SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 20, Honorable Socrates Peter Manoukian, Presiding

Courtroom Clerk: Hien-Trang Tran-Thien

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"Every case is important" . . . . . "No case is more important than any other."—United States District Judge Edward Weinfeld (https://www.nytimes.com/1988/01/18/obituaries/judge-edward-weinfeld-86-dies-on-us-bench-nearly-4-decades.html)

"The Opposing Counsel on the Second-Biggest Case of Your Life Will Be the Trial Judge on the Biggest Case of Your Life."—Common Wisdom.

As Shakespeare observed, it is not uncommon for legal adversaries to "strive mightily, but eat and drink as friends." (Shakespeare, The Taming of the Shrew, act I, scene ii.)" (*Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 309.)

Counsel is duty-bound to know the rules of civil procedure. (See *Ten Eyck v. Industrial Forklifts Co.* (1989) 216 Cal.App.3d 540, 545.) The rules of civil procedure must apply equally to parties represented by counsel and those who forgo attorney representation. (*McClain v. Kissler* (2019) 39 Cal.App.5th 399.)

By Standing Order of this Court, all parties appearing in this Court are expected to comply with the Code of Professionalism adopted by the Santa Clara County Bar Association: https://www.sccba.com/code-of-professional-conduct/

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DATE: Thursday, 09 May 2024
TIME: 9:00 A.M.

This Department uses Zoom for Law and Motion and for Case Management Calendars. Please use the Zoom link below.

TO ALL LAWYERS APPEARING IN THIS COURT: Please be on the lookout for announcements concerning "Civil Trials and Civil Motion Practice: Best Practices in Santa Clara County Superior Court." The program is tentatively set for 20 June 2024 at 12:00 PM on the Department 6 Teams Link. The program is available to all lawyers whether or not they are members of Santa Clara County Bar Association.

This Court expects all counsel and litigants to comply with the Tentative Rulings Procedures that are outlined in Local Civil Rule 8(E) and ***California Rules of Court***, rule 3.1308. If the Court has not directed argument, oral argument must be permitted only if a party notifies all other parties and the Court at (408) 808-6856 before 4:00 p.m. on the court day before the hearing of the party's intention to appear. A party must notify all other parties by telephone or in person. A failure to timely notify this Court and/or the opposing parties may result in the tentative ruling being the final order in the matter.

You may use these links for Case Management Conferences and Trial Setting Conferences without Court permission. Informal Discovery Conferences and appearances on Ex Parte applications will be set on Order by the Court.

Join Zoom Meeting
https://scu.zoom.us/j/96144427712?pwd=cW1JYmg5dTdsc3NKNFBpSjlEam5xUT09
Meeting ID: 961 4442 7712
Password: 017350

Join by phone:
+1 (669) 900-6833
Meeting ID: 961 4442 7712

One tap mobile
+16699006833,,961 4442 7712#

By appearing in this Department, whether in-person or by remote video platform, you represent that you have read the protocols of this Department, that you understand them, and that you will comply with them.APPEARANCES.

Appearances are usually held on the Zoom virtual platform. However, we are currently allowing in-court appearances as well. If you do intend to appear in person, please advise us when you call to contest the tentative ruling so we can give you current instructions as to how to enter the building. If the doors to the Old Courthouse are locked, please see the deputies at the metal detector next door at 191 North First Street.

Whether appearing in person or on a virtual platform, the usual custom and practices of decorum and attire apply. (See ***Jensen v. Superior Court (San Diego)*** (1984) 154 Cal.App.3d 533.). Counsel should use good quality equipment and with sufficient bandwith. Cellphones are very low quality in using a virtual platform. Please use the video function when accessing the Zoom platform. The Court expects to see the faces of the parties appearing on a virtual platform as opposed to listening to a disembodied voice.

For new Rules of Court concerning remote hearings and appearances, please review California ***Rules of Court***, rule 3.672.

"A person's name is to him or her the sweetest and most important sound in any language."—Dale Carnegie. All Courts of California celebrate the diversity of the attorneys and the litigants who appear in our Courts. Do not hesitate to correct the Court or Court Staff concerning the pronunciation of any name or how anyone prefers to be addressed. As this Court is fond of saying, "with a name like mine, I try to be careful how I pronounce the names of others." Please inform the Court how you, or if your client is with you, you and your client prefer to be introduced. The Court encourages the use of diacritical marks, multiple surnames and the like for the names of attorneys, litigants and in court papers. You might also try www.pronouncenames.com but that site mispronounces my name.

Please notify this Court immediately if the matter will not be heard on the scheduled date. ***California Rules of Court***, rule 3.1304(b). If a party fails to appear at a law and motion hearing without having given notice, this Court may take the matter off calendar, to be reset only upon motion, or may rule on the matter. ***California Rules of Court***, rule 3.1304(d). A party may give notice that he or she will not appear at a law and motion hearing and submit the matter without an appearance unless this Court orders otherwise. This Court will rule on the motion as if the party had appeared. California Rules of Court, rule 3.1304(c). Any uncontested matter or matters to which stipulations have been reached can be processed through the Clerk in the usual manner. Please include a proposed order.

All proposed orders and papers should be submitted to this Department's e-filing queue. Do not send documents to the Department email unless directed to do so.

While the Court will still allow physical appearances, all litigants are encouraged to use the Zoom platform for Law & Motion appearances and Case Management Conferences. Use of other virtual platform devices will make it difficult for all parties fully to participate in the hearings. Please note the requirement of entering a password (highlighted above.) As for personal appearances, protocols concerning social distancing and facial coverings in compliance with the directives of the Public Health Officer will be enforced. Currently, facemasks are not required in

all courthouses. If you appear in person and do wear a mask, it will be helpful if you wear a disposable paper mask while using the courtroom microphones so that your voice will not be muffled.

Individuals who wish to access the Courthouse are advised to bring a plastic bag within which to place any personal items that are to go through the metal detector located at the doorway to the courthouse.

Sign-ins will begin at about 8:30 AM. Court staff will assist you when you sign in. If you are using the Zoom virtual platform, it will helpful if you "rename" yourself as follows: in the upper right corner of the screen with your name you will see a blue box with three horizontal dots. Click on that and then click on the "rename" feature. You may type your name as: Line #/name/party. If you are a member of the public who wishes to view the Zoom session and remain anonymous, you may simply sign in as "Public."

CIVILITY.

In the 50 years that this Judge has been involved with the legal profession, the discussion of the decline in civility in the legal profession has always been one of the top topics of continuing education classes.

This Court is aware of a study being undertaken led by Justice Brian Currey and involving various lawyer groups to redefine rules of civility. This Judge has told Justice Currey that the lack of civility is due more to the inability or unwillingness of judicial officers to enforce the existing rules.

The parties are forewarned that this Court may consider the imposition of sanctions against the party or attorney who engages in disruptive and discourteous behavior during the pendency of this litigation.

COURT REPORTERS.

This session will not be recorded. No electronic recordings, video, still photography or audio capture of this live stream is allowed without the expressed, written permission of the Superior Court of California, County of Santa Clara. State and Local Court rules prohibit photographing or recording of court proceedings whether in the courtroom or while listening on the Public Access Line or other virtual platform, without a Court Order. See Local General Rule 2(A) and 2(B); ***California Rules of Court***, rule 1.150.

This Court no longer provides for Court Reporters in civil actions except in limited circumstances. If you wish to arrange for a court reporter, please use Local Form #CV-5100. All reporters are encouraged to work from a remote location. Please inform this Court if any reporter wishes to work in the courtroom. This Court will approve all requests to bring a court reporter. Counsel should meet and confer on the use of a court reporter so that only one reporter appears and serves as the official reporter for that hearing.

PROTOCOLS DURING THE HEARINGS.

During the calling of any hearing, this Court has found that the Zoom video platform works very well. But whether using Zoom or any telephone, it is preferable to use a landline if possible. IT IS ABSOLUTELY NECESSARY FOR ALL INDIVIDUALS TO SPEAK SLOWLY. Plaintiff should speak first, followed by any other person. All persons should spell their names for the benefit of Court Staff. Please do not use any hands-free mode if at all possible. Headsets or earbuds of good quality will be of great assistance to minimize feedback and distortion.

The Court will prepare the Final Order unless stated otherwise below or at the hearing. Counsel are to comply with ***California Rules of Court***, rule 3.1312.

TROUBLESHOOTING TENTATIVE RULINGS.

To access a tentative ruling, move your cursor over the line number, hold down the "Control" key and click. If you see last week's tentative rulings, you have checked prior to the posting of the current week's tentative rulings.

You will need to either "REFRESH" or "QUIT" your browser and reopen it. Another suggestion is to "clean the cache" of your browser. Finally, you may have to switch browsers. If you fail to do any of these, your browser may pull up old information from old cookies even after the tentative rulings have been posted.

