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 19, 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.

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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	23CV426401	Dion Abellon vs GENERAL MOTORS, LLC et al	**Demurrer** Scroll down to Lines 1 and 2 for Tentative Ruling.
LINE 2	23CV426401	Dion Abellon vs GENERAL MOTORS, LLC et al	**Motion to Strike** Scroll down to Lines 1 and 2 for Tentative Ruling.
LINE 3	23CV427679	Ally Liu vs You Wu et al	**Demurrer** Scroll down to Line 3 for Tentative Ruling.
LINE 4	22CV402833	SISCARE RX LLC et al vs JAMES WONG et al	**Motion for Summary Judgment/Adjudication** Scroll down to Line 4 for Tentative Ruling.
LINE 5	22CV401999	FRANCISCO MEJIA, III vs BENJAMIN ZARATE	**Motion to Compel (Discovery)** Defendant Benjamin Antonio Zarate's motions to compel discovery responses from Plaintiff. Plaintiff has provided discovery responses and Defendant has withdrawn the motion. This motion is therefore OFF CALENDAR.

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LAW AND MOTION TENTATIVE RULINGS

LINE 6	23CV410044	Mark Smith vs Terry Drymonacos et al	**Joinder to Motion to Compel** Defendants Brad Kashani and Bigstream Solutions, Inc. joinder to Defendant Terry Drymonacos' motion to compel Plaintiff's attendance and testimony at further deposition with the presence of a Discovery Referee paid by plaintiff. Moving party of this joinder failed to meet and confer; this motion by joinder is therefore DENIED, without prejudice. Moving party to prepare the formal order.
LINE 7	23CV410044	Mark Smith vs Terry Drymonacos et al	**Motion to Compel (Deposition Questions)** Scroll down to Line 7 for Tentative Ruling.

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LAW AND MOTION TENTATIVE RULINGS

LINE 8	24CV431792	Portfolio Recovery Associates Llc vs Michelle Lorenz	**Motion to Compel (Discovery)** Plaintiff Portfolio Recovery Associates, LLC's motion that the truth of all specified facts in its Request for Admissions, Set One, propounded on Defendant Michelle Lorenz by mail on April 23, 2024, be deemed admitted. No opposition to this motion was filed. A failure to oppose a motion may be deemed a consent to the granting of the motion. CRC Rule 8.54c. A failure to oppose a motion leads to the presumption that Defendant has no meritorious arguments. (*Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal. App. 3d 481, 489.) Moving party meets its burden of proof. Good cause appearing, the motion is GRANTED. The Requests for Admission (Set One) served on Defendant Michelle Lorenz on April 23, 2024, by Plaintiff, are deemed admitted against Defendant Michelle Lorenz. Plaintiff shall prepare a formal order after hearing, that repeats the admissions to be admitted verbatim.
LINE 9	20CV372317	Pomogaibo Kateryna vs Yevgeniy Babichev et al	**Motion for Attorney's Fees** This matter was dismissed without prejudice by the Court on August 29, 2024. This motion is therefore MOOT.

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LAW AND MOTION TENTATIVE RULINGS

LINE 10	21CV376675	Nieves Cadaoas et al vs Arellano and Ibrahim LLC et al	**Motion to withdraw as attorney** Attorney Diemer filed a Substitution of Attorneys on August 14, 2024, substituting out of this case. Defendants are now in *pro per.* This motion is therefore MOOT and OFF CALENDAR.
LINE 11	21CV381623	Consumer Law Center, Inc. vs Conditioned Air Associates, Inc. et al	**Motion to Amend Judgment** Judgment Creditor, Consumer Law Center, Inc.'s motion to amend Judgment in this action to include the name Benedict John Levroni, A/K/A Benedict Leveroni as a Judgment Debtor. The motion was served on all defendants on May 10, 2024. 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. A failure to oppose a motion leads to the presumption that Defendant/Judgment Debtor has no meritorious arguments. (*Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal. App. 3d 481, 489.) Moving party meets its burden of proof. Good cause appearing, the motion is GRANTED. The Judgment entered on August 23, 2023, shall be amended to include the name Benedict John Levroni, aka Benedict Leveroni as a judgment debtor (Code of Civil Procedure §187). Moving party to prepare the formal order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 12	21CV376675	Nieves Cadaoas et al vs Arellano and Ibrahim LLC et al	**Motion to Continue Trial** Good cause appearing, Plaintiff's motion to continue trial and reset all deadlines to the new trial date is GRANTED. This matter is SET for Trial on February 18, 2024, a mandatory settlement conference on February 5, 2024, and a Trial Assignment on February 13, 2024 at 1:30p.m. in Department 6. As to the corporate Defendant Arellano and Ibrahim, LLC: A company, regardless of corporate form, cannot represent itself in civil litigation in California. (*Clean Air Transp. Sys. v. San Mateo County Transit Dist.* (1988) 198 Cal. App. 3d 576, 578 "[A] corporation is a distinct legal entity, separate from its shareholders and officers. The rights and liabilities of corporations are distinct from the persons composing it. Thus, a corporation cannot appear in court except through an agent." Accordingly, this matter is SET for an order to show cause on October 31, 2024 at 10:00 a.m. in Department 18b. Defendant Arellano and Ibrahim, LLC. is ordered to appear and show cause why its answer should not be stricken for failure to obtain counsel. Moving party to prepare order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 13	21CV376675	Nieves Cadaoas et al vs Arellano and Ibrahim LLC et al	**Motion to Take Subsequent Deposition of Teresita Hill** Plaintiffs Nieves Cadaoas and Mario Cadaoas' motion for an order granting them leave to take a subsequent deposition of Teresita Hill on the grounds that good cause exists in that Defendants Arellano and Ibrahim LLC and Helen Ibrahim intentionally provided false information regarding Ms. Hill's employment with A& I. Plaintiffs also argue that Defendants intentionally withheld relevant documents related to Ms. Hill's employment with A & I. The motion is made pursuant to Code Civ. Proc., § 2025.610(b). The motion was correctly served. 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. A failure to oppose a motion leads to the presumption that Defendant has no meritorious arguments. (*Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal. App. 3d 481, 489.) There is also good cause to grant the motion. Moving parties meet their burden of proof. Good cause appearing, the motion is GRANTED. Plaintiffs shall be permitted to take a subsequent deposition of Teresita Hill based on the previous omissions of information and tardy production of documents by Defendants. The deposition shall take place at a date and time agreed to by the parties and convenient to the deponent, at a code compliant location or by video, and shall take place later than October 31. 2024. Moving parties to prepare the formal order.

Calendar Lines 1 & 2
Case Name: *Abellon v. General Motors, LLC, et al.*
Case No.: 23CV426401

Before the Court is Defendant General Motors LLC's Demurrer and Motion to Strike Plaintiff Dion Lee Abellon's Complaint. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background

This is an action for violations of the Song-Beverly Act and other claims by Plaintiff Dion Lee Abellon ("Plaintiff") against Defendants General Motors LLC ("Defendant" or "General Motors") and Chevrolet of Folsom, Inc dba Folsom Chevrolet.

According to the Complaint, on December 26, 2020, Plaintiff acquired a 2020 Chevrolet Bolt ("vehicle" or "subject vehicle") for personal, family, and/or household purposes from Capitol Chevrolet, an authorized dealer and agent of Defendant, General Motors. (Complaint at ¶ 7.) The vehicle was sold to Plaintiff with express warranties that the vehicle would be free from defects in materials, noncomformities, or workmanship during the applicable warranty period. (*Id.* at ¶ 8.) And to the extent the vehicle had defects, Defendant would repair those defects. (*Ibid.*) This included an 8-year, 100,000-mile warranty on the vehicle's battery. (*Ibid.*) Defendant also impliedly warranted that the subject vehicle would be of the same quality as similar vehicles sold in the trade and be fit for the ordinary purposes for which similar vehicles are used. (Complaint at ¶ 9.)

Plaintiff alleges Defendant falsely represented that the vehicle is safe and functional for normal use, when it is not because batteries may ignite when fully charged, the vehicle is below 70 miles remaining mileage, or parked inside overnight. (Complaint at ¶ 14.) Plaintiff alleges Defendant first became aware of the issues with the battery in December 2016, but continued to advertise the battery as long range and affordable. (*Id.* at ¶¶ 17, 18.) The Complaint alleges that Defendant first became aware of the first battery fire in March 2019. (*Id.* at ¶ 24.) Later that year, Plaintiff alleges an employee of General Motors, Adam Piper, represented that the battery could be charged to 100%, even though he knew of the risk of fire. (*Id.* at ¶ 25.) Plaintiff alleges that by 2020, Defendant was aware of 12 fires involving the Chevy Bolt. (*Id.* at ¶ 26.)

At the time of Plaintiff's acquisition of the subject vehicle, she alleges that Defendant advertised the subject vehicle battery as long range and affordable on its website. (Complaint at ¶ 27.) Plaintiff alleges that the dealership personnel assured her of the same, (*ibid.*), and that the 2020 marketing materials she reviewed depicted the vehicle was safe and capable of being charged inside her garage. (Complaint at ¶ 30.)

In 2021, Defendant issued a recall notice for the subject vehicle, stating that its batteries may ignite when nearing a full charge. (Complaint at ¶ 31.) Defendant warned Plaintiff that the vehicle's charge should not exceed 90%, the battery mileage should not fall below 70 miles remaining, and the vehicle should not be parked indoors overnight. (*Ibid.*) Plaintiff alleges that because of the risk of fire, she is forced to make unforeseen accommodations and take precautions that interfere with the normal use of the vehicle. (Complaint at ¶ 32.) Plaintiff alleges that she believed the vehicle to be functional and safe, and that she could not have known or discovered that the representation was untrue at the time of the acquisition. (*Id.* at ¶¶ 37, 38.) Plaintiff alleges she would not have bought the vehicle if she had known it was neither safe nor functioned as advertised. (*Id.* at ¶ 46.)

Plaintiff filed suit on November 17, 2023, alleging causes of action for (1) Violation of Song-Beverly Act-Breach of Express Warranty; (2) Violation of Song-Beverly Act-Breach of Implied Warranty; (3) Violation of Song-Beverly Act-Section 1793.2; (4) Fraud; (5) Violation of Business & Professions Code section 17200; and (6) Negligent Repair. On July 3, 2024, Defendant General Motors filed a Demurrer and Motion to Strike. Defendant demurs to the fourth cause of action for fraud and fifth cause of action for violation of Business and Professions Code section 17200. Defendant moves to strike the request for punitive damages. Plaintiff filed her opposition on August 26, 2024. Defendant has not filed a reply.

II. Discussion

a. Demurrer

Defendant GMC argues the fourth and fifth causes of action fail to state a valid claim. (See Code Civ. Proc., § 430.10, subd. (e).)

i. *Timeliness*

"A person against whom a complaint or cross-complaint has been filed may, within 30 days after service of the complaint or cross-complaint, demur to the complaint or cross-complaint." (Code Civ. Proc., § 430.40, subd. (a).)[1] Even if a demurrer is untimely filed, the Court has discretion to hear the demurrer so long as its action ". . . 'does not affect the substantial rights of the parties.' [Citations.]" (See *McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 281-282.)

This action was filed on November 17, 2023. Defendant was served on November 30, 2023. (See Proof of Summons as to General Motors, filed December 20, 2023.) Defendant timely filed an initial demurrer and motion to strike on December 26, 2023, which was unopposed. A hearing on the motion was held on March 12, 2024. Since Defendant failed to appear, the motion was taken off calendar without prejudice. (See March 18, 2024 Minute Order.) As stated above, Defendant re-filed the instant demurrer and motion to strike on July 3, 2024. Although it is unclear from the moving party's declaration and papers whether an extension of time to file the responsive pleading was granted, Plaintiff has opposed Defendant's motions without raising timeliness as an issue. Therefore, even if the motions are untimely, the Court's consideration of the demurrer and motion to strike would not affect the substantial rights of the parties.

ii. *Meet and Confer*

"Before filing a demurrer pursuant to this chapter, the demurring party shall meet and confer in person or by telephone with the party who filed the pleading that is subject to demurrer for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised in the demurrer." (§ 430.41, subd. (a).) "As part of the meet and confer process, the demurring party shall identify all of the specific causes of action that it believes are subject to demurrer and identify with legal support the basis of the deficiencies." (§ 430.41, subd. (a)(1).) "Any determination by the court that the meet and confer process was insufficient shall not be grounds to overrule or sustain a demurrer." (§ 430.41, subd. (a)(4).)

