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: December 12, 2023 TIME: 9:00 A.M.

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: You no longer need to file a blank notice of motion to obtain a hearing date. **Phone lines are now open for you to call and reserve a date before you file your motion**. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Civil Local Rule 8C is in the amendment process and will be officially changed in January 2024.

Where to call: 408-882-2430
When to call: Monday through Friday, 8:30 am to 12:30 pm

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	2014-1-CV-271852	Developers Surety And Indemnity Company vs Weinstock Family Trust, et al	Parties are ordered to appear for the examination.
2	2014-1-CV-271852	Developers Surety And Indemnity Company vs Weinstock Family Trust, et al	Parties are ordered to appear for the examination.
3	2014-1-CV-271852	Developers Surety And Indemnity Company vs Weinstock Family Trust, et al	Parties are ordered to appear for the examination.
4	20CV362241	Adolf Konigsreiter et al vs Dean Rossi et al	Sereno Group Realty, Ed Graziani, and Leslie Woods' Demurrer is SUSTAINED WITHOUT LEAVE TO AMEND. Plaintiff was served with notice of this demurrer multiple times, as the demurrer was continued twice by the Court. No opposition was filed. Failure to oppose a motion may be deemed consent to the motion being granted. (Cal. Rule of Court, 8.54(c).) There is also good cause to SUSTAIN Defendants' demurrer, as the First Amended Complaint fails to plead fraud and undue influence against these defendants. Court to prepare formal order.
5	20CV362241	Adolf Konigsreiter et al vs Dean Rossi et al	On November 3, 2023, the Court declared Plaintiffs vexatious litigants as to Sereno Group Realty, Ed Graziani, and Leslie Woods and ordered Plaintiffs to appear on December 12, 2023 to confirm they posted the ordered $50,000 security. There is no evidence Plaintiffs have posted this security. This case is therefore dismissed. (Code Civ. Pro. §391.4.) Court to prepare formal order.
6	23CV411145	ALVERNAZ PARTNERS, LLC vs SANDEEP KAUR	Defendant's Demurrer is SUSTAINED WITH 20 DAYS LEAVE TO AMEND. Please scroll down to line 6 for full tentative ruling. Court to prepare formal order.
7	23CV411810	WENQIAN ZUO vs Select CAL Physical Therapy, P.C.	CAL Select Physical Therapy's Demurrer to Plaintiff's Complaint is SUSTAINED WITHOUT LEAVE TO AMEND. Please scroll down to line 7 for full tentative ruling. Court to prepare formal order. Parties are ordered to appear at the hearing.
8	23CV418299	Rajeev Guliani vs Milind Dalal et al	First Amended Complaint filed November 17, 2023; motion off calendar.
9	23CV419420	Maria Lopez vs AMERICAN HONDA MOTOR CO., INC.	American Honda Motor Co., Inc.'s Demurrer is OVERRULED. Please scroll down to lines 9-10 for full tentative ruling. Court to prepare formal order.
10	23CV419420	Maria Lopez vs AMERICAN HONDA MOTOR CO., INC.	American Honda Motor Co., Inc.'s Motion to Strike is GRANTED with 20 DAYS LEAVE TO AMEND. Please scroll down to lines 9-10 for full tentative ruling. Court to prepare formal order.

11	23CV423111	XINNONG DONG vs JIAYI LU	Defendant's Motion to Strike "Count Two-Willful Failure to Warn [Civil Code section 846]" is GRANTED WITHOUT LEAVE TO AMEND. Defendant served Plaintiff with notice of the hearing date for this motion by electronic mail on November 7, 2023. No opposition was filed. Failure to oppose a motion may be deemed consent to the motion being granted. (Cal. Rule of Court, 8.54(c).) There is also good cause to grant this motion, as Civil Code section 846 is directed to recreational use, and Plaintiff does not allege recreational use as the cause of her injuries. Court to prepare formal order.
12	18CV328603	Credit Consulting Services, Inc. vs Maritza Paredes	Cross-Defendant Credit Consulting Services, Inc.'s Motion for Protective Order Regarding Cross-Complainant Maritza Paredes' Special Interrogatories (Set Two) and Requests for Production of Documents and for Monetary Sanctions is GRANTED. The discovery sought is overbroad and violates privacy rights of unrelated third parties who (a) sought dental treatment and (b) have unpaid accounts related to that treatment. This is information these third parties would understand to be private, and producing it may constitute statutory violations—without leading to the discovery of admissible evidence in this basic collections case. The Court also finds that sanctions are warranted. Maritza Paredes and her counsel are jointly and severally ordered to pay Cross-Defendant Credit Consulting Services, Inc. $1,850.00 within 60 days of service of this formal order. Moving party to prepare formal order.
13	18CV328603	Credit Consulting Services, Inc. vs Maritza Paredes	Please see line 12.

14	20CV373187	Austin Erlich et al vs Wahid Shah	Austin Erlich's Motion to Compel the Deposition and Production of Documents of Defendant Wahid Shah and for Sanctions is GRANTED. This matter first came on for hearing before the Court on November 28, 2023, no opposition was filed, the Court found good cause to grant the motion, and issued a tentative ruling on November 27, 2023 granting the motion. After David Bunger specially appeared for Defendant during the hearing, the Court agreed to continue formal entry of its tentative ruling because of questions regarding service and ordered any opposition to be filed on or before December 4, 2023. On December 4, 2023, Defendant's counsel filed a motion to withdraw as counsel, which motion is set to be heard on January 9, 2024. There is still no opposition to this motion to compel. The Court accordingly adopts its November 27, 2023 tentative ruling, which states: "Plaintiff's Motion to Compel Defendant's Deposition and for Sanctions is GRANTED. An amended notice of motion with this hearing date was served on Defendant by electronic mail. No opposition was filed. Failure to oppose a motion may be deemed consent to the motion being granted. (Cal. Rule of Court, 8.54(c).) There is also good cause to grant this motion; Defendant failed to appear for deposition on multiple occasions without seeking a protective order or serving objections. Plaintiff's efforts to secure either a finalized settlement or Defendant's deposition have gone well beyond what is required by the Code of Civil Procedure. Accordingly, Defendant is ordered to (1) appear for deposition within ten days of entry of this formal order at the location and time specified in Plaintiffs March 1, 2023 deposition notice, (2) produce all documents requested in Plaintiff's March 1, 2023 deposition notice at the time of his deposition, and (3) pay $5,105 to Plaintiff for fees and costs Plaintiff incurred to prepare this motion. While the number of hours and hourly rates are reasonable, the Court reduced the amount requested to reflect that no opposition was filed. For oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order."

