, SCS was personally served with the cross-complaint on September 2, 2022—nearly two years before it moved to set aside default, and default was sought and objected on March 27, 2023—nearly one year before SCS sought moved to set aside default. Next, SCS's argument is that it did not retain counsel until it became aware of the entry of default in November 2023. The only evidence SCS submits in support of this assertion is an attorney declaration. That is not competent evidence to demonstrate SCS's knowledge. However, even if it were, that declaration provides no explanation for why SCS only "became aware" of the entry of default at that time or why it never responded to Saratoga's cross-complaint before that time. The case docket shows that SCS was also personally served with Plaintiff's complaint very early in the case and failed to file a responsive pleading. While that complaint is not the subject of this motion, it is relevant to the Court's analysis and conclusion that SCS simply ignored this litigation; its failure to participate in any way in this case since 2021 was not a result of mistake, inadvertence or excusable neglect.

SCS's motion fails to satisfy the requirements of Code of Civil Procedure section 473(b) and is therefore DENIED.