SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 6
Honorable Evette D. Pennypacker, Presiding
David Criswell, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2160

DATE: December 14, 2023 TIME: 9:00 A.M.

FOR ORAL ARGUMENT: Before 4:00 PM today you must notify the:

(1) Court by calling (408) 808-6856 and

(2) Other side by phone or email that you plan to appear at the hearing to contest the ruling

(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

FOR APPEARANCES: The Court strongly prefers in person appearances. If you must appear virtually, please use video. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 6:
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

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https://www.scscourt.org/general_info/court_reporters.shtml

FOR YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. **Phone lines are now open for you to call and reserve a date before you file your motion**. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Civil Local Rule 8C is in the amendment process and will be officially changed in January 2024.

Where to call: 408-882-2430
When to call: Monday through Friday, 8:30 am to 12:30 pm

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	2011-1-CV-195803	Creditors Adjustment Bureau, Inc. vs W. Ng	The parties are ordered to appear for the Order of Examination.
2	21CV389474	TYLER KAWAMOTO vs ADRIENNE KAWAMOTO et al	Continued to February 15, 2024 per stipulation.
3	21CV389474	TYLER KAWAMOTO vs ADRIENNE KAWAMOTO et al	Continued to February 15, 2024 per stipulation.
4	21CV389474	TYLER KAWAMOTO vs ADRIENNE KAWAMOTO et al	Continued to February 15, 2024 per stipulation.
5	22CV401810	JANE DOE vs QIN XIE et al	Defendants' Demurrers are CONTINUED to January 30, 2024 at 9 a.m. in Department 6. The Court also sets a further case management conference for January 30, 2024 at 10 a.m. (we will take care of everything on the 9 a.m. calendar).
6	22CV401810	JANE DOE vs QIN XIE et al	Defendants' Demurrers are CONTINUED to January 30, 2024 at 9 a.m. in Department 6. The Court also sets a further case management conference for January 30, 2024 at 10 a.m. (we will take care of everything on the 9 a.m. calendar).
7	22CV401810	JANE DOE vs QIN XIE et al	Ken Xie's Unopposed Motion to Strike is GRANTED. Moving party to prepare formal order.
8	22CV403929	Suemi Gonzales et al vs Santa Clara Valley Transportation Authority	Defendant Santa Clara Valley Transportation Authority's Demurrer to Plaintiff's Amended Complaint is SUSTAINED WITHOUT LEAVE TO AMEND. An amended notice of motion with this hearing date was served by electronic mail on November 10, 2023. No opposition was filed. Failure to oppose a motion may be deemed consent to the motion being granted. (Cal. Rule of Court, 8.54(c).) Plaintiffs' wrongful death claim is also within the exclusive jurisdiction of the worker's compensation board and Plaintiffs fail to adequately allege claims under FEHA. Plaintiffs have not requested leave to amend, and there is thus nothing in the record to explain how Plaintiffs could amend their complaint to overcome Defendant's demurrer. Accordingly, Defendant's demurrer is SUSTAINED WITHOUT LEAVE TO AMEND. Moving party to prepare formal order and appropriate form of dismissal.
9	22CV405807	Taekus, Inc. vs Productfy, Inc.	Taekus's Demurrer is on the basis of uncertainty and as to the first cause of action is OVERRULED, and SUSTAINED WITH 20 DAYS LEAVE TO AMEND as to the remaining causes of action. Please scroll down to line 9 for full tentative ruling. Court to prepare formal order.
10	22CV407741	PAMELA ASHFORD vs MIDPENINSULA REGIONAL OPEN SPACE DISTRICT	MidPeninsula Regional Open Space District's Demurrer to Plaintiff's Second Amended Complaint is SUSTAINED WITHOUT LEAVE TO AMEND. Please scroll down to line 10 for full tentative ruling. Court to prepare formal order.
11	22CV408556	John Doe 2781 vs Doe School District et al	Defendants' Motion for Judgment on the Pleadings is DENIED. Please scroll down to line 11 for full tentative ruling. Court to prepare formal order.

12	23CV410276	Samuel Nathan et al vs Stanford Health Care, a California Non-Profit Corporation	Defendant's Demurrer is SUSTAINED with 20 days leave to amend. Please scroll down to lines 12-13 for full tentative ruling. Court to prepare formal order.
13	23CV410276	Samuel Nathan et al vs Stanford Health Care, a California Non-Profit Corporation	Defendant's Motion to Strike is MOOT. Please scroll down to lines 12-13 for full tentative ruling. Court to prepare formal order.
14	23CV412815	TIEN LE vs SELECT PORTFOLIO SERVICING, INC et al	Defendants' Demurrer to the Fourth Cause of Action is OVERRULED and to the Third, Fifth, Sixth, Seventh Causes of Action is SUSTAINED WITHOUT LEAVE TO AMEND. Please scroll down to line 14 for full tentative ruling. Court to prepare formal order.
15	23CV423806	MICHELLE VARGAS vs AMERICAN HONDA MOTOR CO., INC.	Defendant's Demurrer to Plaintiff's Fraudulent Inducement claim is SUSTAINED WITHOUT LEAVE TO AMEND. Please scroll down to line 15 for full tentative ruling. Court to prepare formal order.
16	21CV389034	EUGENUS, INC. vs WARNER FUNES et al	Plaintiff's Motion to Deem Requests for Admissions Admitted is GRANTED. An amended notice of motion with this hearing date was served by electronic and U.S. mail on November 14, 2023. Defendant failed to file an opposition. Failure to oppose a motion may be deemed consent to the motion being granted. (Cal. Rule of Court, 8.54(c).) Further, Plaintiff served a first set of requests for admission on Defendant by mail on March 17, 2023. To date, Defendant has served no responses. A party served with Requests for Admission must serve a response within 30 days. (Code of Civ. Pro. §2033.250.) When a party fails to respond—even in the face of a motion to have the matters in the Requests for Admission deemed admitted—as Defendant has done here, the Court must order the Requests for Admission deemed admitted. (Code of Civ. Pro. §2033.280(c); *St. Mary v. Superior Court* (2014) 223 Cal.App.4th 762, 775-776.) Such a "deemed admitted" order establishes that the nonresponding party has responded to the requests for admission by admitting the truth of the matters contained in the requests. (*Id.*) "It is mandatory that the court impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) on the party or attorney, or both, whose failure to serve a timely response to requests for admission necessitated this motion." (Code Civ. Proc. § 2033.280.) The Court finds it appropriate to sanction Eugenus, Inc., not its counsel, directly. Since there was no opposition and thus no need for reply, and these are all very simple motions, the Court reduces the number of hours to 2.5, for a total of $1,500 for all three motions, which Defendant is ordered to pay within 30 days of service of this formal order. Court to prepare formal order.

17	21CV389034	EUGENUS, INC. vs WARNER FUNES et al	Plaintiff's Motion to Compel Response to Inspection Demand is GRANTED. An amended notice of motion with this hearing date was served by electronic and U.S. mail on November 14, 2023. Defendant failed to file an opposition. Failure to oppose a motion may be deemed consent to the motion being granted. (Cal. Rule of Court, 8.54(c).) Moreover, Defendant failed to respond to requests for production properly served on March 17, 2023. Defendant is therefore ordered to serve complete, code compliant responses without objections (Code Civ. Proc. § 2031.300) within 10 days of service of this formal order. The Court finds it appropriate to sanction Eugenus, Inc., not its counsel, directly. Since there was no opposition and thus no need for reply, and these are all very simple motions, the Court reduces the number of hours to 2.5, for a total of $1,500 for all three motions, which Defendant is ordered to pay within 30 days of service of this formal order. Court to prepare formal order.
18	21CV389034	EUGENUS, INC. vs WARNER FUNES et al	Plaintiff's Motion to Compel Response to Form Interrogatories is GRANTED. An amended notice of motion with this hearing date was served by electronic and U.S. mail on November 14, 2023. Defendant failed to file an opposition. Failure to oppose a motion may be deemed consent to the motion being granted. (Cal. Rule of Court, 8.54(c).) Moreover, Defendant failed to respond to form interrogatories properly served on March 17, 2023. Defendant is therefore ordered to serve complete, code compliant responses without objections (Code Civ. Proc. § 2030.290(a)) within 10 days of service of this formal order. The Court finds it appropriate to sanction Eugenus, Inc., not its counsel, directly. Since there was no opposition and thus no need for reply, and these are all very simple motions, the Court reduces the number of hours to 2.5, for a total of $1,500 for all three motions, which Defendant is ordered to pay within 30 days of service of this formal order. Court to prepare formal order.
19	22CV407312	Jpmorgan Chase Bank N.a. vs Elysia Johnson	Defendant's Motion for Admissions Be Deemed Admitted is CONTINUED to January 30, 2024 at 9 a.m. in Department 6. The Court is unable to locate an amended notice of motion with this hearing date. The Code of Civil Procedure, Rules of Court and Civil Local Rules require that the moving party serve a written notice of motion with the hearing date and time. (See Code Civ. Proc. §§1005(a), 1010.) A court lacks jurisdiction to hear a motion that has not been properly served, even if the non-moving party had some type of advanced notice. (See *Diaz v. Professional Community Mgmt.* (2017) 16 Cal.App.5th 1190, 1204-1205; *Five-O-Drill Co. v. Superior Court of Los Angeles County* (1930) 105 Cal. App. 232.) Defendant is ordered to serve an amended notice of motion with the January 30, 2024 hearing date and time for this motion. If there is no proof of service demonstrating such service by the next court date, the Court will deny this motion without prejudice. Court to prepare formal order.

20	21CV384211	Cindy Ho et al vs Cindy Nguyen et al	Plaintiffs' Motion For Enforcement of Judgment and Attorneys' Fees is GRANTED. An amended notice of motion with this hearing date was served by electronic and U.S. mail on November 9, 2023. No opposition was filed. Failure to oppose a motion may be deemed consent to the motion being granted. (Cal. Rule of Court, 8.54(c).) There is also good cause to grant this motion. The parties entered a settlement agreement wherein they agreed for the Court to retain jurisdiction pursuant to Code of Civil Procedure section 664.6. Under that agreement, Defendant was to pay $100,000; Defendant has only paid $80,000. The agreement also provides, at paragraph 3: "In the event of a dispute arising out of or to enforce this Agreement, the prevailing party will be entitled to reimbursement of reasonable attorney fees and costs of litigation." Accordingly, judgment is entered in favor of Plaintiff in the sum of $20,000 and $4,185 in attorney fees and costs. Moving party to prepare formal order and judgment.
21	22CV395666	LCS Capital, LLC vs Danny Do	Defendant's Claim of Exemption is DENIED. Defendant does not present a valid basis for exemption. Court to prepare formal order.
22	22CV397100	Sushma Venkataramanappa vs Sudhir Pai et al	The parties are ordered to appear for Defendant GVA Franchise, LLC's Motion to Set Aside Default. The amended notice of motion was served on Plaintiff's former counsel Graham Scott, who had already been relieved as counsel. However, the notice was also served on Naresh Channaveerappa, counsel for Cross-Defendant Prasanna K. Venkataramanappa who has since substituted as counsel for Plaintiff Sushma Venkataramanappa. There is no opposition on file. And, while the Court believes there is good cause to grant the motion to set aside, the Court wants to confirm that the proper parties received notice of the motion.
23	2013-1-CV-247406	P. Kleidman Vs N. Shah, Et Al	Plaintiff's Motion Under Code of Civil Procedure section 377.41 as to Decedent Robert Quist is DENIED. The relief Plaintiff seeks is barred by the statute of limitations. (Code Civ. Pro. §§ 353, 366.2(a), 377.41.) Parties are ordered to appear at the hearing.
24	2013-1-CV-247406	P. Kleidman Vs N. Shah, Et Al	Plaintiff's Motion for Entry of Judgment for Costs on Appeal is DENIED. A notice of lien is on file, and the defendants have already agreed to pay the costs from the appeal. Parties are ordered to appear at the hearing.

