

**SUPERIOR COURT, STATE OF CALIFORNIA  
COUNTY OF SANTA CLARA**

**Department 18b  
Honorable Sheila Deen, Presiding**

Thomas Duarte, Courtroom Clerk  
191 North First Street, San Jose, CA 95113

**DATE: August 8, 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

**\*\*Please specify the issue to be contested when calling the Court and Counsel\*\***

**LAW AND MOTION TENTATIVE RULINGS**

**FOR APPEARANCES:** Department 18 is fully open for in-person hearings. The Court strongly prefers **in-person** appearances for all contested law and motion matters. For all other hearings, the Court strongly prefers either **in-person or video** appearances. If you must appear virtually, you must use video. 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. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 18:

[https://www.scscourt.org/general\\_info/ra\\_teams/video\\_hearings\\_teams.shtml](https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml)

**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.

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[https://www.scscourt.org/general\\_info/court\\_reporters.shtml](https://www.scscourt.org/general_info/court_reporters.shtml)

**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.

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**LAW AND MOTION TENTATIVE RULINGS**

| LINE #                        | CASE #     | CASE TITLE                                                                                                       | RULING                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
|-------------------------------|------------|------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <a href="#"><u>LINE 1</u></a> | 21CV391881 | Amir Weiner et al vs Matthew Carpenter et al                                                                     | <b>Motion: Judgment on Pleadings.</b><br>Scroll down to <a href="#"><u>Line 1</u></a> for Tentative Ruling.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| <a href="#"><u>LINE 2</u></a> | 23CV423952 | Santa Clara Valley Transportation Author vs Lenzen Associates, LLC, a California limited liability company et al | <b>Application for Withdrawal of Deposit of Probable Just Compensation.</b><br><br>Before the Court is an application by Defendant Lenzen Associates, LLC. to withdraw the probable just compensation of \$369,000 deposited in this eminent domain proceeding. This matter has been continued several times as Plaintiff Santa Clara Valley Transportation Authority identified <i>other</i> defendants that may claim an interest or compensation in this action (those defendants included the City of San Jose, Wells Fargo Bank, Bank of America, PRLAP, Inc., Federal Home Loan Mortgage Corporation, and the County of Santa Clara.) On June 6, 2024, the City of San Jose, filed a notice of non-opposition to the application. On June 27, 2024, defaults were entered against Defendants Bank of America, PRLAP, and the County of Santa Clara. On June 23, 2024 a default was entered against Wells Fargo Back. The remaining “outstanding” defendant, Federal Home Loan Mortgage Corporation, was provided notice of this application on June 4, 2024 and it filed no objection or opposition.<br><br>The application is therefore GRANTED.<br><br>Moving party to prepare the formal order. |

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|---------------|------------|---------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <u>LINE 3</u> | 22CV398140 | Citibank N.A. vs Gia Dang | <b>Claim of Exemption.</b><br><br>Debtor's claim of exemption is GRANTED in part and DENIED in part. The Court orders that \$180 per pay period be garnished.<br><br>The Court will prepare the formal order. |
|---------------|------------|---------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

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**LAW AND MOTION TENTATIVE RULINGS**

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| <u>LINE 4</u> | 23CV426400 | Vinay Karna vs Dinesh Parapperi et al | <p><b>Motion to Withdraw.</b></p> <p>Motion of attorney Carney R. Shegerian to be relieved as counsel for Plaintiff Vinay Karna. Notice of hearing was given to Plaintiff Vinay Karna via mail and electronic service on June 21, 2024 at the last known addresses. The proof of service was also filed on June 21, 2024. Moving party declared that an irretrievable breakdown in the attorney-client relationship has occurred. This matter was ordered to arbitration and this action has been stayed (May 24, 2024 order). Plaintiff Karna filed an opposition, which the Court has considered. Moving party has met the burden of proof and it does appear that there has been a breakdown of the attorney/client relationship. Good cause appearing, the Motion is GRANTED. The Order will take effect upon the filing and service of the executed order of this Court.</p> <p>Moving party to prepare the formal order after hearing, to include the future calendared hearing re: Dismissal set for May 29, 2025 at 10a.m. in Department 18b (*please check docket for exact courtroom at the time of the hearing.) The further case management conference currently set for October 8, 2024 at 10a.m. is VACATED.</p> |
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| <u>LINE 5</u> | 23CV421697 | James West vs Gregg Bunker et al | <p><b>Motion for Sanctions.</b></p> <p>Plaintiff James West's motion pursuant to California Code of Procedure § 575.2 and Cal. Rules of Ct. Rule 2.30 for Violation of Local Court Rules 4 and 11, California Rule of Court 3.724, 3.725 meet and confer for Case Management Conference and “[i]mproper Answer submitted by non-attorney Gregg Bunker for the corporate entity Silicon Valley Property Management Group Corporation on the grounds that a California corporation must be represented by an attorney at law and Gregg Bunker is not an attorney at law”. Defendants' counsel was recently retained and filed an interim opposition. After full review and consideration, the motion is DENIED.</p> <p>1. The parties were already ordered to meet and confer pursuant to Rule of Court, Rule 3.724 and are ordered to do so by the next hearing: a further case management conference set for September 3, 2024 at 10 a.m. in Department 18b. The parties are also ordered to timely file updated CMC statements prior to that hearing.</p> <p>2. Corporate defendant Silicon Valley Property Management Group Corporation is now represented by counsel, thus the motion as to this corporation's necessity to be represented by counsel is moot.</p> <p>3. The request to enter a default against Silicon Valley Property Management Group Corporation was not properly brought before this Court; further no good cause shown for Plaintiff's request that this defendant be limited to filing an answer.</p> <p>Defendants to prepare the formal order.</p> |
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**LAW AND MOTION TENTATIVE RULINGS**

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|-------------------------------|------------|----------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------|
| <a href="#"><u>LINE 6</u></a> | 23CV427952 | Anil Godbole vs Satish Soman                       | <b>Motion to Compel (Special Interrogatories).</b><br><br>Scroll down to <a href="#"><u>Lines 6 and 7</u></a> for Tentative Ruling.            |
| <a href="#"><u>LINE 7</u></a> | 23CV427952 | Anil Godbole vs Satish Soman                       | <b>Motion: Compel (Requests for Production of Documents).</b><br><br>Scroll down to <a href="#"><u>Lines 6 and 7</u></a> for Tentative Ruling. |
| <a href="#"><u>LINE 8</u></a> | 21CV382422 | Elizabeth Brierley vs Costco Wholesale Corporation | <b>Motion: Summary Judgment/Adjudication.</b><br><br>Scroll down to <a href="#"><u>Line 8</u></a> for Tentative Ruling.                        |

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**LAW AND MOTION TENTATIVE RULINGS**

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| <a href="#"><u>LINE 9</u></a> | 24CV430363 | Marie Arnold vs California Public Employee Retirement System (CALPERS) | <b>Demurrer.</b><br><br>Demurrer to all causes of action in the complaint, by Defendant California Public Employees' Retirement System filed on July 3, 2024. Notice is proper (proof of service on July 3, 2024, filed on the same day for service on Plaintiff Marie Encar Arnold at the address Plaintiff used on her recent filings), and the demurrer is unopposed. The parties met and conferred regarding the demurrer, without resolution. No opposition to this demurrer was filed by Plaintiff. A failure to oppose a motion may be deemed a consent to the granting of the motion. CRC Rule 8.54c. Failure to file an opposition leads to the presumption that Plaintiff has no meritorious arguments. ( <i>Laguna Auto Body v. Farmers Ins. Exchange</i> (1991) 231 Cal. App. 3d 481, 489.) There is also good cause to grant the demurrer. Upon review of the moving papers, the Court concludes that Defendant has met its burden and good cause appearing, the demurrer is SUSTAINED, with 20 days' leave to amend.<br><br>Moving party to prepare the formal order. |
|-------------------------------|------------|------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

## **Calendar Line 1**

**Case Name:** *Amir Weiner et al. v. Leland Stanford Junior University et al.*  
**Case No.:** 21CV391881

Before the Court is defendant Matthew Ming Carpenter’s motion for judgment on the pleadings to plaintiffs’ second amended complaint. Pursuant to California Rule of Court 3.1308, the court issues its tentative ruling as follows.

