

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

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

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

DATE: September 10, 2024 TIME: 9:00 A.M.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.

Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E

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

LAW AND MOTION TENTATIVE RULINGS

FOR APPEARANCES: Department 18 is fully open for in-person hearings. The Court strongly prefers **in-person** appearances for all contested law and motion matters. For all other hearings, the Court strongly prefers either **in-person or video** appearances. If you must appear virtually, you must use video. Audio-only appearances are permitted, but disfavored, as they cause significant disruptions and delays to the proceedings. Please use telephone-only appearances as a last resort. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 18:

https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

SCHEDULING MOTION HEARINGS: Please go to <https://reservations.scscourt.org> or call 408-882-2430 between 8:30 a.m. and 12:30 p.m. (Mon.-Fri.) to reserve a hearing date for your motion before you file and serve it. You must then file your motion papers no more than five court days after reserving the hearing date, or else the date will be released to other cases.

FOR COURT REPORTERS: The Court is no longer able to provide official court reporters for civil proceedings (as of July 24, 2017). If you want to have a court reporter to report your hearing, you must submit the appropriate form, which can be found here:

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

RECORDING IS PROHIBITED: As a reminder, most hearings are open to the public, but state and local court rules prohibit recording of court proceedings without a court order. This prohibition applies to both in-person and remote appearances.

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

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

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

DATE: September 10, 2024 TIME: 9:00 A.M.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.

Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling,
in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E

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

LAW AND MOTION TENTATIVE RULINGS

LINE #	CASE #	CASE TITLE	RULING
<u>LINE 1</u>	22CV402286	Financial Pacific Leasing, Inc. vs David Amaya et al	Order of Examination. The proposed order has now been forwarded to this Department and has been signed. The hearing for this application is continued to October 31, 2024 at 9 a.m. to allow the order for OEX to be served.
<u>LINE 2</u>	22CV408718	Julie Ricafort vs Anthony Galvan	Motion for Judgment on Pleadings. Scroll down to <u>Lines 2 and 3</u> for Tentative Ruling.
<u>LINE 3</u>	22CV408718	Julie Ricafort vs Anthony Galvan	Motion to Strike. Scroll down to <u>Lines 2 and 3</u> for Tentative Ruling.
<u>LINE 4</u>	23CV416519	Linda Lisner vs City of San Jose et al	Demurrer. A notice of motion with the hearing date and time was served by mail on July 1, 2024. Any opposition was due on August 27, 2024. Plaintiff failed to oppose the motion. Thereafter Plaintiff dismissed the subject of the demurrer – the first cause of action—rendering this motion MOOT.

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

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

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

DATE: September 10, 2024 TIME: 9:00 A.M.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.

Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling,
in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E

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

LAW AND MOTION TENTATIVE RULINGS

LINE 5	20CV367863	Charles Thompson et al vs Bruce Williams et al	Motion for Summary Judgment/Adjudication Plaintiff Charles E. Thompson's motion is unopposed. Plaintiff gave notice of the motion on June 6, 2024. Any opposition was due to be filed on August 27, 2024, and no opposition was filed. A failure to oppose a motion may be deemed a consent to the granting of the motion. (California Rules of Court, Rule 8.54(c); <i>Sexton v. Superior Court</i> (1997) 58 Cal.App.4th 1403, 1410.) Where a responding party does not file an opposition to a motion for summary judgment, the moving party must still meet its initial burden of proof. (<i>Thatcher v. Lucky Stores, Inc.</i> (2000) 79 Cal.App.4th 1081, 1086-1087, <i>CDF Firefighters v. Maldonado</i> (2008) 158 Cal.App.4th 1226, 1239, fn. 2). 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." (Code Civ. Proc., § 437c, subdivision (c)). Plaintiff has shown sufficient evidence to justify the grant of summary judgment in his favor; the motion for summary judgment is GRANTED. Plaintiff to prepare order.
------------------------	------------	---	--

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

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

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

DATE: September 10, 2024 TIME: 9:00 A.M.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.

Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling,
in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E

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

LAW AND MOTION TENTATIVE RULINGS

LINE 6	22CV401891	Zowie Mason et al vs Aurelia Amezcua et al	Motion for Summary Judgment. Plaintiff's request to continue the hearing of this motion to take the deposition of Defendant Amezcua is GRANTED. This motion is CONTINUED to December 12, 2024 at 9a.m. in Department 18b.
LINE 7	22CV404901	Tara Kumar, Trustee of the Anjali Kumar Trust dated 12/17/1997 et al vs T-Mobile West, LLC et al	Motion to Compel (Special Interrogatories, Set 2). Scroll down to <u>Lines 7 and 8</u> for Tentative Ruling.
LINE 8	22CV404901	Tara Kumar, Trustee of the Anjali Kumar Trust dated 12/17/1997 et al vs T-Mobile West, LLC et al	Motion to Compel (Request for Production, Set 2). Scroll down to <u>Lines 7 and 8</u> for Tentative Ruling.

