SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 16
(Dept 16 is now hearing cases that were formerly in Dept 2)
Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 01-23-24 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear by video.

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 prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

TO CONTEST THE RULING: Before 4:00 p.m. today you must notify the:

(1) Court by calling (408) 808-6856 and
(2) Other side by phone or email that you plan to appear and contest the ruling
(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

TO APPEAR AT THE HEARING: The Court strongly prefers in person appearances. If you must appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to Department 16.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

TO SET YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. Phone lines are now open for you to call and reserve a date before you file your motion. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Where to call for your hearing date: 408-882-2430 When you can call: Monday to Friday, 8:30 am to 12:30 pm

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

COURT REPORTERS: The Court no longer provides official court reporters. If any party wants a court reporter, the appropriate form must be submitted. See court website for policy and forms.

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	19CV354144 Hearing: Order of Examination	Global Financial & Leasing Services, LLC vs Jose Medina	All parties shall be present in Department 16 at 9:00 AM. The Court will administer the oath and the examination will take place off line. The parties are to report after the examination has been completed.
LINE 2	22CV409274 Hearing: Demurrer	Jane Roe vs DOE 1 et al	See Tentative Ruling. Court will prepare the final order.
LINE 3	23CV410442 Hearing: Demurrer	ELAINE JULIAN vs GENERAL MOTORS, LLC.	See Tentative Ruling. Court will prepare the final order.
LINE 4	23CV410442 Hearing: Motion to Strike	ELAINE JULIAN vs GENERAL MOTORS, LLC.	See Tentative Ruling. Court will prepare the final order.
LINE 5	19CV341334 Motion: Summary Judgment/Adjudication	Ranvir Kaur vs Jacob Morris et al	Notice appearing proper and good cause appearing, Defendant State of California Department of Transportation's unopposed motion for summary judgment is GRANTED. Defendant State shall submit the final order.
LINE 6	20CV368091 Motion: Compel	VINCENT BEARDSLEY vs JOAN ANTHONY et al	Off calendar.
LINE 7	21CV384274 Motion: Compel	Abhinesh Narayan vs Sahibou Oumarou et a	Off calendar

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LINE 8	22CV395824 Motion: Compel	Green Wall Tech, Inc vs FCA US LLC	Plaintiff has once again filed a motion to compel that fails to comply with California Rule of Court 3.1345, requiring the filing of a separate statement. Based on this procedural defect, Plaintiff's Motion to Compel is DENIED. Sanctions are denied. Defendant shall submit the final order. The Court notes that the inspection report at issue appears to be discoverable and not subject to privilege, at least not without some showing by Defendant. The Court urges the parties to resolve this dispute without any further Court involvement.

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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 prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

LINE 9	21CV382740 Motion: Vacate	Ron Ronen et al vs First American Title Insurance Co. et al	**Defendant First American Title Insurance Co. ("Defendant") brings a motion to vacate the default entered against it. Defendant filed a Declaration of Nonmonetary Status (DNMS) on July 12, 2021. No opposition to the Declaration was filed. As such, no default should have been entered against Defendant. See** *Bae v. T.D. Service Co. of Arizona* (2016) 245 Cal.App.4th 89, 104-105 (entry of default against a party that has filed an unopposed DNMS is improper and should be vacated). Here, the default should be vacated. Because no **objection was served within the 15-day objection period, "the trustee shall not be required to participate any further in the action or proceeding" and "shall not be subject to any monetary awards as and for damages, attorneys' fees or costs." Civil Code § 2924l(d). Plaintiff has filed an opposition to the motion to vacate indicating, among other things, that the court struck Defendant's answer for failing to appear on January 19, 2023. But Defendant was not required to appear, was not required to file an answer, and in fact never filed an answer. The striking of the answer was in error and is of no consequence. Plaintiff provides no legal basis for why the default should not be vacated. Accordingly, the motion to vacate is GRANTED. Defendant shall submit the final order.**

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The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

LINE 10	22CV404340 Motion: Expunge the Notice of pendency	Tam Nguyen et al vs Dzung Pham et a	Notice appearing proper the unopposed motion is GRANTED. Plaintiffs shall pay to Defendant 1405FA, LLC attorney fees and costs totaling $2660 (4 hrs at $500 + 1.5 hours at $400 + $60). The Court will sign the submitted order.
LINE 11	23CV412053 Motion: For entry of Judgment against 3rd party garnishee	Rossi Hamerslough Reischl & Chuck vs Dipali Shah	Continued
LINE 12	23CV418537 Motion: Vacate	Bruce Williams vs Charles Thompson et al	Off calendar
LINE 13	23CV419564 Motion Approve proposition 65 settlement	Dennis Johnson vs Visual Comfort & Co. et al	Notice appearing proper and good cause appearing, the unopposed motion to approve proposition 65 settlement and consent judgment is GRANTED. Plaintiff shall submit the final order and judgment.

- oo0oo -

Calendar Line 2
Case Name: *Roe v. Santa Clara Swim Club et al.*
Case No.: 22CV409274

Defendant City of Santa Clara (the "City" or "Defendant") demurs to the First Amended Complaint ("FAC") filed by plaintiff Jane Roe ("Plaintiff").

I. Background

A. Factual

This action for damages arises out of a sexual assault purportedly suffered by Plaintiff when she was 16 years old. (FAC, ¶¶ 1-2, 8, 17-24.) According to the allegations of the FAC, Plaintiff, who is currently thirty-nine years old, attended Santa Clara Swim Club ("SCSC") located in Santa Clara County, upon recruitment by her swim coach, Mitch Ivey ("Ivey") in 1976. (*Id.*, ¶¶ 4, 16-17.) Plaintiff was 16 years old when she first joined SCSC. (*Id.*, ¶ 11.) While Ivey coached at SCSC, he "quickly gained a reputation for making inappropriate advances towards his young, female swimmers." (*Id.*, ¶ 11.) Plaintiff further alleges that beginning in 1976 both SCSC and the City knew or had reason to know "that Ivey was engaging in highly inappropriate grooming behavior with his minor, female swimmers" and that both SCSC and the City "failed to take reasonable steps…to avoid acts of childhood sexual assault by its swim coaches." (*Id.*, ¶ 14-15.)