15	23CV418654	Freidrik Ternian vs Ninos Ternian et al	Plaintiff's Motion to Compel Nominal Defendant's Arseen Auto Body's Responses to Form Interrogatories and for Sanctions is CONTINUED. It appears to the Court that the amended notice of motion with this hearing date was not timely served. The Court also notes that there are six motions pending in addition to this motion to compel. It will be more efficient for the Court to have the discovery motions, many of which are related, heard on the same date. Accordingly, the Court sets the following hearing schedule for these seven motions, all at 9 a.m. in Department 6: January 16: (1) Demurrer and (2) Motion for Trial Preference February 6: (3) Motion to Compel Compliance with Form Interrogatories; (4) Motion to Quash Subpoena for Records from B & J Check Cashing, (5) Wells Fargo and Sutherland Booking; (6) Motion to Quash Wells Fargo Bank Subpoena; and (7) Motion to Compel Compliance with Third Party Subpoenas The Court also orders the parties to show cause on January 16, 2023 at 9 a.m. in Department 6 why this case should not be consolidated with 22CV398223 and heard in Department 6. Court to prepare formal order.
16	17CV314927	Nadira Akbari vs S5 Advisory, inc. et al	The Court has reviewed Plaintiff's Motion for Terminating Sanctions For Spoliation of Evidence and Monetary Sanctions and Plaintiff's additional motion to compel set for hearing on December 21, 2023. The Court has questions and concerns regarding deposition testimony directed to certain financial spreadsheets. The Court therefore reserves ruling on Plaintiff's motion for terminating sanctions, vacates the December 21 hearing on Plaintiff's further motion to compel, and orders the parties to appear for an informal discovery conference at 9 a.m. on December 22, 2023. The informal discovery conference will be held remotely via Microsoft TEAMS using the Department 6 remote hearing link. The Court will confer with the parties that morning and issue any necessary orders that day.
17	21CV387570	Aegis Security Insurance Company vs Friendly Wholesalers of California dba SeeMoCars et al	Defendant/Cross-Complainant's Motion for Reconsideration is DENIED. Please scroll down to line 17 for full tentative ruling. Court to prepare formal order. Parties are ordered to appear for argument.
18	23CV411588	Mark Porter vs County of Santa Clara Sherriffs Office	Plaintiff's Motion for Leave to File an Amended Complaint is DENIED. The reasons Plaintiff states for the need to file an amended complaint do not require an amended complaint. The Court may take judicial notice of any government claim not already attached to Plaintiff's Second Amended Complaint, Plaintiff may update his contact information at the clerk's office, and Plaintiff already included a flash drive of materials as an attachment to his Second Amended Complaint. Defendants have also demurred to and moved to strike portions of the Second Amended Complaint. Plaintiff will have ample opportunity to oppose those motions and to inform the Court of any amendments Plaintiff believes will permit him to state a cognizable claim in response to those motions, which are set to be heard on February 27, 2024. Court to prepare formal order. Parties are ordered to appear at the hearing.

Calendar Line 6
Case Name: *Alvernaz Partners LLC v. Sandeep Kaur, et.al.*
Case No.: 23CV411145

Before the Court is Defendant, Sandeep Kaur's demurrer to Plaintiff, Alvernaz Partners LLC's verified complaint. Pursuant to California Rule of Court, Rule 3.1308, the Court issues its tentative ruling.

I. Background

This case involves the foreclosure and related property rights regarding property located at 1550 Technology Drive, Unit 1059, San Jose, California 95110-3815 ("Subject Property"). Plaintiff alleges in mid to late 2022, the Subject Property went to a foreclosure sale auction. (Complaint, ¶ 12.) Plaintiff won the auction as the highest bidder and tendered payment in November 2022. (Complaint, ¶¶ 12, 15.) Pursuant to SB 1079, within 45 days from Plaintiff's tender, Defendant submitted her bid with an affidavit claiming preferential treatment as an "eligible-bidder." Defendant then took title and a deed in her name was recorded in November 2022. (Complaint, ¶¶ 16, 17.) Plaintiff was informed that a natural person invoked the eligibility provision of SB 1079 and later learned about Defendant's identity.

Defendant was not a tenant at the Subject Property at any time and had no prior relationship to the property. Therefore, her bidding eligibility was as a "Prospective Owner Occupied." As such, Defendant was required to occupy the subject Property as her primary residence within 60 days of the trustee's deed being recorded and maintain her occupancy for at least one year. (Complaint, ¶¶ 19-22.)

Defendant did not move into the property; Defendant had a different mailing address. Within a month from obtaining title, Defendant listed the Subject Property for sale on December 15, 2022. (Complaint, ¶¶ 24, 25.) Defendant listing the property in such a short time showed that she never intended to reside at the property for the required time, and Defendant thus signed her affidavit to the foreclosure trustee with the intent to defraud the foreclosing trustee and to deprive Plaintiff of the anticipated economic benefit of taking title to the property. (Complaint, ¶¶ 26, 27.) But for Defendant's fraudulent affidavit, Plaintiff would have taken ownership of the Subject Property as the winner of the auction. (Complaint, ¶ 28.)

Plaintiff filed its verified complaint on February 7, 2023, alleging (1) Quiet title, (2) Cancellation of Deed Obtained by Fraud, and (3) Fraud.

II. Legal Standard

"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).) A demurrer for uncertainty will be sustained only where the complaint is so deficient that the defendant cannot reasonably respond – i.e., the defendant cannot reasonably determine what issues must be admitted or denied, or what counts or claims are directed against them. (*Khoury v. Maly's of Calif., Inc.* (1993) 14 Cal.App.4th 612, 616 (*Khoury*).)

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

Leave to amend must be allowed where there is a reasonable possibility of successful amendment. (See *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349 [court shall not "sustain a demurrer without leave to amend if there is any reasonable possibility that the defect can be cured by amendment"]; *Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1037 ["A demurrer should not be sustained without leave to amend if the complaint, liberally

construed, can state a cause of action under any theory or if there is a reasonable possibility the defect can be cured by amendment."].) The burden is on the complainant to show the Court that a pleading can be amended successfully. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

III. Meet and Confer

Code Civ. Proc., 430.41, subd. (a) requires a demurring party to meet and confer in person or by telephone with the party who filed the pleading subject to demurrer to determine whether the objections to be raised in the demurrer can be resolved by agreement. "As part of the meet and confer process, the demurring party shall identify all of the specific causes of action that it believes are subject to demurrer and identify with legal support the basis of the deficiencies." (Code Civ. Proc., 430.41, subd. (a)(l).)