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

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

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

DATE: September 10, 2024 TIME: 9:00 A.M.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.

Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling,
in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E

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

LAW AND MOTION TENTATIVE RULINGS

<u>LINE 9</u>	22CV407215	Florentina Velazquez Diaz et al vs Alfredo Velazquez et al	<p>Motion to Compel (Deposition).</p> <p>Defendants Alfredo D. Velazquez, Maria G. Velazquez, and Domitila D. Velazquez's motion to compel Plaintiff Ramon Diaz Arriaga to appear and testify at his properly noticed deposition and for sanctions of \$4,678.60. The motion to compel was filed and served on July 22, 2024 on Plaintiff at the address stated on his former counsel's withdrawal order. The <i>ex parte</i> order setting the hearing date for September 10, 2024 was also served on Plaintiff at the same address. No opposition to this motion was filed by Plaintiff Ramon Diaz Arriaga. A failure to oppose a motion may be deemed a consent to the granting of the motion. CRC Rule 8.54c. The failure to oppose a motion leads to the presumption that Plaintiff has no meritorious argument. (<i>Laguna Auto Body v. Farmers Ins. Exchange</i> (1991) 231 Cal. App. 3d 481, 489.) There is also good cause to grant this motion. Moving parties meet their burden of proof. Good cause appearing, the motion is GRANTED. Plaintiff Ramon Diaz Arriaga shall appear for his deposition to be taken by Defendants, at a date to be set by Defendants, to be completed no later than September 23, 2024 at a code compliant location.</p> <p>Plaintiff Ramon Diaz Arriaga shall pay sanctions of \$3,728.60 to Defendants no later than September 24, 2024.</p> <p>Moving parties shall prepare a formal order.</p>
-------------------------------	------------	--	--

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

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

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

DATE: September 10, 2024 TIME: 9:00 A.M.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.

Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling,
in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E

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

LAW AND MOTION TENTATIVE RULINGS

<u>LINE 10</u>	24CV432948	Fylicia Taylor Morgan vs Hyundai Motor America et al	Motion to Compel (Request for Production of Documents). Plaintiff filed a notice of withdrawal of this motion on September 4, 2024. This motion is therefore ordered OFF CALENDAR.
<u>LINE 11</u>	23CV417150	Yelena KolodjiI et al vs David Dietrich	Motion for Leave (Amended Answer). Plaintiff's motion to file an amended Answer to Defendant Dietrich's First Amended Cross-Complaint is MOOT and OFF CALENDAR as a Notices of Settlement of the entire case were filed August 28 and 29, 2024.

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

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

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

DATE: September 10, 2024 TIME: 9:00 A.M.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.

Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling,
in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E

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

LAW AND MOTION TENTATIVE RULINGS

LINE 12	23CV428147	Dwayne Harris vs Ben Yadegar	<p>Petition to Compel Arbitration.</p> <p>Defendant The Signature Motors LLC's petition to compel Plaintiff Dwayne Scott Harris to arbitration pursuant to Code Civ. Proc., §§1281.2, 1281.4, and 1281.7 and to stay this action pending the arbitration on the grounds that the retail installment sales contract and its addenda requires binding arbitration of disputes between the parties before the AAA. Plaintiff opposed the petition on several grounds. Defendant's petition is DENIED; Defendant waived its right to compel arbitration by taking steps inconsistent with an intent to invoke arbitration and utilizing the litigation process (multiple demurrers, multiple other motion filings and not once did Defendant make any reference in those filings that any right to arbitration was being reserved or pursued – only after some 8 months of litigation involving multiple demurrers, motions and discovery did Defendant demand arbitration on June 21, 2024; Defendant refers to responses to discovery and an "Olives" Declaration, but no such declaration was filed with this court; Defendant delayed bringing this petition (Defendant's papers repeatedly refer to Plaintiff's <i>amended</i> pleadings being filed in March, but fail to mention that the original complaint and subsequent defense filings were in December 2023 and later). (Code Civ. Proc. §1281.2 (a)).</p> <p>Defendant to prepare formal order.</p>
-------------------------	------------	------------------------------	---

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

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

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

DATE: September 10, 2024 TIME: 9:00 A.M.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.

Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling,
in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E

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

LAW AND MOTION TENTATIVE RULINGS

<u>LINE 13</u>	24CV428701	JPMorgan Chase Bank, N.a. vs Mayleen Salazar	Motion to Withdraw as Attorney. Motion of Attorney Paul Brisson to be relieved as counsel for Defendant Mayleen R. Salazar. Notice of hearing was given to Defendant Salazar by mail service on June 26, 2024, and July 2, 2024 at Defendant Salazar's last known address. No opposition was filed. A failure to oppose a motion may be deemed a consent to the granting of the motion. CRC Rule 8.54c. Failure to oppose a motion leads to the presumption that Defendant client has no meritorious arguments. (See <i>Laguna Auto Body v. Farmers Ins. Exchange</i> (1991) 231 Cal. App. 3d 481, 489.) Moving party has met his burden of proof. Good cause appearing, the motion is GRANTED. The Order will take effect upon the filing and service of the executed order of this Court. Moving party to prepare the formal order after hearing.
----------------	------------	---	--

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

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

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

DATE: September 10, 2024 TIME: 9:00 A.M.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.

Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling,
in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E

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

LAW AND MOTION TENTATIVE RULINGS

LINE 14	22CV407215	Florentina Velazquez Diaz et al vs Alfredo Velazquez et al	<p>Motion for Summary Adjudication.</p> <p>This is a motion for summary adjudication of the fifth cause of action by Defendants. This cause of action was dismissed (request for dismissal filed and entered on July 25, 2024) by plaintiffs Jose Diaz Arriaga and Luis Diaz Martinez <i>only</i>. Plaintiff Ramon Diaz Arriaga was served with the motion, but did not file any opposition. A failure to oppose a motion may be deemed a consent to the granting of the motion. (California Rules of Court, Rule 8.54(c); <i>Sexton v. Superior Court</i> (1997) 58 Cal.App.4th 1403, 1410.) Where a responding party does not file an opposition to a motion for summary judgment, the moving party must still meet its initial burden of proof. (<i>Thatcher v. Lucky Stores, Inc.</i> (2000) 79 Cal.App.4th 1081, 1086-1087, <i>CDF Firefighters v. Maldonado</i> (2008) 158 Cal.App.4th 1226, 1239). Defendants have shown sufficient evidence to justify the grant of summary adjudication in their favor; the motion for summary adjudication of the fifth cause of action as to Plaintiff Ramon Diaz Arriaga is GRANTED.</p> <p>Defendants request for a determination that they are prevailing parties and their request for attorney's fees against Plaintiffs Jose Diaz Arriaga and Luis Diaz Martinez shall remain as set on November 14, 2024 as noticed.</p> <p>Moving party to prepare order.</p>
-------------------------	------------	--	---

Calendar Line 2 & 3**Case Name:** *Julie Ricafort vs Anthony Galvan***Case No.:** 22CV408718

Before the Court is Defendant Anthony Halili Galvan's Motion for Judgment on the Pleadings and Motion to Strike. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background

On December 18, 2021, Plaintiff Julie Ann Ricafort ("Plaintiff") retained the services of Great American Dental for a wisdom tooth extraction performed by Defendant Anthony Halili Galvan ("Defendant"). (First Amended Complaint ["FAC" or "Complaint"] at ¶ 4.) Plaintiff alleges that Defendant failed to explain the risks of injury to the lingual nerve in connection with the extraction. (*Ibid.*) Plaintiff complained of persistent pain and swelling and was only able to receive a phone appointment with Defendant, who provided a written prescription for antibiotics. (*Id.* at ¶¶ 5-7.)

Thereafter, Plaintiff was unable to open her mouth, and sought an in person appointment with Defendant on January 7, 2022. (FAC at ¶¶ 9, 11.) Plaintiff is informed and believes Defendant could not inspect the surgical site due to limited movement of her jaw. (*Id.* at ¶ 11.) She was instead prescribed a muscle relaxant. (*Ibid.*)

On January 11, 2022, Plaintiff met with a Maxillofacial surgeon and underwent a CT scan procedure, and taste and sensation test. (FAC at ¶ 12.) Plaintiff was informed that a foreign body and small lingual plate fracture was found near the site of the extraction. (*Ibid.*) Plaintiff alleges that she was informed that the lingual nerve may have been injured. (*Ibid.*) She was advised to have surgery to repair and explore the nerve to determine if it was still intact. (*Ibid.*) After the surgery, Plaintiff alleges that the surgeon determined that the lingual nerve was severed and may be repairable through grafting. (*Ibid.*) Plaintiff alleges that the following was determined after surgery:

1. Lingual nerve noted to traverse within #17 tooth socket scar tissue bundle;
2. Under high power microscope, scar tissue and neuroma cut back to healthy fascicles;
3. Discontinuity noted to be 2cm after neuroma excised.
4. Axogen 3-4 nerve graft used within 4mm connectors and 10-0 and 8-0 Nylon sutures;

5. Neve repair completed under high power microscope using connector assisted technique;
6. Foreign body at site #17 noted on CBCT not visualized but likely within scar tissue/neuroma bundle that was excised;
7. Closure with 3-0 and 4-0 polysorb in continuous and simple interrupted fashion;
8. Total of 8cc 0.5% lidocaine with 1J200k epi administered.

