TENTATIVE RULINGS
LAW & MOTION CALENDAR
Friday, February 24, 2023, 2:30 p.m.
Courtroom 17 –Hon. Bradford DeMeo
3035 Cleveland Avenue, Santa Rosa

PLEASE NOTE: In accordance with the Order of the Presiding Judge, a party or representative of a party may appear in Department 17 in person or remotely by Zoom, a web conferencing platform. Whether a party or their representative will be appearing in person or by Zoom must be part of the notification given to the Court and other parties as stated below.

CourtCall is not permitted for this calendar.

If the tentative ruling is accepted, no appearance is necessary via Zoom unless otherwise indicated.

TO JOIN ZOOM ONLINE:

D17 – Law & Motion
Meeting ID: 895 5887 8508
Passcode: 062178
https://us02web.zoom.us/j/89558878508?pwd=L2MySDFXWEtMa1JsdGUxUDFDOVNyZz09

TO JOIN ZOOM BY PHONE:
By Phone (same meeting ID and password as listed for each calendar):
+1 669 900 6833 US (San Jose)

The following tentative rulings will become the ruling of the Court unless a party desires to be heard. If you desire to appear and present oral argument as to any motion, **YOU MUST NOTIFY** Judge DeMeo's Judicial Assistant by telephone at **(707) 521-6725**, and all other opposing parties of your intent to appear, and **whether that appearance is in person or via Zoom**, by ***4:00 p.m. the court day immediately preceding the day of the hearing.***

1. MCV-253625, Looney v Kapetanios

Motion to Compel Answers to Post-Judgment Discovery and for Award of Monetary Sanctions DENIED without prejudice because the motion involves, and was served on, parties who are not parties to this action, as explained below.

Facts and History

Plaintiff complains that Defendants, operating a business know as On The Rocks Cocktails, or Mr. D's Cocktail Lounge, ("the Business") in Chula Vista, California, entered into a written contract with Plaintiff's assignor, Youngs Market Company ("Youngs") to purchase alcoholic beverages but that although Youngs performed, Defendants breached the contract by failing to pay the amount owed. Plaintiff filed this action to collect the debt, allegedly $9,781.86, plus interest.

Plaintiff obtained a default against Defendants on January 5, 2021, followed by a default judgment on January 8, 2021.

Motion

Plaintiff filed this motion to obtain post-judgment discovery from My Bar, LLC ("My Bar") and Wayne Brenckle ("Brenckle"), neither of whom is a party to this action. Plaintiff also filed proof of service on My Bar and Brenckle, which does not show service on any party to this action. As far as the court is able to determine, Plaintiff either filed this motion in the wrong case or made an error in naming and serving the parties. The court **DENIES** the motion without prejudice to Plaintiff bringing such a motion regarding the correct parties in the correct case.

2. MCV-254971, California Casualty Indemnity Exchange v Descalso

Motion for Order Vacating Entry of Dismissal for Defendant Megan Descalso Only GRANTED.

Facts and History

Plaintiff filed this action to recover from Defendants money which it paid to its insured as a result of a loss which it claims Defendants negligently caused. Specifically, it complains that Defendant Megan Descalso ("Megan") negligently caused an automobile accident on March 27, 2018 while driving a vehicle belonging to Defendant Marguerita Descalso ("Marguerita") with the latter's permission, and in the accident caused injuries to Plaintiff's insured. Plaintiff paid the losses for its insured under an applicable uninsured motorist coverage and now seeks to recover that loss from Defendants.

Plaintiff filed a proof of service for service of the summons and complaint upon Megan, showing substituted service as of July 2, 2021. In August 2021, Plaintiff filed proof of failed attempted service on Marguerita.

Defendants failed to appear so Plaintiff obtained the default of Megan on October 27, 2021. They eventually requested the dismissal of the claims against Marguerita, without prejudice, and the court entered the dismissal on June 8, 2022.

At the case management conference ("CMC") of April 28, 2022, only Plaintiff's attorney appeared and discussed an order to show cause ("OSC") for entry of default judgment against

Megan. The court set the matter for a CMC on June 9, 2022 regarding the status and continuing treatment of Plaintiff's insured, and for entry of default judgment.

Prior to the next CMC of June 9, 2022, the court issued and served a notice to appear and published a tentative ruling that the court would dismiss the case unless a party requested a hearing. No party requested an appearance or appeared at the CMC so the court dismissed the matter without prejudice.

Motion

Plaintiff moves the court to vacate the dismissal ordered after the June 9, 2022 CMC, with respect to Megan only, based on Code of Civil Procedure ("CCP") section 473. It argues that the dismissal was the result of mistake, inadvertence, surprise, or neglect of counsel.

Service

There is a single proof of service showing service of the notice of the motion and the hearing for this motion only, on both Defendants. No proof of service shows service of the other moving papers, the memorandum or declaration. However, service on a party who has not yet appeared in an action is ordinarily unnecessary. CCP sections 1010, 1014. Similarly, service on defaulted defendants is ordinarily not required absent a change or increase the nature of the judgment which may be entered against them. See CCP section 1010; *Turner v. Allen* (1961) 189 Cal.App.2d 753, 758; *Mackie v. Mackie* (1960) 186 Cal.App.2d 825, 830.

The court therefore finds that the failure to serve all of the moving papers in this motion does not prevent the court from hearing or granting this motion.

Substantive Analysis

CCP §473(b) allows plaintiffs and defendants to set aside dismissals or defaults. This motion must normally be made within a reasonable time, not to exceed 6 months from the date the order was entered. CCP §473(b). Aside from a default where defendant fails to answer in time, a party may move to set aside the order that is the "procedural equivalent of a default," and which deprives a party of the party's day in court. *Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 618. It therefore applies to dismissal for failure attend a hearing or to oppose a motion to dismiss based on failure to prosecute. *Graham v. Beers* (1994) 30 Cal.App.4th 1656, 1661; *Peltier v. McCloud River R.R.Co.* (1995) 34 Cal.App.4th 1809, 1817-1819.

CCP section 473(b) states that "the court *shall*, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, or neglect, vacate" any resulting default or, default judgment, or dismissal. Emphasis added. The provision is clear that this is mandatory "unless the court finds that the default or dismissal was not in fact caused by

the attorney's mistake, inadvertence, surprise, or neglect." Ibid. Relief from default may not be conditional on payment of the fees, costs, or sanctions. CCP section 473(c)(2).

The attorney's neglect, as the statute indicates, need not be excusable. *Billings v. Health Plan of America* (1990) 225 Cal.App.3d 250, 256. In fact, the court is not concerned with the reasons for the attorney's error. *Ibid*. This rule also applies to orders "equivalent" to a default where, for example, a plaintiff seeks to set aside a dismissal. *Graham v. Beers* (1994) 30 Cal.App.4th 1656, 1660.

Plaintiff provides a declaration of its attorney stating that he failed to call the court in time to request an appearance for the CMC at which the court dismissed the case. He explains that he called at about 4:00 p.m. only to be told that he needed to call by 3:30 p.m. He adds that had he called in time and thus been allowed to appear, he would have explained to the court that Plaintiff was still waiting for its insured's treatment to progress in order to be certain of the amount of damages, an issue which had been presented at the prior CMC when Plaintiff explained that the insured was still undergoing treatment so it needed time to verify the damages.

Based on the attorney affidavit of fault, the court GRANTS the motion.

Conclusion

The court **GRANTS** the motion. The prevailing party shall prepare and serve a proposed order consistent with this tentative ruling within five days of the date set for argument of this matter. Opposing counsel shall inform the preparing counsel of objections as to form, if any, or whether the form of order is approved, within five days of receipt of the proposed order. The preparing party shall submit the proposed order and any objections to the court in accordance with California Rules of Court, Rule 3.1312.

