SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 6
Honorable Evette D. Pennypacker, Presiding
David Criswell, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2160

DATE: January 18, 2024 TIME: 9:00 A.M.

FOR ORAL ARGUMENT: Before 4:00 PM today you must notify the:

(1) Court by calling (408) 808-6856 and

(2) Other side by phone or email that you plan to appear at the hearing to contest the ruling

(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

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LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	23CV421635	Tao Lin vs Amazon.com Services LLC	Defendant Amazon.com Services LLC's Demurrer to Plaintiff's First Cause of Action is SUSTAINED WITHOUT LEAVE TO AMEND. Defendant avers it met and conferred with Plaintiff regarding the grounds for this demurrer in the declaration of Mark C. Burnside, and an amended notice of motion with this hearing date and time was served by U.S. Mail on November 9, 2023. Plaintiff failed to oppose the demurrer. Although Plaintiff is self-represented, self-represented litigants are entitled to the same, but no greater, consideration than other litigants and attorneys. (*County of Orange v. Smith* (2005) 132 Cal.App.4th 1434, 1444.) Self-represented litigants "are held to the same standards as attorneys" and must comply with the rules of civil procedure. (*Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 543; see also *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985.) Defendant's demurrer is well-taken. This is the unusual case where a plaintiff fails to allege sufficient facts to put the defendant on notice as the nature of the claim, and the claim is therefore uncertain. (*Khoury v. Maly's of Cal, Inc.* (1993) 14 Cal.App.4th 612, 616 (*Khoury*).) And, while "[i]t is an abuse of discretion for the court to deny leave to amend where there is any reasonable possibility that plaintiff can state a good cause of action[, t]he burden is on the plaintiff to show in what manner plaintiff can amend the complaint, and how that amendment will change the legal effect of the pleading. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) Here, Plaintiff failed to make any such showing. Accordingly, Defendant's demurrer is sustained without leave to amend. Court to prepare formal order; Defendant to prepare form of dismissal and judgment. Parties are ordered to appear for argument.

2	2014-1-CV-264065	C. Berg, Et Al Vs Metaview Wholesale Investments, Lp, Et Al	On November 28, 2023, the Court issued an order to show cause why MetaView Wholesale Investments, LLC's ("MetaView") answer should not be stricken for failure to obtain counsel. The Court's order setting January 18, 2024 at 9 a.m. in Department 6 for a hearing on this issue states: "To be clear: If MetaView Wholesale Investments, LLC fails to file an appearance of new counsel by January 18, 2024, MetaView Wholesale Investments LLC's [] answers will be stricken and default entered against it." MetaView argues that its member, Valerie Houghton, is a licensed attorney, and that therefore she can appear on MetaView's behalf. The Court agrees that Valerie Houghton may so appear. (*Merco Constr. Engineers, Inc. v. Municipal Cour*t (1978) 21 Cal. 3d 724.) However, it does not appear to the Court that Ms. Houghton has made clear that she is the point of contact for MetaView either to the parties or to the court. Moreover, if Ms. Houghton is appearing on behalf of MetaView in this case, she must *appear*. To date, the Court does not recall Ms. Houghton appearing as MetaView at any hearing in this case, including the hearing on Plaintiff's motion to have MetaView's requests for admissions deemed admitted, in opposition to which the Houghtons argued the motion must be denied because MetaView was served at a time it was not represented. Thus, while Ms. Houghton may have been permitted to appear for MetaView, to date, she has not done so. Accordingly, the Court finds MetaView has failed to adequately respond to the Court's order to show cause. MetaView's answer is stricken, and default is entered against it. Court to prepare formal order.
3	23CV412048	Aaron White vs STIHL INCORPORATED et al	Defendant Stihl Incorporated's Demurrer to Plaintiff's Complaint is OVERRULED. Please scroll down to lines 3-4 for full tentative ruling. Court to prepare formal order.
4	23CV412048	Aaron White vs STIHL INCORPORATED et al	Gardenland Center, Inc.'s Demurrer to Plaintiff's First Cause of Action is OVERRULED, to Plaintiff's Second Cause of Action is SUSTAINED WITH 20 DAYS LEAVE TO AMEND, and to Plaintiff's Third Cause of Action is SUSTAINED WITHOUT LEAVE TO AMEND. Please scroll down to lines 3-4 for full tentative ruling. Court to prepare formal order.
5	23CV422394	Zenaida Seid vs Lucian Naum et al	Plaintiff's Motion to Strike Defendant's Affirmative Defenses is DENIED. Please scroll down to line 5 for full tentative ruling. Court to prepare formal order.
6	22CV402927	JANE DOE vs DOE 1 et al	San Jose Unified School District's Motion to Compel Plaintiff to Serve Verified Responses to Form Interrogatories (Set One), Special Interrogatories (Set One), and Requests for Production of Documents (Set One) and for Sanctions is GRANTED. An amended notice of motion with this hearing date and time was served by U.S. Mail on September 15, 2024. Plaintiff failed to file an opposition. Defendant served this discovery on April 27, 2023. Plaintiff's prior counsel served unverified objections and responses because Plaintiff failed to respond to counsel, who had to withdraw for Plaintiff's failure to communicate. To date, Plaintiff still has not served verified responses. Accordingly, Plaintiff is ordered to produced verified written responses to these discovery requests and pay Defendant $605 in sanctions within 20 days of service of this formal order. Court to prepare formal order.