Defendant's attorney, Mr. Rowe declares that on March 28, 2023, he called Plaintiff's attorney to discuss the issues relating to the demurrer but received no response. He followed up his call with a letter (date unknown) and did not receive a response. (Declaration of Benjamin Rowe.) It is therefore evident that no meet and confer took place between the parties. While failure to meet and confer is not grounds to grant or deny a demurrer, the Court admonishes Plaintiff's counsel to comply with Court's rules and procedures. (Code Civ. Proc. § 439(a)(4).

IV. Analysis

A. Late Opposition

Plaintiff's opposition was filed and served late. 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. Plaintiff's opposition was thus due by November 29, 2023. The Court's docket shows Plaintiff filed its opposition on December 1, 2023. Plaintiff acknowledges this delay, explaining it was a clerical oversight. (Declaration of Steffanie Stelnick.) A court may decline to consider untimely papers. (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."].) However, Defendant did not object, and there is no prejudice, thus the Court will consider Plaintiff's opposition.

B. Analysis

The crux of Plaintiff's complaint is that Defendant obtained title to the Subject Property by

falsely and fraudulently invoking SB 1079's "eligible-bidder" provision. SB 1079, codified as Civil Code Section 2924m, changes the procedures for non-judicial foreclosures. Before Section 2924m, delivering the trustee's deed to a bona fide purchaser was conclusive and the buyer took free and clear of any other claims. After Section 2924m, for properties having one to four residential units, the sale only becomes final after 15 days unless an "eligible bidder" submits a notice of intent to bid an amount exceeding the highest bid at the sale. If an eligible bidder submits notice, the bidder then has an additional 30 days to submit a formal bid with a tender of payment by cash or cashier's check.

As applied to a natural person, the operative Civil Code Section 2924m at the relevant time defined an "Eligible bidder" as: (a) an eligible tenant buyer and (b) a prospective owner-occupant. (Civ. Code § 2924m(a)(3); 2021 Cal ALS 255; 2021 Cal AB 175, 2021 Cal Stats. ch. 255.) An eligible "tenant buyer" is a person occupying the property as their primary residence under a rental or lease agreement and who is not the mortgagor. (Civil Code §2924m(a)(2).) An eligible "prospective owner-occupant" is a person who will occupy the property as their primary residence within 60 days of the trustee's deed being recorded and will maintain their occupancy for at least one year. (Civil Code §2924m(a)(1).)

1. Quiet Title

Defendant contends Plaintiff's claim for quiet title fails because (1) Plaintiff was simply a bidder at a foreclosure sale who never gained an interest, (2) Defendant's legal title is superior to any interest Plaintiff may claim, and (3) any claim lies in the hands of the foreclosing trustee and the beneficiary of the foreclosed note.

Actions to quiet title are governed by Code of Civil Procedure section 760.010, et seq. The quiet title plaintiff must file a verified complaint stating (1) a description of the property, (2) the basis for the claim of title, (3) the adverse claims sought to adjudicate, (4) the date as of which to adjudicate those claims, and (5) a prayer for the determination of the plaintiff's title against the adverse claims. (Code Civ. Proc. § 761.020.)

Plaintiff alleges:

- it was the winning bidder in the foreclosure sale auction and would have become the owner of the subject Property but for Defendant's fraudulent "eligible-bidder" submission under SB 1079 (codified as Civil Code § 2924m). (Complaint, ¶¶ 12-17.)

- After winning the auction and before the expiration of the 45-day period for an eligible SB 1079 purchaser, Defendant submitted an affidavit to the foreclosing trustee claiming to be an "eligible bidder" and consequently took title. (Complaint, ¶ ¶ 16, 17.)
- To be an "eligible-bidder" Defendant, being a natural person, could have only taken title as a "Prospective Owner Occupant." (Complaint, ¶¶ 20, 21.)
- As a "Prospective Owner Occupant" Defendant was required to occupy the property as her primary residence within 60 days of the deed being recorded and maintain her occupancy for at least one year. (Complaint, ¶ 22.)
- To invoke SB 1079 eligibility, Defendant was required to submit an affidavit agreeing to the terms for "eligible-bidder" and " Prospective Owner Occupant." (Complaint, ¶ 23.)
- In violation of SB 1079 and in contradiction to her affidavit, Defendant never occupied the Subject Property as her primary residence, as evident by her mailing address listing another property and Defendant listing the property for sale within a month of obtaining title on December 15, 2022. (Complaint, ¶¶ 24-25.)
- Defendant's nearly immediate listing of the property for sale makes it clear that she never intended to reside in the Subject Property as her principal residence, let alone to do so for at least one year. Therefore, Defendant signed her SB 1079 required sworn statement intending to defraud the foreclosing trustee and to deprive Plaintiff of the benefit of taking title to the Subject Property. (Complaint, ¶¶ 26, 27.)
- But for Defendant's fraudulent affidavit, Plaintiff would have taken ownership with the intent to refurbish and resell it for the estimated net profit of $94,000.00. (Complaint, ¶ 28.)

Based on these allegations, if Plaintiff prevails in eliminating or quieting Defendant's claim, it can potentially be the title holder of the Subject Property via an equitable title. A holder of an equitable interest can maintain a quiet title action against a legal owner in cases involving fraud or breach of fiduciary duty by the holder of legal title. (*Strong v. Strong* (1943) 22 Cal.2d 540, 545-

46; *Warren v. Merrill*, 143 Cal.App.4th at 111-12.)

However, pursuant to Code of Civ. Proc. § 761.020(d), Plaintiff must state the date on which the determination is sought. Plaintiff has failed to do so. Accordingly, Defendant's demurrer to the first cause of action is SUSTAINED WITH 20 DAYS LEAVE TO AMEND.

2. Cancellation of Deed Obtained by Fraud

Civil Code § 3412 provides that "[a] written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled." Therefore, to state a cause of action for cancellation of deed, a plaintiff must plead that the instrument is void or voidable due to, for example, fraud and (2) there is a reasonable apprehension of serious injury including pecuniary loss or the prejudicial alternation of one's position. (*U.S. Bank Nat. Assn. v. Naifeh* (2016) 1 C.A. 4th 767, 778; Civil Code, § 3412.) Generally, an action to cancel an instrument is distinct from an action to quiet title. (*Hyatt v. Colkins* (1917) 174 Cal. 580, 581.) However, where a complaint seeks to quiet title to real property and cancel an instrument and both claims are based on the same facts, the cancellation claim is incidental to the claim to quiet title such that the action asserts only one claim. (*Deutsche Bank National Trust Co. v. Pyle*, (2017) 13 Cal. App. 5th 513, 523-524 citing *Ephraim v. Metropolitan Trust Co.* (1946) 28 Cal.2d 824, 833.)