3. SCV-264956, Garcia v Ford Motor Company

Motion for Summary Judgment or, in the Alternative, for Summary Adjudication DENIED in full.

Facts and History

Plaintiff complains that on June 21, 2016 she purchased a 2016 Ford Explorer ("the Vehicle") for which Defendant provided warranties ("the Warranties") but the Vehicle was defective. Plaintiff brought the Vehicle for maintenance or repair but Defendant failed to cure the defects or replace the Vehicle. Plaintiff asserts that Defendant's conduct violated the Song-Beverly Consumer Warranty Act ("Song-Beverly") is at Civil Code ("CC") section 1790, et seq., and that Defendant knew of the defects and its failure to comply with duties, yet intentionally failed to do so. Plaintiff identifies five causes of action in her complaint: 1) Violation of CC section 1793.2(d); 2) Violation of CC section 1793.2(b); 3) Violation of CC section 1793.2(a)(3); 4) Breach of Express Written Warranty in Violation of CC section 1791.2(a); and 5) Breach of Implied Warranty of Merchantability in Violation of CC section 1791.1.

At the original hearing on Defendant's Motion for Summary Judgment or, in the Alternative, for Summary Adjudication on November 16, 2022, the court continued the motion to February 24, 2023 in order to allow Plaintiff, who had filed an opposition brief but no separate statement, to file a separate statement in opposition. It directed Plaintiff to file the separate statement by January 25, 2023 and Defendant to file updated reply papers by February 1, 2023. Plaintiff filed her separate statement in opposition on January 24, 2023.

Motion

Defendant moves the court for summary judgment or summary adjudication against Plaintiff's claims. For summary adjudication, it presents five issues, each one purporting to dispose of one of Plaintiff's five identified causes of action. For the first cause of action, it argues that Plaintiff cannot establish that it failed to repair the alleged defects after a reasonable number of attempts. For the second cause of action, it asserts that the Vehicle was out of service for only nine days and Plaintiff has no evidence of damages for the repairs related to the alleged defects. Regarding the third cause of action, Defendant argues that Plaintiff never asked for service literature or about replacement parts. For the fourth cause of action, Defendant asserts that the applicable New Vehicle Limited Warranty expired before any relevant repair presentations and because Plaintiff cannot establish that Defendant failed to repair defects after a reasonable number of attempts. Finally, as to the fifth cause of action, it argues that no alleged defect existed or manifested during the one-year implied warranty and because the Vehicle was never unfit for its ordinary use of driving.

Requests for Judicial Notice

Defendant requests judicial notice of the complaint in this action. This is judicially noticeable although the court may not judicially notice the truth of assertions made therein. The court GRANTS the request as to Ex. A.

Defendant also requests judicial notice of a document which it claims is its 3-year/36,000 New Vehicle Limited Warranty ("NVLW") as Ex. B. It offers no basis for judicially noticing this document and absent further explanation or context the court does not readily ascertain one. However, Plaintiff raises no objection to the document or judicial notice thereof and, in fact, admits Defendant's representation of the terms of the warranty in relying on this document, admitting that the terms are in fact as set forth in this document. In this context, absent objection by Plaintiff, the court will GRANT the request as to this exhibit as something not reasonably subject to dispute and capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy under Evid. Code section 452(h).

In its reply papers, Defendant requests judicial notice of this court's order of November 16, 2022 continuing the hearing on this motion, and copies of court orders in two separate decisions from the United states District Court for the Central District of California. These documents are judicially noticeable. The court grants the request.

Objections

Defendant in its reply objects to portions of the declaration of Plaintiff's attorney, Joshua Fennell ("Fennell"). The court sustains objections 1-10, 12-13 on the basis that on the face of the statements, which purport to describe Plaintiff's knowledge and experiences prior to engaging Fennell and filing this action, Fennell lacks personal knowledge and the statements include inadmissible hearsay. Nonetheless, the court notes that the information to which Defendant objects is largely repeated in Plaintiff's own declaration and that the information is not necessary to establishing any of the facts which Plaintiff presents. The objections thus have no effect on the outcome of this motion. The court overrules the remaining objections as unpersuasive.

Defendant objects to statements in the declaration of Plaintiff's expert, Randall Bounds, who states to what he is prepared to testify. Defendant is persuasive that the opinions lack any explanation whatsoever and are thus improper for demonstrating the substance of those opinions. However, the evidence in fact only states to what the expert is prepared to testify and to that extent the statements are not objectionable. The court notes that the statement sin the declaration do not set forth the underlying opinions, only that the expert is prepared to make those opinions. The court overrules these objections.

Defendant also objects to portions of Plaintiff's own declaration. These objections are unpersuasive as Plaintiff clearly has personal knowledge of the information and experiences, as well as what the documents from Defendant's repair facilities state, and the statements include no inadmissible hearsay. The court overrules these objections.

Separate Statement and Facts

Defendant in its separate statement sets forth 35 facts in the first issue and repeats some of these by reference in each succeeding issue. Plaintiff admits that facts 1, 5, 10, 12, 13, 16, 18, 20-21, 23, 26, 27, and 30 are undisputed. These undisputed facts show 1) Plaintiff bought the Vehicle, a 2016 Ford Explorer, on June 21, 2016; 5) Plaintiff claims that the Vehicle suffered from unrepaired nonconformities of "engine and infotainment defects"; 10) at her first repair visit on June 18, 2018, Plaintiff reported that the radio dash screen would go black and flash on an off intermittently or when the front parking camera was in use; 12) the repair order for June 18, 2018 states that technicians completed a visual inspection, check for a technical service bulletin ("T"B") and special service message ("SSM") but found none, checked for diagnostic troubles codes ("Codes") but found none, performed a network test which passed, were unable to duplicate the reported dahs problem, found all systems operating, found no problem, and completed repairs by June 27, 2018; 13) Plaintiff next brought the Vehicle for repair on February 19, 2019; 16) Plaintiff filed this action on August 9, 2019; 18) Plaintiff brought the Vehicle regarding a smell of exhaust on October 14, 2019 but a technician test drove it and was unable to verify Plaintiff's concerns; 20) the technician verified that there was no exhaust smell in the Vehicle; 21) Plaintiff reported again on October 29, 2019 that she smelled an exhaust leak; 23) on November 25, 2019, Plaintiff reported that she still smelled the exhaust leak but only at "certain times"; 26) Plaintiff never asked for service literature or about replacement parts; 27) Plaintiff is not aware of a delay to repairs because parts were not available; and 30) Plaintiff is not seeking recovery for insurance-related costs or premiums.

Plaintiff admits that facts 2-4, 7-9, 14, 19, 28, are undisputed except to the extent that she claims that Defendant has omitted certain terms or details. Defendant establishes in fact 2 that the Vehicle included Defendant's 3-year/36,000 New Vehicle Limited Warranty ("NVLW"), the document noted above as Defendant's Exhibit B to the request for judicial notice. Plaintiff states that she does not dispute this but shows that the Vehicle also included Defendant's 5-year/60,000 mile Powertrain Warranty ("PW"), as set forth in Garcia Dec., Ex.B, page 8. In fact 3, Defendant shows that the NVLW provides that Defendant "will repair, replace, or adjust all part on [the] vehicle that malfunction or fail during normal use during the applicable coverage period due to a manufacturing defect in factory-supplied materials or factory workmanship." Plaintiff in response admits this but adds that the PW also states

> "that vehicle's Powertrain components are covered for five years or 60,000 miles, whichever occurs first. The extended coverage applies to the **Engine:** all internal lubricated parts, cylinder block, cylinder heads, electrical fuel pump, powertrain control module, engine mounts, flywheel, injection pump, manifold (exhaust and intake), manifold bolts, oil pan, oil pump, seals and gaskets, engine thermostat, engine thermostat housing, timing chain cover, timing chain (gears or belt), turbocharger/supercharger unit, valve covers, water pump; **Transmission:** all internal parts, clutch cover, seals and gaskets, torque converter, transfer case (including all internal parts), transmission case, transmission mounts."