7	23CV413961	Wells Fargo Bank, N.A vs KATELYN BECK	Plaintiff's Motion for an order deeming the truth of the matters specified in requests for admission admitted is GRANTED. An amended notice of motion with this hearing date and time was served by U.S. Mail on October 12, 2023. Defendant failed to file an opposition. Plaintiff served these requests on Defendant on June 22, 2023. To date, Defendant has failed to produce any responses. A party served with Requests for Admission must serve a response within 30 days. (Code of Civ. Pro. §2033.250.) When a party fails to respond—even in the face of a motion to have the matters in the Requests for Admission deemed admitted—as Defendant has done here, the Court must order the Requests for Admission deemed admitted. (Code of Civ. Pro. §2033.280(c); *St. Mary v. Superior Court* (2014) 223 Cal.App.4th 762, 775-776.) Such a "deemed admitted" order establishes that the nonresponding party has responded to the requests for admission by admitting the truth of the matters contained in the requests. (*Id.*) Accordingly, the truth of the matters contained in Wells Fargo Bank, N.A.'s requests to Defendant are deemed admitted. Court to prepare formal order.
8	23CV417119	Reza Tirgari vs Reza Kazemipour et al	Plaintiff's Motion to Compel Defendant's Documents and Further Responses to Requests for Production (Set One) and for Sanctions is GRANTED IN PART. Please scroll down to lines 8-9 for full tentative ruling. Court to prepare formal order.
9	23CV417119	Reza Tirgari vs Reza Kazemipour et al	Plaintiff's Motion to Compel Defendant's Further Responses to Form Interrogatories (Set Two) and for Sanctions GRANTED IN PART. Please scroll down to lines 8-9 for full tentative ruling. Court to prepare formal order.
10	23CV417192	Jpmorgan Chase Bank N.a. vs Praveenkumar Vedamuthu	Plaintiff's Motion for an order deeming the truth of the matters specified in requests for admission admitted is GRANTED. An amended notice of motion with this hearing date and time was served by U.S. Mail on December 14, 2023. Defendant failed to file an opposition. Plaintiff served these requests on Defendant by U.S. Mail on September 14, 2023 and followed up by letter dated October 31, 2023. To date, Defendant has failed to produce any responses. A party served with Requests for Admission must serve a response within 30 days. (Code of Civ. Pro. §2033.250.) When a party fails to respond—even in the face of a motion to have the matters in the Requests for Admission deemed admitted—as Defendant has done here, the Court must order the Requests for Admission deemed admitted. (Code of Civ. Pro. §2033.280(c); *St. Mary v. Superior Court* (2014) 223 Cal.App.4th 762, 775-776.) Such a "deemed admitted" order establishes that the nonresponding party has responded to the requests for admission by admitting the truth of the matters contained in the requests. (*Id.*) Accordingly, the truth of the matters contained in JPMorgan Chase Bank, N.A.'s requests to Defendant are deemed admitted. Court to prepare formal order.
11	23CV420854	StormQuant, Inc. vs Reuben Purvis	Defendant's Motion to Compel Arbitration is CONTINUED to February 13, 2024 at 9 a.m. in Department 6. No further notice is required. This order will be reflected in the minutes.

12	23CV424795	In RE: Youtube, LLC; Custodian of Records for YouTube, LLC at Google Headquarters	Amazing Grace Movie, LLC's Petition to Compel Compliance with Subpoena for Production of Business Records to Non-Party YouTube, LLC is DENIED. Petitioner fails to meet its burden to show good cause that these requests are reasonably calculated to lead to the discovery of admissible evidence. The requests are also not narrowly tailored, and it does not appear to this Court that Petitioner adequately met and conferred prior to filing this motion. Petitioner accuses Respondent of delaying in its response to the subpoena, but Petitioner did not properly serve the subpoena until October 2023, just before the November 2023 close of fact discovery in the New York case, then failed to work with Respondent—who is not a party to the New York litigation—to provide information to help locate documents or narrow the requests. Even on this motion, Petitioner fails to propose a path for production via narrowed requests. Petitioner's untenable position appears to be that if a subpoena is properly served, it simply must be complied with regardless of its breadth. This is plainly not the law, and its Petition must be denied. Court to prepare formal order.
13	18CV340043	BH Financial Services LLC vs Rafael Cortez	Rafael Cortez's Claim of Exemption is DENIED. Plaintiff is not seeking to garnish wages, but to levy the account at Bank of America, NA in Glendale, California. Court to prepare formal order.
14	22CV403734	Eftychios Theodorakis vs DFINITY Stiftung et al	Defendant's Order to Show Cause Why Sanctions Should not Issue for violation of the court's order compelling arbitration is DENIED. The Court disagrees with Plaintiff that the Court loses the power to enforce its own orders once a case is stayed. However, the Court has reviewed Plaintiff's judicially noticeable First Amended Complaint filed in the Northern District of California, and that Complaint asserts claims not asserted here and includes parties not before the Court. Plaintiff's concerns regarding the statute of limitations are also reasonable. The Court ordered this lawsuit to arbitration, and it appears that arbitration has commenced and is ongoing. Thus, even if Defendants' contempt motion had followed the correct procedures, the Court does not find contempt on this record. Court to prepare formal order.
15	22CV408399	Ning Yu vs 1POINT3ACRES, LLC et al	Defendants' Motions for Attorneys' Fees and Costs are GRANTED, in part. Please scroll down to line 15 for full tentative ruling. Court to prepare formal order.
16	23CV424797	Matthew Ferranti vs Excite Credit Union	Petitioner's Request for Attorneys' Fees and Costs in the amount of $9,368.40 is GRANTED. In its December 7, 2923 order granting petitioner's motion to compel, the Court ordered Petitioner to submit a declaration detailing the time spent on preparing the motion and permitted respondent to submit a response by January 2, 2023. No such response was submitted. The Court has also reviewed Petitioner's submission and finds the number of hours spent reasonable, and, while $900 per hour may be on the higher end of hourly rates submitted to this Court, it is not outside the range and is consistent with rates charged in Silicon Valley. Accordingly, Respondent is ordered to pay Petitioner $9,368.40 within 30 days of service of this formal order. Court to prepare formal order.