Here, the quiet title claim and cancellation claim are based on the same set of facts. The Court sustained Defendant's demurrer to the quiet title claim for lack of sufficient facts, and the analysis there applies equally here. Accordingly, Defendant's demurrer to Plaintiff's second cause of action is SUSTAINED WITH 20 DAYS LEAVE TO AMEND.

3. Fraud

"The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." (*Tenet Healthsystem Desert, Inc. v. Blue Cross of California* (2016) 245 Cal.App.4th 821, 837.) "In California, fraud must be pled specifically; general and conclusory allegations do not suffice. [Citations.] Thus[,] the policy of liberal construction of the pleadings ... will not ordinarily be

invoked to sustain a pleading defective in any material respect. This particularity requirement necessitates pleading facts which 'show how, when, where, to whom, and by what means the representations were tendered.'" (*Tenet Healthsystem*, *supra*, 245 Cal.App.4th at 837-838 (internal quotations and citations omitted); *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645.) Defendant argues Plaintiff was not the defrauded party since (1) her alleged misrepresentation was made to the foreclosure trustee and not to the Plaintiff and (2) Plaintiff did not rely on her alleged misrepresentation.

Section 533 of the Restatement Second of Torts (section 533) provides: "[t]he maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable reliance upon it if the misrepresentation, *although not made directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other*, and that it will influence his conduct in the transaction or type of transaction involved." (Emphasis added; see also*, Marler v. E.M. Johansing, LLC* (2011) 199 Cal. App. 4th 1450, 1464, citing *Geernaert v. Mitchell* (1995) 31 Cal. App. 4th 601, 605-606.)

Plaintiff alleges Defendant submitted a fraudulent affidavit to the foreclosure trustee misrepresenting her "eligible-bidder" status with the intent to obtain title over the Subject Property. However, Plaintiff does not allege Defendant intended or had reasons to expect that the trustee would disclose the substance of her affidavit to Plaintiff or other bidders.

Accordingly, Defendant's demurrer to Plaintiff's third cause of action for fraud is SUSTAINED WITH 20 DAYS LEAVE TO AMEND.

Calendar Line 7
Case Name: *WENQIAN ZUO vs Select CAL Physical Therapy, P.C.*
Case No.: 23CV411810

Before the Court is Defendant CAL Physical Therapy, P.C. dba Select Physical Therapy's ("Select CAL") Demurrer to Plaintiff's First Amended Complaint. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

Plaintiff appears to be trying to state a claim for medical negligence. In her amended complaint, Plaintiff alleges she had physical therapy four years ago in June 2019 after she had surgery on her frozen left shoulder. She claims physical therapy "was pretty effective for releasing frozen shoulder but caused some damages on Deltoid muscle and back of my left shoulder." Plaintiff alleges she "had existing injuries before Physical Therapy: a torn supraspinator muscle, inflammation on both Deltoid and Supraspinatus, a depressed sub-Crominal space, after surgery with decompression, I went to Physical Therapy." She further claims she felt weakness in her left arm and shoulder and could not turn left in bed without pain before physical therapy.

In "around early 2022", Plaintiff began to feel strains from her back and neck and started to see doctors. She had an x-ray and MRI, but it was hard for her to figure out the exact cause of her pain because she is not a medical professional. Plaintiff began to conduct internet research which led her to conclude it had something to do with physical therapy. She states: "I did [sic] file a complaint until so late because I did not know until last x-ray and MRI on Feb. and May last year, so it still within the time stature [sic] of limitation."

Plaintiff filed this action on March 6, 2023. Under causes of action, Plaintiff checked the "other" box and specified: "Left shoulder Delta muscle on the back left shoulder were damaged by physical therapy exercises for loosing [sic] frozen shoulder." Defendant demurred to this Complaint, which demurrer the Court sustained with 20 days leave to amend, stating:

> Plaintiff appears to be trying to state a claim for medical negligence. Code of Civil Procedure 340.5 states: "the time for commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or

> through the use of reasonable diligence should have discovered, the injury, whichever occurs first. (Code Civ. Proc. § 340.5.) The "Cause for Filing Complaint" attached to Plaintiff's complaint states Defendant provided treatment in 2019 but it was "The last MRI took on May 2022 show these severe damages." Thus, Plaintiff appears to allege that she did not discover the injury she claims was caused by Defendant until May 2022, and she filed her Complaint on March 6, 2023. However, Plaintiff's Complaint requires more detail on this point and clarification regarding the cause of action she is asserting. Accordingly, Defendant Select CAL Physical Therapy, P.C. dba Select Physical therapy's Demurrer is SUSTAINED WITH 20 DAYS LEAVE TO AMEND.

On July 26, 2023, Plaintiff filed an amended complaint. It does not contain a cause of action, but instead provides the above-described allegations. Select CAL demurs to the amended complaint on the grounds that it (1) is barred by the statute of limitations under Code of Civil Procedure section 340.5; (2) fails to state a cause of action (Code of Civil Procedure § 430.1(e)) and (3) is uncertain (Code of Civil Procedure § 430.1(f)).

II. Legal Standard

"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).) A demurrer for uncertainty will be sustained only where the complaint is so deficient that the defendant cannot reasonably respond – i.e., the defendant cannot reasonably determine what issues must be admitted or denied, or what counts or claims are directed against them. (*Khoury v. Maly's of Calif., Inc.* (1993) 14 Cal.App.4th 612, 616 (*Khoury*).)

