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

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

**DATE: June 11, 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 | 17CV313599 | Jeffrey Hutchins vs Safyre Solutions, Inc et al | **Order of Examination** (Alan Slater). No Proof of service on file. If there is no appearance, the matter will be ordered OFF CALENDAR. |
| LINE 2 | 19CV348624 | Long Gao et al vs Bethany Liou et al | **Order of Examination** (Bethany Lou). This matter was continued from April 30, 2024. Parties to appear unless mutually agreed otherwise. If no appearance, the matter will be ordered OFF CALENDAR |
| LINE 3 | 24CV433320 | Balboa Capital Corporation vs Daniel Reyes-Villa MD et al | **Order of Examination** (Daniel Reyes Villa). No Proof of service on file. If there is no appearance, the matter will be ordered OFF CALENDAR. |
| LINE 4 | 22CV408959 | FARMERS DIRECT PROPERTY AND CASUALTY INSURANCE COMPANY vs SUJAY DESAI | **Demurer.** Click on LINE 4 or scroll down for Tentative Ruling. |
| LINE 5 | 23CV424871 | LEVEL 5 SECURITY, INC. vs JULIE PUGA | **Demurrer**. Click on LINE 5 or scroll down for Tentative Ruling. |
| LINE 6 | 23CV428385 | Soulbrain CA, LLC et al vs Seung Pyo (Dominic) Lee et al | **Demurrer**. First Amended Complaint filed on May 29, 2024, rendering the demurrer MOOT. |

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**LAW AND MOTION TENTATIVE RULINGS**

| | | | |
|---|---|---|---|
| LINE 7 | 23CV428385 | Soulbrain CA, LLC et al vs Seung Pyo (Dominic) Lee et al | **Motion to Strike**. First Amended Complaint filed on May 29, 2024, rendering the motion to strike MOOT. |
| LINE 8 | 21CV376675 | NIEVES CADAOAS et al vs ARELLANO AND IBRAHIM LLC et al | **Motion to Compel (Discovery)**. The motion to compel is DENIED, without prejudice, as the motion was filed (1) when discovery was closed and (2) after the time to file discovery motions had passed. As the court permitted the re-opening of discovery on June 6, 2024, and pre-trial deadlines are now calculated from the new October 28, 2024 trial date, if the discovery dispute remains, this motion to compel may be re-filed. However, before doing so, the parties are ordered to meet and confer in-person regarding any discovery items in dispute.<br><br>The moving party is instructed to prepare the formal order after hearing. |
| LINE 9 | 23CV416108 | TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA vs LIBERTY INSURANCE CORPORATION et al | **Motion to Compel.** Counsel to appear. |

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**LAW AND MOTION TENTATIVE RULINGS**

| | | | |
|---|---|---|---|
| LINE 10 | 20CV364549 | Faramarz Kiani vs Tom McNeil | **Motion for Attorney's Fees and Costs.** Notice of hearing was given by Defendant on April 29, 2024. Motion is brought pursuant to Civil Code § 1717, following Defendant's successful Motion for Summary Judgment. No opposition was filed. A failure to oppose a motion may be deemed a consent to the granting of the motion. CRC Rule 8.54c. Failure to oppose a motion leads to the presumption that Plaintiff has no meritorious arguments. (See *Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal.App. 3d 481, 489.) Moving party meets his burden of proof. Good cause appearing, the Motion is GRANTED. Defendant is the "prevailing party" for the purposes of an award of attorney's fees under Civil Code § 1717. The Court determines that the attorney's fees are reasonable (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal. 4th 1084, *Ketchum v. Moses* (2001) 24 Cal. 4th 1122). Defendant is awarded $131, 490.00 attorney's fees and $935 in costs (per Memorandum of Costs filed March 14, 2024.)<br><br>Moving party to prepare the formal order after hearing. |

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**LAW AND MOTION TENTATIVE RULINGS**

| | | | |
|---|---|---|---|
| LINE 11 | 23CV426452 | Andrea Lara vs Patricio Sanchez | **Motion to Withdraw**. Motion of Attorney Malek H. Shraibati and BD&J, PC to be relieved as counsel for Plaintiff Andrea Lara. Notice of hearing was given to Plaintiff Andrea Lara via mail service on April 26, 2024 at Plaintiff's last known address. The complaint has not yet been served. No opposition was filed. A failure to oppose a motion may be deemed a consent to the granting of the motion. CRC Rule 8.54c. 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 parties have met their burden of proof. Good cause appearing, the Motion is GRANTED. The Order will take effect upon the filing and service of the executed order of this Court.<br><br>Moving parties to prepare the formal order after hearing, to include the upcoming Order to Show Cause October 3, 2024 hearing date and time. |