17	2014-1-CV-264065	C. Berg, Et Al Vs Metaview Wholesale Investments, Lp, Et Al	The Houghton's Motion to Set Aside Default/Judgment is GRANTED. The Court intends to prepare a more fulsome order outlining its reasoning and legal analysis. However, it appears to the Court that the Houghton's counsel suffered a personal tragedy that significantly impacted his ability to represent his clients, including his ability to help the Houghtons navigate the discovery process, leading directly to the Court's order granting terminating sanctions. Counsel declares under oath that he did not provide the discovery to the Houghtons, did not inform them of the motion to compel, the motion for sanctions, he sanctions order or the motion for terminating sanctions. He further declares that he did receive communications from Ms. Houghton, but that he simply did not pay close enough attention to see them. While Plaintiffs cite to cases showing that the press of work is not sufficient grounds to either set aside a default or an order deeming RFAs admitted, the Court views this neglect as stemming from more than the press of work. Counsel's tragedy occurred on April 9, 2023; the discovery was served approximately one month thereafter, at a time when counsel was in the throes of grief. The discovery events leading to the imposition of terminating sanctions unfolded in those months following. The Court views this unusual set of facts as excusable neglect. That counsel did not previously reveal the facts submitted in support of his various motions to set aside is understandable and does not contradict prior statements, if made. Court to prepare formal order.
18	2014-1-CV-264065	C. Berg, Et Al Vs Metaview Wholesale Investments, Lp, Et Al	Terry and Valerie Houghton's Motion for Relief from Order Deeming RFAs admitted is GRANTED. As stated above, the Court intends to prepare a more fulsome order outlining its reasoning and legal analysis. However, it appears to the Court that the Houghton's counsel suffered a personal tragedy that significantly impacted his ability to represent his clients, including his ability to help the Houghtons navigate the discovery process. Counsel declares under oath that he did not provide the discovery to the Houghtons and did not inform them either of the motion to compel or the need to prepare and serve responses before the motion to compel was heard. He further declares that he did receive communications from Ms. Houghton, but that he did not pay close enough attention to see them. Counsel's tragedy occurred on April 9, 2023; the discovery was served approximately one month thereafter, at a time when counsel was in the throes of grief. The Court views this unusual set of facts as excusable neglect. That counsel did not previously reveal the facts submitted in support of his various motions to set aside is understandable and does not contradict prior statements, if made. Court to prepare formal order.

19	2014-1-CV-264065	C. Berg, Et Al Vs Metaview Wholesale Investments, Lp, Et Al	Mitchell Development Enterprises, Inc.'s motion to exclude Katherine Alves from Testifying is DENIED WITHOUT PREJUDICE. If a party unreasonably fails to list an expert or submit a declaration for an expert when exchanging expert witness information, the trial judge must exclude the expert's testimony at trial unless that party obtains a court order after a motion filed under Code of Civil Procedure section 2034.610. (Code Civ. Proc. §2034.300; *Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536.) To obtain such leave, the moving party must establish that at the time of the deadline for expert exchanges, (1) the party could not, with reasonable diligence, have determined to call that expert witness or have decided to offer the different or additional testimony of that expert witness or (2) the failure to previously identify the witness or additional testimony was due to mistake, inadvertence, surprise, or excusable neglect. Plaintiffs cite late disclosure as the basis for their motion to exclude. At the time of Plaintiff's ex parte application, trial was imminent. Trial has since been continued to March 11, 2024. On this record, the Court agrees with Defendants that this motion is better addressed as a motion in limine before the trial judge. Court to prepare formal order.
20	2008-1-CV-122622	TK Credit Recovery vs J. Melton	John Melton's Claim of Exemption is GRANTED, in part. Debtor will be ordered to pay $75 per pay period. Court to prepare formal order.

Calendar Lines 3 & 4
Case Name: *Aaron White v. STIHL Incorporated, et al.*
Case No.: 23CV412048

Before the Court are defendants' STIHL Incorporated ("STIHL") and Gardenland Center Inc. ("Gardenland") demurrers to the complaint. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

According to the complaint, on February 21, 2021, Plaintiff Aaron White was using a STIHL-branded cut-off machine saw (the "Saw"), when it suddenly and without warning combusted, caught on fire, and shot sudden bursts of fire onto White. (Complaint, ¶¶ 25-26.) He suffered severe burns and other injuries to his chest, torso, groin area, upper thighs, left arm, left hand, ears, and face in addition to emotional and psychological injuries and other injuries which are still being treated or diagnosed. (Complaint, ¶ 27.) White alleges his employer, San Jose Water Company ("SJWC") purchased the Saw in new condition from Gardenland Power Equipment. (Complaint, ¶ 28.) White alleges each of the STIHL defendants designed, manufactured, assembled, and marketed the Saw and that each also marketed, retailed, sold, and/or distributed the Saw. (Complaint, ¶ 29.)

White filed the complaint on February 21, 2023, allegeing: (1) strict products liability; (2) negligence; and (3) breach of implied warranty of merchantability.

II. STIHL's Demurrer

STIHL demurs to each cause of action on the ground that it is uncertain and fails to allege sufficient facts. (Code Civ. Proc., § 430.10, subds. (e) & (f).)

A. Legal Standard

"The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in [Code of Civil Procedure s]ection 430.30, to the pleading on any one or more of the following grounds: . . . (e) The pleading does not state facts sufficient to constitute a cause of action, (f) The pleading is uncertain." (Code Civ. Proc., § 430.10, subds. (e) & (f).) A demurrer may be utilized by "[t]he party against whom a complaint [ ] has been filed" to object to the legal sufficiency of the pleading as a whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).)