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

Leave to amend must be allowed where there is a reasonable possibility of successful amendment. (See *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349 [court shall not "sustain a demurrer without leave to amend if there is any reasonable possibility that the defect can be cured by amendment"]; *Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1037 ["A demurrer should not be sustained without leave to amend if the complaint, liberally construed, can state a cause of action under any theory or if there is a reasonable possibility the defect can be cured by amendment."].) The burden is on the complainant to show the Court that a pleading can be amended successfully. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

III. Analysis

A. Statute of Limitations

It again appears Plaintiff is trying to assert a medical negligence claim. "In an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. (Code Civ. Proc. § 340.5.) *Garabet v. Superior Court* (2007) 151 Cal. App. 4th 1538, 1545 further explains:

> The maximum limitations period for a medical malpractice action is three years from the *date of injury,* tolled for fraud, intentional

> concealment, or the presence of nontherapeutic and nondiagnostic foreign bodies only. (Code Civ. Proc., § 340.5.) For purposes of the statute, "[t]he word 'injury' signifies both the negligent cause and the damaging effect of the alleged wrongful act and not the act itself. (*Larcher v. Wanless* (1976) 18 Cal.3d 646, 655–656 & fn. 11 [135 Cal. Rptr. 75, 557 P.2d 507].)" (*Steketee v. Lintz, Williams & Rothberg* (1985) 38 Cal.3d 46, 54–55 [210 Cal. Rptr. 781, 694 P.2d 1153].) There must be some manifestation of appreciable harm. (*Brown v. Bleiberg* (1982) 32 Cal.3d 426, 437, fn. 8 [186 Cal. Rptr. 228, 651 P.2d 815].) "The date of injury could be much later than the date of the wrongful act where the plaintiff suffers no physical harm until months or years after the wrongful act. [Citation.]" (*Steketee v. Lintz, Williams & Rothberg, supra*, at p. 54.) However, once there is a manifestation of the injury in some significant way, the three-year limitations period begins to accrue. (*McNall v. Summers* (1994) 25 Cal.App.4th 1300, 1311 [30 Cal. Rptr. 2d 914] (*McNall*).)

Thus, in *Hills v. Aronsohn* (1984) 152 Cal. App. 3d 753, the court affirmed summary judgment for the physician even though there was an issue of fact as to when plaintiff reasonably could have discovered the negligent cause of her injury because the court found there was no issue of fact as to the expiration of the three year period. The court explained that "injury is not synonymous with the alleged wrongful act." (*Hills v. Aronsohn* (1984) 152 Cal. App. 3d 753, 759.) However, "the event which activates the three-year limitations period is the moment the plaintiff discovers the harm caused by the alleged negligence. Or, in the words of the court in *Larcher* [*v. Wanless, supra*, 18 Cal.3d 646], the period is activated on the date of the damaging effect of the wrongful act rather than on the date of the act itself." (*Id.*, accord *Garabet v. Superior Court* (2007) 151 Cal. App. 4th 1538, 1545 (claim time barred where plaintiff suffered side effects from Lasik surgery almost immediately but filed seven years after first suffering those side effects); *McNall v. Summers* (1994) 25 Cal. App. 4th 1300 (claim time barred where plaintiff first experienced symptoms in 1979 and filed suit in 1985); compare *Steingart v.*

White (1988) 198 Cal. App. 3d 406 (claim not time barred against physician who failed to identify cancerous tumor because plaintiff suffered injury only once she was diagnosed with cancer).

Plaintiff alleges her treatment with CAL Select took place in June 2019. Plaintiff did not file her complaint until March 6, 2023. Plaintiff argues her claim should not be time barred because it was in "around early 2022" that she began to feel pain, she had an x-ray and MRI in February and May 2022, and she did some internet research. In her "Opposition to the Second Motion for a Demurrer After First Amended Complaint", Plaintiff also states that she experienced the pain during the physical therapy but assumed that pain was related to injuries sustained from the factory work: "I was a patient with existing injuries on my left shoulder. Physical Therapy was supposed to separate sticken [sic] tissues, so I could raise my arm higher. It cause some intense pain at the time of exercise, but it was hard for me to tell the pain was not from separated tissues, which would eventually healed [sic], but from damaged muscles, which would caused further more [sic] damages." Plaintiff goes on to explain that the pain increased and spread, but she also states that the pain started during the physical therapy in June 2019.

In her "Opposition to the Motion for Another Demurrer After First Amended Complaint", this one directed "To Attorney Rachel Leonard", Plaintiff again states that she felt intense pain during or directly after the time of physical therapy ("the intense pain I felt on the back of my left shoulder after therapeutical exercise") but believed that pain to be from her already existing injuries. Plaintiff also filed her answers to form interrogatories with the Court, and the Court can thus take judicial notice of those interrogatories. There, Plaintiff states: "The Supraspinatus was torn by following one wrong instructions of total of six the therapists gave to me. It happened in June, 2019. It started on June 12, 2019 at Los Gatos Facility, then was repeated at home."

The Court finds that Plaintiff suffered her injury, as that term is defined in the case law, during physical therapy in June 2019. Plaintiff repeatedly states that she suffered extreme pain during the exercises but that she thought the pain was from her work related injuries. However, the case law cited above makes clear that the maximum limitations period for a medical malpractice action is three years from the *date of injury, and* the event which activates the three-year limitations period is the moment the plaintiff discovers the harm caused by the alleged negligence. Here, the harm is the intense pain she did and unfortunately continues to experience. That pain started in June 2019, well over three years before

she filed this lawsuit. The time period is not measured from when Plaintiff began to think it was the physical therapy that caused the pain, but when she first experienced that pain in June 2019.

The Court notes Plaintiff is self-represented. Self-represented litigants are entitled to the same, but no greater, consideration than other litigants and attorneys. (*County of Orange v. Smith* (2005) 132 Cal.App.4th 1434, 1444.) Self-represented litigants "are held to the same standards as attorneys" and must comply with the rules of civil procedure. (*Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 543; see also *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985.) Thus, the Court cannot treat Plaintiff differently than other litigants because she is not a lawyer. The Court did, however, review Plaintiff's various documents directed to the demurrer and liberally construe those documents as an opposition to CAL Select's demurrer.

Leave to amend should not be granted when the pleadings show that the action is barred by the statute of limitations. (*Save Lafayette Trees v. City of Lafayette* (2019) 32 Cal.App.5th 148, 154.) Accordingly, CAL Select's demurrer is SUSTAINED WITHOUT LEAVE TO AMEND.

Calendar Lines 9 & 10
Case Name: *Maria Lopez v. American Honda Motor Co., Inc.*
Case No.: 23CV419420

Before the Court is defendant American Honda Motor Co., Inc.'s ("AHM") demurrer to and motion to strike portions of plaintiff Maria Lopez's first amended complaint ("FAC"). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This is a lemon law case. On January 20, 2021, Plaintiff purchased a 2019 Honda Pilot (the "Vehicle"). (FAC, ¶ 8.) In connection with the purchase, she entered into a warranty agreement, by which AHM undertook to preserve or maintain the utility or performance of the Vehicle. (FAC, ¶ 9.) She alleges AHM manufactured and/or distributed hundreds of thousands of vehicles with defective transmissions that were installed in a range of vehicles, including the subject Vehicle while knowing of the alleged transmission defect. (FAC, ¶¶ 11, 17, 19-40.)

