SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 18
Honorable Shella Deen, Presiding
Farris Bryant, Courtroom Clerk
191 North First Street, San Jose, CA 95113

DATE: June 20, 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.

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LAW AND MOTION TENTATIVE RULINGS

LINE #	CASE #	CASE TITLE	RULING
LINE 1	22CV404995	FIRST-CITIZENS BANK & TRUST COMPANY, vs LORENZO TERRONES et al	**Order of Examination** (Lorenzo Terrones). This matter was continued from June 4, 2024. Parties to appear unless mutually agreed otherwise. If no appearance, the matter will be ordered OFF CALENDAR
LINE 2	23CV421976	Community Education Foundation, a Delaware Corporation vs George Eshoo et al	**Order of Examination** (Regina Eshoo). No Proof of service on file. If there is no appearance, the matter will be ordered OFF CALENDAR.
LINE 3	23CV421976	Community Education Foundation, a Delaware Corporation vs George Eshoo et al	**Claim of Exemption**. This application will be heard by Judge Helen Williams on July 24 at 1:30 in D18.
LINE 4	23CV421976	Community Education Foundation, a Delaware Corporation vs George Eshoo et al	**Motions re: Writ of Attachment Order, Bond and Undertaking**. These motions will be heard by Judge Helen Williams on July 24 at 1:30 in D18.
LINE 5	23CV427685	Michael Leonard vs General Motors, LLC	**Demurrer.** Scroll down to Lines 5 and 6 for Tentative Ruling.
LINE 6	23CV427685	Michael Leonard vs General Motors, LLC	**Motion to Strike.** See Line 5 above.
LINE 7	19CV342999	Jose Hernandez vs Devcon Construction Inc. et al	**Motion for Summary Judgment/ Adjudication**. Scroll down to Line 7 for Tentative Ruling.

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LAW AND MOTION TENTATIVE RULINGS

LINE 8	21CV388522	ALICIA AVILA vs COSTCO WHOLESALE CORPORATION	**Motion for Summary Judgment.** Scroll down to Line 8 for Tentative Ruling.
LINE 9	22CV393229	First Street Holdings, LLC et al vs Ronald Werner	**Motion to Compel.** Plaintiff's Motion to Compel the deposition of Timothy Bumb appears on the docket for hearing, however this motion has already been ruled on. The order provides that: "Unless the parties agree otherwise, the deposition shall be taken within 20 days at a code-complaint location and in a code-complaint manner." Notice of Entry of this order was filed on May 7, 2024. The motion set for June 20, 2024, is therefore taken OFF CALENDAR.
LINE 10	22CV398594	Jessica Madani vs General Motors, LLC	**Motion to Compel**. OFF CALENDAR.

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LAW AND MOTION TENTATIVE RULINGS

LINE 11	23CV425715	Rita Gutierrez vs General Motors LLC et al	**Motion to Compel.** See Court's ruling of June 13, 2024: Motions to Compel (1) Form Interrogatories, (2) Requests for Admission, (3) Requests for Production of Documents, and (4) Special Interrogatories. All four motions are CONTINUED to August 6, 2024, at 9 a.m. in Department 18. Thus far Plaintiff's meet and confer "efforts" do not appear to be reasonable or in good faith. As such, the parties are ordered to conduct good faith, reasonable and meaningful meet and confers, either in person, by phone or video conference, to try to narrow the many issues in these motions. If any issues remain after the meet and confer efforts, which may span several sessions, the parties shall file an updated joint statement no later than July 23, 2024, which shall identify the remaining items in dispute and the reasons why further responses should/should not be compelled. Moving party to prepare the formal order after hearing.

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LAW AND MOTION TENTATIVE RULINGS

LINE 12	21CV381946	CARLOS CASTRO vs EQUINIX, INC. et al	**Motion to Continue/Vacate Trial**. Given the Notice of Settlement filed by Intervenor Old Republic Insurance Company on June 14, 2024, the following hearings are vacated: Motion to Continue/Vacate Trial (6/20/24), Mandatory Settlement Conference (6/26/24), Trial Assignment (6/27/24), and Trial (7/8/24) This matter is set on the OSC Re: Dismissal after Settlement Calendar on December 5, 2024 at 10 a.m. in Department 18. Intervenor to give notice.
LINE 13	22CV403405	THOMAS TERTELING et al vs NIXON KENDAL TERTELING (" N.K TERTELING")	**Hearing - Other**. Parties to appear

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LAW AND MOTION TENTATIVE RULINGS

LINE 14	22CV407215	Florentina Velazquez Diaz et al vs Alfredo Velazquez et al	**Motion to Withdraw**. Motion of Attorneys Claudia Borsutzki and Friedman & Chapman, LLC. to be relieved as counsel for Plaintiff Ramon Diaz Arriaga. Notice of hearing was given to Plaintiff Ramon Diaz Arriaga via mail service on May 6, 2024, at his 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 Plaintiff client has no meritorious argument. (See *Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal. App. 3d 481, 489.) Moving parties have met their 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 parties to prepare the formal order after hearing, to include all future calendared dates.

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LAW AND MOTION TENTATIVE RULINGS

LINE 15	23CV410948	VICTORIA AGUILAR vs FORD MOTOR COMPANY	**Motion to Enforce Settlement.** Plaintiff's Motion to Enforce the Settlement is DENIED. Good cause appearing, the request that the settlement between the parties be set aside is GRANTED (Code Civ. Proc., § 664.6). The Court granted leave to file a First Amended Complaint on May 24, 2024, and that pleading was deemed filed on that date. No responsive pleading to the First Amended Complaint has yet been filed. The Dismissal Review hearing after Settlement set for August 15, 2024 at 10a.m. in Department 20 is VACATED. This matter is set for a Case Management Conference on September 3, 2024, at 10a.m. in Department 18. Updated Case Management Conference Statements shall be timely filed. The parties are to address the third owner of the car at issue in this litigation, prior to the September 3, 2024 Case Management Conference. Moving party to prepare the formal order after hearing.