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

B. Timeliness

White contends the instant motion is late, thus it should be overruled.

"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).) Even if a demurrer is untimely filed, the Court has the discretion to hear the demurrer as long as its actions "…'do[] not affect the substantial rights of the parties.'" (*McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 282 (*McAllister*).)

Here, the Complaint was served on July 14, 2023. The instant motion was filed on August 18, 2023. STIHL's counsel Richard Zuromski, Jr. states the motion was filed on August 11, 2023, however, the filing was rejected due to an error. (Zuromski Decl., ¶¶ 2-3.) He did not learn of the issue until the following week, and he corrected it thereafter. (Zuromski Decl., ¶ 3.) Therefore, it appears the motion is untimely. However, White's rights are not substantially affected as shown by his substantive opposition to the motion and the fact that the demurrer was filed only a few days outside of the 30-day time limit. (*McAllister, supra,* 147 Cal.App.4th at p. 282.) The Court will thus address the merits.

C. Analysis

1. Uncertainty

Uncertainty is a disfavored ground for demurrer; it is typically sustained only where the pleading is so unintelligible and uncertain that the responding party cannot reasonably respond to or recognize the

claims alleged against it. (*Khoury v. Maly's of Cal, Inc.* (1993) 14 Cal.App.4th 612, 616 (*Khoury*).) "A demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures." (*Ibid*.) "[U]nder our liberal pleading rules, where the complaint contains substantive factual allegations sufficiently apprising defendant of the issues it is being asked to meet, a demurrer for uncertainty should be overruled or plaintiff given leave to amend. (*Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 139, fn. 2.)

STIHL contends the pleading is uncertain because White groups Defendants together. Although White does collectively refer to Defendants throughout the pleading, he alleges "STIHL Defendants and each of them, marketed, retailed, sold, and/or distributed the Saw and placed the Saw and its components in the stream of commerce…" (Complaint, ¶ 29.) STIHL contends this is insufficient. However, as noted by White, STIHL fails to cite controlling authority in support. The allegations are also not so uncertain that STIHL cannot reasonably respond to them. (*Khoury, supra,* 14 Cal.App.4th at p. 616.) Thus, the demurrer on the basis of uncertainty is OVERRULED.

2. First Cause of Action: Strict Products Liability

"The elements of a strict liability cause of action are a defect in the manufacture and design of the product or a failure to warn; causation; and injury." (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 318.)

"A manufacturer, distributor, or retailer is liable in tort if a defect in the manufacture or design of its product causes injury while the product is being used in a reasonably foreseeable way." (*Soule v. General Motors Corp.* (1994) 8 Cal. 4th 548, 560.) "Products liability may be premised upon a theory of design defect, manufacturing defect, or failure to warn." (*Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 995 (*Anderson*).) The product does not have to be unreasonably dangerous-just defective for liability to attach. (*Cronin v. J.B.E. Olson Corp.* (1972) 8 Cal.3d 121, 133.)

A design defect exists when the product is built in accordance with its intended specifications, but the design itself is inherently defective. (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1303.) There are two test for establishing a design defect: (1) under the consumer expectations test, if the plaintiff shows that the product failed to perform as safely as an ordinary consumer would expect when

using the product in an intended or reasonably foreseeable manner, and (2) under the risk-benefit test, where the trier of fact is asked to balance the risk of danger inherent in the challenged design versus the feasibility of a safer design, the gravity of the danger, and the adverse consequences to the product of a safer design. (*Karlsson v. Ford Motor Co.* (2006) 140 Cal.App.4th 1202, 1208 (*Karlsson*).)

White alleges an area of the Saw suddenly and without warning combusted, exploded, and caught on fire. (Complaint, ¶ 26.) He also alleges the Saw's engine and fuel system were defective in design, assembly, and failing to warn because they (1) failed to provide adequate and reasonable protection for consumers and users *exposed to foreseeable combustion/fire events*; (2) failed to integrate protection components in such a way that would reasonably protect consumers and users in *foreseeable combustion/fire events*; (3) failed to contain any type of safety system or protection *to suppress and/or prevent fire and/or flame burst* to protect human body parts if such a burst did happen; (4) inadequate and/or absent warnings and/or proper notice to alert consumers and users regarding the unreasonably dangerous condition; and (5) marketed in that the advertising and marketing campaigns and programs undertaken relating to the Saw misled consumers and users. (Complaint, ¶ 35 [emphasis added].) White also alleges in considering the gravity of the danger imposed by the design, the likelihood that such danger would cause injury and the adverse consequences to the consumer that would result from an alternative design, the risk of danger inherent in the design of the Saw outweigh the benefits of it and that his injuries were caused by the defective conditions of the Saw. (Complaint, ¶¶ 33, 41-43.)

These allegations are sufficient to state a claim for strict liability. Thus, the demurrer to the first cause of action for strict liability is OVERRULED.

3. Second Cause of Action: Negligence

To prove negligence, a plaintiff must show: (1) a legal duty, (2) a breach of that duty; and (3) resulting damages. (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917.)

Here, White alleges Defendants had a duty of care, they breached that duty, and White was damaged as a result. (Complaint, ¶¶ 45-58.) This is sufficient to state a claim for negligence. (*McMillan v. Western P.R. Co.* (1960) 54 Cal.2d 841, 845 ["it is settled that negligence may be alleged in general terms…"].) Thus, the demurrer to the second cause of action is OVERRULED.

4. Third Cause of Action: Breach of Implied Warranty of Merchantability

"Unless specific disclaimer methods are followed, an implied warranty of merchantability accompanies every retail sale of consumer goods in the state." (*Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 619.) "This warranty includes a guarantee that the particular item is 'fit for the ordinary purpose for which goods are used." (*Ibid*., quoting Civ. Code, § 1791.1, subd. (a).)