This Court's tentative ruling is just that—tentative. Trial courts are not bound by their tentative rulings, which are superseded by the final order. (See *Faulkinbury v. Boyd & Associates, Inc.* (2010) 185 Cal.App.4th 1363, 1374-1375.) The tentative ruling allows a party to focus his or her arguments at a subsequent hearing and to attempt to convince the Court the tentative should or should not become the Court's final order. (*Cowan v. Krayzman* (2011) 196 Cal.App.4th 907, 917.) If you wish to challenge a tentative ruling, please refer to a specific portion of the tentative ruling to which you disagree.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 1	22CV404710	Cyril Smith, III et al vs General Motors, LLC	**Demurrer of Defendant to Plaintiff's Second Amended Complaint.** Defendant GM's demurrer to the fifth cause of action in Plaintiffs' FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., § hello hello 430.10, subd. (e)] for fraudulent concealment is OVERRULED. Defendant GM's motion to strike punitive damages from Plaintiff's FAC is DENIED. SEE ATTACHED TENTATIVE RULING.
LINE 2	22CV404710	Cyril Smith, III et al vs General Motors, LLC	**Motion of Defendant General Motors LLC to Strike Portions of the Plaintiff's Second Amended Complaint.** SEE LINE #1.
LINE 3	20CV368367	Martha Cavero v. George Chiala Farms, Inc. et al.	**Motion of Defendants for Summary Judgment.** The motion for summary judgment by defendants George Chiala Farms, Inc., George Chiala Family Property Management LLC, the Estate of George Allen Chiala, Mary Alice Chiala, George Allen Chiala, Timothy Chiala, George Chiala Packing, and George Chiala Frozen, Inc. to plaintiff Martha Cavero's First Amended Complaint is DENIED. SEE ATTACHED TENTATIVE RULING.
LINE 4	20CV368367	Martha Cavero v. George Chiala Farms, Inc. et al.	**Motion of Defendants to Bifurcate Trial.** The motion of defendants to bifurcate trial is DENIED WITHOUT PREJUDICE to raising the issue at the trial judge. NO FORMAL TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 5	23CV416108	Travelers Property Casualty Company Of America vs. Liberty Insurance Corporation; et al.	**Motion of Liberty Insurance Company to Compel Plaintiff to Provide Further Discovery Responses and Request for Sanctions.** Good cause appearing, IT IS ORDERED that the hearing on this motion be CONTINUED and RESET to 30 May 2024 at 9:00 AM in this Department. IT IS FURTHER ORDERED that the discovery motion set on 11 June 2024 be ADVANCED and RESET to 30 May 2024 at 9:00 AM in this Department NO FORMAL TENTATIVE RULING.
LINE 6	22CV397057	Sylvia Armas v. DS Cargo; Salah Ziada	**Order on Motion of Defendants to Bifurcate.** The motion is DENIED WITHOUT PREJUDICE to raising the issue with the trial judge. This Court cannot prejudge the merits of the case at this juncture. NO FORMAL TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 7	22CV405188	Emily Benson vs Board of Trustees of the California State University And related cross-complaint (Counsel are reminded that in this Department, there is no such thing as a "cross-claim.")	**Motion of Cross-Defendant Lexington Insurance Company to Sever the Breach Contract Cause of Action.** Cross-defendant Lexington Insurance Company appears to be in a coverage dispute with defendant CSU. Cross-defendant Lexington seeks to sever the cross-complaint of CSU. It has been the custom and practice in this County to leave questions of bifurcation to the trial judge. But not always. In its opposition papers, CSU claims on several occasions that the motion is not at issue, is premature, and even states that "CSU would be agreeable to considering the stipulation of bifurcate indemnity issues against Lexington at trial." Maybe this Judge is old-school and remembers ***Evidence Code***, § 1155, ***Royal Globe Ins. Co. v. Superior Court*** (1979) 23 Cal.3d 880 and ***Moradi-Shalal v. Fireman's Fund Ins. Companies*** (1988) 46 Cal.3d 287 and therefore believes that issues of insurance coverage and/or potential bad faith claim should not be litigated in the same case as the tort case. Counsel for Lexington correctly cites to this Court the case of ***Omaha indemnity Co. v. Superior Court*** (1989) 209 Cal.App.3d 1266, 1270-71. The motion of Lexington Insurance Company to bifurcate/sever its coverage dispute with CSU is GRANTED. For purposes of discovery and subsequent litigation, this Court will deem the cases RELATED and continued to proceed as one case up to the time of trial. At that time, the trial judge can reevaluate the matter and perhaps resolve the issues of coverage after the liability phase is completed. This can be done with the same jury, or perhaps a bench trial once the jury has made certain factual findings. NO FORMAL TENTATIVE RULING.
LINE 8	23CV412088	Lasharon Lee vs Alejandro Zepeda	**Motion of Andrew Haling, Esq. and the Wilshire Law Firm To Withdraw As Counsel For Plaintiff.** Counsel declares that there is a breakdown in communication with the client, and the firm cannot actively and in good faith move forward with the case. The motion to be relieved as counsel for plaintiff is GRANTED. The Order will take effect upon the filing and service of the executed order of this Court and an order that complies with the ***Rules of Court***. The Dismissal Review Calendar currently set for today at 10:00 AM will be continued to 18 July 2024 at 10:00 AM in this Department. NO FORMAL TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 9	23CV416895	Lynley Kerr Hogan vs Michael Shtein	**Motion of Plaintiff for Relief from Order of Dismissal after Settlement, Rule 60.** The motion of plaintiff for relief pursuant to Fed. R. Civ. P. 60 is DENIED. SEE ATTACHED TENTATIVE RULING.
LINE 10	23CV426812	Dayana Gage vs Charles Omenihu	**Motion of Defendant to Dismiss/Stay the Action.** OFF CALENDAR.
LINE 11	23CV427979	Vojin Oklobdžija vs SambaNova Systems, Inc.	**Motion of Defendant to Compel Arbitration.** The Court concludes that the arbitration agreement is valid and enforceable. The petition to compel arbitration is GRANTED and the action will be STAYED pending the conclusion of the arbitration proceedings. If the parties wish to contest the Tentative Ruling, this Court will ask both parties if they read the admonitions on the banner had of this Tentative Ruling Page. SEE ATTACHED TENTATIVE RULING.
LINE 12	16CV295730	Cyrus Hazari v. Mandy Brady	**Motion of Defendant to Amend Judgment and Attorney Fee Order.** NO TENTATIVE RULING. The parties are to use the Tentative Ruling Protocol to advise this Court if they wish to appear and argue on the merits or submit on the papers presented.
LINE 13	16CV295730	Cyrus Hazari v. Mandy Brady	**Hearing to Determine Validity of the Third-Party Claim of Dagmar Horvath.** NO TENTATIVE RULING. The parties are to use the Tentative Ruling Protocol to advise this Court if they wish to appear and argue on the merits or submit on the papers presented.
LINE 14			SEE ATTACHED TENTATIVE RULING.
LINE 15			SEE ATTACHED TENTATIVE RULING.
LINE 16			SEE ATTACHED TENTATIVE RULING.
LINE 17			SEE ATTACHED TENTATIVE RULING.
LINE 18			SEE ATTACHED TENTATIVE RULING.
LINE 19			SEE ATTACHED TENTATIVE RULING.
LINE 20			SEE ATTACHED TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 21			SEE ATTACHED TENTATIVE RULING.
LINE 22			SEE ATTACHED TENTATIVE RULING.
LINE 23			SEE ATTACHED TENTATIVE RULING.
LINE 24			SEE ATTACHED TENTATIVE RULING.
LINE 25			SEE ATTACHED TENTATIVE RULING.
LINE 26			SEE ATTACHED TENTATIVE RULING.
LINE 27			SEE ATTACHED TENTATIVE RULING.
LINE 28			SEE ATTACHED TENTATIVE RULING.
LINE 29			SEE ATTACHED TENTATIVE RULING.
LINE 30			SEE ATTACHED TENTATIVE RULING.

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Calendar Line 1

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 20

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(For Clerk's Use Only)

CASE NO.: 22CV404710 **Cyril Smith III, et al. v. General Motors, LLC, et al.**
DATE: 9 May 2024 **TIME: 9:00 am** **LINE NUMBER: 01, 02**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 01 May 2024. Please specify the issue to be contested when calling the Court and Counsel.

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Orders On:
(1) General Motors LLC's Demurrer To Plaintiffs' Second Amended Complaint; and
(2) General Motors LLC's Motion To Strike Punitive Damages
From Plaintiffs' Second Amended Complaint.

I. Statement of Facts.

According to the allegations of the first amended complaint ("FAC"), plaintiffs Cyril Smith III and Cyril Smith Jr. (collectively, "Plaintiffs"), on or about 16 May 2018, entered into a warranty contract with defendant General Motors, LLC ("GM") regarding a 2018 Chevrolet Bolt EV ("Subject Vehicle"), manufactured and/or distributed by defendant GM. (FAC, ¶¶1, 4, 6, 7, and Exh. A.) Plaintiffs purchased the Subject Vehicle at defendant GM's authorized dealer, Momentum Chevrolet ("Momentum"), in San Jose. (FAC, ¶6.)

Defendant GM knew since 2016 that the model year 2017 or newer Chevrolet Bolt EV vehicles, including the Subject Vehicle, ("Chevrolet Vehicles") contained one or more design and/or manufacturing defects in the battery ("Battery Defect") that causes the high voltage battery to overheat when charged to full capacity or near full capacity, loss of propulsion power while driving, catastrophic fire, no crank, reduced range, thermal runaway, and/or spontaneous combustion. (FAC, ¶¶21 – 23.)

Prior to Plaintiffs' acquisition of the Subject Vehicle, defendant GM was well aware and knew the lithium-ion battery installed on the Subject Vehicle was defective but failed to disclose this fact to Plaintiffs prior to the time of sale and thereafter. (FAC, ¶24.) Defendant GM and its dealerships failed to disclose the existence of the Battery Defect to Plaintiffs during successive repair visit as the problems associated with the Battery Defect arose and persisted. (*Id.*) Defendant GM knew or should have known that Chevrolet Vehicles had the Battery Defect. (FAC, ¶25.) Chevrolet Vehicles affected by the Battery Defect, including the Subject Vehicle, are part of the same generation of vehicles. (FAC, ¶26.) Model year 2017 through 2022 Chevrolet Bolt vehicles share common battery system components and the lithium-ion battery. (FAC, ¶27.)

Defendant GM acquired knowledge of the Battery Defect in 2016, prior to Plaintiffs' acquisition of the Subject Vehicle, through sources unavailable to consumers such as Plaintiffs including, but not limited to, pre-production and post-production testing data; early consumer complaints about the Battery Defect made directly to defendant GM and its network of dealers; aggregate warranty data compiled from defendant GM's network of dealers; testing conducted by defendant GM in response to these complaints; as well as warranty repair and part

replacements data received by defendant GM from defendant GM's network of dealers, among other sources. (FAC, ¶28.)

Since 2016, defendant GM has made several communications to the National Highway Traffic Safety Administration ("NHTSA") relating to the battery components in Chevrolet Bolt EV vehicles. (FAC, ¶29.)

Defendant GM had superior and exclusive knowledge of the Battery Defect and knew or should have known the defect was not known or reasonably discoverable by Plaintiffs before they purchased or leased the Subject Vehicle. (FAC, ¶30.) While it has been fully aware of the Battery Defect, defendant GM actively concealed the existence and nature of the alleged defect from Plaintiffs at the time of purchase, repair, and thereafter. (FAC, ¶31.)

Defendant GM was inundated with complaints regarding the Battery Defect, defendant GM dealers either informed consumers their vehicles were functioning properly or conducted repairs that merely mask the defect. (FAC, ¶32.) Defendant GM omitted mention of the Battery Defect in its sales materials, advertisements, publications, online marketing, television, radio, and other marketing campaigns for Chevrolet Vehicles. (FAC, ¶33.)

Plaintiffs are reasonable consumers who interacted with sales representatives, considered defendant GM's advertisement, and/or other marketing materials concerning Chevrolet Vehicles prior to purchasing the Subject Vehicle. (FAC, ¶34.) Had defendant GM revealed the Battery Defect, Plaintiffs would have been aware of it and would not have purchased the Subject Vehicle. (*Id.*)

Despite growing numbers of customer complaints, warranty claims, and defendant GM's own investigations confirming the Battery Defect, defendant GM failed to provide an adequate repair to consumers or disclose the defect to potential buyers. (FAC, ¶36.) As the number of complaints about the Battery Defect increased, on 13 November 2020, defendant GM issued a recall as an interim remedy. (*Id.*) The repair procedure calls for dealers to program the hybrid propulsion control module to limit full charge of the battery to 90% which did not resolve the defect in the battery that leads to fire and/or explosion. (*Id.*) This left consumers with vehicles that had less range than advertised by defendant GM. (*Id.*)

Defendant GM knew the Chevrolet Vehicles were dangerous. (FAC, ¶37.) On 14 July 2021, even for those who had the recall performed, defendant GM instructed owners and lessees of these Chevrolet Vehicles to "park their vehicles outside away from homes and other structures immediately after charging and … not leave their vehicles charging overninght." (*Id.*) Despite multiple recalls, the measures have been unable to repair the Battery Defect. (FAC, ¶38.)

