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 17, 2024 TIME: 9:00 A.M.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E

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

LAW AND MOTION TENTATIVE RULINGS

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

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

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

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

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LAW AND MOTION TENTATIVE RULINGS

LINE #	CASE #	CASE TITLE	RULING
LINE 1	21CV389089	Ghulam Nurie vs Ashley Furniture Industries, LLC Hearing: Order of Examination	**Order of Examination (Zac Spindler)** No Proof of service on file. If there is no appearance, the matter will be ordered OFF CALENDAR.
LINE 2	22CV403402	JESSE SANCHEZ et al vs THE CITY OF GILROY et al	**Demurrer** Scroll down to Line 2 for Tentative Ruling.
LINE 3	23CV427768	Rhett Anderson vs Santa Clara County et al	**Demurrer** By *ex parte* order dated September 9, 2024, this motion was CONTINUED to January 14, 2025 at 9a.m in Department 18b.
LINE 4	23CV427650	Wells Fargo Bank, National Association vs Melissa Nguyen	**Motion for Summary Judgment/Adjudication** Scroll down to Line 4 for Tentative Ruling

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LAW AND MOTION TENTATIVE RULINGS

LINE 5	22CV404901	Tara Kumar, Trustee of the Anjali Kumar Trust dated 12/17/1997 et al vs T-Mobile West, LLC et al	**Motion to Compel** This motion is CONTINUED to November 21, 2024 at 9am in Department 18b. The parties are ordered to conduct good faith, reasonable and meaningful meet and confers, either in person, by phone or video conference, to try to narrow the issues in this motion. If any issues remain after the meet and confer efforts, which may span several sessions, the parties shall file a *joint* statement no later than November 5, 2024, which shall identify the remaining items in dispute and the reasons why further responses should/should not be compelled. Moving party to prepare formal order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 6	22CV404901	Tara Kumar, Trustee of the Anjali Kumar Trust dated 12/17/1997 et al vs T-Mobile West, LLC et al	**Motion to Compel** This motion is CONTINUED to November 21, 2024 at 9am in Department 18b. The parties are ordered to conduct good faith, reasonable and meaningful meet and confers, either in person, by phone or video conference, to try to narrow the issues in this motion. If any issues remain after the meet and confer efforts, which may span several sessions, the parties shall file a *joint* statement no later than November 5, 2024, which shall identify the remaining items in dispute and the reasons why further responses should/should not be compelled. Moving party to prepare formal order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 7	23CV421794	CHUNG-MEI KUO et al vs KENT YU et al	**Motion to Compel (Discovery)** Defendant Zhou Jian Yu aka Kent Yu's motion to compel further verified responses to special interrogatories (set one) and to requests for production of documents (set one) from Plaintiff Chung-Mei Kuo. Defendant moves to compel Plaintiff Kuo to provide further verified responses to Special Interrogatory Nos. 2-4, Request for Production Nos. 1 and 5-28 and for an award of monetary sanctions against Defendant in the amount of $6,875.00 (if the motion is opposed). The motion to compel was filed on July 30, 2024, and served on July 10, 2024 and on August 2, 2024 (filed version) on Plaintiff. No opposition to this motion was filed by Plaintiff. A failure to oppose a motion may be deemed a consent to the granting of the motion. CRC Rule 8.54c. The failure to oppose a motion leads to the presumption that Plaintiff has no meritorious argument. (*Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal. App. 3d 481, 489.) There is also good cause to grant this motion. Moving party meets his burden of proof. Good cause appearing, the motion is GRANTED. Plaintiff Kuo shall provide further verified, code-compliant responses to Special Interrogatory Nos. 2-4 and Request for Production Nos. 1 and 5 – 28 and also produce any responsive documents by October 1, 2024. Plaintiff shall pay sanctions of $4,125 to Defendant Yu no later than October 1, 2024. Moving party to prepare a formal order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 8	20CV374451	Guadalupe Chavez vs FCA US LLC et al	**Motion for Attorney's Fees** Plaintiff Guadalupe Chavez' motion for attorney's fees (for $44,700—which includes a 1.2 multiplier, $) and costs and expenses ($1,847.35) against Defendant pursuant to Civil Code § 1794(d). The motion is unopposed by Defendant. The Court has reviewed the briefing and specifically the time entries submitted, and the arguments presented in support of the hourly rates requested. The Court has discretion to reduce attorney fee awards. (*Mikaeilpoor v. BMW of North America, LLC* (2020) 48 Cal.App.5th 240). Every lemon law case is different, but in this case the Court does not see any unique issues or extraordinary motions and deems the time charged for standard form lemon law discovery and the litigation of this case to be excessive and the hourly rates elevated. The Court determines that (1) the fees incurred are unreasonable and excessive – the award requested is reduced to account for overbilling, lack of accounting for using form template discovery and pleadings and litigation inefficiencies; and (2) the requested hourly rates are reduced for this standard lemon law case. (*Nightingale v. Hyundai Motor America* (1994) 31 Cal.App.4th 99, 152) and no fees are permitted for administrative tasks or time for a reply to this motion. Plaintiff's request for a multiplier on its fees is also rejected. Plaintiff's motion for attorney's fees is GRANTED in the amount of $23,463 and costs of $1,847.35. Moving party to prepare the order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 9	23CV410545	David Martin vs GOOGLE LLC et al	**Motion for Judgment** Plaintiff moves for an order to issue a judgment following Defendant City of Sacramento's demurrer, which was sustained without leave to amend. The motion is GRANTED. Defendant City of Sacramento shall submit a proposed Judgment to the Court for signature.
LINE 10	23CV410545	David Martin vs GOOGLE LLC et al	**Motion for Judgment** Plaintiff moves for an order to issue a judgment following Defendant City of West Sacramento's demurrer, which was sustained without leave to amend. The motion is GRANTED. Defendant City of West Sacramento shall submit a proposed Judgment to the Court for signature.