However, "[p]rivity of contract is a prerequisite in California for recovery on a theory of breach of implied warranties of fitness and merchantability." (*All West Electronics, Inc. v. M-B-W, Inc.* (1998) 64 Cal.App.4th 717, 725.) The specific type of privity requires is "vertical privity," which "means that the buyer and seller were parties to the sales contract." (*Cardinal Health 301, Inc. v. Tyco Electronics Corp.* (2008) 169 Cal.App.4th 116, 138-139.)

> The term 'vertical privity' refers to links in the change of distribution of goods. If the buyer and seller occupy adjoining links in the chain, they are in vertical privity with each other and lack of privity would not be available as a defense to the seller in a warranty action brought by the buyer. For example, the distributor is normally in vertical privity with the manufacturer, and the ultimate retail buyer is normally in vertical privity with the dealer. But if the retail buyer seeks warranty recovery against the manufacturer with whom he has no direct contractual nexus, the manufacturer would seek insulation via the vertical privity defense.

(*Osborne v. Subaru of America, Inc.* (1998) 198 Cal.App.3d 646, fn. 6.)

"There are, of course, multiple court created exceptions to the general rule of privity." (*Windham at Carmel Mountain Ranch Assn. v. Superior Court* (2003) 109 Cal.App.4th 1162, 1169.) For example, exceptions to the privity requirement have been found in cases involving foodstuffs, drugs, and pesticides, substances marketed with the knowledge that the purchaser may not be the ultimate consumer of the product. (*Klein v. Duchess Sandwich Co., LTD.* (1939) 14 Cal.2d. 272, 284 [foodstuffs]; see also *Gottsdanker v. Cutter Laboratories* (1960) 182 Cal.App.2d 602, 607[polio vaccine].) The strict requirement of privity has also been excused when an inherently dangerous instrumentality causes harm to a buyer's employee. (See *Peterson v. Lamb Rubber Co.* (1960) 54

Cal.2d 339, 347 (*Peterson*) [grinding wheel]; see also *Barth v. B.F. Goodrich Tire Co.* (1968) 265 Cal.App.2d 228, 246-247 [tires].)

In *Peterson,* 54 Cal.2d at p. 348, the court explains:

> In the present context, the employee had the successive right to the possession and use of the grinding wheel handed over to him by his purchaser-employer, and we believe, should fairly be considered to be in privity to the vendor-manufacturer with respect to the implied warranties of fitness for use and of merchantable quality upon which recovery is here sought.

Here, White alleges his employer SJWC purchased the Saw from Gardenland Power Equipment (Complaint, ¶ 28); Defendants expressly and/or impliedly warranted the Saw to be free from material defects, including, but not limited to, defects in design, assembly, and manufacture (Complaint, ¶ 31); and Defendants were each other's agents, employees, representatives, and acted in such capacities. (Complaint, ¶¶ 18-19.) A demurrer "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, supra,* 35 Cal.3d at pp. 213-214 [demurrer ""].) Under this authority, accepting these allegations as true, White alleges facts to establish privity of contract between himself and STIHL. Thus, the demurrer to the third cause of action is OVERRULED.

III. Gardenland's Demurrer

Gardenland demurs to each cause of action on the ground it is uncertain and fails to allege sufficient facts. (Code Civ. Proc., § 430.10, subds. (e) & (f).)

A. Uncertainty

Gardenland, like STIHL, argues White's "shotgun" pleading is uncertain. For the same reasons articulated above, the demurrer on the basis of uncertainty is OVERRULED.

B. First Cause of Action: Strict Products Liability

Gardenland offers the same arguments as STIHL, which the Court has addressed above. Thus, the demurrer to the first cause of action is OVERRULED.

C. Second Cause of Action: Negligence

"In order to prove negligence, plaintiff must establish duty, breach of that duty, causation, and damages." (*WFG National Title Ins. Co. v. Wells Fargo Bank, N.A.* (2020) 51 Cal.App.5th 881, 893.) Duty is a necessary element of Plaintiff's claim. (*Salinas v. Martin* (2008) 166 Cal.App.4th 404, 411.) The existence and scope of a defendant's duty is an issue of law to be decided by the court. (*Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 161.) In general, a manufacturer or distributor has a duty to warn about all *known or knowable risks* of harm from the use of its product. (*Anderson, supra*, 53 Cal.3d at p. 1000 [emphasis added].) Gardenland contends White fails to allege a duty owed to him and a breach of said duty.

White alleges Gardenland marketed, sold, retailed, and/or distributed the Saw. (Complaint, ¶ 30.) He further alleges Defendants has a duty to use ordinary care: (1) in the designing… marketing, supplying, selling… with respect to the Saw; (2) avoid a foreseeable risk of injury caused by a condition of the Saw…; (3) avoid a foreseeable risk of injury continued after the Saw left their possession, if they knew of… a foreseeable risk of injury caused by a condition of the Saw; (4) to warn of a risk of injury about which they knew or should have known; (5) to provide directions or instructions for use of the Saw to avoid a risk of injury caused by a foreseeable manner of use; (6) to inspect the Saw; (7) to repair the saw…before selling it. (Complaint, ¶¶ 45-51.) However, White fails to allege the risk of harm was known or knowable to Gardenland. Therefore, it does not appear Gardenland had a duty to White. Thus, White fails to allege this claim against Gardenland and the demurrer to the second cause of action is SUSTAINED with 20 days leave to amend.

D. Third Cause of Action: Breach of Implied Warranty of Merchantability

Commercial Code section 2607, subdivision (3)(A), provides, "the buyer must, within a reasonable time after he or she discovers or should have discovered any breach, notify the seller of breach or be barred from any remedy." (Com. Code, § 2607, subd. (3)(A).) "The requirement of the notice of breach is based on a sound commercial rule designed to allow the defendant opportunity for repairing the defective item, reducing damages, avoiding defective products in the future, and negotiating settlements. (*Pollard v. Saxe & Yolles Dev. Co.* (1964) 12 Cal.3d 374, 380.)