Plaintiffs discovered defendant GM's wrongful conduct shortly before the filing of this complaint, following numerous unsuccessful attempts to repair the Subject Vehicle as the symptoms, issues, or problems associated with the Battery Defect persisted. (FAC, ¶39.) Throughout this period, defendant GM continued to conceal from Plaintiffs the existence, nature, and scope of the Battery Defect. (*Id.*)

On 26 September 2022[1], Plaintiffs filed a complaint against defendant GM for violation of statutory obligations.

On 15 February 2023, defendant GM filed a demurrer and motion to strike portions of Plaintiffs' complaint, but on 10 May 2023, defendant GM withdrew its demurrer and motion to strike Plaintiffs' complaint.

On 15 May 2023, defendant GM re-filed its demurrer and motion to strike portions of Plaintiffs' complaint, but again withdrew these motions on 8 September 2023.

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[1] This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (Government Code, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (Ca. St. Civil Rules of Court, Rule 3.714(b)(1)(C) and (b)(2)(C).)

On 2 February 2024, Plaintiffs filed the now operative Second Amended Complaint which asserts causes of action for:

(1) Violation of Subdivision (D) of Civil Code Section 1793.2

(2) Violation of Subdivision (B) of Civil Code Section 1793.2

(3) Violation of Subdivision (A)(3) of Civil Code Section 1793.2

(4) Breach of the Implied Warranty of Merchantability

(5) Fraudulent Inducement-Concealment

On 5 March 2024, defendant GM filed the two motions now before the court: (1) a demurrer to the fifth cause of action of Plaintiffs' FAC; and (2) a motion to strike punitive damages from Plaintiffs' FAC.

II. Demurrers in General.

A complaint must contain substantive factual allegations sufficiently apprising the defendant of the issues to be addressed. (See *Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 139, fn. 2.)

A demurrer tests the legal sufficiency of a complaint. It is properly sustained where the complaint or an individual cause of action fails to "state facts sufficient to constitute a cause of action." (*Code of Civil Procedure*, § 430.10, subd. (e).) "[C]onclusionary allegations . . . without facts to support them" are insufficient on demurrer. (*Ankeny v. Lockheed Missiles and Space Co.* (1979) 88 Cal.App.3d 531, 537.) "It is fundamental that a demurrer is an attack against the complaint on its face, it should not be sustained unless the complaint shows that the action may not be pursued." (*Yolo County Dept. of Social Services v. Municipal Court* (1980) 107 Cal.App.3d 842, 846-847.)

"It is not the ordinary function of a demurrer to test the truth of the plaintiff's allegations or the accuracy with which he describes the defendant's conduct. A demurrer tests only the legal sufficiency of the pleading." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213.) "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.' [Citation.]" (*Id.* at pp. 213-214; see *Cook v. De La Guerra* (1864) 24 Cal. 237, 239: "[I]t is not the office of a demurrer to state facts, but to raise an issue of law upon the facts stated in the pleading demurred to.")

III. Analysis.

A. Defendant GM's demurrer to the fifth cause of action [Fraudulent Inducement-Concealment] of Plaintiffs' SAC is OVERRULED.

Defendant GM's demurrer is limited to Plaintiffs' fifth cause of action for fraudulent inducement-concealment.

1. Statute of limitations.

Initially, defendant GM demurs to the fifth cause of action for fraudulent inducement-concealment on the ground that it is barred by the applicable statute of limitations. A court may sustain a demurrer on the ground of failure to state sufficient facts if "the complaint shows on its face the statute [of limitations] bars the action." (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1315.) A demurrer is not sustainable on statute of limitations grounds if there is only a possibility that the cause of action is time-barred; the defense must be clearly and affirmatively apparent from the allegations of the pleading [and matters of which the court may properly take

judicial notice]. (*Id.*, at pp. 1315-1316.)[2] When evaluating whether a claim is time-barred, the court must determine: (1) which statute of limitations applies, and (2) when the claim accrued. (*Id.*, at p. 1316.)

The limitations period for a claim predicated on fraud is three years from the date of "the discovery, by the aggrieved party, of the facts constituting the fraud." (Code Civ. Proc., § 338, subd. (d); see *Britton v. Girardi* (2015) 235 Cal.App.4th 721, 734.)

Defendant GM apparently argues the claim for fraud accrued on the date Plaintiffs purchased the Subject Vehicle, 16 May 2018, and that the statute of limitations expired on 16 May 2021 and since Plaintiffs did not commence this action until 26 September 2022, Plaintiffs' fraud claim is barred. However, this completely ignores the express language in the statute of limitations for fraud which states that the cause of action accrues on the date of discovery of the facts constituting the fraud. Defendant GM contends Plaintiffs are bound by their allegations that the Subject Vehicle contained or developed defects during the warranty period. Even so, the accrual does not commence upon the development of the defects. Rather, the cause of action accrues upon Plaintiffs' discovery of the factual basis for fraud.

In fact, Plaintiffs specifically plead they could not have reasonably discovered the true, latent defective nature of the Battery Defect until shortly before this litigation was commenced. (FAC, ¶39.) Plaintiffs also plead how defendant GM actively concealed the Battery Defect. (See FAC, *passim*.) "When a plaintiff reasonably should have discovered facts for purposes of the accrual of a case of action or application of the delayed discovery rule is generally a question of fact, properly decided as a matter of law only if the evidence (or, in in this case, the allegations in the complaint and facts properly subject to judicial notice) can support only one reasonably conclusion." (*Broberg v. The Guardian Life Ins. Co. of America* (2009) 171 Cal.App.4th 912, 921.)

Again, there are no allegations in the complaint which establish, as a matter of law, that Plaintiffs discovered or should have discovered defendant GM's alleged fraudulent acts more than three years before they filed the instant action. Consequently, as Plaintiffs maintain, the viability of the statute of limitations defense is not clearly and affirmatively apparent from the allegations of the complaint and, therefore, defendant GM's demurrer to the fifth cause of action on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] i.e., it is barred by the applicable statute of limitations, is OVERRULED.

2. Specificity.

Defendant GM argues, secondarily, that Plaintiffs have failed to plead this claim with the requisite particularity. The essential elements of a fraud cause of action based on concealment or nondisclosure are: (1) the defendant had a duty to disclose the concealed or suppressed fact to the plaintiff; (2) the defendant intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, and (3) the plaintiff was damaged as a result. (*Jones v. ConocoPhillips* (2011) 198 Cal.App.4th 1187, 1198.)

As a general rule, each element in a fraud cause of action must be pleaded with specificity. (*Lazar v. Super. Ct.* (1996) 12 Cal.4th 631, 645; *Cadlo v. Owens-Illinois, Inc.* (2004) 125 Cal.App.4th 513, 519.) The court in *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645 stated that "this particularity requirement necessitates pleading facts which 'show how, when, where, to whom, and by what means the representations were tendered.' A plaintiff's burden in asserting a claim against a corporate employer is even greater. In such a case, the plaintiff must 'allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they

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[2] See also *Heshejin v. Rostami* (2020) 54 Cal.App.5th 984, 992-993: "'[A] demurrer based on an affirmative defense will be sustained only where the face of the complaint discloses that the action is necessarily barred by the defense.'" (*Stella v. Asset Management Consultants, Inc.* (2017) 8 Cal.App.5th 181, 191 [213 Cal. Rptr. 3d 850]; accord, *Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1191 [151 Cal. Rptr. 3d 827, 292 P.3d 871] [application on demurrer of affirmative defense of statute of limitations based on facts alleged in a complaint is a legal question subject to de novo review]; *Favila v. Katten Muchin Rosenman LLP* (2010) 188 Cal.App.4th 189, 224 [115 Cal. Rptr. 3d 274] ["'It must appear clearly and affirmatively that, upon the face of the complaint [and matters of which the court may properly take judicial notice], the right of action is necessarily barred.'"].)

spoke, what they said or wrote, and when it was said or written." Defendant GM contends that since it is a corporate employer, Plaintiffs must allege, among other things, names/ identities of individuals at GM who purportedly concealed material facts and their authority to speak and act on behalf of GM.

Though the particularity requirement generally mandates that a plaintiff plead facts establishing the aforementioned items, it is much more difficult to apply this rule in a case of non-disclosure because, as one court explained, "[h]ow does one show 'how' and 'by what means' something didn't happen, or 'when' it never happened, or 'where' it never happened?" (*Alfaro v. Community Housing Imp. System & Planning Ass'n., Inc.* (2009) 171 Cal.App.4th 1356, 1384.)

One of the purposes of the specificity requirement is to provide "notice to the defendant, to furnish the defendant with certain definite charged which can be intelligently met." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216, internal quotations omitted.) However, when "it appears from the nature of the allegations that the defendant must necessarily possess full information concerning the facts of the controversy, even under strict rules of common law pleading, one of the canons was that less particularity is required when the facts lie more in the knowledge of the opposite party …." (*Id.*, at p. 217.) Such is the circumstance here, where defendant GM is alleged to possess exclusive and superior knowledge regarding the Battery Defect in the Subject Vehicle and those like it. In this vein, the court agrees with Plaintiffs that they have alleged the elements of this claim for concealment with the requisite specificity.

3. Duty to disclose.

Defendant GM contends further that it did not owe Plaintiff a duty to disclose. "The general rule for liability for nondisclosure is that even if material facts are known to one party and not the other, failure to disclose those facts is not actionable fraud unless there is some fiduciary or confidential relationship giving rise to a duty to disclose." (*La Jolla Village Homeowners' Assn. v. Superior Court* (1989) 212 Cal.App.3d 1131, 1151.[3]) To maintain a cause of action for fraud through nondisclosure or concealment of facts, a plaintiff must demonstrate that the defendant was under a legal duty to disclose those facts. (*OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 845.) "Where … there is no fiduciary relationship, the duty to disclose generally presupposes a relationship grounded in some sort of transaction between the parties. Thus, a duty to disclose may arise from the relationship between seller and buyer … or parties entering into any kind of contractual agreement." (*LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 337, internal citations omitted.)

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; [or] (3) the defendant actively conceals discovery from the plaintiff." (*Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 294.)

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

> 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,

[3] This Court wonders about how an auto manufacture can contend there is no fiduciary relationship to a purchaser the same time or another occasions the manufacture claims to be a third-party beneficiary of the arbitration contract between the dealer/seller of the automobile and the consumer. That discussion will be reserved for a future date.