### **I. Background**

This case stems from the wrongful death of a Stanford University student. Plaintiffs Amir Weiner, father of decedent Eitan Michael Weiner (“EMW”), Julia Erwin-Weiner, mother of EMW, and Ya’el Weiner, sister of EMW (collectively “Plaintiffs”), bring this action against defendants Leland Stanford Junior University (“Stanford”); Theta Delta Chi Founders’ Corporation (“TDX Corp.”); Matthew Ming Carpenter (“Carpenter”); Cole Weston Dill-De Sa (“Dill-De Sa”); William Corbitt Mitchell (“Mitchell”); and Muhammad Yusuf Khattak (“Khattak”).

On January 17, 2020, EMW died of fentanyl toxicity and blunt force trauma to his head. (SAC, ¶ 48.) Hours after his death, a janitor discovered EMW’s body in a bathroom at the Theta Delta Chi (“TDX”) fraternity house. (SAC, ¶ 49.) The pills found at the scene matched the description of pills tied to several deaths involving Percocet laced with fentanyl. (SAC, ¶ 52.) After discovering a controlled substance inside the TDX house, neither Stanford nor TDX took any action. (SAC, ¶ 53.) However, on March 22, 2021, Stanford announced that TDX would lose university recognition for six years. (SAC, ¶ 55.)

### **Allegations Regarding Carpenter**

EMW and Carpenter were lifelong friends and grew up together. (SAC, ¶ 67.) On December 1, 2020, Carpenter provided law enforcement officers with a voluntary statement detailing his role in procuring controlled substances and facilitating their entry into the Stanford campus. (SAC, ¶ 60.) Carpenter admitted to selling substances such as oxycontin and Percocet to students, including EMW and his roommates. (SAC, ¶ 62.) Carpenter admitted to law enforcement that he was concerned about the source of the substances he was obtaining.

(SAC, ¶ 70.) Carpenter, however, did not warn EMW about his concerns. (SAC, ¶ 71.) As a result of fentanyl in the Percocet sold to EMW, he suffered an overdose and died. (SAC, ¶ 75.)

On April 12, 2024, Plaintiffs filed their SAC, asserting the following causes of action:

- 1) Wrongful Death Sounding in Negligence [against Stanford];
- 2) Wrongful Death Sounding in Negligence [against TDX Corp.];
- 3) Wrongful Death Sounding in Negligence [against Carpenter, Dill-De Sa, Khattak, and Mitchell]; and
- 4) California Drug Dealer Liability Act [against Carpenter, Dill-De Sa, Khattak, and Mitchell].

On June 24, 2024, Carpenter filed a motion for judgment on the pleading (“JOP” or “motion”) as to the fourth cause of action.<sup>1</sup> Plaintiffs oppose the motion and Carpenter filed a reply.

## **II. Procedural Matters**

As an initial matter, the Court will address Plaintiffs’ untimely opposition and Carpenter’s subsequent motion to strike Plaintiffs’ opposition.

Code of Civil Procedure section 1005, subdivision (b), requires all opposing papers to be filed and served at least nine court days before the hearing. No paper may be rejected for filing on the ground that it was untimely submitted for filing. (Cal. Rules of Court, Rule 3.1300, subd. (d).) If the Court, in its discretion, refuses to consider a late filed paper, the minutes or order must indicate. (*Ibid.*)

Here, the instant motion was filed on June 24, 2024. The hearing on the motion is scheduled for August 8, 2024. Thus, Plaintiffs were required to file an opposition no later than July 26, 2024 to be considered timely. Plaintiffs however filed their opposition on July 29, 2024, one court day late. Carpenter has managed to file a six-page motion to strike the opposition and a ten-page reply to the opposition. Thus, the Court finds that no prejudice will

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<sup>1</sup> The Court (Hon. Manoukian) previously overruled Carpenter’s demurrer to the fourth cause of action in the initial complaint on the ground it failed to state facts sufficient to constitute a cause of action. Carpenter argued the fourth cause of action was time-barred. The Court determined that because Carpenter was sentenced on May 6, 2022 for violations of Health & Safety Code section 11352, subdivision (a), the statute of limitations had not expired. (See Court’s November 22, 2022 Order, pp. 7-8.)

result in considering the merits of the opposition. Accordingly, Carpenter's motion to strike is DENIED. The Court will exercise its discretion and address the merits of the JOP and opposition. (See, e.g., *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806 [courts have a policy favoring disposition of cases on the merits rather than on procedural grounds].) Plaintiffs' counsel is reminded to comply with all court rules and procedures with respect to future filings.

### **III. Legal Standard**

A complaint must contain substantive factual allegations sufficiently apprising the defendant of the issues to be addressed. (See *Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 139, fn. 2.) A motion for judgment on the pleadings tests the legal sufficiency of factual allegations in the complaint. (*Lee v. Kotyluk* (2021) 59 Cal.App.5th 719, 728.) Like a demurrer, a motion for judgment on the pleadings challenges only defects on the face of the complaint. (*Ibid.*) The grounds for the motion must appear on the face of the complaint or from a matter of which the court may take judicial notice. (*Ibid.*) "Presentation of extrinsic evidence is therefore not proper on a motion for judgment on the pleadings." (*Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 999.) On such motions, "[t]he court accepts as true all material factual allegations, giving them a liberal construction, but it does not consider conclusions of fact or law, opinions, speculation, or allegations contrary to law or judicially noticed facts." (*Shea Homes Limited Partnership v. County of Alameda* (2003) 110 Cal.App.4th 1246, 1254.)

### **IV. Motion for Judgment on the Pleadings**

Carpenter moves for judgment on the pleadings as to the fourth cause of action for violation of the California Drug Dealer Liability Act ("DDLA"). Specifically, Carpenter argues that the two distinct theories of liability available under the DDLA are unconstitutional.

#### **A. DDLA Generally**

Plaintiffs' fourth cause of action asserts a claim under the DDLA, codified at Health & Safety Code sections 11700, et seq.

The purpose of this division is to provide a civil remedy for damages to persons in a community injured as a result of the use of an illegal controlled substance.