[1] All further undesignated statutory references are to the Code of Civil Procedure.

Counsel for Defendant includes a declaration attesting that he met and conferred with Plaintiff's counsel on December 6, 2023 with respect to Defendant's position that the fourth and fifth causes of action are insufficiently pled. (Declaration of Steven D. Park ["Park Decl."] at ¶ 1.) Counsel states that they discussed the authorities supporting Defendant's position and were unable to reach an agreement. (*Id.* at ¶ 1.) Although counsel does not address any subsequent attempts made to meet and confer, the Court nonetheless finds the efforts described sufficient for consideration of the demurrer.

iii. *Request for Judicial Notice*

"Judicial notice is the recognition and acceptance by the court, for use by the trier of fact or by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter." (*Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117.)

In support, Defendant requests judicial notice of the fact that the United States Environmental Protection Agency estimated that the 2020 to 2022 model-year Chevrolet Bolts have a total range of 259 miles. (Defendant's Request for Judicial Notice, Park Decl. at ¶ 2.) (See Evid. Code, § 452, subds. (b), (h).) The court however declines to consider the request as it is not relevant to resolving issues raised by the demurrer for reasons explained below. (See *Gbur v. Cohen* (1979) 93 Cal.App.3d 296, 301 [judicial notice is confined to those matters which are relevant to the issue at hand].)

Accordingly, the request for judicial notice is DENIED.

iv. *Legal Standard*

A demurrer must distinctly specify the grounds upon which a pleading is objected to; a demurrer lacking such specification may be disregarded. (§ 430.60.) 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. (§§ 430.10, 430.50, subd. (a).)

Defendant demurs to the Complaint pursuant to Code of Civil Procedure section 430.10, subdivisions (e). 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: . . . (e) The pleading does not state facts sufficient to constitute a cause of action." (§ 430.10, subd. (e).)

The court in ruling on a demurrer treats it "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214.) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

v. *Analysis*

Defendant demurs to the fourth and fifth causes of action.

1. **Fourth Cause of Action for Fraud**

Plaintiff's fourth cause of action for fraud is based on two theories: (1) misrepresentation; and (2) concealment.

a. Misrepresentation

"The essential elements of a count for intentional misrepresentation are (1) a misrepresentation, (2) knowledge of falsity, (3) intent to induce reliance, (4) actual and justifiable reliance, and (5) resulting damage." (*Chapman v. Skype Inc.* (2013) 220 Cal.App.4th 217, 230-231.)

"Fraud must be pleaded with specificity rather than with general and conclusory allegations. The specificity requirement means a plaintiff must allege facts showing how, when, where, to whom, and by what means the representations were made, and, in the case of a corporate defendant, the plaintiff must allege the names of the persons who made the representations, their authority to speak on behalf of the corporation, to whom they spoke, what

they said or wrote, and when the representation was made." (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 793 (*West*), citation and quotation marks omitted.)

Courts enforce the specificity requirement in consideration of its two purposes. (*West, supra,* 214 Cal.App.4th at p. 793.) The first purpose is to give notice to the defendant with sufficiently definite charges that the defendant can meet them. (*Ibid.*) The second is to permit a court to weed out meritless fraud claims on the basis of the pleadings; thus, the pleading should be sufficient to enable the court to determine whether, on the facts pleaded, there is any foundation, prima facie at least, for the charge of fraud. (*Ibid*.)

To support a claim for misrepresentation, Plaintiff alleges: (1) Defendant willfully, falsely, and knowingly marketed the subject vehicle as having long range capability; (2) Defendant knew the representations were false and intended for Plaintiff to rely on them; and (3) Plaintiff decided to buy the vehicle based in part on the false and misleading representations. (Complaint at ¶¶ 81-84.)

Defendant argues the fraud claim has not been pled with the required specificity to state a cause of action. (Demurrer at pp. 13:6-18:2.) In opposition, Plaintiff fails to address the specificity argument and instead contends she has stated a valid claim for fraudulent concealment. (Plaintiff's Opposition at pp. 4:16-5:24.) Thus, Plaintiff appears to concede there is no cause of action for fraud stated under a theory of intentional misrepresentation. (See *Sehulster Tunnels/Pre-Con v. Traylor Brothers, Inc.* (2003) 111 Cal.App.4th 1328, 1345, fn. 16 [failure to address point is "equivalent to a concession"]; see also *Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 529 [failure to challenge a contention in a brief results in the concession of that argument].)[2] Therefore, the court now considers whether Plaintiff has stated a valid claim for fraud under a theory of concealment. (See *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38 ["If the complaint states a cause of action under any theory, regardless of the title under which the factual basis for relief is stated, that aspect of the complaint is good against a demurrer."].)

[2] For this reason, Defendant's arguments regarding the EPA estimates (Demurrer at pp. 17:8-18:2) and Request for Judicial Notice are irrelevant.

b. Concealment

"[T]he elements of an action for fraud and deceit based on concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage." (*Marketing West, Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 612-613.)

Defendant argues there is no claim stated for fraudulent concealment because: (1) such claims in this instance are barred by the economic loss rule; and (2) there is no relationship alleged giving rise to a duty to disclose. (Demurrer at p. 18:4-12.)

The economic loss rule provides that "where a purchaser's expectations in a sale are frustrated because the product he brought is not working properly, his remedy is said to be in contract alone, for he has suffered only economic losses." (*Robinson Helicopter Company v. Dana Corporation* (2004) 34 Cal.4th 979, 988 (*Robinson*).) This doctrine hinges on a "distinction drawn between transactions involving the sales of goods for commercial purposes where economic expectations are protected by commercial and contract law, and those involving the sale of defective products to individual consumers who are injured in a manner which has traditionally been remedied by resort to the law of torts." (*Ibid.*) The rule requires a purchaser to recover solely in contract for purely economic loss due to disappointed expectations, unless the purchaser can demonstrate harm above and beyond a broken contractual promise. (*Ibid.*)

Defendant asserts the fraudulent concealment claim is barred by the economic loss rule. (Demurrer at p. 18:14-28.) In support, Defendant relies on the following two cases: (1) *Robinson*; and (2) *Butler-Rupp v. Lourdeaux* (2005) 134 Cal.App.4th 1220 (*Butler-Rupp*). (See Demurrer at pp. 13:25-14:4.) However, the California Supreme Court in *Robinson* addressed only claims for intentional misrepresentation and did not consider whether the economic loss rule was applicable to fraudulent concealment. (See *Robinson*,

supra, 34 Cal.4th at p. 991 ["Because Dana's affirmative intentional misrepresentations of fact (i.e., the issuance of the false certificates of conformance) are dispositive fraudulent conduct related to the performance of the contract, we need not address the issue of whether Dana's intentional concealment constitutes an independent tort."]; see also *Murphy v. City of Alameda* (1992) 11 Cal.App.4th 906, 914 ["It is fundamental that cases are not authority for propositions not considered and decided."].) Nor did the First Appellate District in *Butler-Rapp* address a claim for fraudulent concealment as that case examined a cause of action for negligent infliction of emotional distress.

The California Supreme Court, however, has recently addressed the issue in *Rattagan v. Uber Technologies, Inc.* (August 22, 2024, S272113) ___ Cal.5th ___ [2024 Cal. LEXIS 4639] (*Rattagan*). There, after discussing the economic loss rule and majority and dissenting opinions in *Robinson*, the Court addressed the question certified by the Ninth Circuit: whether claims for fraudulent concealment are exempted by the economic loss rule. (*Id.* at *53-54.) The Court answered in the affirmative noting that "[t]he doctrine only applies to bar tort recovery for negligently inflicted economic losses unaccompanied by physical or property damage under the limits recognized in [*Sheen v. Wells Fargo Bank, N.A.* (2002) 12 Cal.5th 905 (*Sheen*)]." (*Id.* at *54.) The Court re-framed the question to ask "[c]an a plaintiff assert an independent claim for fraudulent concealment in the performance of a contract?" (*Ibid.*) The Court again answered in the affirmative and set forth the following rule clarifying the scope of the economic loss doctrine:

> A plaintiff may assert a tort claim for fraudulent concealment based on conduct occurring in the course of a contractual relationship, if the elements of the cause of action can be established independently of the parties' contractual rights and obligations and the tortious conduct exposes the plaintiff to a risk of harm beyond the reasonable contemplation of the parties when they entered into the agreement.

(*Ibid.*)

In addressing this inquiry, the court must ascertain the full scope of the contract and determine if the plaintiff can establish all elements of the tort independent of the right and duties imposed by the contract. (*Rattagan, supra,* 2024 Cal. LEXIS 4639 at *55.) The Court

noted that "California case law similarly has viewed fraud by concealment on equal footing with fraud by affirmative misrepresentation." (*Ibid.*) The Court thus opined that there is no logical reason to distinguish among these various species of actionable fraud. (*Id.* at p. 56.) Accordingly, the Court held:

> In summary, the economic loss doctrine applies when the parties have entered into a contract; the plaintiff sues for tort damages, alleging defendant failed to perform as the contract requires; and negligently caused economic losses flowing from breach. In such a case, plaintiffs are generally limited to recovery of those economic losses and cannot seek to expand their remedies beyond those available in contract. The doctrine does not apply if defendant's breach caused physical damage or personal injury beyond the economic losses caused by the contractual breach and defendant violated a duty flowing, not from the contract, but from a separate, legally recognized tort obligation.

(*Id.* at p. 66.)

As applied to the facts here, the Court determines that Plaintiff's fraudulent concealment claim is not barred by the economic loss rule. Plaintiff's injuries alleged in the Complaint are two-fold. On the one hand, Plaintiff alleges that Defendant made certain express and implied warranties upon sale of the subject vehicle. (Complaint at ¶¶ 8, 9.) Plaintiff further alleges that the subject vehicle exhibited certain defects, non-conformities, misadjustments, or malfunctions, and Defendant failed to make the subject vehicle conform to the applicable warranties despite Plaintiff's notice within a reasonable time after discovery. (*Id.* at ¶¶ 11-13.) These losses are economic in nature, flow from the breach of warranty, and reflect disappointed expectations from the sale of the product.

On the other hand, Plaintiff also alleges harm beyond the economic losses caused by the contractual breach. Plaintiff alleges that at the time of sale, "Defendant concealed and suppressed the fact that the vehicle could not achieve its expected range and safety due to the overheating battery." (Complaint at ¶ 87.) Plaintiff alleges "[t]his was a material fact about which the Defendant had knowledge, and which it concealed from Plaintiff to mislead them." (*Ibid.*) Additionally, "[k]nowledge and information regarding the vehicle's defects were in the exclusive and superior possession of Defendant and their dealers, and were not provided to Plaintiff, who could not reasonably discover the defect through due diligence." (Complaint at

¶ 88.) Plaintiff contends that she would not have purchased the subject vehicle or would have paid significantly less for it had she known it was neither safe nor functioned as represented by Defendant. (*Id.* at ¶ 93.) As a result, Plaintiff maintains her use and enjoyment of the vehicle has been severely limited, and that she experiences a significant level of anxiety and worry regarding the safety of the vehicle. (Complaint at ¶¶ 44, 45.) These allegations go beyond the economic losses caused by the contractual breach and allege the independent tort of failing to disclose material information prior to entering into the contract.

In clarifying the scope of the economic loss rule as applied to fraudulent concealment claims, the California Supreme Court noted that "it is not surprising that most fraudulent concealment allegations stem from precontractual negotiations." (*Rattagan, supra,* 2024 Cal. LEXIS 4639 at *60.) "[I]t has long been the rule that where a contract is secured by fraudulent representations, the injured party may elect to affirm the contract and sue for the fraud." (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645,citing *Campbell v. Birch* (1942) 19 Cal.2d 778, 791; *see generally* 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts § 726, pp. 825-826.) The Court noted that the same may not be true for "fraudulent concealment claims occurring after the contract," as the court is only to enforce the obligations and benefits each party assumes or expects to receive in accordance with contract law. (*Rattagan, supra,* 2024 Cal. LEXIS 4639 at *60-61.) The Court further noted that while parties to a contract may not expect to be affirmatively lied to, they may anticipate the other party may withhold or conceal certain facts and can "allocate the risk of not learning that information by imposing a duty of disclosure during performance on the other party with the right to pursue particular contractual remedies in the event of breach." (*Id.* at p. 62.)