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Calendar Line 9
Case Name: *Taekus, Inc. v. Productfy, Inc., et al.*
Case No.: 22CV405807

Before the Court is plaintiff and cross-defendant Taekus, Inc's ("Taekus") demurrer to defendant and cross-complainant Productfy, Inc.'s ("Productfy") first amended cross-complaint ("FAXC"). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This action arises out of an alleged breach of contract. Productfy is a startup "banking-as-a-service" ("BaaS") company that provides an embedded finance platform enabling any organization to launch financial application products in a safe, compliant, and efficient manner. (FAXC, ¶ 7.) Taekus is a fintech startup payment card company that provides banking services and reward cards to consumers and businesses. (FAXC, ¶ 7.) Each time a consumer "swiped" their Taekus debit card to make a purchase, a series of complex transactions would take place that had the effect of debiting the consumer's account and crediting the retailer's account. (FAXC, ¶ 8.) Because it is not a bank, Taekus needed to work with a bank to establish the customer's prepaid accounts, hold customer funds, issue debit or credit cards, and coordinate and effectuate these series of complex transactions. (*Ibid*.) Productfy offered banking services through Stearns Bank, N.A. ("Stearns Bank"). (FAXC, ¶ 9.)

For the benefit of taking payment by debit or credit card, the merchant pays a transaction fee ("Interchange Fee"), which is split among the other parties to the transaction. (FAXC, ¶ 11.) Interchange Fees cover the cost of handling the transactions and sending payments to the acquiring bank and the merchant's bank account, as well as covering the risk of fraud. (*Ibid*.) Separate from the Interchange Fees are fees and costs for Productfy's services, such as a fee for its platform as well as the pass-throughs of third-party fees. (*Ibid*.)

In early 2021, the parties entered into a Master Subscription Agreement ("MSA") and Order Form, that was most recently amended on November 11, 2021. (FAXC, ¶ 12.) The Order Form contains a fee chart, which sets forth the fees to be paid to Taekus for consumer debit cards and consumer credit cards. (*Ibid*.) Commercial cards were not considered by the MSA. (*Ibid*.)

Under the MSA, Productfy charged Taekus a monthly software usage fee in return for Productfy's service and Taekus would receive a portion of interchange revenue net of, among other

things, payments of amounts owed to Productfy, processing fees of 30 basis points for personal debit card transactions, as agreed upon in the MSA. (FAXC, ¶ 13.) The MSA contemplated, governed, and controlled only the parties' duties and obligations regarding personal (or consumer) debit card transactions and it makes no reference to commercial debit transactions, which is confirmed by the parties' words and conduct. (FAXC, ¶ 14.)

In early 2022, Productfy developed a platform to offer personal debit cards to Taekus customers. (FAXC, ¶ 15.) By mid-2022, the platform and network was in place for personal consumer transactions and consumer accounts were opened through Stearns Bank. (*Ibid*.) In anticipation of signing an agreement for commercial cards, the parties began working on experimenting with commercial debit cards for Taekus customers. (*Ibid.*) As commercial cards present greater risks for banks, they have higher Interchange Fees and other related fees, thus it is industry custom to have separate agreements with respect to consumer versus commercial transactions. (FAXC, ¶ 16.)

Throughout 2022, the parties continued to gather, analyze, and negotiate a potential contract for the Commercial Debit Program. (FAXC, ¶ 18.) The parties knew and understood there was no final written agreement regarding the Commercial Debit Program. (FAXC, ¶ 19.) However, Productfy provided services to Taekus, which it utilized, with the understanding that a final reconciliation and accounting would need to be completed upon the parties' final, written agreement. (*Ibid*.)

Taekus initiated the initial action on October 17, 2022, asserting: (1) breach of written contract; (2) breach of the implied covenant of good faith and fair dealing; (3) violations of the California Business & Professions Code section 17200; (4) conversion; and (5) theft by false pretenses. On June 26, 2023, Productfy filed its Cross-Complaint and on August 23, Productfy filed its FAXC asserting: (1) breach of contract (MSA); (2) breach of oral contract (commercial); (3) breach of implied contract; (4) account stated; (5) open book account; (6) goods and services rendered; (7) quasi contract; (8) declaratory relief; and (9) quantum meruit. On November 6, 2023, Taekus filed the instant demurrer, which Productfy opposes.

II. Meet and Confer

"Before filing a demurrer pursuant to this chapter, the demurring party shall meet and confer in person or by telephone with the party who filed the pleading that is subject to demurrer for the purpose

of determining whether an agreement can be reached that would resolve the objections to be raised in the demurrer." (Code Civ. Proc., § 430.41, subd. (a).) "Any determination by the court that the meet and confer process was insufficient shall not be grounds to overrule or sustain the demurrer." (Code Civ. Proc., § 430.41, subd. (a)(4).)

Taekus' counsel Tom N. Yacko explains that the parties were unable to meet and confer. Failure to meet and confer is not a basis to sustain the demurrer. (See Code Civ. Proc., § 430.41, subd. (a)(4).)

III. Legal Standard

"The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in [Code of Civil Procedure s]ection 430.30, to the pleading on any one or more of the following grounds: . . . (e) The pleading does not state facts sufficient to constitute a cause of action, (f) The pleading is uncertain." (Code Civ. Proc., § 430.10, subds. (e) & (f).) A demurrer may be utilized 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 treats a demurrer "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214 (*Committee on Children's Television*).) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

Taekus demurs to the first, second, third, fourth, fifth, sixth, and ninth causes of action on the grounds they are uncertain and fail to allege sufficient facts. (Code of Civ. Proc., § 430.10, subds. (e) & (f).)

A. Uncertainty

Uncertainty is a disfavored ground for demurrer; it is typically sustained only where the pleading is so unintelligible and uncertain that the responding party cannot reasonably respond to or recognize the claims alleged against it. (See *Khoury v. Maly's of Cal, Inc.* (1993) 14 Cal.App.4th 612, 616 (*Khoury*).) "A demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures." (*Ibid*.) "[U]nder our liberal pleading rules, where the complaint contains substantive factual allegations sufficiently apprising defendant of the issues it is being asked to meet, a demurrer for uncertainty should be overruled or plaintiff given leave to amend. (*Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 139, fn. 2.)

Although Taekus identifies uncertainty as a basis for demurrer for each claim, it fails to offer any substantive argument regarding uncertainty as to most of the claims. Taekus argues uncertainty in the alternative as to the first cause of action, lists it in the heading for the third cause of action, and offers specific argument as to the second cause of action. However, Taekus really appears to be arguing Productfy's cannot sufficiently state the claim, not uncertainty. And, the pleading is not so unintelligible or uncertain that Taekus cannot reasonably respond to it. (See *Khoury, supra,* 14 Cal.App.4th at p. 616.) Thus, Taekus's demurrer on uncertainty grounds is OVERRULED.

B. First Cause of Action: Breach of Contract (MSA)

To allege a cause of action for breach of contract, a plaintiff must allege (1) the contract, (2) the plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff. (*Bushell v. JPMorgan Chase Bank, N.A.* (2013) 220 Cal.App.4th 915, 921 (*Bushell*).) The elements of a breach of oral contract are the same as those for a breach of a written contract. (*Stockon Mortgage, Inc. v. Tope* (2014) 233 Cal.App.4th 437, 453.) Mutual assent or consent is necessary for the formation of a contract. (Civ. Code, §§ 1550, 1565.) For a meeting of the minds to exist, parties must agree on all material contract terms. (*Elyaoudayan v. Hoffman* (2003) 104 Cal.App.4th 1421, 1430 (*Elyaoudayan*).) Mutual assent is determined under an objective standard applied to the outward manifestations or expressions of the parties, i.e., the reasonable meaning of their

words and acts, and not their unexpressed intentions or understandings. (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 119, p. 144.)

"In considering expressions of agreement, the court must not hold the parties to some impossible, or ideal, or unusual standard. It must take language as it is and people as they are. All agreements have some degree of indefiniteness and some degree of uncertainty. Moreover, the law leans against the destruction of contracts because of uncertainty and favors an interpretation which will carry into effect the reasonable intention of the parties if it can be ascertained." (*Moncada v. West Coast Quartz Corp.* (2013) 221 Cal.App.4th 768, 777 (*Moncada*)(internal citations and quotations omitted.)

The parties disagree on whether the MSA considered commercial transactions. Productfy alleges the MSA did not reference commercial transactions at all, so did not include them. (FAXC, ¶ 14.) Taekus argues the MSA contemplated all transactions for "customers", which includes consumer and commercial transactions. (Dem., p. 7:12-15.)

Taekus directs the Court to section 1.9 of the MSA, which provides: "Program Partner Customers" means end-user customers, whether individual consumers or legal entities, authorized by Program Partner to access or use the Services. (FAXC, Exh. A, § 1.9.) Taekus also references Section 4.1 of the MSA, which pertains to fees and provides, in relevant part: "Program Partner shall pay Company the Fees set forth in the Order Form(s) in accordance with this Section 4." (*Id*. at § 4.1.) The Card Issuance section of the Order Form states: "Upon deployment of debit and/or credit cards for Customer, Company will share the full amount of Interchange Reimbursement Fees with the Customer net of Sponsoring Bank and Card Processing Fees (Total Processing Fees). Total Processing Fees shall not exceed the maximums shown on the chart below." (FAXC, Ex. A.)

It appears to the Court that the MSA does not explicitly include or exclude commercial debit transactions. "[W]here an ambiguous contract is the basis of an action, it is proper, if not essential, for a plaintiff to allege its own construction of the agreement. So long as the pleading does not place a clearly erroneous construction upon the provisions of the contract, in passing upon the sufficient of the complaint, we must accept as correct plaintiff's allegation as to the meaning of the agreement." (*Marina Tenants Assn. v. Deauville Marina Development Co.* (1986) 181 Cal.App.3d 122, 128.)

Productfy's construction of the agreement is that commercial transactions were not specifically identified or referenced in the MSA and because they require a higher Interchange Fees and other fees, the fact that it was not referenced or agreed upon in the MSA means that it was not considered by the parties at the time of the MSA. This construction is not a clearly erroneous one and thus, it is sufficient at this stage of the case.

Productfy alleges the MSA (attached to the FAXC), that it performed all or substantially all of its duties, Taekus breached by failing to comply with its duties and obligations, which includes failing to make payment to and/or allow for offset amount owed to Productfy for Productfy's share of the consumer/personal transactions, pursuant to its invoices, and the breach was a substantial factor in causing Productfy's harm. (FAXC, ¶¶ 21-25.) Therefore, Productfy alleges sufficient facts to state this claim. Taekus's demurrer to the first cause of action is accordingly OVERRULED.

