SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 10
Honorable Frederick S. Chung

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

DATE: December 21, 2023 TIME: 9:00 A.M.

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

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

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

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

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

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

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	23CV416524	Vijay Ramadoss v. American Honda Motor Co., Inc.	Click on LINE 1 or scroll down for ruling in lines 1-2.
LINE 2	23CV416524	Vijay Ramadoss v. American Honda Motor Co., Inc.	Click on LINE 1 or scroll down for ruling in lines 1-2.
LINE 3	20CV370683	Nalini Kapur et al. v. Warren Trumbly et al.	Motion to compel: parties to appear. Please click on LINE 3 for specific questions that the court would like the parties to address.
LINE 4	22CV405327	RH Bas, Inc. et al. v. Arnold R. Steiner et al.	Motion to compel: in light of the parties' joint statement of December 15, 2023, the court takes this motion OFF CALENDAR, with the expectation that plaintiffs RH Bas and Allied Aire Services will follow through on their commitment to pay defendants $2,500 in monetary sanctions by January 12, 2024. If this does not occur, the court expects defendants to raise the issue again.
LINE 5	22CV405797	Sarkhan Jafarli v. URS Midwest, Inc. et al.	OFF CALENDAR – the court dismissed this case on December 14, 2023.
LINE 6	22CV405797	Sarkhan Jafarli v. URS Midwest, Inc. et al.	OFF CALENDAR – the court dismissed this case on December 14, 2023.
LINE 7	18CV329857	Unifund CCR, LLC v. Carlos D. Islas	Claim of exemption: The claim is GRANTED in part and DENIED in part. Islas has not shown the application of any statutory exemption, with the possible exception of CCP § 704.220, which exempts $2,080 from a judgment debtor's deposit account. (CCP §§ 703.150 & 704.220.) The remaining balance of the deposit account is not exempt. Any other deposit account is also not exempt.

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LINE 8	20CV364578	Bryan Thuerk v. Kia Motors America, Inc.	Click on LINE 8 or scroll down for ruling.
LINE 9	20CV374065	Villa Developers and Investment, LLC et al. v. Taylor Morrison of California, LLC et al.	Click on LINE 9 or scroll down for ruling.
LINE 10	23CV414222	Adela Moreno v. Rosa Maria Munoz Reyes	Motion to be relieved as counsel: parties to appear.
LINE 11	23CV419579	Santa Clara Valley Transportation Authority v. The Two Youths, LLC et al.	OFF CALENDAR, in light of the parties' last-minute stipulation, filed on December 19, 2023.
LINE 12	23CV423013	Milpitas-District 2 Owner, LLC v. Terry Zheng et al.	Click on LINE 12 or scroll down for ruling in lines 12-13.
LINE 13	23CV423013	Milpitas-District 2 Owner, LLC v. Terry Zheng et al.	Click on LINE 12 or scroll down for ruling in lines 12-13.

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Calendar Lines 1-2
Case Name: *Vijay Ramadoss v. American Honda Motor Co., Inc.*
Case No.: 23CV416524

I. BACKGROUND

This is a "lemon law" action under the Song-Beverly Consumer Warranty Act, brought by plaintiff Vijay Ramadoss against defendant American Honda Motor Co., Inc. ("Honda") and various Does based on Ramadoss's purchase of a 2022 Honda Odyssey on April 5, 2021, which allegedly suffered from a defect in its driver-assistance safety system (the "sensing defect").

The original and still-operative complaint, filed on May 18, 2023, states two causes of action: (1) Violation of the Song-Beverly Act—Breach of Express Warranty, and (2) Fraudulent Inducement—Concealment.

