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: August 1, 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	23CV420419	Beta Psi Chapter of Alpha Phi International Fraternity, Inc. v. Faith Ashlee Schipper et al.	Motion for judgment on the pleadings: notice is proper, and the court has received no response to the motion from defendants. Defendants' answers admit the underlying debt, and they do not set forth sufficient factual allegations for an affirmative defense of duress. (See Civ. Code, §§ 1567 & 1569.) The court therefore GRANTS the motion as to both answers.
LINE 2	23CV423212	Soraya Vela v. Santa Clara County Office of Education	Click on LINE 2 or scroll down for ruling.
LINE 3	24CV433816	Adrian Mark Jacobs et al. v. General Motors LLC et al.	Click on LINE 3 or scroll down for ruling in lines 3-4.
LINE 4	24CV433816	Adrian Mark Jacobs et al. v. General Motors LLC et al.	Click on LINE 3 or scroll down for ruling in lines 3-4.
LINE 5	19CV360439	Mesfin Regassa Ayle et al. v. Keith Laverne Booth et al.	Click on LINE 5 or scroll down for ruling in lines 5 & 12.
LINE 6	23CV425445	Fortune Vieyra v. San Jose Day Nursery et al.	As noted in the court's July 25, 2024 order, this hearing has been continued to September 5, 2024.
LINE 7	23CV427742	Anthony Moran v. FCA US, LLC et al.	OFF CALENDAR
LINE 8	23CV427742	Anthony Moran v. FCA US, LLC et al.	OFF CALENDAR
LINE 9	20CV373696	Jerry Ivy, Jr. v. Jerry Ivy, Sr. et al.	Click on LINE 9 or scroll down for ruling.
LINE 10	21CV389548	Fataneh Kashaninejad v. Fariba Alikhani, D.D.S. et al.	Motion to be relieved as counsel: parties to appear.

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LINE #	CASE #	CASE TITLE	RULING
LINE 11	22CV399413	Li Juan Liu v. Kenneth To	Motion to set aside default: there is no proof of service of the motion in the file, and the court has received no response to the motion from the plaintiff. On the other hand, plaintiff has filed a request for a court reporter and a request for an interpreter for the August 1, 2024 hearing, which indicates that the plaintiff may be aware of this motion. Parties to appear to address the apparent notice defect.
LINE 12	19CV360439	Mesfin Regassa Ayle et al. v. Keith Laverne Booth et al.	Click on LINE 5 or scroll down for ruling in lines 5 & 12.

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Calendar Line 2
Case Name: *Soraya Vela v. Santa Clara County Office of Education*
Case No.: 23CV423212

I. BACKGROUND

Plaintiff Soraya Vela brings this action against defendant Santa Clara County Office of Education ("SCCOE") for employment discrimination and retaliation.

Vela is a licensed clinical social worker and a Latina who speaks Spanish. (First Amended Complaint ("FAC"), ¶ 8.) SCCOE is a public entity responsible for Santa Clara County public schools, facilities, and school employees. (FAC, ¶ 9.) On February 2, 2022, SCCOE hired Vela as a Mental Health School Wellness Specialist II, a managerial, hourly position. (FAC, ¶ 14.) Vela worked full time for SCCOE until February 28, 2022, when she was terminated. (FAC, ¶ 16.)

As part of her job, Vela was responsible for ensuring compliance with applicable state and federal laws, codes, and regulations related to student support and wellness services. (FAC, ¶ 15.) She was also required to observe health and wellness centers to gain operating knowledge. (FAC, ¶ 18.) When visiting these centers, she encountered employees who reported that they were suffering from a lack of access to ergonomic accommodations and disability accommodations, a lack of phone lines, a lack of locking cabinets, discrimination, and wage theft. (*Ibid*.) Additionally, bilingual employees were not being paid for their language skills. (FAC, ¶ 19.) These violations had a negative impact on those who spoke languages other than English, people with disabilities, and people with workplace injuries. (*Ibid*.)

After discovering these issues, Vela contacted a union representative (Sarah Gianocaro, the Service Employees International Union Chapter President), and reported them to her on a telephone call. (FAC, ¶ 25.) Gianocaro requested that Vela document her complaints by drafting an email to have them addressed by the human resources department. (*Ibid*.)

On February 15, 2022, Katie Taylor, Vela's colleague, emailed Vela regarding ongoing violations of employee rights. (FAC, ¶ 28.) On February 17, 2022, Vela sent an email (the "February 17 email") to Taylor and ten other co-workers, stating that she had spoken to the union steward. (FAC, ¶ 30.) Vela requested that her co-workers send her additional information regarding their use of multiple languages in the workplace. (FAC, p. 9 [image of February 17 email].) She also informed her co-workers to use ticket services to request equipment and ergonomic evaluations. (*Ibid*.) "[S]omehow," someone forwarded the February 17 email to Vela's supervisor (Corrine Freese) and Director Chaunise Powell. (FAC, ¶ 32.)

On February 25, 2022, Vela received an email informing her of a probationary evaluation on February 28, 2022. (FAC, ¶ 33.) At the February 28 meeting, Vela's supervisors informed her that her employment was terminated. (FAC, ¶ 34.) Vela's supervisor later admitted that she was terminated because of the February 17 email. (FAC, ¶ 37.)

On September 20, 2023, Vela filed her original complaint in this case. On February 23, 2024, she filed the FAC, asserting the following causes of action:

1. Retaliation in Violation of Labor Code Section 1102.5;
2. Retaliation in Violation of Labor Code Section 6310;
3. Discrimination in Violation of Government Code Section 12940, Subdivision (a);
4. Retaliation in Violation of Government Code Section 12940, Subdivisions (h), (i); and
5. Failure to Prevent Discrimination in Violation of Government Code Section 12940, Subdivision (k).

On April 15, 2024, SCCOE filed its demurrer to the FAC.

II. LEGAL STANDARD

Vela asserts that SCCOE has misstated the legal standard on demurrer. (Opposition, pp. 3-5, subd. (a).) This court applies the following standard on a demurrer: The court 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.)

III. DEMURRER

SCCOE demurs to the second through fifth causes of action on the ground that they fail to state sufficient facts, under Code of Civil Procedure section 430.10, subdivision (e).

A. Second Cause of Action: Retaliation in Violation of Labor Code Section 6310

SCCOE argues that the second cause of action is deficient because there are no allegations that Vela conveyed any complaint about unsafe working conditions to SCCOE, and because any allegations that Vela had safety concerns conflicts with the text of Plaintiff's February 17 email to employees. (Demurrer, p. 4:16-20.)

Labor Code section 6310 protects employees against discrimination or retaliation for making a good-faith oral or written complaint "about working conditions or practices which [she] reasonably believes to be unsafe, whether or not there exists at the time of the complaint an OSHA standard or order which is being violated." (*Hentzel v. Singer Co.* (1982) 138 Cal.App.3d 290, 299-300 [superseded by statute on other grounds].) Section 6310 "reflects a significant public policy interest in encouraging employees to report health and safety hazards existing in the workplace without fear of discrimination or reprisal." (*Ferrick v. Santa Clara University* (2014) 231 Cal.App.4th 1337, 1350 (*Ferrick*).)

In opposition, Vela contends that the February 17 email raised "multiple health and safety concerns" and that SCCOE cannot deny that Vela's supervisors received her email. (Opposition, p. 6:8-17.) Vela further asserts that her email "[r]equesting" SCCOE follow ergonomic evaluation policies is "'reasonably alerting'" to the employer regarding the nature of the problem and the need to take corrective action. (Opposition, p. 6:18-20.)

Here, the FAC alleges Vela received an email from an employee, Taylor, which addressed the need for employee reimbursement for cellphone use; ergonomic assessments for disability-related accommodations; use of Spanish by uncertified employees; and not using interpreters. (FAC, ¶¶ 28-29.) Vela then sent Taylor and "approximately 10 other coworkers" the February 17 email, the entire text of which appears on page 9 of the FAC. (FAC, ¶ 30.) In the email, Vela states that she spoke to a union steward about bilingual pay and cellphone stipends; requests that those using Spanish on-site send her information relevant to their bilingual usage; and reminds the co-workers that they should open tickets with the Technology Department to request necessary equipment and to open tickets with Risk Management Department to request ergonomic assessments to receive proper chairs, desks, and anything else they might need to protect them while working. (*Ibid*.)

Nothing in the FAC indicates that Vela communicated the contents of this email directly to her supervisors to address safety issues or concerns, only that it was "somehow" forwarded to a supervisor. (FAC, ¶ 33.) This allegation is insufficient to support Vela's argument that the February 17 email establishes that she asked SCCOE to follow safety policies. As SCCOE correctly notes in its opening brief, the February 17 email does not state that Vela is concerned about safety issues; rather, it informs co-workers of the ways in which they can address any concerns they might have. (See *Ferrick, supra*, 231 Cal.App.4th at pp. 1350-1351 ["To be protected by a public policy, an employee 'must convey the information in a form which would reasonably alert [her] employer of the nature of the problem and the need to take corrective action.'"].) The email does not mention any other safety concerns identified by Vela in her complaint, including the lack of phone lines, lack of locking file cabinets, inadequate furniture, or poor working conditions. (See Demurrer, p. 4:23-27.)