C. Second Cause of Action: Breach of Oral Contract (Commercial)

"The elements of a breach of oral contract claim are the same as those for a breach of written contract: a contract; its performance or excuse for nonperformance; breach; and damages." (*Stockton Mortgage, Inc. v. Tope* (2014) 233 Cal.App.4th 437, 453.) Mutual consent is essential to the existence of a contract. (Civ. Code, § 1550, subd. (2).) In other words, "[c]ontract formation requires mutual consent, which cannot exist unless the parties 'agree upon the same thing in the same sense." (*Bustamante v. Intuit, Inc.* (2006) 141 Cal.App.4th 199, 208 [citations omitted].) Ordinarily, "[t]he manifestation of mutual assent [ ] is achieved through the process of offer and acceptance." (*Alexander v. Codemasters Group Ltd.* (2002) 104 Cal.App.4th 129, 141.)

Productfy alleges the parties orally agreed to enter the Commercial Debit Program, which set transactions at a higher rate than consumer transactions under the MSA. (FAXC, ¶ 27.) It further alleges that the parties later confirmed the contract in writing through emails and/or electronic messages. (FAXC, ¶ 27.) Taekus argues the Terms and Conditions of the MSA preclude the alleged oral contract. The Terms and Conditions, provide:

> These Terms and Conditions (the "Terms") govern the provisions of services by Company [Productfy] to Program Partner [Taekus] in the applicable Order Form. These Terms, and any applicable Order Form(s) and Attachments, comprise the entire

> agreement between the parties (the "Agreement"), and supersede all *prior or contemporaneous* understandings, agreements, negotiations, representations and warranties, and communications, both written and oral. This Agreement prevails over any of Program Partner's general terms and conditions regardless of whether or when Program Partner has submitted its request for proposal, order, or such terms. Provision of services by Company to Program Partner does not constitute acceptance of any of Program Partner's terms and Conditions and does not serve to modify or amend this Agreement.

(FAXC, Ex. A [emphasis added].)

Factual allegations must generally be accepted as true on demurrer, however, they cannot be accepted as true if they contradict or are inconsistent with facts that are judicially noticed or that appear in exhibits attached to the complaint. (See *Holland v. Morese Diesel Intl'l, Inc.* (2001) 86 Cal.App.4th 1443, 1447.)

Although the FAXC does not allege exactly when the parties started discussions regarding the Commercial Debit Program, it does allege that it occurred after early 2022. (See FAXC, ¶ 15.) The Terms stated that the MSA superseded "all *prior and contemporaneous* understandings… both written and oral" but alleged discussions, conduct, and/or events occurred at least a year later. The MSA states that it is the entire agreement between the parties. Productfy contends the Commercial transactions agreement is separate from the MSA. It further contends the parties had an agreement through their words and their conduct, but it had not been memorialized in writing. In support, Productfy relies on *CSAA Ins. Exchange v. Hodroj* (2021) 72 Cal.App.5th 272, 276 (*CSAA*), for the proposition that

> [w]hen parties agree on the material terms of a contract with the intention to later reduce it to a formal writing, failure to complete the formal writing does not negate the existence of the initial contract. If the parties do not agree on the content of the formal writing… the proposed writing is not a counteroffer; rather, the initial agreement remains binding and a rejected writing is a nullity.

(*CSAA, supra,* 72 Cal.App.5th at p. 276.)

However, the key language in *CSAA*, is "when the parties agree on the material terms" in the first instance. Here, Productfy alleges the parties dispute the exact basis point fees. (See FAXC, ¶ 16.) Productfy also fails to allege any other terms of this oral contract other than that the transactions for the Commercial Debit Program would be at a higher rate than for consumer transactions. (See FAXC, ¶ 27.) Productfy also does not attach any of the alleged confirmations of the oral contract or allege any *facts* regarding Taekus' conduct that it claims evinces Taekus's agreement to this contract. As a result, Productfy fails to allege sufficient facts to state this cause of action. Taekus's demurrer to the second cause of action is SUSTAINED with 20 days leave to amend.

D. Third Cause of Action: Breach of Contract (Implied)

"An implied contract is one, the existence and terms of which are manifested *by conduct*." (Civil Code §1621, emphasis added; see also *California Emergency Physicians Medical Group v. PacifiCare of California* (2003) 111 Cal.App.4th 1127, 1134.) "An implied contract 'consists of obligations arising from a mutual agreement and intent to promise where the agreement and promise have not been expressed in words.' In order to plead a cause of action for implied contract, 'the facts from which the promise is implied must be alleged.'" (*California Emergency Physicians Medical Group v. PacifiCare of California* (2003) 111 Cal.App.4th 1127, 1134, overruled in part on a different ground in *Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994, 1014.)

"An implied contact ' "… in no less degree than an express contract, must be founded upon an ascertained agreement of the parties to perform it, the substantial difference between the two being the mere mode of proof by which they are to be respectively." ' It is thus an actual agreement between the parties, 'the existence and terms of which are manifested by conduct.' Although an implied in fact contract may be inferred from the 'conduct, situation or mutual relation of the parties, the very heart of this kind of agreement is an intent to promise.' " (*Friedman v. Friedman* (1993) 20 Cal.App.4th 876, 887 (*Friedman*) [citations omitted].)

Productfy alleges the parties entered an implied contract for the Commercial Debit Program, the terms of which, included that transactions in the program would be higher than those in the consumer transaction program. (FAXC, ¶ 33.) Productfy further alleges the parties acted intentionally, knew or had reason to know the other party would interpret their conduct as an agreement to enter a contract, and

it performed all or substantially all of its duties while Taekus failed to comply with its duties and obligations under the agreement, including but not limited to, failing to make payment to and/or allow for offset amounts owed to Productfy for its share of the commercial transactions. (FAXC, ¶¶ 34-35.) As the Court must accept these allegations as true on demurrer, the Court cannot sustain Taekus's demurrer on the basis that commercial transactions are not part of the MSA.

Productfy also alleges the parties agreed to test the Commercial Debit Program to negotiate and memorialize a final written agreement, and the parties knew or had reason to know that their conduct would be interpreted as agreement to enter into a contract. (See FAXC, ¶¶ 17, 33.) However, Productfy fails to allege any facts from which the promise could be implied. Consequently, Productfy fails to allege sufficient facts to state this claim, and Taekus's demurrer to the third cause of action is SUSTAINED with 20 days leave to amend.

E. Fourth, Fifth, Sixth, and Ninth Causes of Action

The fourth, fifth, sixth, and ninth causes of action are common counts, asserted as alternatives to the second and third causes of action.

"[A] demurrer to a common count is properly sustained where the plaintiff is not entitled to recover under those counts in the complaint wherein all other facts upon which his claim is based are specifically pleaded." (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 601; see also *McBride v. Boughton* (2004) 123 Cal.App.4th 379, 394 ["When a common count is used as an alternative way of seeking the same recovery demanded in a specific cause of action, and is based on the same facts, the common count is demurrable, if the cause of action is demurrable."].) In other words, the common count "must stand or fall on the viability of plaintiffs' other claims." (*Berryman v. Merit Property Management, Inc.* (2007) 152 Cal.App.4th 1544, 1560.)

The claims are specifically asserted as alternatives to the second and third causes of action, which, for reasons discussed above, do not state sufficient facts to constitute a cause of action. Thus, Taekus's demurrer to the fourth, fifth, sixth, and ninth causes of action is SUSTAINED with 20 days leave to amend.

Calendar Line 10
Case Name: *PAMELA ASHFORD vs MIDPENINSULA REGIONAL OPEN SPACE DISTRICT*
Case No.: 22CV407741

Before the Court is MidPeninsula Regional Open Space District's ("MidPen") Demurrer to Plaintiff Pamela Ashford's Second Amended Complaint ("SAC"). Pursuant to California Rule of Court, Rule 3.1308, the Court issues its tentative ruling.

I. Background

MidPen is a California voter created independent district, i.e., a local government that provides specialized service to the public that local cities and counties do not provide and that MidPen is subject to California's laws pertaining to government contracts. Plaintiff filed this action on November 23, 2022, seeking a declaratory judgment, injunctive relief, and damages against MidPen for MidPen's alleged failure to follow the Ralph M. Brown Act (Govt. Code §54950, *et. seq.*) ("Brown Act") when it awarded a contract for stables concessionaire at Bear Creek Stables to Chaparral Country Corporation ("Chaparral").

Plaintiff sought and was denied a temporary restraining order and preliminary injunction, and filed her FAC on February 16, 2023, asserting (1) violation of the Brown Act, (2) seeking a declaratory judgment finding the contract awarded to Chaparral is void and the contract be re-bid, (3) asking the Court to enjoin performance of the contract as between MidPen and Chaparral and asserting (4) promissory estoppel, (5) negligent misrepresentation, (6) negligent infliction of emotion distress, and (7) retaliatory eviction. MidPen demurred to Ashford's prayer for punitive damages and each cause of action on the grounds of failure to state a claim and lack of subject matter jurisdiction. The Court sustained MidPen's demurrer to claims (1) through (6) without leave to amend and sustained the retaliatory eviction claim with 20 days leave to amend.

Plaintiff filed a Second Amended Complaint ("SAC") on July 27, 2023, asserting (1) retaliatory eviction, (2) deprivation of equal protection, (3) denial of due process, (4) Violation of California Public Records Act [Gov. Code §6250 et. seq.], (5) conversion, (6) specific recovery of personal property [replevin], and (7) common counts. MidPen demurrers to all causes of action on the grounds of failure to state a claim pursuant to Code of Civil Procedure section 430.10(a)(e) and the

Court has no jurisdiction over the subject of the cause of action under Code of Civil Procedure section 430.10(a). MidPen also demurs to Plaintiff's prayer for punitive damages on the grounds that a public entity is not liable for punitive and exemplary damages pursuant to Government Code section 818.

II. Legal Standard

The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in [Code of Civil Procedure s]ection 430.30, to the pleading on any one or more of the following grounds: . . . (e) The pleading does not state facts sufficient to constitute a cause of action, (f) The pleading is uncertain." (Code Civ. Proc., § 430.10, subds. (e) & (f).) A demurrer may be utilized 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 treats a demurrer "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.)

In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

If the complaint fails to state a cause of action, the court will sustain the demurrer. (*Washington v. County of Contra Consta* (1995) 38 Cal.App.4th 890, 895.) Where a court has no subject matter jurisdiction over the suit, a demurrer is also properly sustained. (*Miller-Leigh LLC v. Henson* (2007) 152 Cal.App.4th 1143, 1148-1149.)

A plaintiff that seeks leave to amend has a duty to set forth clearly and specifically the substantive law, the elements of the proposed cause of action, the supporting legal authority, and

supporting factual allegations, which must be specific and not vague or conclusory. (*Myles v. PennyMac Loan Servs., LLC* (2019) 40 Cal.App.5th 1072, 1076.) Plaintiff's statement in an opposition that "if the Court finds the operative complaint deficient, Plaintiff respectfully request leave to amend" is insufficient to meet this burden. (*Major Clients Agency v. Diemr* (19987) 67 Cal.App. 4th 1116, 1133.) And "leave to amend should be denied where the facts are not in dispute and the nature of the claim is clear, but no liability exists under substantive law." (*Lawrence v. Bank of America* (1985) 163 Cal.App.3d 431, 436.)