This language in the PW is included in Plaintiff's Ex.2, at pages 10-11. In fact 4, Defendant shows that Plaintiff also bought an Extended Service Plan ("ESP"), and Plaintiff in response admits this but adds that this was for maintenance. In fact 7, Defendant shows that Plaintiff first reported problems on June 18, 2018, when she reported that the Vehicle felt sluggish and lagged on acceleration and she could not hear the turbo anymore. Plaintiff admits this but adds that she also complained that she smelled a raw fuel odor and that the Vehicle was making a clunking noise. In fact 8, Defendant shows that the technicians found signs of rodent damage to wiring and other components. Plaintiff does not dispute this but contends that the technicians also found Code P0234 related to high boost pressure. In fact 9, Defendant shows that the repairs on the Vehicle were completed on June 27, 2018, and Plaintiff picked up that day. Plaintiff admits this but the parties disagree on whether this amount to 9 or 10 days before Plaintiff picked up the Vehicle. In fact 14, Defendant shows that by the time Plaintiff presented the Vehicle for repair on February 19, 2019, it had 36,725 miles on the odometer and was no longer covered by the NVLW. Plaintiff admits this but shows that the PW still covered the Vehicle at that time with respect to engine and transmission components. In fact 19, Defendant shows that pursuant to Technical Service Bulletin 17-0044 ("TSB 17-0044"), a technician at the repair visit on October 14, 2019 inspected, tested, and sealed seams in the Vehicle. Plaintiff admits this but adds that TSB 17-0044 specifically notes that such vehicles may exhibit an exhaust odor in the vehicle establishes protocols for addressing this. Defendant in fact 28 shows that Plaintiff incurred no expenses for rental cars, ride-sharing services, or towing during the period when the Vehicle was not working properly. Again, Plaintiff does not dispute this but adds that she incurred expenses for payment and registration.

Defendant's remaining facts Plaintiff claims to be disputed. In fact 6, Defendant demonstrates that Plaintiff in her deposition complained of 3 issues with the Vehicle: an acceleration problem,

the infotainment screen going blank, and a smell which described as "For me it was like a propane smell." Plaintiff shows that she actually complained of a "raw fuel odor" or "fuel smell" or "an exhaust leak smell," as reflected in her declaration and documents from the service facilities, and that she also complained that the vehicle was shaking and she could not control heat or radio. Defendant in fact 11 claims that the problem of the dash screen going blank or flashing on and off was not present when Plaintiff brought the Vehicle in on June 18, 2018, but the cited evidence does not establish that. It only shows that the technician wrote upon inspection that the technician could not duplicate the problem. Defendant in fact 15 claims that the ESP covered the work on the infotainment system and screen as of the February 19, 2019 visit instead of any warranty, but the evidence does not show this. It merely shows that employees of the service dealer, in looking at the service records, stated that repairs at that time were made under the ESP. They do not state what the ESP covered or that it applied to the screen system. In fact 17, Defendant claims that Plaintiff did not complain of a fuel or propane smell until the October 14, 2019 repair visit, after the filing of this after and after expiration of the NVLW. However, the evidence does not support this since it only shows that she did complain of this smell in October 2019, but fails to show that she did not complaint of it earlier and in fact the evidence which Defendant cites at Kemnitz Depo 127, MacLear Dec., Ex.A, shows that Plaintiff did complain of the fuel odor in June 2018. Plaintiff also shows in response that she complained of the fuel odor in June 2018. In fact 22, Defendant shows that technicians inspected and road tested the Vehicle in October 2019 but could not verify the exhaust smell but Plaintiff adds that a technician found that the right catalytic converter was cracked so replaced it and transferred O2 sensors. In fact 24, Defendant shows that technicians tested the Vehicle on 3 occasions and initially were unable to detect the exhaust odor but after Plaintiff to the Vehicle in for repair on November 25, 2019, they found a slight gear oil smell, so replaced the power transfer unit, vent tube, and related parts before verifying that an odor was no longer present. Plaintiff in response shows that the technician also found a clunking sound in reverse, there was amber fluid on the transmission case, and the PTU was locking up while venting gear oil. The report referred to SSM 47993 for PTU venting, noise, and smell. Defendant in fact 25 shows that by her March 28, 2022 deposition, Plaintiff could no longer smell the odor but Plaintiff adds that she testified that her son could smell it and asked her to open the window. In fact 29, Defendant shows that Plaintiff herself does not know if the Vehicle is worth less than it would be because of the problems. Plaintiff responds that her expert is prepared to testify that the engine and infotainment defects substantially impair the value. Defendant at fact 31 shows that in her deposition, when asked if she felt that Defendant "honored its warranty obligations to repair any problems that arose during the warranty period," Plaintiff testified "Yes." Plaintiff responds by pointing out that she also testified at the deposition that she still doesn't think that the Vehicle is safe and she's not comfortable driving it a long distance because she doesn't have faith in it. Defendants claims in fact 32 that Plaintiff testified that she had been able to drive it where she needed to go but the evidence does not support this. The evidence shows that Defendant's attorney asked her how and where she used the Vehicle in general for daily usage. The attorney at the cited testimony did not ask, and Plaintiff did not testify, that she had been able to use the Vehicle for all her needs and Plaintiff in fact did not even testify as to whether or how well she could use the Vehicle for the needs discussed. Moreover, as noted above in fact 31, Plaintiff testified that she would avoid using the Vehicle for long drives out of fear and Plaintiff also shows that she could not use the Vehicle during the times when it needed to be repaired. However, in facts 33-34, Defendant shows that Plaintiff testified that she had used the Vehicle

repeatedly for her daily needs and also took it on two long drives to Las Vegas, two drives to Los Angeles, and three drives to Lake Tahoe and she had no problems on those trips. Although Plaintiff could not remember when these trips were, she testified that the trips were all at least two years earlier. Plaintiff in response demonstrates again that her expert will testify that Defendant nonetheless failed to repair the Vehicle after a reasonable number of attempts and the mere fact that Plaintiff was able to use it on those drives with no problem does not necessarily mean that the Vehicle is not defective. In fact 35, Defendant shows that Plaintiff still owns the Vehicle, with over 58,000 miles on it, and uses it within Santa Rosa, to take her son to school or run errands.

Analysis

Implied Warranty

Defendant first argues that the claim for breach of implied warranty fails because no defect existed or manifested during the one-year warranty period and because the Vehicle was fit for its ordinary purposes. Defendant fails to meet its burden on this argument.

Defendant's evidence, as set forth above, does not show as a matter of law no defect existed or manifested during the one-year warranty period. It does show that Plaintiff did not bring the Vehicle in for repair until after the warranty period had expired, but it admits that the warranty may be breached if a defect was latent and existed during the warranty period but was undiscoverable. *Mexia v. Rinker Boat Co., Inc*. (2009) 174 Cal.App.4th 1297, 1308. The court in *Mexia,* at 1310, expressly rejected the defendants' argument "that latent defects must be discovered and reported to the seller within the specified time" of the warranty duration. Defendant asserts that there must be evidence that the defect existed during the warranty period. Defendant's argument fails because in this motion Defendant bears the burden and it must demonstrate that no defect existed during the warranty period and that there is no dispute regarding that fact. Defendant has failed to demonstrate that no such latent, undiscoverable defect existed during the warranty period.