Because it appears that the entire basis for Vela's claim under Labor Code section 6310 is based on the February 17 email, the court finds that Vela has not sufficiently alleged that she made a good-faith complaint to SCCOE about conditions she reasonably believed to be unsafe, and she has not sufficiently stated a claim under section 6310. The court SUSTAINS the demurrer to the second cause of action with 20 days' leave to amend.[1]

B. Third Cause of Action: Discrimination in Violation of Government Code Section 12940, Subdivision (a)

SCCOE argues that the third cause of action fails for the following reasons: 1) to the extent that it seeks redress for Vela's co-workers under FEHA, she lacks standing to bring the claim; 2) to the extent that Vela is alleging discrimination based on physical or mental disabilities, she also lacks standing; 3) the FAC fails to allege discrimination based on ancestry, national origin, color, or race; and 4) the FAC fails to allege associational discrimination.

Government Code section 12940, subdivision (a), makes it an unlawful employment practice for an employer, because of a protected category, to discharge a person from employment or to discriminate against the employee in compensation, terms, conditions, or privileges of employment.

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[1] Because this is the first pleading challenge, and because it is at least theoretically possible that Vela could amend her pleading to cure the insufficiency of the present allegations, the court grants leave to amend.

1. Vela's Co-Workers

According to SCCOE, the third cause of action fails to the extent it seeks redress for Vela's co-workers under FEHA. (Demurrer, p. 5:16-22, citing *Department of Fair Employment & Housing v. M&N Financing Corp.* (2021) 69 Cal.App.5th 434, 443-444 (*M&N Financing*).) As SCCOE points out, part of Vela's third cause of action is based on alleged discrimination suffered by her co-workers, a grievance as to which she lacks standing. (See Demurrer, p. 5:21-22, citing FAC, ¶ 76.)

Vela responds that she has "clearly . . . alleged that as a nonwhite Latina woman who speaks Spanish, she suffered discrimination prohibited by FEHA, along with other employees." (Opposition, p. 10:10-13.) Vela asserts that *M&N Financing* supports her allegations because she is considered an "aggrieved person" who has a beneficial interest in the controversy. (Opposition, p. 10:14, 20.) In reply, SCCOE asserts that the prima facie showing must establish that she was subject to adverse employment action because of *her* protected category and there is no authority permitting employees to bring "representative actions" under FEHA. (Reply, p. 4:1-9.)

The *M&N Financing* Court explained that an "'aggrieved' party is a person who has standing to sue. . . . To have standing, a party must be beneficially interested in the controversy; that is [she] must have 'some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large. The party must be able to demonstrate that [she] has some beneficial interest that is concrete and actual, and not conjectural or hypothetical." (*M&N Financing*, *supra*, 69 Cal.App.5th at pp. 443-444 [internal citations and quotations omitted].)

Here, the FAC alleges that SCCOE acted in a discriminatory manner towards Vela and her co-workers based on national origin, language, ancestry, disability, "and related bases." (FAC, ¶ 76.) Vela alleges that she heard reports of: 1) a lack of access to ergonomic accommodations that would help prevent injury and accommodate disabilities; 2) pay discrimination; and 3) lack of compensation for bilingual employees. (FAC, ¶¶ 18-19.) It is not clear from the FAC's allegations how Vela had a beneficial interest in these issues, given that none of this alleged conduct directly happened to her. (See *Osborne v. Yasmeh* (2016) 1 Cal.App.5th 1118, 1133 [addressing discrimination in the context of the Unruh Civil Rights Act, "a plaintiff who only learns about the defendant's allegedly discriminatory conduct, but has not personally experienced it, cannot establish standing"].) The FAC is devoid of allegations that: Vela needed an ergonomic accommodation or notified her employer of any disability; she was paid less based on a protected category; or she required bilingual pay and did not receive bilingual pay. Even if Vela had a beneficial interest in the controversy, her allegations regarding her co-workers appear to be based on hearsay and are conjectural at best. There are no allegations that any specific co-worker had a specific disability and notified their employer about the need for a reasonasble accommodation, or that any specific employee requested bilingual pay.[2] (See e.g., *Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1167 [internal citations and quotation marks omitted]["Nor is an employer ordinarily liable for failing to accommodate a disability of which it had no

[2] The FAC is also devoid of allegations indicating how bilingual pay is implemented at the SCCOE.

knowledge."].) Thus, Vela does not have standing to bring a claim on behalf of her co-workers.

Although Vela is correct to note that a demurrer does not lie to a portion of a cause of action—and the standing issue applies only to a portion of the third cause of action—that means that the remaining allegations of discrimination *against her* must be sufficient to withstand a demurrer.

2. Disability Discrimination

As noted above, there are insufficient allegations of disability discrimination against Vela. Indeed, Vela concedes that she did not request a disability accommodation in her opposition. (Opposition, p. 11:3-5.) Vela still argues, though, that there was discrimination against her because her February 17 email encouraged employees to seek ergonomic evaluations. (Opposition, p. 10:5-8.) Again, as already noted above, there are no allegations in the FAC that any employees who received the email had a disability or were perceived as having a disability and needing a disability accommodation. Moreover, there is nothing in the February 17 email that suggests the existence of any disability on the part of Vela herself.

3. Ancestry, National Origin, Color, or Race

SCCOE next takes issue with Vela's attempts to maintain a discrimination cause of action based on national origin, language, and ancestry because of unfair pay practices towards employees who spoke Spanish and other non-English languages. (Demurrer, p. 6:5-7, citing FAC, ¶ 76.) As already noted, there are no allegations that Vela was discriminated against because of her own race or ethnicity or because of her use of the Spanish language. In addition, there are no allegations in the FAC that Vela made a complaint about the need for quality, professional, and ethical bilingual services to her employer.

In opposition, Vela contends she "clearly suffered adverse employment action by being terminated as a Spanish speaking Latina person for speaking up about failure to provide quality, professional, and ethical bilingual services." (Opposition, p. 11:17-20.) This argument is unavailing, as it is untethered to any specific allegation contained in the FAC.

4. Associational Discrimination

Finally, SCCOE argues that the third cause of action fails to state a claim for associational discrimination. (Demurrer, p. 6:22-23.)

"FEHA provides a cause of action for associational disability discrimination, although it is a seldom-litigated cause of action." (*Castro-Ramirez v. Dependable Highway Express, Inc.* (2016) 2 Cal.App.5th 1028, 1036.) "Accordingly, when FEHA forbids discrimination based on a disability, it also forbids discrimination based on a person's association with another who has a disability." (*Ibid*.) SCCOE argues that there are no facts supporting a claim that it discriminated against Vela on the basis of her association with a particular race or person with a qualifying disability. (Demurrer, p. 7:3-5.) Having reviewed the FAC, the court agrees. The FAC contains no allegations that Plaintiff associated with anyone of a particular race, national origin, or ancestry, or that she associated with anyone with a qualifying disability. Rather, she sent an email to co-workers notifying them that she was in contact with their union

representative and requested information about bilingual speakers, reminding them to file tickets to have their needs met. This does not amount to associational discrimination.

Based on the foregoing, the court SUSTAINS the demurrer to the third cause of action with 20 days' leave to amend.

C. Fourth Cause of Action: Retaliation in Violation of Government Code Section 12940, Subdivisions (h) and (i)

SCCOE demurs to the fourth cause of action on the grounds that unfair pay practices are not claims prohibited by FEHA and there are no facts to support Vela's allegation that she complained to SCCOE about discriminatory practices.

Government Code section 12940, subdivision (h), makes it unlawful for an employer to discharge or otherwise discriminate against any person because that person has opposed any practices forbidden under FEHA or because the person has filed a complaint under FEHA. (Gov. Code, § 12940, subd. (h); *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042 (*Yanowitz*).)

Here, the FAC alleges that SCCOE unlawfully retaliated against Vela by terminating her for reporting complaints of unfair pay practices by employees who spoke Spanish and other languages and for a failure to provide accommodations for physical and mental disabilities. (FAC, ¶ 87.) As noted several times above, there are no allegations that Vela filed a complaint or otherwise notified SCCOE about unfair pay practices or a failure to provide accommodations. Instead, she emailed her co-workers about union-related activity, requested they send her more information, and informed them about filing tickets to get equipment and accommodations. (FAC, ¶ 30; see also FAC, p. 12 [email screenshot stating Vela was terminated after attempting to organize her co-workers around the relevant issues]; *Yanowitz, supra,* 36 Cal.4th at p. 1047 ["'the relevant question is not whether a formal accusation of discrimination is made but whether the *employee's communications to the employer* sufficiently convey the employee's reasonable concerns that the employer has acted or is acting in an unlawful discriminatory manner.'"][emphasis added].)

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

D. Fifth Cause of Action: Failure to Prevent, Investigate, or Remedy Employment Discrimination and Retaliation in Violation of Government Code Section 12940, Subdivision (k)

SCCOE argues that the fifth cause of action is entirely dependent upon the third and fourth causes of action. Given that the demurrer has been sustained to both, the court likewise SUSTAINS the demurrer to the fifth cause of action with 20 days' leave to amend.

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Calendar Lines 3-4
Case Name: *Adrian Mark Jacobs et al. v. General Motors LLC et al.*
Case No.: 24CV433816

Plaintiffs Adrian Mark Jacobs and Karamjit Kaur Kang (together, "Plaintiffs") initiated this Song-Beverly Consumer Warranty Act case against defendant General Motors, LLC ("GM") and Stevens Creek Chevrolet, arising from Plaintiffs' purchase of a 2022 Chevrolet Bolt that allegedly suffered from a defect in its battery (the "Battery Defect"). GM demurs to the fourth and fifth causes of action in the complaint (for fraud and for violation of the Unfair Competition Law). GM has also filed a motion to strike Plaintiffs' prayer for punitive damages.