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**LAW AND MOTION TENTATIVE RULINGS**

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|---|---|---|---|
| LINE 12 | 23CV427484 | Capital One N.a. vs Tim Dao | **Motion to Deem Requests for Admission Admitted**. No opposition was filed. A failure to oppose a motion may be deemed a consent to the granting of the motion. CRC Rule 8.54c. Failure to oppose a motion leads to the presumption that Defendant client has no meritorious arguments. (See *Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal. App. 3d 481, 489.) Moving party meets its burden of proof. Good cause appearing, the Motion is GRANTED. Requests for Admission (Set One) served on Defendant Tim Dao on January 31, 2024 by Plaintiff, are deemed admitted against defendant Tim Dao.<br><br>Plaintiff shall prepare a formal order after hearing, that repeats the admissions to be admitted verbatim. |

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**LAW AND MOTION TENTATIVE RULINGS**

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|---|---|---|---|
| LINE 13 | 24CV437514 | Byldan Corporation, a California Corporation dba Clarum Homes vs ACCP, Inc. dba Aquascape et al | **Petition to Compel Arbitration**. Notice of hearing was given by Petitioner Byldan Corporation to all named Respondents. No opposition was filed, other than by Respondent Scarpa Specialty, Inc.— Petitioner subsequently filed a Request for Dismissal for this entity on June 4, 2024. A failure to oppose a motion may be deemed a consent to the granting of the motion. CRC Rule 8.54c. Failure to oppose a motion leads to the presumption that Respondent has no meritorious arguments. (See *Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal. App. 3d 481, 489.) Moving party meets its burden of proof. Good cause appearing, the Petition is GRANTED as to all Respondents, except Respondent Scarpa Specialty, Inc. The Respondents, other than Scarpa Specialty Inc., are compelled to binding arbitration in the JAMS arbitration proceeding currently pending, JAMS No. 5110000276. (Code Civ. Proc., §§1280 and 1281.2, *Slaught v. Bercomo Roofing* (1994) 25 Cal.App 4th 744, 748, Prime Contract ¶14, PGI Contract ¶ 2 (f) (ii) (c).) This matter is STAYED, pending the outcome of the binding arbitration and is set for Arbitration Status Review on January 9, 2025, at 10:30 a.m. in Department 18, regarding the status of the arbitration.<br><br>Moving party to prepare the formal order after hearing. |

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**LAW AND MOTION TENTATIVE RULINGS**

| | | | |
|---|---|---|---|
| LINE 14 | 23CV412119 | Susana Hernandez vs Alissa Fernandez et al | **Compromise of Minor's Claim**. No Proof of service on file for Petition for Approval of Compromise of Claim. The hearing of this Petition is continued to June 27, 2024 at 9 a.m. in Department 18 to allow Petitioner to file Proof of Service.<br><br>Moving party to prepare the formal order after hearing. |

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**LAW AND MOTION TENTATIVE RULINGS**

| | | | |
|---|---|---|---|
| LINE 15 | 23CV419273 | Christopher Minasi vs HYUNDAI MOTOR AMERICA, a California Corporation et al | **Motion to Compel Binding Arbitration**. There are valid agreements to arbitrate between the parties and the dispute in question falls within the scope of those arbitration agreements. (*Bruni v. Didion* (2008) 160 Cal. App. 4th 1272, 1283). The Court finds no procedural or substantive unconscionability. The terms of the arbitration provision are equally applied. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83). Defendants Hyundai Motor America and DGDG12, LLC. dba Capital Hyundai's motion to compel arbitration is GRANTED. (FAA, Code Civ. Proc., §§1280 et seq., *JSM Tuscany, LLC v. Superior Ct.* (2011) 193 Cal.App.4th 1222, 1239–40, Warranty (arbitration provision, pgs 14-16), Bluelink Connected Services Agreement).<br><br>The case is stayed pending the outcome of the arbitration. The June 27, 2024 Mediation Status Review Hearing is vacated and the matter will be set for Arbitration Status Review on January 9, 2025 at 10:30 a.m. in Department 18, regarding the status of the arbitration.<br><br>Defendants to prepare the formal order after hearing for lines 15, 16 and 17. |