The Court distinguished between nondisclosures that are within the reasonable contemplation of known risks to the parties that are accounted for before entering into the agreement, and nondisclosures that violate an independent duty to disclose certain material that is instead intentionally concealed, induces detrimental reliance, and exposes the other party to risks of harm not reasonably contemplated at the time the contract was formed. (*Rattagan, supra,* 2024 Cal. LEXIS 4639 at pp. 63-64.) In the former situation, the plaintiff is limited to breach of contract; whereas, in the latter situation, the plaintiff may assert a tort action for

fraudulent concealment, "arising from a breach of duty growing out of the contract." (*Ibid.*) Nevertheless, the same level of specificity applies to a claim for fraudulent concealment at the pleading stage. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 347 (*Goodman*); *Boschma v. Home Loan Center, Inc.* (2011) 198 Cal.App.4th 230, 248; *Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1472.) With respect to the duty of disclosure, the Court opined:

> For instance, in a case such as this, the court must determine whether the plaintiff has alleged a sufficient factual basis for establishing a duty of disclosure on the part of the defendant independent of the parties' contract. If the duty allegedly arose by virtue of the parties' relationship and defendant's exclusive knowledge or access to certain facts, as Rattagan has alleged here, the complaint must also include specific allegations establishing all the required elements, including (1) the content of the omitted facts, (2) defendant's awareness of the materiality of those facts, (3) the inaccessibility of the facts to plaintiff, (4) the general point at which the omitted facts should or could have been revealed, and (5) justifiable and actual reliance, either through forbearance, based on the defendant's omission. "[M]ere conclusory allegations that the omissions were intentional and for the purpose of defrauding and deceiving plaintiff[ ] . . . are insufficient for the foregoing purposes."

(*Rattagan, supra*, 2024 Cal. LEXIS 4639 at *65-66,quoting *Goodman, supra,* 18 Cal.3d at p. 347.)

As stated above, Plaintiff has alleged the content of the omitted facts, namely that Defendant failed to disclose that the batteries may ignite when fully charged, below 70 miles remaining mileage, or parked inside overnight. (Complaint at ¶ 14.) Plaintiff alleges Defendant first became aware of these issues in December 2016 and was aware of at least 12 fires caused by the defective batteries by August 2020, just months before she purchased the vehicle. (*Id.* at ¶¶ 17, 26.) Plaintiff alleges that these facts were not known or accessible to her and could have been disclosed at the time of the sale. (*Id.* at ¶¶ 37, 38.) Plaintiff alleges that she relied on the omission and purchased the subject vehicle. (*Id.* at ¶ 46.) Plaintiff further alleges that had she known these facts about the battery, she would not have purchased the vehicle or would have purchased it for less. (*Ibid.*) The Complaint sufficiently alleges that these risks were unknown to Plaintiff but known to Defendant at the time of purchase. The Court finds these remaining elements of fraudulent concealment sufficiently alleged with the

requisite specificity at the pleading stage. The Court now turns to the Defendant's second argument regarding the duty of disclosure.

"To maintain a cause of action for fraud through nondisclosure or concealment of facts, there must be allegations demonstrating that the defendant was under a legal duty to disclose those facts." (*Los Angeles Memorial Coliseum Commission, et al. v. Insomniac, Inc., et al.* (2015) 233 Cal.App.4th 803, 831.)

"There are 'four circumstances in which nondisclosure or concealment may constitute actionable fraud: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts. [Citation.]' " (*LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 336, quoting *Heliotis v. Schuman* (1986) 181 Cal.App.3d 646, 651.)

Plaintiff alleges Defendant had a duty to disclose as follows:

> Defendant had a duty to disclose that the battery in the vehicle is unsafe at the point of purchase because (1) Defendant had exclusive knowledge of the material, suppressed facts; (2) Defendant took affirmative actions to conceal the material facts; and (3) Defendant made partial representations about the mileage range, battery safety, and performance of the vehicle that were misleading without disclosure of the fact that the vehicle contained unsafe batteries that caused the vehicle to overheat and pose a risk of fire.

(Complaint at ¶ 90.) Despite these allegations, Defendant contends there is no legal basis to support a duty to disclose. In support, Defendant relies principally upon *Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276 (*Bigler*) where the Fourth Appellate District wrote:

> Our Supreme Court has described the necessary relationship giving rise to a duty to disclose as a 'transaction' between the plaintiff and the defendant: 'In *transactions* which do not involve fiduciary or confidential relations, a cause of action for non-disclosure of material facts may arise in at least three instances: (1) the defendant makes representations but does not disclose facts which materially qualify the facts disclosed, or which render his disclosure likely to mislead; (2) the facts are known or accessible only to defendant, and defendant knows they are not known to or reasonably discoverable by the plaintiff; (3) the

> defendant actively conceals discovery from the plaintiff.' [Citation.] Other cases have described the requisite relationship with the same term. [Citations.] **Such a transaction must necessarily arise from direct dealings between the plaintiff and the defendant; it cannot arise between the defendant and the public at large.**

(*Bigler, supra,* at pp. 311-312, emphasis added.)

Defendant argues there is no direct relationship alleged between it and Plaintiff because she did not purchase the subject vehicle directly from General Motors. (See Demurrer at p. 20:2-7.) But, earlier in *Bigler*, the appellate court cites with approval the following: "A duty to disclose facts arises only when the parties are in a relationship that gives rise to the duty, such as seller and buyer, employer and prospective employee, doctor and patient, **or parties entering into any kind of contractual arrangement.**" (*Bigler, supra,* 7 Cal.App.5th at p. 311, citation and quotation marks omitted, emphasis added.)

Here, Plaintiff alleges: (1) she acquired the subject vehicle from an authorized dealer and agent of Defendant; (2) at the time of the sale, Defendant entered into a contract with Plaintiff to provide her with a warranty of the subject vehicle; (3) the warranty contract provided by Defendant demonstrates that the dealer is an agent of General Motors; and (4) the sale of the vehicle by a General Motors dealership, coupled with issuance of the warranty, created a transactional and contractual relationship between Defendant and Plaintiff. (Complaint at ¶ 7.) As stated in opposition (Plaintiff's Opposition at p. 5:7-17), the First Appellate District concluded similar allegations were acceptable for pleading purposes to state a claim for fraudulent concealment:

> "At the pleading stage (and in the absence of a more developed argument by Nissan on this point), we conclude plaintiffs' allegations are sufficient. Plaintiffs alleged that they 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 v. Nissan North America, Inc.* (2022) 84 Cal.App.5th 828, 844 (*Dhital*), review granted Feb. 1, 2023, S277568.)

It remains to be seen whether the California Supreme Court will agree with or reject *Dhital's* holding in connection with the duty to disclose issue. (*Rattagan, supra,* 2024

Cal. LEXIS 4639 at *60, fn. 12 [noting that the Court has granted review in *Dhital v. Nissan North America, Inc.* (2022) 84 Cal.App.5th 828 involving claims of fraudulent inducement by concealment and the Song-Beverly Consumer Warranty Act (Civ. Code § 1791, et seq.), but that it is not addressed here].) But, at least for now, this court will lean on the decision for its persuasive value with respect to this action. Thus, the court rejects Defendant's argument on this point.

Therefore, as Plaintiff has stated a valid claim for fraudulent concealment not barred by the economic loss rule and sufficiently stating a duty to disclose, the demurrer to the fourth cause of action is OVERRULED.

2. **Fifth Cause of Action for Violation of Business and Professions Code Section 17200**

"The UCL defines 'unfair competition' to 'mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising' and any act prohibited by [Business and Professions Code] section 17500. [Citation.]" (*Searle v. Wyndham Int'l* (2002) 102 Cal.App.4th 1327, 1332-1333 (*Searle*).) "[Business and Professions Code s]ection 17200 'is not confined to anticompetitive business practices, but is also directed toward the public's right to protection from fraud, deceit, and unlawful conduct. [Citation.] Thus, California courts have consistently interpreted the language of section 17200 broadly.' [Citation.]" (*South Bay Chevrolet v. General Motors Acceptance Corp.* (1999) 72 Cal.App.4th 861, 877-878.) "The statute prohibits 'wrongful business conduct in whatever context such activity might occur.' [Citation.]" (*Searle, supra,* at 102 Cal.App.4th at p. 1333.)

Here, Plaintiff's UCL claim alleges conduct that is unlawful, unfair, and fraudulent against Defendant. (Complaint ¶¶ 95-132.) As to the fraudulent prong, Defendant repeats arguments made in connection with the demurrer to the fourth cause of action. (Demurrer at p. 20, fn. 2.) The court however has considered and rejected those arguments for reasons stated above. Thus, at a minimum, Plaintiff alleges a valid claim under the UCL with respect to the fraudulent prong, which is sufficient to overcome a pleading challenge by general demurrer. (See *Quelimane Co., supra,* 19 Cal.4th at p. 38 ["If the complaint states a cause of action under

any theory, regardless of the title under which the factual basis for relief is stated, that aspect of the complaint is good against a demurrer."].)

Accordingly, the demurrer to the fifth cause of action on the ground that it fails to state a claim is OVERRULED.

b. Motion to Strike

Defendant separately moves to strike the prayer for punitive damages in the Complaint. As stated above, the court has overruled the demurrer with respect to the fraudulent concealment claim. Consequently, the Complaint properly supports Plaintiff's prayer for punitive damages. (*See Stevens v. Super. Ct.* (1986) 180 Cal.App.3d 605, 610 [pleading of fraud is sufficient for punitive damages].)

Therefore, the motion to strike the prayer for punitive damages is DENIED.

III. Conclusion

Defendant General Motors LLC's Demurrer to Plaintiff's fourth cause of action for fraud and fifth cause of action for violation of Business and Professions Code section 17200 is OVERRULED. Defendant's Motion to Strike the prayer for punitive damages is DENIED.

The Court will prepare the formal order.

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Calendar Line 3
Case Name: *Ally Liu v. You Wu, et al.*
Case No.: 23CV427679

Before the court is the demurrer of defendants You Wu and UTA AI Inc. to plaintiff's first amended complaint. Pursuant to California Rule of Court 3.1308, the court issues its tentative ruling as follows.

I. Background.

In or around March 2023, defendant You Wu ("Wu") reached out to plaintiff Ally Liu ("Liu") about working together on a start up venture. (First Amended Complaint ("FAC"), ¶7.) The initial idea was a travel-based artificial intelligence company provisionally referred to as UTA (Universal Travel Assistant). (*Id.*) Despite some concerns about the value of this concept, plaintiff Liu agreed the venture had merit and agreed to become defendant Wu's partner to develop, promote, and sell the AI travel assistant. (FAC, ¶8.)

Plaintiff Liu and Wu controlled the partnership entity and orally agreed to an ownership split in the planned corporation with 56% for defendant Wu, 34% for plaintiff Liu, and 10% reserved for employee/ service provider grants. (FAC, ¶9.)

Over the next several months and in furtherance of UTA, plaintiff Liu performed hundreds of hours of work. (FAC, ¶10.) Plaintiff Liu also incurred and paid for expenses on behalf of UTA which have not been reimbursed by defendant Wu or UTA. (FAC, ¶11.)

