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: February 8, 2024 TIME: 9:00 A.M.

RECORDING COURT PROCEEDINGS IS PROHIBITED.

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:

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FOR COURT REPORTERS: The Court does **not** provide official court reporters. If you want a court reporter to report your hearing, you must submit the appropriate form, which can be found here:

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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**.

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	22CV402705	KINGDOM OF SWEDEN vs J. Daryaie	Parties are ordered to appear for the examination.
2	19CV352990	Robert Villarreal et al vs Ford Motor Company et al	Defendants' Motion for Judgment on the Pleadings as to the Fourth Cause of Action is GRANTED WITHOUT LEAVE TO AMEND. Please scroll down to line 2 for full tentative ruling. Court to prepare formal order.
3	22CV408359	JOHN DOE vs The Harker School et al	Harker's Demurrer is SUSTAINED with leave to amend and OVERRULED, in part. Please scroll down to lines 3-4 for full tentative ruling. Court to prepare formal order.
4	22CV408359	JOHN DOE vs The Harker School et al	Harker's Motion to Strike is GRANTED with 20 days leave to amend. Please scroll down to lines 3-4 for full tentative ruling. Court to prepare formal order.
5	21CV389205	Shannon Krzycki vs Norman Y. Mineta San Jose International Airport et al	Defendant City of San Jose's Motion for Summary Judgment is GRANTED. Please scroll down to lines 5-6 for full tentative ruling. Court to prepare formal order. Moving party to promptly prepare form of judgment.
6	21CV389205	Shannon Krzycki vs Norman Y. Mineta San Jose International Airport et al	Defendant ABM's Motion for Summary Judgment is GRANTED. Please scroll down to lines 5-6 for full tentative ruling. Court to prepare formal order. Moving party to promptly prepare form of judgment.
7	22CV396854	Rajaa Sonai et al vs 3375 CAMINO CITY SQUARE, LLC et al	Defendant 3375 Camino City Square's Motions to Compel Plaintiffs Rajaa Sonai, Sonai LCC, and Sukira, LLC to Provide Further Responses to Requests for Admission (Set One) are DENIED as MOOT; Defendants' Motions for Sanctions are GRANTED, IN PART. Plaintiffs served code compliant responses to the Requests for Admission on October 3, 2023, after these motions were filed and after extensive informal discussions failed to procure supplemental responses. The Court thus agrees with Defendants that code compliant responses were forthcoming only after Defendants went through the expense of preparing the motions to compel. However, each motion is identical except for the Plaintiff's name, thus triple fees are not warranted, although counsel's billable rates are reasonable for this market and case type. The Court orders Plaintiffs to pay Defendants $4,500 in sanctions (representing the costs for three motions and fees for one motion plus the incremental fees necessary to prepare three motions and replies) within 30 days of service of this formal order. Court to prepare formal order.
8	22CV396854	Rajaa Sonai et al vs 3375 CAMINO CITY SQUARE, LLC et al	Please see line 7, above.
9	22CV396854	Rajaa Sonai et al vs 3375 CAMINO CITY SQUARE, LLC et al	Please see line 7, above.

10	23CV418661	Hwy Labs, Inc. vs Alkaline 88, LLC et al	Plaintiff HWY LABS, Inc. Motions to Compel Defendant Alkaline 88, LLC and Alkaline Water Company, Inc. to Provide Further Responses to Form Interrogatories (Set One), Special Interrogatories (Set One), Requests for Production of Documents, and Requests for Admission is GRANTED. The Court faces many indigent self-represented litigants who are told the law entitles them to the same, but no greater, consideration than other litigants and attorneys. (*County of Orange v. Smith* (2005) 132 Cal.App.4th 1434, 1444.) Those litigants must comply with the Code of Civil Procedure, and so do the corporate defendants here. Further, while Defendants ask the Court to order Plaintiffs to narrow their requests, Defendants fail to articulate what narrowing they seek or to even respond to Plaintiffs' separate statements. Accordingly, Defendants are ordered to serve verified, code compliant responses to all outstanding discovery withing 20 days of service of this formal order. Plaintiff's Motion for Sanctions is GRANTED, in part. The Court finds Plaintiff's counsel's billable rate reasonable for this market. However, the Court further finds 5 hours for these identical motions where no substantive responses were served more appropriate. Accordingly, Defendants are further ordered to pay Defendants $1680 in fees and costs within 60 days of service of this formal order.
11	23CV418661	Hwy Labs, Inc. vs Alkaline 88, LLC et al	Please see line 10, above.
12	2013-1-CV-247406	P. Kleidman Vs N. Shah, Et Al	Cross-Defendants' Motion to Compel Feeva Technology, Inc.'s Attendance at Deposition and for Sanctions is DENIED. Kleidman fails to articulate how any of the deposition topics is likely to lead to the discovery of admissible evidence. Kleidman cannot challenge the agency relationship between Feeva and its counsel, the enforceability of the settlement agreement is a legal determination at the heart of the cross-complaint, not the proper subject matter for deposition, and Feeva has already made plain that it is seeking damages in the form of attorneys' fees spent litigating after the settlement agreement was signed. Feeva was substantially justified in objecting to this deposition and opposing this motion to compel, thus sanctions are inappropriate. Court to prepare formal order.
13	21CV386811	Oluwatosin Aduroja vs The Grove Garden Apartments et al	Plaintiff's Motion for Leave to File a First Amended Complaint is CONTINUED to February 29, 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 Rule in place at the time this motion was filed require that the moving party serve an amended 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.) Plaintiff is ordered to serve an amended notice of motion with the February 29, 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.

14	21CV391464	Warren Nguyen vs Hieu Tran et al	Hieu Tran's Motion Set Aside Default/Judgment is DENIED. The Court understands Mr. Tran was dealing with a medical issue on the day of the default judgment hearing. However, this is an interpleader action in which Plaintiff sought to deposit remaining settlement funds with the Court while Defendant works out how much to pay the chiropractor directly. Plaintiff has no interest in the funds and properly had those finds deposited with the Court. The parties with interest in the deposited funds are Defendant and the chiropractor, which parties must now determine amongst themselves, either through negotiation or litigation, how those funds are to be distributed. (See *Hood v. Gonzales* (2019) 43 Cal. App. 5th 57.) Accordingly, setting aside the interpleader judgment would be futile in any event. Parties are ordered to appear at the hearing.
15	23CV415644	David Chun vs ANYTIME MERCHANT SERVICES, INC.	Off calendar; this matter is being heard by Judge Monahan in Department 3.

Calendar Line 2
Case Name: *Robert Villarreal et al. v. Ford Motor Company et al.*
Case No.: 19CV352990

Before the Court is Defendant Ford Motor Company's ("FMC") motion for judgment on the pleadings against Plaintiffs Robert and Irma Villarreal (collectively, "Plaintiffs") Third Amended Complaint ("TAC") by. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This is a lemon law case. On October 31, 2010, Plaintiffs purchased a 2010 Ford F-150 (the "Vehicle"), which was manufactured and/or distributed by FMC. (TAC, ¶ 6.) In connection with the purchase, Plaintiffs received an express written warranty, including a 3-year/36,000 mile express bumper to bumper warranty and a 5-year/60,000 mile powertrain warranty, which covers the engine and transmission. (TAC, ¶ 8.) During the warranty period, the Vehicle contained or developed defects, including but not limited to, defects related to the transmission; defects causing the transmission to slip gears; defects requiring TCM recalibration; defects causing a dull, heavy sound during the Vehicle's operation; defects causing repeated illumination of the oil change light; defects causing transmission delay; defects causing a bump and/or thud on acceleration and/or when coming to a stop, and defects causing hesitation on acceleration. (TAC, ¶ 9.) Between July 25, 2011, and January 16, 2014, Plaintiffs presented the Vehicle for repair 5 times, for various reasons, including transmission concerns. (TAC, ¶ 11-16.) Plaintiffs allege the statute of limitations is tolled by delayed discovery, the repair doctrine, and fraudulent concealment. (TAC, ¶ 21-37.)