I. BACKGROUND

A. Facts

According to the complaint, on August 14, 2022, Plaintiffs purchased a 2022 Chevrolet Bolt, manufactured and/or distributed by GM (the "Subject Vehicle"). (Complaint, ¶¶ 4, 6.) Plaintiffs purchased the Subject Vehicle at Capitol Chevrolet, GM's authorized dealer. (*Id.* at ¶ 6.) Plaintiffs allege that they entered a contract with GM containing various warranties as well as setting forth various rights and obligations of both parties. (*Id.* at ¶¶ 7-13.)

GM allegedly became aware of issues with the battery in Chevrolet Bolts in December 2016. (Complaint, ¶ 21.) According to Plaintiffs, GM knew that the batteries could ignite when fully charged or when the charge fell below a 70-mile range. (*Id.* at ¶ 18.) The complaint provides a number of instances from 2015 to 2021 showing GM's alleged knowledge of Chevrolet Bolt battery defects and its marketing of the Chevrolet Bolt as fully functional in spite of these defects. (*Id.* at ¶¶ 19-33.)

In December 2021, Plaintiffs claim that they received a letter from GM Vice President Steve Hill, an officer, director, or managing agent of GM. (Complaint, ¶ 50.) Hill stated in this letter that GM would provide Plaintiffs with a new battery that did not suffer from defects for the Subject Vehicle. (*Id.* at ¶ 51.) From December 2021 to June 2023, Plaintiffs relied on Hill's representation and did not sell the vehicle or ask GM to repurchase the vehicle. (*Id.* at ¶ 53.) Shortly after sending an email in June 2023 that GM would replace the battery in the Subject Vehicle, GM allegedly told Plaintiffs there had been a "misunderstanding" and Plaintiffs would not receive a new battery. (*Id.* at ¶¶ 55, 56.)

B. Procedural History

Plaintiffs filed their complaint on March 25, 2024, alleging causes of action for: (1) violation of the Song-Beverly Act for breach of an express warranty; (2) violation of the Song-Beverly Act for breach of an implied warranty; (3) violation of Civil Code section 1793.2; (4) fraud; (5) violation of Business and Professions Code section 17200; and (6) negligent repair. The first five causes of action were asserted against GM; the sixth cause of action was asserted against only Stevens Creek Chevrolet.

On April 24, 2024, GM filed its demurrer to the fourth and fifth causes of action and a motion to strike punitive damages from the complaint. Plaintiffs filed an opposition to both the

demurrer and motion to strike on July 19, 2024. GM filed a reply in support of its demurrer and motion to strike on July 25, 2024.

II. REQUEST FOR JUDICIAL NOTICE

GM has submitted a request 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 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."

GM requests that the court take judicial notice of the fact that the United States Environmental Protection Agency ("EPA") estimated that 2020-2022 model year Chevrolet Bolts have a total range of 259 miles, as reflected on the www.fueleconomy.gov website. (Request for Judicial Notice, p. 2.) In support, GM relies on Evidence Code section 452, subdivision (b), which provides that judicial notice may be taken of "regulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States." GM also relies on Evidence Code section 452, subdivision (h), which provides that a court may take judicial notice of "facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy."

The court denies GM's request. First of all, EPA estimates are not "regulations" or "legislative enactments" under Evidence Code section 452, subdivision (b). Second, there is no such thing as an "'official Web site' provision for judicial notice in California" under section 452, subdivision (h). (*Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 889; see also *L.B. Research & Education Foundation v. UCLA Foundation* (2005) 130 Cal.App.4th 171, 180, fn. 2.) "Simply because information is on the Internet does not mean that it is not reasonably subject to dispute." (*Huitt v. Southern California Gas Co*. (2010) 188 Cal.App.4th 1586, 1605, fn. 10.) GM's request for judicial notice is baseless.

III. DEMURRER

A. Legal Standard

As relevant to the instant 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 brought 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. California*

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 (*Committee*), 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 also be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

B. Analysis

1. Fourth Cause of Action: Fraud

a) Economic Loss Doctrine

GM argues that the economic loss rule bars Plaintiffs' fraudulent concealment cause of action because Plaintiffs seek purely economic damages from the purchase of the subject vehicle. (Memorandum of Points and Authorities in Support of Demurrer ("MPA"), pp. 13:25-14:11.) In support of this argument, GM cites *Robinson Helicopter Co., Inc. v. Dana Corp*. (2004) 34 Cal. 4th 979, 988 (*Robinson*). GM likewise argues that "emotional injuries incidental to purely economic damages based on fraudulent concealment are also barred by the economic loss rule," citing *Butler-Rupp v. Lourdeaux* (2005) 134 Cal. App. 4th 1220, 1229 (*Butler-Rupp*). (MPA, p. 14:2-5.)

The court does not find GM's economic loss arguments to be persuasive.[3] California permits recovery of tort damages in certain types of contract cases where the duty giving rise to tort liability "is either completely independent of the contract or arises from conduct which is both intentional and intended to harm," such as where the contract was fraudulently induced. (See *Erlich v. Menezes* (1999) 21 Cal.4th 543, 552 (*Erlich*).) *Robinson* carves out an exception to the economic loss rule and does not purport to limit the circumstances in which tort damages (economic or otherwise) could be available in contract cases. As already set out in *Erlich,* those circumstances include fraudulent inducement of contract. (See *Erlich, supra*, 21 Cal.4th at p. 552; *Robinson, supra*, 34 Cal. 4th at pp. 989-990 [citing *Erlich* for the proposition that tort damages for fraudulent inducement of contract are not barred by the economic loss rule]; see also *Harris v. Atlantic Richfield Co*. (1993) 14 Cal.App.4th 70, 78 ["when one party commits a fraud during the contract formation or performance, the injured party may recover in contract and tort"].)

The court notes that the California Supreme Court has certified the question presented by the U.S. Court of Appeals for the Ninth Circuit as to whether fraudulent concealment claims are exempt from the economic loss rule. (See *Rattagan v. Uber Technologies, Inc.* (9th Cir. 2021) 19 F.4th 1188, 1193.) That case is still pending in the Supreme Court, and there is no indication as to what (or when) the final ruling may be. Until such time as the high court changes the longstanding and familiar principles set forth above in California law, however,

[3] Indeed, GM has repeatedly raised this same non-meritorious, boilerplate argument in numerous demurrers and motions with this court, and the court has consistently rejected it every time.

this court must apply those principles and hold that the economic loss rule does not bar the recovery of tort damages (economic or otherwise) for fraudulent inducement of contract, regardless of whether that inducement was through deliberate concealment or affirmative misrepresentation.

The First District Court of Appeal in *Butler-Rapp* did not address a cause of action for fraudulent concealment, as that case focused on a cause of action for negligent infliction of emotional distress. (*Butler-Rapp, supra*, 134 Cal. App. 4th at p. 1231.) While the complaint here does allege that Plaintiffs suffered fear and anxiety from the risk of spontaneous ignition, Plaintiffs also allege, as the demurrer notes, that Plaintiffs suffered damages because they would not have purchased the vehicle or would have paid significantly less for it, but for the alleged concealment. (See MPA, p. 14:7-9.) Plaintiffs' claim for damages is not solely premised on the fear and anxiety they suffered, and they have asserted a cause of action for fraudulent concealment, not negligent infliction of emotional distress.

Plaintiffs also rely upon *Dhital v. Nissan North America, Inc.* (2022) 84 Cal.App.5th 828, 844 (*Dhital*) in opposing the demurrer. (See Plaintiffs' Opposition to Defendant's Demurrer to First Amended Complaint ("Opposition"), p. 4:20-26.) The Supreme Court has granted review of *Dhital*. (See *Dhital v. Nissan North America, Inc.* (Feb. 1, 2023 No. S277568) [523 P.3d 392].) Although this divests the opinion of binding or precedential effect, it may still be cited for "potentially persuasive value." (Cal. Rules of Court, rule 8.1115(e)(1).) This court does find *Dhital*'s holding that the economic loss rule does not bar fraudulent concealment causes of action to be persuasive. (*Dhital, supra*, 84 Cal. App. 5th at p. 833 ["We conclude that, under California law, the economic loss rule does not bar plaintiffs' fraudulent inducement claim."].)

b) Duty to Disclose

GM's argument that Plaintiffs do not allege a transactional relationship between the parties sufficient to create a duty to disclose is also unpersuasive. The complaint alleges a direct contractual relationship via the warranty contract signed by Plaintiffs (see Complaint, ¶ 7 ["At the time of sale, General Motors entered into a contract with Plaintiffs . . ."]), and a relationship between two parties giving rise to the duty to disclose "has been described as a 'transaction,' such as that between 'seller and buyer, employer and prospective employee, doctor and patient, or parties entering into any kind of contractual arrangement.'" (*Burch v. CertainTeed Corp.* (2019) 34 Cal.App.5th 341, 349-50, citing *Shin v. Kong* (2000) 80 Cal.App.4th 498, 509.)