(Ibid.)

On February 15, 2022, Plaintiff alleges that she underwent Arthrocentesis of Tempromandibular joint (TMJ) to relieve pain in the jaw. (FAC at ¶ 13.) Plaintiff alleges that she is expected to continue surgeries to remediate the damage allegedly caused by Defendant. (*Id.* at ¶ 14.)

Plaintiff initiated this action on December 16, 2022. The operative First Amended Complaint was filed on March 15, 2023. Plaintiff alleges two causes of action: (1) battery; and (2) negligence. The negligence cause of action is based on lack of informed consent and medical negligence. (*See* FAC.)

With respect to the battery cause of action, Defendant alleges that “Galvan did not inform RICAFORT that a risk integral to the extraction and the probability that there was a risk of severing the lingual nerve, and, in fact had RICAFORT been informed of this risk, RICAFORT would not have had GALVAN perform the EXTRACTION.” (FAC at ¶ 16.)

For the negligence cause of action based on count 1, lack of informed consent, Plaintiff alleges that “Galvan was medically negligent in failing to provide informed consent to RICAFORT of risks [] integral to the EXTRACTION and the probability that there was a risk of severing the lingual nerve, and, in fact, had RICAFORT been informed of this risk, RICAFORT would not have had GALVAN perform the EXTRACTION.” (FAC at ¶ 20.)

For count 2, medical negligence, Plaintiff likewise alleges that “GALVAN was medically negligent in failing to provide informed consent to RICAFORT of risks [] integral to the EXTRACTION and the probability that there was a risk of severing the lingual nerve.” (FAC at ¶ 25.) In connection therewith, Plaintiff seeks punitive damages pursuant to Code of Civil Procedure section 3294. (FAC at p. 7, ¶ 3.)

Defendant filed his answer on May 22, 2024. On July 8, 2024, Defendant filed a Motion for Judgment on the Pleadings and a Motion to Strike. Plaintiff filed her opposition to both motions on August 27, 2024. Defendant filed a reply to Plaintiff's opposition to the Motion for Judgment on the Pleadings on September 4, 2024. However, Defendant has not filed a reply to Plaintiff's opposition to the Motion to Strike. The Court address the parties' contentions with respect to these motions below.

II. Discussion

a. Motion for Judgment on the Pleadings

i. Legal Standard for Motion for Judgment on the Pleadings

"A motion for judgment on the pleadings is analogous to a general demurrer. The task of this court is to determine whether the complaint states a cause of action. All facts alleged in the complaint are deemed admitted, and we give the complaint a reasonable interpretation by reading it as a whole and all of its parts in their context. The court is not concerned with a plaintiff's possible inability to prove the claims made in the complaint, the allegations of which are accepted as true and liberally construed with a view toward attaining substantial justice." (*Lance Camper Manufacturing Corp. v. Republic Indemnity Co.* (1996) 44 Cal.App.4th 194, 198 (*Lance*), internal citations omitted.) As such, a general demurrer does not lie to only part of the cause of action. If there are sufficient allegations to entitle plaintiff to relief, other allegations cannot be challenged by general demurrer. (*Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.4th 1150, 1167.) Like a general demurrer, a judgment on the pleadings cannot lie in only part of a cause of action, but must address the whole cause of action.

Like a general demurrer, the grounds for the motion shall appear on the face of the pleading or from any matter of which the court is required to take judicial notice. (Code Civ. Proc., § 438, subd. (d).)

1. Plaintiff's Request for Judicial Notice

Plaintiff requests that the Court take judicial notice of a copy of a Wikipedia page entitled "Alveolar Process" that was downloaded from the Internet and a copy of a webpage describing a lingual plate fracture. (Plaintiff's Request for Judicial Notice at p. 2, ¶ 1.)

Plaintiff seeks judicial notice pursuant to Evidence Code section 452, subdivisions (g) and (h). (Plaintiff's Request for Judicial Notice at p. 1.)

A court may take judicial notice of "[f]acts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute." (Evid. Code, § 452, subd. (g).) The key element here is that the matter must be noticed beyond any reasonable dispute. A request for judicial notice may be defeated simply by showing a "reasonable" dispute exists, in which event the matter must be resolved by the jury through the customary adversarial process. (*Comings v. State Bd. Of Education* (1972) 23 Cal.App.3d 94, 102.)

A court may also take judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources reasonably indisputable accuracy." (Evid. Code § 452, subd. (h).) "These include, for example, facts which are widely accepted as established by experts and specialists in the natural, physical, and social sciences which can be verified by reference to treatises, encyclopedias, almanacs, and the like or by persons learned in the subject matter." (*See Gould v. Md. Sound Indus.* (1995) 31 Cal.App.4th 1137, 1145.)

