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: July 30, 2024 TIME: 9:00 A.M.

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

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

Scheduling motion hearings: Please go to https://reservations.scscourt.org or 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	19CV341404	Ian Masloff v. JMA Enterprises, LLC et al.	Order of examination: parties to appear.
LINE 2	22CV398536	Roger Darren Coit et al. v. NBK Investment, LLC et al.	Click on LINE 2 or scroll down for ruling.
LINE 3	23CV426650	Ankur Rustagi et al. v. Matthew David Wheeler et al.	Click on LINE 3 or scroll down for ruling.
LINE 4	23CV427933	Debra Ryan et al. v. AAA et al.	Click on LINE 4 or scroll down for ruling.
LINE 5	20CV366393	N.R. Waterloo, LLC v. Dennis Treadaway et al.	This motion has been continued by ex parte order to October 31, 2024 at 9:00 a.m.
LINE 6	21CV381806	Claudia Barrera Roque et al. v. Stucco Supply Co. et al.	Click on LINE 6 or scroll down for ruling.
LINE 7	22CV393755	Joyce Diaz v. General Motors, LLC	Click on LINE 7 or scroll down for ruling.
LINE 8	23CV418929	Sophie Yeh v. The Harker School et al.	Click on LINE 8 or scroll down for ruling.
LINE 9	23CV427742	Anthony Moran v. FCA US, LLC et al.	This matter is OFF CALENDAR, in light of the notice of settlement filed by plaintiff.

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Calendar Line 2
Case Name: *Roger Darren Coit et al. v. NBK Investment, LLC et al.*
Case No.: 22CV398536

Plaintiffs Roger Darren Coit and Sarah Ramsay Coit (the "Coits") filed this action against defendants NBK Investments, LLC; LU Construction and Design Group, Inc.; Mor Liberty; and ADU by Luxury Construction, Inc. (collectively, "Defendants"), based on Defendants' alleged conduct regarding the construction and sale of real property in California. Defendants now demur to the second, third, fourth, fifth, sixth, seventh, and ninth causes of action in the Coits' First Amended Complaint ("FAC").

I. BACKGROUND

According to the FAC, NBK Investments, LLC ("NBK") purchased 1985 Hicks Avenue, San Jose, California, 95125 (the "Property") on July 19, 2018. (FAC, ¶ 21.) NBK thereafter hired LU Construction and Design Group, Inc. ("LU") as the general contractor to build a new home on the Property. (*Id.* at ¶ 22.) On or about May 11, 2020, the Coits purchased the Property from NBK through a written California Residential Purchase Agreement (the "Contract"). (*Id.* at ¶ 23.) Mor Liberty ("Liberty"), who signed the Contract on behalf of NBK, allegedly hid his relationship with LU from the Coits. (*Id.* at ¶ 24.) The Coits allege that the Property contained various construction defects and deficiencies. (*Id.* at ¶ 26.) NBK also allegedly made various misrepresentations, including the Property's exact square footage and that the Property would include all new appliances. (*Id.* at ¶ 27.) In addition, LU built the front yard fence and mechanical gate on land owned by the City of San Jose rather than within the correct property line. (*Id.* at ¶ 28.) The Coits notified NBK of these issues immediately, but NBK has failed and refused to address the issues. (*Id.* at ¶ 29.)

On May 20, 2022, the Coits filed their original complaint. The Coits filed a FAC on October 11, 2023, alleging causes of action for: (1) breach of written contract; (2) breach of the covenant of good faith and fair dealing; (3) negligence; (4) breach of implied warranty; (5) breach of express warranty; (6) intentional misrepresentation; (7) negligent misrepresentation; (8) strict liability; and (9) declaratory relief.

II. REQUEST FOR JUDICIAL NOTICE

Defendants have submitted a request for judicial notice with their demurrer. "Judicial notice may not be taken of any matter unless authorized or required by law." (Evid. Code, § 450.) A precondition to judicial notice in either its permissive or mandatory forms is that the matter to be noticed be relevant to the material issue before the court. (*Silverado Modjeska Recreation and Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 307, fn. 18, citing *People v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 422, fn. 2].) It is the court, and not the parties, that determines relevance. Evidence Code section 453, subdivision (b), requires a party seeking notice to "[furnish] the court with sufficient information to enable it to take judicial notice of the matter."

Defendants request that the court take judicial notice of facts included in the FAC and in Exhibit A to the Request for Judicial Notice. (Defendants' Request for Judicial Notice ("RJN"), pp. 1-2.)

The court grants judicial notice of the fact that Exhibit A (the Articles of Incorporation of defendant ADU by Luxury Construction, Inc. ("ADU")) was filed with the California Secretary of State, but not as to the truth of any statements contained within. (See Evid. Code, § 452, subd. (c); *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 113 ["the existence of a document may be judicially noticeable, [but] the truth of statements contained in the document and its proper interpretation are not subject to judicial notice if those matters are reasonably disputable"].)

The court denies judicial notice of the facts listed in Defendants' Request for Judicial Notice. Defendants ask that the court judicially notice the fact that ADU is a California corporation, and that ADU was incorporated on February 26, 2021, but Defendants present no basis for taking judicial notice of these facts under Evidence Code section 452. Evidence Code section 453 requires that a party "furnish[] the court with sufficient information to enable it to take judicial notice of the matter," and the Defendants have failed to do so here.

Defendants also request that the court judicially notice the following facts included in the FAC: (1) "the real property which is the subject of the pending Action is located at 1985 Hicks Avenue, San Jose, California 95125"; (2) "the Property was sold by NBK Investment, LLC to Plaintiffs Roger Coit and Sarah Ramsay Coit"; and (3) "the Property was sold by NBK to Coit on May 21, 2020." (RJN, p. 2.) The court denies judicial notice of these facts as unnecessary, given that the court must accept the allegations of the FAC as true on a demurrer. (See *Paul v. Patton* (2015) 235 Cal.App.4th 1088, 1091, fn. 1 [denying as unnecessary a request for judicial notice of the pleading under review on a demurrer].)

III. DEMURRER

A. General Legal Standards

As relevant to this case, "[t]he party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on any one or more of the following grounds: . . . [t]he pleading does not state facts sufficient to constitute a cause of action." (Code Civ. Proc., § 430.10, subd. (e).) A demurrer may be used by "[t]he party against whom a complaint [ ] has been filed" to object to the legal sufficiency of the pleading as a whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).)

The court, in ruling on a demurrer, treats it "as admitting all properly pleaded material facts, 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. [Citation.] 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.]" (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214, superseded by statute on other grounds as stated in *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 227.) Evidentiary facts found in exhibits attached to a complaint may be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.) In ruling on a demurrer, courts may also consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.)

B. Discussion

1. First Cause of Action: Breach of Contract

Defendants' memorandum of points and authorities includes a heading that states: "The Homeowner's Repair Act is the exclusive remedy with regard to the causes of action alleged in the first through the seventh causes of action." (Memorandum of Points and Authorities in Support of Defendants' Demurrer, p. 6:18-20 ("MPA").) Thus, Defendants appear to be demurring to the first cause of action on the basis of the Right to Repair Act (Civ. Code, §§ 896 et seq.). Yet the Defendants' notice of demurrer and demurrer does not say anything about challenging the first cause of action. (See Demurrer to Complaint.)

Code of Civil Procedure section 430.60 states: "A demurrer shall distinctly specify the grounds upon which any of the objections to the complaint, cross-complaint, or answer are taken. Unless it does so, it may be disregarded." The California Rules of Court also require that that the demurrer itself (as opposed to a supporting memorandum) specify the target of any objection and the grounds. (See Cal. Rules of Court, rule 3.1320(a) ["Each ground of demurrer must be in a separate paragraph and must state whether it applies to the entire complaint, cross-complaint, or answer, or to specified causes of action or defenses."].)