GM relies on *Bigler-Engler v. Breg, Inc.* (2017) 7 Cal. App. 5th 276, 311 (*Bigler*) to argue that Plaintiffs have failed to allege a direct relationship giving rise to the duty to disclose. (See MPA, pp. 14:12-16:4, citing *Bigler*.) *Bigler* is distinguishable, as it involved an appeal of a jury verdict, not a pleading challenge, and the decision does not discuss pleading standards at all. (*Bigler, supra*, 7 Cal.App.5th at p. 314.) Further, the complaint alleges that Plaintiffs interacted with sales representatives, relied on GM's marketing materials, and purchased the Subject Vehicle from an authorized dealer and agent of GM. (See Complaint, ¶¶ 6, 103.) These allegations contrast with the allegations in *Bigler*, where the manufacturer of a medical device "did not transact with [plaintiff] or her parents in any way. [Plaintiff] obtained her Polar Care device from Oasis, based on a prescription written by [the doctor], all without [defendant's] involvement. The evidence does not show that [defendant] knew—prior to this

lawsuit—that [plaintiff] was a potential user of the Polar Care device, that she was prescribed the Polar Care device, or that she used the Polar Care device. The evidence also does not show that [defendant] directly advertised its products to consumers such as [plaintiff] or that it derived any monetary benefit directly from [plaintiff's] individual rental of the Polar Care device." (*Bigler*, *supra,* 7 Cal.App.5th at p. 314.)

Plaintiffs again rely upon *Dhital* in opposing this argument of GM. (See Opposition, p. 5:7-17.) The Court of Appeal in *Dhital* concluded that plaintiffs sufficiently alleged a duty to disclose on the basis that plaintiffs "bought the car from a Nissan dealership, that Nissan backed the car with an express warranty, and that Nissan's authorized dealerships are its agents for purposes of the sale of Nissan vehicles to consumers." (*Dhital, supra,* 84 Cal.App.5th at p. 844.)

GM argues in reply that *Dhital* is unpersuasive because the defendant in that case, Nissan, only made a "short" argument on the relevant issue, and the court therefore "did not analyze the issue of a direct, transactional relationship between the parties," including a failure on the court's part to consider the "seminal" case of *Bigler*. (Reply, pp. 5:19-6:16.) This court has considered *Bigler* and remains unmoved, given that the case says nothing about the sufficiency of pleadings on a demurrer.

In its reply brief, GM also cites federal case law, which does not control over California law. (Reply, pp. 4:21-5:13; 6:17-7:7.) GM also cites two sections of the California Vehicle Code that, according to GM, require dealerships to be independent franchises. (*Id*. at p. 7:8-14.) It is not clear to the court how these two statutes apply to the issue at hand. One code provision appears to prohibit licensed car dealers from "advertis[ing] for sale, sell[ing], or purchas[ing] for resale a new vehicle of a line-make for which the dealer does not hold a franchise." (Veh. Code, § 11713.1, subd. (f).) The other requires all car dealers to have a license before selling cars. (Veh. Code, § 11700.) Neither of these addresses the sufficiency of the factual allegations in the complaint (including the potential factual question of agency). The court rejects GM's argument that Plaintiffs have not sufficiently pleaded a transactional relationship giving rise to a duty to disclose.

c) Failure to Plead with the Requisite Specificity

Defendant also demurs to the fourth cause of action on the ground that the complaint fails to plead fraud (or fraudulent concealment) with the requisite particularity. (MPA, p. 7:6-8.)

"The elements of fraudulent concealment are: (1) the defendant concealed or suppressed a material fact; (2) the defendant was under a duty to disclose the fact to the plaintiff; (3) the defendant intentionally concealed or suppressed the fact with the intent to defraud the plaintiff; (4) the plaintiff was unaware of the fact and would not have acted as he or she did if the plaintiff had known of the concealed or suppressed fact; and (5) as a result of the concealment or suppression of the fact, the plaintiff sustained damage." (*Burch v. CertainTeed Corp.* (2019) 34 Cal.App.5th 341, 348, citing *Bigler*, *supra,* 7 Cal.App.5th at pp. 310-311.)

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.) In the case of fraud by concealment or omission, however, courts require less particularity because "[h]ow

does one show 'how' and 'by what means' something didn't happen, or 'when' it never happened, or 'where' it never happened?" (*Alfaro v. Community Housing Improvement System & Planning Ass'n., Inc.* (2009) 171 Cal.App.4th 1356, 1384.) "Less specificity is required when 'it appears from the nature of the allegations that the defendant must necessarily possess full information concerning the facts of the controversy.'" (*Committee, supra,* 35 Cal.3d at p. 217, citing *Bradley v. Hartford Acc. & Indem. Co.* (1973) 30 Cal.App.3d 818, 825; see also *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 47 ["the rule is relaxed when it is apparent from the allegations that the defendant necessarily possesses knowledge of the facts"].)

GM argues that the complaint does not meet these standards, and that the complaint does not contain well-pleaded facts regarding Plaintiffs' justifiable reliance on any alleged representation and that the complaint fails to plead that the Plaintiffs actually read and relied on the representations. (MPA, p. 9:23-28.)

The court disagrees. The complaint alleges a direct contractual relationship between Plaintiffs and GM, including an express written warranty. (See Complaint, ¶ 7.) Plaintiffs purchased the Subject Vehicle from a dealership authorized to sell Defendant's vehicles. (*Id*. at ¶ 6.) Plaintiffs allege that the Subject Vehicle exhibited defects, non-conformities, or malfunctions. (*Id*. at ¶ 12.) Plaintiffs allege that GM knew Chevrolet Bolts had issues with their batteries and concealed and failed to disclose facts regarding the Battery Defect at the time Plaintiffs purchased the Subject Vehicle, including by falsely representing the battery's capabilities in marketing materials and falsely reporting the battery's capabilities in a public question and answer session. (*Id*. at ¶¶ 19-34, 91-105.) Furthermore, Plaintiffs interacted with GM dealership personnel who at the time of the sale assured Plaintiffs that the Subject Vehicle had a long range and was safe. (*Id*. at ¶ 92.) The safety and functionality of a vehicle "is material to any consumer seeking to purchase that vehicle" and any alleged false marketing of the vehicle's range and safety "is essential to [a] reasonable consumer's decision-making process in buying an electric vehicle." (*Id*. at ¶¶ 37, 93, 98.) Plaintiffs decided to buy the vehicle based in part on the "false and misleading representations" described in the complaint. (*Id*. ¶ 95.) Moreover, "Plaintiffs decided to buy the vehicle based in substantial part on the representations communicated through the Defendant's marketing material and the representations made by GM's dealership personnel." (*Id*. at ¶ 103.) Had Plaintiffs "known the truth" about the Subject Vehicle they would not have purchased it or would have paid significantly less for it. (*Id*. at ¶ 104.)

GM argues that Plaintiffs' fraud cause of action fails because it is based on EPA estimates. (MPA, p. 12:20-21.) This argument is unavailing, because it relies on extrinsic evidence, including material as to which the court has denied judicial notice. Moreover, the complaint is clear that Plaintiffs do not base their affirmative fraud allegations solely on the alleged misrepresentation of the Subject Vehicle's mileage range. Plaintiffs allege that "based on Defendant's advertising . . . Plaintiffs believed the battery [of the Subject Vehicle] could be charged 100 percent and could be charged safely indoors." (Complaint, ¶ 39.) In addition, GM allegedly knew that there were safety problems and still falsely advertised the safety and functionality of Chevrolet Bolts. For example, the complaint alleges that GM knew material in their marketing brochure was false "because of the reported fires and the previous advisory NHTSA in 2017 warning about charging batteries to 100 percent." (*Id*., ¶ 32.) Yet GM allegedly "falsely represented that the subject vehicle [was] safe and functional for normal use." (*Id*. at ¶ 18.)

Nevertheless, the court does find persuasive GM's argument that Plaintiffs have failed to plead that GM had knowledge that *the Subject Vehicle* suffered from any defects with its battery. (MPA, p. 10:10-16.) According to GM, the complaint alleges that GM had knowledge of issues with batteries between 2016 and 2020. (*Id*. at pp. 10:10-12, 11:3-9.) But the complaint alleges nothing about any knowledge of ongoing battery issues by the time Plaintiffs purchased the Subject Vehicle in August 2022. Furthermore, the alleged letter from GM's Vice President Steve Hill in "December 2021" stating that Plaintiffs would receive a "new battery" for their vehicle does not necessarily establish that GM had knowledge of any defects with the Subject Vehicle's battery. (Complaint, ¶¶ 50-57.) According to GM, Hill sent this letter *after* Plaintiffs purchased their vehicle, and so it cannot be the basis for an allegation that GM fraudulently concealed facts intending to induce Plaintiffs into buying the subject vehicle. This letter is not attached to the complaint, and so the only information about it that is presently before the court is the rather vague description contained in paragraphs 50-57 of the complaint.[4]

Because of the absence of relevant (and coherent) factual allegations contemporaneous with the purchase of the Subject Vehicle, the court SUSTAINS GM's demurrer to the fourth cause of action with 20 days' leave to amend.

2. Fifth Cause of Action: Violation of Business and Professions Code Section 17200

The complaint asserts that GM engaged in fraudulent, unfair, and unlawful conduct under Business and Professions Code section 17200, commonly known as the Unfair Competition Law ("UCL"). (Complaint, ¶¶ 106-143.) GM demurs on the grounds that (1) Plaintiffs' UCL cause of action fails for the same reasons Plaintiffs' fraud cause of action fails; (2) Plaintiffs do not plead an underlying statutory violation in support of their argument that GM has violated the "unlawful prong" of the UCL cause of action; and (3) Plaintiffs do not reference any established public policy in support of the argument that GM has violated the "unfair prong" of their UCL cause of action. (MPA, pp.16:5-17:24.)