The Court declines to take judicial notice of either exhibit. Although the Court may judicially notice the existence of these websites, the content Plaintiff seeks to have noticed is not common knowledge and may reasonably be the subject of dispute. That the information is derived from the Internet alone is insufficient for the court to take judicial notice.

"Simply because information is on the Internet does not mean that it is not reasonably subject to dispute." (*Huitt v. Southern California Gas Co.* (2010) 188 Cal.App.4th 1586, 1605, fn.10.) "Although it might be appropriate to take judicial notice of the existence of the Web sites, the same is not true for their factual content." (*Searless Minerals Operations, Inc. v. State Bd. Of Equalization* (2008) 160 Cal.App.4th 514, 519 [emphasis in original].) There is no " 'official Web site' provision for judicial notice in California." (*Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 889.) Accordingly, Plaintiff's Request for Judicial Notice of Documents 1 and 2 is DENIED.

2. Analysis

In moving for judgment on the pleadings, Defendant's position is that Plaintiff alleges lack of informed consent, which gives rise to negligence, but not a claim for battery. (Defendant's Motion for Judgment on the Pleadings at pp. 3:7-15, 6:1-20.) Thus, Defendant contends that Plaintiff has failed to plead sufficient facts as to the battery cause of action.

"A battery is any intentional, unlawful and harmful contact by one person with the person of another. A harmful contact, intentionally done is the essence of a battery. A contact is "unlawful" if it is unconsented to." (*Ashcraft v. King* (1991) 228 Cal.App.3d 604, 611, internal citations omitted.)

"Where a doctor obtains consent of the patient to perform one type of treatment and subsequently performs a substantially different treatment for which consent was not obtained, there is a clear case of battery." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 239 (*Cobbs*).) In *Cobbs*, the California Supreme Court noted that "[h]owever, when an undisclosed potential complication results, the occurrence of which was not an integral part of the treatment procedure but merely a known risk, the courts are divided on the issue of whether this should be a battery or negligence." (*Ibid.*)

The California Supreme Court has made clear that "California authorities have favored a negligence theory" and has specifically adopted this majority trend. (*Cobbs, supra*, 8 Cal.3d at pp. 239-240.) In so doing, the Court held:

The battery theory should be reserved for those circumstances when a doctor performs an operation to which the patient has not consented. When the patient gives permission to perform one type of treatment and the doctor performs another, the requisite element of deliberate intent to deviate from the consent given is present. However, when the patient consents to certain treatment and the doctor performs that treatment but an undisclosed inherent complication with a low probability occurs, no intentional deviation from the consent given appears; rather, the doctor in obtaining consent may have failed to meet his due care duty to disclose pertinent information. In that situation the action should be pleaded in negligence." Thus, "[a]n action 'should be pleaded in negligence' when the doctor performs an operation to which plaintiff consents, but without disclosing sufficient information about the risks inherent in the surgery. [Citation.]

(*Id.* at pp. 240-241; *see, e.g., Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 324.)

The Court turns to the allegations of the Complaint as it is required to consider the face of the pleading and “determine whether the [it] states a cause of action.” (*Lance, supra*, 44 Cal.App.4th at p. 198.) As Defendant notes, the court is required to focus on “the nature or gravamen of the claim, not the label or form of action the plaintiff selects.” (*Larson v. UHS of Rancho Springs, Inc.* (2014) 230 Cal.App.4th 336, 347.) Here, the allegations of the Complaint with respect to the battery and negligence causes of action are identical:

16. Galvan did not inform RICAFORT that a risk integral to the extraction and the probability that there was a risk of severing the lingual nerve, and, in fact had RICAFORT been informed of this risk, RICAFORT would not have had GALVAN perform the EXTRACTION.

...

20. Galvan was medically negligent in failing to provide informed consent to RICAFORT of risks [] integral to the EXTRACTION and the probability that there was a risk of severing the lingual nerve, and, in fact, had RICAFORT been informed of this risk, RICAFORT would not have had GALVAN perform the EXTRACTION.

...

25. GALVAN was medically negligent in failing to provide informed consent to RICAFORT of risks [] integral to the EXTRACTION and the probability that there was a risk of severing the lingual nerve.

(FAC at ¶¶ 16, 20, 25.)