The court therefore OVERRULES Defendants' demurrer to the first cause of action to the extent that Defendants are in fact challenging this cause of action. Indeed, it appears that Defendants concede on reply that the Right to Repair Act does not preclude a cause of action for breach of contract. (See Reply, p. 2:5-7.)

2. The Right to Repair Act (Second, Third, Fourth, and Fifth Causes of Action)

According to Defendants, the Coits' causes of action for breach of the implied covenant of good faith and fair dealing, negligence, breach of an implied warranty, and breach of an express warranty all allege facts "relating to construction defects and similar damages relating to construction defects" and therefore fall within the purview of the Right to Repair Act. (MPA, p. 8:13-18.) The Defendants argue that the Act "supersedes and preempts the aforesaid causes of action." (*Ibid*.)

The Right to Repair Act sets forth various standards for residential construction projectss and procedures for construction defect actions brought under the Act:

> In any action seeking recovery of damages arising out of, or related to deficiencies in, the residential construction, design, specifications, surveying, planning, supervision, testing, or observation of construction, a builder, and to the extent set forth in Chapter 4 (commencing with Section 910), a general contractor, subcontractor, material supplier, individual product manufacturer, or design professional, shall, except as specifically set forth in this title, be liable for, and the claimant's claims or causes of action shall be limited to violation of, the following standards, except as specifically set forth in this title . . . .

(Civ. Code, § 896.) The construction standards set forth in section 896 pertain to water issues (subd. (a)), structural issues (subd. (b)), soil issues (subd. (c)), fire protection issues (subd. (d)), plumbing and sewer issues (subd. (e)), electrical system issues (subd. (f)), and other areas of

construction (subd. (g)). The Act also includes "a requirement that builders provide a one-year 'fit and finish' warranty ([Civ. Code,] § 900), and it established a new 10-year statute of limitations ([Civ. Code,] § 941)." (*Standard Pacific Corp. v. Superior Court* (2009) 176 Cal.App.4th 828, 832.)

The Act establishes pre-litigation procedures that a claimant must initiate prior to filing an action for violation of these standards. (Civ. Code, § 910.) "These procedures include a requirement that the claimant provide notice of claim 'to the builder.'" (*Greystone Homes, Inc. v. Midtec, Inc.* (2008) 168 Cal.App.4th 1194, 1211 (*Greystone*), citing Civ. Code, § 910, subd. (a).) "The builder may elect to respond to the claim by inspecting the alleged violation ([Civ. Code,] § 916), offering to repair it ([Civ. Code,] § 917), and either repairing the violation, or arranging for a repair to be done ([Civ. Code,] §§ 918, 921)." (*Greystone, supra*, 168 Cal.App.4th at p. 1211.) "If the builder fails to respond to the claim, or otherwise fails to comply with the requirements of the Act's prelitigation procedures, the claimant may bring an action for a violation of the Act's standards without further resort to the prelitigation procedures. ([Civ. Code,] §§ 915, 920.)" (*Ibid.*)

Defendants' sole argument in support of the demurrer to the second, third, fourth, and fifth causes of action is that the Right to Repair Act provides the exclusive remedy for Plaintiffs' allegations. The court addresses this argument for each cause of action in turn.

a) Second Cause of Action: Breach of the Covenant of Good Faith and Fair Dealing

The court is not persuaded by Defendants' Right to Repair Act argument with respect to the cause of action for breach of the implied covenant of good faith and fair dealing. (The Right to Repair Act exempts causes of action to enforce a contract. (Civ. Code, § 943, subd. (a).) If "a party's action for breach of the covenant of good faith and fair dealing does not sound in tort, the action is just another garden variety breach of contract action for which only contract damages may be recovered. [Citations.]" (*Thompson Pacific Constr. v. City of Sunnyvale* (2007)155 Cal.App.4th 525, 542.) In other words, the second cause of action is contractual in nature and is expressly exempted from the Act.

Defendants cite two different cases in reply, neither of which supports their argument. (Reply, p. 3:4-12, citing *VFLA Eventco, LLC v. William Morris Endeavor Entertainment, LLC* (2024) 100 Cal.App.5th 287, 312-313, 318; *Careau ds Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395.) The quoted language relied on by Defendants merely discusses the standard for breach of the implied covenant of good faith and fair dealing and does not discuss when such a cause of action sounds in contract or tort. (*See ibid.*) The Defendants otherwise conclusorily assert that "Plaintiffs' second cause of action sounds in tort and not contract." (*Id.* at p. 13.)

The case law cited by the Coits, on the other hand, discusses when breach of the covenant of good faith and fair dealing provides the basis for a tort action rather than a contract action. "Because the covenant [of good faith and fair dealing] is a contract term, in most cases compensation for its breach is limited to contract rather than tort remedies. [Citation.]" (*Kransco v. American Empire Surplus Lines Ins. Co.* (2000) 23 Cal.4th 390, 400.) "But [a]n exception to this general rule has developed in the context of insurance contracts where, for a

variety of policy reasons, courts have held that [an insurer's] breach of the implied covenant will provide the basis for an action in tort. [Citation.]" (*Ibid*.)

As the Coits point out, the matter here does not involve an insurance contract or any allegations of a bad faith denial of coverage. Accordingly, the Right to Repair Act does not preclude the second cause of action, and the court OVERRULES the demurrer to this cause of action.

b) Third Cause of Action: Negligence

The court is similarly not persuaded by Defendants' Right to Repair Act argument with respect to the cause of action for negligence. The Coits point out that the third cause of action does not completely fall within the scope of the Right to Repair Act because "at least one of LU's negligent acts – the property line encroachment – is not covered by Civil Code section 896." (Opposition, p. 7:15-22.) Civil Code section 897 clarifies that a defect is separately actionable if it is not listed in section 896 and does not involve a function or component of a structure: the "standards set forth in this chapter are intended to address every function or component of a structure. To the extent that a function or component of a structure is not addressed by these standards, it shall be actionable [under the Right to Repair Act] if it causes damage." (Civ. Code, § 897.)

Because of the Coits' "property line encroachment" allegation, at least part of the third cause of action falls outside the Right to Repair Act. It is well settled that a demurrer does not lie to only a portion of a cause of action. (See *Financial Corp. of America v. Wilburn* (1987) 189 Cal.App.3d 764, 778 ["[A] defendant cannot demur generally to part of a cause of action"]; see also *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682 ["A demurrer does not lie to a portion of a cause of action."]) Thus, because this allegation does not involve property damage, it is not precluded by the Right to Repair Act.

The court OVERRULES the Defendants' demurrer to the third cause of action.

c) Fourth Cause of Action: Breach of an Implied Warranty

The court finds that the Right to Repair Act does not preclude the Coits' fourth cause of action. (See Opposition, p. 9:2-7, citing *McMillin Albany LLC v. Superior Court*, (2018) 4 Cal. 5th 241, 259 (*McMillin*).) *McMillin* found that the Right to Repair Act "leaves the common law undisturbed in some areas, expressly preserving actions for breach of contract, fraud, and personal injury." (*McMillin, supra,* 4 Cal. 5th at p. 249.) *McMillin* does not explicitly hold that breach of implied warranty causes of action are exempted from the Right to Repair Act. The only relevant language in *McMillin* states:

> In holding that claims seeking recovery for construction defect damages are subject to the Act's prelitigation procedures regardless of how they are pleaded, we have no occasion to address the extent to which a party might rely upon common law principles in pursuing liability under the Act. Nor does our holding embrace claims such as those for breach of contract, fraud, or personal injury that are expressly placed outside the reach of the Act's exclusivity. ([Civ. Code,] § 943, subd. (a).) That limit does not help the Van Tassels' position here, for while the complaint includes breach of contract and breach of warranty

claims, it also includes claims for strict liability and negligent failure to construct defect-free homes, to which no statutory exception applies.

(*McMillin, supra*, 4 Cal.5th at p. 259.)