These persons include parents, employers, insurers, governmental entities, and others who pay for drug treatment or employee assistance programs, as well as infants injured as a result of exposure to controlled substances in utero (“drug babies”). This division will enable them to recover damages from those persons in the community who have joined the marketing of illegal controlled substances. A further purpose of this division is to shift, to the extent possible, the cost of the damage caused by the existence of the market for illegal controlled substances in a community to those who illegally profit from that market. The further purpose of this division is to establish the prospect of substantial monetary loss as a deterrent to those who have not yet entered into the distribution market for illegal controlled substances. The further purpose is to establish an incentive for users of illegal controlled substances to identify and seek payment for their own treatment from those dealers who have sold illegal controlled substances to the user in the past.

(Health & Saf. Code, § 11701.)

The Legislature finds and declares all of the following:

- (a) Although the criminal justice system is an important weapon against the marketing of illegal controlled substances, the civil justice system can and must also be used. The civil justice system can provide an avenue of compensation for those who have suffered harm as a result of the marketing and distribution of illegal controlled substances. The persons who have joined the marketing of illegal controlled substances should bear the cost of the harm caused by that market in the community.
- (b) The threat of liability under this division serves as an additional deterrent to a recognizable segment of the network for illegal controlled substances. A person who has assets unrelated to the sale of illegal controlled substances, who markets illegal controlled substances at the workplace, who encourages friends to become users, among others, is likely to decide that the added cost of entering the market is not worth the benefit. This is particularly true for a first-

time, casual dealer who has not yet made substantial profits. This division provides a mechanism for the cost of the injury caused by illegal drug use to be borne by those who benefit from illegal drug dealing.

(c) This division imposes liability against all participants in the marketing of illegal controlled substances, including small dealers, particularly those in the workplace, who are not usually the focus of criminal investigations. The small dealers increase the number of users and are the people who become large dealers. These small dealers are most likely to be deterred by the threat of liability.

(Health & Saf. Code, § 11702.)

“A person who knowingly participates in the marketing of illegal controlled substances within this state is liable for civil damages as provided in this division. A person may recover damages under this division for injury resulting from an individual’s use of an illegal controlled substance.” (Health & Saf. Code, § 11704, subd. (a).)

Section 11705 indicates who has standing to bring a claim under the DDLA and who they may seek damages from. Section 11705, subdivisions (b)(1) and (b)(2) provide:

(b) A person entitled to bring an action under this section may seek damages from one or more of the following:

(1) A person who sold, administered, or furnished an illegal controlled substance to the individual user of the illegal controlled substance.

(2) A person who knowingly participated in the marketing of illegal controlled substances, if all of the following apply:

(A) The place of illegal activity by the individual user of an illegal controlled substance is within the city, city and county, or unincorporated area of the county in which the defendant’s place of participation is situated.

(B) The defendant’s participation in the marketing of illegal controlled substances was connected with the same type of specified illegal controlled substance used by the individual user of an illegal controlled substance, and the

defendant has been convicted of an offense for that type of specified illegal controlled substance.

(C) The defendant participated in the marketing of illegal controlled substances at any time during the period the individual user of an illegal controlled substance illegally used the controlled substance.

(D) The underlying offense for the conviction of the specified illegal controlled substance occurred in the same county as the individual user's place of use.

(Health & Saf. Code, § 11705, subds. (b)(1), (2).)

### **B. Constitutional Challenges Generally**

Carpenter contends that portions of Health & Safety Code section 11075, subdivision (b) violate substantive due process under the Fifth and Fourteenth Amendments of the United States Constitution, as well as Article I, Section 7, of the California Constitution.

“The interpretation of a statute and the determination of its constitutionality are questions of law.” (*People v. Alexander* (2023) 91 Cal.App.5th 469, 474 [internal quotations omitted].)

In analyzing a facial challenge to the constitutionality of a statute, a court considers “only the text of the measure itself, not its application to the particular circumstances of an individual.” (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 108.) “On a facial challenge, [a court] will not invalidate a statute unless it ‘poses a present total and fatal conflict with applicable constitutional prohibitions.’” (*California School Boards Assn. v. State of California* (2019) 8 Cal.5th 713, 723-724.) Defendant “must show that [the statute] will create due process problems in at least the generality or vast majority of cases.” (*Today’s Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 218 [internal citations and quotations omitted].)

### **C. Constitutionality of Health & Safety Code Section 11705, subdivision (b)(2)**

Carpenter argues that Section 11705, subdivision (b)(2), referred to as Market Participant Liability, is unconstitutional because it is devoid of any connection between the defendant and the individual drug user, thus eliminating the essential element of tort liability:

causation. (JOP, p. 11:6-10, citing *Novak v. Continental Tire North America* (2018) 22 Cal.App.5th 189, 197.) Carpenter acknowledges that “no California cases analyzing the constitutionality of the DDLA provisions at issue” currently exist. (*Id.* at p. 10:10-11.) He argues, however, that other states have addressed the constitutionality of similar statutes and determined they are unconstitutional. (*Id.* at p. 10:11-13.) In particular, Carpenter relies on an Oklahoma Court of Civil Appeals case and an Illinois Supreme Court case. (*Id.* at p. 10:16-17, 19, citing *Steed v. Bain-Holloway* (2015) 356 P.3d 62, 65 (*Steed*); *Wingert v. Hradisky* (2019) 131 N.E.3d 535 (*Wingert*).)

As Plaintiffs note in opposition, this Court is not bound by the decisions of out-of-state cases, although the reasoning of these cases may be persuasive. (See Opposition, p. 7:18; *Global Modular, Inc. v. Kadena Pacific, Inc.* (2017) 15 Cal.App.5th 127, 136; *Estate of O'Connor* (2018) 26 Cal.App.5th 871, 887.) With that said, the Court will address *Steed* and *Wingert* as follows.

First, in *Steed*, the appellate court acknowledged that while Oklahoma’s version of the DDLA was based on the Model Drug Dealer Liability Act, there are “no published cases concerning the Act. At least sixteen other states have adopted some form of the model act, yet no state has yet published an opinion addressing its constitutionality.” (*Steed, supra*, 356 P.3d at p. 65, fn. 1.) The Oklahoma Court explained that “[i]n determining whether the governmental action violates the substantive component of the due process clause, a balance must be struck between the right protected and the demands of society.” (*Id.* at p. 67.) The Oklahoma case itself acknowledges that the California Supreme Court recognizes a theory of market share liability, while the Oklahoma Supreme Court has rejected that theory. (*Id.* at p. 67, citing *Sindell v. Abbott Laboratories* (1980) 26 Cal.3d 588 (*Sindell*)).

In *Sindell*, the California Supreme Court reversed the dismissal of two class actions against defendant manufacturers of diethylstilbestrol (“DES”) and adopted the theory of market share liability, holding that if defendants could not prove they did not make the DES at issue, liability for damages would be apportioned based on their market share. (*Sindell, supra*, 26

Cal.3d at p. 593.)<sup>2</sup> The Supreme Court began their discussion “with the proposition that, as a general rule, the imposition of liability depends upon a showing by the plaintiff that his or her injuries were caused by the act of the defendant or by an instrumentality under the defendant’s control. The rule applies whether the injury resulted from an accidental event or from use of a defective product. (*Id.* at pp. 597-598 [internal citations and quotations omitted].) The *Sindell* Court explained, however, that there are exceptions to this rule. (*Id.* at p. 598.) The Court went on to address four theories and determined it would rely on the fourth approach: market share liability. “Under this approach, each manufacturer’s liability would approximate its responsibility for the injuries caused by its own products. Some minor discrepancy in the correlation between market share and liability is inevitable; therefore, a defendant may be held liable for a somewhat different percentage of the damage than its share of the appropriate market would justify.” (*Id.* at pp. 612-613 [stating also “We are not unmindful of the practical problems involved in defining the market and determining market share, but these are largely matters of proof which properly cannot be determined at the pleading stage of these proceedings.”].)