III. Request for Judicial Notice

MidPen requests that the Court take judicial notice of: (A) the Revised Agenda for the August 24, 2022 Special and Regular Meeting of the Board of Directors of the Midpeninsula Regional Open Space District; (B) Staff Report for Agenda Item 6: "Approval of a Multi-Year Agreement with Chaparral Country Corporation as the Recommended Concessionaire for Bear Creek Stables located in the Bear Creek Redwoods"; (C) Approved Minutes from the August 24, 2022 special and Regular Meeting of the Board of Directors of the Midpeninsula Regional Open Space District; (D) Staff Report for Agenda Item 6: "Approval of Assignment and Amendment of the Bear Creek Stables Rental Agreement" from the October 14, 2015 Special Meeting of the Board of Directors of the Midpeninsula Regional Open Space District; (E) Approved Minutes from the October 14, 2015 Special Meeting of the Board of Directors of the Midpeninsula Regional Open Space District; (F) Policy 3.03 "Public contract Bidding, Vendor and Professional Consultant Selection, and Purchasing Policy" from the Midpeninsula Regional Open Space District Policies, Chapter 3 — Fiscal Management; (G) January 3, 2023 Order Denying Request by Pamela Ashford for Preliminary Injunction against Midpeninsula Regional Open Space District; (H) the May 19, 2023 Stipulation and Order, entered by the Honorable Carol Overton in *Midpeninsula Regional Open Space District v. Pamela Ashford*, Santa Clara Superior Court Case No. 23CV410606; and (I) the undersigned Court's order sustaining MidPen's Demurrer to Plaintiff's FAC.

Evidence Code section 452 permits the Court to take judicial notice of "[o]fficial acts of the legislative, executive, and judicial departments of…any state of the United States." (Evid. Code, § 452, subd. (c).) However, only relevant material may be judicially noticed. (*Mangini v. R. J. Reynolds*

Tobacco (1994) 7 Cal.4th 1057, 1063; overruled on another ground in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1258; see also *Gbur v. Cohen* (1979) 93 Cal.App.3d 296, 301 (*Gbur*) [information subject to judicial notice must be relevant to the issue at hand].) Judicial notice of court records is also limited to matters that are *indisputably* true; this generally means that notice is limited to the orders and judgments in the court file, as distinguished from the contents of documents filed therein. (See, e.g., *Fremont Indem. Co. v. Fremont Gen. Corp.* (2007) 148 Cal.App.4th 97, 113.)

As with her response to MidPen's demurrer to her FAC, Ashford did not oppose MidPen's Request for Judicial Notice. The law is clear that on a demurrer the Court may consider matters of which the Court may take judicial notice. Code of Civil Procedure section 430.30(a) states: "When any ground for objection to a complaint, cross-complaint, or answer appears on the face thereof, *or from any matter of which the court is required to or may take judicial notice*, the objection on that ground may be taken by a demurrer to the pleading." (Code Civ. Pro. §430.30(a)(emphasis added); see also *Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751 (affirming trial court's taking judicial notice of facts in a contract between a party and the government when sustaining a demurrer without leave to amend.) The above-listed matters are all appropriate matters for judicial notice. MidPen's Request for Judicial Notice is accordingly GRANTED.

IV. Analysis

MidPen demurrers to each cause of action and Ashford's prayer for punitive damages pursuant to Code of Civil Procedure sections 430.10 (a) and (e) on the grounds that each cause of action and the prayer fail to state facts sufficient to constitute a cause of action and the Court has no jurisdiction over the subject of Plaintiff's causes of action as alleged. MidPen also argues that under Government Code section 818, a public entity is not liable for punitive and exemplary damages.

Ashford does not oppose MidPen's demurrer to her claim for punitive damages. Thus, MidPen's prayer for punitive damages is SUSTAINED WITHOUT LEAVE TO AMEND.

A. Ashford Still Fails to State a Claim for Retaliatory Eviction.

"It is settled that a landlord may be precluded from evicting a tenant in retaliation for certain kinds of lawful activities of the tenant. As a landlord has no right to possession when he seeks it for such an invalid reason, a tenant may raise the defense of retaliatory eviction in an unlawful detainer

proceeding. (See, e.g., § 1942.5; *S.P. Growers Assn.* v. *Rodriguez, supra*, 17 Cal.3d 719, 724; *Schweiger* v. *Superior Court, supra*, 3 Cal.3d 507, 517.) The retaliatory eviction doctrine is founded on the premise that "[a] landlord may normally evict a tenant for any reason or for no reason at all, but he may not evict for an improper reason . . . ." (*Id*., at p. 730.)" (*Barela v. Superior Court* (1981) 30 Cal. 3d 244, 249.)

This was the only claim for which the Court granted Ashford leave to amend, noting:

> Here, Ashford claims she was evicted because of her Brown Act complaints. First, there can be no dispute that Ashford was on a month to month lease. Although Judge Zepeda's findings were on a preliminary injunction record and should not be considered definitive, the judicially noticeable materials also make clear that Ashford's lease was month to month at the time it was assigned to her and remained so throughout her tenancy. Indeed, Ashford does not dispute this fact. Thus, Ashford could have been evicted at any time.
>
> Next, MidPen awarded the concessionaire contract to Chaparral, and MidPen had to clear the premises before Chaparral's occupancy could begin. It also appears to the Court that this [] theory is an affirmative defense in unlawful detainer actions rather than an affirmative claim. However, because of the timing of the eviction, the Court finds it appropriate to permit Ashford leave to amend this claim.

In her SAC, Plaintiff again alleges her Brown Act violation and irregularity allegations led to her wrongful eviction. In her SAC, Plaintiff fails to overcome the indisputable judicially noticeable facts that (1) she was a month to month tenant that could have been asked to leave at *any time* for *any reason* before MidPen awarded the concessionaire contract to Chaparral and (2) her complaints to MidPen came after it awarded the contract to Chaparral, which award necessarily involved Ashford vacating the premises. To be clear: MidPen effectively told Ashford she would have to leave the

premises at the same time it told her the contract was being given to Chaparral, which was before she made any of her complaints which she claims led to a retaliatory eviction.

The Court sees no way for Ashford to amend her complaint to overcome these deficiencies. And, while Ashford requests leave to amend, she does not explain how she could amend again to overcome these facts. Accordingly, MidPen's demurrer to the first cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

B. Ashford's Remaining Claims are Not Properly Before this Court.

Plaintiff did not seek nor did the Court grant Ashford leave to file the remaining claims in her complaint. The Court may grant MidPen's demurrer without leave to amend on this basis alone. (*Le Mere v. Los Angeles Unified Sch. Dist.* (2019) 35 Cal.App.5th 237.) Each claim is also defective because it fails to state sufficient facts, MidPen has immunity, or it should have been brought in front of Judge Overton in connection with the unlawful detainer action.

1. Second Cause of Action: Deprivation of Equal Protection

The gravamen of Ashford's claim here is that she had a dispute with MidPen that caused her to be treated differently than similarly situated applicants in the RFP process. This is not what equal protection under the constitution is intended to protect. Nor is there a constitutionally protected "fundamental vested property interest in her long-running equestrian business located at the Stables." (SAC, ¶95.) After two complaints, Ashford also fails to allege she was treated differently than other RFP applicants in the first instance.

2. Third Cause of Action: Denial of Due Process

Ashford again assumes, without authority, that she had a "*right* to continue to operate [her] equestrian business in accordance with [her] long-standing operations at the Stables [that] constitutes a fundamental vested property right protected by the United States and California Constitutions." Ashford was a month to month tenant; she cites no authority to support her claim that maintaining a tenancy for even a long period of time creates a constitutional right in maintaining such tenancy. Instead, the judicially noticeable record reflects that (a) Ashford went through the same RFP process as other candidates and (b) there was substantial public comment on MidPen's decision to award the contract to Chapparal.

3. Fourth Cause of Action: Public Records Act Violation

Exhibit 3 to Ashford's SAC shows that a publication demanded records from MidPen under the Public Records Act, not Ashford. Ashford does not explain in her opposition how she can overcome the legal authority plainly stating that the Public Records Act "provides neither explicit nor implicit authority for one person to enforce another's inspection rights." (*San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School District* (2006) 139 Cal.App.4th 1356, 1415.)

4. Fifth, Sixth and Seventh Causes of Action

MidPen, which the parties agree is a governmental body, can only be liable for an injury where expressly permitted by statute. Ashford fails to identify any such statute or to distinguish the authorities so holding. (Gov. Code §815; *Green Valley Landowners Assn. v. City of Vallejo* (2015) 241 Cal.App.4th 425, 441 ("[T]here is no common law tort liability for public entities in California. Instead, liability must be based on statute per section 815, subdivision (a)"]; *Churchman v. Bay Area Rapid Transit Dist.* (2019) 39 Cal.App.5th 246, 250 (Gov. Code § 815 "abolishes all common law or judicially declared forms of liability for public entities. . . In the absence of a constitutional requirement, public entities may be held liable only if a statute. . .is found declaring them to be liable.") Accordingly, MidPen is immune from liability for the first, sixth and seventh causes of action.

Further, in May 2023, the parties entered a stipulation to resolve MidPen's unlawful detainer action wherein the parties expressly agreed: "The Court [in the unlawful detainer action] shall retain jurisdiction over the parties to enforce the Stipulation herein until performance in full of its terms pursuant to Code of Civil Procedure section 664.6."

That Stipulation specifically references Ashford's personal property—including the fencing—and what steps the parties are to take in the event of noncompliance with the Stipulation:

> 5. Defendant shall remove all the personal property she owns from the Subject Property by June 15, 2023. The parties agree that Defendant's personal property consists of the items set forth in Exhibit A hereto. . . .

6. The schedule for removal of defendant's personal property from the Subject Property shall be restricted to the following dates and times: Juen 3, 4, 10 and 11, during the hours of 9:00Am through 5:00PM, except as this schedule is modified by prior written agreement between the parties. With respect to removal of the metal pipe panel fencing, Defendant shall notify Plaintiff by email at least 24 hours in advance of its removal. . .

7. Any of Defendant's personal property that remains at the Subject Property after June 15, 2023, shall be deemed Plaintiff's property.

According to this Stipulation, Plaintiff's property is now Defendant's property. However, If Plaintiff's position is that she was prevented from complying with the Stipulation, which was entered in the unlawful detainer action, it was incumbent upon Plaintiff to seek relief pursuant to that Stipulation in that Court.

In sum, Plaintiff cannot state a claim for retaliatory eviction and failed to obtain leave of court to file her new causes of action, which, even if allowed would fail in any event. Accordingly, MidPen's demurrer is SUSTAINED WITHOUT LEAVE TO AMEND.

Calendar Line 11
Case Name: *John Doe v. Doe School District et.al.*
Case No.: 22CV408556

Before the Court is Defendant, Cupertino Union School District's ("District") motion for judgment on the pleadings. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

Plaintiff, John Doe 2781, alleges sexual abuse by a non-party perpetrator, who was allegedly Defendant's employee while she was a student at the Garden Gate Elementary School in the mid-1970's. Plaintiff, who is now over the age of forty years old, sues under Assembly Bill 218 (codified as Code of Civ. Proc. §340.1)

In his first amended complaint ("FAC") Plaintiff alleges (1) negligence, (2) negligence supervision, (3) negligent hiring/retention, (4) negligent failure to warn, train of educate, (5) sexual harassment (Civil Code § 51.9), and (6) sexual harassment.