Nevertheless, the court concludes that the breach of implied warranty cause of action sounds in contract in this case. "A warranty is a contractual term concerning some aspect of the sale." (*Windham v. Superior Court* (2003) 109 Cal.App.4th1162, 1168; see also *Wyatt v. Cadillac Motor Car Division* (1956) 145 Cal.App.2d 423, 426 [under California law, a claim for breach of express or implied warranties "necessarily sounds in contract."], abrogated on other grounds by *Sabella v. Wisler* (1963) 59 Cal. 2d 21, 29; *L.B. Laboratories, Inc. v. Mitchell* (1952) 39 Cal. 2d 56, 62 ["For the designation of actions as contractual or delictual, it is to be noted that a contract is defined as an agreement to do or not to do a certain thing, and a tort as any wrong, not consisting in mere breach of contract, for which the law undertakes to give the injured party some appropriate remedy against the wrongdoer . . . [t]here is obviously some overlapping here, and where it is not clear to which class an action belongs, it will ordinarily be construed as in contract rather than in tort."].)

The court therefore concludes that the breach of implied warranty cause of action falls outside the reach of the Act's exclusivity, just as the breach of the implied covenant of good faith and fair dealing cause of action falls outside the Act's exclusivity. The court therefore OVERRULES Defendants' demurrer to the fourth cause of action.

d) Fifth Cause of Action: Breach of an Express Warranty

For similar reasons, the court concludes that the breach of express warranty cause of action sounds in contract and falls outside the Right to Repair Act's exclusivity. The Right to Repair Act expressly exempts claims to enforce a contract. (Civ. Code § 943, subd. (a).) "Claims for breach of an express warranty are based on the parties' agreement and sound in contract. [Citation.]" (*Revers v. Beneficial State Bank* (2022) 76 Cal.App.5th 596, 619.) Defendants' reply brief appears to concede this point. (See Reply, p. 2:5-9 ["In the pending matter except for breach of contract, breach of express warranty, fraud, negligent misrepresentation and declaratory relief all other claims for construction defects are covered by the [Right to] Repair Act."].)

The Court OVERRULES Defendants' demurrer to the fifth cause of action.

3. Sixth Cause of Action: Intentional Misrepresentation

Defendants argue that the Right to Repair Act precludes the Coits' intentional misrepresentation cause of action and that the Coits have failed to allege facts sufficient to state a cause of action for intentional misrepresentation. (MPA, pp. 8:19-11:18.)

The court disagrees that the Right to Repair Act precludes a separate cause of action for fraud. (See Civ. Code § 943, subd. (a) [the Act does not apply to "any action for fraud"]; see also *McMillin, supra*, 4 Cal.5th at p. 249 ["the statute here leaves the common law undisturbed in some areas, expressly preserving actions for breach of contract, fraud, and personal injury."]).

But the court agrees with Defendants that the FAC fails to allege sufficient facts to support an intentional misrepresentation cause of action. "The well-known elements of a cause of action for fraud are: (1) a misrepresentation, which includes a concealment or nondisclosure; (2) knowledge of the falsity of the misrepresentation, i.e., scienter; (3) intent to induce reliance on the misrepresentation; (4) justifiable reliance; and (5) resulting damages. (*Cadlo, supra,* 125 Cal.App.4th at p. 519, citing *Small v. Fritz Companies, Inc*. (2003) 30 Cal.4th 167, 173.) As a general rule, each element in a fraud cause of action must be pleaded with specificity. (*Cadlo v. Owens-Illinois, Inc.* (2004) 125 Cal.App.4th 513, 519 (*Cadlo*).) This particularity requirement "necessitates pleading facts which 'show how, when, where, to whom, and by what means the representations were tendered.' [Citation.]" (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645.)

The Coits allege that defendant Mor Liberty represented to the Coits that "the Property and all fixtures therein were new, free of defects and deficiencies, and constructed in a good and workmanlike manner and to all applicable standards of care." (FAC, ¶ 69.) The Coits further allege that Liberty stated that "he would ensure that the Coits were '100% satisfied.'" (*Ibid*.) According to the Coits, "the above representations were not true," "Liberty intended that the Coits rely upon the above representations," "the Coits reasonably relied upon the above representations, and the Coits' "reasonable reliance upon the above representations was a substantial factor in causing the Coits to suffer." (*Id*., ¶¶ 69-74.)

These allegations do not meet the heightened particularity standard required to plead fraud. The Coits have not pleaded the "how, when, where, and by what means" any misrepresentations occurred, instead making blanket assertions that either NBK or Liberty misrepresented material facts. In addition, the court agrees with Defendants that the misrepresentation allegations consist largely of conclusory allegations "that a contractual promise was not performed," which are insufficient on their own. (Reply, p. 5:7-12 [citing *Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547].) There are no details regarding actual and justifiable reliance by the Coits, or regarding damages resulting from such reliance.

The court SUSTAINS Defendants' demurrer to the sixth cause of action with 20 days' leave to amend.

4. Seventh Cause of Action: Negligent Misrepresentation

For the same reasons, the court finds that the FAC fails to allege sufficient facts to support a negligent misrepresentation cause of action. "The same elements comprise a cause of action for negligent misrepresentation [as for intentional misrepresentation], except there is no requirement of intent to induce reliance. [Citation.]" (*Cadlo, supra,* 125 Cal.App.4th at p. 519.) Each element in a cause of action for fraud or negligent misrepresentation must be factually and specifically alleged. (*Ibid*.) As discussed above, the FAC does not meet the heightened particularity standard required to plead fraud. (FAC, ¶¶ 68-81.)

The court SUSTAINS Defendants' demurrer to the seventh cause of action with 20 days' leave to amend.

5. Ninth Cause of Action: Declaratory Relief

Defendants demur to the Coits' ninth cause of action for declaratory relief as "superfluous and declarative." (MPA, p. 12:21-23.) According to Defendants, a party should not use a cause of action for declaratory relief for the purpose of anticipating and determining an issue that can be determined in the main action, as the object of the statute is to afford a new form of relief where needed. (*Id.* at p. 12:25-28.) Furthermore, Defendants argue that no operative allegations in the FAC identify the parties subject to the cause of action, their capacities, or jurisdiction, as there are no allegations or incorporation by reference from prior paragraphs. (*Id.* at p. 12:10-13.)

The Coits argue that the failure to incorporate by reference the prior allegations of the FAC is immaterial to whether the ninth cause of action states a claim. The court agrees with the Coits that "[t]he mantra 'incorporated by reference' is not sacrosanct, and under a rule of liberal interpretation cannot defeat an otherwise adequate pleading." (Opposition, p. 13:12-16, citing *Ludgate Ins. V. Lockheed Martin Corp*., (2000) 82 Cal.App.4th 592, 609 (*Lockheed*).) The complaint is given "a reasonable interpretation by reading it as a whole and all of its parts in their context. [Citations.]" (*Lockheed, supra,* 82 Cal.App.4th at p. 609.) The FAC provides sufficient facts such that the Coits' ninth cause of action identifies the parties and their capacities. (See FAC, ¶¶ 2-8 [describing NBK, LU, and ADU as California corporations, providing their principal places of business and locations where they conduct business, and naming Liberty's address.)

Otherwise, claims for declaratory relief are governed by Code of Civil Procedure section 1060, which provides, in relevant part:

> Any person interested under a written instrument, excluding a will or a trust, or under a contract, or who desires a declaration of his or her rights or duties with respect to another . . . may, in cases of actual controversy relating to legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a declaration of his or her rights and duties in the premises, including a declaration of any question of construction or validity arising under the instrument or contract. He or she may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of these rights or duties, whether or not further relief is or could be claimed at the time.

(Code Civ. Proc., § 1060.)