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**LAW AND MOTION TENTATIVE RULINGS**

| | | | |
|---|---|---|---|
| LINE 16 | 23CV419273 | Christopher Minasi vs HYUNDAI MOTOR AMERICA, a California Corporation et al | **Motion to Compel (Discovery)**. Plaintiff's Motion to Compel deposition of Hyundai Motor America's PMK and request for production of documents is rendered MOOT, in this court, as a result of the Court's ruling on Defendants' Motion to Compel Arbitration. See LINE 15.<br><br>Defendants to incorporate this ruling into the formal order on Motion to Compel Arbitration. |
| LINE 17 | 23CV419273 | Christopher Minasi vs HYUNDAI MOTOR AMERICA, a California Corporation et al | **Motion to Compel (Discovery).** Plaintiff's Motion to Compel deposition of DGDG 12, LLC dba Capital Hyundai's PMK and request for production of documents is rendered MOOT, in this court, as a result of the Court's ruling on the Motion to Compel Arbitration. See LINE 15.<br><br>Defendants to incorporate this ruling into the formal order on Motion to Compel Arbitration. |
| LINE 18 | 23CV416108 | TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA vs LIBERTY INSURANCE CORPORATION et al | **Motion to Compel.** Counsel to appear. |
| LINE 19 | 23CV416108 | TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA vs LIBERTY INSURANCE CORPORATION et al | **Motion to Compel.** Counsel to appear. |

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**LAW AND MOTION TENTATIVE RULINGS**

| | | | |
|---|---|---|---|
| LINE 20 | 23CV416108 | TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA vs LIBERTY INSURANCE CORPORATION et al | **Motion to Stay Proceedings**. Counsel to appear. |
| LINE 21 | 23CV416108 | TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA vs LIBERTY INSURANCE CORPORATION et al | **Joinder to Motion to Compel.** Counsel to appear. |

**Calendar Line 4**
**Case Name:** *Farmers Direct Property and Casualty Insurance Company v. Sujay Desai, et al.*
**Case No.:** 22CV408959

Before the Court is the demurrer by cross-defendants Shawn Kelley, Troy Beasley, II, and Symone Beasley to first amended cross-complaint of Darren and Ginnette Gemoll. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

## I. Background

This subrogation action arises from fire damages sustained on December 25, 2020. (Complaint, ¶8.)

Plaintiff Farmers Direct Property and Casualty Insurance Company ("Plaintiff") is the subrogee under a policy of property insurance for insureds, Shawn Kelley and Troy Beasley ("Plaintiff's Insureds") covering 5284 Country Oak Court in San Jose ("Kelley Property") which was being rented by Plaintiff's Insureds at the time of the incident. (Complaint, ¶¶2 and 7.)

Defendant Sujay Desai ("Desai") was and is the neighbor to Plaintiff's Insureds at property located at 5290 County Oak Court in San Jose ("Desai Property"). (Complaint, ¶3.)

On December 5, 2020, Plaintiff's Insureds were at home when they smelled burning plastic. (Complaint, ¶9.) When Plaintiff's Insureds went outside to check, the neighbor came running over to inform them that the roof of the Kelley Property was on fire. (Complaint, ¶10.) The fire began as a result of embers from the Desai Property's fireplace which spread on to the wood shake roof of the Kelley Property. (Complaint, ¶11.)

Plaintiff incurred financial loss in paying for damages caused by the fire. (Complaint, ¶12.) The investigation determined that defendant Desai failed to properly control the fireplace and residues from it, causing them to spread and for the embers to cause the fire that spread and damaged Plaintiff's Insureds' property. (Complaint, ¶13.) A city of San Jose ordinance prohibits the use of solid/ wood burning fireplaces. (Complaint, ¶14.) Plaintiff contends defendant Desai was burning solid/ wood fuel at the time of the incident. (Complaint, ¶15.)

The incident caused extensive damage to the Kelley Property and resulted in expenses related to repair of the structure, replacement and cleaning of the contents of the dwelling incurred by Plaintiff's Insureds as well as other damages. (Complaint, ¶16.) Pursuant to their

policy of insurance with Plaintiff, Plaintiff's Insureds made a claim seeking indemnification and reimbursement of damages resulting from the incident. (Complaint, ¶17.) Plaintiff was required to and did pay its insureds in the amount of $73,384. (*Id.*) In consideration of Plaintiff's payments, Plaintiff's Insureds subrogated to Plaintiff all rights, claims and interests they may have against any person or entity that may be liable for causing the damages that resulted from the incident. (Complaint, ¶18.)