Defendant also fails to meet its burden of demonstrating that the Vehicle was adequately fit for its intended purposes. It relies on evidence showing that Plaintiff had in earlier times used it for ling journeys and has continued to use it for daily errands in town. This evidence does tend to support Defendant's position, but nothing more. It does not establish as a matter of law that the Vehicle was or is properly fit for its intended uses.

Express Warranty

Defendant argues that the claims for breach of express warranty fail "for three reasons": the NVLW expired by February 19, 2019, when the Vehicle had over 36,000 miles on the odometer so complaints that arose after that cannot support a claim for breach of the warranty; Plaintiff has no evidence that Defendant failed to repair any particular defect for which she presented the Vehicle during the warranty period; and the complains regarding the exhaust odor arose only after the warranty period.

Defendant fails to meet its burden on any of these three arguments. As set forth in the facts above, Defendant's own evidence shows that Plaintiff raised the exhaust odor complaint when she brought the Vehicle for repair in June 2018. Kemnitz Depo 127, MacLear Dec., Ex.A. Defendant's evidence also fails to establish that the infotainment/dash/screen problem did not occur during the warranty period. Defendant also fails to demonstrate that it repaired any defect which arose in the warranty period and fails to demonstrate that Plaintiff lacks evidence that it failed to repair such a defect, much less that Plaintiff also is not reasonably likely to obtain such evidence.

The court in *Donlen v. Ford Motor Co*. (App. 3 Dist. 2013) 217 Cal.App.4th 138. stated, at 152, that a plaintiff pursuing an action under Song-Beverly has the burden to prove that (1) the vehicle had a covered nonconformity covered that substantially impaired the use, value, or safety of the vehicle, (2) the vehicle was presented to an authorized representative of the manufacturer for repair, and (3) the manufacturer or representative did not repair the nonconformity after a reasonable number of repair attempts.

Moreover, Plaintiff provides evidence demonstrating triable material facts on these points. She shows that a 5-year/60,000-mile Powertrain Warranty, the PW, also covered the Vehicle and this was still in effect by the time when Defendant admits Plaintiff brought the Vehicle in complaining of the exhaust odor. She also demonstrates, as set forth above, she in fact complained of the infotainment/dash/screen problem and the exhaust odor in 2018.

Claim under CC section 1793.2(b)

Defendant argues that the claim for breaching CC section 1793.2(b) by failing to repair a vehicle to conform to the warranty within 30 days must fail because Plaintiff cannot show that any single repair attempt took more than 30 days.

CCP section 1793.2(b) states, in pertinent part and with emphasis added, "the goods shall be serviced or repaired *so as to conform to the applicable warranties* within 30 days. Delay caused by conditions beyond the control of the manufacturer or its representatives shall serve to extend this 30-day requirement. Where delay arises, conforming goods shall be tendered as soon as possible following termination of the condition giving rise to the delay."

Defendant notes that no single repair attempt in the warranty period took more than 30 days but this fails to negate the claim as a matter of awl because it does not cover it fully. Defendant has failed to show that it made the Vehicle conform to the warranty within 30 days. Plaintiff also shows that the defects arose in the warranty period and that on at least one service attempt, from November 25, 2019 lasted into January 2020 and took about 43 days.

Defendant also fails to meet its burden of showing that Plaintiff as a matter of law has suffered no damages as a result of the defects. The evidence noted above fails to demonstrate that she suffered no damages as a matter of law; it only shows that there are some damages which she may not have suffered.

CC section 1793.2(a)(3)

Finally, Defendant contends that the third cause of action, for CC section 1793.2(a)(3), fails because Plaintiff is not herself aware of any repairs being delayed as a result of the fact that no parts were available, and never asked for service literature or about replacement parts. CC section 1793.2(a)(3) states that the manufacturer must "[m]ake available to authorized service and repair facilities sufficient service literature and replacement parts to effect repairs during the express warranty period." Defendant's evidence fails to demonstrate that it complied with this requirement as a matter of law; it merely tends to support Defendant's position.

Conclusion

Defendant fails to meet its burden on any argument or issue, or cause of action. Its evidence does tend to support its position, at least in part, but that is not the standard; Defendant bears the burden of showing that, *as a matter of law*, Plaintiff *cannot* meet one or more elements of each cause of action as a matter. This it fails to do. Moreover, Plaintiff provides evidence establishing fact which raise triable material issues of factual dispute for each cause of action.

The prevailing party shall prepare and serve a proposed order consistent with this tentative ruling within five days of the date set for argument of this matter. Opposing counsel shall inform the preparing counsel of objections as to form, if any, or whether the form of order is approved, within five days of receipt of the proposed order. The preparing party shall submit the proposed order and any objections to the court in accordance with California Rules of Court, Rule 3.1312.

4. SCV-267806, Campion v Isenberg

MOTION GRANTED

5. SCV-268019, Tonti v Rania

Motion to Compel Plaintiff's Further Responses to Form Interrogatories, Special Interrogatories, and Requests for Production of Documents, Set One, and Production of Documents DENIED due to Defendants' failure to make a meaningful, good-faith effort to meet and confer. Plaintiff's request for sanctions is denied.

Facts

In her First Amended Complaint ("FAC"), Plaintiff, both individually and as successor in interest to Richard Tonti, complains that Defendants, administering the state-subsidized *Home Safe* program ("the Program") providing housing assistance and other benefits, improperly and negligently deprived Richard Tonti ("Decedent") of benefits, causing in his death, which otherwise could have been avoided. Specifically, she contends, Decedent was enrolled through

the Program at PEP Housing and suffered from treatable health problems but Defendants required Decedent to vacate the PEP Housing on April 30, 2020, having secured replacement housing only in Temecula, California, and leaving Decedent to make his way to the new housing on his own. Decedent left and, despite his heart condition, began to drive to Temecula to the new housing but was the next day found alone in his vehicle, dead from a heart attack. Plaintiff asserts that Defendants, including Laura Rania ("Rania"), an employee of Defendant County of Sonoma ("County') who was in charge of Decedent's case, improperly and negligently required Decedent to leave the PEP Housing without providing a suitable alternative in an appropriate area, and without ensuring that Decedent would be able to get to the alternative or adequately providing for decedent's safety given his condition. This, she complains, caused stress which resulted in the heart attack and caused Decedent to be without access to health care or other services which could have prevented his death.

Discovery

On August 9, 2022, Defendants served Plaintiff Alison Tonti in her individual capacity and separately in her capacity as successor in interest, with Set One of Form Interrogatories, Special Interrogatories, and Requests for Production of Documents. Zhurnalova-Juppunov Dec., ¶¶1-7. Plaintiff responded on September 12, 2022 but Defendants found the responses deficient and attempted in vain to obtain additional responses. Id., ¶¶8-16.

Motion

Defendants move the court to compel Plaintiff, both individually and as successor in interest, to provide further responses to form interrogatories 1.1, 2.1-2.13, 4.1-4.2, 6.1-6.7, 7.1-7.3, 8.1-8.8, 9.1-9.2, 10.1-10.3, 11.1-11.2, 12.1-12.7, 13.1-13.2, and 14.1-14.2; further responses to special interrogatories 1-80; further responses to requests for production ("RFPs") 1-52; and actual production of responsive documents.

Plaintiff opposes the motion. She contends that Defendants failed to meet and confer adequately, failed to notice the motion in a timely manner, improperly combined five motions into one, failed to present evidence meeting the burden of good cause under Code of Civil Procedure ("CCP") section 2031.310(b)(1), and served special interrogatories which violate CCP section 2030.060.

Defendants have filed a reply.

Authority Governing Motions to Compel Further Responses

When a propounding party is dissatisfied with responses to interrogatories or production requests, that party may move to compel further responses. Code of Civil Procedure ("CCP") sections 2030.300, 2031.310. The moving party must make adequate attempts to meet and confer. Ibid. Generally, once a timely, proper motion to compel further responses has been made, the responding party has the burden to justify objections or incomplete answers. *Coy v. Sup.Ct.* (1962) 58 Cal.2d 210, 220-221.