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LAW AND MOTION TENTATIVE RULINGS

LINE 11	23CV417149	B-Line Construction, Inc. v. Chow, Wen Lung	**Motion to recover costs of service** Plaintiff B-Line Construction, Inc.'s motion pursuant to Code Civ. Proc., §415.30 (d), to recover the reasonable costs it incurred to attempt to serve, and serve, Defendant Wen Lung Chow. Defendant failed to return the notice and acknowledgement of receipt, which B-Line mailed to Defendant, within the requisite time period. B-Line incurred expenses to locate Defendant and exhaust all other methods of service before bringing a motion to effectuate service by publication. Notice of hearing was given to Defendant's counsel by mail service on July 19, 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 Plaintiff client has no meritorious arguments. (See *Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal. App. 3d 481, 489.) There is also good cause to grant this motion. Moving party has met its burden of proof. Good cause appearing, the motion is GRANTED. Defendant shall pay Plaintiff the total costs of $3,139.85 incurred by it to attempt and effectuate service of process on Defendant. Moving party to prepare the formal order after hearing.

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LAW AND MOTION TENTATIVE RULINGS

LINE 12	24CV428637	Larry Nguyen vs Alejandra Gonzalez et al	**Motion to Withdraw as Attorney.** Motion of Attorney Alex C. Park to be relieved as counsel for Plaintiff Larry Nguyen. Notice of hearing was given to Plaintiff Nguyen by mail service on July 16, 2024, at his last known address. No opposition was filed. A failure to oppose a motion may be deemed a consent to the granting of the motion. CRC Rule 8.54c. The failure to oppose a motion leads to the presumption that Plaintiff client has no meritorious arguments. (See *Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal. App. 3d 481, 489.) Moving party has met his burden of proof. Good cause appearing, the motion is GRANTED. The Order will take effect upon the filing and service of the executed order of this Court. This matter is set for a further case management conference on February 4, 2025, at 10a.m. in Department 18b. Moving party to prepare the formal order after hearing, which shall include notification of the new February 4, 2025 CMC date.

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LAW AND MOTION TENTATIVE RULINGS

LINE 13	2012-1-CV-217931	Resurgence Capital, LLC vs M. Moussavi	**Claim of Exemption** Non-Party Simin Moussavi, withdraw her third-party claim of exemption, by stipulation filed on August 15, 2024. This application is therefore MOOT and ordered OFF CALENDAR.

Calendar Line 2
Case Name: *Petra Macias, et al. v. City of Gilroy, et al.*
Case No.: 22CV403402 (Consolidated with 22CV407607)

Before the Court is defendant City of Gilroy's demurrer to Macias' second amended complaint. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background.

On the evening of October 29, 2021 and into the early morning hours of October 30, 2021, a party was being held at 405 and 490 Las Animas Avenue and the public road adjacent thereto in Gilroy. (Second Amended Complaint ("SAC"), ¶30.) On information and belief, assets of defendant City of Gilroy ("City") were utilized in facilitating said party, including but not limited to barricades and the city-street. (SAC, ¶31.)

Defendant Rebecca Armendariz, a Council Member of defendant City, lived at 490 Animas Avenue in Gilroy. (SAC, ¶¶26 – 27.) Defendant Rebecca Armendariz owns, rents, leases, or otherwise has control or was in charge of the premises and knowingly conducted and/or allowed said party which was a loud, unruly gathering; underage drinking was allowed and facilitated. (SAC, ¶¶38 and 49.) Unspecified defendants failed to keep the property in a reasonably safe condition, failed to use care to remedy and repair unsafe conditions, and/or failed to give adequate warning of unsafe conditions including, among others, that there were threats to public safety and assaults. (SAC, ¶38.)