"Under section 1061 of the Code of Civil Procedure the court may refuse to exercise the power to grant declaratory relief where such relief is not necessary or proper at the time under all of the circumstances." (*California Insurance Guaranty Ass'n v. Superior Court* (1991) 231 Cal.App.3d 1617, 1624.) "The refusal to exercise the power is within the court's legal discretion and will not be disturbed on appeal except for abuse of discretion. [Citations.]" (*Ibid*.) "The declaratory relief statute should not be used for the purpose of anticipating and determining an issue which can be determined in the main action." (*General of America Insurance Co. v. Lilly* (1968) 258 Cal.App.2d 465, 470.) "The object of the statute is to afford a new form of relief where needed and not to furnish a litigant with a second cause of action for the determination of identical issues." (*Ibid*.)

Here, the declaratory relief cause of action states, in its entirety:

> 88. An actual controversy exists with respect to justiciable questions relating to Defendants' unity of interest and whether recognizing the separate existence of each of them would promote injustice.
>
> 89. An actual controversy exists with respect to whether Defendants, and each of them, were acting in concert with, as a principal, agent, employee, co-conspirator, alter ego, entity designed to shield one another from corporate liabilities, common enterprise with, and/or a member of a joint venture of each of the other Defendants so that they are jointly and severally liable for the claims set forth herein.
>
> 90. The COITS desire a declaratory judgment regarding same.

This does not sufficiently allege a standalone cause of action for *declaratory relief* as to alter ego liability. It appears that the Coits have brought their declaratory relief cause of action in anticipation of an issue that will be determined as part of the "main action." Declaratory relief is properly refused with respect to issues that can and are likely to be determined in the underlying action. (See, e.g., *General of America Ins. Co. v. Lilly, supra*, 258 Cal.App.2d at pp. 470-471; *California Insurance Guarantee Ass'n v. Superior Court* (1991) 231 Cal.App.3d 1617, 1623-1624 ["Generally, an action in declaratory relief will not lie to determine an issue which can be determined in the underlying tort action . . . [t]he declaratory relief statute should not be used for the purpose of anticipating and determining an issue which can be determined in the main action; [rather,] [t]he object of the statute is to afford a new form of relief where needed and not to furnish a litigant with a second cause of action for the determination of identical issues."].)

The Coits do not respond to this point in the opening brief, instead contending conclusorily that they have successfully pleaded alter ego liability, that Defendants have failed to support their position through their Request for Judicial Notice, and that equitable principles support their allegations of alter ego liability. (See Opposition, pp. 14:1-15:14.) While the court agrees that the FAC sufficiently pleads alter ego liability, this does not address the point that for the Coits to succeed on several of their causes of action against certain defendants, it appears they will necessarily need to substantiate their alter ego theory as part of the "main action" in this matter.

The court SUSTAINS Defendants' demurrer to the ninth cause of action with 20 days' leave to amend. A "[p]laintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading. [Citations.]" (*Goodman v. Kenned*y (1976) 18 Cal.3d 335, 349.) The court cannot envision how the Coits can amend their pleading to assert this cause of action without running afoul of the foregoing principles, but because this is the first pleading challenge, the court nonetheless grants leave to amend.

6. Alter Ego Liability

Defendants demur to the Coits' allegations of alter ego liability as to ADU. (MPA, 13:25-14:14.) Defendants offer no legal support for their argument that alter ego liability cannot apply to an entity that is formed after a transaction at issue has occurred. (MPA,

p. 14:12-14.) In reply, Defendants repeat this same argument, again with no legal support. (Reply, p. 6:16-20.)

"The alter ego doctrine arises when a plaintiff comes into court claiming that an opposing party is using the corporate form unjustly and in derogation of the plaintiff's interests." (*Mesler v. Bragg Management Co*. (1985) 39 Cal.3d 290, 300.) To support an alter ego theory of liability, a plaintiff must plead: (1) such a unity of interest and ownership that the separate personalities of the corporation and the individuals do not exist, and (2) that an inequity will result if the corporate entity is treated as the sole actor. (See *Stodd v. Goldberger* (1977) 73 Cal.App.3d 827, 832.) In applying the alter ego doctrine, courts consider whether an individual or organization dominated and controlled the entity, the controlling party used the entity's assets as his or her own, the entity served as a mere shell and conduit for the controlling party, the entity was undercapitalized, and the entity failed to abide by the formalities of corporate existence. (See *Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 235.)

The court finds that the Coits have adequately pled alter ego liability. The Coits allege that ADU and the other named defendants have a unity of interest "such that any individuality and separateness between them has existed." (FAC, ¶ 9.) "NBK, LU, and Lux are or at all relevant times were inadequately capitalized." (*Id*. at ¶ 10.) "NBK, LU, and Lux each failed and/or continue to fail to abide by the formalities of corporate existence." (*Id*. at ¶ 11.) "Liberty, NBK, LU, and Lux Construction have commingled assets to conduct their respective operations." (*Id*. at ¶ 12.) Liberty served as LU's "sole director," "chief executive office," and "chief financial officer." (*Id*. at ¶¶ 13, 14.) Liberty "had unilateral authority to make material decisions for NBK and LU." (*Id*. at ¶ 15.) Liberty "holds or has held an equity interest in each of NBK, LU, and Lux Construction." (*Id*. at ¶ 16.) ADU "actively advertises that it performed construction work that LU performed, including building the Property." (*Id*. at ¶ 17.) "Recognizing the separate existence of Liberty, NBK, LU, and Lux Construction would promote injustice." (*Id*. at ¶ 19.)

Furthermore, "a demurrer does not lie to a part of a cause of action." (*Grieves v. Superior Court* (1984) 157 Cal.App.3d 159, 163.) "A demurrer lies only as to an entire complaint or a count [citation]." (*Fuller v. First Franklin Financial Corp.* (2013) 216 Cal.App.4th 955, 968, fn. 8.) "Alter ego" liability is not a cause of action, but rather a theory that allows a plaintiff to hold someone other than the named corporate defendant liable for the acts of that corporate defendant. (See *Hennessey's Tavern, Inc. v. American Air Filter Co.* (1988) 204 Cal.App.3d 1351, 1358-1359 ["A claim against a defendant, based on the alter ego theory, is not itself a claim for substantive relief, e.g., breach of contract or to set aside a fraudulent conveyance, but rather, procedural, i.e., to disregard the corporate entity as a distinct defendant and to hold the alter ego individuals liable on the obligations of the corporation where the corporate form is being used by the individuals to escape personal liability, sanction a fraud, or promote injustice."].)

The court OVERRULES Defendants' demurrer as to alter ego liability.

IV. CONCLUSION

The court OVERRULES Defendants' demurrer to the first, second, third, fourth, and fifth causes of action, as well as the alter ego allegations. The court SUSTAINS Defendants' demurrer to the sixth, seventh, and ninth causes of action with 20 days' leave to amend.

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Calendar Line 3
Case Name: *Ankur Rustagi et al. v. Matthew David Wheeler et al.*
Case No.: 23CV426650

I. BACKGROUND

This is a dispute arising from the purchase of residential property in San Jose. Plaintiffs Ankur Rustagi and Dora Gyulai ("Plaintiffs") purchased a single-family residence located at 779 Calero Avenue, San Jose, CA 95123 from defendants Matthew and Megan Wheeler (the "Sellers") in June of 2021. Plaintiffs allege that the Sellers failed to disclose structural problems with the property.

Plaintiffs filed their original and still-operative complaint on November 30, 2023. The complaint states seven causes of action: (1) Breach of Written Contract (against the Sellers and Does); (2) Intentional Misrepresentation (against the Sellers and Does); (3) Fraudulent Concealment (against the Sellers and Does); (4) Statutory Failure to Disclose (Civil Code section 1102—against the Sellers and Does); (5) Negligent Misrepresentation (against the Sellers and Does); (6) Negligence (against the Sellers and Does); and (7) Negligence (against defendant Avalon Structural, Inc. and Does). There are no exhibits attached to the complaint.

Currently before the court is a demurrer to the complaint by defendant Avalon Structural, Inc. ("Avalon"). Avalon was the general contractor for certain "structural repairs" to the property in 2016. (Complaint, ¶ 31.)