II. Legal Standard

A defendant may move for judgment on the pleadings when the "complaint does not state facts sufficient to constitute a cause of action against that defendant." (Code Civ. Pro., §438(b)(1) and (c)(1)(B)(ii).) "A motion for judgment on the pleadings may be made at any time either prior to the trial or at the trial itself. [Citation.]" (*Ion Equipment Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 877.) "A motion for judgment on the pleadings performs the same function as a general demurrer, and hence attacks only defects disclosed on the face of the pleadings or by matters that can be judicially noticed. 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 (Citations Omitted); See also, *Burnett v. Chimney Sweep* (2004) 123 Cal.App.4th 1057.) The court must assume the truth of all properly pleaded material facts and allegations, but not contentions or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Wise v. Pacific Gas and Elec. Co.* (2005) 132 Cal.App.4th 725, 738.)

The standard for ruling on a motion for judgment on the pleadings is essentially the same as that applicable to a general demurrer, that is, under the state of the pleadings, together with matters that may

be judicially noticed, it appears that a party is entitled to judgment as a matter of law. (*Bezirdjian v. O'Reilly* (2010) 183 Cal.App.4th 316, 321-322 (citing *Schabarum v. California Legislature* (1998) 60 Cal.App.4th 1205, 1216).) If the motion for judgment on the pleadings is granted, it may be granted with or without leave to amend. (Code Civ. Proc., § 438, subd. (h)(1).) "Where a demurrer is sustained or a motion for judgment on the pleadings is granted as to the original complaint, denial of leave to amend constitutes an abuse of discretion if the pleading does not show on its face that it is incapable of amendment." (*Virginia G. v. ABC Unified School Dist.* (1993) 15 Cal.App.4th 1848, 1852 (emphasis added).)

III. Request for Judicial Notice

Plaintiff asks the Court to take judicial notice of twenty-two trial court orders in support of his opposition. Defendant asks this Court to take judicial notice of 2 trial court orders in support of their motion as well as the Assembly Floor Analysis of AB 218 as amended on August 30, 2019.

Pursuant to Evidence Code § 452(c) the Court takes judicial notice of the document analyzing AB 218. However, the Court declines both parties' request to take judicial notice of trial court orders addressing the same issue as they are not relevant to the Court's disposition of Defendant's motion. While the Court may take judicial notice of Court records, judicial notice is proper as to those facts that are not subject to dispute. (*Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1564.) The submitted trial courts' orders each arrive at opposing conclusions of law, which are not subject to judicial notice.

IV. Analysis

Plaintiff brings his claims entirely pursuant to Code of Civil Procedure 340.1, which "establishes a liberalized statute of limitations for actions to recover damages caused by childhood sexual assault brought against direct perpetrators of the abuse, as well as third party defendants directly or vicariously responsible for the abuse." (*X.M. v. Superior Court* (2021) 68 Cal.App.5th 1014, 1025.) "[I]n 2019, the Legislature passed Assembly Bill No. 218 . . . which amended section 340.1 to extend the statute of limitations for childhood sexual assault by 14 years, revive time-barred claims for three years, and eliminate the shortened limitations period for claims against public agencies." (*Ibid.*) AB 218 also retroactively eliminated the claim presentation requirement for childhood sexual assault claims made against public entities. (Gov. Code § 905, subd. (m).)

Defendant moves for judgment on the pleadings as to the entire[1] FAC arguing that the AB 218 amendments to the Government Code are unconstitutional. The core of Defendant's argument is that AB 218's revival of barred claims and the retroactive elimination of the claim presentation requirement of the Government Claims Act changed a substantive element of childhood sexual abuse claims; thus, violating the gift clause of the constitution by creating liability where none previously existed. In support of its argument, Defendant refers to *Conlin v. Board of Supervisors of City and County of San Francisco* (1893) 99 Cal.17, 22, (*Conlin*), *Bourn v. Hart* (1892) 93 Cal. 321, 328 (*Bourn*) and *Powell v. Phelan* (1903) 138 Cal. 271, 272-274 (Powell).

In *Conlin*, the legislature passed a law authorizing payment to the Plaintiff for his performed contractual work, despite the contractual provision holding the City unaccountable. The court, recognizing that the plaintiff did not have an enforceable claim, considered the Legislature's attempted compensation an unconstitutional gift. (*Id*. at p. 23) Similarly, in *Bourn*, the Legislature sought to compensate a prison guard for the injuries he suffered during discharge of his duty. The court ruled the appropriation was unconstitutional because it violated the prohibition against "appropriation to individuals from general considerations of charity and gratitude[.]" (*Id.* at 326.) *Bourn* held "[i]f the state desires to make itself liable for such damages as may be sustained by those in its service, it must do so by a general law which shall embrace all cases which may come within its provisions." (*Id*. at 329.) *Powell* also dealt with acts by municipal legislatures that ordered direct appropriation of funds to specific individuals. The Court finds these cases distinguishable and non-dispositive because AB 218 did not appropriate any specific sum to any individual.

AB 218 is a "general law" applicable to all alleged victims of sexual abuse who meet its requirements. It does not direct payment of funds to any individual nor is it targeted to benefit a private individual or entity. Furthermore, in contrast to Defendant's argument, the Court notes that AB 218 does not impose retroactive liability to create liability where none existed before, it merely revives or extends a statute of limitations that might have previously expired. Judgment obtained after the requirements of

[1] Defendant also seeks specific judgment in its favor on the fourth and fifth causes of action. According to Plaintiff's opposition, he has agreed and thus hereby withdraws his fourth cause of action for negligent failure to warn, train or educate, and his fifth cause of action for sexual harassment under Civil Code § 51.9. Consequently, the Court is only left with the issue of AB 218's constitutionality.

due process have been complied with "does not constitute a gift." (*Heron v. Riley* (1930) 209 Cal. 505, 517.)

Additionally, section 6 of article XVI of the California Constitution states: "Legislature has no power 'to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation … ." "The term "gift" in the constitutional provision includes all appropriations of public money for which there is no authority or enforceable claim even if there is a moral or equitable obligation." (*Jordan v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 431, 450.) The primary question is whether the money is to be used for a public or a private purpose, and, if it is for a public purpose, it is generally not regarded as a gift within the meaning of this constitutional prohibition. (See *San Diego County Dept. of Social Services v. Superior Court* (2005) 134 Cal.App.4th 761, 766 (*San Diego DSS*).) The determination of what constitutes a public purpose is primarily a matter for the Legislature to determine, and its discretion will not be disturbed by the courts so long as that determination has a reasonable basis. (*County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 746.) "The courts may infer the public purpose from other legislation or the manner in which the legislation is enacted." (*Scott v. State Bd. of Equalization* (1996) 50 Cal.App.4th 1597, 1604.)

The public purpose of AB 218, as noted in the judicially noticed Legislature's Assembly Floor analysis is "to allow more victims of childhood sexual assault to be compensated for their injuries and, to help prevent future assaults by raising the costs for this abuse"; "AB 218 would expand access to justice for victims of childhood sexual assault by removing the arbitrary time limits upon victims to pursue a case," and "confront the pervasive problem of cover ups in institutions, from schools to sports leagues, which result in continuing victimization and the sexual assault of additional children." (RJN, Defendant's Ex. A.) These rationales show a "reasonable basis" for the Legislature's determinations.

Defendant argues AB 218 does not serve a public purpose because it offers damages to plaintiffs who never had the elements to bring suit against the District. But AB 218's purposes are not limited to victims of past abuse; the bill was also intended to deter future abuse by raising the costs for such abuse. Defendant contends that payments by current school districts to former public school district students for alleged negligence by former district employees (who may or may not be living) will not prevent future abuse and this has no public purpose. Defendant presents no legal authority to support this argument and

fails to refute the reasonableness of the various rationales offered by the Legislature for AB 218. The Legislature's discretion will not be disturbed by this Court. (See, *County of Alameda, supra*, 5 Cal.3d at 746.)

Based on the foregoing, the Court finds AB 218 is constitutional as written and applied. Therefore, Defendant's motion for Judgment on the Pleadings is DENIED.

Calendar Lines 12-13
Case Name: *Dr. Samuel Zev Nathan and Dr. Neal Hiken v. Stanford Health Care, et.al.*
Case No.: 23CV410276

Before the Court is Defendant Stanford Health Care's motion to strike and demurrer to Plaintiffs', First Amended Complaint ("FAC"). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This is a medical malpractice and elder abuse action. FAC alleges that on March 11, 2022, Dr. Samuel Nathan was admitted to Stanford Hospital for a navigational bronchoscopy. (FAC, ¶ 2.) While Dr. Nathan was under anesthesia, the anesthesiologist left him for crucial minutes, during which he suffered a stroke. Failing to detect the stroke, Stanford staff wrongly concluded that Dr. Nathan had suffered a heart attack and did not conduct a physical or neurological examination until 48 hours after the procedure. Dr. Nathan was released on March 16, 2022, and has since been recovering in Santa Barbara. (FAC, ¶ 5.)

Dr. Nathan and his spouse, Dr. Neal Hiken, claim Defendant's staff misdiagnosed the stroke, failed to provide proper care, and failed to air transport Dr. Nathan to Santa Barbara (FAC, ¶ 5.) These negligent acts have caused both Dr. Nathan and Dr. Hiken physical pain and emotional suffering.

In their operative FAC, filed on September 20, 2023, Dr. Nathan and his spouse, Dr. Neal Hiken, assert (1) medical negligence, (2) negligent infliction of emotional distress, (3) loss of consortium, (4) elder abuse, (5) breach of contract, and (6) fraud.

II. Demurrer

A. Legal Standard

A demurrer tests the sufficiency of a complaint as a matter of law and raises only questions of law. (*Schmidt v. Foundation Health* (1995) 35 Cal.App.4th 1702, 1706.) In testing the sufficiency of the complaint, the Court must assume the truth of (1) the properly pleaded factual allegations; (2) facts that can be reasonably inferred from those expressly pleaded; and (3) judicially noticed matters. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Allegations should be read liberally and in context. (*Taylor v. City of Los Angeles Dept. of Water and Power* (2006) 144 Cal.App.4th 1216, 1228.) Still, the court may not

consider contentions, deductions, or conclusions of fact or law. (*Moore v. Conliffe* (1994) 7 Cal.App.4th 634, 638.)

Because a demurrer tests the legal sufficiency of a complaint, the plaintiff must demonstrate that the complaint alleges facts sufficient to establish every element of each cause of action. (*Rakestraw v. California Physicians Service* (2000) 81 Cal.App.4th 39, 43.) Where the complaint fails to state facts sufficient to constitute a cause of action, courts should sustain the demurrer. (Code Civ. Proc. §430.10(e); *Zelig v. County of Los Angeles* (2002) 27 Cal.App.4th 1112, 1126.) Sufficient facts are the essential facts of the case "with reasonable precision and with particularity sufficiently specific to acquaint the defendant with the nature, source, and extent of his cause of action." (*Gressley v. Williams* (1961) 193 Cal.App.2d 636, 643-644.) Whether the plaintiff will be able to prove the pleaded facts is irrelevant. (*Stevens v. Superior Court* (1986) 180 Cal.App.3d 605, 609-610.)