Gardenland argues White's claim fails because he did not provide pre-suit notice.

Relying on *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 61-62 (*Greenman*), White argues the pre-suit notice requirement does not apply to personal injury tort claims by non-contracting, injured parties, like consumers and users of the product. The Court notes *Greenman* analyzed the notice requirement under the Civil Code, not the Commercial Code, which is argued by Gardenland here. Moreover, *Greenman* specifically addressed the requirement as to "manufacturers with whom [consumers] have not dealt." (*Id*. at p. 62.) Here, White alleges Gardenland does business as Gardenland Power Equipment, which is the entity from whom SJWC purchased the Saw. (See Complaint, ¶ 13.) Therefore, the Complaint establishes that Gardenland is not a remote seller or manufacturer and the notice exception addressed in *Greenman* does not apply here.

White is not excused from the notice requirement, and he fails to allege any notice to Gardenland. As a result, White is barred from a remedy from Gardenland under this claim. Thus, the demurrer to the third cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

Calendar Line 5
Case Name: *Zenaida Seid v. Lucian Spiru Naum*
Case No.: 23CV422394

Before the Court is Plaintiff, Zenaida Seid's, motion to strike Defendant, Lucian Spiru Naum's, affirmative defenses from his answer to the complaint. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This action stems from an alleged defamatory text communication. According to the complaint, on August 21, 2023, Defendant sent a text message to his wife, from whom he was separated at the time, about Vince's death. The message indicated that doctors had to stop Vince's pacemaker due to increased and rapid heartbeats caused by severe allergic reaction to peanut oil. Defendant then expresses his belief that Vince's wife (Plaintiff) gave him peanut oil to kill him for money and he would try to prove it. Defendant writes that Plaintiff got the idea from a similar allergic episode in the past that put Vince in the hospital. As a result of this text message, Plaintiff has suffered severe emotional distress and damage to her reputation in the community as a real estate agent. (PLD-PI-001(3), Ex. 1.)

On September 7, 2023, Plaintiff filed the operative complaint for (1) defamation, and (2) intentional infliction of emotional distress. Defendant filed an answer on October 20, 2023, asserting eleven affirmative defenses.

II. Legal Standard

The court may, upon a motion, or at any time in its discretion, and upon terms it deems proper, strike any irrelevant, false, or improper matter inserted in any pleading. (Code Civ. Proc. § 436(a).) The court may also strike all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court or that includes irrelevant, false, or improper matter. (*Id.*, § 436(b).) The grounds for moving to strike must appear on the face of the pleading or by way of judicial notice. (*Id*, § 437.) "When the defect which justifies striking a complaint is capable of cure, the court should allow leave to amend." (*Vaccaro v. Kaiman* (1998) 63 Cal.App.4th 761, 768.)

Where there are grounds both for demurring and moving to strike, the two documents must be filed together and noticed for the same hearing. (Code of Civ. Proc. § 435(b)(3), (d).) Because a motion to strike and a demurrer must be brought at the same time, a motion to strike the answer must be filed

within 10 days after service of the answer. (Code Civ. Proc. § 435(b); California Rule of Court, Rule 3.1322(b).)

III. Analysis

A. Timeliness

Although Defendant does not raise this issue, Plaintiff's motion is untimely, and the Court can decline to consider it on this basis alone. Plaintiff was required to file her motion within 10 days after the service of the answer. (Code of Civ. Proc. §§ 430.40(b), 435(b) (1), (3) and Rule 3.1322(b).) Defendant served his answer, via mail, on October 20, 2023. Plaintiff's motion was thus due no later than November 6, 2023 but was filed and served on November 22, 2023.

However, the Court has discretion to strike out all or any part of a pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court on its own motion. (Code Civ. Proc. § 436(b).) The Court therefore has the authority to consider the matter at any time, even after the statutory deadline has passed, which the Court will do here. (*CPF Agency Corp v. R&S Towing* (2005) 132 Cal.App.4th 1014, 1021).

B. Improper Motion

Whether a defense is sufficiently plead is tested through demurrer, not a motion to strike. (*Warren v. Atchison, T. & S. F. Ry. Co.* (1971) 19 Cal.App.3d 24, 41 [assertions that counts do not state sufficient facts are grounds for demurrer, not motion to strike]; see also Code Civ. Proc., § 430.20, subd. (a) ["The answer does not state facts sufficient to constitute a defense"]; cf. Code Civ. Proc., § 436; Weil & Brown, Cal. Civ. Proc. Before Trial at §7:35.1 ("A demurrer can be used to eliminate 'boilerplate' affirmative defenses that often appear in answers (e.g., 'waiver,' 'estoppel,' 'unclean hands,' etc.). But such demurrers are very rare, probably because they are not worth the cost when the same result can be achieved by serving requests for admission or standard form interrogatories seeking the bases for the affirmative defenses.")

Thus, Plaintiff's motion to strike Defendant's affirmative defenses is DENIED.