In *Steed*, the Oklahoma court declined to adopt market share liability “because there was not a sufficient link between the claimed harm and the alleged wrongful conduct.” (*Steed, supra*, 356 P.3d at p. 67.) However, the *Steed* court explicitly states that California *does* follow market share liability. Thus, the Court does not find *Steed* persuasive because it is incompatible with California holdings and its adoption of market share liability. The same is true of *Wingert*, which, as Carpenter notes in his motion, also declined to follow market share liability. (See JOP, p. 14: 8-9.) As such, the Court does not find *Steed* or *Wingert* compelling.

Carpenter does not present any additional California authority to support his assertion that section 11705, subdivision (b)(2) is unconstitutional. Moreover, he does not address

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<sup>2</sup> The plaintiff in *Sindell* was injured *in utero* by DES. The plaintiff’s mother had taken DES during pregnancy and the Court acknowledged it would be impossible for her to identify who manufactured the DES she ingested. The Court “nevertheless permitted an action, provided that a substantial percentage of DES manufacturers were joined, and that the liability of any one defendant would be limited to the same proportion that their production of the drug bore to the entire market.” (*Steed, supra*, 356 P.3d at p. 67.)

*Sindell* at all. Accordingly, the Court does not find persuasive Carpenter's argument and declines to grant the motion to the fourth cause of action on this basis.

#### **D. Constitutionality of Health & Safety Code Section 11705, subdivision (b)(1)**

Carpenter next argues that section 11705, subdivision (b)(1), referred to as the supplier liability provision, is also unconstitutional because it imposes liability without any actual connection to the injury alleged in the DDLA action. (JOP, pp. 15:28-16:3.) To support his argument, Carpenter relies primarily on *Wingert*. While this Court declines to rely on *Wingert*, the Illinois Supreme Court nevertheless specifically held that "nothing about [subdivision (b)(1)] is arbitrary, and nothing about it allows a plaintiff to shop from a pool of strangers and choose whom from among them to hold responsible for the claimed injuries." (*Wingert, supra*, 131 N.E.3d at p. 547 [stating also "Section 25(b)(1) is constitutional as written"].) While the language of the statutes in California and Illinois differ slightly, the Court does not find Carpenter's arguments regarding their differences to be meritorious. Furthermore, Carpenter's assertion that under the California statute it is "immaterial whether the user 'actually used' the illegal drug supplied by the defendant" is inaccurate. The language of subdivision (b)(1) specifically states that a plaintiff may seek damages from a person who sold, administered, or furnished an illegal controlled substance *to the individual user of the illegal controlled substance.*" (Health & Saf. Code, § 11705, subd. (b)(1) [emphasis added].) Thus, the individual user must have used the illegal controlled substance. In any event, the Court declines to rely on *Wingert* and declines to compare an Illinois statute with California's DDLA. Carpenter asserts no further California authority to support his argument and the Court therefore will not grant the motion on this basis.

Based on the foregoing, the motion for judgment on the pleadings as to the fourth cause of action on the ground that Health & Safety Code Section 11705, subdivisions (b)(1) and (b)(2) are unconstitutional is DENIED. Carpenter's motion to strike the opposition is DENIED.

The Court will prepare the final order.

## **Calendar Lines 6 and 7**

**Case Name:** *Anil Godbole vs Satish Soman*

**Case No.:** 23CV427952

Before the Court are two discovery motions by Defendant Satish Soman against Plaintiff Anil Godbole: (1) a motion to compel further responses to special interrogatories and a request for sanctions of \$3,630 against Plaintiff and his attorney; and (2) a motion to compel further responses to requests for production of documents and a request for sanctions of \$6,150 against Plaintiff and his attorney.

### **1. Motion to Compel – Special Interrogatories**

The discovery at issue was served prior to the filing of the First Amended Complaint and prior to the July 30 ruling on Defendant's demurrer, which was overruled in part and sustained in part; Plaintiff was granted 10 days leave to amend. The special interrogatories were initially served almost six months ago on February 13, 2024. After Defendant's follow up and being advised that the discovery was never received, Defendant re-served the discovery on March 20, 2024. Responses were then due on April 18, 2024, by agreement between the parties. However, no responses were received by this date. Plaintiff argues that as a result, all objections have been waived. (Code Civ. Proc., §2030.290). Responses were eventually provided on April 26, 2024; the answers included a blanket general objection. There were meet and confer efforts and further responses were promised by June 7, 2024. A yet further extension requested but denied by Defendant. It does not appear that any further responses were served. By this motion to compel Defendant seeks further responses to eleven interrogatories -- Nos. 1, 8, 10, 11, 13, 17, 20, 28, 33, 24 and 35, arguing that the responses are all not code compliant.

No opposition to this motion was filed by Plaintiff. A failure to oppose a motion may be deemed a consent to the granting of the motion. CRC Rule 8.54c. Failure to oppose a motion leads to the presumption that Plaintiff has no meritorious arguments. (*Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal. App. 3d 481, 489.) There is also good cause to grant this motion. Plaintiff should have served a response within 30 days of service of the special interrogatories (Code Civ. Proc., §2030.260 (a)). As the responses were not timely served all objections have been waived. (Code Civ. Proc., §2030.290). Further, the responses are not code complaint. Moving party has met his burden of proof.

Good cause appearing, the motion to compel is GRANTED as follows:

### **Fact Interrogatories (1, 10 and 28):**

1. Plaintiff shall respond to this interrogatory if he is still making this claim, even though the interrogatory refers to the original complaint.
10. Plaintiff shall respond to this interrogatory; the current response is not responsive.

**28.** This interrogatory asks if Plaintiff advertised *to anyone else*. Plaintiff only responds for himself. No facts are stated. Plaintiff shall respond with all facts.

**Document Interrogatories (8, 11, 17, 20 and 34):**

**8 and 11.** Plaintiff's responses does not respond to the interrogatory posed; further responses shall be provided.

**17.** Plaintiff responds that he received "several" documents, some, but not all are identified. Plaintiff shall further respond to this interrogatory.

**20 and 34.** Plaintiff shall respond to these interrogatories if he is still making these claims, even though the interrogatory refers to the original complaint. Further, Plaintiff should specifically identify what "documents" he is referring to.

**Interrogatories 13, 33 and 35:**

**13.** This interrogatory asked Plaintiff to state the *date* when he "first realized that Silicon Sage Builders LLC was not a profitable investment". Plaintiff's response of "fall of 2020" is not a date. Plaintiff should provide a date or a code compliant response as to why an exact date cannot be provided.

**33.** This interrogatory sought the reasons for Plaintiff's \$700,000 compensatory damages claim. Plaintiff's response objected based on the attorney work product doctrine. As Plaintiff's responses were served late, all objections have been waived. Plaintiff shall respond to this interrogatory if he is still making this claim.

**35.** This interrogatory asked Plaintiff to identify the contract or statute that allows him to recover attorney's fees. Plaintiff shall respond to this interrogatory. His current response is vague and not straightforward.