Plaintiffs initiated this action on August 8, 2019 asserting: (1) violation of Civil Code section §1793.2(d); (2) violation of Civil Code section §1793.2(b); (3) violation of Civil Code section §1793.2(a)(3); (4) breach of express written warranty; (5) breach of the implied warranty of merchantability; (6) negligent repair; and (7) fraud by omission. On September 20, 2021, Defendants moved for judgment on the pleadings as to each cause of action. On February 22, 2022, the Court entered its order granting Defendants' motion for judgment on the pleadings in its entirety.

On March 10, 2022, Plaintiff filed their First Amended Complaint, which asserted similar claims. On May, 11, 2022, Defendants demurred to each cause of action. On September 6, 2022, the

Court entered its order overruling the demurrer as to the cause of action for fraud by omission, sustaining the demurrer with leave to amend as to the statutory claims and negligent repair, and sustaining the demurrer without leave to amend as to breach of express written warranty and breach of implied warranty of merchantability.

On September 16, 2022, Plaintiffs filed their SAC, asserting: (1) violation Civil Code section §1793.2(d); (2) violation of Civil Code section §1793.2(b); (3) violation of Civil Code section §1793.2(a)(3); (4) fraud by omission; and (5) negligent repair, to which Defendants demurred. On February 24, 2023, the Court issued its order regarding Defendants' demurrer (the "Order"), overruling as to the first cause of action, sustaining with leave to amend as to the fourth cause of action, and sustaining without leave to amend as to the remaining causes of action.

On March 6, 2023, Plaintiffs filed their TAC, asserting (1) violation of Civil Code section § 1793.2, subdivision (d) and (2) fraud by omission. On November 27, 2023, FMC filed the instant motion, which Plaintiffs oppose.

II. Legal Standard

A motion for judgment on the pleadings is the functional equivalent of a general demurrer. (*Evans v. California Trailer Court, Inc.* (1994) 28 Cal.App.4th 540, 548; *Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 999; *Shea Homes Limited Partnership v. County of Alameda* (2003) 110 Cal.App.4th 1246, 1254.) A defendant can move for judgment on the pleadings on the grounds that (1) the court has no jurisdiction of the subject of the cause of action alleged in the complaint and/or (2) the complaint does not state sufficient facts to constitute a cause of action. (Code Civ. Proc., § 438, subd. (c)(1)(B)(i)-(ii).) "The grounds for the motion must appear on the face of the complaint, and in any matters subject to judicial notice. [Citation.] The court accepts as true all material factual allegations, giving them a liberal construction, but it does not consider conclusions of fact or law, opinions, speculation, or allegations contrary to law or judicially noticed facts. [Citations.]" (*Shea,*110 Cal.App.4th at p. 1254; *Kapsimallis v. Allstate Ins. Co.* (2002) 104 Cal.App.4th 667, 672.) The general rule is that statutory causes of action, including alleged violations of the Song-Beverly Act, must be pleaded with particularity. (See *Lopez v. Southern California Rapid Transit District* (1985) 40 Cal.3d 780, 795; *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790.)

FMC moves for judgment on the pleadings as to the second cause of action on the ground that it is time-barred. (Code Civ. Proc., § 438.)

III. Analysis

A. Tolling

1. Delayed Discovery Rule

"Under the delayed discovery rule, a cause of action accrues and the statute of limitations begins to run when the plaintiff has reason to suspect an injury or some wrongful cause, unless the plaintiff pleads and proves that a reasonable investigation at the time would not have revealed a factual basis for that particular cause of action. In that case, the statute of limitations for that cause of action will be tolled until such time as reasonable investigation would have revealed its factual basis." (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 803.) "'In order to rely on the discovery rule for delayed accrual of a cause of action, "[a] plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence."' [Citations.]" (*NBC Universal Media, LLC v. Superior Court* (2014) 225 Cal.App.4th 1222, 1232 (*NBC*); see also *April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 832 ["plaintiff must plead facts sufficient to convince the trial judge that delayed discovery was justified"].) "When a plaintiff relies on a theory of fraudulent concealment, delayed accrual, equitable tolling, or estoppel to save a cause of action that otherwise appears on its face to be time-barred, he or she must specifically plead facts which, if proved, would support the theory." (*Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625, 641.)

Plaintiffs allege 5 events in the repair history from July 25, 2011 to January 16, 2014. (TAC, ¶ 12-16.) Plaintiffs requested repurchase in February 2019. (TAC, ¶ 17.) Plaintiffs allege they could not have discovered through the exercise of reasonable diligence that FMC was concealing the Transmission defect and concealing the company's true position with respect to the Transmission Defect. (TAC, ¶ 24.) However, Plaintiffs fail to allege *any* reasonable diligence to discover the Transmission Defect. Plaintiffs allege they relied on the representations of FMC's authorized repair facilities that the Vehicle was repaired following each visit. (TAC, ¶ 25.) However, as the Court stated in the Order, such allegations are not sufficient to support delayed discovery. (See *Finney v. Ford Motor Co.* (N.D. Cal.

2019) 2019 U.S. Dist. LEXIS 561; *Futrell v. Payday California, Inc.* (2010) 190 Cal.App.4th 1419, 1432, fn. 6 [although not binding, courts may consider unpublished federal district court opinions as persuasive].)

Plaintiffs allege they were further unable to discover the Transmission Defect because FMC's issuance of various TSBs and Recalls purporting to fix the symptoms. (TAC, ¶ 26.) However, Plaintiffs fail to allege *any facts* stating they personally relied on the TSBs or Recalls. The mere fact that FMC issued the TSBs and Recalls does not in itself mean that a reasonable investigation would not have revealed the factual basis for Plaintiffs' claims. (*Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52 (*Allen*) ["We are not required to examine underdeveloped claims or to supply arguments for the litigants."]; see also *Perry v. City of San Diego* (2021) 65 Cal.App.5th 172, 188, fn. 8 (*Perry*) ["It is not this court's role to connect the dots"].) Therefore, the TAC does not allege sufficient facts to support the application of the delayed discovery rule.

2. The Repair Doctrine

The Song-Beverly Act "repair doctrine" is codified in Civil Code section 1795.6, subdivision (b), which states that the warranty period shall not be deemed expired if "the warranty repairs or service performed upon the nonconforming goods did not remedy the nonconformity after the repairs or service was completed, and the buyer notified the manufacturer or seller of this failure within 60 days after the repairs or service was completed. (Civ. Code, § 1795.6, subd. (b); *Ruiz Nunez v. FCA US LLC* (2021) 61 Cal.App.5th 385, 397 (noting that "section 1795.6 governs the tolling of the warranty period, section 1793.1(a)(2) does not expand the circumstances under which the warranty period may be tolled").)

The TAC alleges the claims are tolled because of Defendants' failure to repair the Vehicle. However, the TAC does not state whether Plaintiffs notified the manufacturer or seller of their failure to fix the issues within 60 days of the completion of repairs or services. (*Nunez,* 61 Cal.App.5th at 397.) Thus, the TAC does not state facts sufficient to support the application of the repair doctrine.

3. Fraudulent Concealment Tolling

The doctrine of fraudulent concealment operates such that "the defendant's fraud in concealing a cause of action against him tolls the applicable statute of limitations." (*Regents of University of California v. Super. Ct*. (1999) 20 Cal.4th 509, 533.) Because fraud is the basis of the estoppel, the

same pleading and proof is required in the fraud cases (i.e., the plaintiff must show the substantive elements of fraud and an excuse for late discovery of the facts). (*Snapp & Associates Ins. Services, Inc. v. Robertson* (2002) 96 Cal.App.4th 884, 890-891.) To allege fraudulent concealment tolling, a plaintiff must allege facts showing: (1) the time and manner of the discovery; (2) plaintiff was not at fault for failing to discover the fraud or had no actual presumptive knowledge of facts sufficient to put him on inquiry; and (3) the substantive elements of fraud. (*Community Cause v. Boatwright* (1981) 124 Cal.App.3d 888, 900.) The elements of fraud are "(a) misrepresentation; (b) knowledge of falsity; (c) intent to defraud; (d) justifiable reliance; and (e) resulting damage." (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.)