"Business and Professions Code section 17200 et seq. prohibits unfair competition, including unlawful, unfair, and fraudulent business acts. The UCL covers a wide range of conduct. It embraces [] anything that can properly be called a business practice and that at the same time is forbidden by law. [] [Citations.]" (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1143.) "By proscribing unlawful business practices, the UCL borrows violations of other laws and treats them as independently actionable. In addition, practices may be deemed unfair or deceptive even if not proscribed by some other law. Thus, there are three varieties of unfair competition: practices which are unlawful, or unfair, or fraudulent. [Citation.]" (*Blakemore v. Superior Court* (2005) 129 Cal.App.4th 36, 48.)

[4] The court finds the complaint to be extremely confusing on this point. Although it alleges that Plaintiffs purchased the vehicle in *August 2022*, it also alleges that the Hill letter offering a "new battery" was sent in *December 2021*, which is chronologically impossible. (See Complaint, ¶¶ 6, 50.) While the court recognizes the general rule that it must accept as true the facts pleaded in the complaint (see *Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 318), it cannot be the case that both of these dates are true. It must be that either the car was purchased in *August 2021*, or the letter came in *December 2022*.

Plaintiffs do not address GM's argument regarding the "unfair" and "unlawful" prongs of their UCL cause of action; therefore, they impliedly concede that these prongs of their UCL cause of action are insufficiently supported. (See *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 566 ["By failing to argue the contrary, plaintiffs concede this issue."].)

Plaintiffs do, however, attempt to rebut GM's fraud-based UCL arguments by arguing that they have met the pleading standard for their fourth cause of action. (Opposition, 4:8-14.) "The 'fraud' prong of [the UCL] is unlike common law fraud or deception. A violation can be shown even if no one was actually deceived, relied upon the fraudulent practice, or sustained any damage. Instead, it is only necessary to show that members of the public are likely to be deceived.' [Citations.]" (*Schnall v. Hertz Corp.* (2000) 78 Cal.App.4th 1144, 1167.) The fraud prong of the UCL is less rigorous than common law fraud, as common law fraud requires allegations of actual falsity and reasonable reliance while fraud under UCL does not. (*Morgan v. AT&T Wireless Services, Inc.* (2009) 177 Cal.App.4th 1235, 1256.) An action for fraud under the UCL must be stated with reasonable particularity, which is a more lenient pleading standard than is applied to common law fraud causes of action. (See *Gutierrez v. Carmax Auto Superstores California* (2018) 19 Cal. App. 5th 1234, 1261.)

As already discussed, the court finds that Plaintiffs have not sufficiently pleaded fraud. Plaintiffs have failed to allege that GM had specific knowledge that the Subject Vehicle, allegedly purchased in August 2022, contained the battery defects that were documented years earlier. (*Cansino v. Bank of America* (2014) 224 Cal. App. 4th 1462, 1473-1475 [affirming trial court's decision to sustain a demurrer to a UCL fraud cause of action on the grounds that the UCL failed to state fraud with particularity for the same reason plaintiff's common law fraud cause of action was not pled with the requisite specificity].)

In short, for the same reason that the court sustains the demurrer to the fourth cause of action, the court SUSTAINS GM's demurrer to the fifth cause of action with 20 days' leave to amend.

IV. MOTION TO STRIKE

The motion to strike, which targets only the portion of the complaint's prayer for relief requesting punitive damages, is DENIED as MOOT, given the court's ruling on the demurrer. While the court has found that Plaintiffs have failed to plead fraud with particularity, it has not found that Plaintiffs' fraud cause of action fails as a matter of law, such that leave to amend would be futile.

V. CONCLUSION

The court SUSTAINS GM's demurrer to the fourth cause of action with 20 days' leave to amend. The court SUSTAINS GM's demurrer to the fifth cause of action with 20 days' leave to amend. The motion to strike is DENIED as MOOT.

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Calendar Lines 5 & 12
Case Name: *Mesfin Regassa Ayle et al. v. Keith Laverne Booth et al.*
Case No.: 19CV360439

I. BACKGROUND

In this wrongful death action, plaintiff Mesfin Regassa Ayle ("Ayle") and other members of his family (collectively, "Plaintiffs") have filed suit against the County of Santa Clara (the "County"), the City of San Jose ("San Jose"), the City of Santa Clara ("Santa Clara"), and Keith Booth ("Booth") for an accident in which Ayle's father, Regassa Ayle Walkeba ("Decedent"), was struck and killed by a box truck driven by Booth. This occurred on the Central Expressway near San Jose Airport on December 28, 2018.

Plaintiffs filed their original and still-operative complaint on December 18, 2019, stating six causes of action: (1) Negligence (against Booth, his employer (Pathens, Inc.), and various Does); (2) Negligent Hiring, Training, Supervision and Retention (against Booth's employer and various Does); (3) Negligent Entrustment (against Booth's employer and various Does); (4) Dangerous Condition of Public Property (against the County, San Jose, Santa Clara, and various Does); (5) Dangerous Condition of Public Property (against various Does only); and (6) Negligence (against various Does only). There are no exhibits attached to the complaint. Plaintiffs' allegations against the public entity defendants (the fourth cause of action) are based on Government Code sections 835 and 840.2.

The complaint alleges that Decedent was struck while he was "a pedestrian in or near a crosswalk and refuge island area near the intersection of Central Expressway and De La Cruz Boulevard." (Complaint, ¶ 23.) The complaint alleges in somewhat conclusory fashion that this location was a dangerous condition of public property to pedestrians as a result of: "a. A misleading, confusing, and/or dangerous configuration; b. A misleading, confusing, and/or dangerous refuge island; c. Lack of an adequate refuge island; d. Lack of any or adequate warning signs; e. Lack of traffic control signals; f. Lack of sufficient marked crosswalks; g. Lack of lighting/illumination or adequate lighting/illumination; h. Lack of adequate sight distance; i. Overabundance of visual distractions; j. Lack of adequate speed limitations; k. Unpredictable traffic gaps; *l.* Abnormally high traffic density; and/or[] m. Lack of devices to allow for safe pedestrian and traffic movement." (Complaint, ¶ 25.)

The complaint alleges that Decedent's "encounter" with the dangerous condition was a proximate cause of Decedent's injuries. (Complaint, ¶ 25.) The complaint's first cause of action also alleges that Booth's negligence was a proximate cause of Decedent's injuries. (Complaint, ¶ 36.)

The County filed an answer to the complaint on March 6, 2020, Santa Clara filed an answer on March 24, 2020, and San Jose filed an answer on March 30, 2020. Booth and Pathens, Inc. filed a joint answer on May 6, 2020.

Currently before the court are two motions for summary judgment. The first, by the County, was filed on April 8, 2024. The second, by San Jose, was filed on May 2, 2024. Both motions were originally set for hearing on different dates before the court reset them for August 1, 2024. Plaintiffs filed their separate oppositions to these motions one day late, on

July 19, 2024. While plaintiffs have not attempted to make any showing of good cause, the court has exercised its discretion to consider the late oppositions.[5]

II. REQUEST FOR JUDICIAL NOTICE

Defendant San Jose has submitted a request for judicial notice in support of its motion. "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."

San Jose seeks judicial notice of four documents, submitted as Exhibits A-D to the request, pursuant to "Evidence Code sections 451 and 452." (See Request, p. 1:27.) No specific basis for taking judicial notice of any of the four documents is identified. (See Evid. Code, § 453, subd. (b).) Exhibit A consists of excerpts for San Jose's City Charter. Exhibit B is Plaintiffs' complaint. Exhibit C is San Jose's answer to the complaint, filed on March 20, 2020. Exhibit D is a copy of section 2.04.4420 of the San Jose Municipal Code.

Despite San Jose's failure to identify a specific basis for judicial notice, the court grants judicial notice of Exhibits A and D under Evidence Code section 452, subdivision (b), and GRANTS judicial notice of Exhibits B and C under section 452, subdivision (d). The court does not take judicial notice of the truth of any allegations contained in Exhibits B and C.

III. GENERAL LEGAL STANDARDS

A. Summary Judgment

The pleadings limit the issues presented for summary judgment or summary adjudication, and such a motion may not be granted or denied based on issues not raised by the pleadings. (See *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health Ins*. (2010) 181 Cal.App.4th 60, 73 ["[T]he pleadings determine the scope of relevant issues on a summary judgment motion."].) "A moving party seeking summary judgment or adjudication is not required to go beyond the allegations of the pleading, with respect to new theories that could have been pled, but for which no motion to amend or supplement the pleading was brought, prior to the hearing on the dispositive motion." (*Jacobs v. Coldwell Banker Residential Brokerage Co*. (2017) 14 Cal.App.5th 438, 444 [quoting *Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403, 421]; see also *California Bank & Trust v. Lawlor* (2013) 222 Cal.App.4th 625, 637, fn. 3 ["Evidence offered

[5] "A trial court has broad discretion under rule 3.1300(d) of the California Rules of Court to refuse to consider papers served and filed beyond the deadline without a prior court order finding good cause for late submission." (*Bozzi v. Nordstrom, Inc*. (2010) 186 Cal.App.4th 755, 765.) Code of Civil Procedure section 437c, subdivision (b)(2) "forbids the filing of any opposition papers less than 14 days prior to the scheduled hearing, and case law has sometimes been strict in requiring good cause to be shown before late-filed papers will be accepted" in a summary judgment proceeding. (*Hobson v. Raychem Corp*. (1999) 73 Cal.App.4th 614, 625, disapproved on another ground in *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1031, fn. 6.)

on an unpled claim, theory, or defense is irrelevant because it is outside the scope of the pleadings."].)