In May 2023, defendant Wu claimed that a prospective investor, Sequoia China, was demanding plaintiff Liu's ownership interest in the planned corporation be reduced to 5% or less, in contravention of plaintiff Liu and defendant Wu's agreement. (FAC, ¶12.) This representation was an attempt by defendant Wu to gain a larger equity stake in the planned corporation. (*Id.*)

At plaintiff Liu's demand, defendant Wu set up a meeting with Sequoia China on July 8, 2023 to discuss the issue. (FAC, ¶13.) At the meeting, plaintiff Liu informed Sequoia China that she would not accept a 5% share in the planned corporation and would need that percentage increased. (*Id.*) Defendant Wu did not support plaintiff Liu's demand. (*Id.*) Sequoia China made suggestions but deferred to defendant Wu to determine the final share split. (*Id.*)

Defendant Wu did not allow plaintiff Liu to attend any follow-up meetings with Sequoia China and subsequently froze plaintiff Liu out of any role or involvement with UTA. (*Id.*)

On July 11, 2023, defendant Wu unilaterally incorporated UTA as defendant UTA AI, Inc. ("Company") in Delaware with defendant Company assuming all or substantially all of UTA's assets. (FAC, ¶14.) Defendant Company continues the business operations originally started by UTA related to the development, promotion, and sale of the AI travel assistant. (FAC, ¶15.) Defendant Company was aware of UTA and defendant Wu's obligations to plaintiff Liu. (FAC, ¶16.) Defendant Company did not provide sufficient consideration to UTA to purchase UTA's assets when defendant Company gained control over those assets. (FAC, ¶17.)

Defendant Wu is defendant Company's Chief Executive Officer, Chief Financial Officer, and Secretary. (FAC, ¶18.)

Since July 2023, defendants Wu and Company have denied plaintiff Liu has any ownership interest in defendant Company and have frozen plaintiff Liu out of any role or involvement with defendant Company or its business. (FAC, ¶19.)

On December 14, 2023, plaintiff Liu filed a complaint against defendants Wu and Company.

On February 23, 2024, defendants Wu and Company filed a demurrer to plaintiff Liu's complaint, prompting plaintiff Liu to file the operative FAC on April 10, 2024. The FAC asserts causes of action for:

(1) Declaratory Judgment [against defendant Company]

(2) Breach of Contract [against defendant Wu]

(3) Breach of Contract [against defendant Company]

(4) Breach of Fiduciary Duty [against defendant Wu]

(5) Unjust Enrichment [against defendant Wu]

(6) Unjust Enrichment [against defendant Company]

(7) Quantum Meruit [against defendant Wu]

(8) Quantum Meruit [against defendant Company]

(9) Aiding and Abetting Breach of Fiduciary Duty [against defendant Company]

(10) Nonpayment of Wages

(11) Failure to Pay Wages When Due, California Labor Code §204

(12) Failure to Pay Wages at Termination, California Labor Code §203

(13) Failure to Reimburse Necessary Expenses, California Labor Code §2802

(14) Failure to Provide Wage Statement, California Labor Code §226(a)

(15) Violation of California Labor Code §98.6

(16) Wrongful Termination in Violation of Public Policy

(17) Unfair Competition, California Business & Professions Code §17200 [against defendant Company]

On May 14, 2024, defendants Wu and Company filed the motion now before the court, a demurrer to plaintiff Liu's FAC.

II. Defendants Wu and Company's demurrer to plaintiff Liu's FAC is SUSTAINED, in part, and OVERRULED, in part.

A. Request for judicial notice.

In support of their demurrer, defendants Wu and Company request the court take judicial notice of defendant Company's Statement of Information filed with the California Secretary of State on August 7, 2023 and September 28, 2023. Defendants Wu and Company's request for judicial notice is DENIED as unnecessary. (See *Duarte v. Pacific Specialty Insurance Company* (2017) 13 Cal.App.5th 45, 51, fn. 6—denying request where judicial notice is not necessary, helpful or relevant.)

B. Declaratory relief.

> Any person … who desires a declaration of his or her rights or duties with respect to another, or in respect to, in, over or upon property ... may, ***in cases of actual controversy*** relating to the legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a declaration of his or her rights and duties…. ***The declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought.***

(Code Civ. Proc., §1060; emphasis added.)

> ***[D]eclaratory relief " 'operates prospectively, and not merely for the redress of past wrongs.*** It serves to set controversies at rest before they lead to repudiation of obligations, invasion of rights or commission of wrongs; in short, the remedy is to be used in the interests of preventive justice, to declare rights rather than execute them.' " [Citations omitted.]

(*Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1403; emphasis added.)

It is statutorily recognized that declaratory relief is within the discretion of the trial court. "The court may refuse to exercise the power granted by this chapter in any case where its declaration or determination is not necessary or proper at the time under all the circumstances." (Code Civ. Proc. §1061.) "The declaratory relief statute should not be used for the purpose of anticipating and determining an issue which can be determined in the main action. The object of the statute is to afford a new form of relief where needed and not furnish a litigant with a second cause of action for the determination of identical issues." (*California Ins. Guarantee Assn. v. Superior Court* (1991) 231 Cal.App.3d 1617, 1623 – 1624.)

Plaintiff Liu's first cause of action seeks "a declaratory judgment from the Court that she owns 34% of [defendant Company] on a fully diluted basis." (FAC, ¶24.) Defendants contend this is essentially the same relief plaintiff Liu is seeking in her second and third causes of action for breach of contract. (See FAC, ¶27—"Wu has breached … by failing to provide the 34% equity stake in [defendant Company] to Liu;" ¶37—"[defendant Company] has breached … by failing to provide the 34% equity stake in [defendant Company] to Liu.")

In opposition, plaintiff Liu contends declaratory relief remains proper because there remains a controversy as to the future conduct between the parties relying on *Osseous Technologies of America, Inc. v. DiscoveryOrtho Partners LLC* (2010) 191 Cal.App.4th 357, 371 where the court explained declaratory relief is proper based upon allegations of "continuing contractual relationships and future consequences for the conduct of the relationship that depended on the court's interpretation of the contracts at issue."

Plaintiff Liu asserts that an "ownership interest *vel non* determines her future rights regarding voting, management and decision making in [defendant Company] … [and] determination of these rights is not adequately addressed by … breach of contract [which only]

seeks damages for the past breach."[1] In this court's view, plaintiff Liu's argument is with regard to the adequacy of contract damages as a remedy. [Plaintiff appears to be suggesting that an adequate remedy requires specific performance.] Plaintiff Liu's entitlement to a remedy requires only that the court determine whether the parties had a contract and whether that contract was breached. Declaratory relief is not necessary for such determinations which will necessarily be made in plaintiff Liu's breach of contract causes of action.

Accordingly, defendant Company's demurrer to the first cause of action of plaintiff Liu's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for declaratory judgment is SUSTAINED WITHOUT LEAVE TO AMEND.

C. Breach of contract.

1. Uncertainty and mutual assent.

Defendants demur to the second and third causes of action for breach of contract by arguing, first, that the alleged contract is too indefinite to be enforceable.

> "Under California law, a contract will be enforced if it is sufficiently definite (and this is a question of law) for the court to ascertain the parties' obligations and to determine whether those obligations have been performed or breached." [Citation.] "To be enforceable, a promise must be definite enough that a court can determine the scope of the duty[,] and the limits of performance must be sufficiently defined to provide a rational basis for the assessment of damages." [Citations.] "Where a contract is so uncertain and indefinite that the intention of the parties in material particulars cannot be ascertained, the contract is void and unenforceable." [Citations.] "The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy." [Citations.] But "[i]f ... a supposed 'contract' does not provide a basis for determining what obligations the parties have agreed to, and hence does not make possible a determination of whether those agreed obligations have been breached, there is no contract." [Citation.]

[1] See page 7, lines 21 – 26 of Plaintiff Ally Liu's Opposition to Defendants You Wu and UTA AI Inc.'s Demurrer to First Amended Complaint.

(*Bustamante v. Intuit, Inc.* (2006) 141 Cal.App.4th 199, 209.)

That being said, "The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy. … [¶] ' "In considering expressions of agreement, the court must not hold the parties to some impossible, or ideal, or unusual standard. It must take language as it is and people as they are. All agreements have some degree of indefiniteness and some degree of uncertainty." ' [Citation.] Moreover, ' "[t]he law leans against the destruction of contracts because of uncertainty and favors an interpretation which will carry into effect the reasonable intention of the parties if it can be ascertained." ' [Citation.]" (*Moncada v. West Coast Quartz Corp.* (2013) 221 Cal.App.4th 768, 777.)

Here, the alleged term of the agreement at issue is "that Liu would receive 34% of the equity in the eventual [defendant Company] on a fully diluted basis." (FAC, ¶¶26 and 30.) Defendants contend this term is indefinite because subsequent to this alleged agreement, the parties had continued discussions regarding the terms of a potential equity split. (See FAC, ¶¶12 – 13.) Defendants either mis-read or mischaracterize these allegations. In this court's reading of these allegations, the investor (Sequoia China) sought a modification of the agreement and plaintiff Liu objected. Plaintiff does not waver from her earlier allegation that the parties reached an agreement. (See FAC, ¶12—"In May 2023, Wu claimed to Liu that a prospective investor, Sequoia China, was demanding that Liu's ownership interest in the planned corporation UTA, Inc., be reduced to 5% or less, ***in contravention of Liu's and Wu's agreement***." (Emphasis added.)) The court finds the contract term, i.e., that Liu would receive 34% of the equity in the eventual [Company], is sufficiently definite.

Defendants argue additionally that there is no contract due to lack of mutual consent. Indeed,

> Mutual assent or consent is necessary to the formation of a contract. (Civ. Code, §§ 1550, 1565.) Mutual assent is determined under an objective standard applied to the outward manifestations or expressions of the parties, i.e., the reasonable meaning of their words and acts, and not their unexpressed intentions or understandings. (1 Witkin, Summary of Cal. Law (9th ed. 1987)

> Contracts, § 119, p. 144.) Mutual assent is a question of fact. (See BAJI No. 10.60.)
>
> …
>
> " '[W]hether a certain or undisputed state of facts establishes a contract is one of law for the court . . . . On the other hand, where the existence and not the validity or construction of a contract or the terms thereof is the point in issue, and the evidence is conflicting or admits of more than one inference, it is for the jury or other trier of the facts to determine whether the contract did in fact exist, . . .' [Citation.]" (*Robinson & Wilson, Inc. v. Stone* (1973) 5 Cal. App. 3d 396, 407 [110 Cal. Rptr. 675] [provision, as interpreted, was not enforceable because it was indefinite and uncertain as to scope of the work contemplated in undesigned portions of the building and thus did not provide a proper basis for measuring damages for breach].)

(*Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 141.)

Defendants apparently repeat their argument above that since plaintiff Liu and defendant Wu were continuing their discussions about the equity split, they could not yet have reached any mutual agreement or consent. As discussed above, the court is of the opinion that defendants either mis-read or mischaracterize the allegations. Plaintiff Liu has alleged mutual assent (parties "entered into an oral agreement"/ "Wu and Liu agreed…") which this court accepts as true for purposes of demurrer. While the parties may have held discussions concerning a modification of their agreement, plaintiff Liu maintains throughout the FAC that the parties had already reached an agreement.

Accordingly, defendants Wu and Company's demurrer to the second and third causes of action of plaintiff Liu's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for breach of contract is OVERRULED.

2. Defendant Company liability for breach of contract.

Defendant Company separately demurs to the third cause of action for breach of contract which is directed only against it on the basis that the FAC does not allege that

defendant Company entered into an agreement with plaintiff Liu. Instead, the FAC alleges, in relevant part, "***Wu and Liu*** agreed that Liu would receive 34% of the equity in the eventual [Company] on a fully diluted basis." (FAC, ¶¶26 and 30.) More accurately, this agreement on sharing equity is alleged to be part of the partnership agreement entered into between Wu and Liu in or around March 2023.

In opposition, plaintiff Liu contends defendant Company is liable under a theory of successor liability. However, "[t]he general rule is 'where one corporation sells or transfers all of its assets to another corporation, the latter is not liable for the debts and liabilities of the former unless (1) the purchaser expressly or impliedly agrees to such assumption, (2) the transaction amounts to a consolidation or merger of the two corporations, (3) the purchasing corporation is merely a continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape liability for debts. [Citations.]' [Citations]" (*McClellan v. Northridge Park Townhome Owners Assn.* (2001) 89 Cal.App.4th 746, 753 (*McClellan*); see also *Ray v. Alad Corp.* (1977) 19 Cal.3d 22, 28.)