Decedent Michael Daniel-Zuniga Macias ("Decedent") was an invitee to said party. (SAC, ¶32.) As a result of defendants' acts and/or omissions, Decedent sustained severe and serious injury from a gunshot wound, ultimately resulting in his death. (SAC, ¶54.)

According to the SAC, defendant City is responsible for the actions, negligence, and/or intentional torts of its employees and elected officials, including defendant and Council Member Rebecca Armendariz, who knowingly conducted and/or allowed said party. (SAC, ¶49.) Defendant City employees provided and allowed the use of the barricades which were arranged for by defendant Rebecca Armendariz. (*Id.*)

On November 17, 2022, plaintiffs Petra Macias, Decedent's mother, and Jeremiah Macias, Decedent's brother (collectively, "Maciases"), filed a complaint against defendant City and others.

On June 12, 2023, plaintiffs filed a first amended complaint ("FAC").

On July 14, 2023, several defendants filed a demurrer to and motion to strike plaintiffs' FAC.

On April 4, 2024, the court (Hon. Manoukian) issued an order consolidating the action filed by plaintiffs Maciases with an action filed by parents of decedent Jesse Sanchez, Jr. arising from the same incident. The consolidation order specifically states, "All documents should be filed under the lower case number but reflect that the actions are consolidated."[1]

On May 15, 2024, the court (Hon. Rosen) sustained, in part, the demurrer to plaintiffs Maciases' FAC and deeming the motion to strike moot.

On May 24, 2024, plaintiffs Maciases filed the now operative SAC which asserts causes of action for:

(1) Wrongful Death

(2) Negligent Infliction of Emotional Distress as a Bystander

On July 9, 2024, defendant City filed the motion now before the court, a demurrer to plaintiffs Maciases' SAC.

II. Defendant City's demurrer to plaintiffs Maciases' SAC is SUSTAINED.

A. Dangerous condition of public property.

Although framed as a wrongful death cause of action, defendant City understands plaintiff Maciases' SAC to assert a claim for dangerous condition of public property.

> A public entity is not liable for an injury arising out of the alleged act or omission of the entity except as provided by statute. (§ 815.) Section 835 is the sole statutory basis for a claim imposing liability on a public entity based on the condition of public property. (*Brown v. Poway Unified School Dist.* (1993) 4

[1] Apparently, the April 4, 2024 order re consolidation was not served upon plaintiffs' Maciases' counsel who continues to file documents under case #22CV407607, the higher case number, instead of filing documents under the lower case number, 22CV403402. As a result, the court will excuse the incorrect filings. However, plaintiffs Maciases and their counsel are now hereby placed on notice to file all further documents in the lower case number while reflecting that the cases have been consolidated.

Cal.4th 820, 829 [15 Cal. Rptr. 2d 679, 843 P.2d 624].) Under section 835, a public entity may be liable if it creates an injury-producing dangerous condition on its property or if it fails to remedy a dangerous condition despite having notice and sufficient time to protect against it. (*Grenier v. City of Irwindale* (1997) 57 Cal.App.4th 931, 939 [67 Cal. Rptr. 2d 454].)

To state a cause of action against a public entity under section 835, a plaintiff must plead: (1) a dangerous condition existed on the public property at the time of the injury; (2) the condition proximately caused the injury; (3) the condition created a reasonably foreseeable risk of the kind of injury sustained; and (4) the public entity had actual or constructive notice of the dangerous condition of the property in sufficient time to have taken measures to protect against it. (§ 835; *Vedder v. County of Imperial* (1974) 36 Cal. App. 3d 654, 659 [111 Cal. Rptr. 728].) Section 830 defines a "[d]angerous condition" as "a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property is used with due care in a manner in which it is reasonably foreseeable that it will be used." Property is not "dangerous" within the meaning of the statutory scheme if the property is safe when used with due care and the risk of harm is created only when foreseeable users fail to exercise due care. (*Chowdhury v. City of Los Angeles*, *supra*, 38 Cal.App.4th 1187, 1196.