The complaint alleges that, as part of the purchase of the subject vehicle, Ramadoss entered into an express written contract with Honda, a warranty agreement that is attached to the complaint as Exhibit 1. (Complaint at ¶ 9.) The complaint alleges that Honda was aware of the sensing defect before Ramadoss purchased the subject vehicle and concealed it from him and other consumers. (See Complaint at ¶¶ 23-25, 29-64.) It further alleges that Honda had a duty to disclose the defect based on the unreasonable safety hazard it represented, that Honda had exclusive knowledge of a defect not reasonably discoverable by consumers, and that Honda made representations that were likely to mislead without disclosure of the defect. (*Id*. at ¶ 67.)

Ramadoss alleges that he would not have purchased the subject vehicle had he known of the defect, that he had reviewed marketing materials written by Honda prior to purchasing the vehicle, and that he visited an authorized Honda dealership where he reasonably relied on statements by authorized Honda agents who did not disclose the defect. (Complaint at ¶¶ 66, 80, 87 and 111-125.)

Currently before the court are Honda's demurrer to the complaint and motion to strike portions of the complaint, both of which were filed on August 3, 2023.

II. DEMURRER TO THE COMPLAINT

A. General Standards

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

The court considers only the pleading under attack, any attached exhibits (which are part of the "face of the pleading"), and any facts or documents for which judicial notice is properly requested and may be granted. The court cannot consider extrinsic evidence. The court has considered the declaration of Honda counsel Marcia LaCour only to the extent that it describes the meet-and-confer efforts by counsel, as required by statute. The court has not considered the documents attached as Exhibits A and B to the LaCour Declaration, or any arguments based on such extrinsic evidence. The court has also not considered any other extrinsic evidence cited or quoted in Honda's papers, of which there is a lot.

Honda demurs to the complaint's second cause of action only, on the ground that it fails to state sufficient facts. (See August 3, 2023 Notice of Demurrer and Demurrer at p. 2:6-7.)

B. Fraudulent Inducement of Contract

"[I]t has long been the rule that where a contract is secured by fraudulent representations, the injured party may elect to affirm the contract and sue for the fraud." (*Lazar v. Sup. Ct*. (1996) 12 Cal.4th 631, 645.) "It is a truism that contract remedies alone do not address the full range of policy objectives underlying the action for fraudulent inducement of contract. In pursuing a valid fraud action, a plaintiff advances the public interest in punishing intentional misrepresentations and in deterring such misrepresentations in the future. Because of the extra measure of blameworthiness inhering in fraud, and because in fraud cases we are not concerned about the need for 'predictability about the cost of contractual relationships,' fraud plaintiffs may recover 'out-of-pocket' damages in addition to benefit-of the-bargain damages." (*Id*. at p. 646 [internal citation omitted].)

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

C. Discussion

The court OVERRULES Honda's demurrer to the second cause of action, as follows.

1. Specificity of Pleading

The first argument in Honda's supporting memorandum—that the elements of the second cause of action are not alleged with sufficient specificity—is unpersuasive.[1] 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.) This specific pleading requirement is significantly relaxed, however, in the case of fraud by concealment or omission, because as one court has 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 Improvement System & Planning Association, Inc*. (2009) 171 Cal.App.4th 1356, 1384.) Additionally, one of the purposes of the specificity requirement is to provide "notice to the defendant, to furnish the defendant with certain definite charges which can be intelligently met." (*Committee, supra*, 35 Cal.3d at p. 216, internal quotations omitted.) Therefore, when "it appears from the nature of the allegations that the defendant must necessarily possess full information concerning the facts of the controversy, even under strict rules of common law pleading, one of the canons was that less particularity is required when the facts lie more in the knowledge of the opposite party . . . ." (*Id*. at p. 217; see also *Bushell v. JPMorgan Chase Bank, N.A.* (2013) 220 Cal.App.4th 915, 931 ["plaintiffs did not have to specify the . . . personnel who prepared these documents because that information is uniquely within [defendant's] knowledge"].)