In the fall of 1976, Ivey arranged for Plaintiff to live with a host family while training at SCSC. (*Id.*, ¶ 17.) According to Plaintiff's allegations "Ivey used his trusted position as head swim coach to manipulate Plaintiff…[h]e began grooming Plaintiff in preparation for his sexual advances." (*Id.*, ¶ 18.) A year later, in Los Angeles, on multiple occasions, Ivey would enter Plaintiff's hotel room before SCSC swim meets to "massage her alone" while Plaintiff was in her underwear. (*Id.*, ¶ 19.) During these massages, Ivey "touched Plaintiff's breasts and genitals." (*Id.*, ¶ 20.) Ivey continued to sexually assault, exploit, and bully Plaintiff when she was physically isolated either in Ivey's office or when Plaintiff was alone in her host family's home. (*Id.*, ¶ 20-24.) As a result of Ivey's actions, Plaintiff quit SCSC in December 1978. (*Id.*, ¶ 20-24.) Given the trauma she suffered, Plaintiff alleges Ivey destroyed both her swimming career and "Olympics aspirations." (*Id.*, ¶ 24.)

The following year, in March 1979, both SCSC members and member parents collectively filed a lawsuit in our Court against both Ivey and SCSC's Board of Directors requesting Ivey's termination as "head coach" from SCSC. (*Id.*, ¶ 25.) Despite this lawsuit for injunctive relief and multiple City Council meetings addressing Ivey's misconduct, neither SCSC nor the City reported "Ivey's sexual misconduct to law enforcement and/or child protective services." (*Id.*, ¶ 28-29.) According to Plaintiff's allegations, Ivey continued to act as head coach at SCSC until approximately 1981, at which time, Ivey purportedly abused another SCSC member. (*Id.*, ¶ 29.) In response, "SCSC and/or The City quietly and discreetly terminated and/or forced Ivey to resign from his position …" (*Ibid.*)

B. Procedural

Based on the foregoing allegations, Plaintiff initiated the instant action on December 29, 2022 against SCSC, The City, Ivey, and Does 4 through 10 (collectively "Defendants"). On July 26, 2023, Plaintiff filed the FAC asserting the following causes of action: (1) sexual assault of a minor (Code Civ. Proc., § 340.1) (against all defendants); and (2) negligence (against all defendants).

On September 28, 2023, the City demurred to the FAC in its entirety, and it appears to make the following arguments: (1) Code of Civil Procedure section 340.1, subdivision (q), does not eliminate the requirement to present a Government Claim; (2) given Plaintiff's failure to comply with the Government Claims Act, the City never waived its available sovereign immunity defense; (3) the revival components of Assembly Bill 218 ("AB 218") and Code of Civil Procedure section 340.1 amount to an unconstitutional gift of public funds; (4) Notwithstanding Constitutional Issues, Plaintiff fails to plead sufficient facts to state a claim for sexual abuse of a minor because a public entity may not be sued for a common law tort; and (5) Plaintiff has failed to allege sufficient facts to support a ratification theory of liability against the City. (Demurrer, p. 2:2-16; p.14:1-22.) Plaintiff opposed the motion.

The City filed a reply brief on January 16, 2024.

II. The City's Demurrer

A. Legal Standard

"In reviewing the sufficiency of a complaint against a general demurer, we are guided by long settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. We also consider matters which may be judicially noticed.'" (*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.)

"… [I]t is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment." (*Gregory v. Albertson's, Inc.* (2002) 104 Cal.App.4th 845, 850, citations and quotation marks omitted.)

B. Plaintiff's Request for Judicial Notice

"Judicial notice is the recognition and acceptance by the court, for use by the trier of fact or by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter." (*Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117, citations and quotation mark omitted.)

Plaintiff requests judicial notice of (1) An Order in Santa Clara Superior Court Case No. 22CV401151 entitled *John Doe, et al. vs. Berryessa Union School District, et al*. (Ex. 1); (2) An Order in Merced Superior Court Case No. 22CV-02223 entitled *Jane Doe 1, Jane Doe 2 and Jane Doe 3 vs. Los Banos Unified School District, et al.* (Ex. 2); (3) An Order in San

Bernardino Superior Court Case No. CIVSB2125982 *entitled Jane BWK Doe vs. Barstow Unified School District, et al*. (Ex. 3); (4) A Court Order in Los Angeles Superior Court Case No. 22SMCV02373 entitled *John Doe Y.G. vs. Doe 1, et al*. (Ex. 4); (5) An Order in Alameda Superior Court Case No. 22CV014895 *entitled Jane Doe M.W. vs. Oakland Unified School District, et al*. (Ex. 5); (6) An Order in Lake County Superior Court Case No. CV423734 entitled *Jane Doe 1 and Jane Doe 2 vs. Konocti Unified School District, et al.* (Ex. 6); (7) A Minute Order in Santa Clara Superior Court Case No. 20CV367836 entitled *Reza Afshar vs. Charles Sayers et al.* (Ex. 7); (8) An Order in Calaveras Superior Court Case No. 22CV4599 entitled *G.C. vs. Calaveras Unified School District, et al.* (Ex. 8); (9) A Minute Order in Butte County Superior Court Case No. 21CV01364 entitled *Robin Richie vs. Oroville Union High School District et al.* (Ex. 9); (10) A Tentative Ruling that was adopted in Solano County Superior Court Case No. FCS058729 entitled *Doe vs. Benicia Unified School District, et al.* (Ex.10.); (11) A Notice of Entry of Order in Alameda Superior Court Case No. RG21096415; (12) A Minute Order in Stanislaus Superior Court Case No. CV-21-004338 entitled *Y.T. vs. Sylvan Unified School District* (Ex. 12); (13) A Ruling in Placerville Superior Court Case No. S-CV-0047426 entitled *John Doe 7016 vs. Roseville City School District* (Ex. 13.); (14) An Order in Santa Cruz County Superior Court Case No. 22CV02834 entitled *John Roe 1 through John Roe 5 vs. Mountain View Whisman School District, et al.* (Ex. 14.); (15) An Order in Alameda Superior Court Case No. RG21087567 entitled *Jane Doe vs. Doe 1* (Ex. 15.); A Minute Order in Santa Clara Superior Court Case No. 21CV376542 entitled J*ane Doe vs. Los Gatos-Saratoga Union High School District* (Ex. 16.); (17) A Tentative Ruling that was adopted in Amador County Superior Court Case No. 22-CV-12948 *entitled Jane Doe vs. Amador County Unified School District* (Ex. 17.); (18) An Order in San Bernardino County Superior Court Case No. CIVSB2115713 entitled *Jane BNS Doe vs. Barstow Unified School District* (Ex. 18.); (19) Assembly Floor Analysis of AB 218 as amended August 30, 2019, an official act of the legislative department of this state (Ex. 19.)

There is no opposition to Plaintiff's request. Therefore, the court takes judicial notice of the fact that these orders were entered by the courts and for the dates on which they were entered. The court cannot take judicial notice of the correctness of another trial court's interpretation of the law or its findings of fact. (See *Bolanos v. Superior Court* (2008) 169 Cal.App.4th 744, 761 [a written trial court ruling has no precedential value]; *In re Marriage of Shaban* (2001) 88 Cal.App.4th 398, 409 [no "horizontal stare decisis"]; *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1565; *Fowler v. Howell* (1996) 42 Cal.App.4th 1746, 1749; *Kilroy v. State of Calif*. (2004) 119 Cal.App.4th 140, 145-148; *Barri v. Workers' Comp. Appeals Bd.* (2018) 28 Cal.App.5th 428, 437-438.)