Thus, the general rule is non-liability unless an exception applies. Here, plaintiff Liu contends she has alleged an exception at paragraph 14 of the FAC which states, "Thereafter, on July 11, 2023, Wu unilaterally incorporated UTA as [Company] in Delaware, with [Company] assuming all, or substantially all, assets of UTA" and/or paragraph 15 of the FAC which states, "[Company] continues the business operations originally started by UTA related to the development, promotion, and sale of the AI travel assistant. Other than freezing Liu out, [Company] continues to operate the same business UTA, Wu, and Liu did prior to incorporation." (See also FAC, ¶36—"As the continuation of UTA, the [Company] is liable for the debts and liabilities [of] UTA.")

The court does not find paragraph 14 to be a sufficient allegation to invoke successor liability since there must be an express or implied assumption of the debts or liabilities of the former entity, not an assumption of the assets as alleged in the FAC.

With regard to paragraph 15 and plaintiff Liu's attempt to come within the third exception, "'California decisions holding that a corporation acquiring the assets of another corporation is the latter's mere continuation and therefore liable for its debts have imposed such

liability only upon a showing of one or both of the following factual elements: (1) no adequate consideration was given for the predecessor corporation's assets and made available for meeting the claims of its unsecured creditors; (2) one or more persons were officers, directors, or stockholders of both corporations. [Citations.]'" (*McClellan, supra,* 89 Cal.App.4th at p. 754, fn. 4.) "[S]uccessor liability, like alter ego and similar principles, is an equitable doctrine. As with other equitable doctrines, 'it is appropriate to examine successor liability issues on their own unique facts' and '[c]onsiderations of fairness and equity apply.' [Citation.]" (*Cleveland v. Johnson* (2012) 209 Cal.App.4th 1315, 1330.) Plaintiff's FAC also includes allegations of inadequate consideration being given for the predecessor's assets (see FAC, ¶¶17 and 35) and allegations that Wu was the plurality owner of both the predecessor (UTA) and successor (Company) (see FAC, ¶¶9, 13, 14, 18.)

Based on these allegations, the court finds plaintiff Liu has sufficiently alleged facts to invoke defendant Company's liability for breach of contract under a successor liability theory. On demurrer, "the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213 – 214.)

Accordingly, defendant Company's demurrer to the third cause of action of plaintiff Liu's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for breach of contract is OVERRULED.

D. Unjust enrichment.

In *McBride v. Houghton* (2004) 123 Cal.App.4th 379 (*McBride*), the court wrote, "Unjust enrichment is not a cause of action, however, or even a remedy, but rather a general principle, underlying various legal doctrines and remedies. It is synonymous with restitution. Unjust enrichment has also been characterized as describing the result of a failure to make restitution."

> There are several potential bases for a cause of action seeking restitution. For example, restitution may be awarded in lieu of breach of contract damages when the parties had an express contract, but it was procured by fraud or is unenforceable or ineffective for some reason. [Citations.] Alternatively,

> restitution may be awarded where the defendant obtained a benefit from the plaintiff by fraud, duress, conversion, or similar conduct. In such cases, the plaintiff may choose not to sue in tort, but instead to seek restitution on a quasi-contract theory (an election referred to at common law as "waiving the tort and suing in assumpsit"). [Citation.] In such cases, where appropriate, the law will imply a contract (or rather, a quasi-contract), without regard to the parties' intent, in order to avoid unjust enrichment. [Citation.]

(*McBride*, *supra*, 123 Cal.App.4th at pp. 387 – 388; internal citations and punctuation omitted.)

Defendants Wu and Company demur to plaintiff Liu's fifth and sixth causes of action for unjust enrichment by relying on the principle that, "When parties have an actual contract covering a subject, a court cannot--not even under the guise of equity jurisprudence--substitute the court's own concepts of fairness regarding that subject in place of the parties' own contract." (*California Medical Assn. v. Aetna U.S. Healthcare of California, Inc.* (2001) 94 Cal.App.4th 151, 172.) "There cannot be a valid, express contract and an implied contract, each embracing the same subject matter, existing at the same time." (*Wal-Noon Corp. v. Hill* (1975) 45 Cal.App.3d 605, 613; see also *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism* (2016) 6 Cal.App.5th 1207, 1222—"quasi-contractual recovery rests upon the equitable theory that a contract to pay for services rendered is implied by law for reasons of justice. However, it is well settled that there is no equitable basis for an implied-in-law promise to pay reasonable value when the parties have an actual agreement covering compensation." [Citations and punctuation omitted.]) Defendants Wu and Company assert plaintiff Liu cannot simultaneously be entitled to pursue contractual and quasi-contractual right to the same recovery.

In opposition, plaintiff Liu does not dispute the general principles above. However, as plaintiff Liu points out, she is entitled to plead inconsistent theories in the alternative.

> It is true that modern rules of pleading generally permit plaintiffs to "set forth alternative theories in varied and inconsistent counts." (*Rader Co. v. Stone* (1986) 178 Cal.App.3d 10, 29 [223 Cal. Rptr. 806]; see *Mendoza v. Continental Sales Co., Inc.* (2006) 140 Cal.App.4th 1395, 1402 [45 Cal. Rptr. 3d 525] ["the

> modern practice allows that party to plead in the alternative and make inconsistent allegations"].) Thus, if a plaintiff was uncertain as to whether the parties had entered into an enforceable agreement, the plaintiff would be entitled to plead inconsistent claims predicated on both the existence and absence of such an agreement. (See *Rader Co. v. Stone*, *supra*, 178 Cal.App.3d at p. 29 [plaintiff "is not precluded by law from alleging in one cause of action the breach of a contract and an inconsistent theory of recovery in another cause of action"].)

(*Klein v. Chevron U.S.A., Inc.* (2012) 202 Cal.App.4th 1342, 1388 (*Klein*).)

In *Klein*, *supra*, 202 Cal.App.4th at pp. 1389 – 1390, the court wrote, "Although a plaintiff may plead inconsistent claims that allege both the existence of an enforceable agreement and the absence of an enforceable agreement, that is not what occurred here. Instead, plaintiffs' breach of contract claim pleaded the existence of an enforceable agreement and ***their unjust enrichment claim did not deny the existence or enforceability of that agreement. Plaintiffs are therefore precluded from asserting a quasi-contract claim under the theory of unjust enrichment.***" (Emphasis added.)

In the opposition, plaintiff Liu contends the defendants are disputing the very existence of an agreement[2] and should a trier of fact agree with defendants, then plaintiff Liu ought to be allowed to seek quasi-contractual recovery. However, as *Klein* suggests, plaintiff Liu herself must ***plead*** a denial of the existence or enforceability of the agreement in the alternative. Plaintiff Liu has not done so in the FAC.

Accordingly, defendants Wu and Company's demurrer to the fifth and sixth causes of action of plaintiff Liu's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for unjust enrichment is SUSTAINED with 10 days' leave to amend.

E. Quantum meruit.

Defendant Company demurs on the basis that it did not exist until after the alleged actions giving rise to plaintiff Liu's claim for quantum meruit and thus cannot be liable. For the

[2] See fn. 1 to the Memorandum of Points and Authorities in Support of Demurrer of Defendants You Wu and UTA AI Inc. to Plaintiff's First Amended Complaint.

same reasons discussed above concerning successor theory of liability, defendant Company's demurrer to the eighth cause of action of plaintiff Liu's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for quantum meruit is OVERRULED.

F. Aiding and abetting.

"Liability may … be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person." (*Richard B. LeVine, Inc. v. Higashi* (2005) 131 Cal.App.4th 566, 574; see also *Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 879; see also *Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1325 – 1326; see also *IIG Wireless, Inc. v. Yi* (2018) 22 Cal.App.5th 630, 653–654; see also CACI, No. 3610.) "[W]hile aiding and abetting may not require a defendant to agree to join the wrongful conduct, it necessarily requires a defendant to reach a conscious decision to participate in tortious activity for the purpose of assisting another in performing a wrongful act." (*Howard v. Superior Court* (1992) 2 Cal.App.4th 745, 749, superseded by statute on other grounds.)

Defendant Company demurs to plaintiff Liu's ninth cause of action entitled, "Aiding and Abetting Breach of Fiduciary Duty," for the reason that it did not exist at the time of the alleged breach of fiduciary duty so it could not have knowledge of the wrongful conduct.

In opposition, plaintiff Liu contends defendant Company necessarily did exist at the time of the breach of fiduciary duty because one alleged breach is defendant Wu's "transfer of the UTA assets from UTA to [defendant Company]," and this could not occur unless defendant Company was already in existence. The court does not agree with plaintiff Liu that defendant Company's existence is necessarily derived from the allegation that defendant Wu breached by transferring UTA assets.

More fundamentally, the court questions whether an aiding and abetting theory of liability can even apply here where defendant Wu is alleged to aid and abet his own tort based

on an allegation that he is acting in different capacities (as an agent and/or principal of defendant Company and in his own individual capacity). (*Cf. Black v. Bank of America* (1994) 30 Cal.App.4th 1, 6.)

Accordingly, defendant Company's demurrer to the ninth cause of action of plaintiff Liu's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for aiding and abetting breach of fiduciary duty is SUSTAINED with 10 days' leave to amend.

G. Employment causes of action.

Defendants demur to the tenth through sixteenth causes of action based on the argument that they are employment based claims and plaintiff Liu has not sufficiently alleged the existence of an employment relationship with either defendant apart from a conclusory allegation.[3]

"The question of whether an employment relationship exists is generally a question reserved for the trier of fact." (*Brassinga v. City of Mountain View* (1998) 66 Cal.App.4th 195, 210.) "[G]enerally speaking, the burden of proof is on the party attacking the employment relationship." (*Bemis v. People* (1952) 109 Cal.App.2d 253, 263.)

On demurrer, defendants point to the allegation at paragraph 14 wherein plaintiff Liu alleges defendant Company was unilaterally incorporated by defendant Wu on July 11, 2023. However, plaintiff Liu also alleges she was "frozen … out of any role or involvement with [defendant Company] or its business" since July 2023. (FAC, ¶19.) According to defendants, the alleged conduct supporting the employment based claims pre-date defendant Company's existence.

In opposition, plaintiff maintains defendant Company would still be liable under a successor liability theory even if it did not have an employment relationship with plaintiff. For successor liability to apply, then plaintiff must be able to establish that an employment relationship existed between plaintiff Liu and the predecessor entity, UTA. Defendants contend, however, that prior to defendant Company's existence, UTA (by plaintiff Liu's own allegations) was a partnership. "A partnership is an entity distinct from its partners." (Corp.

[3] "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

Code, §16201.) Defendants (citing to federal authorities) contend further that a partner cannot be an employee of the partnership. Plaintiff argues in opposition that partners are not categorically precluded from also being employees.

Still, plaintiff Liu's assertion that she is both an employee and a partner is fundamentally at odds. "A person who receives a share of the profits of a business is presumed to be a partner in the business, unless the profits were received … In payment for services as an independent contractor or of wages or other compensation to an employee." (Corp. Code, §16202, subd. (c)(3)(B).) Nevertheless, it does not appear clearly and affirmatively from the allegations of the FAC or the legal authorities cited whether plaintiff Liu's allegation of a partnership and an employment relationship can or cannot coexist.[4] As such and since plaintiff is allowed to plead in the alternative, defendants Wu and Company's demurrer to the tenth through sixteenth causes of action of plaintiff Liu's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] is OVERRULED.

In spite of this ruling, the court takes the opportunity to note that the arguments raised by the parties underscore the confusion and uncertainty of the relationships between plaintiff Liu, defendant Wu, the alleged partnership entity UTA, and defendant Company. Did plaintiff Liu and defendant Wu actually form a partnership? If so, did the partnership engage plaintiff Liu as an employee or merely an independent contractor? If not, did Wu directly and individually engage plaintiff Liu as an employee or independent contractor? Although plaintiff Liu is allowed to plead alternative theories, the court urges plaintiff Liu to engage in thoughtful consideration about which theory or theories she would realistically pursue in light of the evidence that she currently possesses and evidence she might reasonably obtain through discovery.