A party moving to compel further responses to a production request, however, must demonstrate "good cause" for seeking the items. CCP section 2031.310(b)(1). This requires a showing that the items are relevant to the subject matter of the litigation and a showing of specific facts justifying discovery. *Glenfed Develop. Corp. v. Sup.Ct.* (1997) 53 Cal.App.4th 1113, 1117. Whether there is an alternative source for the information is relevant though not dispositive. *Associated Brewers Distrib. Co. v. Sup.Ct.* (1967) 65 Cal.2d 583, 588. Once the moving party demonstrates good cause, the responding party must justify its objections. See *Hartbrodt v. Burke* (1996) 42 Cal.App.4th 168.

Requests must identify the documents sought by describing a category with "reasonable particularity" CCP section 2031.030(c)(1). This description must be particularized from the point of view of the person on whom the demand is made, such as by describing categories which bear some relationship to the manner in which the documents are kept. See *Calcor Space Facility, Inc. v. Sup.Ct.* (1997) 53 Cal.App.4th 216, 222.

CCP sections 2030.300(c), 2031.310(c), and 2033.290(c) state that "[u]nless notice of this motion is given within 45 days of the service of the verified response, or any supplemental verified response...the propounding party waives any right to compel a further response...." If the party seeking discovery does not bring the motion by the 45-day deadline, that party waives the right to compel further responses unless there is a "specific later date to which the propounding party and the responding party have agreed in writing." CCP sections 2030.300(c), 2031.310(c), 2033.290(c). It is extended 5 days where the responses were served by mail. CCP sections 2016.050, 1013.

Meeting and Conferring

Defendants show that Plaintiff responses to the discovery on September 12, 2022 and they contacted Plaintiff on October 31, 2022 in an effort to meet and confer. Zhurnalova-Juppunov Dec., ¶¶9-14. This meet-and-confer effort consisted of one phone call which resulted Defendants' attorney simply leaving a voicemail message, followed by a meet-and-confer e-mail that day. Id., ¶14, Ex.L. The e-mail, Ex. L, states generally that the "objections asserted are meritless" and otherwise briefly states that the RFPs are relevant and adequately limited as to time, it was proper to serve Plaintiff in both her capacities, the special interrogatories are not compound, and the form interrogatories are both relevant and not vague, while Plaintiff has identified no basis for the asserted privileges. Defendant received no response so filed the motion the next day.

October 27, 2022 was 45 days following the date on which Plaintiff served her responses, September 12, 2022. Service was by mail, as demonstrated in the responses attached as exhibits to the moving papers, thus providing an additional five days, making the deadline for filing this motion November 1, 2022, as both parties agree.

Plaintiff persuasively points out that Defendants' meet-and-confer effort is not sufficient. Defendants, inexplicably, made no effort to meet and confer or alert Plaintiff to their position, until the very last day before needing to file this motion, 44 days after Plaintiff had served the responses. Its contact also simply consisted of a single phone call and voice mail, because there

was no response, followed by a single e-mail on the afternoon of the same day. The e-mail was also short and only briefly set forth a very generalized statement of why Defendants felt the responses were deficient.

As Plaintiff argues, the court in *Obregon v. Sup. Ct*. (1998) 67 Cal.App.4th 424, at 430-432, affirmed a trial court's decision, regarding a motion to compel further responses, that a meet-and-confer effort consisting of a single, short letter late in the time period, failed to satisfy the meet-and-confer requirement.

In this instance, Defendants' own evidence reveals a clear failure to meet and confer in good faith. Defendants made only a basic, conclusory, generalized and very brief effort, despite the large number of items at issue, and waited until the very last day before doing so. On its face, this objectively demonstrates a lack of a good-faith effort to make any meaningful attempt to meet and confer. Plaintiff did not respond, but only had one day in which to do so. The court in *Obregon* noted that the meet-and-confer effort at issue there might potentially have been adequate if the other party had at least responded with a refusal to make any compromise or concession, but here that is not the case. Plaintiff made no such refusal and had no meaningful opportunity to do so. Plaintiff, moreover, explains that this was because of an illness, and that as soon as Plaintiff's attorney received the moving papers, he contacted Defendants in an effort to address the situation, the lack of informal resolution, and to seek additional time as a result of the fact that Plaintiff was in an inpatient medical facility due to medical issues. Plaintiff's efforts were in vain because, despite having received this information and Plaintiff's attempts to address the matter, Defendants still insisted on proceeding with the motion.

The court notes that Plaintiff's responses are, as discussed below, formulaic, conclusory, and repetitive, but this does not relieve Defendants of the burden of making a meet and confer effort which is procedurally and substantively meaningful. Here, Defendants' effort is facially not meaningful or in good faith either procedurally, in the timing and Plaintiff's lack of opportunity to address it, or substantively, in the content.

The court DENIES the motion on this basis.

Deadline

Plaintiff also contends that the motion is untimely because Defendants served notice of the hearing date after the deadline for bringing this motion.

Plaintiff is correct that, according to *Weinstein v. Blumberg* (2018) 25 Cal.App.5th 316, at 320-322, serving only a notice of motion and motion without the supporting papers before the expiration of the deadline for making the motion renders such a motion untimely. In *Weinstein*, a party had filed a motion to compel further deposition responses but before the expiration of the mandatory 60-day deadline, had served only the notice of motion and motion, without memorandum of points and authorities or the evidence. The court ruled that the service was insufficient and the motion was therefore untimely.

In this instance, however, Defendants served all of the moving papers on the day they filed the motion, November 1, 2022. The only document which they failed to serve before the expiration of the deadline was the amended notice with the hearing date, which they served 14 days later. This is not the type of failure addressed in *Weinstein*. Defendants had fully made the motion and served all of the supporting papers on time. They had to wait until filing the motion to have the hearing date. Although they could have served the amended notice with the hearing date earlier, they did not need to; they gave sufficient notice of the hearing.

The court finds the motion to be timely.

Form Interrogatories

Plaintiff served only objections to the form interrogatories. These objections are formulaic, terse, lack explanation, are repetitious without apparent effort to tailor the objections to the specific interrogatories, and on their face appear to be inapplicable as well as an unpersuasive attempt to claim that standard form language is vague and ambiguous. These objections substantively are deficient. If the court were to reach the substantive merits of this motion, it would grant the motion as to these.

Special Interrogatories

Plaintiff again served only objections to the special interrogatories. These objections again are formulaic, terse, lack explanation, are simply repeated without apparent effort to tailor the objections to the specific interrogatories, and on their face appear to be inapplicable. These objections substantively are deficient. If the court were to reach the substantive merits of this motion, it would grant the motion as to these.

Requests for Production

Plaintiff also served only objections to the RFPs. These objections again are formulaic, terse, lack explanation, are simply repeated without apparent effort to tailor the objections to the specific interrogatories, and on their face appear to be inapplicable. These objections substantively are deficient. If the court were to reach the substantive merits of this motion, it would grant the motion as to these.

Compelling Production

Defendants also move the court to compel production in response to the RFPs. However, Plaintiff served only objections and did not agree to produce anything. Where a party has failed to respond to a request for production or the responses are considered inadequate, the first step is not to compel production but, as with interrogatories, to compel a response, and only once a party has obtained a response agreeing to produce items may the party seek production in compliance with that response. CCP §§ 2031.300, 2031.310, 2031.320.

The court DENIES the motion on this point and would deny the motion on this point even if reaching the substantive merits of the motion.