Calendar Lines 5 and 6
Case Name: *Michael Leonard v. General Motors, LLC*
Case No.: 23CV427685

Plaintiff Michael Leonard ("Plaintiff") initiated this fraudulent inducement-concealment and Song-Beverly Consumer Warranty Act action against defendant General Motors, LLC ("Defendant" or "GM") based on Plaintiff's purchase of a 2023 Chevrolet Bolt EV that allegedly suffered from a defect in its battery (the "Battery Defect"). Defendant demurs to the fifth cause of action in the First Amended Complaint ("FAC"). Defendant has also filed a motion to strike Plaintiff's request for punitive damages.

I. BACKGROUND

A. Factual

According to the allegations of the FAC, on or about March 31, 2023, Plaintiff entered into a warranty contract with Defendant regarding a 2023 Chevrolet Bolt EV, vehicle identification number 1G1FZ6S01P4113046 (the "Subject Vehicle"), that Defendant manufactured and or distributed. (FAC, ¶ 6.) Plaintiff purchased the Subject Vehicle at Capitol Chevrolet, GM's authorized dealer, in San Jose, California. (*Id.*) Plaintiff alleges the warranty contract, attached to the FAC as Exhibit A, contained various warranties, including, but not limited to, the bumper-to-bumper warranty, powertrain warranty, and emission warranty. (*Id.*, ¶ 7.)

Plaintiff's FAC claims Defendant "knew since 2016 that the model year 2017 or newer Chevrolet Bolt EV vehicles" contained "one or more design and/or manufacturing defects in the battery that causes the high voltage battery to overheat when charged to full capacity." (FAC, ¶ 21.) This overheating results in "losses of propulsion power while driving, catastrophic fire, no crank, reduced range, thermal runaway, and/or spontaneous combustion." (*Id.*) Plaintiff experienced symptoms of the Battery Defect, as "is evident from the repair history for the Subject Vehicle." (*Id.*, ¶ 22.)

Defendant "distributes the motor vehicles it manufactures for sale to certain dealerships." (FAC, ¶ 35.) These dealerships "have purchased a license from GM to utilize, display, and profit from GM's branding and trademarks," "are recognized as GM retailers," and Defendant supplies these dealerships with "literature and parts to repair vehicles manufactured by GM." (*Id.*)

Plaintiff alleges Defendant "actively concealed the existence and nature of the alleged defect from Plaintiff prior to, and at the time of purchase." (FAC, ¶ 31.) "Since 2016, GM has made several communications to the National Highway Traffic Safety Administration" concerning battery components in Chevrolet Bolt EV vehicles. (*Id.*, ¶ 29.) Defendant "acquired its knowledge of the Battery Defect in 2016, prior to Plaintiff acquiring the Subject Vehicle, through sources not available to consumers such as Plaintiff," including consumer complaints, aggregate warranty data, and pre-production and post-production testing data. (*Id.*, ¶ 28.) Defendant "was inundated with complaints regarding the Battery Defect, but rather than repair the problem under warranty, GM dealers either informed consumers that their vehicles are functioning properly or conducted repairs that merely mask the defect." (*Id.*, ¶ 32.) Defendant "omitted mention of the Battery Defect in its sales materials, advertisements, publications,

online marketing, television, radio, and other marketing campaigns for Chevy Vehicles" and concealed the Battery Defect's existence with "ineffective repair procedures published directly to its dealerships." (*Id.*, ¶ 33.)

Plaintiff "interacted with sales representatives, considered GM's advertisement, and/or other marketing materials concerning Chevy Vehicles prior to purchasing Subject Vehicle." (FAC, ¶ 34.) "Had GM and its dealership(s) revealed the Battery Defect in these disclosures, Plaintiff would have been aware of it and would not have purchased the Subject Vehicle." (*Id.*)

B. Procedural

Plaintiff filed his initial complaint on December 13, 2023. On March 28, 2024, Plaintiff filed his FAC alleging causes of action for: (1) violation of Civil Code section 1793.2, subdivision (d); (2) violation of Civil Code section 1793.2, subdivision (b); (3) violation of Civil Code section 1793.2, subdivision (a)(3); (4) breach of the implied warranty of merchantability under Civil Code sections 1791.1, 1794, and 1795.5; and (5) fraudulent inducement-concealment.

On May 1, 2024, Defendant filed a demurrer to the fifth cause of action in the FAC and a motion to strike punitive damages from the FAC. Plaintiff filed oppositions to both the demurrer and motion to strike on June 6, 2024. Defendant filed replies in support of its demurrer and motion to strike on June 12, 2024.

II. DEMURRER

A. Legal Standard

As relevant to the instant case, "[t]he party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on any one or more of the following grounds: . . . [t]he pleading does not state facts sufficient to constitute a cause of action[;] . . . [t]he pleading is uncertain[;] . . . [or i]n an action founded upon a contract, it cannot be ascertained from the pleading whether the contract is written, is oral, or is implied by conduct." (Code Civ. Proc., § 430.10, subds. (e)-(g).) 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 properly pleaded material facts, 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. [Citation.] It 'admits the truth of all material factual allegations in the complaint . . . ; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court.' [Citation.]" (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214 (*Committee*), superseded by statute on other grounds as stated in *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 227.) Evidentiary facts found in exhibits attached to a

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

B. Analysis

Defendant demurs to the fifth cause of action, fraudulent inducement-concealment, because the FAC (1) fails to state facts relevant to the elements of the claim and (2) fails to allege a transactional relationship giving rise to a duty to disclose.