Calendar Lines 8-9
Case Name: *Reza Tirgari vs Reza Kazemipour et al*
Case No.: 23CV417119

Before the Court Plaintiff's Motions to Compel Defendant's (1) Documents and Further Responses to Requests for Production (Set One) and for Sanctions and (2) Further Responses to Form Interrogatories (Set Two) and for Sanctions. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This matter arises out of an alleged multi-year fraud scheme from 2018 to 2022, in which defendant Reza Kazemipour lied amount investment opportunities, which caused Plaintiff to invest money with him that Kazemipour spent on unauthorized personal expenses and travel. (Complaint, ¶ 15.) With the assistance of defendant Troy Foster, Kazemipour defrauded Plaintiff out of approximately $750,638. (*Ibid*.) After he commenced legal action against Kazemipour, Plaintiff discovered Kazemipour transferred Plaintiff's stolen assets to others, including but not limited to, Sayar and Foster. (*Ibid*.) Kazemipour was the manager and director for defendant 1792 Partners, Inc. ("1792 Partners"). (Complaint, ¶ 8.) Sayar was married to Kazemipour from July 20, 1995, until October 1, 2019. (Complaint, ¶ 16.) She filed for divorce on September 7, 2022. (Complaint, ¶ 39.)

Plaintiff initiated this action on June 2, 2023, asserting: (1) Fraudulent Conveyance-Actual Intent (Civ. Code, § 3439.04, subd. (a)(1)); (2) Fraudulent Conveyance-Constructive (Civ. Code, § 3439.04, subd. (a)(2)(B)); (3) Aiding and Abetting Violations of the Uniform Voidable Transactions Act ("UVTA"); (4) Declaratory Relief; (5) Conspiracy to Fraudulently Transfer Assets (Pen. Code, § 192); (6) Receiving Stolen Property (Civ. Code §§ 484, 496, & 503); and (7) Appointment of a Receiver. The Court sustained aspects of Defendant's demurrer with leave to amend, and Plaintiff filed an amended complaint on December 28, 2023.

Before the Court here are Plaintiff's two motions to compel Defendant to produce additional discovery. Defendant only partially opposes these motions. Defendant does not oppose Plaintiff's request for a ruling that (1) the marital communications privilege does not apply to the MSA; (2) the marital communications privilege does not apply to private communications between Ms. Sayar and Mr. Kazempour during their marriage; or (3) Mr. Kazemipour be required to provided Ms. Sayer with

passwords to her email and Apple accounts. Defendant claims Plaintiff's request for a privilege log is moot because she has no pre-litigation privileged communications, and Defendant does oppose Plaintiff request for an order directing her to produce documents and communications related to her daughter's college tuition and for sanctions.

II. Legal Standard and Analysis

A. Marital Privilege

California Evidence Code section 980 provides: "a spouse (or his or her guardian or conservator when he or she has a guardian or conservator), whether or not a party, has a privilege during the marital or domestic partnership relationship and afterwards to refuse to disclose, and to prevent another from disclosing, a communication if he or she claims the privilege and the communication was made in confidence between him or her and the other spouse while they were spouses." The spouse must intend for the communication to be confidential, which can be assessed by examining the circumstances of the communication; if third parties are privy to the communication, it is not confidential. (*People v. Gomez* (1982) 134 Cal.App.3d 874, 879; *People v. Bryant* (2014) 60 Cal.4th 335, 419; *Rubio v. Superior Court* (1988) 2020 Cal.App.3d 1343, 1348.) Because the privilege applies only to confidential communications, it is inapplicable to the existence of assets, which is not a communication. (*Troy v. Superior Court* (1986) 186 Cal. App. 3d 1006, 1013 ("The privilege conferred by section 980 is likewise unavailable to Troy, since the information sought relates to the existence of assets, not to confidential communications between Mr. Troy and his spouse.")

"[T]he claimant of the confidential marital communication privilege has the burden to prove, by a preponderance of the evidence, the facts necessary to sustain the claim. (1 Jefferson, Cal. Evidence Benchbook (2d ed. 1982) § 25.2(p), p. 715 [speaking generally of claimants of privileges].) He is aided by a presumption that a marital communication was made in confidence. Evid. Code, § 917.) The opponent has the burden to prove otherwise (*ibid*.) by a preponderance of the evidence (see *id*., § 115)." (*People v. Mickey* (1991) 54 Cal. 3d 612, 655.)

Review of the cases in this area reveals that whether the privilege applies is conducted on a communication by communication basis; a blanket assertion is insufficient. The Court is also faced with a situation where it is being told through argument that one spouse is asserting the privilege, but it has

been given no *evidence*—such as a declaration from Defendant's spouse—that (a) the spouse is asserting the privilege or (b) to support that the privilege is applicable to any particular communications. From what the Court can discern, Defendant's spouse's counsel wrote an email stating his client was asserting the privilege for all communications and would not waive it. But this email, even if it were competent evidence, which it is not, fails to provide any context for the parties' communications, much less any evidence of such context, to allow a trier of fact to assess whether the privilege applies. It also appears that during meet and confer, Defendant declined to provide a privilege log because doing so would be too burdensome. Defendant takes these positions while simultaneously arguing she and her spouse were not actually spouses during certain relevant time periods.

Thus, on this record, the objection on the basis of the marital privilege is overruled, Plaintiff's motion is GRANTED, and Defendant is ordered to (1) serve verified supplemental responses to Plaintiff's requests for production and Form Interrogatory No. 17.1 and (2) produce all documents withheld on the basis of the marital privilege (including the MSA) within 20 days of service of this formal order.

B. College Tuition Communications

Discovery is generally permitted "regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." (Code Civ. Pro. § 2017.010.) Everything that is relevant to the subject matter is presumed to be discoverable. (*Id.*)

Plaintiff argues that the expansive documents sought regarding Defendant's daughter's college tuition are relevant to Plaintiff's allegation that Defendant wrongfully used Plaintiff's investment money to pay those bills. The request are not so narrowly tailored, however, and the Court agrees that, as currently drafted, there are relevance and potentially privacy concerns for Defendant's daughter.

Accordingly, the motion is GRANTED IN PART. Within 20 days service of this formal order, Defendant is ordered to produce documents, including communications, referring or relating to the source of the funds Defendant or her agents used to pay her daughter's college tuition. Such documents may be produced under the parties' stipulated protective order.