The allegations for battery and negligence are all premised on the fact that Defendant failed to inform Plaintiff that a risk of the extraction included severing the lingual nerve. Nowhere in the Complaint does Plaintiff allege that she did not consent to the extraction. Rather, paragraph four of the Complaint indicates that she willingly retained the services of Defendant at Great American Dental to perform the wisdom tooth extraction. (FAC at ¶ 4.) Likewise, Plaintiff has failed to allege that Defendant performed a substantially different procedure that she did not consent to other than the extraction. In opposition, Plaintiff contends that her jaw broke from the extraction and that her battery claim is based on the broken jaw because of the way Defendant provided professional services. (Plaintiff’s Opposition at p. 3:13-15.) In sum, “Plaintiff does not know what Defendant did to break the

jaw.” (Plaintiff’s Opposition at p. 4:5.) However, based on these facts, Plaintiff has only alleged negligence to describe the way Defendant provided professional services. Plaintiff has not offered any additional facts to support that her jaw broke because Defendant performed an unauthorized or substantially different procedure other than the one she consented to. In sum, the facts alleged do not support a battery theory as a matter of law.

Plaintiff seeks leave to amend to “include an allegation of reckless disregard for the safety and wellbeing of the Plaintiff on the part of Defendant that resulted in the broken jaw.” (Plaintiff’s Opposition at p. 4:26-28.) A plaintiff bears the burden of proving an amendment would cure the defect identified in the pleading. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) The opposition does not meet this burden as it simply makes a generic request for leave to amend.

“[W]here the plaintiff requests leave to amend the complaint, but the record fails to suggest how the plaintiff could cure the complaint’s defects, ‘the question as to whether or not [the] court abused its discretion [in denying the plaintiff’s request] is open on appeal’ (Code Civ. Proc., § 472c, subd. (a).) . . . Absent an effective request for leave to amend the complaint in specified ways, an abuse of discretion can be found ‘only if a potentially effective amendment were both apparent and consistent with the plaintiff’s theory of the case.’” (*Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal App 4th 497, 507, disapproved on another ground in *Yvanova v. New Century Mortg. Corp.* (2016) 62 Cal.4th 919, 934, 939, fn. 13; *See also Shaeffer v. Califia Farms, LLC* (2020) 44 Cal.App.5th 1125, 1145 [“The onus is on the plaintiff to articulate the ‘specifi[c] ways’ to cure the identified defect, and absent such an articulation, a trial or appellate court may grant leave to amend ‘only if a potentially effective amendment [is] both apparent and consistent with the plaintiff’s theory of the case. [Citation.]’”].)

Plaintiff’s request to amend does not pertain to the scope of the Motion for Judgment on the Pleadings. The California Supreme Court in *Cobbs* has also made the distinction between battery and negligence clear. Plaintiff has not shown that any new facts can be stated to inform the cause of action for battery. It is also unclear what facts Plaintiff would rely on to allege a reckless disregard for the safety and wellbeing of the Plaintiff. To the extent Plaintiff

seeks to amend her complaint based on this request or any newly discovered facts, she may file a separate motion to amend. Therefore, Defendant’s Motion for Judgment on the Pleadings is GRANTED without leave to amend.¹

B. Motion to Strike

1. *Timeliness*

“Any party, within the time allowed to respond to a pleading may serve and file a notice of motion to strike the whole or any part thereof.” (Code Civ. Proc. § 435, subd. (b)(1)²; see also Cal. Rules of Court, rule 3.1322, subd. (b).) “The term ‘pleading’ means a demurrer, answer, complaint, or cross-complaint.” (§ 435, subd. (a)(2).) Unless extended by stipulation or court order, a defendant’s answer is due within 30 days after service of the complaint. (See § 412.20, subd. (a)(3).)

As noted above, the First Amended Complaint was filed on March 15, 2023. Although Plaintiff did not move for default, Defendant filed his Answer over a year later, on May 22, 2024. The Motion to Strike was filed on July 8, 2024 with the Motion for Judgment on the Pleadings. Plaintiff has raised the untimeliness of the Motion to Strike in her opposition. Defendant has failed to respond to these arguments. The Motion to Strike is extremely untimely. Defendant has been dilatory, and this inexplicable delay demonstrates a serious disregard for the rules.

However, the Court may consider the motion so long as it “does not affect the substantial rights of the parties.” (See *McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 281.) While the Court may otherwise be inclined to deny the Motion to Strike on these grounds alone, it nonetheless recognizes that Defendant’s rights may be affected by the denial. Defendant’s Motion to Strike challenges the request for punitive damages in the prayer for relief pursuant to Code of Civil Procedure section 423.15. (See, generally, Defendant’s Motion to Strike.) The protection conferred by section 425.13 is

¹ The Court declines to address Plaintiff’s arguments with respect to Defendant’s insurance policy and the Medical Injury Compensation Reform Act (“MIRCA”) as neither issue, including the insurance policy attached to counsel’s declaration, appears on the face of the Complaint and cannot be considered on a motion for judgment on the pleadings unless subject to judicial notice. (See Plaintiff’s Opposition at pp. 3:21-4:13; Declaration of Kenneth C. Brookes at ¶ 3, Exhibit.)