Defendant argues Plaintiff did not plead fraudulent concealment with specificity because Plaintiff "failed to allege (i) the identity of the individuals at GM who purportedly concealed material facts or made untrue representations about the Bolt, (ii) their authority to speak and act on behalf of GM, (iii) GM's knowledge about alleged defects in Plaintiff's Bolt at the time of purchase, (iv) any interactions with GM before or during the purchase of the Bolt, or (v) GM's intent to induce reliance by Plaintiff to purchase the specific Bolt at issue." (Memorandum of Points and Authorities in Support of General Motors LLC's Demurrer to Plaintiff's First Amended Complaint, p. 8, lns. 10-15.) "Nowhere in the FAC does Plaintiff identify when, where or how anyone from GM concealed any issues with Plaintiff's Bolt." (*Id.*, p. 6, lns. 1-2.) The "allegations of the FAC do not establish GM's intent to defraud Plaintiff or demonstrate that the Bolt was unsuitable for its intended use at the time of purchase." (*Id.*, p. 8, lns. 16-17.)

"The elements of fraudulent concealment are: (1) the defendant concealed or suppressed a material fact; (2) the defendant was under a duty to disclose the fact to the plaintiff; (3) the defendant intentionally concealed or suppressed the fact with the intent to defraud the plaintiff; (4) the plaintiff was unaware of the fact and would not have acted as he or she did if the plaintiff had known of the concealed or suppressed fact; and (5) as a result of the concealment or suppression of the fact, the plaintiff sustained damage." (*Burch v. CertainTeed Corp.* (2019) 34 Cal.App.5th 341, 348, citing *Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 310-311 (*Bigler*).)

As a general rule, each element in a fraud cause of action must be pleaded with specificity. (*Cadlo v. Owens-Illinois, Inc.* (2004) 125 Cal.App.4th 513, 519.) In the case of fraud by concealment or omission, however, courts require less particularity because "[h]ow does one show 'how' and 'by what means' something didn't happen, or 'when' it never happened, or 'where' it never happened?" (*Alfaro v. Community Housing Improvement System & Planning Ass'n., Inc.* (2009) 171 Cal.App.4th 1356, 1384.) "Less specificity is required when 'it appears from the nature of the allegations that the defendant must necessarily possess full information concerning the facts of the controversy.'" (*Committee, supra*, 35 Cal.3d at p. 217, citing *Bradley v. Hartford Acc. & Indem. Co.* (1973) 30 Cal.App.3d 818, 825; see also *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 47 ["the rule is relaxed when it is apparent from the allegations that the defendant necessarily possesses knowledge of the facts."].)

Plaintiff's allegations meet this standard. The FAC alleges a direct contractual relationship (the warranty contract) between Plaintiff and Defendant. (See FAC, ¶¶ 6-7.) Plaintiff purchased the Subject Vehicle from a dealership authorized to sell Defendant's vehicles. (See *Id.*, ¶ 6.) Plaintiff alleges the Subject Vehicle was part of the same generation of Chevy vehicles affected by the Battery Defect that puts the Subject Vehicle's battery "at risk of

catching fire or exploding." (See *Id*., ¶¶ 22, 26-27.) The concealed information about the Defective Battery was material "in that a reasonable person would have considered them to be important in deciding whether or not to purchase the Vehicle." (See *Id*., ¶ 80.) Had "Plaintiff known that the Vehicle, and its lithium-ion battery, were defective at the time of sale, Plaintiff would not have purchased the vehicle." (See *Ibid*.) Plaintiff "interacted with sales representatives" and considered Defendant's marketing materials concerning Chevy vehicles prior to purchasing the Subject Vehicle. (See *Id*., ¶ 34.) Plaintiff alleges Defendant knew of the Battery Defect and concealed and failed to disclose facts regarding the Battery Defect at and after the time Plaintiff purchased the Subject Vehicle, including omitting mention of the Battery Defect in Defendant's marketing materials and failing to notify Plaintiff of the issue during repair visits to Defendant's authorized dealership. (See *Id*., ¶¶ 24-25, 28-39, 48-49, 72-77, 79-80.) Had "Defendant disclosed the defect, Plaintiff would have been aware of it and would not have purchased the Subject Vehicle." (See *Id*., ¶ 81.) Lastly, Plaintiff alleges he was harmed by Defendant's concealment of the Battery Defect. (See *Id*., ¶ 83.)

Defendant's argument that Plaintiff does not allege a transactional relationship between the parties sufficient to create a duty to disclose is unpersuasive. The FAC alleges a direct contractual relationship between Plaintiff and Defendant via the warranty contract signed by Plaintiff (see FAC, ¶¶ 6-7), and a relationship between two parties giving rise to the duty to disclose "has been described as a 'transaction,' such as that between 'seller and buyer, employer and prospective employee, doctor and patient, or parties entering into any kind of contractual arrangement.'" (*Burch v. CertainTeed Corp.* (2019) 34 Cal.App.5th 341, 349-50, citing *Shin v. Kong* (2000) 80 Cal.App.4th 498, 509.)