Plaintiffs allege Defendants concealed the transmission defects, minimized the scope, causes, and dangers of the defect with inadequate recalls and refused to investigate, address, and remedy the defect as it pertains to their vehicles. (TAC, ¶ 35.) They further allege they acted reasonably by relying on the representations of Defendant's authorized representations that the Vehicle was repaired. (TAC, ¶ 36.) However, as the Court stated above, Plaintiffs fail to allege facts in support of their assertions. Moreover, Plaintiffs fail to explain how the 5 repair events from 2011 to 2014 did not put them on inquiry of the facts underlying their fraud claim. Nor do Plaintiffs allege they relied on the TSBs. Thus, Plaintiffs fail to allege fraudulent concealment tolling.

4. Equitable Estoppel

"Generally, speaking, four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of the fact; and (4) he must rely upon the conduct to his injury." (*Honeywell v. Workers' Comp. Appeals Bd.* (2005) 35 Cal.4th 24, 37.) Critically, for the doctrine to apply, the plaintiff must be "*directly* prevented … from filing [a] suit on time" (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 385 (emphasis added)) because the defendant "engag[ed] in some sort of *purposeful* conduct or [made] a representation that leads that *particular* plaintiff not to take action against [it]" (*Ortega v. Pajaro Valley Unified Sch. Dist.* (1998) 64 Cal.App.4th 1023, 1056 (emphasis added).) Further, "the rule of equitable estoppel,

includes, of course, the requirement that the plaintiff exercise reasonable diligence." (*Bernson v. Browning-Ferris Indus.* (1994) 7 Cal.4th 926, 936.)

In the statute of limitations context, equitable estoppel may be appropriate where the defendant's act or omission actually and reasonably induced the plaintiff to refrain from filing a timely suit. (See *Lantzy,* 31 Cal.4th at p. 385.) The requisite act or omission must involve a misrepresentation or nondisclosure of a material fact bearing on the necessity of bringing timely suit. (*Vu v. Prudential Property & Casualty Ins. Co.* (2001) 26 Cal.4th 1142, 1149-1152.)

In support of their argument that equitable estoppel applies, Plaintiffs rely on *Doe v. Marten* (2020) 49 Cal.App.5th 1022 and *Honeywell,* 35 Cal.4th 24. *Honeywell* addressed a Worker's Compensation Appeals Board ruling, and did not determine whether equitable estoppel applied, but rather remanded the matter to the Appeals Board to determine whether the parties' words and conduct established an estoppel. (*Id*. at p. 38.)

Doe involved a medical malpractice claim arising out of defendant's performance of plastic surgery on the plaintiff. (*Doe*, 49 Cal.App.5th at 1024.) After a verdict in plaintiff's favor, the trial court found the claim time-barred and dismissed the action. The appellate court reversed, concluding defendant's conduct in first agreeing to arbitration then withdrawing his agreement after determining he never signed the arbitration agreement actually and reasonably induced plaintiff to refrain from filing a timely action. (*Id*. at p. 1025.) Thus, the defendant was estopped from relying on a statute of limitations. *Doe* teaches: "the requisite act or omission must involve a misrepresentation or nondisclosure of a material *fact* bearing on the necessity of bringing a timely suit." (*Id*. at p. 1028.)

Here, Plaintiffs contend FMC knew of the Transmission Defect and that the repairs would not be successful; after each repair, FMC's authorized repair facility represented that the Vehicle was repaired and by doing so, FMC acted in such a way that Plaintiffs had a right to believe it was so intended; Plaintiffs were ignorant of the true state of the repairs; and they relied on FMC's conduct to their injury. However, Plaintiffs fail to allege any facts or representations from FMC regarding the statute of limitations or the necessity of bringing a timely suit. Moreover, there are five years between the repair on January 16, 2014, and the recurrence of the defects and subsequent request for repurchase around February 2019. There are no facts stating Plaintiffs were going to file suit around the time the

representations were made. Furthermore, based on this record, it is unclear to the Court how FMC's representations in 2014 could have *directly prevented* Plaintiffs from filing a suit for that entire time. Nor do Plaintiffs allege facts showing their reasonable diligence. Thus, equitable estoppel is not applicable here.

B. Fourth Cause of Action: Fraud by Omission

The limitations period for a fraud claim is three years, pursuant to Code of Civil Procedure section 338, subdivision (d). A claim for fraud is not deemed to have accrued until the "discovery, by the aggrieved party, of the facts, constituting fraud or mistake." (Code Civ. Proc., § 338, subd. (d); *Britton v. Girardi* (2015) 235 Cal.App.4th 721, 734 (*Britton*).)

The TAC alleges the fraud occurred at the time of the sale and that "Plaintiffs could not reasonably have been expected to learn or discover of the Subject Vehicle's Transmission Defect and its potential consequences until well after Plaintiffs purchased the Subject Vehicle." (TAC, ¶¶ 47, 53d.) However, as noted in the Order, Plaintiffs repeatedly allege they were aware of transmission problems such as "slipping upon acceleration," "hesitation upon acceleration," "a bump/thump upon acceleration," "…again slipping upon acceleration," and "ongoing transmission concerns, including, a bump upon acceleration." (TAC, ¶¶ 12-16.) Plaintiffs fail to allege sufficient facts to support any tolling principles. Therefore, the Court declines to depart from its prior conclusion that this claim is time-barred.

"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, Plaintiffs request leave to amend but fail to show in what manner they would do so. Moreover, it does not appear that Plaintiffs can sufficiently amend this claim. Thus, the motion for judgment on the pleadings is GRANTED without leave to amend.

Calendar Lines 3-4
Case Name: *John Doe v. The Harker School, et al.*
Case No.: 22CV408359

Before the Court is Defendant the Harker School's ("Harker") demurrer to Plaintiff John Doe's third amended complaint ("TAC") and motion to strike portions contained therein. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This action arises out of the alleged sexual abuse suffered by Plaintiff while he was a boarding student at Harker in 1977. (TAC, ¶ 1.) Defendant Aaron Michael Cox was a Harker employee, as a dorm parent and/or staff member, and he sexually assaulted and abused Plaintiff on at least 10 occasions over a year when Plaintiff was 10 years old. (*Id*.)

Plaintiff initiated this action on December 2, 2022, and on July 20, 2023, he filed his TAC asserting: (1) negligence; (2) negligent supervision; (3) negligent hiring and/or retention; (4) negligent failure to warn, train, or educate; (5) intentional infliction of emotional distress; (6) sexual battery; (7) sexual assault; (8) gender violence; (9) violation of Penal Code section 288; (10) violation of penal code section 647.6; and (11) violation of civil rights. On September 28, 2023, Harker filed the instant motions which Plaintiff opposes.

II. Demurrer

A. 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.)

Harker demurs to the first, fifth through eleventh causes of action on the ground Plaintiff fails to allege facts sufficient to state his claims. (Code Civ. Proc., § 430.10, subd. (e).)

B. Vicarious Liability

Plaintiff alleges Harker's liability is based on vicarious liability and ratification. (TAC, ¶¶ 24, 78-79, 87, 94, 116.) Under the doctrine of respondeat superior, "an employer is vicariously liable for the torts of its employees committed within the scope of the employment." (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 296.) An employer's vicarious liability may extend to an employee's willful, malicious, and criminal torts, as well as negligence, even if the employer did not authorize the crimes or torts. (See *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 209; *Perry v. County of Fresno* (2013) 215 Cal.App.4th 94, 101.)