Here, the complaint alleges a direct contractual relationship (the warranty contract) between the parties. The complaint's second cause of action, including the general allegations incorporated by reference, adequately alleges a buyer/seller relationship in which Honda had exclusive knowledge of material facts not known to Ramadoss (the sensing defect) and which Honda actively concealed while making partial representations that were misleading. The allegation that the sales representatives to whom Ramadoss spoke were authorized agents of Honda is accepted as true on demurrer, as is the allegation that Ramadoss reviewed and relied upon written materials authored by Honda before purchasing the subject vehicle.[2] It is not obvious on the face of the pleading that such materials were mere sales puffery. The complaint sufficiently alleges that Honda must necessarily possess full information concerning the facts of the controversy.

Contrary to Honda's contentions, a defendant's knowledge and intent to deceive are facts that may generally be pled in a fraud claim. (See 5 Witkin, *Cal. Procedure* (5th Ed., 2019) Pleading §§726, 728 ["Intent, like knowledge, is a fact. Hence, the averment that the representation was made with the intent to deceive the plaintiff, or any other general allegation with similar purport, is sufficient."].) There is no requirement that a plaintiff have unique insight into a defendant's state of mind before making such allegations.

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[1] Honda's memorandum, at 16 pages, fails to comply with the page limit in Rule of Court 3.1113(d) and lacks the table of contents, table of authorities, and summary of argument required by Rule of Court 3.1113(f).

[2] Honda's reliance on California decisions that did not involve pleading challenges (or even fraud claims) in arguing otherwise indicates either a failure to read these decisions or an effort to mislead the court. Honda's citations to the decisions in *Daugherty v. American Honda Motor Co., Inc.* (2006) 144 Cal.App.4th 824 and *Guiterrez v. Carmax Auto Superstores California* (2018) 19 Cal.App.5th 1234, are particularity inapt, as those decisions discuss the pleading standards for claims brought under the CLRA and UCL, not fraud claims.

2. Direct Transactional Relationship

Honda's claim that a direct transactional relationship is required under *Bigler*, *supra*, is unpersuasive. (Memorandum at p. 9:21-25.) *Bigler* did not involve a pleading challenge, but rather an appeal of a jury verdict, and it does not say anything about pleading requirements. Again, the complaint's allegations of a direct contractual relationship, and Ramadoss's reliance on both statements by authorized representatives of Honda and written materials prepared by Honda, are accepted as true on demurrer. Also accepted as true is the allegation that Ramadoss would not have purchased the subject vehicle had he been told of the sensing defect. (Complaint at ¶ 66.) Contrary to the implication in the demurrer, Ramadoss's ability to prove these allegations are completely irrelevant on demurrer. Ramadoss's allegations, accepted as true for purposes of the demurrer, contrast significantly with the situation in *Bigler*, where the court of appeal found that the manufacturer of the medical device "did not transact with [plaintiff] or her parents in any way. [Plaintiff] obtained her Polar Care device from Oasis, based on a prescription written by Chao, all without [defendant's] involvement. The evidence does not show [defendant] knew—prior to this lawsuit—that [plaintiff] was a potential user of the Polar Care device, that she was prescribed the Polar Care device, or that she used the Polar Care device. The evidence also does not show that [defendant] directly advertised its products to consumers such as [plaintiff] or that it derived any monetary benefit directly from [plaintiff's] individual rental of the Polar Care device." (*Bigler*, *supra*, 7 Cal.App.5th at p. 314.)

Honda's argument, taken to its logical conclusion, would mean that Honda can never be sued for fraud by omission unless a plaintiff purchases a vehicle directly from Honda as opposed to an authorized Honda dealership.

3. Uncertainty

To the extent that Honda's sprawling memorandum appears to suggest that the second cause of action is uncertain (see Memorandum at pp. 12:23-13:1), the court will not consider that argument, as it failed to raise Code of Civil Procedure section 430.10, subdivision (f), in its notice of demurrer. The sole basis for the current demurrer is the alleged failure to state sufficient facts under subdivision (e).