Defendant relies on *Bigler* to argue that Plaintiff has failed to allege a direct relationship giving rise to the duty to disclose. Defendant's reliance on *Bigler* is also unpersuasive. (See Memorandum of Points and Authorities in Support of General Motors LLC's Demurrer to Plaintiff's First Amended Complaint, p. 10, lns. 3-6.) *Bigler* involved an appeal of a jury verdict, not a pleading challenge, and the decision does not discuss pleading standards. (*Bigler, supra,* 7 Cal.App.5th at p. 314.) Furthermore, the FAC alleges Plaintiff interacted with sales representatives, relied on Defendant's marketing materials, and purchased the Subject Vehicle from a dealership authorized by Defendant to sell Chevrolet vehicles. (See FAC, ¶¶ 6, 34.) These allegations contrast the allegations in *Bigler*, where the manufacturer of a medical device "did not transact with [plaintiff] or her parents in any way. [Plaintiff] obtained her Polar Care device from Oasis, based on a prescription written by Chao, all without [defendant's] involvement. The evidence does not show that [defendant] knew—prior to this lawsuit—that [plaintiff] was a potential user of the Polar Care device, that she was prescribed the Polar Care device, or that she used the Polar Care device. The evidence also does not show that [defendant] directly advertised its products to consumers such as [plaintiff] or that it derived any monetary benefit directly from [plaintiff's] individual rental of the Polar Care device." (*Bigler, supra,* 7 Cal.App.5th at p. 314.)

Plaintiff relies upon *Dhital v. Nissan North America, Inc.* (2022) 84 Cal.App.5th 828, 844 (*Dhital*) in opposing the demurrer. (See Plaintiff's Opposition to Defendant's Demurrer to First Amended Complaint, pgs. 3-5.) The Supreme Court has granted review of *Dhital*. (See *Dhital v. Nissan North America, Inc.* (Feb. 1, 2023 No. S277568) [523 P.3d 392].) Although this divests the opinion of binding or precedential effect, it may still be cited for "potentially persuasive value." (Cal. Rules of Ct., rule 8.1115(e)(1).) This Court will consider the decision for its persuasive value with respect to this action.

The *Dhital* court analyzed facts similar to those present here, ultimately holding plaintiffs sufficiently plead fraudulent concealment. (*Dhital, supra,* 84 Cal.App.5th at p. 845.) Plaintiffs in *Dhital* alleged the continuously variable transmissions "installed in numerous Nissan vehicles (including the one plaintiffs purchased) were defective; Nissan knew of the defects and the hazards they posed; Nissan had exclusive knowledge of the defects but intentionally concealed and failed to disclose that information; Nissan intended to deceive plaintiffs by concealing known transmission problems; plaintiffs would not have purchased the car if they had known of the defects; and plaintiffs suffered damages in the form of money paid to purchase the car." (*Id.,* at p. 844.)

The *Dhital* court rejected Nissan's argument that plaintiffs did not provide specific facts about what Nissan should have disclosed to plaintiffs. (*Dhital, supra,* 84 Cal.App.5th at p. 844.) The *Dhital* plaintiffs alleged the continuously variable transmissions "were defective in that they caused such problems as hesitation, shaking, jerking, and failure to function." (*Id.*) Plaintiffs "also alleged Nissan was aware of the defects as a result of premarket testing and consumer complaints that were made both to National Highway Traffic Safety Administration and to Nissan and its dealers." (*Id.*) Plaintiff makes similar allegations here. (See FAC, ¶¶ 21, 28, 29, 32.)

Dhital is also informative regarding Defendant's argument that Plaintiff has failed to allege a relationship between Plaintiff and Defendant giving rise to the duty to disclose. The appellate court in *Dhital* concluded plaintiffs sufficiently alleged a duty to disclose on the basis plaintiffs "bought the car from a Nissan dealership, that Nissan backed the car with an express warranty, and that Nissan's authorized dealerships are its agents for purposes of the sale of Nissan vehicles to consumers." (*Dhital, supra,* 84 Cal.App.5th at p. 844.)

The demurrer to the fifth cause of action is OVERRULED.

III. 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. The grounds for a motion to strike must appear on the face of the challenged pleading or from any matter of which the court is required to 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.) A motion to strike should not be a procedural "line item veto" for the civil defendant. (*PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1683.)

In ruling on a motion to strike, the court reads the complaint as a whole, all parts in their context, and assumes the truth of all well-pleaded allegations. (See *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.) The court's decision to strike pursuant to section 436 is discretionary. (See Code Civ. Proc., § 436 ["The court may . . . strike"]; see also *Colden v. Broadway State Bank* (1936) 11 Cal.App.2d 428, 429 [motion to strike is addressed to the sound discretion of the court].)

B. Analysis

Defendant moves to strike Plaintiffs' request for punitive damages, arguing that: (1) Plaintiff's Song-Beverly Act causes of action do not allow for the recovery of punitive damages; (2) Plaintiff does not adequately allege malice, oppression, or fraud under Civil Code section 3294, subdivision (c); and (3) Plaintiff's fraudulent concealment cause of action cannot support the request for punitive damages because Plaintiff does not allege the cause of action with sufficient facts to state a cause of action.

For the reasons stated above in connection with Defendant's demurrer, Defendant's argument that the fraudulent concealment cause of action does not allege sufficient facts to state a cause of action lacks merit. Because the fraud cause of action survives Defendant's demurrer, it may properly form the basis for Plaintiff's request for punitive damages. (See *Stevens v. Super. Ct.* (1986) 180 Cal.App.3d 605, 610 ["A fraud cause seeking punitive damages need not include an allegation that the fraud was motivated by the malicious desire to inflict injury upon the victim. The pleading of fraud is sufficient. [Citation.]"].)