In determining whether the employee's conduct occurred within the scope of his or her employment, the court "considers whether the conduct benefited the employer, whether it was authorized or directed by the employer, the reasonable expectations of the employer, the amount of freedom the employee has to perform the duties of the job, the type of work the employee was hired to do, the nature of the conduct involved, and the time and place of the accident." (*Tognazzini v. San Luis Coastal Unified School Dist.* (2001) 86 Cal.App.4th 1053, 1058.) "Conduct committed within the scope of employment for purposes of respondeat superior liability requires a nexus between the employee's tort and the employment to ensure that liability is properly placed on the employer." (*Inter Mountain Mortg., Inc. v. Sulimen* (2000) 78 Cal.App.4th 1434, 1441.)

Harker relies on *Kimberly M. v. Los Angeles Unified School Dist.* (1989) 215 Cal.App.3d 545, *John R. v. Oakland Unified School Dist.* (1989) 48 Cal.3d 438, and *Alma W. v. Oakland Unified School Dist.* (1981) 123 Cal.App.3d 133 to argue it cannot be held vicariously liable. *Alma W.* involved a janitor molesting a student. The court there declined to hold the school district vicariously liable, because sexual molestation was "in no way related to mopping floors, cleaning rooms, or any of the other tasks that are required of a school custodian." (*Alma W., supra,* 123 Cal.App.3d at pp. 139-140.)

In *John R., supra,* 48 Cal.3d at p. 447, the Supreme Court addressed whether a school district would be held liable for a sexual assault by a teacher on a fourteen-year old student where the teacher used his authority to obtain the student's participation in an extracurricular program, which required the student to visit the teacher's home, and the teacher told the student sexual conduct was part of a teacher-student relationship and was meant to help the student with his problems. Under these facts, the court held that a school may not be held vicariously liable for the intentional torts of its employees where the conduct at issue falls outside of the scope of employment.

In *Kimberly M,* 215 Cal.App.3d at 547, a five-year old student was molested by her teacher. Applying *John R*., the court concluded there was no vicarious liability because the abuse of a teacher's authority to "indulge in personal, sexual misconduct is simply too attenuated to deem a sexual assault as falling within the range of risks allocable to a teacher's employer." (*Id*. at 549.)

Plaintiff relies on *Samantha B. v. Aurora Vista Del Mar, LLC* (2022) 77 Cal.App.5th 85, 107, where the appellate court states that under the rule of respondeat superior, an "employer may be vicariously liable for willful, malicious, even criminal acts, of an employee that are deemed to be committed within the scope of employment, even though the employer has not authorized such acts," and that specifically "a sexual tort will be considered to be within the scope of employment if 'its motivating emotions were fairly attributable to work-related events or conditions.'" (*Id*. at 107-108.) In *Samantha B,* an unlicensed mental health worker employed by an acute psychiatric hospital sexually assaulted three patients. (*Id*. at 91-92.) The worker was permitted to be alone with female patients in their rooms, which were not visible from the nursing station, for up to 20 minutes. (*Id.* at 93.) On these facts, the court found the duties of a mental health worker include helping vulnerable patients who may be suffering from cognitive impairment over an extended period of time and the hazard was

"exponentially increased by the employer's policies, including allowing male workers 20 minutes alone with patients and providing inadequate training on worker-patient boundaries." (*Id.*)

Here, Cox was a dorm parent and/or staff member at Harker, not a teacher. (TAC, ¶ 12.) Plaintiff was a boarding student, boarding and residing at Harker's dormitory. (TAC, ¶ 1.) Therefore, Plaintiff's relationship with Cox was not that of a student-teacher. Plaintiff also alleges Cox's duties included helping students with daily living activities; Cox was personally involved with the students over an extended period of time; elementary students like Plaintiff were vulnerable due to their age; and Harker's policies allowed male workers to be alone with students at night when there were in bed and in their pajamas. (TAC, ¶ 1.) These allegations are analogous to those in *Samantha B.*; it appears the motivating emotions of Cox's sexual torts were fairly attributable to work-related conditions, thus the torts can be considered within the scope of employment. (*Samantha B.,* 77 Cal.App.5th at p. 107; *cf. Lisa M.,* 12 Cal.4th at p. 301 [hospital was not liable for a sexual assault committed by a technician under the pretense of conducting an ultrasound examination because the employee's interaction with the victim was brief, his duties were technical, and the motivating emotions were not fairly attributable to work-related conditions].) Thus, Plaintiff sufficiently alleges a theory of vicarious liability and the demurrer cannot be sustained on this basis.

C. Ratification

"As an alternative to respondeat superior, an employee may be liable for an employee's acts where the employer subsequently ratifies the originally unauthorized tort." (*Samantha B., supra,* 77 Cal.App.5th at p. 109.) The failure to investigate or respond to charges that an employee has committed an intentional tort or the failure to discharge the employee may be evidence of ratification. (*C.R. v. Tenet Healthcare Corp.* (2009) 169 Cal.App.4th 1094, 1110.)

Plaintiff's allegations regarding ratification are conclusory. He alleges, on information and belief, that Harker knew or should have known of Cox's wrongful conduct and failed to investigate or respond to charges. (See TAC, ¶¶ 24, 79, 87, 94, 116.) However, Plaintiff fails to allege any facts that Harker knew of the conduct or was made aware of it such that its failure to investigate or respond to charges would constitute ratification. On these facts, it is unclear what Plaintiff reported to Harker, if

anything, and when. Thus, the TAC fails to allege sufficient facts to support Plaintiff's theory of liability through ratification.

D. First Cause of Action: Negligence

"An action in negligence requires a showing that the defendant owed the plaintiff a legal duty, that the defendant breached the duty, and that the breach was a proximate or legal cause of injuries suffered by the plaintiff." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673.)

Plaintiff alleges Defendants created an environment in which Cox was afforded years of continuous secluded access to minor children. (TAC, ¶ 32.) He alleges Defendants were aware or on notice of Cox's sexual misconduct with minors, and Defendant's conduct constituted negligence per se under the Child Abuse and Neglect Reporting Act ("CANRA"), codified in Penal Code section 11164, et seq. because Defendants knew or should have known Cox was taking Plaintiff into his room alone and/or fondling Plaintiff and other students when they were in bed, and Defendants failed to report the assaults. (TAC, ¶¶ 33-38.)

Penal Code section 11166 provides:

> A mandated reporter shall make a report to an agency specified in Section 11165.9 whenever the mandated reporter, in the mandated reporter's professional capacity or within the scope of the mandated reporter's employment, has knowledge of or observes a child whom the mandated report knows, or reasonably suspects has been the victim of child abuse or neglect.

(Pen. Code, § 11166, subd. (a).)

Plaintiff fails to allege any facts as to how Harker knew or should have known about the acts. However, this is a negligence claim, and Plaintiff incorporated the prior paragraphs into the first cause of action. (See TAC, ¶ 32.) Plaintiff alleges Defendant owed students a duty of care, it breached that duty by failing to adequately supervise students and protect them against sexual abuse, his injury was proximately caused by Defendants' breach of duty and as a result, he suffered damages. (TAC, ¶¶ 16-17, 27, 36, 43.) This is sufficient to allege negligence. Harker does not address these general negligence allegations. "A demurrer does not lie to a portion of a cause of action." (See *PH II, Inc. v. Super. Ct.* (1995) 33 Cal.App.4th 1680, 1682; see also *Financial Corp. of America v. Wilburn* (1987)

189 Cal.App.3d 764, 778 ["[A]' defendant cannot demur generally to part of a cause of action"].) Thus, the demurrer to the first cause of action is OVERRULED.

E. Fifth Cause of Action: Intentional Infliction of Emotional Distress

The elements of the tort of intentional infliction of emotional distress are: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001.) "Extreme and outrageous" conduct is that which exceeds "all bounds of that usually tolerated in a civilized community." (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050-1051.) Generally, whether the conduct at issue is extreme and outrageous is a question of fact to be determined beyond the pleading stage. (*Spink v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004.)