On December 21, 2022, Plaintiff filed a complaint against defendant Desai asserting causes of action for:

(1) Negligence

(2) Violation of Health & Safety Codes 13007 & 13008

(3) Trespass

On March 6, 2023, defendant Desai (presumably) filed a general denial to Plaintiff's complaint and also filed a Judicial Council form cross-complaint against Derren Gemoll, Ginnette Gemoll (collectively, "Gemolls"), and others asserting causes of action for:

(1) Indemnification

(2) Apportionment of Fault

(3) Declaratory Relief

On May 17, 2023, the Gemolls filed an answer to defendant/ cross-complainant Desai's cross-complaint.

On October 10, 2023, the Gemolls filed a Judicial Council form cross-complaint against cross-defendants Desai and Tam Nguyen ("Nguyen") which, like Desai's cross-complaint, asserts causes of action for:

(1) Indemnification

(2) Apportionment of Fault

(3) Declaratory Relief

On December 8, 2023, Plaintiff filed an amendment to its complaint substituting the Gemolls for Doe defendants.

On January 24, 2023, the Gemolls filed an answer to Plaintiff's amended complaint.

On March 14, 2024, based upon an order from the court allowing it, the Gemolls filed a Judicial Council form first amended cross complaint ("FAXC") against Desai, Nguyen, Shawn Kelley, Troy Beasley II, and Symone Beasley asserting the same three causes of action previously asserted in their original "cross-complaint."

On April 26, 2024, cross-defendants Shawn Kelley, Troy Beasley II, and Symone Beasley ("Moving Cross-Defendants") filed the motion now before the court, a demurrer to the Gemolls' FAXC.

**II. Moving Cross-Defendants' demurrer to the Gemolls' FAXC is OVERRULED.**

The Moving Cross-Defendants (including Symone Beasley) contend they are the Plaintiff's Insureds and that Plaintiff has filed a subrogation action against the Gemolls, among others, to recover for monies Plaintiff paid to its insureds.

The Moving Cross-Defendants argue that, as a subrogation action, Plaintiff stands in the Moving Cross-Defendants' shoes in filing the complaint. In demurring to the Gemolls' FAXC, Moving Cross-Defendants contend the Gemolls cannot seek indemnification, apportionment of fault, and declaratory relief against them because indemnity applies to joint tortfeasors and the Moving Cross-Defendants and Gemolls are not joint tortfeasors vis-à-vis Plaintiff. If the Gemolls are able to obtain indemnity against Moving Cross-Defendants, Moving Cross-Defendants claim this would essentially result in Plaintiff indemnifying itself.

In opposition, the Gemolls understand Moving Cross-Defendants to argue for application of the anti-subrogation rule:

> "While the insurer by subrogation steps into the shoes of the insured, that substitute position is qualified by a number of equitable principles. For example, an insurer cannot bring a subrogation action against its own insured. … [¶] The most restrictive principle is the doctrine of superior equities, which prevents an insurer from recovering against a party whose equities are equal or superior to those of the insurer." (*State Farm*, *supra*, 143 Cal.App.4th at pp. 1106–1107.)

(*Western Heritage Ins. Co. v. Frances Todd, Inc.* (2019) 33 Cal.App.5th 976, 984 (*Western*).)

In *Western*, the court gives an example of an application of the anti-subrogation rule. "The rule adopted in California precludes a subrogation action by the fire insurance company

of a lessor against a lessee where a lessee's negligence causes a fire, but the policy is intended to benefit the lessee. In such cases, the lessee is treated as an insured, despite the lessee not being a named insured on the policy. Because the insurance company could not seek subrogation against its own named insured (the lessor), it cannot seek subrogation against the lessee." (*Western*, *supra*, 33 Cal.App.5th at p. 987.)

Moving Cross-Defendants, however, offer no analogous legal authority supporting application of the anti-subrogation rule here. Moving Cross-Defendants' suggestion that the Gemolls should have raised any new matter or affirmative defense in their answer to Plaintiff's amended complaint rather than asserting cross-claims is not a sufficient basis to sustain a demurrer.

Consequently, Moving Cross-Defendants' demurrer to cross-complainant Gemolls' FAXC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] is OVERRULED.