C. The City's Request for Judicial Notice

In support of its demurrer, the City requests judicial notice of the California Assembly's Floor Analysis of AB 218 as amended August 30, 2019 (Ex. A.) This request is GRANTED under Evidence Code section 452, subdivisions (a), (c). (*See* Evid. Code § 452, subd.(a) [the decisional, constitutional, and statutory law of any state of the United States and the resolutions and private acts of the Congress of the United States and of the Legislature of this state].) The City also asks this Court to take judicial notice of Superior Court Judge Danielle Douglas' June 13, 2023, Order in Contra Costa County Case No. C22-02613 (Ex. B.) In support of its reply brief, the City filed a supplemental request for judicial notice of the

October 2, 2023, Order in Case No. C22-02488. (Ex. 1). These latter two requests are granted, but only for the same limited purposes as Plaintiff's requests.

D. Defendant's Challenge to Validity of Revival Provisions of Code of Civil Procedure Section 340.1

1. Claims Presentation Requirement, Exemptions and Code of Civil Procedure Section 340.1

The thrust of the City's demurrer is that Plaintiff's claims against it are barred by her failure to comply with the claims presentation requirement of the Government Claims Act (Gov. Code, § 810, et seq.) (the "Act"). (Demurrer, p. 2;18-28; p. 12-28.) "Under the Act, no person may sue a public entity or public employee for 'money or damages' unless a timely written claim has been presented to and denied by the public entity." (*County of Los Angeles v. Superior Court* (2005) 127 Cal.App.4th 1263, 1267, citations and quotation marks omitted.) In order to be timely, the claim generally must be presented to the particular entity within six months of accrual of the injury. (*A.M. v. Ventura Unified School Dist.* (2016) 3 Cal.App.5th 1252, 1257.) Absent an applicable exception, "failure to timely present a claim for money or damages to a public entity bars a plaintiff from filing suit against that entity." (*State of California v. Superior Court* (2004) 32 Cal.4th 1234, 1239.)

However, Government Code section 905 ("Section 905") enumerates a number of exceptions to the claims presentation requirement including, as relevant here, claims made pursuant to Code of Civil Procedure section 340.1 ("Section 340.1") for damages resulting from childhood sexual abuse. (Gov. Code, § 905, subd. (m).) Previously, Section 340.1 allowed such an action to be commenced "within eight years of the date the plaintiff attains the age of majority or within three years of the date the plaintiff discovers or reasonably should have discovered that psychological injury of illness occurring after the age of majority was caused by the sexual abuse, whichever period expires later." However, Section 340.1 was significantly amended on October 13, 2019, when AB 218 was signed into law. Among other things, AB 218, lengthened the time within which an action for damages resulting from "childhood sexual assault" may be brought to 22 years from the date the plaintiff attains the age of majority or five years from the date the plaintiff "discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual assault." (Former § 340.1, subd. (a).)[1]

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[1] Due to the changes made by Assembly Bill 452 (Reg. Sess. 2022-2023), Section 340.1, subdivision (a), currently provides:

> There is no time limit for the commencement of any of the following actions for recovery of damages suffered as a result of childhood sexual assault:
> (1) An action against any person for committing an act of childhood sexual assault.
> (2) An action for liability against any person or entity who owed a duty of care to the plaintiff, if a wrongful or negligent act by that person or entity was a legal cause of the childhood sexual assault that resulted in the injury to the plaintiff.
> (3) An action for liability against any person or entity if an intentional act by that person or entity was a legal cause of the childhood sexual assault that resulted in the injury to the plaintiff.

As acknowledged by the City, AB 218 also amended Section 905 by deleting from subdivision (m) of that section the language that previously limited the exception to the government claims presentation requirement to claims arising out of conduct occurring on or after January 1, 2009, and adding subdivision (p), which made this change retroactive.

Despite these retroactive changes to Section 905, here, the City maintains that the claims presentation requirement provided by the Act applies to Plaintiff's claims against it and, because she never filed such a claim, those claims are barred and "unenforceable." (Demurrer, p. 5; 7-28.) According to the City, Plaintiff's claims against it would have accrued when the last act giving rise to them took place, i.e., the sexual assault by Ivey in 1979. The City maintains that Section 340.1 should not retroactively eliminate the claims presentation requirement and subdivision (m) of Section 340.1 does not apply because neither of the foregoing laws were in effect when the alleged incidents of sexual abuse took place. Additionally, the formally applicable statute of limitations would have run before AB 218 went into effect. At the time the FAC was filed, subdivision (q) of Section 340.1 provided that:

> Notwithstanding any other provision of law, any claim for damages described in paragraphs (1) through (3), inclusive, of subdivision (a) that has not been litigated to finality and that would otherwise be barred as of January 1, 2020, because the applicable statute of limitations, claim presentation deadline, or any other time limit had expired, is revived, and these claims may be commenced within three years of January 1, 2020. A plaintiff shall have the later of the three-year time period under this subdivision.

Indeed, the exemption contained in subdivision (m) of Section 905, which exempts claims for damages due to childhood sexual abuse (Section 340.1) from the claims presentation requirement in the Act, was not codified until 2008. The previous version of the statute expressly limited the exception for Section 340.1 claims to those arising out of conduct occurring "on or after January 1, 2009." (Former § 905, subd. (m).) While the "on or after January 1, 2009" language was removed from the statute by AB 218, the City nevertheless contends that subdivision (m) of Section 905 does *not* apply to Plaintiff's claims, i.e., that it has no retroactive application to claims predicated on conduct arising before January 1, 2009. The City makes this argument again in its reply brief. (City's Reply, pp. 2-8.) However, the Court does not find this contention persuasive for the reasons discussed below.

As a general matter, there is a presumption against retroactive application of new statutes "in the absence of a clear indication of a contrary legislative intent, such as "express language of retroactivity." (*Quarry v. Doe I* (2012) 53 Cal.4th 945, 955, citations and quotation marks omitted.) This presumption, however, does not apply here because, as briefly touched on above, AB 218 expressly made the new claims presentation exemption retroactive, with the statute providing as follows:

> The changes made to this section by the act that added this subdivision *are retroactive and apply to any action commenced on or after the date of enactment of that act*, and to any action filed before the date of enactment and

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However, Plaintiff filed her FAC in 2023 when the statute read as quoted above.

> still pending on that date, including any action or causes of action that would have been barred by the laws in effect before the date of enactment.