Plaintiff alleges Defendants' conduct towards him during the course and scope of his Harker employment was outrageous and extreme. (TAC, ¶¶ 76-77.) Harker's liability is based on vicarious liability and ratification. (TAC, ¶¶ 78-79.) As stated above, Plaintiff alleges sufficient facts to support vicarious liability. Harker offers no other arguments as to this claim. On this record, whether the underlying conduct is extreme and outrageous is a question of fact inappropriate for resolution on demurrer. (*Spink,* 171 Cal.App.4th at 1004.) Thus, the demurrer to the fifth cause of action is OVERRULED.

F. Sixth Cause of Action: Sexual Assault and Seventh Cause of Action: Sexual Battery

The elements for battery are (1) the defendant intentionally committed an act resulting in a harmful or offensive contact with the plaintiff's body; (2) the plaintiff did not consent to contact; and (3) the contact caused injury, damage, loss, or harm to plaintiff. (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 526.) "A cause of action for sexual battery… requires the batterer intend to cause a 'harmful or offensive' contact and the batteree suffer a 'sexually offensive contact.'" (*Angie M v. Superior Court* (1995) 37 Cal.App.4th 1217, 1225.)

The elements of assault are: (1) defendant acted with intent to cause harmful or offensive contact, or threatened to touch plaintiff in a harmful or offensive manner; (2) plaintiff reasonably

believed [they] were about to be touched in a harmful or offensive manner or it reasonably appeared to plaintiff that defendant was about to carry out the threat; (3) plaintiff did not consent to defendant's conduct; (4) plaintiff was harmed; and (5) defendant's conduct was a substantial factor in causing plaintiff's harm. (*So v. Shin* (2013) 212 Cal.App.4th 652, 668-669; see also CACI, No. 1301.)

Plaintiff alleges Cox subjected Plaintiff to numerous instances of sexual assault; with the intent to cause a harmful or offensive contact; Plaintiff did not consent to such acts; and the conduct caused injury and damage to Plaintiff. (TAC, ¶¶ 85-88.) He further alleges Cox subjected him to numerous instances of sexual abuse and molestation with the intent to cause harmful or offensive contact; Plaintiff believed Cox had the ability to make the harmful and offensive contact with him; he did not consent to the conduct; because of the conduct, Plaintiff has suffered harm, including but not limited to, emotional, financial, and psychological injuries. (TAC, ¶¶ 90-96.)

As stated above, Plaintiff alleges sufficient facts to support Harker's vicarious liability. Thus, the demurrer to the sixth and seventh causes of action is OVERRULED.

G. Eighth, Ninth, and Tenth Causes of Action

Plaintiff does not assert these claims against Harker. (TAC at pp. 29:18; 30:19; 32:5 ["Against All Defendants Except the Harker School"].) Thus, the demurrer to the eighth, ninth, and tenth causes of action is OVERRULED.

H. Eleventh Cause of Action: Violation of Civil Rights (Civil Code sections 51.7, 51.9, 52)

Civil Code section 51.7, provides:

> All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property *because of political affiliation*, or on account of *any characteristic listed* or defined in subdivision (b) or (e) of Section 51, or position in a labor dispute, or because another person perceives them to have one or more of those characteristics.

(Civ. Code, § 51.7 [emphasis added].)

Civil Code section 51, states: "all persons… are free and equal, and no matter what their sex…are entitled to full and equal accommodations, advantages, privileges, or services in all business establishments of every kind whatsoever." (Civ. Code, § 51, subd. (b).)

Civil Code section 51.9, provides:

> A person is liable in a cause of action for sexual harassment under this section when plaintiff proves *all of the following* elements: "(1) [t]here is a business, service, or professional relationship between the plaintiff and defendant… [such as] Physician, psychotherapist, or dentist… Landlord or property manager… Teacher… A relationship that is substantially similar to any of the above… (2) [t]he defendant has made sexual advances, solicitations, sexual requests, demands for sexual compliance by the plaintiff, or engaged in other verbal, visual, or physical conduct of a sexual nature or of a hostile nature based on gender, that were unwelcome and pervasive or severe… (3) [t]here is an inability by the plaintiff to easily terminate the relationship… [and] (4) [t]he plaintiff has suffered or will suffer economic loss or disadvantage or personal injury, including, but not limited to, emotional distress or the violation of a statutory or constitutional right, as a result of the conduct described in paragraph (2).

(Civ. Code § 51.9, subd. (a) [emphasis added].)

Plaintiff alleges the sexual assault and acts of violence were on the basis of his sex. (TAC, ¶ 116.) He further alleges Cox committed violence, or intimidation by threat of violence against Plaintiff on account of his sex. (TAC, ¶ 117.) However, Plaintiff fails to allege any facts regarding how his sex was the basis for the sexual assault, violence and/or intimidation by threat of violence. Plaintiff's allegations are insufficient to allege this claim. (See *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790 [statutory causes of action must be pleaded with particularity].) Moreover, while a teacher is included in Section 51.9, Cox is not alleged to be a teacher, but rather a *dorm parent* and/or staff member of Harker. (TAC, ¶ 1.) Therefore, Plaintiff fails to allege this claim against Cox. As a result, he cannot maintain the claim against Harker on his theory of vicarious liability. Thus, the demurrer to the eleventh cause of action is SUSTAINED with 20 days leave to amend.

IV. Motion to Strike

A. Legal Standard

Under Code of Civil Procedure section 436, a court may strike out any irrelevant, false, or improper matter inserted into any pleading or strike out all or part of any pleading not drawn or filed in

conformity with the laws of this state, a court rule, or an order of the court. (Code Civ. Proc., § 436.) The grounds for a motion to strike must appear on the face of the challenged pleading or from matters of which the court may take judicial notice. (Code Civ. Proc., § 437, subd. (a); see also *City and County of San Francisco v. Strahlendorf* (1992) 7 Cal.App.4th 1911, 1913.) In ruling on a motion to strike, the court reads the complaint as a whole, all parts in their context, and assuming the truth of all well-pleaded allegations. (*Turman v. Turning Point of Central California, Inc.* (2010) 191 Cal.App.4th 53, 63, citing *Clauson v. Super. Ct.* (1998) 67 Cal.App.4th 1253, 1255.) "Thus, for example, defendant cannot base a motion to strike the complaint on affidavits or declarations containing extrinsic evidence showing that the allegations are 'false' or 'sham.' " (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2020) 7.169.)

Harker moves to strike portions of the TAC regarding punitive damages, including:

(1) Paragraph 83;

(2) Paragraph 88;

(3) Paragraph 96;

(4) Paragraph 100, p. 30:7-9;

(5) Paragraph 101;

(6) Paragraph 107;

(7) Paragraph 127;

(8) Prayer for Relief, No. 8; and

(9) Prayer for Relief, No. 9.

B. Analysis

To properly plead a claim for punitive damages, a plaintiff must allege the defendant was guilty of malice, oppression, or fraud and the ultimate facts underlying such allegations. (Civ. Code, § 3294, subd. (a); *Clauson v. Super. Ct.* (1998) 67 Cal.App.4th 1253, 1255.) Malice is defined as, "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights and safety of others." (Civ. Code, § 3294, subd. (c)(1).) "Oppression" is defined as "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (Civ. Code, § 3294, subd.

(c)(2).) "Despicable conduct," in turn, has been described as conduct that is "so vile, base, contemptible, miserable, wretched, or loathsome that it would be looked down upon and despised by ordinary decent people." (*Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.4th 306, 331.) Finally, "fraud" is defined within the statute as "an intentional misrepresentation, deceit, or concealment of material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." (Civ. Code, § 3294, subd. (c)(3).)

"When the Defendant is a corporation…the oppression, fraud, or malice must be perpetrated, authorized, or knowingly ratified by an officer, director, or managing agent of the corporation." (*Wilson v. Southern California Edison Co.* (2015) 234 Cal.App.4th 123, 164; Civ. Code, § 3294, subd. (b).) The purpose of this requirement is to "limit corporate punitive damage liability to those employees who exercise substantial independent authority and judgment over decisions that ultimately determine corporate policy." (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 573.)