² All further undesignated statutory references are to the Code of Civil Procedure.

waived if not timely raised. (*Vallbona v. Springer* (1996) 43 Cal.App.4th 1525, 1534-1535 [holding that defendant there, waived benefit of section 425.13 by answering the complaint, litigating the case for almost a year, failing to raise the issue by way of a motion to strike or motion for judgment on the pleadings, and instead raising the issue by way of a motion *in limine* before trial].) Given that this case is still in the early stages of the proceedings, and no court order for punitive damages has been sought as stated below, considering the Motion to Strike may still be appropriate.

Nonetheless, the Court recognizes that Plaintiff has been put at a disadvantage by Defendant's failure to timely file both his Answer and his Motion to Strike. To strike a balance between Defendant's rights under section 425.13 and Plaintiff's right to plead a punitive damages request should the facts of this case support it, the Court will allow Plaintiff to file the section 425.13, subdivision (a) motion amend outside the timeframe required by the statute. The Court retains the "inherent power and authority to make an appropriate order to avoid injustice or unfairness[,] including circumstances where the plaintiff "is placed in a position where she cannot reasonably comply with the narrow time limits set out in section 425.13." (*Goodstein v. Superior Court* (1996) 42 Cal.App.4th 1635, 1645.) For these reasons, the Court proceeds to consider the Motion to Strike..

2. Meet and Confer

A party moving to strike some or all of a complaint is required to engage in meet and confer efforts prior to the filing of a motion to strike. (§ 435.5, subd. (a).) "Any determination by the court that the meet and confer process was insufficient shall not be grounds to grant or deny the motion to strike." (§ 435.5, subd. (a)(4).)

Here, Defendant submits that counsel telephonically met and conferred with Plaintiff's counsel on May 24, 2024 to outline his concerns with respect to the defects contained in the pleadings. (Declaration of Steven J. Wysocky in support of Motion to Strike at ¶ 3.) Counsel further elaborates on the meet and confer efforts from that day in his declaration to support the Motion for Judgment on the Pleadings. Therein, counsel states "both sides were unable to reach a resolution informally . . . [.]'" (Declaration of Steven J. Wysocky in support of Motion

for Judgment on the Pleadings at ¶ 2.) The Court finds these efforts to meet and confer sufficient. Any further efforts to meet and confer would not prove fruitful.

3. *Legal Standard for Motion to Strike*

A court may strike out any irrelevant, false, or improper matter asserted in a pleading. (§ 436, subd. (a).) A court may also strike out all or any part of a pleading not drawn or filed in conformity with the laws of the State of California. (§ 436, subd. (b).) The grounds for a motion to strike shall appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice. (§ 437, subd. (a).)

4. *Analysis*

Defendant contends that Code of Civil Procedure section 425.13, subdivision (a) bars a claim for punitive damages against a health care provider absent a court order, which provides as follows:

In any action for damages arising out of the professional negligence of a health care provider, no claim for punitive damages shall be included in a complaint or other pleading unless the court enters an order allowing an amended pleading that includes a claim for punitive damages to be filed.

(§ 425.13, subd. (a).) This provision applies to all claims related to the rendering of healthcare services, including intentional torts. (*Central Pathology Service Medical Clinic., Inc. v. Superior Court* (1992) 3 Cal.4th 181, 189.)

Plaintiff alleges that Defendant is a licensed dentist with the Dental Board of California. (FAC at ¶ 2.) Plaintiff does not argue that Defendant is not a health care provider as defined in section 425.13, subdivision (b). Here, Plaintiff has filed a claim for negligence against Defendant for lack of informed consent and medical negligence in relation to the extraction of her wisdom tooth. This action undoubtedly arises out of the professional services provided by Defendant. Plaintiff has not obtained a court order pursuant to section 425.13 to seek punitive damages. Since Plaintiff has failed to comply with the requirements of the statute, the request for punitive damages must be stricken from the Complaint.

Plaintiff requests leave to amend the Complaint to “include an allegation of reckless disregard for the safety and wellbeing of the Plaintiff on the part of the Defendant that resulted in the broken jaw.” (Plaintiff’s Opposition at p. 5:14-16.) To state a claim for punitive

damages, a plaintiff must allege malice, oppression, or fraud. (*Blegen v. Superior Court* (1981) 125 Cal.App.3d 959, 963.) For example, malice is defined as “conduct which is intended by the defendant to cause injury to plaintiff, or despicable conduct that is carried on by the defendant with a willful and conscious disregard for the rights and safety of others.” (Civ. Code, § 3294, subd. (c)(1).) Although Plaintiff’s request bears relation to the standard for punitive damages, as noted above, it is Plaintiff’s burden “articulate the ‘specifi[c] ways’ to cure the identified defect.” (*Shaffer, supra*, 44 Cal.App.5th at p. 1145.) Here, Plaintiff has identified no facts to support her request. Additionally, section 425.13 makes clear that Plaintiff must seek leave of court and obtain an order to amend the Complaint and include the request for punitive damages. Therefore, the Motion to Strike is GRANTED without leave to amend. However, the court will entertain a motion for leave to amend as contemplated in section 425.13, subdivision (a).