H. Unfair competition.

"Business and Professions Code section 17200 et seq. prohibits unfair competition, including unlawful, unfair, and fraudulent business acts. The UCL covers a wide range of

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[4] See *Heshejin v. Rostami* (2020) 54 Cal.App.5th 984, 992-993: "'[A] demurrer based on an affirmative defense will be sustained only where the face of the complaint discloses that the action is necessarily barred by the defense.'"

conduct. It embraces anything that can properly be called a business practice and that at the same time is forbidden by law." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1143 (*Korea*).) "The UCL covers a wide range of conduct. It embraces anything that can properly be called a business practice and that at the same time is forbidden by law." (*Korea, supra*, 29 Cal.4th at p. 1143.) "Section 17200 'borrows' violations from other laws by making them independently actionable as unfair competitive practices. In addition, under section 17200, a practice may be deemed unfair even if not specifically proscribed by some other law." (*Id.*) "By proscribing unlawful business practices, the UCL borrows violations of other laws and treats them as independently actionable. In addition, practices may be deemed unfair or deceptive even if not proscribed by some other law. Thus, there are three varieties of unfair competition: practices which are unlawful, or unfair, or fraudulent." (*Blakemore v. Superior Court* (2005) 129 Cal.App.4th 36, 48.)

With regard to the seventeenth cause of action, defendant Company argues essentially that this claim fails because it is derivative of plaintiff Liu's earlier claims and since those claims all fail, so too does the UCL claim. However, in light of the court's rulings above, not all of plaintiff's claims above fail.

Accordingly, defendant Company's demurrer to the seventeenth cause of action of plaintiff Liu's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for unfair competition is OVERRULED.

The Court will prepare the formal order.

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Calendar Line 4
Case Name: *GoodLife Rx LLC, et al. v. James Wong, et al.*
Case No.: 22CV402833

Before the court is defendants and cross-complainants' motion for summary judgment, or in the alternative, summary adjudication. Pursuant to California Rule of Court 3.1308, the court issues its tentative ruling as follows.

I. Background.

From 2003 and until 2019, plaintiffs and sisters Thuy Mien Thanh Le ("Mien") and Thuy Tram Thanh Le ("Tram") were working as pharmacists for defendant James Wong ("Wong") at his two pharmacies: Garcia Care and Garcia Pharmacy. (Complaint, ¶¶4 and 10.) Early in 2020, defendant Wong offered to sell both pharmacy businesses to plaintiffs Mien and Tram. (Complaint, ¶11.) Plaintiff Mien requested tax returns and profit/ loss statements for the businesses which defendant Wong provided. (*Id.*) Defendant Wong represented Garcia Pharmacy alone was generating more than one million dollars in annual profits. (*Id.*) Defendant Wong also promised that the largest account (a long-term care facility) of Garcia Pharmacy would continue using the pharmacy after the change of ownership and that the new owners should expect an increase of business from this facility due to the facility's expansion. (*Id.*)

On or around August 20, 2020, the parties signed two asset purchase agreements ("APA"). (Complaint, ¶12 and Exh. 1.) One APA provided for the transfer of assets of Garcia Pharmacy from defendant Farmacia San Jose LLC ("Farmacia") to plaintiff GoodLife Rx LLC ("GoodLife"). (*Id.*) The second APA, with virtually identical terms, provided for the transfer of assets of Garcia Care from defendant Drogueria San Jose LLC ("Drogueria") to plaintiff Siscare Rx LLC ("Siscare"). (*Id.*)

On or around December 2, 2020, Siscare and GoodLife received all necessary government approvals to operate both pharmacies. (Complaint, ¶13.) The effective date of the change of ownership for both pharmacies was December 2, 2020. (*Id.*)

After the change of ownership, plaintiffs discovered that most financial data provided by defendant Wong during the due diligence stage was incorrect and/or misrepresented because the cost of drugs in the reports provided by defendant Wong was incorrect. (Complaint, ¶14.) The businesses were not performing nearly as well as represented by

defendant Wong during the negotiations. (*Id.*) In fact, due to poor performance, substantial losses, and the pandemic, Garcia Care pharmacy had to be shut down shortly after the change of ownership. (*Id.*) Nevertheless, plaintiff still paid and continue to pay rent for Garcia Care's location due to the existing lease. (*Id.*)

Garcia Pharmacy also did not perform as promised by defendant Wong. (Complaint, ¶15.) Plaintiffs Mien and Tram focused their efforts on saving the business but the task was complicated by defendant Wong's refusal to help with business retention during the transition period as previously promised and required by the APA. (*Id.*)

In addition, defendant Wong kept Garcia Pharmacy's reimbursements and refunds which were deposited to his account post-closing for the services performed by the new owner. (Complaint, ¶16.) Defendant Wong refused to forward the funds to plaintiff GoodLife despite multiple demands. (*Id.*)

Plaintiffs also discovered that a blister pack machine and pharmacy software were non-operational which caused additional damages and costs to plaintiffs in excess of $150,000. (Complaint, ¶17.)

Despite Wong's promises, several facilities stopped using Garcia Pharmacy shortly after the change of ownership occurred. (Complaint, ¶18.)

Despite plaintiffs' efforts, Garcia Pharmacy continues to underperform and lose money. (Complaint, ¶19.)

On August 10, 2022, plaintiffs GoodLife, Siscare, Mien, and Tram filed a complaint against defendants Wong, Farmacia, and Drogueria asserting causes of action for:

(18) Fraud

(19) Breach of Contract

(20) Violation of California Business & Professions Code §17200, et seq.

(21) Negligent Misrepresentation

(22) Declaratory Relief

On February 16, 2023, defendants Farmacia, Drogueria, and Wong jointly filed an answer to plaintiffs' complaint.

On January 26, 2023, defendants Farmacia and Drogueria filed a cross-complaint against Goodlife, Siscare, Mien, and Tram asserting causes of action for:

(1) Breach of Contract – Garcia Pharmacy APA

(2) Breach of Contract – Garcia Pharmacy Purchase Note

(3) Breach of Contract – Garcia Pharmacy Inventory Note

(4) Breach of Contract – Garcia Pharmacy Guaranty

(5) Breach of Contract – Garcia Care APA

(6) Breach of Contract – Garcia Care Purchase Note

(7) Breach of Contract – Garcia Care Inventory Note

(8) Breach of Contract – Garcia Care Guaranty

(9) Promissory Estoppel – Farmacia, Drogueria against GoodLife, Mien, and Tram

(10) Promissory Estoppel – Drogueria and Farmacia against Siscare, Mien, and Tram

(11) Declaratory Relief

The cross-complaint arises from cross-defendants GoodLife, Siscare, Mien, and Tram's failure and refusal to pay over $5.5 million owed for the two pharmacies they purchased from Drogueria and Farmacia in a transaction which closed in or around December 2020. (Cross-Complaint, ¶9.)

On February 21, 2023, plaintiffs/ cross-defendants GoodLife, Siscare, Mien, and Tram jointly filed a Judicial Council form general denial of cross-complainants Farmacia and Drogueria's cross-complaint.

On April 23, 2024, defendants/ cross-complainants Farmacia, Drogueria, and Wong filed the motion now before the court, a motion for summary judgment/ adjudication of plaintiffs' complaint and cross-complainants' cross-complaint.

II. Defendants Wong, Farmacia, and Drogueria's motion for summary judgment/ adjudication of plaintiffs GoodLife, Siscare, Mien, and Tram's complaint is DENIED.

A. Defendants' motion for summary judgment based upon statute of limitations is DENIED.

Initially, defendants Wong, Farmacia, and Drogueria move for summary judgment of plaintiffs' complaint by arguing that the claims therein are barred by the statute of limitations. "In assessing whether plaintiff's claims against defendant are time-barred, two basic questions drive our analysis: (a) What statutes of limitations govern the plaintiff's claims? (b) When did the plaintiff's causes of action accrue?" (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1316.)

Defendants contend the answer to the first question is that the applicable statute of limitations in this case is, pursuant to the APA, a contractual period of limitation, shorter than that fixed by the relevant statutes of limitations. In both the APA between plaintiff GoodLife and defendants Farmacia/ Wong and the APA between plaintiff Siscare and defendants Drogueria/ Wong, the following provisions exist:

> Article 8.1 Owner's and Garcia Pharmacy' [sic] Representations and Warranties
> As an inducement to Buyer to enter into this Agreement and to consummate the transactions contemplated hereby, Owner and Garcia Pharmacy (with regard to its business and operations only) represent and warrant to Buyer and agree, as of the Effective Date of this Agreement and as of the Final Closing as follows:
> …
> (i) Warranties True and Correct. No warranty or representation by the Owner or Garcia Pharmacy contained in this Agreement or in any writing to be furnished pursuant hereto, or previously furnished to the Buyer, contains any untrue statement of fact, or omits to state any material fact required to make the statements herein contained not misleading. Notwithstanding any investigation by or information supplied to the Buyer, the warranties and representations of the Owner and Garcia Pharmacy herein contained are true and correct on the Effective Date and shall survive the Final Closing of the purchase and sale transaction contemplated by this Agreement for a period of one (1) year.

> Article 12.10 Survival of Obligations. All representations, warranties, covenants and obligations contained in this Agreement shall survive the consummation of the transactions contemplated by this Agreement but only for a period of one (1) year.

Defendants contend these two provisions of the APA operate as one year periods of limitation for each of the claims asserted by plaintiffs in their complaint and the one year period expired on December 2, 2021 which is one-year after the final closing date.[1] Since plaintiffs did not file their complaint until August 10, 2022, it is defendants' contention that the complaint is barred.

Defendants rely heavily on *Western Filter Corp. v. Argan, Inc.* (9th Cir. 2008) 540 F.3d 947 (*Western*) where the 9th Circuit Court of Appeals wrote:

> "It is a well-settled proposition of law [in California] that the parties to a contract may stipulate therein for a period of limitation, shorter than that fixed by the statute of limitations, and that such stipulation violates no principle of public policy, provided the period fixed be not so unreasonable as to show imposition or undue advantage in some way." *Moreno v. Sanchez*, 106 Cal. App. 4th 1415, 1430, 131 Cal. Rptr. 2d 684 (Cal. Ct. App. 2003) (internal quotation marks omitted). While allowed under California law, contractual stipulations are not favored. *Lewis v. Hopper*, 140 Cal. App. 2d 365, 367, 295 P.2d 93 (Cal. Ct. App. 1956) (stating that contractual stipulations are not favored "because they are in derogation of the statutory limitation" (internal quotation marks omitted)). Therefore, "they should be construed with strictness against the party invoking them." *Id.* (internal quotation marks omitted).

(*Western, supra*, 540 F.3d at p. 952.)

In *Western*, the plaintiff corporation (WFC) entered into a stock purchase agreement to acquire its competitor (Puroflow), a wholly owned subsidiary of defendant Argan, Inc. (Argan).

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[1] See Defendants and Cross-[Complainants'] Separate Statement of Undisputed Material Facts in Support of Motion for Summary Judgment, or in the Alternative, Summary Adjudication ["Defendants' UMF"], Fact No. 14—"On or about December 2, 2020, the transactions closed and GoodLife Rx and Siscare Rx took ownership and assumed control of the business and operations of the pharmacies."

> Both parties made several representations and warranties, which are set forth in Article III of the SPA. The portion of the contract at issue is found in Section 8. Section 8.1 ("Survival Clause") provides that "[t]he representations and warranties of [Western Filter] and [Argan] in this Agreement shall survive the Closing for a period of one year, except the representations and warranties contained in Section 3.1(a), (b), (c), and (f) and 3.2(a) and (b) shall survive indefinitely."

(*Id.* at p. 949.)

The trial court granted Argan's motion for summary judgment by interpreting, as a matter of law, that the Survival Clause operated as a one-year limitation period. On appeal, the *Western* court reversed the summary judgment in favor of Argan explaining:

> Although Argan's interpretation is reasonable--and ultimately may be more practical--the Survival Clause can also be reasonably read as Western Filter suggests: that the one-year limitation serves only to specify when a breach of the representations and warranties may occur, but not when an action must be filed. [Footnote omitted.] Western Filter's interpretation becomes even more reasonable in light of California's policy of strictly construing any contractual limitation against the party seeking to invoke the time limitation. [Footnote omitted.] See *Lewis*, 140 Cal. App. 2d at 367. Because the language of the Survival Clause is ambiguous, the district court erred in holding that the clause created a limitation period.