4. The Economic Loss Rule

Finally, Honda's argument that the second cause of action is barred by the economic loss rule is also unpersuasive. California permits recovery of tort damages in certain types of contract cases where the duty giving rise to tort liability "is either completely independent of the contract or arises from conduct which is both intentional and intended to harm," such as where the contract was fraudulently induced. (See *Erlich v. Menezes* (1999) 21 Cal.4th 543, 552 ("*Erlich*").) Honda asserts that the only exception to the economic loss rule is a fraud claim based on *affirmative* misrepresentations, citing *Robinson Helicopter Co. v. Dana Corp.* (2004) 34 Cal.4th 979, 988 ("*Robinson*"). (Memorandum at p. 14:11-22.) This argument mischaracterizes the *Robinson* decision, which merely carved out *an* exception to the economic loss rule and did not purport to limit the circumstances under which tort damages (economic or otherwise) could be available in contract cases. As already set out in *Erlich*, those circumstances included fraudulent inducement of contract. (See *Erlich*, *supra*, 21 Cal.4th at p. 552; *Robinson*, *supra*, at 34 Cal.4th at pp. 989-990 [citing *Erlich* for the proposition that tort

damages for fraudulent inducement of contract are not barred by the economic loss rule]; see also *Harris v. Atlantic Richfield Co.* (1993) 14 Cal.App.4th 70, 78 ["when one party commits a fraud during the contract formation or performance, the injured party may recover in contract and tort"].)

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

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

Numerous California courts have recognized this aspect of the *Robinson* decision. (See *County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 328-329 ("*County of Santa Clara*") ["The first part of the *Robinson* opinion was concerned with whether Dana's wrongful conduct constituted tortious conduct, not whether the economic loss rule applied to it. It was only *after* the court held that Dana's conduct was a tort independent of Dana's breach of contract that the court addressed the application of the economic loss rule. The analysis that followed suggested that fraud *itself* is immune from application of the economic loss rule because fraud is particularly blameworthy and therefore unlike both contract causes of action *and* products liability causes of action."], internal citation omitted, emphasis in original.) While the *County of Santa Clara* decision involved affirmative misrepresentations, it focused on whether the fraudulent activity was intentional or negligent, rather than on the form of the fraudulent activity (i.e., misrepresentations versus concealment).

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

III. MOTION TO STRIKE PORTIONS OF THE COMPLAINT

A. General Standards

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

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

B. Discussion

Honda moves to strike the request for punitive damages in the complaint's prayer for relief. (See August 3, 2023 Notice of Motion and Motion at p. 2:6-7.) Honda argues that the request is inadequate for two reasons: (1) "Plaintiff fails to plead with the requisite specificity facts showing [Honda] engaged in conduct rising to the level of malice, oppression, fraud and therefore fails to allege sufficient facts to state a claim for punitive damages," and; (2) "Plaintiff fails to allege facts demonstrating [Honda's] officers, directors or managing agents engaged in or otherwise ratified the conduct Plaintiff contends is wrongful." (Notice of Motion and Motion at p. 2:9-14.)

A failure to state sufficient facts is not a basis for striking a request for punitive damages under Code of Civil Procedure section 436, and the arguments made in Honda's demurrer also do not provide a basis for granting the motion to strike the request for punitive damages. As the court has overruled Honda's demurrer to the second cause of action, finding that the claim for fraud is adequately alleged, the court rejects Honda's first argument.

As for the second argument, a request for punitive damages against a corporation must allege that an officer, director, or managing agent of the corporation was either personally responsible for the allegedly despicable conduct or that an officer, director, or managing agent of the corporation: (1) had advance knowledge of the despicable conduct and consciously disregarded it; or (2) authorized or ratified the despicable conduct. (See Civ. Code, § 3294, subd. (b).) "For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 726.) "Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature." (*Ibid*.) Honda claims that "Plaintiff has not alleged that an officer, director or managing agent of [Honda] authorized, ratified or personally engaged in any oppressive, malicious or fraudulent conduct." (Memo. at p. 8:21-28.)