III. Conclusion

Defendant’s Motion for Judgment on the Pleadings is GRANTED without leave to amend and Defendant’s Motion to Strike is GRANTED without leave to amend.

The Court will prepare the formal order.

- oo0oo -

Calendar Lines 7 and 8

Case Name: *Tara Kumar, Trustee of the Anjali Kumar Trust dated 12/17/1997 et al vs T-Mobile West, LLC et al*

Case No.: 22CV404901

Before the Court are Plaintiff's (1) motion to compel further responses to special interrogatories (Set 2) and (2) motion to compel further responses and production to request for production of documents (Set 2). The court has carefully and thoroughly reviewed the briefing and orders as follows:

Motion to Compel (Special Interrogatories, Set 2)

In their motion, Plaintiffs move to compel Defendant T-Mobile West, LLC. to provide further responses to certain special interrogatories and seek \$4,810 in sanctions.

The requests are relevant and reasonably calculated to lead to the discovery of admissible evidence based on the allegations pled by Plaintiffs. The Court has already issued a protective order in the matter for any information that Defendant contends contains confidential and/or proprietary information and thus this should not be a bar to providing that information. The motion to compel for each of the remaining interrogatories in dispute is GRANTED (interrogatory Nos. 37-41, 43-44, 47, 52, 55 and 58).

Defendant shall provide further verified responses by October 24, 2024. Sanctions in the amount of \$2,910 are awarded to Plaintiffs against Defendants and shall be paid by October 24, 2024.

Motion to Compel (Request for Production, Set 2)

In their motion to compel further responses and responsive documents from Defendant T-Mobile West, LLC., Plaintiffs seek further responses, further production and also seek \$4,810 in sanctions.

Request No. 2: GRANTED. The request is relevant and reasonably calculated to lead to the discovery of admissible evidence based on the allegations pled by Plaintiffs. Defendant's response is unclear as to whether *all* documents in its *possession, custody and control* have been produced; the response is not code compliant. Defendant shall provide a verified *code compliant*, further response to this request and shall provide a privilege log for any documents being withheld.

Request Nos. 4-7: GRANTED. The request is relevant and reasonably calculated to lead to the discovery of admissible evidence based on the allegations pled by Plaintiffs. Defendant's responses state *both* that it has already produced documents and that it is unable to comply (4, 5 and 7) and where documents are said to have been produced, the response is unclear whether *all* documents in its *possession, custody and control* have been produced. Defendant shall provide a verified, *code compliant* further response to this request and shall provide a privilege log for any documents being withheld.

Request Nos. 10-13: GRANTED. The request is relevant and reasonably calculated to lead to the discovery of admissible evidence based on the allegations pled by Plaintiffs. Defendant shall provide verified *code compliant* further responses to these requests and shall provide a privilege log for any documents being withheld.

Request Nos. 20, 22 and 23: GRANTED The request is relevant and reasonably calculated to lead to the discovery of admissible evidence based on the allegations pled by Plaintiffs. Defendant shall provide verified, *code compliant* further responses to these requests and shall provide a privilege log for any documents being withheld.

Request Nos. 24 and 25: GRANTED for the time period 1999 to the present. The request is relevant and reasonably calculated to lead to the discovery of admissible evidence based on the allegations pled by Plaintiffs. Defendant shall provide verified, *code compliant* further responses to these requests and shall provide a privilege log for any documents being withheld. The Court has already issued a protective order for any documents for which contain confidential and/or proprietary information.

Request Nos. 27 and 28: GRANTED. The request is relevant and reasonably calculated to lead to the discovery of admissible evidence based on the allegations pled by Plaintiffs and more so that Defendant has purportedly already produced documents in response to this request. Defendant's response is unclear whether *all* documents in its *possession, custody and control* have been produced; the response is not code compliant. Defendant shall provide a verified *code compliant* further response to this request and shall provide a privilege log for any documents being withheld.

Defendant shall provide further verified responses and produce any responsive documents by October 24, 2024. Sanctions in the amount of \$2,910 are awarded to Plaintiffs against Defendants and shall be paid by October 24, 2024.

The parties are ordered to meet and confer in good faith by phone or video conference for the remaining motions to compel that have been filed in this matter. After these further meet and confer efforts, however many sessions that may take, the parties are to file a *joint* statement at least 5 days before each motion to compel hearing that identifies (1) the remaining items in dispute, and (2) the current reasons why that item should be/should not be compelled. Courtesy copies of the joint statements are to be delivered to Department 18b.

Moving party to prepare formal order.

- oo0oo -