(*Western, supra*, 540 F.3d at p. 954.)[2]

Consequently, *Western* is of no assistance to defendants' position on the instant motion for summary judgment. Just as in *Western*, the language of Article 8.1(i) and 12.10 of the APA agreements here is ambiguous and reasonably susceptible to different interpretations.

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[2] The *Western* court also pointed out that "In an unpublished memorandum disposition, a three-judge panel of our court reversed the decision in [*Herring v. Teradyne, Inc.*, 256 F. Supp. 2d 1118 (S.D. Cal. 2002)]. See *Herring v. Teradyne, Inc.*, 242 Fed. Appx. 469 (9th Cir. July 13, 2007)." (*Western Filter Corp. v. Argan, Inc.* (9th Cir. 2008) 540 F.3d 947, 951.) As the trial court in *Western* did, defendants here also rely on *Herring v. Teradyne, Inc.*, 256 F. Supp. 2d 1118 (S.D. Cal. 2002) and such reliance is unpersuasive in light of its reversal.

Defendants' reliance on *Zalkind v. Ceradyne, Inc.* (2011) 194 Cal.App.4th 1010, 1018 is also unavailing as the contract language shortening the limitation period there is significantly different: "Section 14.4(a) of the Asset Purchase Agreement provides that '[n]o claim for indemnification under this Section 14 may be made more than twenty-four (24) months after the Closing Date [(May 14, 2004)],' with exceptions not applicable here."

Since defendants have not established that a contractually shortened limitation period applies here, defendants' motion for summary judgment of plaintiffs' complaint is DENIED.

B. Defendants' alternative motion for summary adjudication of the first (fraud) and fourth (negligent misrepresentation) causes of action based upon waiver and/or estoppel is DENIED.

1. Waiver.

"Waiver is the intentional relinquishment of a known right after knowledge of the facts." (*Roesch v. De Mota* (1944) 24 Cal.2d 563, 572.) "'Waiver always rests upon intent. Waiver is the intentional relinquishment of a known right after knowledge of the facts.' [Citations.] The burden, moreover, is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and 'doubtful cases will be decided against a waiver.'" (*Florence W. Medical Clinic v. Bonta* (2000) 77 Cal.App.4th 493, 504.) "The waiver may be either express, based on the words of the waiving party, or implied, based on conduct indicating an intent to relinquish the right." (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 31.)

However, whether waiver actually exists is a question of fact. "[W]aiver … is a question of fact and not of law." (*Moss v. Minor Properties, Inc.* (1968) 262 Cal.App.2d 847, 857.) "Whether there has been a waiver is usually regarded as a question of fact to be determined by the jury, or by the trial court if there is no jury. Although some authorities say waiver is a mixed question of law and fact, each case depending on its own circumstances, the only question of law that can be involved must relate to the legal definition of waiver. For example, the jury might be instructed that, as a matter of law, a waiver must be voluntary, and that it implies a knowledge of the right claimed or thing waived. Whether it actually was voluntary, and whether the party had knowledge of the right or thing waived, are questions of

fact to be submitted to the jury, unless but one inference can be drawn from the evidence." (*Kay v. Kay* (1961) 188 Cal.App.2d 214, 217 – 218.)

Defendants contend plaintiffs waived their claims for fraud and negligent misrepresentation based upon the following: On or about December 2, 2020, the transactions closed and Goodlife Rx and Siscare Rx took ownership and assumed control of the business and operations of the pharmacies.[3] Over the following months, the parties engaged in ongoing dialog regarding post-closing matters, as well as the forthcoming monthly payments coming due under the promissory notes with Buyers expressing financial concerns after taking ownership and control of the pharmacies following closing.[4] More than six months later, on or around June 1, 2021, based on the negotiations and communications between the parties, Farmacia and Drogueria agreed to extend the due date of monthly payments coming due under both Purchase Notes and the parties signed two substantially similar "Amendments to Promissory Note" (1) expressly affirming Buyers' obligations under the Purchase Notes, and (2) based thereon extending the due date of the first payment under each Purchase Note to January 15, 2022.[5] Specifically, each "Amendment to Promissory Note" expressly and unambiguously states: "Except as set forth in this Agreement, the Note is unaffected and shall continue in full force and effect in accordance with its terms. If there is conflict between the Amendment and the Note the terms of this Agreement will prevail."[6]

In support of their waiver argument, defendants cite *Oakland Raiders v. Oakland-Alameda County Coliseum, Inc.* (2006) 144 Cal.App.4th 1175, 1185 (*Oakland*) where the court wrote:

> California law has, for more than a century, recognized that a plaintiff claiming to have been induced into signing a contract by fraud or deceit is deemed to have waived a claim of damages arising therefrom if, ***after discovery of the alleged fraud***, he enters into a new contract with the defendant regarding the same subject matter that supersedes the former agreement and confers upon him significant benefits.

[3] See Defendants' UMF, Fact No. 14.
[4] See Defendants' UMF, Fact No. 15.
[5] See Defendants' UMF, Fact No. 16.
[6] *Id.*

(Emphasis added.)

Defendants contend here that plaintiffs waived their claims for fraud and negligent misrepresentation when they signed the amendments to the promissory notes. However, the highlighted language above is what the court finds to be missing from defendants' argument/ evidence. The highlighted language is the equivalent of the requirement of a "known right after knowledge of the facts" in order for there to be a waiver. Defendants must establish that plaintiffs signed the amendments to the promissory notes knowing that defendants had engaged in fraud and knowing that plaintiffs had a right to assert a claim against defendants based on such fraud. Defendants have not made any such showing here. Consequently, defendants have not met their burden of establishing plaintiffs' waiver of claims for fraud and negligent misrepresentation.

2. Estoppel.

Additionally or alternatively, defendants contend plaintiffs are equitably estopped from asserting their claims for fraud and negligent misrepresentation.

> "The doctrine of equitable estoppel is founded on concepts of equity and fair dealing. It provides that a person may not deny the existence of a state of facts if he intentionally led another to believe a particular circumstance to be true and to rely upon such belief to his detriment." (*Strong v. County of Santa Cruz* (1975) 15 Cal.3d 720, 725 [125 Cal. Rptr. 896, 543 P.2d 264], citing *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 488–489 [91 Cal. Rptr. 23, 476 P.2d 423] (*Mansell*).) The traditional elements of estoppel are: " '(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.' " (*Mansell*, *supra*, 3 Cal.3d at p. 489.)

(*Oakland*, *supra*, 144 Cal.App.4th at p. 1189.)

Defendants assert, "Buyers [plaintiffs] possessed the facts they now allege constitute fraud when each 'Amendment to Promissory Note' was entered. [UMF No. 16]."[7] However, as this court already noted above, neither the undisputed material fact nor the underlying evidence cited by defendants support defendants' assertion that the plaintiffs "possessed the facts they now allege constitute fraud" at or before the time they entered into the amendment to the promissory note.

Accordingly, defendants' alternative motion for summary adjudication of the first and fourth causes of action based upon waiver and/or estoppel is DENIED.

C. Defendants' alternative motion for summary adjudication of the third (UCL) cause of action is DENIED.

"Business and Professions Code section 17200 et seq. prohibits unfair competition, including unlawful, unfair, and fraudulent business acts. The UCL covers a wide range of conduct. It embraces anything that can properly be called a business practice and that at the same time is forbidden by law." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1143 (*Korea*).) "The UCL covers a wide range of conduct. It embraces anything that can properly be called a business practice and that at the same time is forbidden by law." (*Korea*, *supra*, 29 Cal.4th at p. 1143.) "Section 17200 'borrows' violations from other laws by making them independently actionable as unfair competitive practices. In addition, under section 17200, a practice may be deemed unfair even if not specifically proscribed by some other law." (*Id.*) "By proscribing unlawful business practices, the UCL borrows violations of other laws and treats them as independently actionable. In addition, practices may be deemed unfair or deceptive even if not proscribed by some other law. Thus, there are three varieties of unfair competition: practices which are unlawful, or unfair, or fraudulent." (*Blakemore v. Superior Court* (2005) 129 Cal.App.4th 36, 48.)

1. Standing.

Against plaintiffs' third cause of action, defendants argue first that plaintiffs lack standing to assert a claim for violation of Business and Professions Code section 17200, et seq.

[7] See page 14, lines 5 – 7 of the Memorandum of Points and Authorities in Support of Defendants' and Cross-Complainants' Motion for Summary Judgment, or in the Alternative, Summary Adjudication ["Defendants' MPA"].

"UCL can only be brought by 'a person who has suffered injury in fact and has lost money or property as a result of the unfair competition.'" (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 325 citing Bus. & Prof. Code, §17204.) Defendants' argument initially, however, is not that plaintiffs did not suffer an injury in fact. Rather, defendants rely initially upon *Linear Technology Corp. v. Applied Materials, Inc.* (2007) 152 Cal.App.4th 115 (*Linear*). In *Linear*, plaintiff Linear Technology Corporation alleged that three equipment manufacturers had sold it equipment that was the source of a patent infringement claim against Linear by a third party. The trial court sustained the demurrers of the three defendants, finding insufficient facts to state a cause of action for fraud or unfair competition.

Defendants extract one line from *Linear* to suggest that a party lacks standing to assert a UCL claim where "the alleged victims are neither competitors nor powerless, unwary consumers." (*Linear, supra*, 152 Cal.App.4th at p. 135.) Defendants incorrectly read *Linear*. The reason the *Linear* court determined the unfair competition claim to be unviable was as follows:

> where a UCL action is based on contracts not involving either the public in general or individual consumers who are parties to the contracts, a corporate plaintiff may not rely on the UCL for the relief it seeks. (*Rosenbluth*, at pp. 1077–1079.) "By purporting to act as their self-appointed representative and asserting claims on their behalf in a UCL action, [Linear] could in fact deprive [respondents'] alleged victims of the individual opportunity to seek remedies far more extensive than those available under the UCL." (*Id*. at p. 1079.) Thus, to the extent that Linear purports to represent other customers, permitting its UCL claim would raise " 'serious fundamental due process considerations.' " (*Rosenbluth*, at p. 1079, quoting *Bronco Wine Co. v. Frank A. Logoluso Farms* (1989) 214 Cal. App. 3d 699, 720 [262 Cal. Rptr. 899].)

(*Linear*, *supra*, 152 Cal.App.4th at p. 135.)

Linear bears no application here since plaintiffs GoodLife and Siscare are parties to the contract(s) at issue, the APA, and the complaint here does not assert a representative action.[8]

[8] See also Bus. & Prof. Code, §17203—" Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or

2. Fraudulent/ unfair business practices.

Defendants argue next that plaintiffs have not adequately alleged that they have engaged in any unfair or fraudulent business practices.

> When an unfair competition claim is based on an alleged fraudulent business practice—that is, a practice likely to deceive a reasonable consumer—"a plaintiff need not plead the exact language of every deceptive statement; it is sufficient for [the] plaintiff to describe a scheme to mislead customers, and allege that each misrepresentation to each customer conforms to that scheme." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 212–213 [197 Cal. Rptr. 783, 673 P.2d 660].) The allegation "may be based on representations to the public which are untrue, and ' "also those which may be accurate on some level, but will nonetheless tend to mislead or deceive. … A perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable under" ' the UCL." (*McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1471 [49 Cal. Rptr. 3d 227].)

(*Linear*, *supra*, 152 Cal.App.4th at p. 134.)

Defendants nevertheless acknowledge, "[plaintiffs'] UCL claim is simply a regurgitation of their common law fraud claim and is based on the same set of facts."[9] Defendants proffer no legal authority which precludes a fraudulent business practice from being based on the same facts which give rise to common law fraud.

3. Standing, revisited.

Finally, defendants return to the issue of standing to assert that there is no evidence that plaintiffs suffered an actual injury. On a motion for summary judgment or adjudication, the

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judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary ***to restore to any person in interest*** any money or property, real or personal, which may have been acquired by means of such unfair competition." Defendants' citation to Bus. & Prof. Code, §302's definition of "consumer" is inapt since that definition is limited to Chapter 4 of Division 1 of the Business and Professions Code, not Division 7, where section 17200 is found. Instead, the term "person" as used in Business and Professions Code section 17203 is defined at Business and Professions Code section 17201: "As used in this chapter, the term person shall mean and include natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons."