In the opposition, Ramadoss responds that the complaint specifically states that "All acts of corporate employees as alleged were authorized or ratified by an officer, director or managing agent of the corporate employer." (See Opp. at p. 4:9-12, citing Complaint at ¶ 7.) Given the well-established rule that less specificity is required in an action for fraudulent concealment, and given that the facts underlying this allegation are likely in Honda's possession rather than Ramadoss's possession, the court concludes that the allegation is sufficient at the pleading stage to establish that corporate ratification of the fraudulent concealment occurred.

Accordingly, the court DENIES Honda's motion to strike the prayer for punitive damages on the basis of an insufficiency of either the fraud or corporate ratification allegations.

As the demurrer has been overruled and the motion to strike denied, Honda is ordered to file an answer to the complaint within 20 days, with the time running from notice of entry of the court's order. (See Code Civ. Proc., § 472a, subds. (b) and (d).)

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Calendar Line 3
Case Name: *Nalini Kapur et al. v. Warren Trumbly et al.*
Case No.: 20CV370683

The parties are to appear for the hearing. The court intends to ask the following questions to clarify the briefs:

1. Is it 19,000 *documents* or 19,000 *pages* of documents? The Trumbly Defendants' opposition brief says both.

2. How did Mr. Paul scan or copy the documents in Mr. Tweedy's office? Was there a copy machine or scanner in the office? Were electronic documents copied on a computer – onto an external drive? Did Mr. Paul do this by himself, or did anyone else assist?

3. The Trumbly Defendants' opposition says that counsel has continued to have difficulties opening "vast numbers of the documents" on Plaintiffs' thumb drive in August and September 2023. Has this now been resolved? If so, exactly when was this resolved?

4. Has counsel for the Kapur Plaintiffs experienced any issues accessing any of the 19,000 documents (or 19,000 pages of documents)?

5. Are there documents that neither side is able to access/open at this time?

6. When does counsel for the Trumbly Defendants believe it can finish reviewing the documents and provide supplemental responses? When will one of the Trumbly Defendants be in a position to verify those responses?

7. Are these 19,000 documents/pages the complete universe of responsive documents? Is there any reason to believe that there are any other responsive documents in any of the Trumbly Defendants' possession, custody, or control?

8. Besides Exhibit 18 to Ms. Diemer's declaration, are there any other documents that have been identified as potentially containing attorney-client communications or attorney work product? If so, how many others? The court is looking for as much specificity as possible.

9. Why are Plaintiffs' opening and reply briefs filed conditionally under seal? Please identify by page and line number exactly what confidential information is contained in these briefs, if any, because the court does not see any.

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Calendar Line 8
Case Name: *Bryan Thuerk v. Kia Motors America, Inc.*
Case No.: 20CV364578

This is a "lemon law" case under the Song-Beverly Consumer Warranty Act. Plaintiff Brian Thuerk ("Thuerk") brings this motion for attorney's fees and costs against defendant Kia Motors America, Inc. ("Kia") in connection with his 2019 Kia Stinger. After three years of litigation, the parties reached a settlement under which Kia would pay Thuerk $15,000, as well as agree to pay attorney's fees and costs to him as the prevailing party. Thuerk now seeks attorney's fees in the amount of $75,037, plus $11,069.15 in costs.

The court GRANTS in part and DENIES in part the motion. There is no dispute that Thuerk is entitled to attorney's fees; the only dispute between the parties is over the amount of those fees. The court finds that Thuerk's counsel's billing rates are reasonable for this type of case ($300-$625 per hour). Indeed, the court has found similar rates to be reasonable in similar cases, including at least one prior case involving the same plaintiff's counsel. In addition, although the total number of hours expended on this case is substantial (180.9 hours), it is still within the range of reasonableness for a case that took more than three years to resolve. The court finds that Thuerk's motion sets forth a proper application of the lodestar method for determining attorney's fees.