(Gov. Code, § 905, subd. (p) [emphasis added].)

The foregoing language is unequivocal with regards to retroactivity and this code section, read in concert with subdivision (q) of Section 340.1, makes it clear to this Court that Plaintiff's claims against the City are exempt from the claims presentation requirement. If Plaintiff had attempted to file her Section 340.1 claims against the City *prior* to AB 218, those claims would have been subject to the presentation requirement because the exemption from that requirement was limited to 340.1 claims predicated on conduct occurring "on or after January 1, 2009"; the abuse Plaintiff alleges that she suffered occurred on or about 1978 to1979. However, not only was such limiting language *removed* from subdivision (m), but subdivision (q) of Section 340.1 unequivocally *revived* claims that would otherwise have been barred as of January 1, 2020, "because the applicable statute of limitations, claims presentation *deadline*, or any other time limit had expired." Thus, the Court finds the City's reading of the pertinent statutes and the effect of AB 218 to be wholly unpersuasive.

The Plaintiff's Opposition briefly, and correctly, contends that AB 218 not only expands the statute of limitations on childhood sexual abuse cases, but also removes the claims presentation requirement in such circumstances. (Plaintiff's Opp., pp. 2-3.) The Plaintiff relies on *Coats v. New Haven Unified School Dist*. (2020) 46 Cal.App.5th 415 (*Coats*), for the proposition that AB 218 and its revival provisions do not violate constitutional principles. In *Coats*, the First District Court of Appeal noted (in a slightly different context involving claims made by a foster mother) that it was aware of "no reason the Legislature should be any less able to revive claims in this context as it expressly did in Assembly Bill 218." (*Coats*, *supra*, 46 Cal.App.5th at p. 428.) The *Coats* Court also confirmed the retroactive application of the AB 218 amendments. "In the face of a revival provision *expressly and unequivocally encompassing claims of childhood sexual abuse previously barred for failure to present a timely government claim*, it is clear we must reverse the trial court's judgment and remand for further proceedings on appellants' complaint." (*Id*. at pp. 430-431, emphasis added.) The City, in its Reply Brief, contends that Plaintiff's reliance on *Coats*, is misplaced. (City's Reply, p. 4.) Contrary to the City's conclusion, *Coats* is controlling.

In sum, Section 905, subdivision (p) and Section 340.1, subdivision (q) make it clear that Plaintiff's claims against the City are exempt from the claim presentation requirement. The City's demurrer on the ground that the Complaint as a whole is barred for failure to comply with the claims presentation requirement is therefore OVERRULED.

2. AB 218 and Gift of Public Funds

The City next argues that the revival components of AB 218 and Section 340.1 amount to an unconstitutional gift of public funds. (Demurrer, pp. 6-12.) Specifically, the City explains, in great length, that under section 6 of Article XVI of the California Constitution, the Legislature has no power "to make any gift or authorize the making of any gift, or any public money or thing of value to any individual, municipal or other corporation …" and "[a]n appropriation of money by the legislature for the relief of one who has no legal claim therefor must be regarded as a gift within the meaning of that term, as used in this section, and it is none the less a gift that a sufficient motive appears for its appropriation, if the motive does not

rest upon a valid consideration." (*Jordan v. California Dept. of Motor Vehicles* (2002) 100 Cal.App.4th 431, 450, citations and quotation marks omitted.) It continues that the expenditure of public funds to pay "invalid" legal claims is inadequate consideration and the expenditure of public funds for such claims serves no public purpose and violates the gift clause. (*Id.*) Moreover, the City argues, when a public entity has a vested right under the law as it exists at that time, the Legislature cannot surrender, diminish, or impair those rights. (*Estate of Cooke* (1976) 57 Cal.App.3d 595, 602-603.) Given the foregoing, the City insists, in enacting AB 218, thereby forcing local public entities to be liable for claims which were legally barred, the Legislature has appropriated public money to pay past legal claims where no enforceable claims existed under the law- a gift which is unconstitutional.

The Court does not find this argument persuasive. The City's argument is dependent upon the Court's acceptance of its assertions that Plaintiffs' claims against it are "invalid" and that it (the City) possessed vested interests that have been surrendered by the Legislature due to the changes effectuated by AB 218. As discussed *supra,* and as Plaintiff argues in her Opposition, Plaintiff's childhood sexual abuse claims were never invalidated, at the outset, given the retroactive application of AB 218 and its exemption of such cases from the claim presentation requirements.

3. AB 218 Does Not Create a New Liability

The City contends Plaintiff did not have an enforceable claim, and the Legislature had no authority to retroactively impose liability on a public entity "for a past occurrence." (Demurrer, pp. 7-8.)

As Plaintiffs point out in her Opposition, AB 218 did not create a new tort liability that never existed before. It merely removed a procedural barrier (previously enacted by the very same California Legislature against bringing those claims in court. Thus, the case of *Chapman v. State* (1894) 104 Cal. 690, 696 (*Chapman*), though ancient, is directly on point. In *Chapman*, the California Supreme Court held that the Legislature's provision of a judicial remedy for claims that could previously only be brought before the State Board of Examiners was not a violation of the gift clause because it did not create any *new liability*:

> We are entirely satisfied that plaintiff's cause of action, as alleged in the complaint, arises upon contract, and that the liability of the state accrued at the time of its breach; that is, when the coal was lost through the negligence of the officers in charge of the state's wharf, although there was then no law giving to the plaintiff's assignors the right to sue the state therefor. At that time the only remedy given the citizen to enforce the contract liabilities of the state, was to present the claim arising thereon to the state board of examiners for allowance, or to appeal to the legislature for an appropriation to pay the same; but the right to sue the state has since been given by the act of February 28, 1893, and in so far as that act give the right to sue the state upon its contracts, the legislature did not create any liability or cause of action against the state where none existed before. The state was always liable upon its contracts, and the act just referred to merely gave an additional remedy for the enforcement of such liability, and it is not, even as applied to prior contracts, in conflict with any provision of the constitution.

(*Ibid.*)

Rather than distinguish or discredit *Chapman*, the City's reply brief simply ignores it, and instead, cites to multiple cases with fact patterns entirely distinguishable from the instant case—*Conlin v. Board of Supervisors of the City and County of San Francisco* (1893) 99 Cal. 17, 21 (*Conlin*); *Perez v. Roe 1* (2006) 146 Cal.App.4th 171; *Powell v. Phelan* (1903) 138 Cal. 271 (*Powell*); *Jordan, supra,* 100 Cal.App.4th at p. 441—all of which involved an appropriation of specific sums of money, or an identification of a specific fund, for specific recipients. In contrast to those cases, there is no "appropriation" here—there is no sum of money or fund set aside or designated for a specific use—and so there is no "gift."