Here, Harker is a private school. (TAC, ¶ 1.) It is undisputed that Harker is a corporation, which falls under Civil Code section 3294, subdivision (b). As the Court stated above, Plaintiff fails to provide any facts in support of his allegations of ratification. His conclusory allegations are insufficient to allege punitive damages against Harker. (Civ. Code, § 3294, subd. (b).) Thus, the motion to strike is GRANTED with 20 days leave to amend.

Calendar Lines 5-6
Case Name: Shannon Krzycki v. Norman Y. Mineta San Jose International, et.al.
Case No.: 21CV389205

Before the Court are Defendants', ABM Aviation ("ABM") and the City of San Jose's motions for summary judgment against Plaintiff's complaint for negligence and premises liability. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Factual Background

On August 29, 2020, Ms. Krzycki arrived at San Jose Mineta International Airport ("SJC") for the purpose of boarding a flight back to her home in the State of Washington. (Deposition of Shannon Krzycki ("Krzycki Depo.") 72:5-10.) As Ms. Krzycki waited for her flight to begin boarding, she sat in a bank of seats across from a restroom near Gate 13 with several traveling companions, including Ken Erickson, Adam Berns, and Alessandra Berns. (Krzycki 72:21-74:13; Deposition of Adam Berns (" Adam Berns Depo."), 26:1-10; Deposition of Ken Erickson ("Erickson Depo") 46:6-8; Deposition of Alessandra Berns ("Alessandra Berns") 18:12-19:21.)

Ms. Krzycki got up to use the bathroom adjacent to the area where she was sitting. While walking into the women's restroom, she slipped and fell in the entranceway to the bathroom. (Krzycki Depo. 78:7-25.) Ms. Krzycki testified that Mr. Erickson, Ms. Berns, and Mr. Berns all witnessed her fall. (Krzycki Depo. 80:24-25.) Ms. Krzycki declined the offered medical care and chose to proceed with her flight. (Krzycki Depo 90:24-91:13; Deposition of Lorena Martinez ("Martinez Depo") 42:24-43:3.)

At the time of the incident, the women's restroom, including the entryway, located directly across from Gate 13 in Terminal A of SJC was owned, operated, and controlled by the City of San Jose. (UMF No. 2.) At the time of the incident, ABM was providing janitorial services to the City of San Jose in Terminal A, including in the women's restroom across from Gate 13. (UMF No. 4.)

On September 30, 2021, Plaintiff filed her operative complaint for general negligence and premises liability. On November 11, 2022, Plaintiff added ABM Aviation as a Doe defendant.

II. Evidentiary Objections

A. Plaintiff's objections to AMB's Evidence

- Ex. 12 –Paragraph 6 of the Declaration of Rosalyn Bond: SUSTAINED

- Ex. 11 – Paragraph 6 of the Declaration of Camillo Simms: OVERRULED

Plaintiff also objects to the below supplemental evidence:

- Excerpts of deposition of Shannon Krzycki
- Excerpts of deposition of Ken Erickson
- Exhibits 1-8 to deposition of Ken Erikson
- Excerpts of Deposition of Maria Fernandez Contreras
- Declaration of Kris Rath

The general rule of motion practice, which applies here, is that new evidence is not permitted with reply papers. … "[T]he inclusion of additional evidentiary matter with the reply should only be allowed in the exceptional case … and if permitted, the other party should be given the opportunity to respond." (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537–1538 [161 Cal. Rptr. 3d 700].) Whether to accept new evidence with the reply papers is vested in the trial court's sound discretion. (See, *Alliant Ins. Services, Inc. v. Gaddy* (2008) 159 Cal.App.4th 1292, 1308; *Carbajal v. CWPSC, Inc.,* (2016) 245 Cal. App. 4th 227, 241, *Hahn v. Diaz-Barba* (2011) 194 Cal.App.4th 1177, 1193 ["While additional evidentiary matter submitted with the reply ordinarily should not be allowed, the court has discretion to consider it when it poses no prejudice to the opposing party"].)

Plaintiff's objection only as to the declaration of Kris Rath as new evidence is SUSTAINED. Plaintiff's remaining objections are OVERRULED, as the remaining supplemental evidence is not new.

B. ABM'S and City of San Jose's Objections

Defendants' objections to Plaintiff's evidence listed below are SUSTAINED.

- Ex. 3 -Airport Incident Report produced by Defendants and bates-stamped for the purposes of this case as SJ000075-77
- Ex. 8. -Excerpts of the records of Plaintiff Shannon Krzycki from Virginia Mason Franciscan Health, dated August 31, 2020
- Ex. 9. - Excerpts of the records of Plaintiff Shannon Krzycki from Seattle Pain Relief, dated October 12, 2020
- Ex. 11. - Excerpts of the deposition of Alessandra Berns, taken on October 17, 2023; Page 63 lines 11-17.

- Ex. 12. -Excerpts of the deposition of Adam Berns taken on July 11, 2023; Page 45 lines 18-20; Page 47 lines 2-7; Page 48 lines 11-18
- Ex. 13. -Excerpts of the deposition of Kenneth Erickson, taken on July 12, 2023; Pages 90-91 lines 22-9
- Ex. 17. -Excerpts of the deposition of Maria Contreras (Vol. 2), taken January 19, 2024.
- Ex. 19. - Excerpts of the deposition of City of San Jose's Person Most Qualified Bryan Pignone, taken on January 17, 2023
- Ex. 20. -Excerpts of the deposition of City of San Jose's Person Most Qualified Helen Moreno, taken on January 23, 2024.
- 24. Declaration of Plaintiff in Opposition to Motions for Summary Judgment; paragraphs 12-21
- 25. Declaration of Kenneth Erickson in Opposition to Motions for Summary Judgment; paragraphs 5, 7, 8, 9, 10, 11, 13, 14.

III. Legal Standard

The purpose of a motion for summary judgment or summary adjudication "is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atl. Richfield Co.* (2001) 25 Cal. 4th 826, 843.) "Code of Civil Procedure section 437c, subdivision (c), requires the trial judge to grant summary judgment if all the evidence submitted, and 'all inferences reasonably deducible from the evidence' and uncontradicted by other inferences or evidence, show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (*Adler v. Manor Healthcare Corp.* (1992) 7 Cal.App.4th 1110, 1119.)

A defendant moving for summary judgment bears two burdens: (1) the burden of production, i.e., presenting admissible evidence, through material facts, sufficient to satisfy a directed verdict standard; and (2) the burden of persuasion, i.e., the material facts presented must persuade the court that the plaintiff cannot establish one or more elements of a cause of action, or a complete defense vitiates the cause of action. (Code Civ. Proc., § 437c(p)(2); *Aguilar,* 25 Cal.4th at p. 850-851; *Scalf v. D. B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1519.) A defendant may satisfy this burden by showing that the claim "cannot be established" because of the lack of evidence on some essential element of the

claim. (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 574, 590.) Once the defendant meets this burden, the burden shifts to the plaintiff to show that a "triable issue of one or more material facts exists as to that cause of action or defense thereto." (*Id*.)

A defendant may simply show the plaintiff cannot establish an essential element of the cause of action "by showing that the plaintiff does not possess, and cannot reasonably obtain, needed evidence." (*Aguilar, supra,* 25 Cal.4th at 854.) Thus, rather than affirmatively disproving or negating an element (e.g., causation), a defendant moving for summary judgment has the option of presenting evidence reflecting the plaintiff does not possess evidence to prove that element. "The defendant may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action. The defendant may also present evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence—as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing" to support an essential element of his case. (*Aguilar, supra,* at p. 855.) Under the latter approach, a defendant's initial evidentiary showing may "consist of the deposition testimony of the plaintiff's witnesses, the plaintiff's factually devoid discovery responses, or admissions by the plaintiff in deposition or in response to requests for admission that he or she has not discovered anything that supports an essential element of the cause of action." (*Lona v. Citibank, N.A., supra*, 202 Cal.App.4th at p. 110.)