…

Because this action was dismissed at the pleading stage, we outline the rules for pleading a claim against a governmental entity. The limited and statutory nature of governmental liability mandates that claims against public entities be specifically pleaded. (*Susman v. City of Los Angeles* (1969) 269 Cal. App. 2d 803, 809 [75 Cal. Rptr. 240].) Accordingly, a claim alleging a dangerous condition may not rely on generalized allegations (*Mittenhuber v. City of Redondo Beach*, *supra*, 142 Cal. App. 3d at p. 5) but must specify in what

manner the condition constituted a dangerous condition. (*People ex rel Dept. of Transportation v. Superior Court* (1992) 5 Cal.App.4th 1480, 1485–1486 [7 Cal.Rptr.2d 498].)

(*Brenner v. City of El Cajon* (2003) 113 Cal.App.4th 434, 439 (*Brenner*); see also *Mohler v. County of Santa Clara* (2023) 92 Cal.App.5th 418, 428—also noting a "heightened pleading standard applicable to claims against government entities.")

"[A] claim alleging a dangerous condition may not rely on generalized allegations [citation] but must specify in what manner the condition constituted a dangerous condition." (*Brenner, supra*, 113 Cal.App.4th at p. 439.) "A plaintiff's allegations, and ultimately the evidence, must establish a physical deficiency in the property itself. [Citations.] A dangerous condition exists when public property "is physically damaged, deteriorated, or defective in such a way as to foreseeably endanger those using the property itself," or possesses physical characteristics in its design, location, features or relationship to its surroundings that endanger users. [Citation.]" (*Cerna v. City of Oakland* (2008) 161 Cal.App.4th 1340, 1347–48.)

The SAC alleges the party took place at 405 Las Animas Avenue and "the property across the street," 490 Las Animas Avenue, and "the public road adjacent thereto." (SAC, ¶¶21 and 30.) As 405 and 490 Las Animas Avenue are alleged to be privately owned, the only property subject to a claim for dangerous condition of public property would be the public road adjacent to those properties.

The SAC alleges this public property was not safe in several respects. Initially, the SAC alleges, "the lighting was insufficient." Without actually citing to any legal authority, defendant City argues it has no obligation to light its streets. Despite the lack of legal authority, the court is aware of several decisions which collectively hold that a public entity has no duty to provide street lighting and cannot be held liable for a failure to do so. (See *Antenor v. City of Los Angeles* (1985) 174 Cal.App.3d 477; *Plattner v. City of Riverside* (1999) 69 Cal.App.4th 1441; and *Mixon v. State* (2012) 207 Cal.App.4th 124.)

Apart from the lighting, defendant City contends there are no other allegations concerning the physical conditions of the public street which could support a claim for dangerous condition of public property. The only other relevant allegations do not concern a

physical defect. Instead, the SAC alleges a dangerous or defective condition existed because "the public street was taken over by the party" and "city barricades were used at said party and they were used to direct traffic and they allowed and facilitated said party."

In opposition, plaintiffs focus on the barricades and argue the barricades were used to "enlarge[e] the size of the subject party" and "connect" the two private residences "to make the public street part of the subject party's premises." Plaintiffs do not squarely address what physical characteristics of the public street itself which endangered users. In telling fashion, plaintiffs instead argue it was defendant City's "***acts and/or omissions*** allowed a dangerous condition to exist."

"In general, 'whether a given set of facts and circumstances creates a dangerous condition is usually a question of fact and may only be resolved as a question of law if reasonable minds can come to but one conclusion.'" (*Peterson v. San Francisco Community College District* (1984) 36 Cal.3d 799, 810.) "[A]lthough the question of whether a dangerous condition exists is often one of fact, the issue may be resolved as a question of law when reasonable minds can only draw one conclusion from the facts." (*Dina v. People ex rel. Dept. of Transportation* (2007) 151 Cal.App.4th 1029, 1054; see also *Cerna v. City of Oakland* (2008) 161 Cal.App.4th 1340, 1347.)

Here, plaintiffs' allegations suggest it is the ***use and placement*** of barricades rather than any physical defect with the property itself that forms the basis for liability. Under such allegations, the court is of the opinion that plaintiffs have not alleged the existence of a dangerous condition of public property.

Accordingly, defendant City's demurrer to the first cause of action in plaintiffs' SAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] wrongful death (premised on dangerous condition of public property) is SUSTAINED WITHOUT LEAVE TO AMEND.

B. Vicarious liability – Council Member Rebecca Armendariz.

Defendant City further acknowledges the doctrine of respondeat superior applies to public entities pursuant to Government Code section 815.2, subdivision (a), which states: "A public entity is liable for injury proximately caused by an act or omission of an employee of

the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative."