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.) A plaintiff is not ordinarily required to allege "'each evidentiary fact that might eventually form part of the plaintiff's proof . . . .'" (*Ferrick v. Santa Clara University* (2014) 231 Cal.App.4th 1337, 1341 [citation omitted].)

"Where a pleading includes a general allegation, such as an allegation of an ultimate fact, as well as specific allegations that add details or explanatory facts, it is possible that a conflict or inconsistency will exist between the more general allegation and the specific allegations." (*Perez v. Golden Empire Transit Dist*. (2012) 209 Cal.App.4th 1228, 1235 (*Perez*).) "To handle these contradictions, California courts have adopted the principle that specific allegations in a complaint control over an inconsistent general allegation." (*Id*. at pp. 1235–1236.) "Under this principle, it is possible that specific allegations will render a complaint defective when the general allegations, standing alone, might have been sufficient." (*Id*. at p. 1236.) "It is well established that in the context of a demurrer, specific allegations control over more general ones." (*Chen v. PayPal, Inc.* (2021) 61 Cal.App.5th 559, 571-572 (*Chen*) [citing *Perez*, among others].)

The court considers only the pleading under attack, any attached exhibits (part of the "face of the pleading"), and any facts or documents for which judicial notice is properly requested. The court cannot consider extrinsic evidence in ruling on a demurrer or motion to strike. This includes declarations. The court has considered the declaration of counsel Michael Tunink only to the extent that it discusses the meet-and-confer efforts required by statute. The court has not considered the exhibits attached to that declaration.

Code of Civil Procedure section 430.60 states that "[a] demurrer shall distinctly specify the grounds upon which any of the objections to the complaint, cross-complaint, or answer are taken. Unless it does so, it may be disregarded." The rules of court also require that that the demurrer itself (distinct from a supporting memorandum) specify the target of any objection and the grounds. (See Cal. Rules of Court, rules 3.1103(c), 3.1112(a), and 3.1320(a) ["Each ground of demurrer must be in a separate paragraph and must state whether it applies to the entire complaint, cross-complaint, or answer, or to specified causes of action or defenses."]; see also 5 Witkin, *Cal. Procedure* (5th ed., 2019) Pleading, § 953 ["Each ground of demurrer must be in a separate paragraph and must state whether the demurrer applies to the entire complaint, cross-complaint, or answer, or to specified causes of action or defenses."].)

Finally, "points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before." (*Proctor v. Vishay Intertechnology, Inc*. (2013) 213 Cal.App.4th 1258, 1273; See also *REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489, 500 ["This court will not consider points raised for the first time in a reply brief for the obvious reason that opposing counsel has not been given the opportunity to address those points."].)

B. Basis for the Demurrer

Avalon demurs to the seventh cause of action on the ground that it fails to state sufficient facts. (See Notice of Demurrer and Demurrer, pp. 1:25-2:4.)

C. Discussion

As an initial matter, the court notes that the meet-and-confer efforts here were insufficient. Code of Civil Procedure section 430.41, subdivision (a), requires the parties to meet and confer "in person, by telephone, or by video conference" before the filing of a demurrer. The exchange of emails described in the declaration of Michael Tunink does not comply with the plain terms of the statute. Nevertheless, because a finding that meet-and-confer efforts were insufficient is not itself a basis for sustaining or overruling a demurrer, the court will consider the demurrer on its merits. (See Code Civ. Proc, § 430.41, subd. (a)(4).)

The court also notes that the demurrer is untimely. A proof of service shows that service of the summons and complaint on Avalon occurred on December 6, 2023. A party may file a demurrer within 30 days of service of the complaint. (See Code Civ. Pro. § 430.40, subd. (k).) Avalon's demurrer was not filed until April 18, 2024, making it untimely. Plaintiffs have not raised this issue, and the court is unaware of whether the parties have had any discussions or agreement regarding the time to respond to the complaint. The court elects to exercise its discretion to consider this untimely demurrer. (See *Jackson v. Doe* (2011) 192 Cal.App.4th 742, 750 [trial court properly exercised its discretion in considering untimely demurrer].)

The court SUSTAINS Avalon's demurrer to the seventh cause of action with 20 days' leave to amend, as follows.

"In order to establish negligence, a plaintiff must demonstrate a duty on the part of defendant, breach of that duty, causation and damages." (*Strong v. State of Cal.* (2011) 201 Cal.App.4th 1439, 1449.) Whether a duty of care exists is a question of law for the Court. (*Id*.) "Negligence may be alleged in general terms; that is, it is sufficient to allege an act was negligently done without stating the particular omission which rendered it negligent." (*Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 747.) "While negligence is ordinarily a question of fact, the existence of duty is generally one of law. Thus, a demurrer to a negligence claim will properly lie only where the allegations of the complaint fail to disclose the existence of any legal duty owed by the defendant to the plaintiff." (*Osornio v. Weingarten* (2004) 124 Cal.App.4th 304, 316, internal citations omitted.)

Here, the seventh cause of action alleges in conclusory fashion that the "Construction Defendants," including Avalon, "owed *the owner* a legal duty to exercise reasonable care in performing the functions, duties and responsibilities inherent in each of their respective disciplines. Further Avalon owed a legal duty to exercise reasonable care in performing the functions, duties, and responsibilities of [a] general contractor." (Complaint, ¶ 90, emphasis added.) It further alleges that it was foreseeable to the "Construction Defendants" that the property might be sold, and that they therefore knew or should have known that "subsequent purchasers, such as Plaintiffs" would suffer damages if the "Construction Defendants" or Does "failed to perform such functions, duties and responsibilities in a reasonable manner commensurate with the prevailing standard of care for such disciplines." (*Id.* at ¶ 92.) The complaint also alleges that "Defendants breached their duty owed to Plaintiffs by their actions and omission including, but not limited to, failing to use reasonable care in providing services or providing materials, failing to properly supervise their own subcontractor and/or workers, failing to obtain a soils report, and failing to perform services and work in a proper and workmanlike manner and in compliance with the California Building Code and in conformance with the approved architectural drawings and/or structural plans." (*Id.* at ¶ 93.)[1]

Avalon is correct that the seventh cause of action fails to allege how Avalon breached a duty of care owed to plaintiffs, as opposed to the prior owners of the property.

As noted above, specific allegations control over general ones on demurrer. (See *Perez* and *Chen, supra*.) The seventh cause of action incorporates the prior general allegations by reference. (See Complaint, ¶ 89.) Among them are specific allegations at paragraphs 31-35 that "just prior to Sellers [the Wheelers] purchasing the Property in 2016, Avalon was engaged to conduct structural repairs to the Property," that these repairs "failed to adequately or properly address the structural problems," and that the Wheelers were aware of this failure and "continued to make cosmetic repairs." All of this was allegedly not disclosed to plaintiffs before they purchased the subject property. These allegations establish that any negligence cause of action arising from Avalon's structural repair work accrued in 2016 or earlier and either belongs to the Wheelers or to the owners who immediately preceded them, rather than to Plaintiffs. As a general matter, "a cause of action for damage to real property accrues when the defendant's act causes '*immediate* and *permanent* injury' to the property or, to put it another

[1] No violation of any provision of the Building Standards Code is alleged in the complaint.

way, when there is '[a]ctual and appreciable harm' to the property." (*Siegel v. Anderson Homes, Inc*. (2004) 118 Cal.App.4th 994, 1005 (*Siegel*) [emphasis in original, internal citations omitted].)