Further, as explained by the California Supreme Court in *Heron v. Riley* (1930) 209 Cal. 509, 517:

> 'We are not strongly impressed with the contention of the respondent that the application of funds to pay judgments obtained against the state constitutes a gift of public money, within the prohibition of the Constitution. The state cannot be subjected to suits against itself express by its express consent; but it may surrender its sovereignty in that particular. The judgments which are to be paid bear no semblance to gifts. They must first be obtained in courts of competent jurisdiction, to which the parties have submitted their claims in the manner directed by law. In other words, they are judgments obtained after the requirements of due process of law have been complied with.'

4. AB 218 Serves a Public Interest

Next, and as stated in Plaintiff's Opposition, even if AB 218 could somehow be construed to provide for an "appropriation," the Court finds that its amendments to Section 340.1 and Section 905 are directed to a public purpose. "It is well settled that the primary question to be considered in determining whether an appropriation of public funds is to be considered a gift is whether the funds are to be used for a public or private purpose. If they are to be used for a public purpose, they are not a gift within the meaning of this constitutional prohibition. [Citations omitted]." (*California Teachers Assn. v. Board of Trustees* (1978) 82 Cal.App.3d 249, 257; see also *Teachers' Retirement Bd. v. Genest* (2007) 154 Cal.App.4th 1012, 1036.) "The benefit to the state from an expenditure for a 'public purpose' is in the nature of consideration and the funds expended are therefore not a gift even though private persons are benefited therefrom. The determination of what constitutes a public purpose is primarily a matter for legislative discretion, which is not to be disturbed by the courts so long as it has a reasonable basis." (*County of Alameda v. Janssen* (1940) 16 Cal.2d 276, 281, internal citations omitted; see also *Paulson v. Abdelnour* (2006) 145 Cal.App.4th 400, 419.)

Here, in the event that Plaintiff prevails on her causes of action, the benefits of such a result would not be limited to Plaintiff. The stated purpose of AB 218, in addition to allowing victims of childhood sexual abuse to be compensated for their injuries, is to "help prevent future assaults by raising the costs for [harm caused by childhood sexual abuse]" and to serve "as an effective deterrent against individuals and entities who have chosen to protect perpetrators of sexual assault over victims." (See *X.M. v. Superior Court* (2021) 68 Cal.App.5th 1014, 1027, quoting Off. Of Assem. Floor Analyses, Analysis of Assem. Bill

No. 218 (2019-2020 Reg. Sess.), as amended Aug. 30, 2019, p. 2.) The prevention of future sex assaults on minors by City employees in a position of power, such as a swim coach, provides a public benefit, which contrasts sharply with the narrow scope of benefits conferred in the gift clause cases cited by the City in both its demurrer and reply. (*Conlin*, *Powell*, and *Jordan, supra*.) Therefore, any liability that may ultimately result from this case or similar cases involving childhood sexual assault serves a public purpose and does not qualify as a gift within the meaning of the "gift clause" of Article XVI, section 6 of the California Constitution.

In its Reply, the City repeatedly contends that because Plaintiff's sexual assault claims are "unenforceable," at the outset, for lack of compliance with the Government Claims Act, her claims are prohibited by Article XVI, section 6. (City Reply, pp. 6-7.) Again, the City prefaces this argument with the incorrect conclusion that Plaintiff's claim is unenforceable. Based on this Court's analysis *supra,* the Plaintiff is exempt from the Claims Presentation requirement given the nature of her allegations – childhood sexual assault.

Thus, the demurrer is also OVERRULED.

E. **Demurrer to First Cause of Action**

The City contends that the first cause of action fails to state sufficient facts as alleged against it because a public entity cannot be sued for a Common Law Tort. (Notice of Demurrer and Demurrer at p.2:10-12.) As a general matter, "[e]xcept as otherwise provided by statute[, … a] public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." (Gov. Code, § 815, subd. (a).) However, "[a] public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative." (Gov. Code, § 815.2 ("Section 815.2"), subd. (a).) Here, Plaintiff alleges Ivey was an employee of the City and sexually assaulted plaintiff as a minor in the course of his employment. (See First Amended Complaint ("FAC") at ¶ 8, 18-22, 35.) Ivey's sexual assault of plaintiff subjects him to liability under Civil Code §1708.5 [Sexual battery].

A principal may become liable for an originally unauthorized tort of the agent by a subsequent ratification of the tort. (Civ. Code §2339, see also CACI 3710.) "The failure to discharge an employee who has committed misconduct may be evidence of ratification. [Citation.] The theory of ratification is generally applied where an employer fails to investigate or respond to charges that an employee committed an intentional tort, such as assault or battery. [Citation.] Whether an employer has ratified an employee's conduct is generally a factual question. [Citation.]" (*Ventura v. ABM Industries, Inc.* (2012) 212 Cal.App.4th 258, 272.) Here, Plaintiff alleges City knew its prominent swimming coach had an illegal, sexual relationship with minor swimmer N.M., and yet it continued to retain him at the City's premier swim club resulting in the coach sexual assaulting plaintiff and others. (Complaint, para. 36). This allegation is sufficient to allege ratification. Accordingly, the demurrer is OVERRULED on this basis.

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III. Conclusion

The demurrer is OVERRULED. The Court will prepare the Order.

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Calendar Lines 3 and 4
Case Name: *Julian v. General Motors, LLC*
Case No.: 23CV410442