Contrary to what Plaintiff seems to suggest, if the conduct underlying each set of damages is distinct a plaintiff may claim punitive damages under a theory of fraud while also seeking civil penalty damages under the Song-Beverly Consumer Warranty Act. (See *Dhital, supra,* 84 Cal.App.5th at p. 841 ["a defendant's conduct in fraudulently inducing someone to enter a contract is separate from the defendant's later breach of the contract or warranty provisions that were agreed to"]; *Anderson v. Ford Motor Co.* (2022) 74 Cal.App.5th 946, 966 [holding a plaintiff may seek both punitive damages for fraud and civil penalties under the Song-Warranty Act when a plaintiff bases the damages on different conduct at different times, such as a "presale fraudulent inducement and [] postsale noncompliance with the Song-Beverly Act"].)

It is therefore unnecessary for the court to consider whether punitive damages are also available under the Song-Beverly Consumer Warranty Act.

The motion to strike is DENIED.

IV. Conclusion

Defendant's demurrer to the fifth cause of action is OVERRULED.

Defendant's motion to strike is DENIED.

The Court will prepare the final order.

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Calendar Line 7
Case Name: *Jose Hernandez v. Devcon Construction Inc., et al.*
Case No.: 19CV342999

Before the court is plaintiff Jose Hernandez's motion for summary adjudication. Pursuant to California Rule of Court 3.1308, the court issues its tentative ruling as follows.

I. Background.

On or about February 14, 2018, plaintiff Jose Hernandez ("Plaintiff") was acting within the course and scope of his employment with Pacific Steel Group ("PSG"). (Complaint, ¶10.) Plaintiff was an ironworker working at the Stanford University Frost Amphitheater project in Palo Alto ("Project"). (*Id.*) Defendant Devcon Construction Incorporated ("Devcon") was providing general contracting services at the Project. (Complaint, ¶11.)

Defendant Devcon failed to coordinate and control the work being performed on said job site in a safe and proper manner, thereby creating a risk of injury to persons working on said job site. (Complaint, ¶16.) Defendant Devcon negligently performed, controlled, and directed work relating to trenching, excavating, creating ramps, and creating safe access to work areas and exposed Plaintiff and other workers to risk of injury on the Project. (Complaint, ¶¶17 and 24.) Defendant Devcon violated various Labor Code provisions for safety as well as Cal-OSHA or other ordinance enacted to protect the class of plaintiffs here involved in the type of injury here incurred. (Complaint, ¶21.) Defendant Devcon negligently created or directed the creation of excessively sloped walkways composed of loose earth around the perimeter of an excavation where Plaintiff and his coworkers were working, resulting in Plaintiff falling and sustaining substantial injury to his right leg. (Complaint, ¶25.)

On February 11, 2019, Plaintiff filed a complaint against defendant Devcon and Doe defendants asserting a single cause of action for negligence.

On April 16, 2019, defendant Devcon filed its answer to Plaintiff's complaint.

On July 12, 2019, pursuant to a stipulation and order, Plaintiff filed a Doe amendment substituting defendant Joseph J. Albanese, Inc. ("Albanese") for Doe defendant one.

On August 29, 2019, defendant Albanese filed an answer to Plaintiff's first amended complaint.

On June 16, 2021, pursuant to a stipulation and order, defendant Devcon filed a motion for summary judgment of Plaintiff's complaint.

On August 3, 2021, the court (Hon. Manoukian) issued an order granting defendant Devcon's motion for summary judgment and on August 18, 2021, the court entered judgment thereon in favor of defendant Devcon.

On September 20, 2021, the court clerk entered dismissal of Plaintiff's complaint as to defendant Albanese at Plaintiff's request.

On October 18, 2021, Plaintiff filed a Notice of Appeal of the judgment in favor of defendant Devcon.

On June 30, 2023, the Sixth District Court of Appeal issued remittitur reversing the judgment.

On March 11, 2024, Plaintiff filed the motion now before the court, a motion for summary adjudication. More specifically, Plaintiff desires an adjudication that "Defendant [Devcon] owed a duty of care to Plaintiff to ensure the subject dirt bench was maintained in a condition to support Plaintiff without collapsing."[1]

II. Plaintiff's motion for summary adjudication is DENIED.

A. Summary adjudication – issue of duty.

In view of Plaintiff's request for summary adjudication of an issue of duty, the court deems it pertinent to review Code of Civil Procedure section 437c, subdivision (f)(1), which states, in relevant part:

> A party may move for summary adjudication as to … one or more issues of duty, ***if the party contends*** … ***that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs***. A motion for summary adjudication shall be granted only if it completely disposes of … an issue of duty.

(Emphasis added.)

As a preliminary matter, the court pauses to consider whether Plaintiff seeks relief beyond that which is authorized by Code of Civil Procedure section 437c, subdivision (f). For instance, in his accompanying points and authorities, Plaintiff asserts, "Both duty ***and breach***

[1] See page 2, lines 6 – 7 of Plaintiff's Notice of Motion and Motion for Summary Adjudication; Memorandum of Points and Authorities ("Plaintiff's MPA"). (Emphasis added.)

are crystal clear here."[2] Plaintiff continues, "At issue is Devcon's anticipated defense … known as the *Privette* doctrine. … the *Privette* doctrine cannot bar the imposition on Devcon of the regulatory duty arising out of that work."[3] Indeed, section IV(B) of Plaintiff's memorandum of points and authorities appears dedicated to arguing whether defendant Devcon can properly assert a *Privette* doctrine defense as Plaintiff summarizes, "Devcon is not shielded from liability because it did not, and could not, fully and effectively delegate its tort duty to PSG."[4]

Thus, Plaintiff's contention goes well beyond whether "one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs." (Code Civ. Proc., §437c, subd. (f).) To the extent Plaintiff is inviting this court to decide issue relating to defendant Devcon's anticipated *Privette* doctrine defense such as the delegability or nondelegability of its duty, breach of such duty, and/or whether defendant's breach affirmatively contributed to plaintiff's injury, the court declines to do so as summary adjudication of such issues is not authorized except upon joint stipulation and permission from the court. (See Code Civ. Proc., §437c, subd. (t).)[5]

B. Duty pursuant to Cal-OSHA regulations.

The Sixth District Court of Appeal succinctly summarized the law applicable to this case.