Sanctions of \$3,000 are awarded to Defendants. (Code Civ. Proc., §§2030.290(c) *et seq.*

Plaintiff shall serve verified, code-compliant responses to the aforementioned special interrogatories and shall pay the sanctions awarded – all within 10 days of service of this order.

**2. Motion to Compel -- Requests for Production of Documents**

**Requests for Production Nos. 1-2, 4-19, 21, 23, 28, and 30-39**

In response to Requests for Production Nos. 1-2, 4-19, 21, 23, 28, and 30-39, Plaintiff cuts-and-pastes the following answer: "Plaintiff is not in possession of the documents responsive to this request at this time. However, Plaintiff reserves the right to supplement this request at a later time." These responses are not code-compliant: they do not comply with Plaintiff's obligations to respond to each request with: (1) a statement of compliance; (2) a

representation the party lacks the ability to comply; or (3) an objection to the particular request. (Code Civ. Proc., § 2031.210(a).) Further, Plaintiff has not affirmed that he has made a “diligent search and a reasonable inquiry” to comply with the request. (Code Civ. Proc., § 2031.230.) He also did not specify, if applicable, whether the inability to comply is because the document “has never existed, has been destroyed, has been lost, misplaced, or stolen, or has never been, or is no longer, in the possession, custody, or control” of that party. (*Ibid.*) Plaintiff also failed to state the name and address of any person or organization that may have “possession, custody, or control” of that item. (*Ibid.*) As such the motion to compel with respect to each of these requests is GRANTED.

### **Requests For Production Nos. 3, 20, 22, 24-27, and 29**

Defendant references documents in his Complaint and in his responses to the Special Interrogatories, Set One, but only produced *two* documents: an email designated “Exhibit 1” and a payment of \$500,000 by Plaintiff and a document designated as “Exhibit 2.” Defendant identifies these 2 “exhibits” in response to these requests as follows: “Plaintiff produces [an email [or] a payment by Plaintiff,] responsive to this request, attached hereto as ‘Exhibit [1 or 2].’” This response is not code-compliant. The motion to compel with respect to these document requests is GRANTED. Plaintiff shall serve a code complaint response to each of these requests stating: (1) a statement of compliance; (2) a representation the party lacks the ability to comply; or (3) an objection to the particular RFP. (Code Civ. Proc., § 2031.210(a).)

### **All RFPs (Numbers 1-39)**

None of the responses to these requests are code compliant for the reasons stated above. As such, Plaintiff shall provide code compliant responses to these requests.

Sanctions of \$5,000 are awarded to Defendants. (Code Civ. Proc., §§2030.290(c) *et seq.*

Plaintiff shall serve verified, code-compliant responses to the aforementioned document request and shall pay the sanctions awarded – all within 10 days of service of this order.

Defendant shall prepare a formal order.

## **Calendar Line 8**

**Case Name:** *Elizabeth Brierley v. Costco Wholesale Corporation*

**Case No.:** 21CV382422

Before the court is cross-defendant/cross-complainant Apogee Delivery and Installation, Inc.'s motion for summary adjudication. Pursuant to California Rule of Court 3.1308, the court issues its tentative ruling as follows:

### **I. Introduction**

According to allegations of the operative First Amended Complaint ("FAC"), plaintiff Elizabeth Brierley ("Plaintiff") purchased a refrigerator from defendant Costco Wholesale Corporation ("Costco") on or about May 1, 2018. (FAC, ¶ BC-1, p. 3 of 28.) Acting through its agents, Costco delivered and installed the refrigerator incorrectly by failing to attach the water line, resulting in damage to Plaintiff's home. (*Id.* at ¶ BC-2, p. 3 of 28.) On May 25, 2021, Plaintiff initiated this action by filing a form complaint against Costco, setting forth causes of action for: (1) breach of contract; and (2) negligence.

On March 16, 2022, Costco filed a cross-complaint against Apogee Delivery and Installation, Inc. ("Apogee") and Mora Trucking, Inc. ("Mora") ("Costco XC"), setting forth causes of action for: (1) indemnification; and (2) apportionment of fault.

On April 3, 2023, Plaintiff filed the FAC against Costco, alleging causes of action for: (1) breach of contract; (2) breach of contract (covenant of good faith and fair dealing); (3) negligence; (4) violation of the Consumer Legal Remedies Act (Civ. Code §§ 1770, 1780); (5) violation of Business and Professions Code section 17200, *et seq.*; (6) violation of Business and Professions Code section 17500, *et seq.*; (7) negligent misrepresentation; and (8) fraud—intentional misrepresentation.

On October 20, 2023, Apogee filed a cross-complaint against Mora ("Apogee XC"), setting forth causes of action for: (1) breach of written contract; (2) express contractual indemnity; (3) implied contractual indemnity; (4) contribution; (5) declaratory relief – duty to indemnify; (6) declaratory relief – duty to defend. According to Apogee's allegations, Mora contracted to provide delivery services to Apogee. (Apogee XC, ¶ 8, Ex. C.) Apogee alleges that Mora has a present duty to defend Apogee. (*Id.* at ¶ 39.) Apogee further alleges that Mora is obligated to indemnify Apogee from all liability, loss, or damage in this action relating to matter embraced by the indemnity. (*Id.* ¶ 34.) Mora filed an answer to the Apogee XC.

On May 23, 2024, Apogee filed the motion now before the court, a motion for summary adjudication of Mora's alleged duties to defend and indemnify Apogee. Mora filed opposition papers, and Apogee filed a reply.

### **II. Evidentiary Objections**

In connection with its opposition papers, Mora submits objections (Nos. 1-7) to evidence offered by Apogee in support of its motion for summary adjudication. More specifically, Mora objects to portions of the Declaration of Andrew Perez (including its Exhibit F) (Nos. 1-5), and to portions of the Declaration of Steve Hoswell (Nos. 6-7). The court declines to rule on the objections. (See Code Civ. Proc., 437c, subd. (q) ["In granting or denying motion for summary judgment or summary adjudication, the court need only rule on those objections to evidence that it deems material to its disposition of the motion."].)

### **III. Legal Standard**

A motion for summary judgment “shall be granted if all the papers submitted show that there is no triable issue of material fact and that the moving party is entitled to a judgment as a matter of law.” (Code Civ. Proc., § 437c, subd. (c).) The “party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact[.]” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) “A prima facie showing is one that is sufficient to support the position of the party in question.” (*Id.* at p. 851.)

If the moving party makes the necessary initial showing, the burden of production shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. (*Aguilar, supra*, 25 Cal.4th at p. 850.) “There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Ibid.*) “[I]f the court concludes that the [opposing party’s] evidence or inferences raise a triable issue of material fact, it must conclude its consideration and deny the [moving party’s] motion.” (*Id.* at p. 856.)

Throughout the process, the trial court “must consider all of the evidence and all of the inferences reasonably drawn therefrom[.]” (*Aguilar, supra*, 25 Cal.4th at p. 844 [internal quotations omitted].) The moving party’s evidence is strictly construed, while the opposing party’s evidence is liberally construed. (*Id.* at p. 843.)