The moving party bears the initial burden of production to make a prima facie showing that there are no triable issues of material fact. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850.) A motion for summary judgment or adjudication shall be granted only if it completely disposes of an entire cause of action, an affirmative defense, a claim for damages, or an "issue of duty." (See Code Civ. Proc., § 437c, subd. (f)(1); *McClasky v. California State Auto. Ass'n* (2010) 189 Cal.App.4th 947, 975 ["If a cause of action is not shown to be barred in its entirety, no order for summary judgment—or adjudication—can be entered."].) Summary adjudication of general "issues" or of facts is not permitted. (See *Raghavan v. The Boeing Company* (2005) 133 Cal.App.4th 1120, 1136.)

The moving party's declarations and evidence will be strictly construed in determining whether they negate or disprove an essential element of a plaintiff's claim "in order to resolve any evidentiary doubts or ambiguities in plaintiff's (or opposing party's) favor." (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 64, parentheses added.) While the same standards of admissibility govern both, the opposition declarations are liberally construed while the moving party's evidence is strictly scrutinized. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) The evidence must be liberally construed in support of the opposing party, resolving any doubts in favor of that party. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.)

"A defendant seeking summary judgment must show that at least one element of the plaintiff's cause of action cannot be established, or that there is a complete defense to the cause of action . . . . The burden then shifts to the plaintiff to show there is a triable issue of material fact on that issue." (*Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72; internal citations omitted.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable finder of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra,* 25 Cal.4th at p. 850.) "[W]hen the evidence is in equipoise on a matter that a party must establish by a preponderance of the evidence, summary judgment will be granted against that party." (*Id.* at p. 857, fn. 27.) "A party """cannot avoid summary judgment by asserting facts based on mere speculation and conjecture, but instead must produce admissible evidence raising a triable issue of fact. [Citation.]" [Citation.]' [Citation.]" (*Christina C. v. County of Orange* (2013) 220 Cal.App.4th 1371, 1379 (*Christina C.*); see also *McHenry v. Asylum Entertainment Delaware, LLC* (2020) 46 Cal.App.5th 469, 479 (*McHenry*) [because speculation is not evidence, speculation cannot create a triable issue of material fact].)

B. Dangerous Condition of Public Property

Government Code section 835 "sets out the exclusive conditions under which a public entity is liable for injuries caused by a dangerous condition of public property," to the exclusion of a general negligence claim. (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 829.) Section 835 provides that a public entity is liable for injury caused by a dangerous condition:

> . . . if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous

> condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:
>
> (a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or
>
> (b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

(Gov. Code, § 835.)

> [A] claim alleging a dangerous condition may not rely on generalized allegations but must specify in what manner the condition constituted a dangerous condition. A plaintiff's allegations, and ultimately the evidence, must establish a physical deficiency in the property itself. A dangerous condition exists when public property is physically damaged, deteriorated, or defective in such a way as to foreseeably endanger those using the property itself, or possesses physical characteristics in its design, location, features or relationship to its surroundings that endanger users.

(*Cerna v. City of Oakland* (2008) 161 Cal.App.4th 1340, 1347-1348, internal citations and quotations omitted; see also *Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 759 ["To establish a qualifying condition, the plaintiff must point to at least one physical characteristic of the property."], internal citations and quotations omitted.)

Regarding notice, "[t]he primary and indispensable element of constructive notice is a showing that the obvious condition existed a sufficient period of time before the accident." (*State v. Superior Court for San Mateo County* (1968) 263 Cal.App.2d 396, 400.) "Whether the dangerous condition was obvious and whether it existed for a sufficient period of time are threshold elements to establish a claim of constructive notice. Where the plaintiff fails to present direct or circumstantial evidence as to either element, his claim is deficient as a matter of law." (*Heskel v. City of San Diego* (2014) 227 Cal.App.4th 313, 317 [internal citation omitted].)

"Ordinarily, the existence of a dangerous condition is a question of fact, but whether there is a dangerous condition may be resolved as a question of law if reasonable minds can come to but one conclusion. It is for the court to determine whether, as a matter of law, a given defect is not dangerous. This is to guarantee that cities do not become insurers against the injuries arising from trivial defects. Moreover, expert opinions on whether a given condition constitutes a dangerous condition of public property are not determinative: The fact that a witness can be found to opine that such a condition constitutes a significant risk and a dangerous condition does not eliminate the court's statutory task pursuant to Gov. Code, § 830.2, of independently evaluating the circumstances." (*Thimon v. City of Newark* (2020) 44 Cal.App.5th 745, 755 (*Thimon*) [internal quotations and citations omitted].)

Government Code section 830.2 expressly permits courts to decide the existence of a "dangerous condition" as a matter of law. That section states: "A condition is not a dangerous condition within the meaning of this chapter if the trial or appellate court, viewing the evidence most favorably to the plaintiff, determines as a matter of law that the risk created by the

condition was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition created a substantial risk of injury when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used." (See also CACI No. 1102.)

The absence of similar accidents at a given location is relevant but not dispositive on the issue of whether it is dangerous. (*Salas v. California Dept. of Transp.* (2011) 198 Cal.App.4th 1058, 1071.) "Property is not 'dangerous' within the meaning of the statutory scheme if the property is safe when used with due care and the risk of harm is created only when foreseeable users fail to exercise due care." (*Brenner v. City of El Cajon* (2003) 113 Cal.App.4th 434, 439.) "A public entity is not required to assume that third parties . . . will act negligently or recklessly." (*Thimon, supra,* 44 Cal.App.5th at p. 754.)

"Property cannot be 'public property' unless owned or controlled by the public entity." (5 Witkin, *Summary of Cal. Law* (11th ed., 2017) Torts, § 303; see also Gov. Code, § 830, subd. (c) ["'Property of a public entity' and 'public property' mean real or personal property owned or controlled by the public entity, but do not include easements, encroachments and other property that are located on the property of the public entity but are not owned or controlled by the public entity."])

Under Government Code section 830.4, "A condition is not a dangerous condition within the meaning of this chapter merely because of the failure to provide regulatory traffic control signals, stop signs, yield right–of–way signs, or speed restriction signs, as described by the Vehicle Code, or distinctive roadway markings as described in Section 21460 of the Vehicle Code." Government Code section 830.6 states: "Neither a public entity nor a public employee is liable under this chapter for an injury caused by the failure to provide traffic or warning signals, signs, markings or devices described in the Vehicle Code. Nothing in this section exonerates a public entity or public employee from liability for injury proximately caused by such failure if a signal, sign, marking or device (other than one described in Section 830.4) was necessary to warn of a dangerous condition which endangered the safe movement of traffic and which would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care."

Darkness itself does not constitute a dangerous condition of public property. Several court decisions have held that that a public entity has no duty to provide street lighting and cannot be held liable for a failure to do so. (See *Antenor v. City of Los Angeles* (1985) 174 Cal.App.3d 477 (*Antenor*); *Plattner v. City of Riverside* (1999) 69 Cal.App.4th 1441; see also *Mixon v. State* (2012) 207 Cal.App.4th 124, 133-137 (*Mixon*), internal citations omitted ["A public entity is under no duty to light its streets . . . . A duty to light, 'and the consequent liability for failure to do so,' may arise only if there is 'some peculiar condition rendering lighting necessary in order to make the streets safe for travel.' In other words, a prior dangerous condition may require street lighting or other means to lessen the danger but the absence of street lighting is itself not a dangerous condition . . . . A public entity, which has no general duty to light its streets, cannot be held liable for failing to provide a consistent level of lighting between one street and the next . . . . Absent a duty to eliminate darkness—which, as discussed above, a public entity does not have—diminished visibility that comes with nightfall is not evidence of a dangerous condition subjecting a public entity to liability."])

As noted above, the complaint alleges that Booth's negligence was a proximate cause of Decedent's injuries. As a general matter, such allegations against a co-defendant may intersect with the allegations against the public entity defendants:

> The fact that [a third party's] negligence was a proximate cause of [plaintiff's] injury does not preclude a finding of dangerous condition. "[I]f a condition of public property 'creates a substantial risk of injury even when the property is used with due care' [citation], a public entity 'gains no immunity from liability simply because, in a particular case, the dangerous condition of its property combines with a third party's negligent conduct to inflict injury.' " (*Cordova, supra*, 61 Cal.4th at p. 1105, 190 Cal.Rptr.3d 850, 353 P.3d 773.) *When a third party's conduct is the immediate cause of a plaintiff's harm, the question becomes whether the dangerous condition "increased or intensified" the risk of injury from the third party's conduct*. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1137, 119 Cal.Rptr.2d 709, 45 P.3d 1171; *Cerna v. City of Oakland* (2008) 161 Cal.App.4th 1340, 1348, 75 Cal.Rptr.3d 168.)

(*Thimon, supra*, 44 Cal.App.5th at p. 754 [emphasis added]; see also *Thimon, supra*, 44 Cal.App.5th at p. 759 ["Given that [the third party's] negligence was a proximate cause of [plaintiff's] injuries, [plaintiff must also explain how [defendant public entity's] painting of lines to demarcate the crosswalk along with installing signs warning motorists of the pedestrian crossing 'increased or intensified' the risk of injury to pedestrians crossing at that location. There is no evidence that these improvements did so."].)