Kia raises a number of arguments in opposition to the motion, most of which are unavailing.

First, Kia argues that Thuerk's attorney invoices reflect "value billing": *i.e.*, "what counsel believes the 'value' of the task should be, not the actual time spent." (Opposition at p. 5:14-6:11.) The court does not understand how Kia and its counsel could possibly know this for a fact. Indeed, it appears to be based on conjecture by Kia's counsel, according to what he subjectively believes should have been spent on various tasks. (See Declaration of Bradley Rankell, ¶ 7.) The court does not find the amounts of time spent drafting, reviewing, and responding to discovery (22.4 hours) to be excessive, particularly over the life of this three-year-old case. Similarly, the court does not find that 27.7 hours to prepare motions to compel and 5.1 hours to prepare an informal discovery statement and participate in the conference are unreasonable on their face for a case of this duration. The numbers may be high, especially for a Song-Beverly Act case where discovery requests are frequently reused, but they are not obvious examples of "value billing."

Second, Kia criticizes the fact that "counsel billed a collective 19.5 hours" communicating with their client. The court does not see how Kia can expect the court to find that 19.5 hours over the course of more than three years is objectively unreasonable. This averages out to approximately 32 minutes per month.

Most of Kia's other arguments are vague and generalized efforts to criticize what appears to be normal litigation behavior, including billing for travel time. There is some repetition or overlap in the billing between multiple timekeepers, but that is to be expected in any case, especially one with a three-year duration.

The two items that Kia specifically identifies as potentially excessive—and as to which the court is inclined to agree—are: (1) the time spent by Thuerk's counsel unsuccessfully

opposing Kia's motion for a vehicle inspection ($3,885); and (2) the time spent preparing this motion for attorney's fees. As to the latter, Thuerk requests $6,499.50, representing 10.8 hours of time. Having reviewed this motion and an extremely similar motion by the same counsel within the last month, the court agrees with Kia that there are large parts of these briefs that are recycled in multiple cases. In addition, the court will not grant fees for possible *future* attendance at a hearing that the parties often do not attend. The court reduces the attorney's fees for this motion from $6,499.50 to $3,000, representing five hours of time at an average of $600/hour.

In short, the court reduces the requested amount of attorney's fees ($75,037) by $7,384.50, for a total of $67,652.50. Added to the $11,069.15 in costs, the total amount awarded on this motion is **$78,721.65**.

IT IS SO ORDERED.

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Calendar Line 9
Case Name: *Villa Developers and Investment, LLC et al. v. Taylor Morrison of California, LLC et al.*
Case No.: 20CV374065

Cross-complainant Mountain Cascade, Inc. ("MCI") moves for leave to file a first-amended cross complaint ("FACC") to add allegations against Taylor Morrison Services, Inc. ("TMS"), as well as to seek a declaration that plaintiffs (Villa Developers and Investment, LLC and Montecito San Jose, LLC) are not third-party beneficiaries of the Master Services Agreement between MCI and TMS. The court finds that MCI has moved promptly to bring this proposed amendment and that granting it will not prejudice any other party. The court grants the motion, except to the extent that it purports to add Taylor Morrison of California, LLC ("TMC") as a cross-defendant.

This motion was alluded to in the briefing on TMC and TMS's motion for determination of good-faith settlement, which was heard by the court on November 28, 2023. It was the court's hope that its decision on that motion, along with the subsequent trial setting of **January 13, 2025** would obviate the need for a hearing on this motion. Unfortunately, that was not to be, and the parties have persisted in making ill-considered arguments to the court.

First, plaintiffs make the microscopically trivial argument that MCI failed to comply with Rule 3.1324(a)(1) of the California Rules of Court, even though MCI did comply. MCI's motion is accompanied by a declaration that attaches the "serially numbered" proposed amendment as Exhibit 1. This satisfies Rule 3.1324.