466 P.2d 996], italics added, fns. omitted.) Other cases have described the requisite relationship with the same term. (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.)

Defendant GM contends there is no direct relationship alleged between defendant GM and Plaintiffs because Plaintiffs did not purchase the subject Vehicle directly from GM. However, earlier in *Bigler*, the court cites with approval the following: " '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.***'" [Citation.]" (*Bigler*, *supra*, 7 Cal.App.5th at p. 311; emphasis added.)

Here, although Plaintiffs do not allege they directly purchased the subject Vehicle from defendant GM, Plaintiffs have alleged the existence of a contractual agreement (express written warranty) with defendant GM and thus, a basis upon which a duty to disclose arises. (See FAC, ¶6 and Exh. A.)

Accordingly, defendant GM's demurrer to the fifth cause of action in Plaintiffs' FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for fraudulent concealment is OVERRULED.

B. Defendant GM's motion to strike punitive damages from Plaintiff's SAC is DENIED.

Defendant GM moves to strike the portion of Plaintiffs' prayer for relief that seeks punitive damages on the basis, among others, that Plaintiff has not (and cannot) state a claim for fraudulent concealment. However, in light of the court's ruling above, defendant GM's motion to strike punitive damages from Plaintiff's FAC is DENIED.

IV. Tentative Ruling.

The tentative ruling was duly posted.

V. Case Management.

The case has a trial date is 16 December 2024. For that reason, the Case Management Conference for 04 June 2024 will be VACATED.

VI. Order.

Defendant GM's demurrer to the fifth cause of action in Plaintiffs' SAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for fraudulent concealment is OVERRULED.

Defendant GM's motion to strike punitive damages from Plaintiff's SAC is DENIED.

_____ _____

DATED:

HON. SOCRATES PETER MANOUKIAN
Judge of the Superior Court
County of Santa Clara

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Calendar Line 2

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Calendar Line 3

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 20

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(For Clerk's Use Only)

CASE NO.: 20CV368367 **Martha Cavero, et al. v. George Chiala Farms, Inc., et al.**
DATE: 09 May 2024 **TIME: 9:00 am** **LINE NUMBER: 03**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 01 May 2024. Please specify the issue to be contested when calling the Court and Counsel.

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Order On The Chiala Defendants' Motion For Summary Judgment.

I. Background.

A. Plaintiff's First Amended Complaint.

Defendants George Chiala Farms, Inc. ("GCF") and Chiala Family Property Management, LLC ("CFPM") are corporations doing business at 15500 Hill Road in Morgan Hill ("Subject Premises"). (First Amended Complaint ("FAC"), ¶2.) CFPM owns the Subject Premises. (*Id.* at ¶9.) GCF owns a screw conveyor blancher machine ("Subject Machine") operated on the Subject Premises. (*Id.* at ¶¶5, 10.)

Cross-defendant Ameri-Kleen, Inc., dba Sanitation Specialists ("Ameri-Kleen") was the employer of plaintiff Martha Merino Cavero ("Plaintiff"). (FAC, ¶12.) At all relevant times, Ameri-Kleen was an independent contractor who performed daily sanitation services for GCF on the Subject Machine. (*Id.* at ¶15.) There is a written agreement, dated 22 October 2017, between Ameri-Kleen and GCF for the performance of sanitation services. (*Id.* at ¶19.) The agreement contains an indemnity provision. (*Id.* at ¶24.)

GCF failed to provide Ameri-Kleen with a lockout/tagout ("LOTO") procedure specific to the Subject Machine. (*Id.* at ¶¶27-32.) Plaintiff and other Ameri-Kleen employees were told to clean the Subject Machine while it was in motion. (*Id.* at ¶33.) Plaintiff was never advised of the hazards of cleaning the Subject Machine while it was in motion. (*Id.* at ¶34.)

On 28 January 2019, Plaintiff was severely injured while attempting to clean the Subject Machine for the first time; her right hand was pulled into the machine and three of her fingers were fully or partially amputated. (FAC, ¶¶35-37.) An Ameri-Kleen employee ran to get help from a GCF security guard, who called an Ameri-Kleen supervisor but did not call 911. (*Id.* at ¶38.) The supervisor drove over forty miles to the Subject Premises and told an Ameri-Kleen employee to call 911. (*Id.* at ¶39.)

CAL FIRE responded, but because there was no Emergency Action Plan ("EAP") informing them how to disassemble the Subject Machine to free Plaintiff, CAL FIRE determined that the Subject Machine required disassembly by GCF's own mechanics. (*Ibid.*) Two GCF mechanics drove to the Subject Premises and were able to

disassemble the Subject Machine in approximately 20 minutes, allowing emergency responders to remove Plaintiff from the Subject Machine. (*Id.* at ¶40.)

A LOTO procedure specific to the Subject Machine would have both prevented Plaintiff's injuries and allowed for faster emergency medical treatment. (FAC, ¶41.) After the incident, CAL-OSHA investigated and cited Ameri-Kleen with several violations, including the lack of a safe LOTO procedure for hazardous equipment. (*Id.* at ¶42.) Ameri-Kleen had asked GCF for a LOTO for the Subject Machine, the lack of which rendered it unreasonably dangerous. (*Id.* at ¶¶43-44.) Because the Subject Machine is a unique machine designed exclusively for GCF, GCF could not delegate to Ameri-Kleen any duties relating to the creation of a LOTO or compliance with a non-existent LOTO. (*Id.* at ¶45.)

GCF negligently and/or knowingly provided Ameri-Kleen and Plaintiff with a dangerous and defective instrumentality when it hired Ameri-Kleen to clean the Subject Machine without also providing a LOTO procedure for the machine. (FAC, ¶46.) GCF was responsible for and did create safety policies for the Subject Premises and Subject Machine but failed to provide the same to Ameri-Kleen employees. (*Id.* at ¶47.) GCF was aware of the danger the Subject Machine posed to persons such as Plaintiff at the Subject Premises. (*Id.* at ¶¶48-49.)

GCF created an unsafe work environment by providing unsafe equipment which affirmatively contributed to Plaintiff's injuries. (FAC, ¶¶50-51, 54-56.) GCF knew the Subject Machine lacked the necessary emergency stop buttons and other safety features, and GCF either designed or caused the design flaw of the Subject Machine. (*Id.* at ¶52.) Before the incident, Plaintiff and other workers received safety training for other equipment, but neither Ameri-Kleen nor GCF provided a LOTO for the Subject Machine, which was unique and one of a kind. (*Id.* at ¶53.)

A party who hires an independent contractor normally delegates responsibility for contractor's workers to the contractor, under ***Privette v. Superior Court*** (1993) 5 Cal.4th 689 (***Privette***). (FAC, ¶73.) But the normal rule does not apply here because GCF retained control over the Subject Machine for several reasons. (*Id.* at ¶¶74-105.) For example, the Subject Machine had an emergency cord, but due to the machine's design, the cord follows the angle of the conveyor and was very likely unreachable by Plaintiff from where she was at the time of the incident. (*Id.* at ¶¶79-80.) CAL-OSHA regulations provide that machines shall be equipped with adequate means for an operator to disconnect power promptly in case of emergency (*Id.* at ¶81.) Ameri-Kleen lacked the ability to redesign GCF's Subject Machine or implement safety procedures to comply with safety requirements. (*Id.* at ¶¶82, 95-99.)

GCF is a multiple employer worksite, and GCF is responsible under **Labor Code** section 6400 for compliance with CAL-OSHA regulations pertaining to the Subject Machine. (FAC, ¶¶101-106.) GCF's negligent exercise of its retained control over the Subject Machine, Subject Premises, and safety conditions related thereto was a substantial factor in causing Plaintiff's harm. (*Id.* at ¶¶107-115.)

Creating a LOTO specific to the Subject Machine, creating an EAP, providing on-site personnel who could disassemble the Subject Machine, and/or providing/knowing disassembly schematics for the Subject Machine was not part of the work that GCF hired Ameri-Kleen or Plaintiff to perform. (FAC, ¶120.)

B. Cross-Complaint

Cross-complainants GCF, CFPM, Mary Alice Chiala, George Allen Chiala, and Timothy Chiala ("Cross-Complainants") are defendants in the main action, where Plaintiff alleges that Cross-Complainants are responsible in some manner for damages. (Cross-Complaint ("XC"), ¶¶12-13.) If Plaintiff recovers against Cross-Complainants, then Cross-Complainants are entitled to equitable indemnity, apportionment of liability, contribution among and from cross-defendant Ameri-Kleen, according to their respective fault. (*Id.* at ¶15.) Should Cross-Complainants be found liable, their acts were passive and secondary, while those of Ameri-Kleen were active, primary, and superseding. (*Id.* at ¶16.) If Cross-Complaints are found liable to Plaintiff, then Cross-Complainants are entitled to a judgment of indemnification against Ameri-Kleen and Roe cross-defendants for the total amount of the judgment. (*Id*. at ¶23.)

Cross-Complainants entered into certain written contracts with Ameri-Kleen that entitle Cross-Complainants to be fully indemnified with respect to any loses incurred as a consequence to Plaintiff's allegations. (XC, ¶¶26-27.) Cross-Complaints request a judicial determination that they be indemnified by Ameri-Kleen. (*Id.* at ¶¶29-31.)

C. Procedural Background

On 22 May 2023, plaintiff Cavero filed the FAC against GCF, CFPM, the Estate of George Allen Chiala, Mary Alice Chiala, George Allen Chiala, Timothy Chiala, George Chiala Packing, and George Chiala Frozen, Inc., (collectively hereafter, the "Chiala Defendants" or "Defendants") asserting causes of action for:

(1) General Negligence

(2) Premises Liability

(3) Gross Negligence (Willful, Wanton, Reckless Disregard)

(4) Negligent Products Liability

(5) Negligent Failure to Warn

On 19 October 2023, cross-defendants Ameri-Kleen filed a motion for summary judgment, or in the alternative, for summary adjudication, as to Defendants' 16 June 2022 cross-complaint against Ameri-Kleen.

On 16 February 2024, the Chiala Defendants filed the motion now before the court, a motion for summary judgment of plaintiff Cavero's FAC.

On 29 March 2024, the court granted cross-defendant Ameri-Kleen's motion for summary judgment of the Chiala Defendants' cross-complaint.

II. Summary Judgment and Summary Adjudication Generally.

Any party may move for summary judgment. (***Code Civ. Proc.***, § 437c, subdivision (a); ***Aguilar v. Atlantic Richfield Co***. (2001) 25 Cal.4th 826, 843 (***Aguilar***).) The motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (***Code Civ. Proc.***, § 437c, subdivision (c); ***Aguilar,*** *supra,* at p. 843.) The object of the summary judgment procedure is "to cut through the parties' pleadings" to determine whether trial is necessary to resolve the dispute. (***Aguilar,*** *supra,* at p. 843.)