Defendant City argues plaintiffs have not alleged sufficient facts to establish that defendant Councilwoman Armendariz was acting within the scope of her employment. "Ordinarily, the determination whether an employee has acted within the scope of employment presents a question of fact; it becomes a question of law, however, when 'the facts are undisputed and no conflicting inferences are possible.' [Citation.]" (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 213.)[2]

> Some courts employ a two-prong test to determine whether an employee's conduct was within the scope of his employment for purposes of respondeat superior liability, asking whether " '1) the act performed was either required or "incident to his duties" [citation], or 2) the employee's misconduct could be reasonably foreseen by the employer in any event [citation].' [Citation.]" (*Alma W., supra*, 123 Cal.App.3d at p. 139.) If the employee's actions fall within either prong, the employer is liable for the injury. (*Ibid.*) " ' "[F]oreseeability" in this context must be distinguished from "foreseeability" as a test for negligence. In the latter sense "foreseeable" means a level of probability which would lead a prudent person to take effective precautions whereas "foreseeability" as a test for respondeat superior merely means that in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among the other costs of the employer's business. [Citations.]' " (*Bailey, supra,* 48 Cal.App.4th at p. 1559.) Thus, for respondeat superior liability to attach there must be "a nexus between the employee's tort and the employment to ensure that liability is properly placed upon the employer." (*Id.* at p. 1560.)

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[2] The court is not persuaded by plaintiffs' argument in opposition that the SAC includes an allegation that an employee of defendant City was "acting with the scope of his/her employment." "The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. The court does not, however, assume the truth of contentions, deductions or ***conclusions of law***." (*Gregory v. Albertson's, Inc.* (2002) 104 Cal.App.4th 845, 850; emphasis added.)

(*Halliburton Energy Services, Inc. v. Department of Transportation* (2013) 220 Cal.App.4th 87, 94-95; see also CACI, No. 3720.)

The only relevant allegation in plaintiffs' complaint is that defendant and Council Member Rebecca Armendariz "was present during said party" and "arranged for items for said party including Porta-parties, parking, and barricades for said party." (SAC, ¶49.) Even if the court accepts this allegation to be true, the court finds this allegation insufficient, as a matter of law, to establish that defendant Rebecca Armendariz was acting in the scope of her employment. There are no facts alleged that defendant and Council Member Armendariz's organization, promotion, and hosting of the Halloween party at her home was either required or incident to her duties as a City employee. The court cannot reasonably infer that the alleged use of City resources was required or incident to her duties as a City employee. Similarly, while it may reasonably foreseeable for a Council Member to obtain a City issued barricade, there are no facts alleged from which defendant City could reasonably foresee defendant and Council Member Armendariz's subsequent misuse of such City barricade for a private event.

C. Vicarious liability – City employee.

As to City employees, the SAC's allegations are even more scant alleging only, "that Defendant CITY OF GILROY employees provided and allowed the use of the barricades." (SAC, ¶49.) In light of the requirement for pleading statutory claims with specificity, the court will not accept plaintiffs' conclusory allegation that defendant City's employees were acting in the course and scope of their employment in providing and allowing the use of the barricades.

Moreover, to support a claim for wrongful death, plaintiffs must allege and establish the defendant City employee's negligence. "Wrongful death is a statutorily created cause of action for pecuniary loss brought by heirs against a person who causes the death of another by a wrongful act or neglect. It is original in nature and does not represent a right of action that the deceased would have had if the deceased had survived the injury. [Citations.] It is a cause of action for the heir who recovers for the pecuniary loss suffered on account of the death of the relative. [Citation.] In any action for wrongful death resulting from negligence, the complaint must contain allegations as to all the elements of actionable negligence. [Citation.] Negligence involves the violation of a legal duty imposed by statute, contract or otherwise, by the

defendant to the person injured, e.g., the deceased in a wrongful death action." (*Jacoves v. United Merchandising Corp.* (1992) 9 Cal.App.4th 88, 105.)

Defendant City contends there are no facts alleged to support any negligence based solely on an employee's provision or allowance of use of a barricade. Defendant City suspects plaintiffs seek to hold the employees liable under a negligent entrustment theory, but contend there are no facts had any advance knowledge the barriers would be used improperly. Plaintiffs instead contend, in apparent concession, that any defect in pleading can be amended.

Accordingly, defendant City's demurrer to the first and second causes of action in plaintiffs' SAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] wrongful death and negligent infliction of emotional distress is SUSTAINED with 10 days' leave to amend.

The Court will prepare the formal order.

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Calendar Line 4
Case Name: *Wells Fargo Bank, National Association v. Melissa H. Nguyen, et al.*
Case No.: 23CV427650

Before the Court is Wells Fargo Bank, National Association's motion for summary judgment or in the alternative for summary adjudication. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background.