The Court of Appeal in *Krusi v. S.J. Amoroso Construction Co.* (2000) 81 Cal.App.4th 995 (*Krusi*), a decision cited by Plaintiffs in the opposition, noted that "the *Biakanja* rule simply means that a duty may run from an architect, engineer, or contractor to a subsequent owner of real property. It does not mean that, in a case implicating damage to such property, once a cause of action in favor of a prior owner accrues, another cause of action against the same defendant or defendants can accrue to a subsequent property owner—unless, of course, the damage suffered by that subsequent owner is fundamentally different from the earlier type. Thus, if owner number one has an obviously leaky roof and suffers damage to its building on account thereof, a cause of action accrues to it against the defendant or defendants whose deficient design or construction work caused the defect. But, if that condition goes essentially unremedied over a period of years, owners two and three of the same building have no such right of action against those defendants, unless such was explicitly (and properly) transferred to them by owner number one." (*Id*. at p. 1006 [citing *Biakanja v. Irving* (1958) 49 Cal.2d 647].) The Court in *Siegel, supra*, similarly noted that while a duty of care could run from a contractor to a subsequent owner, this "does not mean that, in a case implicating *damage to such property*, once a cause of action in favor of a prior owner accrues, another cause of action against the same defendant or defendants can accrue to a subsequent property owner—unless, of course, the damage suffered by that subsequent owner is fundamentally different from the earlier type . . . ." (*Siegel, supra*, 118 Cal.App.4th at p. 1006 [italics in original; internal citations omitted].) In *Jasmine Networks, Inc. v. Superior Court* (2009) 180 Cal.App.4th 980, 995, the Court of Appeal further noted the "central premise that a right of action for damage to property is distinct from the title to the property, and from any right in the property, and that the transfer of the latter does not by itself effect a transfer or diminution of the former."

As there are no allegations in the complaint that any prior owners transferred any already accrued negligence claim against Avalon to Plaintiffs, the seventh cause of action fails to state sufficient facts. The court agrees with Avalon that the demurrer must be sustained.

A plaintiff bears the burden of demonstrating that an amendment would cure the defect identified on demurrer. (See *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081; *Shaeffer v. Califia Farms, LLC* (2020) 44 Cal.App.5th 1125, 1145 ["The onus is on the plaintiff to articulate the 'specifi[c] ways' to cure the identified defect, and absent such an articulation, a trial or appellate court may grant leave to amend 'only if a potentially effective amendment [is] both apparent and consistent with the plaintiff's theory of the case. [Citation.]'"].) Here, Plaintiffs' opposition fails to meet this burden, as it does not request leave to amend at all, let alone articulate any specific manner in which the seventh cause of action could be amended. Instead, it simply argues that the demurrer "is wholly lacking in merit and should be denied," and that it "demonstrates a misunderstanding of the law and Plaintiffs' complaint to such a shocking degree that it appears more likely to be a calculated delay tactic than a genuine argument." (See Opposition, pp. 4:13 & 1:27-2:1.)

While this rhetoric is somewhat antithetical to supporting any leave to amend, the court will nonetheless grant 20 days' leave to amend on the basis that this is the first pleading challenge in this case to be heard by the court.

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

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Calendar Line 4
Case Name: *Debra Ryan et al. v. AAA et al.*
Case No.: 23CV427933

I. BACKGROUND

This is a dispute over insurance coverage for fire-related losses suffered by plaintiffs Debra and Richard Ryan (the "Ryans") in December 2020 at their residence in San Jose, California.

The Ryans filed their original complaint, a form complaint, on December 18, 2023. They filed their operative first amended complaint ("FAC"), also a form complaint, on February 6, 2024. The FAC states two causes of action: (1) breach of written contract (insurance policies), and (2) fraud (with boxes checked for misrepresentation, concealment, and promise without intention to perform).[2] Both causes of action are alleged against "AAA, CSAA Insurance Exchange." There is also an exemplary damages attachment. Attached to the FAC as Exhibits A and B are copies of (1) Homeowners Policy Declarations issued by "AAA Insurance underwritten by CSAA Insurance Exchange" covering the period from "10/16/2020" to "10/16/2021," listing Richard Ryan and Debra Ryan as named insureds, with an attached "California Homeowners Policy Special Form HO-3" from "AAA Insurance," and (2) a copy of a December 20, 2023 letter from "AAA Insurance | CSAA Insurance Exchange" stating that Richard Ryan's claim was now closed and that all payments owed had been issued.

Currently before the court is a demurrer to the FAC by defendants AAA and CSAA Insurance Exchange ("Defendants"), filed on April 19, 2024. The Ryans filed an opposition on July 17, 2024.

II. REQUESTS FOR JUDICIAL NOTICE

Both sides here have submitted requests for judicial notice. "Judicial notice may not be taken of any matter unless authorized or required by law." (Evid. Code, § 450.) A precondition to judicial notice in either its permissive or mandatory forms is that the matter to be noticed be relevant to the material issue before the court. (*Silverado Modjeska Recreation and Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 307 [citing *People v. Shamrock Foods Co*. (2000) 24 Cal.4th 415, 422, fn. 2].) It is the court, and not the parties, that determines relevance. Evidence Code section 453, subdivision (b), requires a party seeking notice to "[furnish] the court with sufficient information to enable it to take judicial notice of the matter."

A. Defendants' Request

Defendants request judicial notice of two documents, attached as Exhibits A and B, pursuant to Evidence Code section 452, subdivision (h). Both documents are described as

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[2] The second cause of action is improperly titled "Fraud and Breach of the Implied Covenant of Good Faith and Fair Dealing." This is two different causes of action. A plaintiff may not plead causes of action with separate and distinct elements as one cause of action, and the second cause of action does not plead the elements of a breach of implied covenant claim against an insurer. Each cause of action attachment form states near the top: "Use a separate cause of action form for each cause of action."

having been "found" on the website for the California Department of Insurance. Defendants maintain that these documents establish that AAA does not issue insurance in California. The court denies the request as to both documents.

First, Evidence Code section 452, subdivision (h), does not apply. Subdivision (h) "is intended to cover facts which are not reasonably subject to dispute and are easily verified." (*Gould v. Maryland Sound Industries* (1995) 31 Cal.App.4th 1137, 1145.) It does not apply to information contained on websites. (See *Jolley v. Chase Home Finance LLC* (2013) 213 Cal.App.4th 872, 889 ["[W]e know of no 'official web site' provision for judicial notice in California."]; *Duronslet v. Kamps* (2012) 203 Cal.App.4th 717, 737 [refusing to take judicial notice of information on the California Board of Registered Nursing web site]; *Searles Valley Minerals Operations, Inc. v. State Board of Equalization* (2008) 160 Cal.App.4th 514, 519 [affirming denial of request to take notice of the truth of the contents of web site pages of the American Coal Foundation and the U.S. Dept. of Energy].)

Second, a demurrer cannot be turned into an evidentiary hearing via attempts to have the court take judicial notice of the truth of the contents of documents. "For a court to take judicial notice of the meaning of a document submitted by a demurring party based on the document alone, without allowing the parties an opportunity to present extrinsic evidence of the meaning of the document, would be improper. A court ruling on a demurrer therefore cannot take judicial notice of the proper interpretation of a document submitted in support of the demurrer. In short, a court cannot by means of judicial notice convert a demurrer into an incomplete evidentiary hearing in which the demurring party can present documentary evidence and the opposing party is bound by what that evidence appears to show." (*Fremont Indemnity Co. v. Fremont General Corp*. (2007) 148 Cal.App.4th 97, 114-115, internal citations omitted; see also *New Livable California v. Assoc. of Bay Area Governments* (2020) 59 Cal.App.5th 709, 716 [citing Fremont Indemnity Co. among other decisions].)

B. The Ryans' Request

With their opposition, the Ryans similarly submit a misplaced request for judicial notice under section 452, subdivision (h). The source of their proposed document, attached as Exhibit A to the request, is not identified, but it appears to be marketing material from AAA Home Insurance. Subdivision (h) does not apply to this document, either. The request is denied.

III. DEMURRER TO THE FAC

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.) A plaintiff is not ordinarily required to allege "'each

evidentiary fact that might eventually form part of the plaintiff's proof . . . .'" (*Ferrick v. Santa Clara University* (2014) 231 Cal.App.4th 1337, 1341.)

The court considers only the pleading under attack, any attached exhibits, and any facts or documents as to which judicial notice is properly requested. The court cannot consider extrinsic evidence in ruling on a demurrer or motion to strike. This includes declarations. The court has only considered the declaration from Weiland Chiang, counsel for defendants, to the extent that it discusses the meet-and-confer efforts required by statute. The court has not considered the contents of the attached exhibits.