The "party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact…" (***Aguilar,*** *supra,* 25 Cal.4th at p. 850; see ***Evid. Code,*** § 110.) "A prima facie showing is one that is sufficient to support the position of the party in question." (***Aguilar,*** *supra,* at p. 851.)

If the moving party makes the necessary initial showing, the burden of production shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. (***Code Civ. Proc.***, § 437c, subdivision (p)(2); see ***Aguilar,*** *supra,* 25 Cal.4th at p. 850.) A triable issue of material fact exists "if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (***Aguilar,*** *supra,* at p. 850, fn. omitted.) If the party opposing summary judgment presents evidence demonstrating the existence of a disputed material fact, the motion must be denied. (***Id.*** at p. 856.)

Throughout the process, the trial court "must consider all of the evidence and all of the inferences drawn therefrom." (***Aguilar,*** *supra,* 25 Cal.4th at p. 856.) The moving party's evidence is strictly construed, while the opponent's is liberally construed. (***Id.*** at p. 843.)

Similarly, "[a] party may seek summary adjudication on whether a cause of action, affirmative defense, or punitive damages claim has merit or whether a defendant owed a duty to a plaintiff. A motion for summary adjudication…shall proceed in all procedural respects as a motion for summary judgment." (***California Bank & Trust v. Lawlor*** (2013) 222 Cal.App.4th 625, 630, internal citations and quotation marks omitted.)

III. Judicial Notice.

In support of their reply in opposition to the Chiala Defendants' motion for summary judgment, plaintiff Cavero requests that the court take judicial notice of its own Order on Cross-Defendant Ameri-Kleen's Motion for Summary Judgment, or Alternatively, Summary Adjudication, issued on 29 March 2024, and filed on 02 April 2024. The request is GRANTED insofar as the court takes judicial notice of the existence and disposition of the previous motion in this matter, though not necessarily the truth of any hearsay statements referenced therein. (**Evid. Code**, § 452, subd. (c) [court may take judicial notice of "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States"]; see also ***Barri v. Workers' Comp. Appeals Bd.*** (2018) 28 Cal.App.5th 428, 437 [court may take judicial notice of documents related to workers' compensation cases, but not of the truth of hearsay statements in such documents unless an independent hearsay exception exists; "it is improper to rely on judicially noticed documents to prove disputed facts"].)

IV. The Chiala Defendants' Motion for Summary Judgment is DENIED.

The Chiala Defendants move for summary judgment of plaintiff Cavero's FAC. (Notice of Motion and Motion for Summary Judgment ("Notice"), p. 2, lns. 2-8.) Defendants contend that worker's compensation is plaintiff Cavero's exclusive remedy, and because of Cavero applicable worker's compensation claim, Defendants are entitled to summary judgment of all fives causes of action set forth in Cavero's FAC. (Notice, p. 2, lns. 9-20.) In opposition, plaintiff Cavero argues that Defendants' failure to address the FAC's allegations concerning a non-delegable duty is fatal to its motion. (Plaintiff Cavero's Opposition to Defendants' Motion for Summary Judgment ("Opposition"), p. 13, lns. 1-6.) Plaintiff Cavero emphasizes that her claims are not barred by worker's compensation exclusivity because the doctrine of non-delegable duties provides an exception to general exclusivity rule set forth by our high court in ***Privette***. (Opposition, p. 15, lns. 4-10.)

A. *Privette*

In moving for summary judgment as to plaintiff Cavero's FAC, the Chiala Defendants contend that plaintiff cannot recover under any of her causes of action because worker's compensation is her sole and exclusive remedy. (MPA, p. 5, lns. 18-22, quoting and citing ***Labor Code*** section 3602.)[4] Thus, Defendants argue that the rule of worker's compensation exclusivity, as set forth in ***Privette*** and its progeny, presents a complete defense to the entirety of Cavero's FAC. (See ***Code Civ. Proc.***, § 437c, subd. (p)(2) ["A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if the party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to the cause of action."].)

"The burden on a defendant moving for summary judgment based upon the assertion of an affirmative defense is heavier than the burden to show one or more elements of the plaintiff's cause of action cannot be established." (***Anderson v. Metalclad Insulation Corp.*** (1999) 72 Cal.App.4th 284, 289.) "The defendant must demonstrate that under no hypothesis is there a material factual issue requiring trial. [Citation.]" (***Id.*** at p. 290.)

> If the moving defendant argues that it has a complete defense to the plaintiff's cause of action, the defendant has the initial burden to show that undisputed facts support each element of the affirmative defense. Once it does so, the burden shifts to the plaintiff to show an issue of fact concerning at least one element of the defense. If, in anticipation of an affirmative defense, the complaint alleges facts to refute it, the pleadings themselves create a material issue which defendant would have to refute in order to obtain summary judgment. In the absence of such

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[4] ***Labor Code***, section 3602, subdivision (a): **"**Where the conditions of compensation set forth in Section 3600 concur, the right to recover compensation is, except as specifically provided in this section and Sections 3706 and 4558, the sole and exclusive remedy of the employee or his or her dependents against the employer. The fact that either the employee or the employer also occupied another or dual capacity prior to, or at the time of, the employee's industrial injury shall not permit the employee or his or her dependents to bring an action at law for damages against the employer."

allegations, the plaintiff can avoid summary judgment only by presenting evidence sufficient to raise a triable issue concerning the affirmative defense.

(***Bacon v. Southern Cal. Edison Co.*** (1997) 53 Cal.App.4th 854, 858 (***Bacon***) internal punctuation and citations omitted; see also ***Consumer Cause, Inc. v. Smilecare*** (2001) 91 Cal.App.4th 454, 473 [defendants' showing to meet initial burden could not be based on plaintiff's lack of evidence to disprove the applicability of the defense]; see also ***Weil & Brown*****,** Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2023), § 10:247, p. 10-119.)

Here, the complete defense asserted by the Chiala Defendants is the general rule of worker's compensation exclusivity, explained by the California Supreme Court in ***Privette***, *supra*, 5 Cal.4th 689. "Under the **Workers' Compensation Act** (hereafter the **Act**), all employees are automatically entitled to recover benefits for injuries 'arising out of and in the course of the employment.' [Citations.]" (***Privette***, *supra*, 5 Cal.4th at pp. 696-697 [quoting and citing, inter alia, **Lab. Code,** § 3600, subd. (a)].) "When the conditions of compensation exist, recovery under the workers' compensation scheme 'is the exclusive remedy against an employer for injury or death of an employee.' [Citations.]" (***Privette***, *supra*, 5 Cal.4th at p. 697; see also ***Lab. Code***, § 3602, subd. (a).) "The **Act**'s exclusivity clause applies to work-related injuries regardless of fault, including those attributable to the employer's negligence or misconduct, as well as the employer's failure to provide a safe workplace." (***Privette***, *supra*, 5 Cal.4th at p. 697 [internal citations omitted].) "But the exclusivity clause does not preclude the employee from suing anyone else whose conduct was a proximate cause of the injury. [Citations.]" (***Ibid***.) The ***Privette*** court concluded "that because workplace injuries are covered by worker's compensation, liability under the doctrine of peculiar risk does not extend to the employees of an independent contractor hired to do dangerous work." (***Id.*** at p. 702.)

In ***Redfeather v. Chevron United States*** (1997) 57 Cal.App.4th 702 (***Redfeather***), the Chevron corporation hired an independent contractor to close down an oil well, and the contract contained an express indemnity agreement requiring the contractor to indemnify the corporation against all liability for injury to employees of the contractor. (***Redfeather***, *supra*, 57 Cal.App.4th at p.704.) An injured employee sued Chevron, and the court of appeal held that Chevron was not liable to the employee for personal injuries – based on its interpretation of the ***Privette*** decision. (***Id.*** at pp 705-708.) "The overarching principle in the ***Privette*** decision … was whether liability advanced any 'societal interest that is not already served by the worker's compensation system.'" (***Id.*** at p. 705 [quoting and citing ***Privette***, *supra*, 5 Cal.4th at p. 692].) The ***Redfeather*** court said the presence of an express indemnity made no difference. (***Ibid.***)

In ***Toland v. Sunland Housing Group, Inc.*** (1998) 18 Cal.4th 253 (***Toland***), the Supreme Court extended ***Privette*** to bar liability against a hirer of an independent contractor to do inherently dangerous work even if the hirer fails to provide in the contract or in some other manner that "special precautions" be taken to avert the peculiar risks of that work. The Court held that "[i]n either situation, it would be unfair to impose liability on the hiring person when the liability of the contractor, the one primarily responsible for the worker's on-the-job injuries, is limited to providing workers' compensation coverage." (***Toland***, *supra*, 18 Cal.4th at p. 267.) And in ***Camargo v. Tjaarda Dairy*** (2001) 25 Cal.4th 1235 (***Camargo***), the same reasoning was applied by the court in holding that an employee of a contractor is barred from suing the hirer of the contractor under a negligent hiring theory.

In ***Hooker v. Department of Transportation*** (2002) 27 Cal.4th 198 (***Hooker***), an independent contractor's employee was killed in a crane accident while helping to construct a freeway overpass for Caltrans. Caltrans had permitted vehicles to use the overpass where the employee operated his crane. Shortly before the accident, the employee had retracted the crane's outriggers to allow traffic to pass. The employee attempted to swing the boom without first reextending the outriggers, and the crane tipped over, killing the employee. Caltrans was responsible for compliance with safety laws and regulations, and its construction safety coordinator was supposed to "'recognize and anticipate unsafe conditions'" in its construction projects. (***Ibid***.) The employee's estate contended there was a triable issue regarding whether Caltrans was liable under a "retained control theory" under the Restatement Second of Torts, section 414, which states: "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care." The Supreme Court agreed that "if a hirer does retain control over safety conditions at a worksite and negligently exercises that

control in a manner that affirmatively contributes to an employee's injuries, it is only fair to impose liability on the hirer." (***Id.*** at p. 213.) However, the court noted that liability would not attach on the hirer "merely because the hirer retained the ability to exercise control over safety at the worksite. …[T]he imposition of tort liability on a hirer should depend on whether the hirer exercised the control that was retained in a manner that affirmatively contributed to the injury of the contractor's employee." (***Id.*** at p. 210.) The court affirmed summary judgment in favor of Caltrans because it found that by merely permitting traffic to use the overpass, Caltrans did not affirmatively contribute to the employee's death.