The Court will prepare the formal order.

**- oo0oo -**

**Calendar Line 5**
**Case Name:** *Level 5 Security, Inc. v. Julie Puga*
**Case No.:** 23CV424871

Before the court is the demurrer to first-amended cross-complaint by cross-defendants Troy Carson and Carol Stensrud. Pursuant to California Rule of Court 3.1308, the court issues its tentative ruling as follows.

## I. Background.

In this action for declaratory relief, plaintiff Level 5 Security, Inc. ("Plaintiff") alleges that on May 15, 2022, an organizational meeting was held where Carol Stensrud ("Stensrud") and defendant Julie Puga ("Puga") were elected to Plaintiff's Board of Directors and as officers of the corporation. (Complaint, ¶¶2 – 3.) Among other things, Stensrud made a significant capital contribution and loan to Plaintiff in exchange for 80% ownership of the company. (Complaint, ¶3.)

Plaintiff corporation later prepared a written "Action by Unanimous Written Consent of the Board of Directors of Level 5 Security, Inc.," to formally document actions taken at the May 15, 2022 organizational meeting. (Complaint, ¶7.) The Unanimous Written Consent adopted new bylaws, documented a $207,000 loan from Stensrud, authorized the sale of shares pursuant to written subscription agreements. (Complaint, ¶¶8 – 10.)

As of April 30, 2023, only Stensrud paid money for the purchase of shares. (Complaint, ¶14.) Plaintiff corporation executed and delivered a share certificate to Stensrud for 800,000 shares reflecting Stensrud's payment of $8,000. (*Id.*) Although it was discussed that defendant Puga would be a 20% owner of Plaintiff corporation, defendant Puga did not pay $2,000 for 20% of the shares of Plaintiff corporation. (Complaint, ¶¶15 – 16.)

On September 11, 2023, Stensrud, the sole shareholder of Plaintiff corporation, took action to protect Plaintiff corporation from improper financial transactions by defendant Puga, removing Puga as a director and officer and terminating Puga's employment. (Complaint, ¶17.)

On October 20, 2023, Plaintiff corporation filed this action against defendant Puga asserting a single cause of action for declaratory relief seeking a judicial declaration that the

Subscription Agreement is valid; defendant Puga did not purchase shares of the Plaintiff corporation; and defendant Puga is not a shareholder of the Plaintiff corporation.

On December 14, 2023, defendant Puga filed an answer to Plaintiff's complaint and also filed a cross-complaint against Troy Carson, Stensrud, and Plaintiff corporation asserting claims of (1) fraud; and (2) breach of fiduciary duty.

On February 5, 2024, Plaintiff/ cross-defendant corporation filed a demurrer to defendant/ cross-complainant Puga's cross-complaint which prompted Puga to file the now operative first amended cross-complaint ("FAXC") on February 9, 2024.

The FAXC alleges Puga's son, Bryce Fernandez ("Fernandez"), formed Plaintiff corporation on January 27, 2022 at the urging of cross-defendant Troy Carson ("Carson"). (FAXC, ¶9.) Carson had worked in private security and offered to help Fernandez get a private security company up and running. (*Id.*) When Plaintiff corporation was founded, Fernandez owned 100% of its shares. (FAXC, ¶10.)

In the spring of 2022, Carson advised Puga that it would be beneficial for business if she were involved as an owner in order to be eligible for certain contracts. (FAXC, ¶11.) Fernandez agreed and transferred sixty percent of his shares to Puga. (*Id.*)

In May 2022, Carson advised Puga of an opportunity for Plaintiff to purchase an existing security company, Griffin Protective Services, Inc. ("Griffin"). (FAXC, ¶13.) To fund the purchase of Griffin, Carson suggested Plaintiff get a loan from Stensrud. (*Id.*) Stensrud and [Plaintiff] entered into a loan agreement for the purchase of Griffin and Puga agreed to be personally liable for the loan. (FAXC, ¶14.)

Over the remainder of 2022, Puga continued working as an owner of Plaintiff including, among other things, contributing $15,000 in capital in an effort to obtain business funding for Plaintiff from a bank. (FAXC, ¶15.)

In February 2023, Plaintiff (by Puga as owner and officer) signed a new lease with Puga acting as guarantor. (FAXC, ¶16.)