> …Hernandez alleged a single cause of action against Devcon for negligence. The elements of a negligence claim are: a legal duty of care, breach of that duty, causation and damages. (*Colonial Van & Storage, Inc. v. Superior Court* (2022)

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[2] See page 5, line 6 of Plaintiff's MPA.
[3] See page 5, lines 20 – 22 and line 27 to page 6, line 1 of Plaintiff's MPA.
[4] See page 3, lines 18 – 19, and page 11, lines 2 – 3, of Plaintiff's MPA.
[5] Even the decision cited by Plaintiff is in accord. (*Linden Partners v. Wilshire Linden Assocs.* (1998) 62 Cal.App.4th 508, 522—"We hold that on a motion for summary adjudication, the court may rule whether a defendant owes or does not owe a duty to plaintiff ***without regard for the dispositive effect of such ruling on other issues in the litigation***, except that the ruling must completely dispose of the issue of duty." (Emphasis added.)) See also *Paramount Petroleum Corp. v. Superior Court* (2014) 227 Cal.App.4th 226, 244, cited by defendant Devcon in opposition where the court stated, "there is simply no statutory basis for an order summarily adjudicating that a party breached a duty."

The court would also caution Plaintiff against filing another motion for summary adjudication by re-framing the issue as one for summary adjudication of an affirmative defense. Even if Plaintiff can establish the Cal-OSHA regulations impose non-delegable duties on defendant Devcon, whether defendant Devcon breached and whether such breach affirmatively contributed to Plaintiff's injuries remain as questions of fact. (See *Regalado v. Callaghan* (2016) 3 Cal.App.5th 582, 597.)

76 Cal.App.5th 487, 496, 291 Cal. Rptr. 3d 581, citing *Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1158, 210 Cal. Rptr. 3d 283, 384 P.3d 283.) This appeal presents only the first element—a legal duty of care allegedly owed to Hernandez by Devcon.

It is well settled that a "[w]hen a person or organization hires an independent contractor, the hirer presumptively delegates to the contractor the responsibility to do the work safely." (*Sandoval v. Qualcomm Incorporated* (2021) 12 Cal.5th 256, 269, 283 Cal. Rptr. 3d 519, 494 P.3d 487 (*Sandoval*), citing *SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 597, 600, 602, 129 Cal. Rptr. 3d 601, 258 P.3d 737.) As the California Supreme Court has explained, "[t]his presumption is grounded in two major principles: first, that independent contractors by definition ordinarily control the manner of their own work; and second, that hirers typically hire independent contractors precisely for their greater ability to perform the contracted work safely and successfully." (*Sandoval*, *supra*, at p. 269, citing *Privette*, *supra*, 5 Cal.4th at p. 693.) "We refer to this principle that a hirer is ordinarily not liable to the contract workers as the Privette doctrine, for the first case in which we announced it." (*Sandoval*, *supra*, at p. 270.) Through application of this doctrine, California courts "have endorsed a 'strong policy' of presuming that a hirer delegates all control over the contracted work, and with it all concomitant tort duties, by entrusting work to a contractor." (*Ibid*.)

When it applies, this presumption is subject to two specific exceptions: "where the hirer either withholds critical information regarding a concealed hazard (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 664 (*Kinsman*, 37 Cal.4th 659, 664, 36 Cal. Rptr. 3d 495, 123 P.3d 931 (*Kinsman*)); or retains control over the contractor's work and actually exercises that control in a way that affirmatively contributes to the worker's injury (*Hooker v. Department of*

> *Transportation* (2002) 27 Cal.4th 198, 202 (*Hooker*))." (*Sandoval*, *supra*, 12 Cal.5th at p. 264.) In *Hooker*, the California Supreme Court "articulated the rule that a hirer owes a duty to a contract worker if the hirer retains control over any part of the work and actually exercises that control so as to affirmatively contribute to the worker's injury." (*Id*. at p. 271.)

(*Hernandez v. Devcon Constr.* (Apr. 20, 2023, No. H049512) ___Cal.App.5th___ [2023 Cal. App. Unpub. LEXIS 2248, at *18-19].)

As he argued on defendant Devcon's earlier motion for summary judgment, Plaintiff instead asserts a third exception to the *Privette* doctrine. "Another exception permits recovery when the hirer (1) has a nondelegable legal duty (2) which it breaches (3) in a manner that affirmatively contributes to the injury." (*Khosh v. Staples Construction Company, Inc.* (2016) 4 Cal.App.5th 712, 717 (*Khosh*).)[6]

To prevail on this argument, Plaintiff must first establish that the hirer, defendant Devcon, owed a legal duty to the independent contractor (or here, Plaintiff, the independent contractor's employee). In moving for summary adjudication on the issue of duty, Plaintiff relies almost exclusively on two Cal-OSHA regulations:

> The controlling contractor shall ensure that the following is provided and maintained: … (2) Except where infeasible due to space constraints in dense metropolitan areas, a firm, properly graded, and drained area, that is readily accessible to the work with adequate space for the safe assembly, rigging, and storage of reinforcing and post-tensioning materials, and the safe operation of the reinforcing contractor's equipment. … (4) Adequate benching and/or shoring in accordance with the provisions of Sections 1541 and 1541.1 prior to the commencement of reinforcing operations in excavations and/or trenches.