As relevant here, “a motion for summary adjudication may be made … as an alternative to a motion for summary judgment and shall proceed in all procedural respects as a motion for summary judgment.” (Code Civ. Proc., § 437c, subd. (f)(2).) “A party may seek summary adjudication on whether the cause of action, affirmative defense or punitive damages claim has merit or whether a defendant owed a duty to a plaintiff.” (*California Bank & Trust v. Lawlor* (2013) 222 Cal.App.4th 625, 630; Code Civ. Proc., § 437c, subd. (f)(1).)

### **IV. Analysis**

Apogee moves for summary adjudication as to whether Mora has an immediate duty to defend Apogee against Plaintiff and Costco’s claims in this action and as to whether Mora owes Apogee a duty to indemnify for any and all liability and loss arising from Mora’s services. (Notice of Motion and Motion, p. 2:2-13 (“Notice”).)

A party may seek summary adjudication of “one or more issues of duty.” (Code Civ. Proc., § 437c, subd. (f)(1).) “A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty.” (*Ibid.*) “[T]he existence and scope of a duty is a question of law for the court. [Citation.]” (*Linden Partners v. Wilshire Linden Assocs.* (1998) 62 Cal.App.4th 508, 518 (*Linden*); see also *Merrill v. Navegar* (2001) 26 Cal.4th 465, 477 [same].) “[I]f, under the facts and circumstances of a given case, a court finds it appropriate to determine the existence or nonexistence of a duty in the nature of a contractual obligation, it may properly do so by ruling on that issue presented by a motion for summary adjudication.” (*Linden, supra*, 62 Cal.App.4th at p. 519.)

Civil Code section 2778 (“Section 2778”) sets forth rules for interpreting an agreement of indemnity. (*Crawford v. Weather Shield Mfg., Inc.* (2008) 44 Cal.4th 541, 553 (*Crawford*) [Section 2778 sets forth general rules for the interpretation of indemnity contracts, unless a contrary intention appears.])

As relevant here, Section 2778 provides:

1. Upon an indemnity against liability, expressly, or in other equivalent terms, the person indemnified is entitled to recover upon becoming liable; [¶] 2. Upon an indemnity against claims, or demands, or damages, or costs, expressly, or in other equivalent terms, the person indemnified is not entitled to recover without payment thereof; [¶] 3. An indemnity against claims, or demands, or liability, expressly, or in other equivalent terms, embraces the costs of defense against such claims, demands, or liability incurred in good faith, and in the exercise of reasonable discretion; [¶] 4. The person indemnifying is bound, on request of the person indemnified, to defend actions or proceedings brought against the latter in respect to the matters embraced by the indemnity, but the person indemnified has the right to conduct such defenses, if he chooses to do so; [¶]
5. If, after request, the person indemnifying neglects to defend the person indemnified, a recovery against the latter suffered by him in good faith, is conclusive in his favor against the former; [¶] 6. If the person indemnifying, whether he is a principal or a surety in the agreement, has not reasonable notice of the action or proceeding against the person indemnified, or is not allowed to control its defense, judgment against the latter is only presumptive evidence against the former....

(Civ. Code, § 2778; see also *City of Watsonville v. Corrigan* (2007) 149 Cal.App.4th 1542, 1547.)

In *Crawford*, the California Supreme Court explained that an indemnitor's duty to defend is distinct from its duty to indemnify. (*Crawford, supra*, 44 Cal.4th at pp. 547, 557-558, 564.) “[S]ubdivision 4 of section 2778, by specifying an indemnitor's duty to defend the indemnitee upon the latter's request, places in every indemnity contract, unless the agreement provides otherwise, a duty to assume the indemnitee's defense, if tendered, against all claims embraced by the indemnity.” (*Crawford, supra*, 44 Cal.4th at p. 557, internal quotation marks omitted.) “But this duty is nonetheless distinct and separate from the contractual obligation to pay an indemnitee's defense costs, after the fact, as part of any indemnity owed under the agreement.” (*Id.* at p. 558, citing Section 2778, subd. (3).) “[T]he duty to defend upon the indemnitee's request, as set forth in subdivision 4 of section 2778, is distinct from, and broader than, the duty expressed in subdivision 3 of the statute to reimburse an indemnitee's defense costs as part of any indemnity otherwise owed.” (*Id.* at p. 564, emphasis original.)

Accordingly, the issue of Mora's duty to defend Apogee is distinct from its duty to indemnify Apogee.

#### A. Duty to Defend

Apogee moves for declaratory relief that “Mora Trucking has an immediate duty to defend Apogee against Plaintiff ELIZABETH BRIERLEY ('Plaintiff') and Defendant COSTCO WHOLESALE CORPORATION's ('Costco') claims in this action ....” (Notice, p. 2:7-9.) To meet its burden on this issue, Apogee must show: (i) the existence of a valid indemnification agreement; (ii) the indemnity embraces the action(s) in question; and (iii) the indemnitor denied the indemnitee's tender of defense. (See Section 2778, subd. (4); *Crawford, supra*, 44 Cal.4th at pp. 557-558.)

##### i. *Indemnification Agreement*

Apogee asserts that there is a valid indemnification agreement between itself and Mora. (Apogee's Memorandum of Points and Authorities ("Apogee's MPA"), pp. 5:15-17, 7:6-10.) Apogee provides the following evidence: On March 15, 2018, Apogee and Mora entered into a Contract Services Provider Agreement on March 15, 2018. (Apogee Separate Statement of Undisputed Material Facts ("Apogee UMF"), No. 1; Declaration of Steve Hoswell, Ex. A (the "Provider Agreement").

The Provider Agreement defines the "COMPANY" as Apogee and the "SERVICE PROVIDER" as Mora. (Provider Agreement, p. 1.) The agreement contains the following provisions, in pertinent part:

- A. SERVICE PROVIDER shall defend, indemnify, and hold COMPANY ... harmless from and against all loss, liability, damage, claims, fine, cost or expense including reasonable attorney's fees and court costs (collectively, the "Claims") arising out of or in any way related to the performance or breach of this Agreement by SERVICE PROVIDER ... including, but not limited to, Claims arising from: ... property damage ...; provided, however, that SERVICE PROVIDER's indemnification and hold harmless obligations under this paragraph will not apply to the extent Claims are caused by the COMPANY'S willful or negligent acts.
- B. To the fullest extent permitted by law, SERVICE PROVIDER will defend, indemnify, and hold COMPANY ... harmless from and against all Claims, proceedings, causes of action, and suits alleged to arise out of or relate to (i) any act whether real or perceived, omission, or breach of any provision of this Agreement by SERVICE PROVIDER ..., and (ii) any accident, injury, or damage whatsoever occurring, to the extent arising, in whole or part, out of negligent acts or omissions on the part of SERVICE PROVIDER ...; provided, however, that SERVICE PROVIDER's indemnification and hold harmless obligations under this paragraph will not apply to the extent Claims are cause by COMPANY's willful or negligent acts. The indemnification contained herein shall survive the Term or termination of this Agreement.
- C. In the event, such Claims, proceedings, causes of action and suits are alleged to arise from or relate to the joint and concurrent negligence of the parties, or the parties and a third party, the indemnity obligations of the parties under this Section of the Agreement for such Claims, proceedings, causes of action, and suits shall be borne by each party in proportion to its degree of fault. In no event, shall the party requesting indemnification under this Section be entitled to such indemnification, defense, or to be held harmless for the proportionate responsibility that its negligence bears for causing the accident, injury, or damage giving rise to the Claims, proceedings, cause of action, or suit for which indemnification is sought.
- D. .... Any indemnified party under this Section shall promptly tender the defense of any of any claim to the indemnifying party. ...
- E. The obligations of this Section of the Agreement shall survive termination of the Agreement.