Defendant demurrers to Plaintiffs first, second, fourth, fifth, and sixth causes of action for failure to allege sufficient facts constituting a claim.

B. First Cause of Action: Medical Negligence

"The elements of a cause of action for medical malpractice are: (1) a duty to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; (2) a breach of the duty; (3) a proximate causal connection between the negligent conduct and the injury; and (4) resulting loss or damage." (*Chakalis v. Elevator Solutions, Inc.* (2012) 205 Cal.App.4th 1557, 1571.)

Defendant asserts the FAC fails to allege duty, a breach of that duty, the causal connection between the injury-producing event and the resulting damages, or damages. Dr. Nathan contends he used vernacular but that his language is equivalent to "duty" or breach of such. This is insufficient. Plaintiff is required to allege facts sufficient to establish every element of each cause of action. (*Rakestraw v. California Physicians Service* (2000) 81 Cal.App.4th 39, 43.) Where the complaint fails to state facts sufficient to constitute a cause of action, courts are required to sustain the demurrer. (Code of Civil Procedure §430.10(e); *Zelig v. County of Los Angeles* (2002) 27 Cal.App.4th 1112, 1126.)

Accordingly, Defendant's demurrer to Plaintiff's first cause of action is SUSTAINED WITH LEAVE TO AMEND within 20 days from the service date of the final order.

C. Second Cause of Action: Negligent Infliction of Emotional Distress

Dr. Hiken's claim for negligent infliction of emotional distress is based on his status as spouse and a bystander. A viable claim as a bystander requires that the plaintiff (1) be closely related to the injured victim, (2) be present at the scene of the injury-producing event at the time it occurs and be aware the event is causing injury to the victim, and (3) as a result suffers emotional distress beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances. (*Bird v. Saenz* (2002) 28 Cal.4th 910, 915, (*Bird*).)

Defendant asserts the FAC fails to allege facts showing that Dr. Hiken was present in the operating room for the crucial minutes while Dr. Nathan suffered a stroke under anesthesia. Defendant further argues Dr. Hiken is a lay person with no record of having a medical license from the California Medical Board, and he therefore could not have the contemporaneous awareness that Dr. Nathan was suffering a stroke. Dr. Hiken's argument that Defendants are misreading the FAC and focusing on only one fact giving rise to this cause of action rather than reading the FAC as a whole further confuses rather than clarifies the basis for this claim.

Neither the FAC nor Plaintiff's opposition clarify the injury-producing event or establish that Dr. Hiken knew that the medical procedure was causing injury to Dr. Nathan. If the injury-producing event was the operation, as argued by Defendant, then Dr. Hiken's admitted exclusion from the operating room and lack of contemporaneous awareness of injury bars any recovery for this claim. If the injury-producing event was the failed diagnosis and treatment of Dr. Nathan's stroke while it was occurring, the FAC still fails since it does not allege facts showing that Dr. Hiken could meaningfully have perceived such failures as a medical doctor. And, if neither the operation nor the failed diagnosis are the injury-causing events, the FAC plainly fails to state this claim.

Defendant's demurrer to Plaintiff's second cause of action is SUSTAINED WITH LEAVE TO AMEND within 20 days from the service date of the final order.

D. Fourth Cause of Action: Elder Abuse

A cause of action brought under the Elder Abuse Act allows the plaintiff to seek certain enhanced remedies when the plaintiff proves "by clear and convincing evidence" that defendant is liable for physical abuse, neglect, or abandonment and that the defendant committed the abuse with

"recklessness, oppression, fraud, or malice." (Welf. & Inst. Code, §§15610.63, 15610.57, 15610.05, and 15657, subd. (a).) The rule that "statutory causes of action must be pleaded with particularity" applies to claims made under the Elder Abuse Act. (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790.)

Plaintiff here is alleging neglect. The Act defines "neglect" to mean "[t]he negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise." (Welf. & Inst. Code, § 15610.57 subd. (a)(1);see also Welf. & Inst. Code, § 15610.27 [defining "elder" as "person residing in this state, 65 years of age or older"].) Examples of neglect include, but are not limited to: (1) failure to assist in personal hygiene, or in the provision of food, clothing, or shelter; (2) failure to provide medical care for physical and mental health needs; (3) failure to protect from health and safety hazards; (4) failure to prevent malnutrition or dehydration. (Welf. & Inst. Code § 15610.57, subd. (b).)

"[N]eglect [as a form of abuse under the Act] refers not to the substandard performance of medical services but, rather, to the 'failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults, regardless of their professional standing, to carry out their custodial obligations.'" (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 783, quoting *Delaney v. Baker* (1999) 20 Cal.4th 23, 34.) "Thus, the statutory definition of 'neglect' speaks not of the *undertaking* of medical services, but of the failure to *provide* medical care." (*Covenant Care, Inc. v. Superior Ct.*, *supra*, 32 Cal.4th at p. 783, italics original.)

To recover the enhanced remedies under the Elder Abuse Act from a health care provider, a plaintiff must plead and prove more than simple or even gross negligence in the provider's care or custody of the elder. (*Carter v. Prime Healthcare Paradise Valley* (2011) 198 Cal.App.4th 396, 405 (citations omitted).) Instead, a plaintiff must show reckless, oppressive, fraudulent, or malicious conduct. The latter three categories involve "intentional," "willful," or "conscious" wrongdoing of a "despicable" or "injurious" nature. "Recklessness" refers to a subjective state of culpability greater than simple negligence, which has been described as a "deliberate disregard" of the "high degree of probability" that an injury will occur. (*Delaney v. Baker*, 20 Cal.4th at 31 (citations omitted).) Thus, "the enhanced remedies are available only for 'acts of egregious abuse against elder and dependent adults.'"

(*Carter v. Prime Healthcare Paradise Valley*, 198 Cal.App.4th at 405, quoting *Delaney v. Baker*, 20 Cal.4th at p. 34.)

Defendant argues the FAC allegations fail to establish a caretaker relationship with Dr. Nathan and at most supports a claim of standard medical negligence for failure to diagnose and/or treat a stroke. Plaintiff also fails to plead facts to show that its employed officers, directors, or managing agents ratified its alleged acts. Plaintiff argues the allegations are sufficient to show egregious abuse in the form of neglect. The FAC alleges:

- On March 11, 2022, Dr. Samuel Nathan was admitted to Stanford Hospital for a navigational bronchoscopy. (FAC, ¶ 2.)
- While Dr. Nathan was under anesthesia, the anesthesiologist left him for crucial minutes, during which he suffered a stroke. Failing to detect the stroke, Stanford staff wrongly concluded that Dr. Nathan had suffered a heart attack and did not conduct a physical or neurological examination until 48 hours after the procedure. Dr. Nathan was released on March 16, 2022, and has since been recovering in Santa Barbara. (FAC, ¶ 5.)
- Defendant negligently provided anesthesia, negligently failed to diagnose Dr. Nathan's stroke, failed to provide any care or treatment to Dr. Nathan for a prolonged period of time, failed to authorize air transportation to Santa Barbara, and failed to provide the care and treatment to Dr. Nathan in conformity with his basic needs. (FAC, ¶ 24.)
- Defendant's practice of double-booking anesthesiologists is a direct cause of its failure to detect the stroke. (FAC, ¶ 5.)
- Dr. Nathan was released by Defendant on March 16, 2022, and has since been recovering in Santa Barbara. (FAC, ¶ 5.)

Plaintiff fails to allege facts establishing what medical treatments were or were not rendered during Dr. Nathan's hospital stay, how double-booking anesthesiologists caused Dr. Nathan's misdiagnosis, how Dr. Nathan relied on Defendant for his basic care, or what injuries Dr. Nathan suffered as a result of Defendant's conduct. Also critically for this claim, Plaintiff fails to allege sufficient facts to show a caretaking or custodial relationship wherein Defendant assumed significant responsibility for attending

to Dr. Nathan's basic needs in more than a casual or limited interaction. (*Winn v. Pioneer Medical Group, Inc*. (2016) 63 Cal.4th 148, 155.)

Defendant's demurrer to Plaintiff's fourth cause of action is SUSTAINED WITH LEAVE TO AMEND within 20 days from the service date of the final order.

E. Fifth Cause of Action: Breach of Contract

The essential elements for a breach of contract cause of action are (1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting harm to the plaintiff. (*Careau & Co. v. Security Pacific Business Credit, Inc*. (1990) 222 Cal. App. 3d 1371, 1388.)

Defendant asserts the FAC fails to state facts establishing each element of the claim. The Court agrees. If "the action is based on an alleged breach of a written contract, the terms must be set out verbatim in the body of the complaint or a copy of the written instrument must be attached and incorporated by reference." (*Otworth v. S. Oac. Transp. Co*. (1985) 166 Cal.App.3d 452, 459.) Plaintiffs are also permitted to plead the legal effect of the agreement "rather than its precise language." (*Construction Protective Services, Inc. v. TIG Specialty Insurance Co.* (2002) 29 Cal.4th 189, 198-199.)

Dr. Nathan has not adequately alleged the terms or the legal effect of the contract.

Defendant's demurrer to Plaintiff's fifth cause of action is SUSTAINED WITH LEAVE TO AMEND within 20 days from the service date of the final order.

F. Sixth Cause of Action: Fraud

"In California, fraud must be pled specifically; general and conclusory allegations do not suffice." (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645.) "The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." (*Id*. at 638.) "The requirement of specificity in a fraud action against a corporation requires the plaintiff to allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." (*Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 157.) "We acknowledge that the requirement of specificity is relaxed when the

allegations indicate that 'the defendant must necessarily possess full information concerning the facts of the controversy' (Citation) or 'when the facts lie more in the knowledge of the opposite party[.]' (Citation.)" (*Id*. at 158.)

An action for fraud does not lie only where an affirmative misrepresentation is made but also where there has been concealment or nondisclosure. (*Jones v. ConocoPhillips* (2011) 198 Cal.App.4th 1187, 1198 ["Not every fraud arises from an affirmative misstatement of material fact."]; see also *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638; 5 Witkin, Summary of Cal. Law (11th ed. 2017) Torts, § 890.)

Plaintiff appears to allege here that Defendants made knowingly false representations to induce Dr. Nathan to undergo treatment at its facility; concealed and failed to disclose facts; made promises with no intent to perform; Dr. Nathan actually and justifiable relied on these wrongful conducts. (FAC, ¶¶ 34, 35.) However, Plaintiff fails to allege the misrepresentations/concealments, who made them, by what means, how were they false, Defendant's awareness of the falsity, or how Defendant's alleged misrepresentations (made to induce Dr. Nathan's acceptance of the procedure) caused his stroke.

Defendant's demurrer to Plaintiff's sixth cause of action is SUSTAINED WITH LEAVE TO AMEND within 20 days from the service date of the final order.

III. Motion to Strike

In light of the Court's demurrer rulings, Defendant's motion to strike is MOOT.