Second, plaintiffs argue that the proposed FACC "fails to state a cause of action for declaratory relief." This is a demurrer-style argument that is not appropriate on a motion for leave to amend. Unless it is completely obvious that the proposed amendment would be futile, these arguments as to the sufficiency of the pleading should be left to a noticed hearing that affords full briefing and consideration of the merits. Here, it is not apparent to the court that the proposed cause of action for declaratory relief would be futile, and so the court rejects plaintiffs' effort to skip a step without sufficient briefing.

Third, neither plaintiffs nor any of the other parties allege any undue delay on the part of MCI in bringing this motion, nor do they make any showing of prejudice. It would be difficult to make a showing of prejudice, given that the trial date is more than a year away. On a motion for leave to amend, the prejudice to the non-moving parties, or lack thereof, is the ***most important consideration*** for the court in determining whether to grant or deny the motion. Here, the opposing parties have utterly failed to identify—indeed, they do not even attempt to identify—any prejudice that would result from the amendment.

The only material problem that the court sees with MCI's amendment is its proposed reintroduction of TMC as a party to the case, after the court recently dismissed TMC. MCI claims that it "is not just seeking indemnity [against TMC], but also damages as a consequence of the Opposing Parties' failure to provide MCI with an accurate set of plans to build MCI's portion of the project at issue." (Reply at p. 4:6-14.) This sounds exactly like an indemnity claim, notwithstanding MCI's conclusory denial, especially as MCI has made it clear that it never dealt directly with TMC, only with TMS. Unless MCI can identify some liability on the part of ***TMC*** that is unrelated to MCI's own liability as a named defendant in this case, then its

breach of implied warranty cause of action for "damages" is nothing more than an indemnity claim in disguise, and it is directly inconsistent with the court's November 28, 2023 ruling on the motion for determination of good-faith settlement. Because the motion fails to identify any independent basis for liability of ***TMC to MCI***, MCI's FACC must be revised to add only TMS as a party, not TMC.

GRANTED in part and DENIED in part. MCI shall file its FACC, modified in accordance with the foregoing, within 10 days of this order.

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Calendar Lines 12-13
Case Name: *Milpitas-District 2 Owner, LLC v. Terry Zheng et al.*
Case No.: 23CV423013

Both the undersigned and the clerk's office have made mistakes in this case. It appears, however, that these mistakes are not irreparable, and so the court will now seek to set things right. For the reasons that follow, the court GRANTS plaintiff's motion to strike defendant Terry Zheng's demurrer, and it DENIES defendant Guihong Ni's motion to vacate the default.

I. ZHENG'S DEMURRER

The court finds that Zheng's demurrer, filed on December 8, 2023, was untimely, and that it was filed after a default should have been entered by the clerk's office on November 30, 2023. The court disagrees with Zheng's argument that he had until December 12, 2023 to demur or otherwise respond to the complaint. That is based on the erroneous premise that the court's November 16, 2023 order on his (and Ni's) second motion to quash, as well as the Appellate Division's November 27, 2023 denial of Zheng and Ni's petition for writ of mandate concerning that November 16 order, were based on a valid service of the summons and complaint. They were not, because service had not yet occurred at the time defendants filed their second motion to quash. *In other words, there was nothing to quash*. As this court noted in its order, "[Zheng and Ni] may not preemptively file a motion to quash based on service that ha[s] not yet occurred and that was merely hypothetical at the time of filing." (Nov. 16, 2023 Order at p. 2:9-11.) Proper service of the summons and complaint did not occur until November 9, 2023, *after* Zheng and Ni had already filed their motion. As the court noted on November 16, "The present order does not relate in any way to any alleged service on November 9, 2023." (*Id.* at p. 2:11-12.)