(Provider Agreement, Section (II), subsection (9).)

Here, Mora agreed to indemnify Apogee to the fullest extent permitted by law against all claims arising out of its agreement to provide delivery services on behalf of Apogee. This evidence is sufficient to demonstrate that there is an indemnity agreement between Apogee and Mora. Moreover, Mora does not dispute that it entered into the Provider Agreement containing the above indemnification terms. (Mora’s Opposition to Separate Statement of Undisputed Material Facts (“Mora’s UMF”), No. 1.)

Therefore, Apogee has established the existence of a valid indemnity agreement between itself and Mora.

## ii. *Scope of Indemnity Agreement*

Apogee contends the claims against it in this action are embraced by the indemnity provisions of its agreement with Mora. (Apogee’s MPA, pp. 8:12-9:6.) As discussed above, Plaintiff filed the operative FAC against Costco, alleging negligence in the delivery of the refrigerator she purchased from Costco. Costco in turn filed its cross-complaint for indemnification and apportionment of fault against Apogee and Mora.

As Mora points out in opposition, Apogee’s motion references Plaintiff’s initial complaint rather than her FAC. Because both pleadings allege negligence against Costco with respect to the delivery of the refrigerator, the court does not consider this discrepancy to be material to the disposition of this motion.

Apogee presents the following evidence to connect the allegations of Plaintiff’s FAC and Costco’s XC to Mora’s agreement to indemnify Apogee: In 2015, Costco entered into an agreement with Innovel Solutions, Inc. (“Innovel”) for Innovel to furnish home delivery and installation service to Costco’s retail customers. (Apogee’s UMF, No. 2.) In 2020, Costco acquired Innovel, who is not a party to this action. (*Ibid.*) In 2016, Innovel entered into an agreement for Apogee to provide home delivery and installation services to Costco, and the agreement allowed Apogee to use subcontractors to furnish such services to Costco. (*Id.* at No. 3.)

Mora was one of the subcontractors Apogee used to fulfill delivery services of Costco merchandise to Costco customers. (Apogee’s UMF, No. 4.) The Provider Agreement between Apogee and Mora states the following: “By way of illustration, and not limitation, the Service to be provided by SERVICE PROVIDER will include pick-up, delivery and installation of Merchandise to, from and within residences and business locations provider and required of COMPANY’s customer ....” (Provider Agreement, Section (II), subsection (1)(A).)

According to Plaintiff’s FAC, Costco delivered and installed the subject refrigerator incorrectly, and in doing, Costco acted through its agents Innovel, Apogee, and Mora. (FAC, ¶ BC-2, p. 3 of 28.) The Costco XC seeks indemnity and apportionment of fault regarding the “[n]egligence and property damage as described in Plaintiff’s complaint.” (Costco XC, ¶¶ 7-8, 11.) Apogee confirmed that Mora in fact delivered the subject refrigerator to Plaintiff’s residence and installed the refrigerator on May 17, 2018, and Plaintiff alleges this installation was performed negligently and resulted in damage to her property. (Apogee’s UMF, No. 10.) Thus, Mora’s delivery and installation of the refrigerator at Plaintiff’s residence is the basis for Plaintiff’s claims against Costco and the basis for Costco’s claims against Apogee. (*Id.* at No. 11.)

In opposition, Mora contends that it is not under an immediate duty to defend Apogee. (Mora’s Opposition to Apogee’s Motion for Summary Adjudication (“Mora’s Opp.”), p. 7:10-11.) Mora argues that, by failing to set forth the primary allegations against it, Apogee has not

shown that Mora's duty to defend has been triggered. (*Id.* at p. 7:20-23.) Mora points to Plaintiff's discovery responses asserting Apogee's involvement in the incident. (Mora's Opp., p. 7:24-8:7; Mora's Additional Material Facts ("Mora's AMF"), Nos. 1-7.) In sum, Mora contends that it is not under an immediate duty to defend Apogee because Apogee is also being sued for its own negligence. (Mora's Opp., p. 8:8-9.)

Notably, although Mora cites *Crawford* elsewhere in its opposition, Mora's analysis of its duty to defend includes no reference to the California Supreme Court's detailed discussion of the issue in *Crawford*. (Mora's Opp., p. 9:4-20.) Mora instead cites *Dua v. Stillwater Ins. Co.* (2023) 91 Cal.App.5th 127, 138 (*Dua*) for the proposition that a contractual obligation to indemnify does not create the same duty to defend that exists in the insurance context. (*Id.* at p. 9:4-5.) But *Dua* is inapposite because it involves an insurer's duty to defend. (*Dua, supra*, 91 Cal.App.5th at p. 130-131.) Moreover, the appellate court in *Dua* concluded the trial court erred in granting summary judgment in favor of the insurer because there was evidence that the insurer breached its duty to defend. (*Id.* at p. 131.)

Mora further contends that the Apogee's own negligent acts are not "embraced by the indemnity," relying upon *City of Bell v. Superior Court* (2013) 220 Cal.App.4th 236, 249 (*City of Bell*). (Mora's Opp., p. 9:10-14.) *City of Bell* is readily distinguishable because it addresses whether a municipality owes a duty to defend its former employee against civil and criminal actions alleging the employee looted and misappropriated public funds, including against an action brought by the city itself. (*City of Bell, supra*, 220 Cal.App.4th at p. 241.) The appellate court concluded that the city owed no duty to defend its former employee because it was statutorily prohibited from doing so under the Government Claims Act (Government Code section 900, *et seq.*). (*Id.* at p. 253.) Such conditions are not present here. Furthermore, the discussion in *City of Bell* regarding the duty to defend tends to support Apogee's position rather than Mora's:

[S]ometimes it will not be clear whether an action brought against the indemnitee is within the scope of the indemnity until after the underlying action has been resolved. In those situations, the duty to defend nonetheless arises. That is to say, the law implies in every indemnity contract, unless the contract provides to the contrary, the duty to defend claims which, at the time of tender, *allege* facts that would give rise to a claim of indemnity. (*Crawford, supra*, 44 Cal.4th at p. 558.)

(*City of Bell*, 220 Cal.App.4th at p. 249, emphasis original.)

Mora contends that the terms of the Provider Agreement relieve it from the obligation of defending Apogee from the latter's own negligent acts. (Mora's Opp., p. 9:13-20.) Mora points to the following language of the Provider Agreement:

In the event, such Claims, proceedings, causes of action and suits are alleged to arise from or relate to the joint and concurrent negligence of the parties, or the parties and a third party, the indemnity obligations of the parties under this Section of the Agreement for such Claims, proceedings, causes of action, and suits shall be borne by each party in proportion to its degree of fault. In no event, shall the party requesting indemnification under this Section be entitled to such indemnification, defense, or to be held harmless for the proportionate responsibility that its negligence bears for causing the accident, injury, or damage giving rise to the Claims, proceedings, cause of action, or suit for which indemnification is sought.

(Provider Agreement, Section (II), subsection (9)(C).)