Calendar Line 14
Case Name: *Tien M. Le v. Select Portfolio Servicing, Inc., et al.*
Case No.: 23CV412815

Before the Court is Defendant Select Portfolio Servicing, Inc.'s ("SPS") and U.S. Bank N.A.'s ("U.S. Bank") (collectively, "Defendants") demurrer to plaintiff Tien M. Le's first amended complaint ("FAC"). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This is an action arising out of a residential foreclosure. According to the FAC, on January 8, 2004, Plaintiff obtained a mortgage loan on property located at 191 Curry Avenue in Morgan Hill (the "Property") from LoanCity.com in the amount of $569,700.00, memorialized by a Deed of Trust. (FAC, ¶ 11.) The maturity due date is February 1, 2034. (*Ibid*.) The Trustee was First American Title. (*Ibid*.) Mortgage Electronic Registration System, Inc. ("MERS") was delineated as Beneficiary solely as nominee for the Lender. (*Ibid*.)

On April 5, 2022, an assignment of the deed of trust from MERS to U.S Bank National Association ("U.S. Bank") was recorded in Santa Clara County. (FAC, ¶ 12.) On April 27, 2022, a notice of default ("NOD") and election to sell under a deed of trust was recorded in Santa Clara County. (FAC, ¶ 13.)

On September 29, 2022, a notice of trustee's sale was recorded in Santa Clara County. (FAC, ¶ 14.) On November 9, 2022, the Property was sold at a public auction. (*Ibid*.)

Plaintiff attempted to contact SPS to obtain a debt validation and loan modification, but it would not take his calls or respond to his correspondence. (FAC, ¶ 15.) He further alleges he was working with SPS to obtain a debt validation and loan modification, but SPS would not provide him with alternatives to foreclosure. (FAC, ¶ 16.)

On March 14, 2023, Plaintiff filed his Complaint, which asserts: (1) violation of Civil Code section 2923.5; (2) violation of Civil Code section 2924(a)(1); (3) violation of Civil Code section 2924.9; (4) negligence; (5) wrongful foreclosure; (6) violation of Business & Professions Code section 17200; and (7) cancellation of written instruments. On September 6, 2023, the Court issued its order overruling the demurrer as to the negligence claim, sustaining without leave to amend the first and

second causes of action, and sustaining with leave to amend the third, fifth, sixth, and seventh causes of action.

On September 27, 2023, Plaintiff filed his FAC, asserting (3) violation of Civil Code section 2924.9; (4) negligence; (5) wrongful foreclosure; (6) violation of Business & Professions Code section 17200; and (7) cancellation of written instruments.[2] On October 27, 2023, Defendants filed the instant demurrer, which Plaintiff opposes.

II. Legal Standard

"The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in [Code of Civil Procedure s]ection 430.30, to the pleading on any one or more of the following grounds: . . . (e) The pleading does not state facts sufficient to constitute a cause of action, (f) The pleading is uncertain." (Code Civ. Proc., § 430.10, subds. (e) & (f).) A demurrer may be utilized 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 material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214 (*Committee on Children's Television*).) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

[2] The FAC simply strikes through the first and second causes of actions in the caption and starts the causes of action at number three. For clarity, the Court will follow this nomenclature.

III. Analysis

Defendants demur to each cause of action on the basis that it fails to allege sufficient facts to constitute a cause of action. (See Code Civ. Proc., § 430.10, subd. (e).)

A. Third Cause of Action- Violation of Civil Code section 2924.9

The first claim is asserted under the Homeowner Bill of Rights ("HBOR"), codified in Civil Code section 2923.1, et seq. Civil Code section 2924.9, provides, in relevant part:

> [W]ithin five business days after recording a notice of default pursuant to Civil Code section 2924, a mortgage servicer shall send a written communication to the borrower that includes all of the following information: (1) that the borrower may be evaluated for a foreclosure prevention alternative or, if applicable foreclosure prevention alternatives, (2) whether an application is required to be submitted by the borrower in order to be considered for a foreclosure prevention alternative, and (3) the means and process by which a borrower may obtain an application for a foreclosure prevention alternative.

(Civil Code, § 2924.9, subd. (a).)

Civil Code section 2924.12, provides:

> A mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not be liable for any violation of [Civil Code Sections 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, or 2924.17] that it has corrected and remedied prior to the recordation of the trustee's deed upon sale…

(Civ. Code, § 2924.12, subd. (c).) "[A] violation is material if it affected the borrower's loan obligations, disrupted the loan-modification process, or otherwise harmed the borrower in connection with the borrower's efforts to avoid foreclosure." (*Billesbach v. Specialized Loan Servicing LLC* (2021) 63 Cal.App.5th 830, 845 (*Billesbach*).) "[T]echnical non-compliance with the HBOR" includes when a servicer "communicated with [the borrower] only after it recorded its notice of default, and its declaration of compliance was inaccurate at the time it was recorded." (*Id*. at 846.) Those violations are only material if they "affect [the borrower's] loan obligations, disrupted [their] loan modification process, or otherwise harmed [them], despite their subsequent remedial actions." (*Ibid*.)

Plaintiff alleges Defendants failed to notify him of all foreclosure alternatives within 5 business days after the notice of default was recorded. (FAC, ¶ 20.) Plaintiff further alleges he did not receive any communications about alternatives to foreclosure before it was commenced. (FAC, ¶ 21.) However, Plaintiff also alleges that he incurred costs in the loan modification application process, and he was subject to the review process. (See FAC, ¶¶ 29, 59, 64, 67.) Defendants do not dispute that Plaintiff was not contacted within five business days of the recording of the NOD as required by the statute; Defendants do contend this non-compliance with the statute is technical and was remedied because Plaintiff commenced the loan modification process.

Plaintiff's amendment fails to cure the deficiency identified by the Court in its order. The allegations are still contradictory as Plaintiff alleges that he incurred costs pertaining to the loan modification process, and he was not provided alternatives to foreclosure. Plaintiff does not allege any facts regarding the loan modification, such as when he started the process, which would allow the Court to assess whether Defendants' failure to contact him after the recordation of the NOD disrupted his loan modification process or otherwise harmed his efforts to avoid foreclosure, thus constituting a material violation of the statute. (See *Billesbach, supra,* 63 Cal.App.5th at p. 846.)

Moreover, if Defendants were able to correct and remedy their failure to contact Plaintiff prior to the recordation of the trustee's deed upon sale Defendants are not liable. (See Civ. Code, § 2924.12, subd. (c).) Here, neither the date of the recordation of the trustee's deed upon sale nor the date of the loan modification process are alleged. As a result, a determination that the non-compliance with the statute was technical and not material, goes beyond the pleadings. Nevertheless, this claim is a statutory one and it must be pleaded with particularity. (See *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790.) Plaintiff fails to do that here.

"Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading." (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349 [citations omitted] (*Goodman*).) "Plaintiffs have the burden to show how they could further amend their pleadings to cure the defects. (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 411 [citations omitted] (*Carter*).) Here, Plaintiff requests leave to amend but fails to show in what manner he would do so. Moreover, it does not appear that Plaintiff can amend this claim to overcome these

deficiencies. Defendants' demurrer to the third cause of action is thus SUSTAINED without leave to amend.

B. Fourth Cause of Action: Negligence

"To support a negligence cause of action, a plaintiff must plead and prove: (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the duty, and (3) the breach was a proximate or legal cause of the plaintiff's injuries." (*Weimer v. Nationstar Mortgage, LLC* (2020) 47 Cal.App.5th 341, 354.) Plaintiff alleges Defendants breached their duty of ordinary care and good faith through various statutory violations.

The California Supreme Court has held that loan servicers do not have a duty to use reasonable care when reviewing and processing loan modification applications. (See *Sheen v. Wells Fargo Bank, N.A.* (2022) 12 Cal.5th 905, 925-927.) Thus, to the extent Plaintiff alleges Defendants had such a duty, the claim is not viable. However, it appears this claim is based on breach of the duty of care outside of the loan modification process. (FAC, ¶ 26.)

Plaintiff alleges various statutory violations under the HBOR and violation of 15 U.S.C. § 1641, subd. (g). For the first time in the reply, Defendants offer specific arguments as to the applicability of these statutes. Plaintiff did not have an opportunity to reply to those arguments and, the Court declines to consider them. (See *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764 [points raised for the first time in reply brief will not ordinarily be considered, because this would deprive respondent of an opportunity to counter the argument]; *L.A. Taxi Cooperative, Inc. v. The Independent Taxi Owners Assn. of Los Angeles* (2015) 239 Cal.App.4th 918, 926, fn. 7 [contention forfeited where raised for the first time in reply brief without a showing of good cause].)

"Statutes may be borrowed in the negligence context for one of two purposes: (1) to establish a duty of care, or (2) to establish a standard of care." (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 927-928, fn. 8.) Therefore, Plaintiff sufficiently alleges statutory duties arising from the HBOR statutes, that Defendants breached those statutory duties, and the breaches were the actual and proximate cause of Plaintiff's damages. (FAC, ¶¶ 25-28.) Thus, Defendants' demurrer to the fourth cause of action is OVERRULED.

C. Fifth Cause of Action: Wrongful Foreclosure

"The elements of a wrongful foreclosure cause of action are: (1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale (usually but not always the trustor or mortgagor) was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering." (*Sciarratta v. U.S. Bank Natl. Assn.* (2016) 247 Cal.App.4th 552, 562.) "Recognized exceptions to the tender rule include when: (1) the underlying debt is void; (2) the foreclosure sale or trustee's deed is void on its face; (3) a counterclaim offsets the amounts due; (4) specific circumstances make it inequitable to enforce the debt against the party challenging the sale; or (5) the foreclosure sale has not yet occurred." (*Chavez v. Indymac Mortgage Services* (2013) 219 Cal.App.4th 1052, 1062 (*Chavez*).) "[M]ere technical violations of the foreclosure process will not give rise to a tort claim; the foreclosure must have been entirely unauthorized on the facts of the case." (*Miles v. Deutsche Bank National Trust Co.* (2015) 236 Cal.App.4th 394, 409.)

Defendants argue Plaintiff fails to allege how he was prejudiced and that he tendered the full amount of the secured indebtedness. Plaintiff fails to respond to these arguments; he argues Defendants' negligence resulted in the wrongful foreclosure. Plaintiff alleges Defendants caused the trustee's sale to occur even though Plaintiff had not been provided alternatives to foreclosure. (FAC, ¶ 34.) On this basis, he alleges the NOD and Notice of Sale are invalid and/or void. (FAC, ¶ 40.) He further alleges he suffered prejudice or harm as a result of the wrongful foreclosure. (FAC, ¶ 49.)

"The rational behind the [tender] rule is that if [the borrower] could not have redeemed the property had the sale procedures been proper, any irregularities in the sale did not result in damages to the [borrower]." (*Lona v. Citibank N.A.* (2011) 202 Cal.App.4th 89, 113.) Plaintiff alleges he is excused from the tender rule because it would frustrate and be inconsistent with the purpose of his claim. (FAC, ¶ 44.) However, Plaintiff fails to allege any facts in support of this conclusion. Plaintiff also alleges tender may not be required where it is inequitable to do so, however he fails to allege any facts in support of this allegation. (See FAC, ¶ 45.)