In late February/ early March 2023, Carson advised Puga that it would be best for Fernandez to step away from Plaintiff corporation and for Stensrud to become an owner. (FAXC, ¶17.) Puga, Stensrud, Carson, and Fernandez agreed Fernandez would step away from

Plaintiff corporation and Stensrud would assume eighty percent ownership and Puga would own 20% of Plaintiff corporation. (FAXC, ¶18.) Carson assumed the role of Operations Manager. (*Id.*) The loan previously issued to Puga would be assumed by Plaintiff corporation in consideration for Stensrud's ownership interest. (*Id.*)

In March 2023, Puga and Stensrud agreed to have the bylaws of Plaintiff corporation revised and amended. (FAXC, ¶20.) The most discussed and negotiated provision was for protection of a minority shareholder because Puga held only 20% of Plaintiff's stock. (*Id.*) Puga and Stensrud reached an agreement on the amended bylaws in late April 2023. (FAXC, ¶22.)

Despite shares of Plaintiff corporation having already issued, Stensrud had a Subscription agreement prepared which purportedly required Puga and Stensrud to contribute money to purchase shares of Plaintiff corporation which they already owned. (FAXC, ¶23.) Since Puga already owned her shares, Puga did not provide the amount requested by Stensrud. (*Id.*)

In September 2023, Stensrud and Carson terminated Puga's employment from Plaintiff corporation and claimed she held no ownership. (FAXC, ¶24.)

Carson intentionally concealed from Puga the fact that he was a convicted felon and pursuant to a stipulated order, Carson agreed he would not work for, have authority to act on behalf of, or have control over any private security company. (FAXC, ¶25.) Carson advised Puga that the money Stensrud loaned to Plaintiff corporation to purchase Griffin was his but he had to run it through Stensrud to conceal it from authorities due to a $1.9 million restitution judgment against him. (*Id.*) Carson and Stensrud made representations to Puga that they wanted her to be a part of Plaintiff corporation causing Puga to invest her own funds into the company and work at below market compensation. (*Id.*) At Carson's direction, Puga agreed to take a below market salary and no other distributions from Plaintiff corporation despite being an owner while Carson and Stensrud routinely took money from Plaintiff corporation for personal expenses (including the purchase of Carson's personal vehicle) without documentation. (*Id.*) Carson and Stensrud falsified tax records for 2022. (*Id.*)

Puga's cross-complaint asserts causes of action against Carson and Stensrud for:

(1) Fraud [against cross-defendants Carson and Stensrud]

(2) Breach of fiduciary duty [against cross-defendant Stensrud]

On March 14, 2024, cross-defendants Carson and Stensrud filed the motion now before the court, a demurrer to Puga's FAXC.

The court (Hon. Takaichi) heard this matter on April 23, 2024. At the hearing, cross-defendants pointed out to the court that cross-complainants filed untimely opposition and failed to serve cross-defendants with the opposition. The court continued hearing on the matter to June 11, 2024. Thereafter, on April 29, 2024, the court proceeded to issue an order ruling on the merits of cross-defendants' demurrer.

This court deems Hon. Takaichi's order to be entered in error and will vacate his order filed April 29, 2024. This court has independently reviewed the motion papers including the reply papers filed by cross-defendants on June 4, 2024. After doing so, the court hereby adopts the same ruling issued by Judge Takaichi on April 29, 2024.

**II. Cross-defendants Carson and Stensrud's demurrer to the first cause of action [fraud] of cross-complainant Puga's FAXC is OVERRULED.**

"The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638 (*Lazar*); see also CACI, No. 1900.)

"Fraud actions are subject to strict requirements of particularity in pleading. … Accordingly, the rule is everywhere followed that fraud must be specifically pleaded." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216.) "The pleading should be sufficient to enable the court to determine whether, on the facts pleaded, there is any foundation, prima facie at least, for the charge of fraud." (*Commonwealth Mortgage Assurance Co. v. Superior Court* (1989) 211 Cal.App.3d 508, 518.) The *Lazar* court did not comment on how these particular allegations met the requirement of pleading with specificity in a fraud action, but the court did say that "this particularity requirement necessitates pleading facts which 'show how, when, where, to whom, and by what means the

representations were tendered.' A plaintiff's burden in asserting a claim against a corporate employer is even greater. In such a case, the plaintiff must 'allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." (*Lazar*, *supra*, 12 Cal.4th at p. 645.)