This is a lemon law case. According to the allegations of the first amended complaint ("FAC"), on August 26, 2013, plaintiff Elaine Julian ("Plaintiff") entered into a warranty contract with defendant General Motors, LLC ("Defendant" or "GM") for a 2013 Chevrolet Cruze ("subject vehicle"), which contained a bumper-to-bumper warranty, a powertrain warranty and an emissions warranty. (See FAC, ¶¶ 6-7, exh. A.) Prior to purchase, Plaintiff saw GM's window sticker that contained important information about the subject vehicle and spoke with the salespeople at Courtesy Chevrolet who told her about the vehicle's key features, components and reliability but failed to inform Plaintiff about the Cooling System Defect. (See FAC, ¶ 8.) However, GM knew since 2010 that the 2011 and newer Chevrolet Cruze vehicles contained design and/or manufacturing defects in their engine cooling system that resulted in an engine coolant leak from the water pump, water pump weep reservoir, and/or water pump shaft seal and engine overheating, coolant odor, reduced engine power, stalling and engine failure, and that the defect typically manifested itself shortly after the limited warranty period expired. (See FAC, ¶¶ 22-29.) While GM knew about the Cooling System Defect, it concealed the defective nature of the subject vehicle from its salespeople and its consumers such as Plaintiff from the point of sale and thereafter and concealed its inability to fix it. (See FAC, ¶¶ 30-34.) In March 2014 and August 2014, GM issued TSBs indicating low coolant levels, but instead of offering restitution for its failure to repair the subject vehicle after a reasonable number of attempts, it instead provided a warranty extension on October 2014 and released a recall which has been updated multiple times—both of which were insufficient to repair the Cooling System Defect. (See FAC, ¶¶ 35-37.) On May 22, 2017 and January 11, 2019, GM issued other TSBs regarding engine overheating and overheating coolant boiling in the reservoir, but rather than disclosing the existence of the known Cooling System Defect, GM instead blamed aftermarket parts and concealed the existence of the Cooling System Defect. (See FAC, ¶ 38.) On May 30, 2017, with approximately 52,474 miles on the odometer, Plaintiff presented the subject vehicle to GM's authorized repair facility for various concerns including engine concerns, and the repair facility performed warranty repairs, representing that the vehicle was repaired. (See FAC, ¶ 41.) On February 1, 2018, with approximately 59,999 miles on the odometer, Plaintiff presented the subject vehicle to GM's authorized repair facility for various concerns including engine concerns, and the repair facility performed warranty repairs, representing that the vehicle was repaired. (See FAC, ¶ 42.) On July 6, 2020, with approximately 80,247 miles on the odometer, Plaintiff presented the subject vehicle to GM's authorized repair facility for various concerns including engine and cooling system concerns, and the repair facility performed warranty repairs, representing that the vehicle was repaired. (See FAC, ¶ 43.) On March 18, 2021, with approximately 86,512 miles on the odometer, Plaintiff presented the subject vehicle to GM's authorized repair facility for various concerns including engine and cooling system concerns, and the repair facility performed warranty repairs, representing that the vehicle was repaired. (See FAC, ¶ 44.) Thereafter, Plaintiff has continued to experience symptoms of the subject vehicle's defects, including overheating and engine coolant odors in the passenger cabin of the vehicle, requiring Plaintiff to pay out of pocket to fix the engine cooling system. (See FAC, ¶ 45.) The earliest that Plaintiff could have discovered GM's wrongful conduct with respect to the Cooling System Defect was March 18, 2021, when she realized that GM had failed to fix the cooling system issues after they had represented that it was repaired. (See FAC, ¶ 46.) Additionally,

the statutes of limitations were tolled by the filing of the *Feliciano, et al. v. General Motors LLC* (District Court, Case No. 1:14-CV-06374) class action on August 11, 2014, from August 11, 2014 to December 7, 2016—when the *Feliciano* class action was dismissed. (See FAC, ¶¶ 47-50.)

On August 2, 2023, Plaintiff filed the FAC against GM, asserting causes of action for:

1) violation of Civil Code section 1793.2, subdivisions (a)(2) and (d);
2) violation of Civil Code section 1793.2, subdivision (b);
3) violation of Civil Code section 1793.2, subdivision (a)(3);
4) breach if the implied warranty of merchantability; and,
5) fraudulent inducement/concealment.

GM demurs to the fifth cause of action of the FAC for fraudulent inducement/concealment, and moves to strike paragraph d from the prayer seeking punitive damages.

I. GM'S DEMURRER TO THE FIFTH CAUSE OF ACTION

GM demurs to the fifth cause of action for fraudulent inducement/concealment arguing that it: is time barred; fails to allege facts with sufficient particularity; and, fails to allege a transactional relationship giving rise to a duty to disclose.

Transactional relationship

As to GM's argument regarding a transactional relationship, GM cites to *Bigler-Engler v. Breg, Inc*. (2017) 7 Cal.App.5th 276, in which the court stated that "[i]n transactions which do not involve fiduciary or confidential relations, a cause of action for non-disclosure of material facts may arise in at least three instances: (1) the defendant makes representations but does not disclose facts which materially qualify the facts disclosed, or which render his disclosure likely to mislead; (2) the facts are known or accessible only to defendant, and defendant knows they are not known to or reasonably discoverable by the plaintiff; (3) the defendant actively conceals discovery from the plaintiff." (*Bigler-Engler*, *supra*, 7 Cal.App.5th at p.311; see also Def.'s memorandum of points and authorities in support of demurrer ("Def.'s demurrer memo"), pp.9:15-25, 10:1-25, 11:1-3.) "Such a transaction must necessarily arise from direct dealings between the plaintiff and the defendant; it cannot arise between the defendant and the public at large." (*Bigler-Engler*, *supra*, 7 Cal.App.5th at p.312.)

Here, the FAC plainly alleges that "Plaintiff entered into a warranty contract with Defendant GM regarding a 2013 Chevrolet Cruze…." (FAC, ¶ 6.) This alleges a direct dealing between the parties. GM's argument regarding a transactional relationship is clearly without merit.

Statute of limitations

GM argues that the fifth cause of action for fraudulent concealment is barred by the three-year of statute of limitations for fraud, Code of Civil Procedure section 338, subdivision (d), because "Plaintiff purchased the Subject Vehicle on or about August 26, 2013… [and] Plaintiff had to file her claim no later than August 26, 2016… [and s]he did not." (Def.'s demurrer memo, p.7:8-13.) GM also argues that "Plaintiff cannot invoke the delayed

discovery rule because she affirmatively states that the alleged '[d]efects and nonconformities to warranty manifested themselves within the applicable express warranty period'… [and t]he delayed discovery rule tolls the applicable statute of limitations only if a plaintiff is unable to discover their cause of action with reasonable diligence." (*Id*. at p.7:14-26.)

GM misunderstands the delayed discovery rule as applied to Plaintiff's allegations. As GM notes, "the discovery rule, where applicable, 'postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action.'" (*Aryeh v. Canon Business Solutions, Inc*. (2013) 55 Cal.4th 1185, 1192.) The fifth cause of action alleges GM's active continued concealment of the safety of the subject vehicle and GM's inability to repair it. (See FAC, ¶¶ 77-89.) Unless the car was defective such that it needed repairs on the date of its purchase, Plaintiff cannot have discovered GM's concealment of its inability to repair on the date of purchase. GM is clearly wrong about the date of accrual.

Rather, the FAC alleges that Plaintiff discovered GM's concealment of the existence of the Cooling System Defect on March 18, 2021. (See FAC, ¶ 46.) Prior to her discovery, the subject vehicle had engine issues that were reportedly repaired on May 30, 2017 and February 1, 2018, and then had cooling system and engine concerns on July 6, 2020 that were reportedly repaired. (See FAC, ¶¶ 41-43.) She became aware that GM was concealing the existence of the Cooling System Defect on March 18, 2021 when it was apparent that GM had failed to fix the cooling system issues that they had represented were repaired previously. (See FAC, ¶¶ 44-46.) "The statute of limitations is tolled where one who has breached a warranty claims that the defect can be repaired and attempts to make repairs." (*A & B Painting & Drywall, Inc. v. Super. Ct. (Bohannon Development Co.)* (1994) 25 Cal.App.4th 349, 354; see also *Cardinal Health 301, Inc. v. Tyco Electronics Corp*. (2008) 169 Cal.App.4th 116, 133-134 (stating that "[t]olling during a period of repairs generally rests upon… reliance by the plaintiff on the words or actions of the defendant that repairs will be made"); see also *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 383 (stating that "[o]ne cannot justly or equitably lull his adversary into a false sense of security, and thereby cause his adversary to subject his claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his course of conduct as a defense to the action when brought").) That is exactly what occurred here.