Code of Civil Procedure section 430.60 states that "[a] demurrer shall distinctly specify the grounds upon which any of the objections to the complaint, cross-complaint, or answer are taken. Unless it does so, it may be disregarded." The rules of court also require that the demurrer itself (distinct from a supporting memorandum) specify the target of any objection and the grounds. (See Cal. Rules of Court, rules 3.1103(c), 3.1112(a), and 3.1320(a) ["Each ground of demurrer must be in a separate paragraph and must state whether it applies to the entire complaint, cross-complaint, or answer, or to specified causes of action or defenses."]; see also 5 Witkin, *Cal. Procedure* (5th ed., 2019) Pleading, § 953 ["Each ground of demurrer must be in a separate paragraph and must state whether the demurrer applies to the entire complaint, cross-complaint, or answer, or to specified causes of action or defenses."].)

Finally, "points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before." (*Proctor v. Vishay Intertechnology, Inc*. (2013) 213 Cal.App.4th 1258, 1273; see also *REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489, 500 ["This court will not consider points raised for the first time in a reply brief for the obvious reason that opposing counsel has not been given the opportunity to address those points."].)

B. Basis for the Demurrer

Defendants' April 19, 2024 Notice of Demurrer states that Defendants demur to the entire FAC "on the grounds that it fails to state a claim against 'AAA' and CSAA IE [and] is uncertain." The Demurrer further states that the FAC's second cause of action for fraud fails to state sufficient facts "against 'AAA' and CSAA IE" and is uncertain. It also asserts that the entire FAC fails to state sufficient facts against AAA.

In their supporting memorandum, Defendants attempt to raise other arguments not raised in the notice of demurrer and demurrer, such as the notion that the second cause of action for fraud is barred by the economic loss rule. Not only is this improper; it is also incorrect.[3]

[3] (See *County of Santa Clara v. Atlantic Richfield Co*. (2006) 137 Cal.App.4th 292, 328-329 [fraud generally falls outside the scope of the economic loss rule].) The decision in *Food Safety Net Services v. Eco Safe Systems USA, Inc.* (2012) 209 Cal.App.4th 1118, cited by Defendants, also does not provide support for the demurrer. That decision concerned a review of a summary judgment ruling, not a pleading challenge. It is not apparent from the *face of the FAC* that the economic loss rule bars the fraud claim here.

C. Analysis

1. Uncertainty (Code Civ. Proc., § 430.10, subd. (f).)

The court OVERRULES Defendants' demurrer to the entire FAC and to the second cause of action for fraud on the ground of uncertainty.

"'[D]emurrers for uncertainty are disfavored, and are granted only if the pleading is so incomprehensible that a defendant cannot reasonably respond.' 'A demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures.'" (*A.J. Fistes Corp. v. GDL Best Contractors, Inc.* (2019) 38 Cal.App.5th 677, 695, internal citations omitted.)

While the FAC is a form complaint with limited narrative allegations, the court does not find it to be so ambiguous or incomprehensible that Defendants are unable to respond. Indeed, it is apparent from Defendants' arguments under subdivision (e) that they understand the FAC as a whole and the second cause of action for fraud, and they are capable of responding.

2. Failure to State Sufficient Facts (Code Civ. Proc., § 430.10, subd. (e).)

The court OVERRULES the demurrer to the entire FAC on the ground that it fails to state sufficient facts as to AAA, based on Defendants' claim that AAA is not an insurer that issues policies in California. This argument depends upon extrinsic evidence, including extrinsic materials as to which the court has denied judicial notice. The FAC, including the attached exhibits, adequately alleges that "AAA Insurance underwritten by CSAA Insurance Exchange" issued a policy to the Ryans covering the subject property that was in effect at the time of the fire. This allegation is accepted as true on demurrer.

The court SUSTAINS the demurrer to the second cause of action for fraud on the ground that it fails to state sufficient facts, with 20 days' leave to amend.

"The elements of fraud are (1) the defendant made a false representation as to a past or existing material fact; (2) the defendant knew the representation was false at the time it was made; (3) in making the representation, the defendant intended to deceive the plaintiff; (4) the plaintiff justifiably relied on the representation; and (5) the plaintiff suffered resulting damages." (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 792 [citation omitted].) "Fraud must be pleaded with specificity rather than with general and conclusory allegations. The specificity requirement means a plaintiff must allege facts showing how, when, where, to whom, and by what means the representations were made, and, in the case of a corporate defendant, the plaintiff must allege the names of the persons who made the representations, their authority to speak on behalf of the corporation, to whom they spoke, what they said or wrote, and when the representation was made." (*Id*. at p. 793 [citation and quotation marks omitted].) Courts enforce the specificity requirement in consideration of its two purposes. (*Id*. at p. 793.) The first purpose is to give notice to the defendant with sufficiently definite charges that the defendant can meet them. (*Ibid*.) The second is to permit a court to weed out meritless fraud claims on the basis of the pleadings; thus, the pleading should be sufficient to enable the court to determine whether, on the facts pleaded, there is any foundation for the charge of fraud. (*Ibid*.)

Defendants' argument that the second cause of action fails to allege an intent to deceive is not persuasive. (See 5 Witkin, *California Procedure* (5th ed. 2019) Pleading, §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."].)

On the other hand, Defendants are correct that the FAC fails to allege reliance and resulting damages, and also fails to allege who made misrepresentations on their behalf, as they are both corporate entities. A plaintiff asserting fraud by misrepresentation is obliged to establish a complete causal relationship between the alleged misrepresentations and the harm claimed to have resulted therefrom. This requires a plaintiff to allege specific facts not only showing that he or she actually and justifiably relied on the defendant's misrepresentations, but also how the actions he or she took in reliance on the defendant's misrepresentations caused alleged damages. Misrepresentation, even maliciously committed, does not support a cause of action unless the plaintiff suffered consequential damages. (See *Orcilla v. Big Sur, Inc*. (2016) 244 Cal.App.4th 982, 1008.) The Ryans' complaints do not comply with these pleading requirements. Indeed, as Defendants correctly point out, the FAC does not even come close to alleging fraud with any reasonable specificity, and both the FAC and the Ryans' opposition arguments appear to mix up the elements of fraud and the elements of insurance bad faith.[4]

A plaintiff bears the burden of demonstrating that an amendment would cure the defect identified on demurrer. (See *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081; *Shaeffer v. Califia Farms, LLC* (2020) 44 Cal.App.5th 1125, 1145 ["The onus is on the plaintiff to articulate the 'specifi[c] ways' to cure the identified defect, and absent such an articulation, a trial or appellate court may grant leave to amend 'only if a potentially effective amendment [is] both apparent and consistent with the plaintiff's theory of the case. [Citation.]'"].) The Ryans have not met this burden, as the opposition simply includes a general request for 30 days' leave to amend if the court sustains any part of the demurrer. Nevertheless, because this is the first pleading challenge in the case, the court grants 20 days' leave to amend.

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

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[4] Contrary to the opposition's arguments, the FAC does not allege a cause of action for breach of the implied covenant of good faith and fair dealing or for breach of Insurance Code section 790.03. (See Opposition, p. 7:1-15.) The general rule is that statutory causes of action must be pleaded with particularity. (See *Lopez v. Southern California Rapid Transit District* (1985) 40 Cal.3d 780, 795; *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790.) In fact, the FAC does not make any reference to Insurance Code section 790.03. If the Ryans wish to add additional causes of action beyond the two currently alleged, that will require a noticed motion for leave to amend.

amend does not presently include any new causes of action for breach of the implied covenant of good faith and fair dealing or for breach of Insurance Code section 790.03

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Calendar Line 6
Case Name: *Claudia Barrera Roque et al. v. Stucco Supply Co. et al.*
Case No.: 21CV381806

Plaintiff Claudia Barrera Roque moves to compel further deposition testimony from defendant Gabriel Calderon; in addition, she seeks $1,560 in monetary sanctions for having had to bring this motion. The court GRANTS the motion and GRANTS IN PART the request for sanctions.