The Chiala Defendants contend that this case falls squarely within the confines of ***Privette*** and its progeny. To meet their initial burden,[5] Defendants proffer the following evidence: On 28 January 2019, Plaintiff sustained amputation and/or partial amputation of three of her right fingers while attempting to clean a blanching machine at Defendants' premises.[6] Plaintiff was on Defendants' premises pursuant to her employment as a sanitation specialist with Ameri-Kleen/Sanitation Specialists ("Ameri-Kleen") and her job duties were to clean the subject machine.[7] Plaintiff attempted to clean the blanching machine while it was running; she reached into the running machine to retrieve a cleaning cloth that she had accidentally dropped inside the machine when her gloved right hand got caught, resulting in the finger amputations.[8]

Plaintiffs' employer Ameri-Kleen trained Plaintiff to clean the machine while it was running despite showing Plaintiff a training video upon her hiring that instructed employees not to clean the machine while it was running.[9] The subject incident occurred after business hours during which time Plaintiff was on Defendants' premises pursuant to her work with Ameri-Kleen who contracted with Defendants to provide sanitation services at the industrial location.[10] Defendants hired Ameri-Kleen (dba "Sanitation Specialists") to perform sanitation services at the subject premises located at 15500 Hill Road in Morgan Hill, and this work included having Ameri-Kleen sanitize Defendants' industrial food processing machines, including the machine Plaintiff was attempting to clean in the subject incident.[11]

Ameri-Kleen provided all training for Plaintiff's work at the subject premises, including training for cleaning the machine on which Plaintiff was injured.[12] Defendants did not provide any training to Plaintiff, and Defendants' employees conducted quality control to determine if its machinery and products had been sufficiently cleaned, but not to determine or instruct Ameri-Kleen employees, including Plaintiff, as to how to do the work.[13] Defendants did not provide any job materials to Plaintiff or Ameri-Kleen that were involved in the subject incident; the services contract merely required Defendants to provide air hoses/nozzles, water hoses/nozzles, sanitation chemicals and booms and lifts equipment.[14] Defendants did not retain any control over the means and methods of sanitation work for which it contracted with Ameri-Kleen, including that for the industrial machinery that Plaintiff was cleaning at the time of the

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[5] "A defendant seeking summary judgment must show that at least one element of the plaintiff's cause of action cannot be established, or that there is a complete defense to the cause of action. … The burden then shifts to the plaintiff to show there is a triable issue of material fact on that issue." (***Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.*** (2002) 98 Cal.App.4th 66, 72; internal citations omitted.)

[6] See Separate Statement of Undisputed Material Facts in Support of Defendants' Motion for Summary Judgment ("Defendants' UMF"), Fact No. 1. (See also Defendants' UMF, Fact Nos. 19, 37, 55, 73, 91. The court observes that each of Defendants' UMF, Fact Nos. 1-18 are repeated in sequence for each of the six issues identified by Defendants.)

[7] See Defendants' UMF, Fact No. 2.

[8] See Defendants' UMF, Fact No. 3.

[9] See Defendants' UMF, Fact No. 4.

[10] See Defendants' UMF, Fact No. 5.

[11] See Defendants' UMF, Fact No. 6.

[12] See Defendants' UMF, Fact No. 7.

[13] See Defendants' UMF, Fact No. 8.

[14] See Defendants' UMF, Fact No. 9.

subject incident.[15] All hazardous conditions related to the subject machine from which Plaintiff was injured were open and obvious, as Plaintiff concedes she attempted to clean the machine while it was running a spinning blade, in the way her employer, Ameri-Kleen, had trained her to do.[16]

The State of California's Division of Occupational Safety and Health ("CAL-OSHA") performed a post-incident inspection.[17] CAL-OSHA issued citations to Plaintiff's employer, Ameri-Kleen, and did not cite Defendants for causing the incident, rather only for not providing to Ameri-Kleen an Emergency Evacuation Plan that was, in fact, in existence but apparently not provided prior to the subject incident to Plaintiff's employer.[18] Ameri-Kleen had a worker's compensation insurance policy with AmTrust North America at the time of the subject incident.[19] On 06 February 2019 AmTrust North America accepted Plaintiff's worker's compensation claim and advised Plaintiff that she would be compensated with worker's compensation benefits pursuant to Ameri-Kleen's policy.[20] AmTrust North America's written acceptance of Plaintiff's worker's compensation claim confirmed that Plaintiff was entitled to medical benefits, medical mileage, and disability benefits pursuant to Ameri-Kleen's worker's compensation insurance policy.[21]

Plaintiff filed her initial complaint against Defendants on 15 July 2020, and she filed her FAC on 22 May 2023, alleging causes of for: (1) General Negligence; (2) Premises Liability; (3) Gross Negligence; (4) Negligent Products Liability; and (5) Negligent Failure to Warn.[22] On 16 June 2022, Defendants filed their Cross-Complaint for (1) Equitable Indemnity; (2) Implied Total Indemnity; (3) Express Contractual Indemnity; and (4) Declaratory Relief, all based on Ameri-Kleen's duty to indemnify and defendant Defendants in this action pursuant to the services contract between Defendants and Ameri-Kleen.[23] At the time Defendants filed the instant motion, the court's final order on Ameri-Kleen's motion for summary judgment was still pending.[24]

Here, the Chiala Defendants present undisputed evidence generally establishing that – absent an applicable exception – the ***Privette*** rule applies as a defense to Plaintiff Cavero's causes of action against them. More specifically, Defendants have shown: Plaintiff was on the premises as an employee of Ameri-Kleen (2), Defendants hired Ameri-Kleen to perform sanitation services at the subject premises (6), Ameri-Kleen had a worker's compensation insurance policy with AmTrust North America at the time of the incident (14), and on 06 February 2019, AmTrust North America accepted Plaintiff's workers compensation claim (15).[25] Plaintiff does not dispute these facts.[26]

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[15] See Defendants' UMF, Fact No. 10.

[16] See Defendants' UMF, Fact No. 11.

[17] See Defendants' UMF, Fact No. 12.

[18] See Defendants' UMF, Fact No. 13.

[19] See Defendants' UMF, Fact No. 14.

[20] See Defendants' UMF, Fact No. 15.

[21] *Id.*

[22] See Defendants' UMF, Fact No. 16.

[23] See Defendants' UMF, Fact No. 17.

[24] See Defendants' UMF, Fact No. 18.

[25] See Defendants' UMF, Fact Nos. 2, 6, 14, 15.

[26] See Plaintiff's Opposition to Separate Statement of Undisputed Material Facts in Support of Defendants' Motion for Summary Judgment (Plaintiff's UMF), Fact Nos. 2, 6, 14, 15. (As to Fact No. 15, Plaintiff does not dispute that Plaintiff had a worker's compensation claim arising out the incident, but she asserts that there is no foundation for the document offered by Defendants in support. However, the court disregards this argument because Plaintiff has not submitted separate objections in writing as required by California Rules of Court, Rule 3.1354.)

B. Exceptions to *Privette*

The Chiala Defendants acknowledge that the ***Privette*** doctrine is not absolute, but they contend none of the exceptions apply here. (See MPA, p. 7, lns. 8-22.)

There are recognized exceptions to the ***Privette*** rule. One exception would allow an action in tort against the hirer of an independent contractor if the hirer retained control over the work and exercised that control negligently so as to affirmatively contribute to the worker's injury. (***Hooker v. Dept. of Transportation*** (2002) 27 Cal.4th 198, 210, 215 (***Hooker***).) An example of this form of hirer liability was shown where the hirer negligently furnished defective or unsafe equipment to an independent contractor, resulting in injury to the independent contractor's employee. (See ***McKown v. Wal-Mart Stores, Inc.*** (2002) 27 Cal.4th 219, 225 [defective forklift supplied by hirer Wal-Mart].) Another exception to the ***Privette*** rule would allow an action in tort against the hirer of an independent contractor if the hirer was subject to a nondelegable statutory or regulatory duty and breached said nondelegable duty in a manner that affirmatively contributed to the worker's injury. (***Khosh v. Staples Construction Co., Inc.*** (2016) 4 Cal.App.5th 712, 717, 719-721 (***Khosh***); ***Padilla v. Pomona College*** (2008) 166 Cal.App.4th 661, 673.) A third exception to the ***Privette*** rule has been found to exist where the hirer of an independent contractor knew or should have known of a concealed hazardous condition on its property, the contractor did not know and could not have reasonably discovered the same, and the hirer failed to warn the contractor about the concealed hazardous condition. (***Kinsman v. Unocal Corp.*** (2005) 37 Cal. 4th 659, 664.)

Here, Plaintiff Cavero contends that the exception based on a non-delegable duty applies as an exception to the ***Privette*** rule. (Opposition, p. 5, lns. 3-6.) Further, Plaintiff argues that she has alleged facts in support of the exception in her FAC, in anticipation of Defendants' assertion of the ***Privette*** rule as a complete defense. (*Id.* at p. 13, lns. 23-26, citing the FAC at ¶¶27, 30-32, 35, 41, 43-46, 77, 108-11, 116(3) & (4), 119-120, 124, etc.) Indeed, the FAC specifically identifies the issue of "delegation" on several occasions. (See FAC, ¶¶23, 25, 45, 73, 75, 100, 125, 141, 146, 171-172.) Therefore, by raising the issue of an alleged non-delegable duty, the FAC "create[d] a material issue which defendant would have to refute in order to obtain summary judgment." (***Bacon***, *supra*, 53 Cal.App.4th at p. 858.)

Plaintiff Cavero persuasively argues that the Chiala Defendants have failed to meet their initial burden by failing to refute the FAC's allegations concerning the non-delegable duty exception to the ***Privette*** rule. (See Opposition, pp. 13, lns. 1-6, 15, lns. 1-3.)

In their MPA, the Defendants contend that they "cannot be held liable as a matter of law, having delegated the specialized sanitation services and associated specialized safety duties to Ameri-Kleen." (MPA, p. 14, lns. 22-24, citing ***Gonzalez v. Mathis*** (2021) 12 Cal.5th 29 and Defendants' UMF, Fact Nos. 1-18, 73-90.) However, it is Defendants' burden to support this assertion with facts. Defendants' reference to virtually all of the facts asserted in their Separate Statement is of little help, and the Separate Statement itself makes no reference to the delegation of duties to Ameri-Kleen. "It is not the court's duty to rummage through [a party's] papers to construct or resuscitate their case." (***Collins v. Hertz Corp.*** (2006) 144 Cal.App.4th 64, 75.)

Defendants assert that there are three "limited and case specific exceptions" to the ***Privette*** rule, but they make no mention of the non-delegable duty exception discussed in ***Khosh***. Defendants present argument concerning the non-delegable duty issue, asserting "Plaintiff's Opposition provides no facts or evidence to somehow allege" that an exception to the ***Privette*** rule applies here. (Reply Brief to Plaintiff's Opposition to Defendants' Motion for Summary Judgment, pp. 4, ln. 23 – 5, ln. 13, 6, ln. 1-3.) But these arguments on reply, lacking reference to Defendant's UMFs, are not sufficient to meet *Defendant's* initial burden to refute the allegations of the FAC regarding the existence of a non-delegable duty. (***Bacon***, *supra*, 53 Cal.App.4th at p. 858; see also ***Jay v. Mahaffey*** (2013) 218 Cal.App.4th 1522, 1537 [the general rule of motion practice is that new evidence is not permitted with reply papers]; see also ***Nazir v. United Airlines, Inc.*** (2009) 178 Cal.App.4th 243, 252 [improper to introduce new evidence in reply].)