As a result, the motion to quash, the trial court's ruling on it, and the appellate court's ruling on the writ petition do not have any effect on the deadlines arising out of the service of the summons and complaint that occurred on November 9, 2023. Zheng's deadline to respond to the complaint was November 29, 2023 (15 days for substituted service plus holidays/weekends). When plaintiff filed a request for entry of default on November 30, 2023, it should have been entered by the clerk's office. In fairness to the clerk's office, its error may have been precipitated by Zheng and Ni's filing of a "Notice of Filing and Automatic Prevention of Default" on November 27, 2023, which erroneously stated that entry of default was precluded by the pending writ petition (on the court's November 16, 2023 Order) in the Appellate Division.

The court also wishes to correct its own prior erroneous conclusion that even though a default should have been entered on November 30, 2023, that error was rendered "moot" by Zheng's subsequent filing of his demurrer and Ni's subsequent filing of a motion to vacate. (See Request for Action, dated December 13, 2023; see also Order, dated December 14, 2023.) In its rush to decide matters on the merits rather than on procedural grounds, the court overlooked case law that holds that "a plaintiff is entitled to the entry of default on the date he requests it if there is then no responsive pleading by the defendant on file; and that the plaintiff *cannot be deprived of his right to the entry of default merely because the clerk erroneously fails to perform [his or her] ministerial duty and does not enter it when requested*." (*Goddard v. Pollock* (1974) 37 Cal.App.3d 137, 142 [citing *W.A. Rose Co. v. Municipal Court* (1959) 176 Cal.App.2d 67], italics added.)

Based on this authority, the court is persuaded by plaintiff that the appropriate remedy here is to strike the demurrer and direct the clerk to enter a default against Zheng, rather than address his demurrer on the merits.[3] The court is also persuaded by other unpublished trial court decisions, cited by plaintiff, that yielded the same result, even though these decisions are not controlling authority. (See *Godet v. Zemla* (Orange County Super. Ct., April 22, 2019, No. 30-2018-01001889-CU-PA-CJC) 2019 Cal. Super. LEXIS 32846; *Knapp v. Diestel Turkey Ranch* (Alameda County Super. Ct., July 23, 2018, No. RG18-889110) 2018 Cal. Super. LEXIS 43101.)

The court GRANTS the motion to strike Zheng's demurrer and directs the clerk's office to enter the default.

II. NI'S MOTION TO VACATE

As for defendant Ni, the clerk's office did enter a default on November 20, 2023, and this was apparently correct. In contrast to Zheng, who was served by substitute service on November 9, 2023, Ni was served personally on that date, and so Ni's deadline to respond was 10 days shorter. Ni now moves to vacate the default, but he presents no basis upon which to grant the motion.

This court is typically very liberal in setting aside any defaults based on "mistake, inadvertence, surprise, or excusable neglect." (Code Civ. Proc., § 473, subd. (b).) There is a strong public policy in California that favors deciding cases on the merits, rather than by default. (*Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681, 685.) That is in fact what prompted this court to conclude, erroneously and precipitously, that the entry of default was "moot." In this case, however, Ni does not allege any mistake, inadvertence, surprise, or excusable neglect. Rather, he relies solely on the same incorrect assumption as Zheng that the court's denial of the *unripe* second motion to quash on November 16, 2023 and the subsequent writ petition extended his deadline to respond to the complaint. They did not.

There is no other basis presented for vacating the default. Indeed, rather than "mistake, inadvertence, surprise, or excusable neglect," the court sees evidence of a concerted strategy to delay a trial on the merits in the file (a non-stipulation to a commissioner, a section 170.6 challenge to a judge, a motion to quash, a second motion to quash, a writ petition, a "notice of filing and automatic prevention of default," and now this motion and demurrer).

The court finds no basis to set aside or vacate the default as to Ni, and so the motion is DENIED.

IT IS SO ORDERED.

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[3] If the court were to address the merits, it would still overrule the demurrer, because it is based solely on the argument that Ni is not a party to the lease agreement, something that has no bearing on the sufficiency of the complaint as to Zheng. Nevertheless, this is not the remedy being sought in the motion to strike.