"On ruling on a motion for summary judgment, the court is to 'liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party.'" (*Cheal v. El Camino Hospital* (2014) 223 Cal.App.4th 736, 760.) The court must, therefore, consider what inferences favoring the opposing party a factfinder could reasonably draw from the evidence. "While viewing the evidence in this manner, the court must bear in mind that its primary function is to identify issues rather than to determine issues. [Citation.]" (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 839.)

Defeating summary judgment requires only a single disputed material fact. (CCP § 437c(c) [a motion for summary judgment" shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."] [emphasis added].) Thus, any disputed material fact means the court must deny the motion; the

court has no discretion to grant summary judgment. (*Zavala v. Arce* (1997) 58 Cal.App.4th 915, 925, fn. 8; *Saldana v. Globe-Weis Systems Co.* (1991) 233 Cal.App.3d 1505, 1511-1512.)

IV. Analysis

A. ABM Aviation's Motion for Summary Judgment

1. Premises Liability

The elements of a cause of action for premises liability are the same as those for negligence: duty, breach, causation, and damages. (*Castellon v. U.S. Bancorp (2013)* 220 Cal.App.4th 994, 998.) Those who own, possess, or control property generally have a duty to exercise ordinary care in managing the property to avoid exposing others to an unreasonable risk of harm. (*Annocki v. Peterson Enterprises, LLC* (2014) 232 Cal.App.4th 32, 37.) If a dangerous condition exists, the property owner is "under a duty to exercise ordinary care either to make the condition reasonably safe for [visitors'] use or to give a warning adequate to enable them to avoid the harm." (*Bridgman v. Safeway Stores, Inc.* (1960) 53 Cal.2d 443, 446.) The existence and scope of a property owner's duty are legal questions for the court. (*Annocki,* 232 Cal.App.4th at p. 36.) "'[P]roperty owners are liable for injuries on land they own, possess, or control.' But … the phrase 'own, possess, or control' is stated in the alternative. A defendant need not own, possess and control property in order to be held liable; control alone is sufficient." (*Alcaraz v. Vece* (1997) 14 Cal.4th 1149 internal citations omitted; *Salinas v. Martin* (2008) 166 Cal.App.4th 404, 414.)

a. Ownership or control of the property.

ABM contends it did not owe Plaintiff a duty of care since it did not own or control the terminal area where Plaintiff fell. Defendant's undisputed material facts and pertinent evidence establish:

- On August 29, 2020, Plaintiff fell at the entrance of the women's restroom across from Gate 13 in Terminal A at SJC.
- At the time of the incident, the women's restroom and entryway were owned, operated, and controlled by the City of San Jose.
- At the time of the incident, ABM was providing janitorial services to the City of San Jose in Terminal A, including in the women's restroom across from Gate 13.
- Plaintiff was at SJC for the purpose of boarding a flight back to her home in the State of

Washington.

- Responding to Plaintiff's discovery requests, City of San Jose admits and acknowledges ownership and control of the SJC property including the incident area at the time of the incident. (ABM Ex. 4; Declaration of Rosalyn Bond.)

Plaintiff relies on *Hassaine v. Club Demonstration Servs., Inc*. (2022) 77 Cal. App.5th 843, 852 to argue that ABM's employee, Ms. Contreras had (1) exclusive access and control over the incident area during her cleaning services, (2) power to remove the dangerous condition from the restroom floor, and (3) power to deny Plaintiff access to the dangerous condition. In support, Plaintiff submits the following admissible evidence:

- Excerpts of the Deposition of Lorena Martinez
- Excerpts of the Deposition of Maria Contreras (Vol.1)

In *Hassaine*, the plaintiff slipped and fell on a slippery substance while shopping at a Costco warehouse. She sued Costco and Club Demonstration Services (CDS), an independent contractor that operated food sample tables within the store. The court acknowledged that defendants generally do not have a duty of care where they did not contribute to the risk that the plaintiff would suffer the harm alleged. But it found an exception to this rule applied because a special relationship exists between a business and their invitees, which gives rise to a duty of care by the business to "'those who are lawfully on the premises regarding risks that arise within the scope of their relationship." (77 Cal. App.5th 843.) The court held that "[i]rrespective of control, [this duty] also extends to all property the proprietor impliedly adopts and invites others to use." (*Id*. at 851-852.)

Ms. Martinez testified about ABM's safety policies and the training of its janitorial staff, stating that employees are required to place "caution, wet floor" or "closed" signs at both entries of the restroom prior to cleaning to prevent people from entering the restroom area. Ms. Contreras testified that before Plaintiff's fall, she cleaned, mopped, and dried the floors of the bathroom. Before starting her cleaning, Ms. Contreras placed caution sings at both entrances and even placed her cart at one entry to block access. This evidence is sufficient to support Plaintiff's argument that ABM had control of the incident area and thus owed Plaintiff a duty of care.

b. Dangerous Condition

"A plaintiff alleging injuries based on a dangerous condition must prove the defendant either: (1) created the dangerous condition, or (2) knew or should have known of the dangerous condition." (*Peralta v. Vons Companies, Inc.* (2018) 24 Cal.App.5th 1030, 1036; see also *Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1206.) "[A] defendant is entitled to judgment as a matter of law if the plaintiff fails to show that the dangerous condition existed for at least a sufficient time to be discovered by ordinary care and inspection." (*Ortega,* 26 Cal.4th at 1207.)

ABM argues Plaintiff cannot prevail on her premises liability claim because she does not possess and cannot reasonably obtain needed evidence to show any liquid, foreign substance or other dangerous condition existed on the floor at the time of her fall. In support of its position, ABM provides the following evidence:

- Plaintiff's deposition testimony that she did not see any liquid, foreign substance, or other dangerous condition on the floor where she fell. (Krzycki Depo. 81:17-82:2.)
- Plaintiff's deposition testimony that the floor felt slippery with her foot because she fell. (*Id.*)
- Mr. Erickson's, Mr. Bern's, and Ms. Bern's deposition testimony that they did not see any liquid, foreign substance, or dangerous condition on the floor where Plaintiff fell and that they did not observe the floor area where Plaintiff fell to be slippery. (Erickson Depo. 48: 22-49:9; Adam Berns Depo. 32:18-33:9; Alessandra Berns Depo. 26:6-27.)
- Former ABM employees Ms. Martinez's and Ms. Contreras's deposition testimony that the floor was clean and dry at the time of Plaintiff's fall. Ms. Contreras testified that pursuant to her employer's policy, after she mopped the floor, she used towels and rags to dry the floor and waited until the floor was dry before allowing public access. (Deposition of Maria Fernandez Contreras, 26:22-32:3; Martinez Depo. 45:19-25, 54:23-55:3.)

ABM relies on *Buehler v. Alpha Beta Co.* (1990) 224 Cal.App.3d 729. In *Buehler*, the plaintiff alleged she fell on an unknown substance or an improperly waxed floor in the defendant's store. In finding the store was entitled to summary judgment, that court held:

> To establish negligence, it is necessary to link the existence of an improperly waxed floor to the creation of an inappropriately slippery floor. However, the deposition testimony

indicated the absence of a slippery or otherwise defective condition. There was no foreign debris of any type on the floor prior to appellant's fall. Appellant had no idea as to what caused her to fall. Appellant candidly admitted that just prior to the fall she had not had any difficulty keeping her footing. An unbiased witness who saw appellant and was only five feet from her when she fell specifically stated that she did not find the floor slippery. Conjecture that the floor might have been too slippery at the location where appellant happened to fall is mere speculation which is legally insufficient to defeat a summary judgment. [Citations.] Accordingly, all appellant can argue is that she slipped and fell. She lost her balance for some unknown reason... (*Id*.)

ABM has met its prima facie burden that there are insufficient facts to infer a dangerous condition existed. Therefore, the burden shifts to Plaintiff.