Further, "[t]he doctrine of fraudulent concealment tolls the statute of limitations where a defendant, through deceptive conduct, has caused a claim to grow stale." (*Id*.; see also *Ross v. Seyfarth Shaw LLP* (2023) 96 Cal.App.5th 722, 742 (stating same); see also *Fuller v. First Franklin Financial Corp.* (2013) 216 Cal.App.4th 955, 962 (stating same).) In support of this doctrine, a plaintiff must allege the supporting facts—i.e., the date of discovery, the manner of discovery, and the justification for the failure to discover the fraud earlier—with the same particularity as with a cause of action for fraud. (*Fuller v. First Franklin Financial Corp*. (2013) 216 Cal.App.4th 955, 962.) As stated above, the FAC alleges that Plaintiff discovered GM's active concealment of the existence of the Cooling System Defect on March 18, 2021, and that while the subject vehicle had engine issues and later engine and cooling system issues, it stated that those issues were repaired. (See FAC, ¶¶ 41-43, 46.) GM knowingly concealed the existence of the Cooling System Defect, minimized the scope, cause and dangers of the defect so as to prevent Plaintiff from discovering the existence of the Cooling System Defect. (See FAC, ¶¶ 27-39, 51-54.) She only became aware that GM was concealing the existence of the Cooling System Defect when it was apparent that GM had failed to fix the cooling system issues that they had represented were repaired previously. (See FAC, ¶¶ 44-46.) The doctrine of fraudulent concealment is an additional basis to toll the statute of limitations.

Additionally, the FAC alleges that the filing of the *Feliciano, et al. v. General Motors LLC* (District Court, Case No. 1:14-CV-06374) class action on August 11, 2014, tolled the statute of limitations pursuant to *American Pipe & Constr. Co. v. Utah* (1974) 414 U.S. 538. Under the *American Pipe* doctrine, the timely filing of a class action tolls the applicable statute of limitations for putative class members until the propriety of class certification is determined or the putative class action is otherwise resolved. (*Id*. at p.554 (stating that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action").) Thus, the statute of limitations is tolled from the August 11, 2014 *Feliciano* class action complaint filing date to its December 7, 2016 dismissal date.

GM's argument regarding the statute of limitations is also unconvincing.

Requisite particularity

Lastly, GM argues that the fifth cause of action fails to allege facts with sufficient particularity. (See Def.'s demurrer memo, pp. 8:1-28, 9:1-14.) As GM notes, a cause of action for concealment is required to be pled with specificity. (See *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 878 (stating that "[c]oncealment is a species of fraud, and '[f]raud must be pleaded with specificity'").) GM argues that the fifth cause of action "fails as a matter of law because Plaintiff failed to allege (i) the identity of the individuals at GM who purportedly concealed material facts or made untrue representations about her Cruze, (ii) their authority to speak and act on behalf of GM, (iii) GM's knowledge about alleged defects in Plaintiff's Cruze at the time of purchase, (iv) any interactions with GM before or during the purchase of her Cruze, or (v) GM's intent to induce reliance by Plaintiff to purchase the specific Cruze at issue." (Def.'s demurrer memo, p.9:5-10.) GM cites to *Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, in which the court noted that "[t]he requirement of specificity in a fraud action against a corporation requires the plaintiff to allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." (Def.'s demurrer memo, p.8:24-28, 9:1-2, citing *Tarmann, supra,* 2 Cal.App.4th at p.157.)

While it is true that "[i]f the duty to disclose arises from the making of representations that were misleading or false, then those allegations should be described… [t]his statement of the rule [regarding t]his particularity requirement necessitat[ing] pleading facts which 'show how, when, where, to whom, and by what means the representations were tendered'…reveals that it is intended to apply to affirmative misrepresentations." (*Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009) 171 Cal.App.4th 1356, 1384.) "[I]t is harder to apply this rule to a case of simple nondisclosure." (*Id*. (also stating, "How does one show 'how' and 'by what means' something didn't happen, or 'when' it never happened, or 'where' it never happened?").) "Less specificity should be required of fraud claims 'when 'it appears from the nature of the allegations that the defendant must necessarily possess full information concerning the facts of the controversy,' [citation]; '[e]ven under the strict rules of common law pleading, one of the canons was that less particularity is required when the facts lie more in the knowledge of the opposite party." (*Id*.)

Moreover, the allegations regarding the identity and the authority of the individuals at GM who allegedly concealed the facts regarding the vehicle's defects are pled with sufficient particularity: the FAC alleges that he interacted with GM's authorized dealer sales representatives prior to purchase of the vehicle and representatives at GM's authorized repair facilities after the purchase, and GM specifically told its dealers that any "coolant loss does not indicate a leak," any "engine coolant type odor" inside the vehicle passenger compartment was just coolant vapor emanating through small gaps in the vehicle's hood or grease used during the assembly of the heating ventilation and air conditioning case and "instructed dealers to forego replacing malfunctioning water pumps, if, upon inspection, coolant 'seepage' appeared 'minimal.'" (See FAC, ¶¶ 8, 26, 34, 35.) As to GM's knowledge about the alleged defects and its intent to induce reliance, the FAC also alleges these facts with the requisite particularity as it alleges in detail facts demonstrating that GM knew of the existence of the Cooling System Defect; GM knew of the latency of the defect, the resulting conditions and the safety hazards it posed; GM had exclusive knowledge of the defects but intentionally and actively concealed and failed to disclose the information despite an affirmative duty to disclose such information; Plaintiff would not have purchased the vehicle if she had known of the defect; and, Plaintiff suffered damages in the form of money paid to purchase the Cruze. (See FAC, ¶¶ 22-39, 76-89.) These allegations are not mere conclusionary allegations. As Plaintiff argues, these allegations were found to be pled with the requisite specificity in *Dhital v. Nissan North America, Inc.* (2022) 84 Cal.App.5th 828, 844.

GM's demurrer to the fifth cause of action is OVERRULED.

II. GM'S MOTION TO STRIKE PORTIONS OF THE COMPLAINT

GM also moves to strike paragraph d from the prayer seeking punitive damages, arguing that the FAC fails to allege sufficient facts to support punitive damages and that the cause of action for fraudulent inducement/concealment fails to state facts sufficient to constitute a cause of action because it is time-barred and therefore cannot support punitive damages.