IV. THE COUNTY'S MOTION FOR SUMMARY JUDGMENT

A. The Basis for the County's Motion

As noted above, the only cause of action alleged against the County is the fourth cause of action for dangerous condition of public property. The County moves for summary judgment on the basis that: (1) Plaintiffs cannot establish that any physical condition of the property proximately caused Decedent's injuries; (2) Plaintiffs cannot establish the existence of a dangerous condition of public property at all; and (3) the County would be entitled to design immunity even if a dangerous condition were found to exist. (See Notice of Motion.)[6]

The County's motion is supported by seven declarations from the following witnesses: (1) Jim Weston, Division Manager, Records, in the Office of the Clerk of the Board of Supervisors for the County, who authenticates certain County records (Exhibits 19-22); (2) Raymond Boales, a police officer with the City of Santa Clara Police Department ("SCPD"), who described his observations of the scene on the night of the accident and authenticates photographs taken by SCPD personal (submitted as Exhibit 2); (3) Steve Sandbank, a regional manager and custodian of records for National Data & Surveying Systems, who authenticates November 2019 traffic volume counts for a location "on Central Expressway between its intersections with Scott Boulevard and Lafayette Street" (Exhibit 18); (4) Tony Layton, another SCPD officer, who describes his observations of the scene on the night of the accident and his preparation of a factual diagram of the accident collision scene (Exhibit 1); (5) Roberto

[6] The County labels these grounds "issues" but it has not moved for summary adjudication, making this designation irrelevant.

Salinas, a civil engineer with the County's Roads & Airports Department, who attests to the County's ownership and control of the Central Expressway on December 28, 2018, and who describes the layout and features of the location at that time, authenticating photographs and County records (Exhibits 3, 4, 17, 23, and 24); (6) Eric Rossetter, Ph.D., P.E., a mechanical engineer retained by the County as an expert witness, who describes his conclusions; and (7) Deputy County Counsel Steve Schmid ("Schmid Decl."), who authenticates Exhibits 5-16.

It is undisputed that, contrary to the allegation in paragraph 23 of the complaint (which states that Decedent was "in or near a crosswalk and refuge island near the intersection of Central Expressway and De La Cruz Boulevard"), the collision between Decedent and the truck driven by Booth actually took place in the westbound merge lane of the Central Expressway, more than 200 feet west of the intersection with De La Cruz Boulevard. It is also undisputed that the Central Expressway was owned and controlled by the County, not San Jose, on December 18, 2018. (See the County's Separate Statement of Undisputed Material Facts, Nos. 8 and 18.)[7]

B. Analysis of the County's Motion

A defendant may obtain summary judgment by demonstrating that a "plaintiff does not possess, and cannot reasonably obtain, needed evidence" to establish an essential element of the causes of action, such as causation. (*Aguilar, supra*, at pp. 854-855.) "Such evidence may consist of the deposition testimony of the plaintiff's witnesses, the plaintiff's factually devoid discovery responses, or admissions by the plaintiff in deposition or in response to requests for admission that he or she has not discovered anything that supports an essential element of the cause of action." (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 110 [citing *Aguilar* among others]; see also *Leyva v. Garcia* (2018) 20 Cal.App.5th 1095, 1102-1103.)

The County argues that Plaintiffs cannot establish how Decedent arrived at the location where the collision occurred, from what direction he initially approached, or even the number of times he moved through the area before the collision, as there are no witnesses to his pre-collision movements. The occupants of the truck that struck him—Booth (the driver) and Fernando Garcia (the passenger)—both testified that they did not see Decedent until the collision occurred, and they did not know where he came from. (See Schmid Decl., Exhibits 7 and 10.) Both testified that Decedent came from their "left" side immediately before the collision. Thus, the County asserts that even if Plaintiffs could establish that the Central Expressway-De La Cruz Boulevard intersection constituted a dangerous condition of public property, they cannot identify any "causal link" between that intersection and the collision with Decedent. The County submits that this case is analogous to *Padilla v. Rodas* (2008) 160 Cal.App.4th 742, 752-753, which determined that because an allegedly defective gate was just one of multiple, equally likely access points to a swimming pool in which a child drowned, there was insufficient evidence to show a causal link between that defective gate and the drowning. Causation was a matter of "'pure speculation or conjecture, or the probabilities [were] at best evenly balanced.'" (*Id.* at p. 752 [quoting Prosser & Keeton, Torts (5th ed. 1984) § 41, p. 269].) Here, to establish the County's liability under the fourth cause of action,

[7] The County asserts the location of the collision was "no less than 256 feet" from the west edge of the intersection, while Plaintiffs assert it was "approximately 200 feet west," based on a "guess" from Booth at his deposition. This is not a material dispute of fact.

Plaintiffs must establish all of the elements of Government Code section 835, including that Decedent's "injury was proximately caused by the dangerous condition."

The County has submitted excerpts from the May 23, 2023 deposition testimony of plaintiff Mesfin Regassa Ayle, Decedent's son. (See Schmid Decl., Exhibit 8.) Ayle testified that he did not know why Decedent was at the accident location at 8:00 p.m., did not know how Decedent came to be at that location, and did not know where he was going. Ayle also testified that he did not know what Decedent had been doing since leaving Ayle's house nine hours earlier that day. When asked if he knew of "any witness who could account for Dad's activities during the ten minutes leading up to the accident," he answered "no."

The County has also submitted various written discovery responses from Ayle. In Ayle's April 2022 responses and his May 16, 2023 supplemental responses to requests for admission (RFAs), Ayle admitted that he did not know of any eyewitnesses to Decedent's movements within 60 seconds of the accident other than Decedent, Booth, and Garcia, and he admitted that Decedent had left his residence at about 11:00 a.m. on December 28, 2018 and never returned. (See Responses to RFAs Nos. 4 & 35 (Schmid Decl., Exhibits 11-12.) In his April 19, 2022 responses to Form Interrogatory No. 17.1, Ayle stated that he was "currently unaware" of the names of any eyewitnesses with personal knowledge of Decedent's "whereabouts or activities" for the time period after he left Ayle's residence until the accident, other than Booth and Garcia. (See Schmid Decl., Exhibit 13.) In his April 19, 2022 responses to special interrogatories, Ayle similarly stated that he was "currently unaware" of the names of any eyewitnesses with personal knowledge of either the collision or Decedent's movements other than Booth and Garcia, and was "currently unaware" of the names of any other eyewitnesses with personal knowledge of Decedent's "whereabouts or activities" from the time he left Ayle's home until the accident. (See Responses to Interrogatories Nos. 14 & 19, Schmid Decl., Exhibit 14.) In his August 18, 2023 response to the County's first supplemental interrogatory, Ayle stated that he "currently has no later acquired information bearing on answers previously made in response to interrogatories and currently has no changes or additions to make." (See Schmid Decl., Exhibit 15.)

All of these written discovery responses are verified, and this evidence is sufficient to meet the County's initial burden to demonstrate that Plaintiffs do not have, and cannot reasonably obtain, evidence to support the essential element of causation in the fourth cause of action.

With the burden shifted to Plaintiffs, they are unable to raise a triable issue of material fact as to causation. Indeed, Plaintiffs' opposition brief does not even respond to the causation argument; instead, Plaintiffs rely almost entirely on the July 18, 2024 declaration of counsel, Manuel Balam ("Balam Decl."). (See Plaintiffs' Separate Statement, Response to UMFs 4, 7-12, 16-17, 19, and 31.)[8] The Balam declaration states that "[f]or the collision incident and events immediately before it in the roadway, as far as I and Plaintiffs currently know, there are no other currently known eyewitnesses identified in discovery responses by Plaintiffs, other than driver Keith Booth and Passenger Fernando Garcia; whether there, in fact, are other witnesses remains to be determined as discovery, depositions, and trial preparation continue."

[8] These responses refer to a "request for judicial notice" by plaintiffs, but none has been filed in opposition to the County's motion. There are also references to the Salinas declaration submitted by the County, but this declaration does not support any inference of causation.

This is insufficient to establish a material issue regarding causation. Speculation as to the existence of other possible witnesses cannot raise a triable issue of material fact, as speculation is not evidence. (See *Christina C.* and *McHenry, supra*.)

The Balam declaration also authenticates Plaintiffs' Exhibits A-G. Exhibits A and B are excerpts from the deposition testimony of Booth and Garcia. These excerpts do not raise any triable issue of material fact as to causation. Plaintiffs highlight speculative statements by Booth, that he was "assuming" or "guessing" that Decedent was walking to the shoulder before the collision. (Ex. A, pp. 56:22-57:2 and 57:23-58:1.) In response to follow-up questions, Booth stated that he had no actual memory of Decedent heading to the shoulder, and he did not know where Decedent had been prior to the collision. (Ex. A, pp. 57:3-10 and 58:2-21.) Garcia testified that the "second before" the collision, he saw Decedent coming from his and Booth's left. (Ex. B, p. 10:8-12.) Exhibits C through G, excerpts from the depositions of other third-party witnesses Melsa Workneh, Roberto Salinas, and James Bittner (San Jose's person most knowledgeable), have little if any relevance to the question of whether Plaintiffs currently have, or can reasonably obtain, evidence to support the essential element of causation. They do not raise any triable issues of material fact on that point.

Plaintiffs are bound by their complaint on summary judgment. Even if it is assumed that the conclusory allegations in the complaint's fourth cause of action adequately allege a claim against any of the public entity defendants, the County has demonstrated that Plaintiffs do not have, and cannot reasonably obtain, evidence to show proximate causation of injury. Plaintiffs do not have any evidence establishing: (1) how Decedent arrived at the location of the accident, (2) how long before the accident Decedent arrived at the location where the collision occurred; (3) from which direction Decedent was traveling when he arrived at the location; or (4) how long he may have been moving through the area—including how many times he crossed any of the streets in the vicinity—before the collision occurred.