Sanctions

Plaintiff seeks monetary sanctions. Under the circumstances, the court denies this request. Defendants, in the court's view, have failed to make a good-faith effort to meet and confer but Plaintiff's responses are substantively clearly deficient and the court is not convinced that Plaintiff's has acted with substantial justification.

Conclusion

The prevailing party shall prepare and serve a proposed order consistent with this tentative ruling within five days of the date set for argument of this matter. Opposing counsel shall inform the preparing counsel of objections as to form, if any, or whether the form of order is approved, within five days of receipt of the proposed order. The preparing party shall submit the proposed order and any objections to the court in accordance with California Rules of Court, Rule 3.1312.

6. SCV-269797, Johnson v Israni

Motion to Compel Further Responses to Plaintiff's Special Interrogatories, Set 2 GRANTED in full, subject to a third-party administrator sending opt-in notices to those whose information is sought, and Plaintiffs being able to obtain the information only of those who opt in and agree.

Facts and History

Plaintiffs complain that Phyllis Johnson ("Decedent"), an elder, died as a result of the negligence and neglect when she was in the care of Defendants. They allege that after leg surgery, she was admitted to Defendant Summerfield Healthcare Center ("SHC") for recovery but Defendants' conduct resulted in her developing a Stage III pressure ulcer. Decedent was then transferred to Defendant Healdsburg Senior Living Community ("HSLC") where Defendants allowed the wound to worsen, resulting ultimately in her death.

As of January 10, 2023, only Defendant Pacifica SL Grove Street LP dba Healdsburg Senior Living Community ("Pacifica") has been served with the summons and complaint or appeared in this action.

Plaintiffs subsequently moved the court to compel Defendant Deepak Israni ("Deepak") to appear for deposition. At the hearing on February 1, 2023, this court granted the motion with respect to compelling Deepak to appear as an employee of the entity Defendant but not as a party.

Special Interrogatories

Plaintiffs served Defendant Pacifica with Special Interrogatories, Set 2, on September 9, 2022 and Pacifica served response on October 4, 2022, but Plaintiffs found the responses deficient and their efforts to resolve the matter informally were in vain. Moore Dec.

Motion

Plaintiffs move the court to compel Pacifica to provide further responses to Special Interrogatories, Set 2, numbers 28 and 29. They argue that the information is discoverable and directly relevant, while they offered to have a third-party administrator serve the witnesses at issue with opt-in notices, so that Plaintiffs will ultimately obtain only the information from those who agree.

Defendant Pacifica opposes the motion, reiterating its objections and claiming that the opt-in method applies only to class actions.

Plaintiffs have filed a reply, reiterating the propriety of using the opt-in procedure while noting that there is a lack of access to the facility records.

Authority Governing Motions to Compel Further Responses

When a propounding party is dissatisfied with responses to interrogatories, that party may move to compel further responses. Code of Civil Procedure ("CCP") section 2030.300. The moving party must make adequate attempts to meet and confer. Ibid. Generally, once a timely, proper motion to compel further responses has been made, the responding party has the burden to justify objections or incomplete answers. *Coy v. Sup.Ct.* (1962) 58 Cal.2d 210, 220-221.

Whether there is an alternative source for the information is relevant though normally not dispositive. *Associated Brewers Distrib. Co. v. Sup.Ct.* (1967) 65 Cal.2d 583, 588. However, the presence of an alternative source may be dispositive where the right to privacy protects the information. *Allen v. Sup.Ct.* (1984) 151 Cal.App.3d 447, 449.

Generally, parties may obtain from others information about witnesses and investigations as long as the information does not reveal attorney work-product. CCP §§2017.010, 2018.030. CCP §2017.010 states that "any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action...if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." It adds that "[d]iscovery *may* be obtained of the identity and location of persons having knowledge of any discoverable matter, as well as of the existence, description, nature, custody, condition, and location of any document, tangible thing, or land or other property." (Emphasis added).

A party has a duty to provide "complete" responses and to make them as straightforward as possible. CCP sections 2030.220; 2031.210-2031.230. Requests must be answered to the extent possible and an answer that contains only part of the information requested or which evades a meaningful response is improper. *Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 783.

Request for Judicial Notice

Plaintiffs request judicial notice of minute orders from the court records of several different court proceedings throughout this state. These are judicially noticeable. Pacifica objects that the court may notice judicially notice the truth of factual assertions made therein, that these are not relevant, and that these are not authority on which this court ay rely. Pacifica is basically correct as to the law but these arguments have no bearing on whether the documents, or that they say what they say, are judicially noticeable. The court notes that these are not controlling authority here and have no direct bearing on the facts at issue in this motion, while if they are irrelevant they will by definition have no impact on the court's decision.

With the above caveats, the court grants the request.

Objections to Information in the Reply

Pacific objects to inclusion in the reply of new cases cited and the evidence that it was shut down, but these appear properly to be in the reply as a response to the opposition arguments. Moreover, they have no impact on the outcome of this motion as this court will, even without the reply papers, reach the same conclusion and grant the motion.

Analysis

In the two interrogatories at issue, 28 and 29, Plaintiffs seek similar information and Pacifica responded with the same set of objections, refusing to provide any information. In interrogatory 28, Plaintiffs ask Pacifica to identify any residents who were residing in the same "FACILITY" as Decedent at the same time as Decedent. In 29, Plaintiffs requested the identity of any "RESPONSIBLE PARTY" for any such resident. Pacifica posited solely objections. It claimed that the term "resident" was vague and ambiguous since Decedent was a "patient" rather than a "resident" while Pacifica's different, adjacent facility housed "residents"; the interrogatory is impermissibly overbroad, burdensome and oppressive because it seeks identities of people who were "residents" of a facility different from the one in which Decedent was a "patient"; and it improperly seeks private third-party information protected under the Health Insurance Portability and Accountability Act ("HIPAA"), the California Confidentiality of Medical Information Act ("CMIA"), and the right of privacy.

The arguments regarding the ambiguity of the term "resident" are unpersuasive. It is clear what Plaintiff meant and that she specifically requested the information of those who were in the same, specific facility in which Decedent was, regardless of what Defendants may have called her. Plaintiffs specifically defined the term "FACILITY" to mean the facility where Decedent

was and repeat this specification in the question. Therefore, it is clear that Plaintiffs did not request information of residents from the different, nearby facility.

Pacifica is also unpersuasive as to privacy rights and protections for medical information preventing Plaintiffs from obtaining the contact information of others in the facility.

Preliminarily, Pacifica is correct that the requested information receives protection because it falls within the right of privacy and HIPAA, issues which Plaintiffs acknowledge. Even without considering the HIPAA protections for medical information, which Plaintiffs do not dispute, home addresses and similar contact information are considered protected private information. *Planned Parenthood Golden Gate v. Sup.Ct.* (2000) 83 Cal.App.4th 347, 358-359. Under this standard, the information may be discoverable but a party must "do more than satisfy the [CCP] section 2017 standard" *Ibid*., citing other cases. However, such information may be disclosed where the public interest in obtaining the information outweighs privacy concerns. *Ibid*.; Palay *v. Sup.Ct.* (1993) 18 Cal.App.4th 919, 933; *Valley Bank of Nevada v. Sup.Ct.* (1975) 15 Cal.3d 652, 657.

Identity and contact information of witnesses is generally discoverable, despite privacy concerns. CCP section 2017 allows parties to discover the identity and location and similar information of possible witnesses, while the court in *Union Mut. Life Ins. Co. v. Sup.Ct.* (1978) 80 Cal.App.3d 1, at 11, indicated that under the broad discovery rules, it is proper for a plaintiff to obtain discovery in order to determine whether one should plead a cause of action, and this includes discovery of information about possible class members. Parties may thus obtain names and contact information for witnesses, such as employees of a defendant. *Puerto v. Superior Court* (2008) 158 Cal.App.4th 1242. As explained in *Puerto*, at 1249-1250, where plaintiffs sued their employer for wage violations and sought contact information for employees who were witnesses, the employer "identified approximately 2600 witnesses, but refused to tell petitioners how to find them. Petitioners have a statutory entitlement to the contact information for these witnesses."