On or about June 26, 2016, plaintiff Wells Fargo Bank, National Association ("Wells Fargo") granted a business line of credit to M Tax and Finance Corporation, Inc. ("Borrower") which Borrower agreed in writing to repay. (Complaint, ¶¶3 and 9 and Exh. 1 – 2.) To induce plaintiff Wells Fargo to extend credit to Borrower, defendant Melissa H. Nguyen ("Nguyen") agreed in writing to pay plaintiff Wells Fargo the amount equal to all funds advanced by plaintiff Wells Fargo to Borrower under the line of credit ("Guaranty"). (Complaint, ¶10.) In reliance thereon, plaintiff Wells Fargo extended credit to Borrower under the line of credit. (Complaint, ¶11.)

The last payment on the business line of credit was on July 30, 2020. (Complaint, ¶13.) There is now due and owing to plaintiff Wells Fargo from defendant Nguyen, under the line of credit, the principal sum of $54,256.35. (Complaint, ¶15.) Plaintiff Wells Fargo has made demand on defendant Nguyen for payment of the obligation but defendant Nguyen has not repaid any part of this obligation. (Complaint, ¶16.)

On or about December 26, 2012, plaintiff Wells Fargo granted a business credit card to Borrower which Borrower agreed in writing to repay. (Complaint, ¶19 and Exh. 3 – 4.) To induce plaintiff Wells Fargo to extend credit to Borrower under the business credit card, defendant Nguyen agreed in writing to pay plaintiff Wells Fargo the amount advanced by plaintiff Wells Fargo to Borrower under the business credit card. (Complaint, ¶20.) In reliance thereon, plaintiff Wells Fargo extended credit to Borrower under the business credit card. (Complaint, ¶21.)

The last payment on the business credit card was on March 4, 2020. (Complaint, ¶23.) There is now due and owing to plaintiff Wells Fargo from defendant Nguyen, under the business credit card, the principal sum of $23,404.50. (Complaint, ¶25.) Plaintiff Wells Fargo

has made demand on defendant Nguyen for payment of the obligation but defendant Nguyen has not repaid any part of this obligation. (Complaint, ¶26.)

On December 14, 2023, plaintiff Wells Fargo filed a complaint against defendant Nguyen asserting causes of action for:

(1) Breach of Guaranty (Line of Credit)

(2) Breach of Guaranty (Credit Card)

On March 15, 2024, defendant Nguyen filed an answer to plaintiff Wells Fargo's complaint.

On June 14, 2024, plaintiff Wells Fargo filed the motion now before the court, a motion for summary judgment/ adjudication of its complaint against defendant Nguyen.

II. Plaintiff Wells Fargo's motion for summary judgment is GRANTED.

"A party may move for summary judgment in an action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding." (Code Civ. Proc., §437c, subd. (a).) "For purposes of motions for summary judgment and summary adjudication: A plaintiff or cross-complainant has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on the cause of action." (Code Civ. Proc., §437c, subd. (p)(1).)

Plaintiff Wells Fargo has asserted breach of guaranty claims against defendant Nguyen. "A lender is entitled to judgment on a breach of guaranty claim based upon undisputed evidence that (1) there is a valid guaranty, (2) the borrower has defaulted, and (3) the guarantor failed to perform under the guaranty." (*Gray1 CPB, LLC v. Kolokotronis* (2011) 202 Cal.App.4th 480, 486.)

To meet its initial burden on summary judgment/ adjudication, plaintiff Wells Fargo proffers the following facts: On or about June 26, 2016, Wells Fargo entered into a business line of credit agreement with M Tax and Finance Corp ("Borrower") under the present account number ending in 1220.[1] To induce Wells Fargo to extend credit to Borrower, defendant Nguyen personally agreed in writing to pay Wells Fargo the amount due under the Line of

[1] See Separate Statement of Undisputed Material Facts in Support of Wells Fargo Bank, National Association's Motion for Summary Judgment ("Wells Fargo UMF"), Issue No. 1, Fact No. 1.

Credit.[2] Pursuant to the terms of the Credit Agreements, Wells Fargo extended credit to Defendant, which Defendant agreed to repay.[3] Defendant is in default under the Credit Agreements, in that Defendant failed to make the monthly payment amounts due.[4] Wells Fargo charged off the Business Line of Credit on January 19, 2021.[5] On January 19, 2021, Wells Fargo accelerated payment of the full balance due on the Business Line of Credit.[6] The last payment was received on the Business Line of Credit was July 30, 2020.[7] The current amount due on the Business Line of Credit is $54,256.35.[8] Wells Fargo demanded payment of the charged-off amount from Defendant, and Defendant failed to repay said amount.[9] In addition to the amounts referenced above that Defendant owes Wells Fargo, Wells Fargo has employed counsel for the purpose of instituting and prosecuting this action.[10] Wells Fargo is entitled to judgment on the subject account Line of Credit in the amount of $54,256.35.[11]