Even assuming *arguendo* that Defendants had met their initial burden, based on the evidence submitted by the parties, the court finds triable issues of material fact with regard to whether Defendants breached a non-

delegable duty and whether such a breach affirmatively contributed to Plaintiffs' injuries. "***Hooker*** holds that if a hirer retains control over safety conditions at a worksite and negligently exercises that retained control so as to affirmatively contribute to the injury of the independent contractor's employee, the hirer is subject to direct liability to the injured employee." (***Evard v. Southern California Edison*** (2007) 153 Cal.App.4th 137, 145; see also ***SeaBright Ins. Co v. US Airways, Inc.*** (2011) 52 Cal.4th 590, 600-601 [discussing application of the ***Hooker*** rule to the non-delegable duties doctrine].) For example, Plaintiff asserts that the root cause of Plaintiff's injury was the failure to lock out the equipment, and that there were no locks available to lock out the equipment until after the subject incident.[27] Plaintiff also presents evidence that the machine that injured Plaintiff was a unique machine manufactured by defendant GCF, that only GCF mechanics had the knowledge necessary to disassemble the machine to free Plaintiff's hand, and that by the time Plaintiff finally arrived at the hospital, it was too late to save her fingers.[28]

For the reasons set forth, Defendants have failed to establish that the ***Privette*** rule provides a complete defense to the FAC. Thus, the asserted defense is not a sufficient basis for summary judgment. Plaintiff Cavero points out that the Chiala Defendants have not moved for summary adjudication as an alternative to summary judgment. "A motion for summary adjudication may be made by itself or as an alternative to a motion for summary judgment." (***Code Civ. Proc.***, § 437c, subd. (f)(2).) When a party moves only for summary judgment, the trial court cannot "rule on individual causes of action but [must] deny the motion in its entirety when any one claim [withstands] the grounds asserted in the motion. [Citations.]" (***UDC-Universal Development, L.P. v. CH2m Hill*** (2010) 181 Cal.App.4th 10, 24; see also ***Jimenez v. Protective Life Ins. Co.*** (1992) 8 Cal.App.4th 528, 534 [noting courts may not grant summary adjudication when motion was only for summary judgment].)

Here, the Chiala Defendants' motion is only for summary judgment because the Notice makes no mention of summary adjudication. (See Notice, p. 2.) Defendants' supporting memorandum also discusses the standard for summary judgment but at no point mentions summary adjudication of individual causes of action. (See, e.g., Chiala's Memorandum of Points and Authorities in Support of Motion for Summary Judgment ("MPA"), pp. 2, lns. 12-15; 4, lns. 27 – 5, ln. 17.) Defendants do not address this issue in their reply brief, effectively conceding the issue. The court understands Defendants' position to be that the ***Privette*** rule provides a complete defense to all causes of action set forth in Plaintiff's FAC. As the court has found that Defendants have not met their initial burden, and further, that there are triable issues of material fact, the Defendants' asserted complete defense is not a basis for summary judgment or summary adjudication.

Accordingly, the motion for summary judgment is DENIED.

VI. Order.

The motion for summary judgment by defendants George Chiala Farms, Inc., George Chiala Family Property Management LLC, the Estate of George Allen Chiala, Mary Alice Chiala, George Allen Chiala, Timothy

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[27] See Plaintiff's Opposition to Separate Statement of Undisputed Material Facts in Support of Defendants' Motion for Support Judgment, Plaintiff's Additional Material Facts ("Plaintiff's AMF"), Fact Nos. 29, 36. Defendants filed Evidentiary Objections to Plaintiff's Evidence Submitted in Opposition to Defendants' Motion for Summary Judgment. The court declines to rule on said objections since the court does not deem the material objected to be material to its ruling. "In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review." (***Code Civ. Proc.,*** §437c, subd. (q).)] Defendants point out both in their objections and in their reply that Plaintiff's opposition papers refer to the declaration of a "Mr. Craig," no such declaration was filed along with Plaintiff's opposition. Because court records do not reflect that a declaration of a Mr. Craig has been properly filed and served, the court has not considered Plaintiff's evidence and argument made in reference to such a declaration, and therefore, the court does not deem such evidence and argument to be material to its ruling. Defendants further contend that Plaintiff's separate statement does not comply with ***Code of Civil Procedure*** section 437c, subd. (b)(3) and ***California Rules of Court***, Rule 3.1350, subds. (d)(f), but the court is not persuaded that there are such procedural defects.

[28] See Plaintiff's AMF, Fact Nos. 14-22, 44.

Chiala, George Chiala Packing, and George Chiala Frozen, Inc. to plaintiff Martha Cavero's First Amended Complaint is DENIED.

DATED:	**HON. SOCRATES PETER MANOUKIAN** ***Judge of the Superior Court*** ***County of Santa Clara***

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Calendar Line 9

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 20

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(For Clerk's Use Only)

CASE NO.: 23CV416895 **Lynley Kerr Hogan v.ichael Shtein**
Lindley Kerr 09 May 2024 **TIME: 9:00 am** **LINE NUMBER: 09**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 01 May 2024. Please specify the issue to be contested when calling the Court and Counsel.

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Order on Motion of Plaintiff for Relief from Order of Dismissal after Settlement, Rule 60.

I. Statement of Facts.

The facts of this case are best stated in the order of this Court filed on 28 November 2023. On 6 June 2023 , plaintiff Hogan, a self-represented litigant, filed a complaint against defendant Shtein asserting causes of action for: (1) Defamation, Libel; (2) Attempted Conversion; (3) Tortious Interference; (4) Harassment; (5) Infliction of Emotional Distress; and (6) Hate Crime.

Following the hearing on the matter, this Court sustained defendants' demurrers to the 2nd, 3rd, and 6th causes of action without leave to amend. This Court granted the motion of defendant to strike the 1st, 4th, and 5th cause of action pursuant to ***Code of Civil Procedure***, § 425.16.

On 06 December 2023, plaintiff filed her 1st amended complaint. Defendant filed a 2nd special motion to strike pursuant to ***Code of Civil Procedure***, § 425.16. That motion was argued and submitted on 20 February 2024. In its order filed on 04 April 2024, this Court granted defendant's motion with respect to the 1st amended complaint.

II. Motion For Relief etc.

Plaintiff seeks relief from the order placing the matter on calendar for dismissal review and file yet another amended complaint.

III. Analysis.

Plaintiff's motion for relief is DENIED.

In support of this motion she cites Fed. R. Civ. P. 60. That rule applies in federal court, not in state court. She cites no other authority for the relief she seeks.

Plaintiff does not file a motion for reconsideration pursuant to ***Code of Civil Procedure***, § 1008 nor does she attempt to seek some kind of relief pursuant to ***Code of Civil Procedure***, § 473.

A memorandum of points and authorities should contain: (1) a statement of facts; (2) a concise statement of law; (3) evidence and arguments relied upon; and (4) a discussion of the statutes, cases and texts cited in support of the position advanced. (California ***Rules of Court***, rule 3.1113(b) (emphasis supplied); ***Quantum Cooking Concepts, Inc. v. LV Associates., Inc.*** (2011) 197 Cal.App.4th 927, 934[29].) "It is not the court's duty to rummage through [a party's] papers to construct or resuscitate their case." (***Collins v. Hertz Corp.*** (2006) 144 Cal.App.4th 64, 75.)

IV. Tentative Ruling.

The tentative ruling was duly posted.

V. Case Management.

There is no judgment on file and therefore the dismissal review will be continued to 11 July 2024 at 10:00 AM in Department 20.

VI. Order.

The motion of plaintiff for relief pursuant to Fed. R. Civ. P. 60 is DENIED.

_____ _____

DATED: **HON. SOCRATES PETER MANOUKIAN**
Judge of the Superior Court
County of Santa Clara

---oooOooo---

[29] "[T]he trial court had no obligation to undertake its own search of the record "backwards and forwards to try to figure out how the law applies to the facts" of the case."

Calendar Line 10

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Calendar Line 11

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
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(For Clerk's Use Only)

CASE NO.: 23CV427979 **Vojin Oklobdžija v. SambaNova Systems, Inc.**
DATE: 09 May 2024 **TIME: 9:00 am** **LINE NUMBER: 11**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 01 May 2024. Please specify the issue to be contested when calling the Court and Counsel.

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Order on Motion of Defendant SambaNova Systems, Inc.
To Compel Arbitration and Stay Proceedings.

I. Statement of Facts.

Plaintiff filed this complaint on 19 December 2023.[1] The complaint alleges cause of action for (1) Age Discrimination; (2) Wrongful Termination; and (3) Breach of the Covenant of Good Faith and Fair Dealing.

When hired, plaintiff signed defendant's standard offer of employment letter.[2] There was no negotiation on the terms of his employment as they were presented in a" take it or leave it basis," and employment was expressly contingent on plaintiff signing the agreement. The offer was to expire after three days. The letter called for binding arbitration of disputes between the parties.

Plaintiff claims that he was one of the first employees hired by defendant. He was never subject to any discipline or corrective action. He was fired without warning after four years of employment, purportedly as part of the layoff. In reality, he was fired because he was 74 years of age. He was the only one of 31 Senior Principal Engineers In the Hardware Engineering Department who was selected for layoff.

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[1] This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (Government Code, §§ 8600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (Ca. St. Civil ***Rules of Court***, Rule 3.714(b)(1)(C) and (b)(2)(C).

[2] "SambaNova offered me a salary of $170,000 per year and 60,000 non-qualified stock options that would vest over a four-year period to become an employee. The terms of my employment with SambaNova were presented on a take-it-or-leave-it basis. I was not able to negotiate those terms. I certainly was not able to negotiate the non-monetary terms of the offer letter or the Proprietary Inventions and Information Agreement ("PIIA") that I was required to sign per paragraph 9 of the offer letter." (Plaintiff's declaration, ¶ 5.) "I saw that the PIIA directed me to list inventions that belong to me. I followed those directions, completed the form, and signed it electronically." (Plaintiff's declaration, ¶ 6.)

II. Motion to Compel Arbitration.

Ddefendant contends that all of the claims contained in Plaintiff's complaint are fully covered by the express terms of the arbitration provision in his offer letter. Specifically, the arbitration provision provides "you [Plaintiff] agree that any Dispute between you and the Company… will be resolved through binding arbitration in Santa Clara County, California under the Federal Arbitration Act and, to the extent not inconsistent with or preempted by the Federal Arbitration Act, the Arbitration Rules set forth in California ***Code of Civil Procedure***, § 1280 et seq."