The court has reviewed the entire transcript of Calderon's deposition, lodged with this motion, and makes the following findings:

- Defendants' counsel improperly instructed Calderon not to answer questions on multiple occasions. The most common rationales offered were that the answer was "not likely to lead to the discovery of admissible evidence" or that the image/video that was the subject of the question "speaks for itself." Neither of these is a valid basis for instructing a witness not to answer a question.

    - Indeed, the notion that a document (or image or video) "speaks for itself" is not a proper deposition objection *under any circumstance*. At best, the oft-misused objection that a document "speaks for itself" is a misapplication of the best evidence rule, which calls for the use of an original document rather than a facsimile. In other words, this is *at best* an evidentiary objection at trial, not a discovery objection.

- Defendants' counsel repeatedly made speaking objections at the deposition that appeared to be designed to coach or steer (and did have the effect of coaching and steering) the witness's answers. This was grossly improper.

- The court disagrees with Calderon's allegation that the questioning at the deposition constituted "harassment." To be sure, some of the questioning was persistent and repetitive, but the repetition was largely attributable to the witness's evasive answers and counsel's improper coaching and instructions.

- Barrera Roque adequately met and conferred before bringing this motion.

The court grants the motion to compel and orders that Calderon be deposed for up to one more hour on the record, within 30 days of notice of entry of this order. The court also grants, in part, Barrera Roque's request for monetary sanctions. Barrera Roque has requested $1,560, but that amount includes one hour for appearing at the hearing on this motion, which the court finds to be unnecessary. Instead, the court orders sanctions in the amount of **$1,260** (four hours at $300/hour plus the $60 filing fee). Calderon and his counsel are jointly and severally liable for this amount, which shall be paid within 30 days of notice of entry of this order. The purpose of discovery sanctions is compensatory, not punitive.

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Calendar Line 7
Case Name: *Joyce Diaz v. General Motors, LLC*
Case No.: 22CV393755

It is extremely difficult to tell from the parties' lengthy briefs filled with generic and boilerplate arguments exactly what the subject of this motion is. Plaintiff Joyce Diaz seeks to compel the deposition of defendant General Motors, LLC's ("GM's") person most knowledgeable ("PMK") as to deposition topics Nos. 1-11, 15-16, 27-28, 31, and 33-36. (Notice of Motion, p. 1:7-8.) Nowhere in Diaz's opening brief does she actually identify the language of any of these topics. GM's opposition states that GM has already agreed to produce a PMK witness for topics Nos. 1-26 and 31-37. Therefore, it appears that the only remaining dispute is as to topics Nos. 27 and 28. Based on the court's review of the exhibits, it appears that these topics focus on GM's efforts to "preserve relevant and discoverable information in this matter" and its efforts "to search for documents and information responsive to Plaintiff's discovery requests." The court finds that these are inappropriate topics for a PMK deposition of an entity, with little or no probative value for the causes of action in this case. The court therefore DENIES the motion as to the deposition topics.

Diaz also seeks to compel further responses to 21 requests for production of documents (Nos. 1, 2, 3, 7, 8, 13, 20, 24, 25, 27, 33, 41, 85, 91, 108, 110, 111, 125, 126, 127, and 128), but once again, her generic briefs fail to address the specific language of any single one of these requests, much less all of them. Her separate statement contains generic arguments that appear to have been cut and pasted from other separate statements in other cases. The court has reviewed the language of the document requests and observes the following:

- First, it appears that Requests Nos. 1, 2, 3, 7, 8, and 13 focus on documents relating to the "Subject Vehicle"—*i.e.*, Diaz's 2018 GMC Acadia vehicle. GM's responses state that it will produce *at least some* of the requested documents, to the extent that they exist, and it identifies what those documents are. For example, the response to Request No. 7 states:

  > GM will comply in part and produce a list of technical service bulletins ("TSBs") issued for vehicles of the same year, make, and model as the SUBJECT VEHICLE. After it has produced a list of TSBs GM will – at Plaintiff's request – search for and produce, if located, copies of a reasonable number of TSBs if any, that Plaintiff has identified as specifically regarding the defects alleged in Plaintiff's complaint. GM will also produce copies of the bulletins for every field action, including any recalls, it issued for the SUBJECT VEHICLE as identified in the Global Warranty History Report.

  Diaz's separate statement fails to identify the deficiency in this response and similar responses, as it fails to identify what documents it believes are still being withheld by GM and that still need to be produced in response to Requests Nos. 1, 2, 3, 7, 8, and 13. Absent such an identification, there is no basis to compel a further response to these requests.

- Second, Requests Nos. 20, 24, 25, 27, 33, 41, 85, 91, 108, 110, 111, 125, 126, 127, and 128 call for more general, company-wide documents that are not focused on the

"Subject Vehicle" itself. The court finds that these requests are overbroad and that Diaz has failed to articulate any rationale by which this broad scope of discovery could potentially be relevant to the causes of action in this case.

In light of the generic and unhelpful arguments advanced on this motion, including a total failure to show good cause, the court DENIES the motion as to the document requests.

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Calendar Line 8
Case Name: *Sophie Yeh v. The Harker School et al.*
Case No.: 23CV418929

Plaintiff Sophie Yeh moves to compel further responses to requests for production of documents from defendant The Harker School. The court has reviewed the text of the requests and the responses at issue, and it now rules as follows:

- The court agrees with plaintiff that defendant's responses to Requests Nos. 2 and 3 fail to include a statement of compliance. Although this may seem like a technicality, the wording of defendant's responses is improper: it asserts a number of boilerplate objections and then it simply states: "Without waiving and subject to said objections The Harker School responds as follows . . . ," followed by a listing of documents. These responses must be supplemented to include a verified statement of compliance. Contrary to defendant's position, it is not simply a matter of "reverifying" the responses. The responses themselves are improperly worded and must be amended and then verified.

- Similarly, the court finds that the responses to Requests Nos. 8-13, 18, 27, and 31-32 are also improperly worded. Rather than state that "All tree-related documents within the possession, custody or control of The Harker School are attached hereto as . . . ," the response should state: "The Harker School will produce all responsive documents within its possession, custody or control, including the documents attached hereto as [Bates numbers]." Otherwise, this is also an ambiguous and unclear statement of compliance/non-compliance.

- Defendant must amend its response to Request No. 7. The basis upon which defendant has opposed this motion is the notion that producing communications with other students injured by the tree, as well as communications with their families, would violate the Family Educational Rights and Privacy Act (FERPA). First, as plaintiff correctly notes, defendant's written response failed to include any objection based on FERPA.[5] Second, and more critically, the court is not persuaded that communications between the school and other students' families would fall within the scope of FERPA, which is designed to protect a child's educational records. Defendant fails to explain how communications about potential injuries to students from a fallen tree could constitute the *educational records* of those students. Defendant presents no authority to support its position, and the court strains to see how such a broad interpretation of FERPA would serve the legislative purpose behind that statute. To the extent that the objection is not waived, it is overruled.

- Based on counsel's representation that all documents that have been withheld on the basis of privilege (other than those responsive to Request No. 7, discussed above) are included in the privilege log that has already been served, the court finds that no

[5] Indeed, in the meet-and-confer correspondence between the parties, there is no discussion of FERPA, either. Instead, in an April 4, 2024 letter, it appears that defendant tried to invoke "HIPPA[sic]," which is also inapplicable.

further privilege log is called for at this time. But if documents are withheld on the basis of privilege in response to Request No. 7, then they must be logged.

The court GRANTS plaintiff's motion to compel IN PART. The court denies defendants' request for monetary sanctions. Defendant shall serve amended or supplemental responses to the foregoing requests for production within 20 days of notice of entry of this order.

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