Plaintiff initiated this action on July 21, 2023, asserting claims for violation of the Song-Beverly Act and fraudulent inducement. On August 22, 2023, she filed her FAC, which asserts the same claims. On October 27, 2023, AHM filed the instant motions, which Plaintiff opposes.

II. Request for Judicial Notice

A. AHM's Request

AHM requests judicial notice of:

(1) NHTSA's publication of Technical Service Bulletin 14-041 on August 21, 2015: Exhibit A;

(2) NHTSA's publication of Technical Service Bulletin 15-034: Exhibit B;

(3) NHTSA's publication of Service News Article A15110F: Exhibit C;

(4) NHTSA's publication of Service News Article A15110H: Exhibit D;

(5) NHTSA's publication of Technical Service Bulletin 16-008: Exhibit E;

(6) NHTSA's publication of Technical Service Bulletin 16-087: Exhibit F;

(7) NHTSA's publication of Service News A16120B: Exhibit G;

(8) NHTSA's publication of Service News A17010D: Exhibit H;

(9) NHTSA's publication of Technical Service Bulletin 16-012: Exhibit I;

(10) NHTSA's publication of Technical Service Bulletin 19-04: Exhibit J; and

(11) NHTSA's publication of Technical Service Bulletin 19-124: Exhibit K

Evidence Code section 452, subd. (c), permits judicial notice to be taken of "[o]fficial acts of the legislative, executive, and judicial departments of the United States or any public entity in the United States." (Evid. Code, § 452, subd. (c).) Thus, the request for judicial notice is GRANTED.

B. Plaintiff's Request

Plaintiff requests judicial notice of the second amended complaint filed in *Dhital v. Nissan North America, Inc.* Case No. RG19009260 in Alameda County.

Evidence Code section 452, subd. (d) permits the Court to take judicial notice of court records. Thus, Plaintiff's request for judicial notice is GRANTED.

III. Demurrer

AHM demurs to the third cause of action for fraudulent inducement—concealment on the ground that it fails to allege sufficient facts to state the cause of action. (Code Civ. Proc. § 430.10, subd. (e).)

A. Legal Standard

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

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

N.A. (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

B. Analysis

1. Second Cause of Action: Fraudulent Inducement-Concealment

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*).)

As with fraudulent misrepresentation, the elements of concealment must be pleaded with specificity, but significantly less particularity is required in the case of fraudulent concealment because it is difficult to plead a negative, such as "how and by what means something didn't happen, or when it never happened, or where it never happened." (*Alfaro v. Community Housing Improvement System and Planning Assn*. (2009) 171 Cal.App.4th 1356, 1384.) Thus, when courts refer to the requirement of specificity with respect to allegations of fraudulent concealment, they are generally concerned that allegations regarding the facts giving rise to a duty to disclose material facts are pleaded with particularity. (See *Linear Technology Corp. v. Applied Materials, Inc.* (2007) 152 Cal.App.4th 115, 132-133 (*Linear Technology*).)

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.)

AHM argues the claim is uncertain because Plaintiff's allegation that AHM concealed information is contradicted by her allegations that AHM publicly disclosed defects through service bulletins published by the NHTSA. It is unclear to the Court whether technical service bulletins ("TSBs") were publicly accessible at the time the subject TSBs were published. Furthermore, even if there is a contradiction between the allegations, it does not render the pleading so unintelligible that AHM cannot reasonably respond to the claims against it. Thus, the demurrer on the basis of uncertainty is OVERRULED.

2. Failure to Allege Sufficient Facts

AHM argues the claim fails because (1) AHM did not have a duty to disclose because it did not have exclusive knowledge and Plaintiff fails to allege a direct transaction with AHM and (2) it is not alleged with the requisite specificity.

a. Duty to Disclose

"A failure to disclose a fact can constitute actionable fraud or deceit in four circumstances: (1) when the defendant is the plaintiff's fiduciary; (2) when the defendant has exclusive knowledge of material facts not known or reasonably accessible to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations that are misleading because some other material fact has not been disclosed." (*Collins v. eMachines, Inc.* (2011) 202 Cal.App.4th 249, 255 (*Collins*).) The latter 3 circumstances, "presupposes the existence of some other relationship between the plaintiff and the defendant in which a duty to disclosure can arise… As a matter of common sense, such a relationship can only come into being as a result of some sort of transaction between the parties." (*LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 336-337.)

Bigler-Engler v. Breg, Inc. (2017) 7 Cal.App.5th 276, 311-312 (*Bigler*) explains:

> Our Supreme Court has described the necessary relationship giving rise to a duty to disclose as a "transaction" between the plaintiff and the defendant: "In *transactions* which do not involve fiduciary or confidential relations, a cause of action for non-disclosure of material facts may arise in at least three instances: (1) the defendant

> makes representations but does not disclose facts which materially qualify the facts disclosed, or which render his disclosure likely to mislead; (2) the facts are known or accessible only to defendant, and defendant knows they are not known to or reasonably discoverable by the plaintiff; (3) the defendant actively conceals discovery from the plaintiff." (*Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 294 [85 Cal. Rptr. 444, 466 P.2d 996], italics added, fns. omitted.) Other cases have described the requisite relationship with the same terms. (See, e.g., *Hoffman v. 162 North Wolfe LLC* (2014) 228 Cal.App.4t 1178, 1187 [175 Cal. Rptr. 3d 820] (*Hoffman*); *LiMandri*, *supra*, 52 Cal.App.4th at p. 337 ["As a matter of common sense, such a relationship can only come into being as a result of some sort of transaction between the parties."].) *Such a transaction must necessarily arise from direct dealings between the plaintiff and the defendant; it cannot arise between the defendant and the public at large.*

(Emphasis added.)

AHM contends there is no direct relationship alleged between it and Plaintiff because Plaintiff did not purchase the Vehicle directly from AHM. However, earlier in *Bigler*, the court cites with approval that: " 'A duty to disclose facts arises only when the parties are in a relationship that gives rise to the duty, such as "'seller and buyer, employer and prospective employee, doctor and patient, ***or parties entering into any kind of contractual arrangement.***'" (*Bigler*, *supra*, 7 Cal.App.5th at p. 311; emphasis added.) Here, although Plaintiff does not allege she purchased the Vehicle from AHM she does allege a contractual agreement (the express written warranty) with AHM. (FAC, ¶ 9.)