Generally, the need to obtain witness identities is a strong interest and supported by public policy enshrined in CCP section 2017. See, e.g., *Planned Parenthood*, supra, at 359-360. The information is thus typically discoverable, as demonstrated in its inclusion in form interrogatories and in comments in *Planned Parenthood*, supra, at 359-360, 364, 367, and *Union Mut. Life Ins. Co., supra.* As the court in *Puerto v. Sup.Ct*. (2008) 158 Cal.App.4th 1242, at 1247, explained, the right to privacy in witness contact information generally will not "trump [parties] right to investigate their claims by contacting witnesses."

Courts may allow discovery of such information by applying a four-step analysis. *Pioneer Electronics (USA), Inc. v. Sup.Ct.* (2007) 40 Cal.4th 360, 370-374. The first step, according to *Pioneer*, is that first the party claiming a privacy right must possess a "legally protected privacy interest" such as "informational privacy" or "autonomy privacy." The court stated that "informational privacy" includes 'information… deemed private "when well-established social norms recognize the need to maximize individual control over its dissemination and use to prevent unjustified embarrassment of indignity." Autonomy privacy applies where such norms protect a 'person's private decisions or activities from "public or private intervention."'

Second, at issue there must be 'a reasonable expectation of privacy under the particular circumstances, including 'customs, practices, and physical settings surrounding particular activities…". [Citation.]' This involves an "objective entitlement founded on broadly based and widely accepted community norms. [Citation.]"

Third, to protect the information, the invasion must be '"serious" in nature, scope, and actual; or potential impact to constitute an "egregious" breach of social norms…."

Fourth, if the information warrants protection by meeting the first three criteria, the privacy interest must be measured against other competing or countervailing interests in a balancing test.

In *Pioneer*, a named plaintiff consumer sought information from the defendant company about potential class members who were other consumers of defendant's goods. The Supreme Court ruled that it was proper to allow the plaintiff to obtain contact information to communicate with the potential members, as long as the potential members were first given a chance to opt out, without first requiring the potential members to opt in. The appellate court ruled that the plaintiff could only obtain the information from such members who affirmatively chose to allow dissemination of the information and the Supreme Court overturned the decision, ruling that this was "overprotective of the purchasers' privacy rights, inconsistent with established privacy principles, and likely to cause adverse consequences in future cases…." *Pioneer*, 364.

The court in *Planned Parenthood* did find the addresses, etc., of members of Planned Parenthood to be non-discoverable under the circumstances simply because there the information directly impacted the right to freely associate in organizations and because the party seeking the information failed to demonstrate any actual need for it. *Planned Parenthood*, 358-364, 367-369. Thus, there was a great, specific, interest in protecting the information and little interest in discovering it.

Accordingly, in certain instances, notice to a third party is appropriate or required prior to disclosure of the third parties' private information, such as identity and contact information. There are two basic methods for addressing third-party privacy concerns. First, the party from whom disclosure is sought is must notify the third party of the discovery request, allowing the third party a fair opportunity to object, or opt out. *Valley Bank of Nevada v. Sup. Ct.* (1975) 15 Cal.3d 652, 658. Second, the court may order the party from whom disclosure is sought to ask the third party for permission to disclose the information, or opt in. *Colonial Life & Acc. Ins. Co. v. Sup. Ct.* (1982) 31 Cal.3d 785, 794-95. Disclosure is then permitted only as to those who give permission. It is within the court's discretion to decide which method is appropriate on a case-by-case basis. *Olympic Club v. Sup. Ct.* (1991) 229 Cal.App.3d 810, 815.

In this instance the information is directly relevant and the ability to contact witnesses of the conditions and conduct at issue is critical to Plaintiffs' claims.

Moreover, Plaintiffs have already offered to have a third-party administrator serve opt-in notices, a method by which Plaintiffs will ultimately obtain the information only of those who have expressly opted in. This is the method of allowing the discovery which is most protective of such privacy rights and this resolves not only the issues under the right of privacy, but the

protections of HIPAA and CMIA. Pacifica argues that this device is used only for class actions but this is not correct, as noted above, and may be used in any such discovery situation requesting the identities and contact or other information of third parties. Pacifica also offers no authority to support its contention.

The court GRANTS the motion in full.

Conclusion

The court GRANTS the motion in full. The prevailing party shall prepare and serve a proposed order consistent with this tentative ruling within five days of the date set for argument of this matter. Opposing counsel shall inform the preparing counsel of objections as to form, if any, or whether the form of order is approved, within five days of receipt of the proposed order. The preparing party shall submit the proposed order and any objections to the court in accordance with California Rules of Court, Rule 3.1312.

7-8. SCV-271139, Bolster v Lasecke

Demurrers OVERRULED.
Motion to Strike DENIED.

Facts

Plaintiff complains that Defendants, who own and operate a retail furniture and interior-design store in Santa Rosa, Mark Thomas Home ("the Store") as well as a store in Santa Clara ("the Santa Clara Store"), convinced Plaintiff to move from Hawaii to work at the Store based on their misrepresentations about the employment and was then terminated and replaced with a younger male employee with less experience. Defendants are Mark Thomas Home, LLC ("Entity Defendant") and Mark Lasecke ("Lasecke"), the principal and owner of the Entity Defendant.

Plaintiff asserts six causes of action: 1) Violation of Labor code ("Lab.Code") section 970 for misrepresenting the character, length, and terms and conditions of employment; 2) Lab. Code Section 221 for forcing Plaintiff to pay back wages to recover a reimbursement which Defendants had agreed to pay prior to Plaintiff relocating to California; 3) Age Discrimination in violation of the Fair Employment and Housing Act ("FEHA"), Government Code ("Gov.Code") section 12940(a) because Plaintiff was 68 years old but Defendants terminated her to replace her with a younger, less experienced employee; 4) Wrongful Termination in Violation of Public Policy; 5) Intentional Misrepresentation; and 6) Breach of the Covenant of Good Faith and Fair Dealing. She asserts causes of action 1 and 2 against all Defendants, causes of action 3, 4, and 6 against only the Entity Defendant, and causes of action 5 against only Lasecke.

Eastern Wholesale Furniture Company of California, Inc., dba Mark Thomas Home ("Eastern" or the "Entity Defendant"), has appeared as the Entity Defendant, erroneously sued as Mark Thomas Home LLC.

Plaintiff on November 22, 2022 filed an amendment to the complaint substituting a true name of a Defendant for a Doe, naming Eastern Wholesale Furniture Company of California, Inc., dba Mark Thomas Home as the true name and identity of the Defendant whom she had identified as Mark Thomas Home, LLC.

Demurrer and Motion to Strike

The Entity Defendant demurs to every cause of action against it on the ground that it fails to state facts sufficient to constitute a cause of action and there is a defect of parties because it was improperly named and the entity named in the complaint is not Plaintiff's actual employer. It also demurs to the first cause of action on the ground that it fails to state facts sufficient to constitute a cause of action because it is barred by the one-year statute of limitations. It demurs to the fourth cause of action on the grounds that it fails to state facts sufficient to constitute a cause of action and is uncertain because Plaintiff failed to identify the applicable statute. It demurs additionally to the sixth cause of action on the grounds that it fails to state facts sufficient to constitute a cause of action, is uncertain, and because it cannot be ascertained whether the contract at issue is written, oral, or implied.

Defendant also moves the court to strike allegations and prayer for punitive damages.