In support of his assertion that tender is excused, Plaintiff relies on *Barrionuevo v. Chase Bank, N.A.* (2012) 885 F.Supp.2d 964 (*Barrionuevo*), a wrongful foreclosure case where the plaintiffs sought to challenge the foreclosure, prior to the sale of the property. *Barrionuevo* is a federal case, which is not binding on this Court. (See *Futrell v. Payday California, Inc.* (2010) 190 Cal.App.4th 1419, 1432, fn. 6 (*Futrell*).) And, while federal authorities can be persuasive, *Barrionuevo* is distinguishable. There, the plaintiffs alleged the foreclosure was invalid because the California Reconveyance Corporation was not the true present beneficiary under the plaintiffs' deed of trust, thus it could not conduct a valid foreclosure. (*Id*. at 971.) Here, Plaintiff's theory as to the foreclosure sale being void is based entirely upon the allegation that he was not contacted and provided foreclosure alternatives, pursuant to Civil Code section 2924.9. (FAC, ¶ 47.) Plaintiff fails to provide any authority that states such a circumstance alone is sufficient to render a foreclosure sale void and not require tender.

Plaintiff also relies on *Dimock v. Emerald Properties, LLC* (2000) 81 Cal.App.4th 868 (*Dimock*), where the court reversed summary judgment in favor of the defendants, held that the deed was void, and the plaintiff was not required to tender any of the amounts due under the note. (*Id*. at p. 878.) *Dimock* is also distinguishable. There, the deed was void because the foreclosure sale was conducted by the former trustee under the deed of trust after a substitution of trustee had been recorded, and the former trustee thus did not have the power of sale at the time of the sale. (*Id*. at p 876.) Plaintiff alleges no such facts here.

Plaintiff fails to allege any other exception to the tender rule. As a result, Plaintiff fails to allege sufficient facts to show tender or show that he qualifies for any exception to the tender requirement. (See *Chavez, supra,* 219 Cal.App.4th 1052 at p.1062; *Sciarratta, supra,* 247 Cal.App.4th at p. 562.) Defendants' demurrer to the fifth cause of action is thus SUSTAINED without leave to amend.

D. Sixth Cause of Action: Violation of Business & Professions Code section 17200

Business and Professions Code section 17200 (Section 17200) prohibits any "unlawful, unfair, or fraudulent business practices." (Bus. & Prof. Code § 17200.) The Unfair Competition Law ("UCL") covers a wide range of conduct. It embraces anything that can be properly called a business practice and that at the same time is forbidden by law. (*Korea Supply Co. v. Lockhead Martin Corp.* (2003) 29 Cal.4th 1134, 1143.) Under section 17200, a practice may be deemed unfair or deceptive even if not

proscribed by some other law. (*Blakemore v. Superior Court* (2005) 129 Cal.App.4th 36, 48.) There are three varieties of unfair competition: practices which are unlawful, unfair, or fraudulent. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180.) Pursuant to Section 17200, unfair competition includes, "any unlawful, unfair, or fraudulent business act or practice, and unfair, deceptive, untrue, or misleading advertising…" (Bus. & Prof. Code § 17200.)

Defendants argue this claim is derivative of the HBOR claim and because the HBOR claim fails as a matter of law, the Court should sustain the demurrer to this claim. Defendants' argument is well taken to the extent this claim is predicated upon the HBOR claim. However, a demurrer "does not lie to a portion of a cause of action." (*PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682.)

Plaintiff also alleges information provided to him was misleading and not consistent as to the status of his loan modification review and what he was supposed to do to satisfy the lender's demands. (FAC, ¶ 67.) However, this allegation is inconsistent with Plaintiff's allegations that he was not contacted by Defendants, thus, it cannot support this claim. Furthermore, Plaintiff's opposition contends this claim is supported by conduct and various actions by Defendants, which were never mentioned in the FAC. (See Opp., p. 8:6-12.) Consequently, Plaintiff fails to allege sufficient facts to state this claim. Defendants' demurrer to the sixth cause of action is SUSTAINED without leave to amend.

E. Seventh Cause of Action: Cancellation of Written Instruments

The demurrer to the HBOR claim has been sustained without leave to amend. Accordingly, Defendants' demurrer to the seventh cause of action without leave to amend.

Calendar Line 15
Case Name: *MICHELLE VARGAS vs AMERICAN HONDA MOTOR CO., INC.*
Case No.: 23CV423806

Before the Court is defendant American Honda Motor Co., Inc.'s ("AHM") demurrer to plaintiff Michelle Vargas's Complaint. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This is a lemon law case. On March 18, 2021, Plaintiff purchased a new 2020 Honda CR-V Hybrid for $40,773.84 ("Vehicle"). (Complaint, ¶8.) At the time of purchase, Plaintiff received an express warranty with AMH. During the warranty period, the Vehicle's Honda Sensing system suffered from defects. (Complaint, ¶¶ 16-19.) According to material AMH provided to dealers, certain environmental and roadway conditions, such as bad weather, can affect the operation of Honda Sensing. (Complaint, ¶ 20.) Honda's owner's guide failed to disclose this information to Plaintiff. (Complaint, ¶ 21.) AMH, according to Plaintiff, knew that Honda Sensing had faults and limitations from roughly the time the 2016 vehicles became available for sale, and at least by November 16, 2017 when it provided information to its dealers, but AMH did not disclose this information to consumers. (Complaint, ¶ 37.) Plaintiff further alleges AMH knew of these defects based on consumer complaints available through NHTSA. (Complaint, ¶¶ 47-48.)

Plaintiff initiated this action on October 4, 2023, asserting Song-Beverly Act violations and fraudulent inducement. AMH demurrers to Plaintiff's third cause of action for fraudulent inducement; which Plaintiff opposes.

II. Request for Judicial Notice

AHM requests judicial notice of:

(1) NHTSA's Tech Line Summary Article, ATS 170102: Exhibit A;

(2) NHTSA's Tech Line Summary Article, ATS 170104: Exhibit B;

(3) NHTSA's publication of AER17030B: Exhibit C;

(4) NHTSA's September 3, 2017 publication of Technical Service Bulletin 17-064: Exhibit D;

(5) NHTSA's publication of Tech Line Summary Article, ATS 170902: Exhibit E;

(6) NHTSA's publication of Tech Line Summary Article, ATS 171104: Exhibit F;

(7) Early Warning Reporting, Foreign Defect Reporting, and Motor Vehicle Equipment recall Regulations 78 Fed Reg 161, 51382-51462: Exhibit G;

Evidence Code section 452, subd. (c), permits judicial notice to be taken of "[o]fficial acts of the legislative, executive, and judicial departments of the United States or any public entity in the United States." (Evid. Code, § 452, subd. (c).) Thus, the request for judicial notice is GRANTED.

III. Legal Standard

"The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in [Code of Civil Procedure s]ection 430.30, to the pleading on any one or more of the following grounds: . . . (e) The pleading does not state facts sufficient to constitute a cause of action, (f) The pleading is uncertain." (Code Civ. Proc., § 430.10, subds. (e) & (f).) A demurrer may be utilized 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 treats a demurrer "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214 (*Committee on Children's Television*).) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

AHM demurs to the third cause of action for fraudulent inducement on the grounds that it is preempted by federal law and fails to allege sufficient facts to state the cause of action. (Code Civ. Proc. § 430.10, subd. (e).)

IV. Analysis

A. Preemption

Defendant argues: "any state law which requires disclosure of information subject to protection pursuant to 49 CFR 512, necessarily infringes upon those federal protections and that the protections afforded by 49 CFR Part 512 are explicitly a significant objective of 49 CFR Part 512" and is therefore preempted. (Reply, p. 8.)

Preemption can be express or implied. Defendant does not contend Congress expressly preempted state law fraudulent misrepresentation claims, but rather such preemption is implied. Preemption can be implied when it is clear Congress intended to occupy an entire field of regulation (field preemption), when compliance with both federal and state regulations is impossible (conflict preemption), or when state law would stand as an obstacle to fully accomplishing the purpose of regulation (conflict preemption). (*Hines v. Davidowitz* (1941) 312 U.S. 52, 67; *Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 955.) Defendant's focus is on conflict preemption—specifically, Defendant argues permitting Plaintiff's fraudulent concealment claim to go to a jury would stand as an obstacle to the accomplishment of the full purpose and objectives of Congress in passing NHTSA disclosure rules and regulations. (*Lloyd v. Ford Motor co.* (6th Cir. 2023) 65 F.4th 851, 859.)

The Court is persuaded by this argument for several reasons. First, the Song-Beverly act and other California legislation regulating vehicle sales does not require the type of disclosure Plaintiff's claim would require. In other words, when crafting consumer protection legislation for vehicle purchasers, the California legislature did not require car manufacturers to directly disclose detailed data to individual purchasers regarding each vehicle available for purchase. Next, the comprehensive NHTSA disclosure rules and regulations balanced the need for the agency to collect data to address public safety with the confidentiality and competition concerns the industry legitimately faces. Requiring car manufacturers to comply with different standards based on different jury verdicts over time thwarts the purpose of the NHTSA regulatory scheme, which does make data available to the public after analysis in conjunction with substantial other data NHTSA receives while considering consumer privacy and company competition and confidentiality concerns.

AMH's demurrer to Plaintiff's third cause of action is therefore SUSTAINED WITHOUT LEAVE TO AMEND.

B. Failure to State a Claim

The Court also concludes Plaintiff cannot state a claim for fraud even if the claim is not preempted. The elements of fraud based on concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiffs, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiffs, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damages. (*Jones v. ConocoPhillips* (2011) 198 Cal.App.4th 1187, 1198 (*Jones*).)

As with fraudulent misrepresentation, the elements of concealment must be pleaded with specificity, but significantly less particularity is required in the case of fraudulent concealment because it is difficult to plead a negative, such as "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 and Planning Assn*. (2009) 171 Cal.App.4th 1356, 1384.) Thus, when courts refer to the requirement of specificity with respect to allegations of fraudulent concealment, they are generally concerned that allegations regarding the facts giving rise to a duty to disclose material facts are pleaded with particularity. (See *Linear Technology Corp. v. Applied Materials, Inc.* (2007) 152 Cal.App.4th 115, 132-133 (*Linear Technology*).)

"A failure to disclose a fact can constitute actionable fraud or deceit in four circumstances: (1) when the defendant is the plaintiff's fiduciary; (2) when the defendant has exclusive knowledge of material facts not known or reasonably accessible to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations that are misleading because some other material fact has not been disclosed." (*Collins v. eMachines, Inc.* (2011) 202 Cal.App.4th 249, 255 (*Collins*).) The latter 3 circumstances, "presupposes the existence of some other relationship between the plaintiff and the defendant in which a duty to disclosure can arise…

As a matter of common sense, such a relationship can only come into being as a result of some sort of transaction between the parties." (*LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 336-337.)

Both parties cite to publicly available information about the alleged defects as evidence to support their positions. Plaintiff contends the fact that this information was available on NHTSA's website is insufficient to constitute disclosure because consumers should not be required to search for that information before purchasing—AMH had superior knowledge of these defects. However, Plaintiff cites only federal law to support this proposition, and the Court is not persuaded by that authority. The fact remains that the material in Plaintiff's complaint cited in support of her fraudulent concealment claim was all gathered from publicly available information. It thus follows that this information was not uniquely in AMH's knowledge but was, instead, "reasonably accessible to plaintiff."

Accordingly, AMH's demurrer to Plaintiff's third cause of action is SUSTAINED WITHOUT LEAVE TO AMEND on this additional ground.