Plaintiff relies on *Dhital v. Nissan North America, Inc.* (2022) 84 Cal.App.5th 828, 844 (*Dhital*). In *Dhital*, the plaintiffs alleged they bought the car from a Nissan dealership, that Nissan backed the car with an express warranty, and that Nissan's authorized dealerships are its agents for purposes of the sale of Nissan vehicles to consumers. (*Id*. at p. 844.) The appellate court found that the plaintiffs' allegations were sufficient to establish the existence of a buyer-seller relationship between the parties at the pleading stage. (*Ibid*.) Similarly here, Plaintiff alleges she purchased the Vehicle, AHM backed the

Vehicle with a warranty, and the dealership is AHM's authorized agent for the purposes of the sale of vehicles to consumers. (See FAC, ¶¶ 8-9, 54, 85.)

AHM relies on *Ford Motor Warranty Cases* (2023) 89 Cal.App.5th 1324. In *Ford Motor Warranty Cases*, the appellate court affirmed an order denying the defendants motion to compel arbitration of plaintiff's claims regarding alleged defects in a car it manufactured. (*Id*. at p. 1329.) The court found that the plaintiffs failed to allege sufficient facts to support an agency relationship between the manufacturer and the dealership because its agency allegations were "ambiguous". (*Id*. at p. 1341.) However, the agency analysis there pertained to whether the allegations would permit the manufacturer to compel arbitration against as an undisclosed principal, which is not at issue on this motion. (*Id*. at p. 1340.) Moreover, as noted in *Ford Motor Warranty Cases*:

> the concealment allegations do not rest on an agency relationship. While plaintiffs allege FMC communicated some information about vehicle defects to its dealers, we are directed to no allegations that the dealers from which plaintiffs bought their cars knew the legally sufficient information that FMC allegedly concealed from plaintiffs. To have fraudulently concealed information on FMC's behalf, it is necessary that the dealers had that information. But the only entity alleged to have full knowledge of the relevant facts allegedly concealed-knowledge that was 'superior and exclusive' is FMC.

(*Id*. at p. 1342.)

Similarly here, the concealment allegations do not rest on an agency relationship and there are no allegations that the dealers knew the material facts that AHM allegedly concealed from Plaintiff. The entity with the full knowledge of the relevant facts that was superior and exclusive is AHM.

Both *Dhital* and *Ford Motor Warranty Cases* are pending review by the California Supreme Court. "Grant of review by the Supreme Court of a decision by the Court of Appeal does not affect the appellate court's certification of the opinion for full or partial publication under rule 8.1105(b) or rule 8.1110, but any such Court of Appeal opinion, whether officially published in hard copy or electronically, must be accompanied by a prominent notation advising that review by the Supreme Court has been granted… (2) The Supreme Court may order that an opinion certified for publication is not to be published or that an opinion not certified is to be published. The Supreme Court may also order

depublication of part of an opinion at any time after granting review." (Cal. Rules of Court, rule 8.1105(e)(1)(B), (e)(2).) "Pending review and filing of the Supreme Court's opinion, unless otherwise ordered by the Supreme Court under (3), a published opinion of a Court of Appeal in the matter has no binding or precedential effect, and may be cited for potentially persuasive value only. Any citation to the Court of Appeal opinion must also note the grant of review and any subsequent action by the Supreme Court." (Cal. Rules of Court, 8.1115(e)(1).) Given the potentially changing nature of lemon law claims appearing before the court, the court still considers the cases persuasive impacts as ruled upon in the Appellate Districts. "As a practical matter, a superior court ordinarily will follow an appellate opinion emanating from its own district even though it is not bound to do so. Superior courts in other appellate districts may pick and choose between conflicting lines of authority." (*McCallum v. McCallum* (1987) 190 Cal.App.3d 308, 315, fn. 4.)

Here, neither of the cases emanate from this Court's own district. The California Supreme Court denied the request for depublication in *Dhital,* thus, the Court may consider the opinion for persuasive value. (See *Dhital v. Nissan North America, Inc.* (Cal. 2023) 304 Cal.Rptr.3d 82, 83.) Additionally, *Ford Motor Warranty Cases* can be relied upon for persuasive value. (*Ochoa v. Ford Motor Co. (In Re Ford Motor Warranty Cases)* 2023 Cal.LEXIS 4235.)

As the Court stated above, it is unclear whether Plaintiff (and other consumers) had access to the NHTSA's technical service bulletins at the time they were published. The Court is also persuaded by the similarities between *Dhital* and the present case. Thus, Plaintiff's allegation that AHM has exclusive knowledge of the transmission defects and the alleged facts supporting the existence of a direct transactional relationship with AHM are sufficient to support a duty not to conceal material facts.

b. Sufficiency of Allegations Pertaining to Elements of Fraud

The fraud particularity requirement necessitates pleading facts which show "how, when, where, to whom, and by what means the representations were tendered." (*Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 73.) For cases involving nondisclosure, the elements must be pleaded with specificity, but significantly less particularity is required because it is difficult to plead a negative, such as "how and by what means something didn't happen, or when it never happened, or where it never happened." (*Alfaro v. Community Housing Improvement System and Planning Assn*. (2009) 171 Cal.App.4th 1356,

1384.) "Less specificity is required when it appears from the nature of the allegations that the defendant must necessarily possess full information concerning the facts of the controversy." (*Committee on Children's Television, Inc.,* (1983) 35 Cal.3d 197, 216.) Thus, even under the strict rules of common law pleading, one of the canons was that less particularity is required when the facts lie more in the knowledge of the opposite party. (*Ibid*.)

Here, Plaintiff alleges AHM and its agents concealed and failed to disclose facts regarding the alleged transmission defects and they intended to deceive her by concealing known issues in an effort to sell or lease the Vehicle. (FAC, ¶ 87.) She alleges AHM had a duty to disclose based on its exclusive knowledge of material facts. (See FAC, ¶ 81-82.) She further alleges she was unaware of the alleged transmission defect and "but for AHM's concealment of the alleged defect, she would not have purchased the Vehicle." (FAC, ¶ 90.) Lastly, she alleges she was harmed by AHM's concealment of the alleged transmission defect. (FAC, ¶ 95.) Therefore, Plaintiff alleges sufficient facts to state a claim for fraud based on concealment. (See *Jones, supra,* 198 Cal.App.4th at pp. 1198.) Thus, the demurrer is OVERRULED.