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[6] "Over the nearly three decades since we decided *Privette*, we have repeatedly reaffirmed the basic rule that a hirer is typically not liable for injuries sustained by an independent contractor or its workers while on the job. ***Our more recent cases emphasize delegation as the key principle*** underlying this rule: Because the hirer presumptively delegates to the independent contractor the authority to determine the manner in which the work is to be performed, the contractor also assumes the responsibility to ensure that the worksite is safe, and the work is performed safely. [Citation omitted.]" (*Gonzalez v. Mathis* (2021) 12 Cal.5th 29, 41; emphasis added.) Since delegation is the key principle, another way to view the nondelegable duty exception identified by *Khosh* is to view it as an attempt to overcome/ rebut the presumption in *Privette* that workplace safety is delegated to the independent contractor.

(Cal. Code Regs., tit. 8, §1711, subd. (c).)

> The controlling contractor shall ensure that the reinforcing steel contractor on the project is provided with the following written notifications at the times indicated: …
>
> (2) Prior to commencement of reinforcing steel installation, that the vertical formwork, elevated decks, and other working/walking surfaces are structurally stable and remain adequately braced, guyed, or supported in accordance with Sections 1713 and 1717 to allow safe access of reinforcing ironworkers, materials, and equipment.
>
> (3) Prior to commencement of reinforcing steel installation, that the benching and/or shoring for excavations have been inspected by a competent person.

(Cal. Code Regs., tit. 8, §1711, subd. (d).)

Plaintiff then proffers evidence that defendant Devcon was the controlling employer on the jobsite, that is the employer responsible for safety and health conditions on the worksite.[7] Plaintiff further asserts defendant Devcon had a responsibility as the controlling contractor on the jobsite to ensure a firm, adequately graded, and drained area from which ironworkers could perform their work; defendant Devcon admitted it had a duty under Cal-OSHA 1711(c)(2); and defendant Devcon admitted it had a duty under Cal-OSHA section 1711(d).[8]

From these two regulations and the proffered evidence, Plaintiff contends this court should reach the conclusion that defendant Devcon owed "a duty of care to Plaintiff to ensure the subject dirt bench was maintained in a condition to support Plaintiff without collapsing."

> The question of whether a duty exists is a question of law and must be decided by the court on a case-by-case basis. [Citations omitted.] "[I]n considering the existence of 'duty' in a given case several factors require consideration including 'the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's

[7] See Plaintiff's Separate Statement of Material Facts in Support of Motion for Summary Adjudication ("Plaintiff's SSMF"), Fact No. 13.
[8] See Plaintiff's SSMF, Fact Nos. 23, 49, and 50.

> conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved. [Citations.]' [Citations.]"

(*Dutton v. City of Pacifica* (1995) 35 Cal.App.4th 1171, 1175.)

The court finds Plaintiff's argument underdeveloped. Although Plaintiff has put forth evidence that defendant Devcon has admitted an obligation to comply with Cal-OSHA sections 1711, subdivision (c)(2) and (d), the determination of a duty requires consideration of a number of other factors which Plaintiff has not addressed. To the extent Plaintiff is asking this court to make the logical leap and declare, by way of summary adjudication, the existence of a duty that defendant Devcon owed "a duty of care to Plaintiff to ensure the subject dirt bench was maintained in a condition to support Plaintiff without collapsing," the court finds Plaintiff has not met his initial burden.

Accordingly, Plaintiff's motion for summary adjudication is DENIED.

The Court will prepare the formal order.

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Calendar Line 8
Case Name: *Alicia Avila v. Costco Wholesale Corporation, et al.*
Case No.: 21CV388522

Before the court is a motion for summary judgment by defendant Costco Wholesale Corporation. Pursuant to California Rule of Court 3.1308, the court issues its tentative ruling as follows.

III. Background.

On September 29, 2019, plaintiff Alicia Avila ("Avila") was a business invitee at defendant Costco Wholesale Corporation's ("Costco") store located at 7251 Camino Arroyo in Gilroy. (Complaint, ¶Prem.L-1.) While plaintiff Avila was at said premises, she slipped on water that was allowed to accumulate on the bathroom floor. (*Id.*) Plaintiff Avila suffered serious injuries as a result of defendant Costco's failure to utilize reasonable care in the maintenance of its premises. (*Id.*)

On August 25, 2021, plaintiff Avila filed a Judicial Council form complaint against defendant Costco asserting causes of action for:

(1) Premises Liability

(2) General Negligence

On November 24, 2021, defendant Costco filed an answer to plaintiff Avila's complaint.

On March 22, 2024, defendant Costco filed the motion now before the court, a motion for summary judgment.

IV. Defendant Costco's motion for summary judgment is DENIED.

"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.) "Premises liability is a form of negligence … and is described as follows: The owner of premises is under a duty to exercise ordinary care in the management of such premises in order to avoid exposing persons to an unreasonable risk of harm. A failure to fulfill this duty is negligence." (*Brooks v. Eugene Burger Management Corp.* (1989) 215 Cal.App.3d 1611, 1619.)

"The proper test to be applied to the liability of the possessor of land . . . is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others." (*Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1156.) "The question is whether in the management of his property, the possessor of land has acted as a reasonable person under all the circumstances. The likelihood of injury to plaintiff, the probable seriousness of such injury, the burden of reducing or avoiding the risk, the location of the land, and the possessor's degree of control over the risk-creating condition are among the factors to be considered by the trier of fact in evaluating the reasonableness of a defendant's conduct." (*Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358, 372.)