[9] See page 15, lines 26 – 27 of Defendants' MPA.

moving defendant bears the initial burden. Simply saying that the plaintiff lacks evidence is insufficient to meet that initial burden. Defendant must affirmatively demonstrate how plaintiffs lacks any evidence they suffered an actual injury.

> Summary judgment law in this state, however, continues to require a defendant moving for summary judgment to present evidence, and not simply point out that the plaintiff does not possess, and cannot reasonably obtain, needed evidence. … For the defendant must "support[]" the "motion" with evidence including "affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice" must or may "be taken." (Code Civ. Proc., § 437c, subd. (b).) The defendant may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action. The defendant may also present evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence-as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing.

(*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854–855.)

For all the reasons discussed above, defendants' alternative motion for summary adjudication of the third cause of action of plaintiffs' complaint is DENIED.

D. Defendants' alternative motion for summary adjudication of the fifth (declaratory relief) cause of action is DENIED.

> [I]n a declaratory relief action, the defendant's burden is to establish the plaintiff is not entitled to a declaration in its favor. It may do this by establishing (1) the sought-after declaration is legally incorrect; (2) undisputed facts do not support the premise for the sought-after declaration; or (3) the issue is otherwise not one that is appropriate for declaratory relief.

(*Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1402.)

Defendants move for summary adjudication of plaintiffs' fifth cause of action for declaratory relief on the basis that it is derivative of the other four causes of action. Defendants

essentially rely on their arguments in support of summary judgment/ adjudication of the first four causes of action to argue that this declaratory relief cause of action also fails.

In light of the court's rulings above, defendants' alternative motion for summary adjudication of the fifth cause of action of plaintiffs' complaint is DENIED.

III. Cross-complainants Farmacia and Drogueria's motion for summary judgment/ adjudication of their cross-complaint is DENIED.

I. Summary adjudication of the first through eighth (breach of contract) causes of action.

Cross-complainants Farmacia and Drogueria seek summary adjudication of the first through eighth causes of action of their cross-complaint which concern cross-defendants Goodlife, Siscare, Mien, and Tram's breaches (failure to pay) of the APA and ensuing notes and guarantees. Cross-complainants are correct that their initial burden does not include disproving any of the cross-defendants' affirmative defenses. (See *Oldcastle Precast, Inc. v. Lumbermens Mutual Casualty Co.* (2009) 170 Cal.App.4th 554, 564—"Plaintiff's initial burden of proof in moving for summary judgment, however, did not include disproving any affirmative defenses asserted by defendants.")

Even if the court assumes cross-complainants Farmacia and Drogueria meet their initial burden of establishing each element of each of the first eight causes of action, the court finds cross-defendants present evidence to create a triable issue of material fact with regard to whether there is a basis for rescission of the APA and ensuing notes and guarantees. Civil Code section 1689, subdivision (b) enumerates the various grounds for rescission. One such ground is "[i]f the consent of the party rescinding, or of any party jointly contracting with him, was … obtained through … fraud … exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party." Here, plaintiffs/ cross-defendants allege fraud as the basis for rescission of the APA.[10] In opposition to cross-complainants' motion for summary judgment of their cross-complaint, cross-defendants proffer evidence of fraud. For example, "During the negotiations, Wong represented that long term care facilities served by the Pharmacies would continue working

[10] See also the twenty-third affirmative defense of cross-defendants' General Denial filed February 21, 2023.

with the Pharmacy after the change of ownership. Shortly after the closing of the transaction, Pharmacy's largest account – Everwell – decided to change its pharmacy provider."[11] "Wong represented that his family's business – Stacie Chalet – would continue using Pharmacy post closing. Shortly after closing, however, Stacie Chalet was sold and changed its pharmacy provider."[12] "After losing several large accounts due to the change of ownership, Plaintiffs contemplated closing Garcia Pharmacy. Due to the financial hardship, GarciaCare was never opened post-closing."[13]

Consequently, cross-complainants Farmacia and Drogueria's motion for summary adjudication of the first eight causes of action of their cross-complaint is DENIED.

J. Summary adjudication of the ninth through tenth (promissory estoppel) causes of action.

"The doctrine of promissory estoppel is set forth in section 90 of the Restatement of Contracts. It provides: 'A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promise and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.'" (*Signal Hill Aviation Co. v. Stroppe* (1979) 96 Cal.App.3d 627, 637 (*Signal Hill*).) "California recognizes the doctrine. 'Under this doctrine a promisor is bound when he should reasonably expect a substantial change of position, either by act or forbearance, in reliance on his promise, if injustice can be avoided only by its enforcement." (*Signal Hill*, *supra*, 96 Cal.App.3d at p. 637.) "The required elements for promissory estoppel in California are … (1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) his reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance." (*Laks v. Coast Fed. Sav. & Loan Assn.* (1976) 60 Cal.App.3d 885, 890; see also *US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 901 (*US Ecology*).)

As alleged here, cross-complainants' ninth and tenth causes of action for promissory estoppel operate as alternative theories in the event cross-complainants' breach of contract

[11] See Plaintiffs' Additional Undisputed Material Facts ("Plaintiffs' AUMF"), Fact No. 85.
[12] See Plaintiffs' AUMF, Fact No. 86.
[13] See Plaintiffs' AUMF, Fact No. 87.

causes of action fail. “Cases have characterized promissory estoppel claims as being basically the same as contract actions, but only missing the consideration element.” (*US Ecology, supra*, 129 Cal.App.4th at p. 903.) “[P]romissory estoppel claims are aimed solely at allowing recovery in equity where a contractual claim fails for a lack of consideration, and in all other respects the claim is akin to one for breach of contract.” (*Id.* at p. 904.) “Promissory estoppel was developed to do rough justice when a party lacking contractual protection relied on another's promise to its detriment.” (*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, 315.)

Since promissory estoppel relies upon equity and equity involves a balancing, the same evidence of fraud proffered by cross-defendants above would create a triable issue of material fact with regard to whether cross-complaints would be entitled to promissory estoppel.

Accordingly, cross-complainants Farmacia and Drogueria’s motion for summary adjudication of the ninth and tenth causes of action of their cross-complaint is DENIED.

The Court will prepare the formal order.

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Calendar Line 7
Case Name: *Mark Smith vs Terry Drymonacos et al*
Case No.: 23CV410044

Before the Court is the motion by Defendant Terry Drymonacos to compel Plaintiff Mark Smith to attend and testify at a further deposition on a date and time specified by defense counsel, with the presence of a Discovery Referee, paid for by plaintiff's counsel. Defendant also seeks monetary sanctions of $744.76 (the notice states this amount; the declaration in support seeks $855.95). Defendant seeks the appointment of a Discovery Referee (to be paid by Plaintiff pursuant to CCP § 2025.420 (b) to prevent Plaintiff's counsel from making any improper objections, instructions not to answer at the deposition and improper coaching. The deposition, that was court ordered on February 26, 2024, was suspended.

After careful and thorough review of all of the briefing and good cause shown, the Court rules that the deposition was not terminated, but suspended and as to the individual questions, rules as follows:

DEPOSITION QUESTIONS:

QUESTION NO. 1:
I want to know, Mr. Smith, did you ever have pain radiating from your low back down your left leg before the April 2021 accident?

GRANTED. Objections are overruled. The information sought, relates to the same parts of the body at issue, is relevant or reasonably calculated to lead to the discovery of admissible evidence. The Plaintiff shall answer this question and any follow up questioning relating to this question.

QUESTION NO. 2:
Did you have any medical payment coverage that paid for any of the health care you received for any of the injuries in this accident?

GRANTED. Objections are overruled. The information sought is relevant or reasonably calculated to lead to the discovery of admissible evidence and relates to the claims set forth in Plaintiff's complaint. The Plaintiff shall answer this question and any follow up questioning relating to this question.

QUESTION NO. 3:
Since the incident in April of 2021, have you been involved in any other incidents where you received a trauma to your body and suffered any kind of pain to your head, neck, shoulders, arms, back or legs?

GRANTED: Objections are overruled. This question is relevant to the claims set forth in Plaintiff's complaint and shall be answered by Plaintiff (including any follow up questioning) .
The Court agrees that evidence of any subsequent incidents causing trauma to areas of the body claimed to be injured in the subject incident are relevant to the issue of proximate and legal cause of Plaintiff's claimed injuries, damages, and treatment.

QUESTION NO. 4:
Mr. Smith, where did the vehicle ahead of yours on Saratoga Avenue stop when it came to a stop?

GRANTED: Plaintiff has not shown sufficient evidence that this exact question was asked previously. Plaintiff shall answer this question and any follow up questioning relating to this question.

QUESTION NO. 5:
Mr. Smith, the vehicle that stopped ahead of you that caused you to come to a stop while the light was green for Saratoga Avenue, where was it when it stopped?

GRANTED: Plaintiff has not shown sufficient evidence that this exact question was asked previously. Plaintiff shall answer this question and any follow up questioning relating to this question.

QUESTION NO. 6:
Mr. Smith, where did the car ahead of you stop while the light was green for Saratoga Avenue?

GRANTED: Plaintiff has not shown sufficient evidence that this exact question was asked previously. Plaintiff shall answer this question and any follow up questioning relating to this question.

QUESTION NO. 7:
Mr. Smith, the vehicle that stopped ahead of you that caused you to come to a stop while the light was green for Saratoga Avenue, where was it when it stopped?

This is duplicative of Question No. 5.

QUESTION NO. 8:
Other than information learned from your attorney, have you ever been told or learned where Mr. Drymonacos was coming from?

GRANTED. The objections are overruled. The question seeks information that is not attorney/client privileged ("other than information learned from your attorney"). Plaintiff shall answer this question and any follow up questioning relating to this question.

QUESTION NO. 9:
Have you ever read in any document, other than documents that are written by your attorney or prepared by your attorney's office, where Mr. Drymonacos was coming from?

GRANTED. The objections are overruled. The question explicitly seeks information that is not attorney/client privileged ("other than documents that are written by your attorney or prepared by your attorney's office"). Plaintiff shall answer this question and any follow up questioning relating to this question.

QUESTION NO. 10:
Mr. Smith, have you reviewed documents that are not prepared by your attorney in which it specifies where Mr. Drymonacos was coming from at the time of the accident?

GRANTED. The objections are overruled. The question seeks information that is not attorney/client privileged ("that are not prepared by your attorney"). Plaintiff shall answer this question and any follow up questioning relating to this question.

QUESTION NO. 11:
Do you know whether Mr. Drymonacos at the time of the accident was doing any type of work for his employer?

GRANTED in part and DENIED in part. The objections are overruled. Plaintiff shall answer this question *as to his understanding* as to whether Defendant was doing any work for his employer and any follow up questions relating thereto. The question is not seeking any attorney/client privileged information. If this information that responds to this question was received from his attorney, and Plaintiff has no independent, non-privileged information then he should so state.

QUESTION NO. 12:
At any time have you learned whether Mr. Drymonacos – or let me strike that. Was Mr. Drymonacos doing any work for his employer at the time of the accident?

DENIED. The question calls for speculation as phrased.

QUESTION NO. 13:
Do you know if he was working at all on the day of the accident?

GRANTED. The objections are overruled. Plaintiff shall answer this question and any follow up questioning relating to this question as it seeks relevant and discoverable information *if the deponent knows the information.*

QUESTION NO. 14:
Mr. Smith, do you know whether Mr. Drymonacos did any work for any employer on the day of the accident?

GRANTED. The objections are overruled. Plaintiff shall answer this question and any follow up questioning relating to this question.

Three hours remain of time allotted for this deposition. The Court orders that Defendant shall be permitted an additional hour and a half to take Plaintiff's deposition. Thus a four and a half hour deposition of Plaintiff is permitted. The deposition shall take place on a mutually agreed upon date, and no later than October 31, 2024 at a code compliant location.

Sanctions in the amount of $744.76 are awarded to the moving party, to be paid by Plaintiff no later than October 4, 2024.

If there are any further discovery disputes, the parties are ordered to meet and confer in person or by video conference, in good faith. The Court will not order a discovery referee at this point but will do so if there are any further discovery disputes that warrant such an appointment.

Moving party to prepare formal order.

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