Plaintiff claims that the arbitration agreement is procedurally and substantively unconscionable under ***Armendariz v. Foundation Health Psychcare Services, Inc.*** (2000) 24 Cal.4th 83.

III. Analysis.

A. Arbitration Agreements in General.

To establish an agreement to arbitrate, defendant needs only submit a copy of it. (***Espejo v. Southern California Permanente MedicalGroup*** (2016) 246 Cal.App.4th 1047, 1060 ("defendants here met their initial burden by attaching to their petition a copy of the purported arbitration agreement bearing Espejo's electronic signature"). SambaNova has met that burden.

"***Civil Code***, § 1643[3] [if possible without violating the parties' unambiguous intent, a contract is interpreted so as to make it "lawful, operative, definite, reasonable, and capable of being carried into effect"]), we would necessarily construe the arbitration agreement as imposing a valid, mutual obligation to arbitrate." (***Roman v. Superior Court*** (2009) 172 Cal.App.4th 1462, 1473.)

1. Favored Method of Dispute Resolution.

Arbitration is a favored method of dispute resolution under both federal law (***Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*** (1983) 460 U.S. 1) and state law (***Madden v. Kaiser Foundation Hospitals*** (1976) 17 Cal.3d 699) because it is supposed to be expeditious, it economical, and a way of relieving overburdened court calendars.[4]

"[A] party is bound by provisions in an agreement which he signs, even though he has not read them and signs unaware of their existence." (***N.A.M.E.S. v. Singer*** (1979) 90 Cal.App.3d 653, 656; see also ***George v. Bekins Van & Storage Co.*** (1949) 33 Cal.2d 834, 848-849.)

"Where a party to a written contract wishes to avoid liability . . . on the ground that he did not know its contents, the question, in the absence of misrepresentation, fraud, undue influence, and the like, turns on whether he was guilty of negligence in signing without such knowledge." (***Knox v. Modern Garage & Repair Shop*** (1924) 68 Cal.App. 583, 587.) Further, when a party "is negligent in not informing himself of the contents, and signs or accepts the agreement with full opportunity of knowing the true facts, he cannot avoid liability 0n the ground that he was mistaken concerning such terms." (***Id.***; see also ***Greve v. Taft Realty Company*** (1929) 101 Cal.App. 343, 351-353.)

Thus, as long as a party entering into the contract has the capacity to read and to understand it, the party will be bound by its contents and is not permitted to say that its explicit provisions are contrary to its intention or understanding. (***Palmquist v. Mercer*** (1954) 43 Cal.2d 92, 98; ***Estate of Wilson*** (1976) 64 Cal.App.3d 786, 802;

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[3] "A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties."

[4] This Court's opinion on this subject may conflict with these venerable authorities but is of no moment. This Court declines to use referral to arbitration, contractual or otherwise, solely for the purpose of clearing the calendars of this Court.

Varco-Pruden, Inc. v. Hampshire Construction Co. (1975) 50 Cal.App.3d 654, 660; ***Larsen v. Johannes*** (1970) 7 Cal.App.3d 491, 501.)

This Court will observe that "A heavy presumption weighs the scales in favor of arbitrability; an order directing arbitration should be granted unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." (***Gear v. Webster*** (1968) 258 Cal.App.2d 57, 61.) (internal quotation marks modified.)

2. Unconscionability.

Plaintiff must establish that this agreement is nevertheless unenforceable under the doctrine of unconscionability. (***Engalla v. Permanente Medical Group*** (1997) 15 Cal.4th 951, 972 ("a party opposing the petition [to compel arbitration] bears the burden of proving by a preponderance of the evidence any fact necessary to its defense").

Plaintiff asserts that he was not represented by counsel and did not consult counsel. He was afforded only three business days to decide whether to accept the offer. He claims that there is simply no doubt that the contract at issue was one of adhesion and was procedurally unconscionable.

To preclude enforcement under the doctrine of unconscionability, Plaintiff must establish that:

1. the Agreement is procedurally unconscionable; and
2. the Agreement is substantively unconscionable.

"An agreement is procedurally unconscionable where there is 'oppression' arising from unequal bargaining power or 'surprise' arising from hidden or buried terms in a long or complex printed form." (***McManus v. CIBC World Markets Corp.*** (2003) 109 Cal.App.4th 76, 87 (2003); ***American Airlines v. Wolens*** (1995) 513 U.S. 219, 249; ***Nagrampa v. MailCoups, Inc.*** (9th Cir. 2006) 469 F.3d 1257, 1280 (procedural unconscionability is found where there exists an "inequality of bargaining power that results in no real negotiation and an absence of meaningful choice...").

The California Supreme Court has reiterated that a 'contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the offending term "must be so one-sided as to shock the conscience." (***Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC*** (2012) 55 Cal.4th 223, 246; ***Sanchez v. Valencia Holding Co.*** (2015) 61 Cal.4th 899, 910-911.)

A contract term is not conscionable when it merely gives one side a greater benefit; rather the term must be so one-sided as to shock the conscience." (***See Pinnacle Museum Tower Association v. Pinnacle Market Development (US), LLC*** (2016) 55 Cal.4th 223, 246 (2016) (emphasis added and citations omitted).

Plaintiff argues the Agreement was adhesive, but the adhesive aspect of an agreement is not dispositive and adhesiveness only connotes a "low level" of unconscionability. (***Davis v. Kozak*** (2020) 53 Cal.App.5th 897, 907.)

An arbitration agreement is not unenforceable simply because it is required as a condition of employment. An adhesion contract is not procedurally unconscionable unless a party can show the existence of oppression, surprise, or "lack of reasonable commercial alternatives." (***Gilmer v. Interstate/Johnson Lane Corp.***, 500 U.S. 20 (1991): a predispute arbitration agreement is not invalid merely because it is imposed as a condition of employment); ***Roman*** **v. Superior** ***Court*** (2009) 172 Cal.App.4th 1462, 1471: take it or leave it arbitration agreement not procedurally unconscionable simply because it was an adhesive contract required for employment).)

Absent some special element of unfair advantage, an arbitration is mutually advantageous and inclusion of an arbitration provision in commercial contracts is common. (See ***Keating v. Superior Court*** (1982) 31 Cal.3d 584, 594-595.) When the parties could reasonably anticipate an arbitration clause, and the agreement is not unduly oppressive, the arbitration provision will be enforced even if the contract is adhesive. (Ibid.) A party asserting unconscionability as a defense has the heavy burden of establishing that condition. (***Woodside Homes of California v. Superior Court*** (2003) 107 Cal.App.4th 1728 [citing ***Westlye v. Look Sports, Inc***. (1993) 17 Cal.App.4th 1715, 1738-1739.)

3. Discussion.

As shown in footnote 2 above, plaintiff pretty much admits that he read the contract, that he understood it, and thereafter signed it.

"[A] party is bound by provisions in an agreement which he signs, even though he has not read them and signs unaware of their existence." (***N.A.M.E.S. v. Singer*** (1979) 90 Cal.App.3d 653, 656; see also ***George v. Bekins Van & Storage Co.*** (1949) 33 Cal.2d 834, 848-849.)

"Where a party to a written contract wishes to avoid liability . . . on the ground that he did not know its contents, the question, in the absence of misrepresentation, fraud, undue influence, and the like, turns on whether he was guilty of negligence in signing without such knowledge." (***Knox v. Modern Garage & Repair Shop*** (1924) 68 Cal.App. 583, 587.) Further, when a party "is negligent in not informing himself of the contents, and signs or accepts the agreement with full opportunity of knowing the true facts, he cannot avoid liability 0n the ground that he was mistaken concerning such terms." (***Id.***; see also ***Greve v. Taft Realty Company*** (1929) 101 Cal.App. 343, 351-353.)

Thus, as long as a party entering into the contract has the capacity of reading and understanding it, the party will be bound by its contents and is not permitted to say that its explicit provisions are contrary to its intention or understanding. (***Palmquist v. Mercer*** (1954) 43 Cal.2d 92, 98; ***Estate of Wilson*** (1976) 64 Cal.App.3d 786, 802; ***Varco-Pruden, Inc. v. Hampshire Construction Co.*** (1975) 50 Cal.App.3d 654, 660; ***Larsen v. Johannes*** (1970) 7 Cal.App.3d 491, 501.)

Nowhere in the declaration does plaintiff admit that he was surprised or that he felt under duress to sign the contract. He did not offer any statement as to what terms he might have wanted to include in the arbitration agreement.

Both parties invite this Court to review the decisions of ***Roman v. Superior Court*** (2009) 172 Cal.App.4th 1462; ***Alberto v. Cambrian Homecare*** (2023) 91 Cal.App.5th 482; and ***Net Global Marketing, Inc. v. Dialtone, Inc.*** (9th Cir. 2007) 217 Fed. Appx. 598.

In ***Roman v. Superior Court***, the trial judge granted a petition to compel arbitration. The Court of Appeal denied the employee's petition for review. The Court found that the arbitration provision was written in clear and understandable language.

In ***Alberto v. Cambrian Homecare***, the Court of Appeal held that three hree aspects of the agreements in question were unconscionable: the carve-outs permitting Cambrian to obtain an injunction from the courts on one-sided terms on matters more significant to the employer while relegating the claims most significant to the employee to arbitration, the illegal prohibition on the employee discussing her wages, and the waiver of PAGA claims. Taken together, the trial court could have reasonably concluded that "[s]uch multiple defects indicate a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage." (supra at 496.)

In ***Net Global Marketing, Inc. v. Dialtone, Inc.***, the district court's finding that the arbitration provisions met California's test for surprise was supported by substantial evidence. The arbitration provisions appearing on page 12 of a 17 page document were not clearly disclosed. A unilateral modification clause rendered the arbitration provision severely one-sided.

Plaintiff also argues that the arbitration clause in the letter agreement calls for all employment disputes to be arbitrated on an individual basis only. It bars employees from litigating claims on a class, collective or representative class before any arbitrator or in any forum, citing ***Hasty v. American Automobile Ass'n of Northern Cal.*** (2023) 98 Cal.App.5th 1041, 1063.)

This Court observes that the ban on class actions might be inapplicable in this case where no class action is contemplated. If so, this Court is within its rights to sever this portion of the agreement.

The Court concludes that the arbitration agreement is valid and enforceable. The petition to compel arbitration is GRANTED and the action will be STAYED pending the conclusion of the arbitration proceedings.

IV. Tentative Ruling.

The tentative ruling was duly posted**.**

V. Case Management.

The Case Management Conference currently set for 11 June 2024 is VACATED. A Dismissal Review/ADR hearing will be set for 29 May 2025 at 10:00 AM in this Department.

VI. Order.

The Court concludes that the arbitration agreement is valid and enforceable. The petition to compel arbitration is GRANTED and the action will be STAYED pending the conclusion of the arbitration proceedings.

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DATED: **HON. SOCRATES PETER MANOUKIAN**
Judge of the Superior Court
County of Santa Clara

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