IV. Motion to Strike

A. Legal Standard

Under Code of Civil Procedure section 436, a court may strike out any irrelevant, false, or improper matter inserted into any pleading or strike out all or part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court. (§ 436.) The grounds for a motion to strike must appear on the face of the challenged pleading or from matters of which the court may take judicial notice. (§ 437, subd. (a); see also *City and County of San Francisco v. Strahlendorf* (1992) 7 Cal.App.4th 1911, 1913.) In ruling on a motion to strike, the court reads the complaint as a whole, all parts in their context, and assuming the truth of all well-pleaded allegations. (See *Turman v. Turning Point of Central California, Inc.* (2010) 191 Cal.App.4th 53, 63, citing *Clauson v. Super. Ct.* (1998) 67 Cal.App.4th 1253, 1255.) "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.' " (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2020) 7.169.)

B. Analysis

AHM moves to strike the prayer for punitive damages on the basis that is not stated with specificity and Plaintiff has not met the pleading standard for punitive damages.

To properly plead a claim for punitive damages, a plaintiff must allege the defendant was guilty of malice, oppression, or fraud and the ultimate facts underlying such allegations. (Civ. Code, § 3294, subd. (a); *Clauson v. Super. Ct.* (1998) 67 Cal.App.4th 1253, 1255.) Malice is defined as, "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights and safety of others." (Civ. Code, § 3294, subd. (c)(1).) "Oppression" is defined as "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (Civ. Code, § 3294, subd. (c)(2).) "Despicable conduct," in turn, has been described as conduct that is "so vile, base, contemptible, miserable, wretched, or loathsome that it would be looked down upon and despised by ordinary decent people." (*Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.4th 306, 331.) Finally, "fraud" is defined within the statute as "an intentional misrepresentation, deceit, or concealment of material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." (Civ. Code, § 3294, subd. (c)(3).) Here, Plaintiff has sufficiently alleged an entitlement to recover punitive damages based on fraud. (See *Stevens v. Super. Ct.* (1986) 180 Cal.App.3d 605, 610 [pleading of fraud is sufficient for punitive damages.].)

AHM further argues Plaintiff's fails to proper allege recovery of punitive damages against a corporate entity. Regarding a corporate employer, Civil Code section 3294, subdivision (b), provides: the "advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation." (Civ. Code section 3294, sub. (b).)

Plaintiff alleges that all acts of corporate employees as alleged were authorized or ratified by an officer, director, or managing agent of the corporate employer. (FAC, ¶ 7.) However, this is a conclusory allegation and Plaintiff fails to offer any specific facts as to corporate ratification. Thus, the motion to strike punitive damages is GRANTED with 20 days leave to amend.

Calendar Line 17
Case Name: *Aegis Security Insurance Company vs Friendly Wholesalers of California dba SeeMoCars*
Case No.: 21CV387570

Before the Court is Defendant and Cross-Complainant Azzam Abdo's Motion for Reconsideration of the Court's October 10, 2023 Order Sustaining Demurrer Without Leave to Amend. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This matter was previously assigned to Judge Manoukian in Department 20. At that time, Cross-Defendants' Demurrer to Mr. Abdo's Second Amended Cross-Complaint came on for hearing on May 30, 2023. According to the local rules, Judge Manoukian issued a tentative ruling sustaining the demurrers without leave to amend. The parties appeared both for argument and a case management conference. Because Judge Manoukian had a particularly busy calendar that day, during the hearing, Mr. Abdo was not permitted to provide Judge Manoukian with his complete argument concerning the demurrers. As a result, Mr. Abdo submitted a declaration attaching the outline of the points he intended to make at that hearing, which the undersigned Court has reviewed. It is also for this reason that Mr. Abdo moves for reconsideration—he argues (1) Judge Manoukian was disqualified by the time he issued a final order and (2) he was prevented from offering argument during the May 30, 2023 hearing.

II. Legal Standard

Motions for reconsideration are generally governed by Code of Civil Procedure section 1008, which represents the Legislature's attempt to regulate what the Supreme Court has referred to as "repetitive motions." (See *Standard Microsystems Corp. v. Winbond Electronics Corp.* (2009) 179 Cal.App.4th 868, 885.) Section 1008, subdivision (a), "requires that any such motion be (1) filed within 10 days after service upon the party of written notice of entry of the order of which reconsideration is sought, (2) supported by new additional facts, circumstances or law, and (3) accompanied by an affidavit detailing the circumstances of the first motion and the respects in which the new motion differs from it." (*Id.*) The legislative intent was to restrict motions for reconsideration to circumstances where a party offers the court some fact or circumstance not previously considered, and some valid

reason for not offering it earlier. (*Gilberd v. AC Transit* (1995) 32 Cal.App.4th 1494, 1500; see *Baldwin v. Home Sav. Of America* (1997) 59 Cal.App.4th 1192, 1198.)

The burden under Section 1008 "is comparable to that of a party seeking a new trial on the ground of newly discovered evidence: the information must be such that the moving party could not, with reasonable diligence, have discovered or produced it at the trial." (*New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 212-213.)

Parties may only move for reconsideration as authorized by Section 1008. Section 1008 "does not limit the court's ability, on its own motion, to reconsider its prior interim orders so it may correct its own errors" (*Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1107) and the court has inherent power to correct its own errors when they are called to the court's attention by way of an improperly filed motion (*Marriage v. Barthold* (2008) 158 Cal.App.4th 1301, 1308). However, a party's motion asking the court to reconsider a ruling on its own motion after the 10-day period is ineffective*;* the court is not obliged to rule on it, and the opposing party need not respond. (*Le Francois, supra,* 35 Cal.4th at 1108; see also *Farmers Ins. Exch. v. Superior Court* (2013) 29 Cal.App.4th 96, 102.)

III. Analysis

First, Judge Manoukian signed the order granting the challenge under Code of Civil Procedure section 170.6 on October 16, 2023—three days after Mr. Abdo submitted his challenge. Moreover, it appears the final order adopts the tentative ruling, which ruling was issued on May 29, 2023—well before Mr. Abdo submitted his challenge.

Next, the Court has reviewed these orders, the briefing, and Mr. Abdo's Declaration regarding the hearing on May 30, 2023, and it not only appears to the Court that the tentative ruling did not change when made final, but that there are no new facts or law to support the motion for reconsideration. The grounds for motions for reconsideration are narrow, and none of those grounds are present here.

Finally, some parties complain that Mr. Abdo filed a Third Amended Complaint. It appears to the undersigned that Mr. Abdo was granted leave to amend some claims and not others. If there are aspects of the Third Amended Complaint the parties believe are improper, the appropriate vehicle to attack that is a motion to strike.