Similarly, Plaintiffs have no evidence that could establish that Decedent encountered or interacted with any of the allegedly dangerous condition(s) of the Central Expressway-De La Cruz Boulevard intersection. As a result, even if the fourth cause of action could be reasonably construed as adequately alleging a "failure to warn" of a dangerous condition (and the court finds that the conclusory allegations in paragraphs 25d and 62 fail to do so), the same inability to show causation would apply. Moreover, because the complaint admits that the alleged negligence of defendant Booth was a proximate cause of Decedent's injuries, Plaintiffs were required to show through evidence that an identified dangerous condition of public property "increased or intensified" the risk of injury from Booth's conduct. (See *Thimon, supra*, 44 Cal.App.5th at p. 754.) Plaintiffs have not done this.

The court therefore GRANTS the County's motion for summary judgment. As the motion is granted based on the established lack of evidence of causation, it is not necessary for the court to address the County's arguments that there was no dangerous condition of public property to begin with, or that design immunity provides a complete defense to any allegedly dangerous condition of public property.

V. SAN JOSE'S MOTION FOR SUMMARY JUDGMENT

A. The Basis for San Jose's Motion

The fourth cause of action is also the only cause of action in the complaint alleged against San Jose. San Jose moves for summary judgment on the grounds that: (1) it did not own or control the location where Decedent was struck; (2) Plaintiffs cannot establish causation; (3) Plaintiffs cannot establish the existence of a dangerous condition of public property; and (4) Plaintiffs cannot establish that San Jose had actual or constructive notice of any dangerous condition, assuming one existed. (See May 2, 2024 Notice of Motion.)[9]

In addition to the request for judicial notice discussed above, San Jose's motion is supported by declarations from: (1) Senior Deputy City Attorney Kendra McGee, who authenticates Exhibits A-J to San Jose's packet of evidence, the contents of which significantly with the County's previously submitted evidence; (2) Rick Scott, Assistant Director of San Jose's Department of Transportation, who states that San Jose has no record of any complaints regarding work by San Jose at or near the intersection of Central Expressway and De La Cruz Boulevard from 1999 through December 28, 2018; and (3) Fai Ali, Deputy Director of San Jose's Airport Department, who authenticates San Jose's Exhibit K, a copy of a 2001 agreement between the County and San Jose, and states that San Jose has no records of any plans submitted to San Jose by the County under that agreement.

B. Analysis of San Jose's Motion

The court GRANTS San Jose's motion for summary judgment, as follows.

San Jose asserts that the location where the collision occurred on the Central Expressway was owned and controlled by the County, based on the declaration of Roberto Salinas submitted in support of the County's motion (and re-submitted as Exhibit I to the McGee declaration in support of San Jose's motion). (See San Jose UMF No. 17.) The Salinas declaration is sufficient evidence to meet San Jose's initial burden to show that the County, and not San Jose, owned and controlled the Central Expressway on December 28, 2018.

Plaintiffs' opposition disputes that San Jose's lack of ownership and control relieves it of any liability, based on the decision in *Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139 (*Bonanno*). (See Opposition, pp. 20:3-21:28.) Contrary to Plaintiffs' contention, *Bonanno* does not stand for the proposition that multiple public entities can own and control the same physical condition of a public property at the same time. Indeed, the Supreme Court expressly stated that the scope of its review was limited "to the question 'whether the location of a bus stop may constitute a dangerous condition of public property under [Gov. Code § 830] because bus patrons will be enticed to cross a dangerous crosswalk to reach the bus stop.'" (*Bonanno, supra,* 30 Cal.4th at p. 146.) While it upheld the jury verdict and concluded the location was in a dangerous condition, it stressed: "Our decision here, we emphasize, does not concern the question whether the crosswalk . . . was in fact an unsafe pedestrian route for crossing [the road], or even the broader question whether painted

[9] While the caption page of the Notice refers to summary adjudication in the alternative, neither the body of the notice nor San Jose's separate statement make any mention of summary adjudication.

crosswalks at uncontrolled intersections are more dangerous than those at signal-controlled intersections. As the County, which controlled the intersection, settled with plaintiff before trial, our decision does not in any respect address the liability of a city or county for maintenance of an unsafe crosswalk. To be sure, plaintiff introduced evidence—which the jury apparently found persuasive—showing the DeNormandie crossing was more dangerous than that at Morello, in order to establish that CCCTA should have moved its bus stop to Morello. But the sufficiency of that evidence is not before this court. Our order limiting review, quoted earlier in this opinion, assumes the existence of a dangerous crosswalk, posing only the question whether a *bus stop* may be deemed dangerous because bus users, to reach the stop, must cross at that dangerous crosswalk." (*Id*. at pp. 146-147, italics in original.) Thus, *Bonanno* assumed the existence of a dangerous condition on property owned/controlled by one public entity defendant and concluded another adjacent property (the bus stop), owned by a different public entity defendant, could be found dangerous based solely on its placement next to the assumed dangerous condition. This is completely distinguishable from the present scenario. In addition, *Bonanno* does not change the general rule that a public entity can only be found liable for a dangerous condition of public property that it in fact owns or controls. For there to be liability for a dangerous condition of public property, "the public entity must own or control the public property at issue at the time of the injury." (*Goddard v. Department of Fish & Wildlife* (2015) 243 Cal.App.4th 350, 366 [citing *Longfellow v. County of San Luis Obispo* (1983) 144 Cal.App.3d 379, 383].)

In disputing San Jose's UMF No. 17, Plaintiffs rely solely on the deposition testimony of James Bittner (and exhibits from that deposition), as well as Exhibit K to the declaration of Fai Ali submitted by San Jose.[10] The deposition testimony of Mr. Bittner, discussing projects in the area several years before the accident and the location of San Jose's jurisdictional line, is not evidence that San Jose owned or controlled either the Central/De La Cruz intersection or the actual accident location on Central Expressway 200 feet to the west on December 28, 2018.[11] Exhibit K, a copy of a 2001 agreement between San Jose and the County concerning improvements to portions of Central Expressway and De La Cruz Boulevard, also does not raise any material issues of fact as to any ownership and control of Central Expressway on December 28, 2018. The fact that San Jose participated in projects with the County in the general area where the accident occurred years prior to the accident does not speak to the question of ownership or control.

Finally, even if Plaintiffs could raise a triable issue as to San Jose's ownership or control of the relevant property, San Jose is still entitled to summary judgment on the same basis as the County: Plaintiffs cannot establish a material fact as to causation.

Like the County's argument, San Jose's argument regarding causation is also based on Ayle's verified discovery responses. (See San Jose UMFs nos. 14-16.) This evidence is sufficient to meet San Jose's initial burden of showing that Plaintiffs do not have, and cannot reasonably obtain, evidence that any alleged condition of the property at issue proximately caused Decedent's injuries.

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[10] Plaintiffs notably do not dispute several related UMFs, such as nos. 30-38. (See Cal. Rules of Court, rule 3.1350(f)(2) [response in opposing statement "must unequivocally state whether that fact is 'disputed' or 'undisputed.'"].)

[11] In fact, when asked if he thought a portion of a pedestrian island located within the jurisdictional boundary line was controlled and owned by San Jose, he responded "I do not believe so." (See Exhibit F, pp. 90:17-91:6.)

With the burden shifted to Plaintiffs, they are again unable to raise any triable issue of material fact on this point. In disputing San Jose's UMFs 14-16, Plaintiffs rely solely on another declaration from Manuel Balam. This declaration is identical to that submitted in opposition to the County's motion, and it likewise fails to raise any triable issue of material fact as to causation.

San Jose's motion for summary judgment is GRANTED based on San Jose's lack of ownership and control, and based on the absence of any potential evidence of causation. As with the County's motion, it is not necessary for the court to consider San Jose's additional arguments that Plaintiffs cannot establish the existence of a dangerous condition of public property or establish that San Jose had actual or constructive notice of any specific dangerous condition.

C. San Jose's Objections to Evidence

San Jose has submitted evidentiary objections with its reply. These objections are to Plaintiffs' "additional" material facts nos. 3 and 4 in their responding separate statement. These additional facts, and the opposing separate statement more generally, are not themselves evidence. Therefore, the court does not need to rule on these objections. Even if the objections were to the evidence submitted in support of the additional facts rather than the additional facts themselves it would still not be necessary for the court to rule on them. "In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review." (Code Civ. Proc. § 437c, subd. (q).)[12]

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[12] For the same reasons, the court does not need to rule on the County's objections to evidence, submitted with its reply.

Calendar Line 9
Case Name: *Jerry Ivy, Jr. v. Jerry Ivy, Sr. et al.*
Case No.: 20CV373696

Defendants move to seal financial information contained in papers submitted by both sides in connection with defendants' motion for leave to amend their answer, which the court granted on April 25, 2024. Notice is proper for this motion to seal, and plaintiff has not filed any opposition.

The court finds that there exists an overriding privacy interest in the parties' financial information that overcomes the right of public access to this information, that the overriding interest supports sealing the documents reflecting this information, that a substantial probability exists that the overriding interest will be prejudiced if the record is not sealed, that the proposed sealing is narrowly tailored with targeted redactions, and that no less restrictive means exist to achieve the overriding interest. Public access to the documents that have been conditionally lodged under seal will remain restricted until further order of the court.

IT IS SO ORDERED.

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