"Because the owner is not the insurer of the visitor's personal safety [citation], the owner's actual or constructive knowledge of the dangerous condition is a key to establishing its liability." [Citation.] ***In the absence of actual or constructive knowledge of the dangerous condition, the owner is not liable.*** Moreover, where the plaintiff relies on the failure to correct a dangerous condition to prove the owner's negligence, the plaintiff has the burden of showing that the owner had notice of the defect in sufficient time to correct it. (*Moore v. Wal-Mart Stores, Inc.* (2003) 111 Cal.App.4th 472, 476 (*Moore*); emphasis added.)

"Although liability might easily be found where the landowner has actual knowledge of the dangerous condition, '[the] landowner's lack of knowledge of the dangerous condition is not a defense. He has an affirmative duty to exercise ordinary care to keep the premises in a reasonably safe condition, and therefore must inspect them or take other proper means to ascertain their condition. And if, by the exercise of reasonable care, he would have discovered the dangerous condition, he is liable.'" (*Swanberg v. O'Mectin* (1984) 157 Cal.App.3d 325, 330.)

> [T]he plaintiff need not show actual knowledge where evidence suggests that the dangerous condition was present for a sufficient period of time to charge the owner with constructive knowledge of its existence. [Citation.] Whether this condition has existed long enough for a reasonably prudent person to have discovered it is a question of fact for the jury. [Citation.] There are no exact time limits. Rather, each accident must be viewed in light of its own unique

> circumstances. [Citation.] [¶] Thus, where … there is no direct evidence of the length of time the dangerous condition existed, the plaintiff can demonstrate the store owner had constructive notice of the dangerous condition by showing that the site had not been inspected within a reasonable period of time. [Citation.] In other words, the plaintiff may raise an inference that the condition existed long enough for the owner to have discovered it. [Citation.] "It remains a question of fact for the jury whether, under all the circumstances, the defective condition existed long enough so that it would have been discovered and remedied by an owner in the exercise of reasonable care." [Citation.] Nevertheless, it is still the plaintiff who has the burden of producing evidence and who must prove that the owner had constructive notice of the hazardous condition. [Citation.]

(*Moore, supra*, 111 Cal.App.4th at p. 477. See also *Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1210 (*Ortega*)—"The exact time the condition must exist before it should, in the exercise of reasonable care, have been discovered and remedied, cannot be fixed, because, obviously, it varies according to the circumstances. A person operating a grocery and vegetable store in the exercise of ordinary care must exercise a more vigilant outlook than the operator of some other types of business where the danger of things falling to the floor is not so obvious.")

In moving for summary judgment, defendant Costco contends it did not have actual or constructive knowledge of the purportedly dangerous condition (here, water on the floor of the bathroom) and, thus, cannot be liable. Defendant Costco proffers evidence that it did not have actual knowledge.[9] As to constructive knowledge, despite the California authorities discussed above stating that it is a question of fact whether a dangerous condition existed long enough to impart constructive notice, defendant Costco relies upon federal authorities to argue constructive notice can be decided as a matter of law. Specifically, defendant Costco contends a 30-minute benchmark applies, i.e., if there is undisputed evidence that an active inspection of the relevant area occurred less than 30 minutes before the accident, summary judgment in favor

[9] See Statement of Undisputed Facts in Support Motion for Summary Judgment ("Defendant's SUF"), Fact No. 16.

of the store owner is appropriate.[10] Defendant Costco proffers evidence that the floor in the restroom where plaintiff Avila purportedly slipped and fell was inspected for safety hazards, including liquids, by a Costco maintenance employee within 16 minutes of the purported slip and fall.[11]

This court, however, declines to follow the federal ***trial court*** authorities relied upon by defendant Costco. "A written trial court ruling has no precedential value." (*Santa Ana Hospital Med. Ctr. v. Belshe* (1997) 56 Cal.App.4th 819, 831.) Defendant Costco asserts the 9th Circuit agreed with the federal trial court's application of a 30-minute benchmark in *Cardoza v. Target Corp.* (9th Cir. 2019) 765 F.App'x 360, but acknowledges this decision was not selected for publication. California Rules of Court, rule 8.11153 precludes citation or reliance upon an unpublished decision. For those reasons and in light of existing California authority (*Moore* and *Ortega*), the court declines to apply the 30-minute benchmark advanced by defendant Costco.

While it would be plaintiff Avila's burden at trial to show that defendant Costco had notice of the alleged dangerous condition in time to correct it, defendant Costco bears the initial burden in moving for summary judgment to demonstrate that it did not have actual or constructive notice of the purportedly dangerous condition in time to correct it. Since this element of notice is written in the disjunctive, defendant Costco does not meet its initial burden on summary judgment unless it can establish it did not have both actual and constructive notice. Defendant Costco has not met its initial burden as constructive notice is a question of fact and cannot be decided as a matter of law.

Accordingly, defendant Costco's motion for summary judgment is DENIED.

The Court will prepare the formal order.

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[10] Defendant Costco cites *Eidem v. Target Corp.* (C.D.Cal. Aug. 24, 2011, No. EDCV 10-01000 VAP(DTBx)) 2011 U.S.Dist.LEXIS 95544 and *Cardoza v. Target Corp.* (C.D.Cal. June 22, 2018, No. CV 17-2232-MWF (RAOx)) 2018 U.S.Dist.LEXIS 117106.

[11] See Defendant's SUF, Fact No. 22.