C. Privilege Log

If Defendant is withholding any documents created before June 2, 2023, Plaintiff is ordered to produce a privilege log listing all such documents within 20 days of service of this formal order.

D. Sanctions

The Court agrees that the extensive meet and confer record suggests Defendant caused Plaintiff to jump through numerous hoops before this motion was filed and did not communicate to Plaintiff Defendant's agreement to several aspects of this motion. This motion could have been substantially narrowed had Defendant responded otherwise. The Court accordingly orders Defendant to pay Plaintiff, within 30 days of service of this formal order, $4,575 in sanctions, reflecting a portion of the fees spent on meeting and conferring and preparing this motion.

Calendar Line 15
Case Name: *Ning Yu vs 1POINT3ACRES, LLC et al*
Case No.: 22CV408399

Before the Court are Defendants' Motions for Attorney Fees and Costs Pursuant to California Code of Civil Procedure Section 425.16.

I. Background

By Order dated August 15, 2023, the Court granted Defendants' 1pointacres, LLC's ("1point"); Yao Meng, Hongkang Liang, Aegean Lee, Winnie Chen, Xianren Wu, Zhiyong Huang, Ruolin Duan, Wa Goa, Hanxing Shi, Yingzi Du (the "Individual Defendants"); BUPT[1] Alumni Association of America's ("BUPTAAA"); and iTalk Global Communications, Inc.'s ("iTalk") special motion to strike Plaintiff Ning Yu's First Amended Complaint.

California Code of Civil Procedure section 425.16(c) states: "a prevailing defendant on a special motion to strike **shall** be entitled to recover his or her attorneys' fees and costs." (Cal. Code Civ. Pro. §425.16(c) (emphasis added).) Given the mandatory nature of these fees and costs, the only issue before the Court is the proper amount.

II. Legal Standard and Analysis

Anti-SLAPP fee awards should include expenses incurred for all proceedings "directly related" to the special motion to strike and fees "addressing matters with factual or legal issues that are 'inextricably intertwined' with those issues raised in an anti-SLAPP motion." (*Henry v. Bank of Am. Corp.* (N.D.Cal. Aug. 23, 2010) 2010 WL3324890 *4.) To determine the correct award, the Court applies the lodestar method which is calculated by multiplying "the number of hours reasonably expended. . . by the reasonable hourly rate" of counsel. (*PLCM Group, Inc. v. Drexler* (2000) 17 Cal.4th 1084, 1095.) To determine reasonableness, the Court considers "the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure." (*Id.* at 1096.)

A. 1point

[1] This acronym refers to the Beijing University of Posts and Telecommunications.

1point seeks to recover $21,913.32 in fees and costs. (See Declaration of Bing Zhang Ryan.) 1point spent 32 hours on its opposition to the Anti-SLAPP motion, 8.3 hours on the fee motion, and estimates 7 hours for a reply and hearing on the fee motion.

Plaintiff does not oppose 1point's fee request. Thus, the estimated 7 hours for a reply and hearing on the fee motion is not necessary and should be deducted from the total amount awarded. The Court otherwise finds the number of hours and Mr. Ryan's $450 per hour rate to be reasonable for this type of case and this market. The costs incurred are also reasonable.

1points motion for fees and costs in the amount of $18,763.32 is GRANTED.

B. Individual and BUPTAAA Defendants

The Individual and BUPTAAA Defendants seek $62,822.51 in fees and costs, reflecting 93.1 hours of attorney time at billing rates ranging from $800 to $450 per hour, 39.2 hours of paralegal time at $225 per hour, and $6,197. Plaintiff does not appear to oppose this request.

Given the number of defendants in this group (10 individuals and 1 organization), the number of hours spent and attorneys and paralegals working on the case is reasonable. The range of hourly rates is also reasonable for this case type and the Silicon Valley market.

The Individual and BUPTAAA Defendants' motion for $62,822.51 in fees and costs is accordingly GRANTED.

C. iTalk

iTalk seeks $139,578 in attorney fees. (Declaration of Michael E. Williams ("Williams Decl.") Mr. William's reduced billing rate for this matter is $1,380 per hour (his new client rate is $1,865 per hour), and associate Olivia Diab's rate for this matter is $680 per hour (her new client rate is $990 per hour). (Williams Decl., ¶ 5.) iTalk's team billed 147.10 hours in relation to the anti-SLAPP motion, with Mr. Williams billing 56.50 hours and Ms. Diab billing 90.60 hours. (*Id.*, ¶¶68.) According to iTalk's motion, "[t]he team spent approximately 36 hours analyzing Plaintiff's opposition, declarations and evidentiary objections and drafting the documents filed in reply to Plaintiff's opposition. . .[t]he remainder of the approximately 40 hours were spent discussing internally the claims and issues for the anti-SLAPP motion as well as case strategy between Mr. Willaims and Ms. Diab, discussing and educating the client on the grounds for the anti-SLAPP motion, communicating with the Plaintiff about

the anti-SLAPP motion, and preparing for and attending the hearing on the motion." (Opening Brief, p. 4.) Plaintiff opposes iTalk's motion, arguing the billing rates and amount of time spent are not reasonable, particularly when compared to the other defendants' fee requests. The Court agrees.

In particular, 40 hours spent discussing the case internally and with the client is excessive. The Court will thus reduce the number of hours to 107.10. The rates are also substantially higher than those charged by other firms regularly practicing in Santa Clara Superior Court—even in similarly situated business litigation disputes. Considering this fact, and the fact that iTalk went to its known counsel to assist it with this case, the Court will use a blended rate of $800 per hour for the iTalk team, and grant iTalk's motion for fees in the reduced amount of $85,680.