On or about December 26, 2012, Wells Fargo entered into a business credit card agreement with Borrower under the present account number ending in 2992.[12] To induce Wells Fargo to extend credit to Borrower, defendant Nguyen personally agreed in writing to pay Wells Fargo the amount due under the business credit card.[13] Pursuant to the terms of the Credit Agreements, Wells Fargo extended credit to Defendant, which Defendant agreed to repay.[14] Defendant is in default under the Credit Agreements, in that Defendant failed to make the monthly payment amounts due.[15] Wells Fargo charged off the business credit card on March 4, 2020.[16] On November 8, 2020, Wells Fargo accelerated payment of the full balance due on the business credit card.[17] The last payment was received on the business credit card

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[2] See Wells Fargo UMF, Issue No. 1, Fact No. 2.
[3] See Wells Fargo UMF, Issue No. 1, Fact No. 3.
[4] See Wells Fargo UMF, Issue No. 1, Fact No. 4.
[5] See Wells Fargo UMF, Issue No. 1, Fact No. 5.
[6] See Wells Fargo UMF, Issue No. 1, Fact No. 6.
[7] See Wells Fargo UMF, Issue No. 1, Fact No. 7.
[8] See Wells Fargo UMF, Issue No. 1, Fact No. 8.
[9] See Wells Fargo UMF, Issue No. 1, Fact No. 9.
[10] See Wells Fargo UMF, Issue No. 1, Fact No. 10.
[11] See Wells Fargo UMF, Issue No. 1, Fact No. 11.
[12] See Wells Fargo UMF, Issue No. 2, Fact No. 12.
[13] See Wells Fargo UMF, Issue No. 2, Fact No. 13.
[14] See Wells Fargo UMF, Issue No. 2, Fact No. 14.
[15] See Wells Fargo UMF, Issue No. 2, Fact No. 15.
[16] See Wells Fargo UMF, Issue No. 2, Fact No. 16.
[17] See Wells Fargo UMF, Issue No. 2, Fact No. 17.

was March 4, 2020.[18] The current amount due on the business credit card is $23,404.50.[19] Wells Fargo demanded payment of the charged-off amount from Defendant, and Defendant failed to repay said amount.[20] In addition to the amounts referenced above that Defendant owes Wells Fargo, Wells Fargo has employed counsel for the purpose of instituting and prosecuting this action.[21] Wells Fargo is entitled to judgment on the subject account[s] in the amount of $77,660.85 plus attorney's fees of $3,153.20 and recoverable costs of $553.92 for a total judgment of $81,367.97.[22]

On these facts, the court finds plaintiff Wells Fargo has met its initial burden of proof.

In opposition, defendant Nguyen contends first that plaintiff Wells Fargo has not met its burden of establishing an account stated between the parties. Defendant Nguyen's argument misses the mark as plaintiff Wells Fargo's complaint does not assert claims for an account stated. Defendant Nguyen's argument gives the court the impression that her opposition is boilerplate.

Next, defendant Nguyen appears to object to the admissibility of business records relied upon by plaintiff Wells Fargo. Defendant Nguyen relies upon *American Exp. Travel Related Servs. v. Vinhnee (In re Vinhnee)* (Bankr.9th Cir. 2005) 336 B.R. 437, 446 based upon her "belie[f] that the same authentication issues can be raised in state court since the evidentiary rules are very similar."[23] The court declines to follow this federal authority based simply upon defendant's belief particularly when there is valid and binding existing California statutory authority. (See Evid. Code, §1271.) Moreover, defendant Nguyen has not properly asserted any objection. (See Cal. Rules of Court, rules 3.1352 and 3.1354—"A party desiring to make objections to evidence in the papers on a motion for summary judgment must … [s]ubmit objections in writing under rule 3.1354; All written objections to evidence must be served and filed separately from the other papers in support of or in opposition to the motion.")

Defendant Nguyen next takes issue with whether plaintiff Wells Fargo has established the existence of a valid agreement claiming plaintiff Wells Fargo has only presented a "generic

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[18] See Wells Fargo UMF, Issue No. 2, Fact No. 18.
[19] See Wells Fargo UMF, Issue No. 2, Fact No. 19.
[20] See Wells Fargo UMF, Issue No. 2, Fact No. 20.
[21] See Wells Fargo UMF, Issue No. 2, Fact No. 21.
[22] See Wells Fargo UMF, Issue No. 2, Fact No. 22.
[23] See page 6, lines 21 – 22, of Defendant's Opposition to Plaintiff's Motion for Summary Judgment.

contract" with "unknown provisions."[24] The court does not agree with defendant Nguyen's assertions. The underlying agreements proffered by plaintiff Wells Fargo are identified as the specific agreements (and their specific provisions) that defendant Nguyen entered into and plaintiff Wells Fargo also provides defendant Nguyen's response to a request for admissions wherein defendant Nguyen admitted signing said agreements.[25]

Defendant Nguyen thereafter apparently objects further to the supporting declaration offered by plaintiff Wells Fargo. As noted above, defendant Nguyen has not properly asserted any objections. (See Cal. Rules of Court, rules 3.1352 and 3.1354.) For that reason alone, the court declines to consider and rule upon defendant Nguyen's evidentiary objections.