Citing no specific paragraph of the FAC, GM argues that "[t]he only thing Plaintiff states is that prior to acquiring the vehicle, GM knew, ***or should have known,*** that the Subject Vehicle's cooling system was defective and failed to disclose those defects at the time she bought it." (Def.'s memorandum of points and authorities in support of motion to strike ("Def.'s strike memo"), p.4:4-6, citing "generally FAC.") GM argues that "Plaintiff fails to allege what specific representation(s), if any, were made about the Subject Vehicle and its cooling system, and whether the person making those representation(s), if any, was an agent of GM." (*Id*. at pp.4:7-9, 27-28, 5:1 (also stating that "Plaintiff has not sufficiently pled, and indeed cannot do so, that GM engaged in fraudulent conduct to sustain an award of punitive damages").) "Essentially, Plaintiff omitted the who what, when, and where allegations necessary to plead fraud." (*Id*. at p.4:9-10.) However, this is the identical argument that GM made on demurrer, and it appears that GM misunderstands that the statement of the rule upon which it relies "is intended to apply to affirmative misrepresentations… [and] is harder to apply this rule to a case of simple nondisclosure." (*Alfaro, supra*, 171 Cal.App.4th at p.1384.) As stated above with respect to GM's demurrer, the fifth cause of action alleges facts supporting a fraudulent inducement/concealment cause of action with sufficient particularity. Moreover, in *Dhital, supra*, 84 Cal.App.5th 828, the court reversed the trial court's granting of

a motion to strike in which the defendant likewise argued that the plaintiffs had not stated a viable fraud claim regarding allegations that were very similar to those alleged in the FAC. (*Id*. at pp. 844-845.)

GM also argues that, to justify the award of punitive damages, Plaintiff must allege facts demonstrating wrongfulness, and that there are no specific allegations showing that GM knew of the defect and knowingly concealed it. (See Def.'s strike memo, p.4:3-19.) However, the fifth cause of action of the FAC alleges that: "Defendant GM was well aware and knew that the cooling system installed on the Subject Vehicle was defective… [s]pecifically, Defendant GM knew… that Chevy vehicles had the Cooling System Defect… [t]hat is, latent defects causing and/or resulting in an engine coolant leak from the water pump, water pump weep reservoir, and/or water pump shaft seal…. GM acquired its knowledge of the Cooling System Defect in 2010, prior to Plaintiff's acquisition of Subject Vehicle, through sources not available to consumers such as Plaintiff, including (but not limited) to pre-production and post-production testing data; early consumer complaints about the Cooling System Defect made directly to GM and its network of dealers; aggregate warranty data compiled from GM's network of dealers; testing conducted by GM in response to these complaints; as well as warranty repair and part replacements data received by GM from GM's network of dealers, amongst other sources of internal information… while GM knew about the Cooling System Defect, and its safety risks since 2010, if not before, GM nevertheless concealed and failed to disclose the defective nature of the Subject Vehicle and its defective cooling system to its sales representatives and to Plaintiff at the time of sale and thereafter… GM omitted mention of the Cooling System Defect in its sales materials, advertisements, publications, online marketing, television, radio, and other marketing campaigns for Chevy Vehicles… GM had superior and exclusive knowledge of the Cooling System Defect… [t]o make matters worse, and prevent consumers from discovering their wrongdoing, GM also concealed the existence, nature, extent, and scope of the Defect with ineffective repair procedures published directly to its dealerships and not consumers, such as Plaintiff… [w]hile it had been fully aware of the Cooling System Defect, GM actively concealed the existence and nature of the alleged defect from Plaintiff prior to, and at the time of purchase… Defendant persisted in concealing the defect and its inability to fix it during repair, and thereafter… [d]espite growing numbers of customer complaints, warranty claims, and GM's own investigations confirming the Cooling System Defect, GM failed to provide an adequate repair to consumers or disclose the defect to potential buyers… [a]s the number of complaints about the Cooling System Defect increased, in February 2014, GM issued a technical services bulletin ('TSB') to its authorized dealerships regarding coolant odor in the passenger compartment… acknowledg[ing] customer complaints of an 'engine coolant type odor' inside the vehicle passenger compartment… [h]owever, GM blamed the odor on coolant vapor emanating through small gaps in the vehicle's hood to the plenum seal and/or grease used during the assembly of the heating ventilation and air conditioning ('HVAC') case… [i]n March 2014… GM acknowledged that the water pump is one area where coolant may leak at the bearing shaft seal… [h]owever, GM informed its dealers that 'coolant loss does not indicate a leak,' and instructed dealers to forego replacing malfunctioning water pumps if, upon inspection, coolant 'seepage' appeared 'minimal'… in August 2014… GM acknowledged that Chevy Vehicles are defective and experience 'low engine coolant level(s)… in the coolant reservoir even though there are no external leaks present… If air was trapped in the cooling system during the coolant fill process at the plant, the coolant level may be decreased over time as the trapped air was purged from the cooling system'… [d]espite GM's knowledge of this fact, GM did not inform Plaintiff of the true cause of the

coolant leak(s) and/or other defects experienced by Plaintiff relating to the cooling system installed in the Subject Vehicle during successive repair visits to GM's authorized dealership(s)…. [a]s recently as May 22, 2017, and January 11, 2019, respectively, GM issued TSB Nos. PIP5499 and PIP 5499 version 'A'… acknowledg[ing] customer complaints regarding the engine overheating and/or overheating coolant boiling in the reservoir… prior to Plaintiff's acquiring the subject vehicle, GM was well aware and knew that the cooling system installed in the subject vehicle was defective but failed to disclose this fact to Plaintiff at the time of sale and thereafter…[s]pecifically, GM knew… that the cooling system had one or more defects that can result in various problems, including, but not limited to, excessive low engine coolant level; improper leakage/evaporation of abnormally high amounts of coolant fluid; coolant leak(s) from the radiator; premature failure of the water pump; premature failure of the bearing shaft seal; premature failure of the reservoir plug; premature failure of the water outlet; premature failure of the coolant hose; fluid leak(s) into the engine; illumination of the 'service engine soon' light; engine overheating; illumination of a 'engine hot, air conditioning (A/C) off' message; and/or emission of malodorous fumes in the passenger compartment (i.e., the Cooling System Defect)." (FAC, ¶¶ 27-38, 78-84.) Contrary to GM's assertion, the FAC unambiguously alleges that GM *knew* that the subject vehicle's cooling system was defective and actively concealed those facts from Plaintiff and other consumers.

GM's motion to strike paragraph d from the prayer of the FAC is DENIED.

The Court will prepare the Order.

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