Mora apparently interprets this language to mean that it is under no obligation to defend Apogee until it is determined through litigation whether Apogee was itself negligent. (Mora's Opp., p. 9:18-20.) However, such an interpretation conflates Mora's duty to defend with its duty to indemnify (which may include some or all of Apogee's defense costs). (See *Crawford, supra*, 44 Cal.4th at p. 557-558 [the duty to defend is "distinct and separate from the contractual obligation to pay an indemnitee's defense costs, after the fact, as party of any indemnity owed under the agreement."])

As Apogee argues, Mora's duty to defend would be effectively meaningless if it were only triggered at the outcome of litigation, after Apogee's and Mora's comparative fault were determined. (Apogee's MPA, p. 13:13-17; see also *UDC-Universal Development, L.P. v. CH2M Hill* (2010) 181 Cal.App.4th 10, 21-22 [the duty to defend cannot be premised upon a finding of negligence because "requiring such a determination would render meaningless the defense obligation and contravene Civil Code section 2778 and the Supreme Court's admonition that a duty to defend arises of out an indemnity obligation as soon as the litigation commences and regardless of whether the indemnitor is ultimately found negligent."])

In sum, Apogee's evidence and argument sufficiently establishes that the claims against it are "matters embraced by the indemnity" promised by Mora in the Provider Agreement. (See Civ. Code, § 2778, subd. (4); see also *Crawford, supra*, 44 Cal.4th at p. 554.) Mora does not dispute that it delivered and installed the refrigerator at Plaintiff's property, and that such delivery "was within the scope of Mora Trucking's performance of the Provider Agreement." (Mora's UMF, No. 10.) The court is not persuaded by Mora's arguments that its duty to defend is not invoked because the pleadings allege negligence against Apogee.

Accordingly, Apogee has sufficiently established that the claims against it in this action are embraced by the indemnity, thus triggering Mora's duty to defend, if a proper tender was made.

### **iii. *Tender of Defense***

Apogee asserts it tendered its defense to Mora on several occasions, and that Mora has denied the tender. (Apogee's MPA, pp. 9:8-10:4.) Apogee offers evidence to support this assertion. (Apogee's UMF, Nos. 12-15.) Apogee states that it tendered the defense to Mora's insurance carrier, Colony Insurance Company ("Colony"), who issued a denial letter. (Apogee's UMF, No. 12.) Mora explains that Colony denied the coverage because, although Apogee was a "certificate holder" on the policy, the policy did not have "additional insured" provisions. (Mora's UMF, No. 12.) Nonetheless, Mora does not dispute that Apogee tendered its defense *to Mora*. (Mora's UMF, No. 15.) Likewise, as made evident by Mora's opposition to this motion, it is undisputed that Mora has not accepted Apogee's tender of its defense. (Mora's UMF, No. 16.) Therefore, Apogee has sufficiently established that it made a tender of its defense to Mora and that Mora denied the tender.

In conclusion, Apogee has met its initial burden with respect to the issue of Mora's duty to defend, and Mora has not met its burden in opposition. Accordingly, the motion for summary adjudication of the issue of whether Mora has an immediate duty to defend Apogee against plaintiff Brierley and defendant/cross-complaint Costco's claims in this action is GRANTED.

## B. Duty to Indemnify

Apogee also moves for summary adjudication of Mora’s duty to indemnify, framed as follows: “Pursuant to Apogee’s Fifth Cause of Action for Declaratory Relief in its Cross-Complaint against Mora Trucking, Mora Trucking owes Apogee a duty to indemnify for any and all liability and loss whatsoever arising out of Mora Trucking’s services under the Contract Service Provider Agreement (“Provider Agreement”) and relating to this action.” (Notice, p. 2:9-13.)

Apogee contends that Mora “clearly and explicitly agreed” to indemnify Apogee against all claims “arising out of or in any way related to the performance or breach” of the Provider Agreement by Mora. (Apogee’s MPA, p. 13:23-28, apparently quoting *in part* the Provider Agreement at Section II, subsection (9)(A).)

Apogee argues that the Provider Agreement must be interpreted to give effect to the mutual intention of the parties. (Apogee’s MPA, p. 14:1-5, citing Civ. Code §§ 1636 [“A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracted, so far as the same is ascertainable and lawful.”] and 1638 [“The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.”].)

Apogee contends that courts have given the terms “arising out of” or “arising from” broad interpretation requiring only a slight connection or incidental relationship to the event creating liability. (Apogee’s MPA, p. 14:6-16, citing: *Acceptance Ins. Co. v. Syufy Enterprises* (1999) 69 Cal.App.4th 321; *Southgate Recreation and Park Dist. v. California* (2003) 106 Cal.App.4th 293; and *Transps. Indem. Co. v. Schnack* (1982) 131 Cal.App.3d 149.) Apogee asserts that an indemnity obligation may be imposed even without a finding of fault on the indemnitor’s part, citing *Continental Heller Corp. v. Amtech Mechanical Services, Inc.* (1997) 53 Cal.App.4th 500, 506-507 (*Continental Heller*). (Apogee’s MPA, p. 14:17-25.)

In opposition, Mora emphasizes that the duty to defend is distinct from the duty to indemnify. (Mora’s Opp., pp. 9:22-10:3.) Mora directs the court to the following language from *Crawford*: “One can only indemnify against ‘claims for damages’ that have been resolved against the indemnitee, i.e., those as to which the indemnitee has actually sustained liability or paid damages.” (*Crawford, supra*, 44 Cal.4th at p. 559.) Mora argues that there has been no determination of damages in this action, nor a determination of Apogee’s alleged negligence. (Mora’s Opp, p. 10:13-16.)

Here, Apogee frames the indemnification issue more broadly than can be supported by the evidence that it presents. More specifically, Apogee’s analysis completely ignores the following language of the Provider Agreement: “In no event, shall the party requesting indemnification under this Section be entitled to such indemnification … for the proportionate responsibility that its negligence bears for causing the accident, injury, or damage giving rise to the Claims, proceedings, cause of action, or suit for which indemnification is sought.” (Provider Agreement, Section II, subsection (9)(C).) Similarly, while Apogee relies heavily upon the analysis of the appellate court in *Continental Heller*, the appellate decision there is based upon analysis of the contract in *that* action (with no mention of any “proportionate responsibility” clause) and *after* a determination of the parties’ negligence. (*Continental Heller, supra*, 53 Cal.App.4th at pp. 503, 505.)

In this case, there have been no findings of fact regarding negligence and none of Plaintiff or Costco’s claims have been resolved. Therefore, it is too soon to say that Mora owes Apogee a duty to indemnify for “any and all liability and loss whatsoever.”

Accordingly, the motion for summary adjudication of the issue of whether cross-defendant Mora owes cross-defendant Apogee a duty to indemnify for any and all liability and loss whatsoever arising out of Mora's services under the Contract Service Provide Agreement and relating to this action is DENIED.

**V. Conclusion**

The motion for summary adjudication of the issue of whether cross-defendant Mora has an immediate duty to defend cross-defendant Apogee against plaintiff Brierley and defendant/cross-complaint Costco's claims in this action is GRANTED.

The motion for summary adjudication of the issue of whether cross-defendant Mora owes cross-defendant Apogee a duty to indemnify for any and all liability and loss whatsoever arising out of Mora's services under the Contract Service Provide Agreement and relating to this action is DENIED.

The Court will prepare the final order.

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