Though the particularity requirement generally mandates that a plaintiff plead facts establishing the aforementioned items, it is much more difficult to apply this rule in a case of non-disclosure because, as one court explained, "[h]ow does one show 'how' and 'by what means' something didn't happen, or 'when' it never happened, or 'where' it never happened?" (*Alfaro v. Community Housing Imp. System & Planning Ass'n., Inc.* (2009) 171 Cal.App.4th 1356, 1384.) One of the purposes of the specificity requirement is to provide "notice to the defendant, to furnish the defendant with certain definite charged which can be intelligently met." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216, internal quotations omitted.) However, when "it appears from the nature of the allegations that the defendant must necessarily possess full information concerning the facts of the controversy, even under strict rules of common law pleading, one of the canons was that less particularity is required when the facts lie more in the knowledge of the opposite party …." (*Id.*, at p. 217.)

Such is the circumstance here. As cross-defendants note, Puga's first cause of action for fraud includes an allegation that, "CARSON and STENSRUD repeatedly made material statements to Puga … [including] … that CARSON could legally participate in LEVEL 5." (FAXC, ¶27(a).) The court does not read this allegation in isolation but rather in conjunction with Puga's earlier allegation that, "CARSON intentionally hid this from PUGA and worked at LEVEL 5 for more than year [sic] in direct violation of this Stipulation [i.e., he would not work for, have authority to act on behalf of, or have control over any private security company flowing from Carson's felony conviction for crimes involving moral turpitude.]" (FAXC, ¶25.) Although Puga would have been clearer by denoting such as "concealment" rather than affirmative "misrepresentations," it is sufficiently clear to this court that Puga is alleging

concealment. As such, the court is inclined to relax the specificity normally needed in pleading affirmative fraud.

Puga's first cause of action does also allege affirmative misrepresentations for which specificity would be required. However, a defendant (or cross-defendant) cannot demur to a portion of a cause of action. (See *Financial Corp. of America v. Wilburn* (1987) 189 Cal.App.3d 764, 778—"[A] defendant cannot demur generally to part of a cause of action;" see also *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682—"A demurrer does not lie to a portion of a cause of action;" *Pointe San Diego Residential Community, L.P. v. Procopio, Cory, Hargreaves & Savitch, LLP* (2011) 195 Cal.App.4th 265, 274—"A demurrer challenges a cause of action and cannot be used to attack a portion of a cause of action.")

Consequently, cross-defendants' Carson and Stensrud's demurrer to the first cause of action in cross-complainant Puga's FAXC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for fraud is OVERRULED.

**III. Cross-defendant Stensrud's demurrer to the second cause of action [breach of fiduciary duty] of cross-complainant Puga's FAXC is OVERRULED.**

In *Stephenson v. Drever* (1997) 16 Cal.4th 1167, 1178 (*Stephenson*), the court wrote, "The rule of corporation law and of equity invoked is well settled and has been often applied. The majority has the right to control; but when it does so, it occupies a fiduciary relation toward the minority, as much so as the corporation itself or its officers and directors." The *Stephenson* court went on to explain that, under certain circumstances,

> the minority shareholders could state a cause of action for breach of fiduciary duty against the majority shareholders. We rejected the earlier rule that majority shareholders owed no fiduciary duty to minority shareholders absent reliance on inside information. Instead, we declared that "Majority shareholders may not use their power to control corporate activities to benefit themselves alone or in a manner detrimental to the minority. Any use to which they put the corporation or their power to control the corporation must benefit all shareholders proportionately and must not conflict with the proper conduct of

> the corporation's business." We adopted "the comprehensive rule of good faith and inherent fairness to the minority in any transaction where control of the corporation is material," and declared broadly that "[t]he rule applies alike to officers, directors, and controlling shareholders in the exercise of powers that are theirs by virtue of their position and to transactions wherein controlling shareholders seek to gain an advantage in the sale or transfer or use of their controlling block of shares."

(*Id.*; internal citations omitted.)

In demurring, Stensrud contends she owed no fiduciary duty to Puga who was merely an employee of Plaintiff corporation. While Plaintiff's complaint alleges Puga no longer holds any ownership in the company, the court is confined to the operative pleading and in Puga's FAXC, Puga alleges that she is a minority 20% shareholder of the company. For purposes of a demurrer, the court accepts this allegation to be true.

Accordingly, cross-defendant Stensrud's demurrer to the second cause of action in cross-complainant Puga's FAXC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for breach of fiduciary duty is OVERRULED.

The Court will prepare the formal order.

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