Plaintiff provides the following admissible evidence:

- Excerpts of Plaintiff's June 27, 2022 Responses to City of San Jose's First Set of Special Interrogatories
- Airport Daily Activity/Event Report
- Excerpts of City of San Jose's September 15, 2022 Responses to Plaintiff's First Set of Special Interrogatories
- Excerpts of City of San Jose's September 15, 2022 Responses to Plaintiff's First Set of Requests for Admission
- Excerpts of ABM Aviation, Inc.'s June 13, 2023 Responses to Plaintiff's First Set of Special Interrogatories
- Excerpts of the Defense Medical Examination report by Diana Kraemer, M.D., conducted on March 22, 2023
- Excerpts of the deposition of Alessandra Berns, taken on October 17, 2023; excluding Page 63 lines 11-17 pursuant to evidentiary objection
- Excerpts of the deposition of Adam Berns taken on July 11, 2023; excluding Page 45 lines 18-20; Page 47 lines 2-7; Page 48 lines 11-18 pursuant to evidentiary objection
- Excerpts of the deposition of Kenneth Erickson, taken on July 12, 2023; excluding Pages 90-91

lines 22-9 pursuant to evidentiary objection

- Excerpts of the deposition of Lorena Martinez, taken on February 23, 2023
- Excerpts of the deposition of Shannon Krzycki, taken on April 5, 2023
- Excerpts of the deposition of Maria Contreras (Vol. 1), taken on February 27, 2023
- Excerpts of the deposition of ABM Aviation, Inc.'s Person Most Qualified, Ronnel Raju, taken on January 8, 2024
- Agreement for Janitorial Services at The Airport between City of San Jose and GCA Services Group
- Photograph of the Airport Floor
- Excerpts of the records of Plaintiff from NeoSpine, dated January 19, 2021

None of Plaintiff's submitted evidence provides any facts to infer that some liquid or foreign substance was on the floor where Plaintiff fell nor are there any facts showing the incident area was wet and/or slippery. Plaintiff's responses to written discovery merely states: " On August 29, 2020, there was a wet, slippery area in a public restroom in the Norman Y. Mineta San Jose International Airport." Evidence that the floor was mopped right before Plaintiff's entry into the bathroom does not allow one to reasonably infer that the floor was wet at the time of the incident, especially considering testimony that the floor was dried off with towels after mopping and that Plaintiff's companions did not observe liquid or other evidence that the floor was wet.

The Court thus finds that Plaintiff's evidence fails to establish facts sufficient to support an inference that a dangerous condition existed when she fell.

c. Causation

ABM contends Plaintiff cannot meet her burden of proving causation. The Court agrees. Having ruled Plaintiff has not established the existence of a dangerous condition, the issue of causation is rendered moot.

2. Negligence

The elements of a cause of action for negligence are: duty, breach, causation, and damages. (*Castellon v. U.S. Bancorp (2013)* 220 Cal.App.4th 994, 998.) If a dangerous condition exists, the property owner is "under a duty to exercise ordinary care either to make the condition reasonably safe

for [visitors'] use or to give a warning adequate to enable them to avoid the harm." (*Bridgman v. Safeway Stores, Inc.* (1960) 53 Cal.2d 443, 446.)

Plaintiff pleads a cause of action for General Negligence against ABM based on the allegation that: "[ABM] and each of [its] agents/employees so negligently owned, controlled, supervised, managed, designed, constructed, maintained and/or operated said premises, so as to cause and/or allow a dangerous condition to exist on the property which proximately caused Plaintiff to slip and fall on a liquid substance that was in a high traffic area of the subject premises, resulting in injuries and damages to Plaintiff." (Complaint PLD-PI-001(2), ABM evidence Ex. 2, p. 4.)

The facts alleged and the evidence provided by Plaintiff in support of her general negligence claim are nearly identical to those alleged in support of her premises liability claim. For the same reasons stated above and because the undisputed evidence shows there was no liquid, foreign substance, or other dangerous condition on the floor where Plaintiff fell, the Court finds that Plaintiff cannot meet her burden of proving the essential elements of her Negligence claim.

B. The City of San Jose's Motion for Summary Judgment

Under California Government Claims Act §835, a public entity may be liable for injuries caused by a dangerous condition of public property if plaintiff establishes (1) existence of a dangerous condition causing injury, (2) a reasonably foreseeable risk of the type of injury that occurred, and (3) the entity had actual or constructive notice. (Cal. Gov. Code §835; *Cordova v. City of Los Angeles* (2015) 61 Cal.4th 1099, 1105.) When a third party's conduct causes the injury, a public entity is only liable when "a feature of the public property has increased or intensified the danger to users from third party conduct." (*Bonanno v. Contra Costa Transit Auth*. (2003) 30 Cal.4th 139, 155.) Moreover, the plaintiff's allegations, and ultimately the evidence, must establish a physical deficiency in the property itself such that the property is "'physically damaged, deteriorated, or defective in such a way as to foreseeably endanger those using the property itself,' or possesses physical characteristics in its design, location, features, or relationship to its surroundings that endanger users." (*Id.* at 148-149)

Ms. Krzycki alleges a cause of action for Premises Liability against the City based on the allegation that: "Plaintiff was walking through the premises when she slipped and fell on a liquid substance that was in a high traffic area on the subject premises." Ms. Krzycki further alleges (1) the

City "negligently owned, operated or maintained" the premises, and (2) a dangerous condition of public property existed. (Complaint PLD-PI-001(4), Ex. 2.). As her first cause of action for general negligence, Plaintiff alleges " [SJC] and each of [its] agents/employees so negligently owned, controlled, supervised, managed, designed, constructed, maintained and/or operated said premises, so as to cause and/or allow a dangerous condition to exist on the property which proximately caused Plaintiff to slip and fall on a liquid substance that was in a high traffic area of the subject premises, resulting in injuries and damages to Plaintiff." (Complaint PLD-PI-001(2), Ex. 2.)

The facts alleged and the evidence provided by Plaintiff in support of her claims against SJC are nearly identical to those alleged against ABM. As reasoned above, undisputed evidence shows there was no liquid, foreign substance, or other dangerous condition on the floor where Plaintiff fell. Therefore, Plaintiff has not met her burden of establishing a prima facie case of a Dangerous Condition of Public Property.

Based on the foregoing, ABM's and the City of San Jose's motions for summary judgment are GRANTED.

C. Plaintiff's Request for Continuance to Conduct Discovery

Plaintiff asks the Court for a continuance to conduct further discovery. To prevail on this request, Plaintiff must show: (1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts. (*Frazee v. Seely*, (2002) 95 Cal. App. 4th 627, 633.) The court may deny a continuance "where the action has been pending a long time and extensive discovery has already been conducted." (*Fisher v. Larsen*, (1982) 138 Cal. App. 3d 627, 648.)

ABM and the City of San Jose contend Plaintiff has conducted extensive discovery aimed at uncovering the exact issues she now seeks even further discovery on, including the condition of the premises and training of the ABM employees contracted to maintain the subject premises and that no new facts would be revealed by further discovery.

Plaintiff seeks to depose (1) unidentified City of San Jose's employees who contributed and/or drafted the City's Report of August 29, 2020, (2) Kris Rath, (3) Camillo Simms, (4) Rosalyn Bond, (5) secondary PMQ for ABM. She also seeks a continuance to obtain the certified deposition transcripts for

Maria Contreras (Vol. 2), Helen Moreno, and Bryan Pigone.

The Court does not find a continuance justifiable because (1) certified deposition transcripts will not add essential facts where Plaintiff has had the rough version, (2) no reason has been shown that a second PMQ for ABM will testify any differently than the first one, (3) it is unreasonable to depose Ms. Bond and Ms. Simms for their conclusory declaratory statements when Plaintiff has the option to object to their admissibility, (4) City's report and declaration of Kris Rath have been excluded pursuant to Defendants' evidentiary objections.

Accordingly, Plaintiff's request for a continuance is DENIED.