As her penultimate argument, defendant Nguyen alludes to the federal Truth-in-Lending Act ("Act"), claiming the Act requires material terms of a credit card relationship to be set forth in a written agreement. Without citation to any specific legal authority, defendant Nguyen apparently contends failure to comply with the Act operates as an affirmative defense to plaintiff Wells Fargo's claim(s).

Initially, the court will note that defendant Nguyen did not properly plead the Act as an affirmative defense. In her answer, defendant Nguyen alleged only, "Defendant did not receive the disclosures and notices required under 12 C.F.R. 226.9(c)(2) regarding Defendant's account. Defendant is entitled to a setoff or recoupment of all interest charged." Defendant Nguyen's argument in opposition to plaintiff Wells Fargo's motion for summary judgment appears to be much broader. In view of defendant Nguyen's answer, the court will confine defendant Nguyen's argument to that which she specifically alleged, plaintiff's failure to provide the disclosures and notice required under 12 C.F.R 226.9(c)(2).[26]

In her opposition, defendant Nguyen seemingly concedes 12 C.F.R. 226.9(c)(2) governs "when certain terms of the account agreement are changed" which comports with the

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[24] Defendant Nguyen cites *Acoustics, Inc. v. Trepte Construction Co.* (1971) 14 Cal.App.3d 887, 913, where the court wrote, "A complaint for the breach of contract must include the following: (1) the existence of a contract, (2) plaintiff's performance or excuse for non-performance, (3) defendant's breach, and (4) damages to plaintiff therefrom." However, as noted earlier, the specific type of agreement at issue here is a guaranty agreement.

[25] "Any matter admitted in response to a request for admission is conclusively established against the party making the admission in the pending action, unless the court has permitted withdrawal or amendment of that admission … ." (Code Civ. Proc., §2033.410, subd. (a).)

[26] See *Leibert v. Transworld Systems, Inc.* (1995) 32 Cal.App.4th 1693, 1699—where party opposing summary judgment "wished to rely upon unpleaded theories to defeat summary judgment, he was required to move to amend the [answer] prior to the hearing on … motion."

title of that section which discusses "***[s]ubsequent*** disclosure requirements." Thus, it would be of no consequence, as defendant Nguyen argues "plaintiff has failed to provide any document signed by Defendant setting forth the requirements in existence from the date the contract between the parties allegedly formed."[27] Only failures to disclose thereafter would be relevant.

Even so, the court finds defendant Nguyen's argument underdeveloped. Defendant Nguyen bears the burden "to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto." (Code Civ. Proc., §437c, subd. (p)(1).) Defendant Nguyen's opposition is lacking any relevant legal authority which explains the consequence for a failure to comply with 12 C.F.R. 226.9(c)(2). Defendant Nguyen has not provided this court with any authority to support her assertion that a failure to comply with 12 C.F.R. 226.9(c)(2) operates as an affirmative defense to plaintiff Wells Fargo's claim for breach of guaranty or even that, as defendant Nguyen alleged in her answer, she is "entitled to a setoff or recoupment of all interest charged." As such, it is the court's opinion that defendant Nguyen has not met her burden to show that a triable issue of one or more material facts exists.

Finally, defendant Nguyen asserts the subject cardmember agreement entitles either party to request arbitration and defendant Nguyen "invokes" this right as her last basis for opposition. While "[t]he question of arbitration may also be raised as an affirmative defense in the answer by a plea in abatement alleging that the action was prematurely brought," defendant Nguyen has not alleged such an affirmative defense in her answer. (*Northcutt Lumber Co. v. Goldeen's Peninsula, Inc.* (1973) 30 Cal.App.3d 440, 444; see also *Charles J. Rounds Co. v. Joint Council of Teamsters* (1971) 4 Cal.3d 888, 899.)

For all the reasons discussed above, plaintiff Wells Fargo's motion for summary judgment is GRANTED.

The Court will prepare the formal order.

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[27] See page 15, lines 1 – 3, of Defendant's Opposition to Plaintiff's Motion for Summary Judgment.