Plaintiff opposes the demurrer and motion to strike and Defendant has filed reply papers.

Demurrer

A demurrer can only challenge a defect appearing on the *face* of the complaint, exhibits thereto, and judicially noticeable matters. Code of Civil Procedure ("CCP") section 430.30; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318. The grounds for a demurrer are set forth in CCP section 430.10. The grounds, as alphabetically identified in the statute, include: (d) defect or misjoinder of parties; (e) the pleading fails to state facts sufficient to constitute a cause of action; (f) uncertainty; and (g) it is unclear, in an action founded upon a contract, whether the contract is written, oral, or implied.

Demurrer for failure to state facts sufficient to constitute a cause of action is a general demurrer, which must fail if there is *any* valid cause of action. CCP §430.10(e); *Quelimane Co., Inc. v. Steward Title Guar. Co.* (1998) 19 Cal.4th 26, 38; *Fox v. JAMDAT Mobile, Inc*. (2010) 185 Cal.App.4th 1068, 1078 *Saunders v. Cariss* (1990) 224 Cal.App.3d 905, 908.

The demurrer for uncertainty is not favored and will only be sustained if the responding party cannot reasonably comprehend what allegations are made against him and thus respond. *Khoury v. Maly's of Calif., Inc.* (1993) 14 Cal.App.4th 612, 616.

A demurrer for uncertainty must specify precisely how, why, and where the complaint is uncertain. See *Fenton v. Groveland Community Services Dist.* (1982) 135 Cal.App.3d 797, 809. Failure to do so is thus improper and impairs a party's ability to defend against the demurrer and the court's ability to understand exactly what to consider or what its ruling will be.

According to CCP section 430.10(g), a party must allege, "in an action upon a contract," whether the contract is written, oral, or implied.

Identity of the Entity Defendant

The demurrers based on the allegedly incorrect name of the Entity Defendant is unpersuasive. First, it rests entirely on extrinsic evidence and is not apparent from the face of the complaint, while Defendant has not requested judicial notice of any matter which might support this argument. Second, even if the alleged defect were evident from the face of the complaint, Plaintiff cured that by the amendment naming Eastern as the Entity Defendant. The court OVERRULES any demurrer based on this.

First Cause of Action: Statute of Limitations

Eastern argues that the first cause of action is also untimely based on the one-year statute of limitations in CCP section 340(a) because the double damages provided for, and sought, is a penalty.

CCP section 338 creates a three-year limitations period for, among others, actions upon a liability created by a statute other than a penalty or forfeiture; trespass or injury to real property; taking or injuring goods or chattels; relief on the ground of fraud or mistake.

CCP section 340 sets forth a one-year limitations period for actions based on a statute for penalty or forfeiture.

This cause of action is for violation of Lab. Code section 970, which makes it illegal for one to induce another to move for employment based on knowingly false representations. Lab. Code section 972 states that anyone who violates this "is liable to the party aggrieved, in a civil action, for double damages resulting from such misrepresentations." Unfortunately, the statutes do not provide a specific limitations period and there does not appear to be any controlling California law directly addressing the question of whether this is subject to the three-year limitations period or the one-year period generally applicable to statutory penalties.

The Entity Defendant relies on *Munoz v. Kaiser Steel Corp*. (1984) 156 Cal.App.3d 965, where the court, at 980, stated that the one-year statute of limitations applies but the court did not make this holding and did even face or address the questions of whether section 972 creates a "penalty" or is subject to the one-year statute of limitations. The court simply noted that the one-year limitations period applied when addressing whether the statute creates an exception to the statute of frauds. Defendant otherwise cites only to federal or unpublished decisions for the proposition that section 972 creates a penalty subject to the one-year period, and at least some of these actually rely on *Munoz* for that conclusion.

Plaintiff points out that the Supreme Court in *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 10 Cal 4th 1094, at 1102, reversed an appellate court's decision "holding that Labor Code section 226.7 payments assessed for meal and rest period violations are penalties subject to a one-year statute of limitations." Section 226.7 requires an employer to pay an "additional hour

of pay" if violating any of the requirements for to provide unpaid 30-minute meal periods and paid 10-minute rest periods. The court held that this is not a penalty subject to the one-year limitations period but instead is a wage and subject to the three-year limitations period. It explained that

> [t]he Labor Code defines "wages" as "all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other methods of calculation." [Citation.] Courts have recognized that "wages" also include those benefits to which an employee is entitled as a part of his or her compensation, including money, room, board, clothing, vacation pay, and sick pay. [Citations.] A "penalty," on the other hand, is that "which an individual is allowed to recover against a wrong-doer, as a satisfaction for the wrong or injury suffered, and without reference to the actual damage sustained...." [Citations.] Penalties provide for " 'recovery of damages additional to actual losses incurred, such as double or treble damages....' " [Citation.]

The court found the statutory language reasonably open to different interpretations but, in looking to legislative history, determined that the legislature distinguished this remedy from a penalty, which was also imposed in the statutory framework, and considered it instead to be a "premium wage" recoverable as part of the plan to help deter violations of the break requirements. It added, at 1112, "Section 226.7 pay is not transformed into a penalty merely because a one-to-one ratio does not exist between the economic injury… and the remedy selected by the Legislature…. Where damages are obscure and difficult to prove, the Legislature may select a set amount of compensation without converting that remedy into a penalty."

The Supreme Court in *Pineda v. Bank of America* (2010) 50 Cal.4th 1389 found that the day's wages which an employer must pay under Lab.Code section 203 for each day that wages remain unpaid, are also subject to the three-year limitations period. The court explained, at 1395, that although these are clearly penalties, they are based on an action for wages and that section 203(b) expressly states that "Suit may be filed for these penalties at any time before the expiration of the statute of limitations on an action for the wages from which the penalties arise." It also noted the strong public policy of ensuring that employees are promptly paid.

In addressing the question of whether the remedy under Lab. Code section 972 is a "penalty" which would not be enforced by a Texas court, the court *in Chavarria v. Superior Court of Fresno County* (App. 5 Dist. 1974) 40 Cal.App.3d 1073, at 1076-1077, determined that it is not a "penalty" but merely a measure of remedy to the one aggrieved. It explained that

> 'The question whether a statute of one state, which in some aspects may be called penal, is a penal law, in the international sense, so that it cannot be enforced in the courts of another state, depends upon the question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act . . . The test is not by what name the statute is called by the legislature or the courts of the state in which it is passed, but whether it appears to the tribunal which is called upon to enforce it to be, in its essential character and effect, a punishment of an offense against the public, or a grant of a civil right to a private person.' [Citation.]

It further notes that under California law Labor Code section 972 is recognized as purely civil in nature.

As with the statutory provisions at issue in *Murphy* and *Pineda*, here Lab.Code section 970 and the double wages recoverable under section 972 appear to be subject to the three-year limitations period. As with the provisions in *Murphy*, Lab.Code section 970 simply provides the requirements and creates a clear cause of action; it in of itself imposes no specific remedy. Instead, section 971 imposes a criminal penalty while section 972 imposes an obligation to pay double wages. This is analogous to the provisions in *Murphy*, where one provision creates the duty regarding meal and rest breaks, another imposes a clear penalty, and another allows the employee to recover an additional hour's pay.
Ultimately, this situation is not clear but considering the California authority above and the lack of any California decision to the contrary, this court must conclude that the three-year statute of limitations is, or at least may be, applicable.

The court OVERRULES the demurrer on this basis.

Fourth Cause of Action

Defendant argues that the fourth cause of action is defective because Plaintiff does not identify any statute which Defendant violated in terminating Plaintiff. Plaintiff responds that she has pleaded violation of FEHA, specifically Gov. Code section 12940(a), barring age discrimination. The Supreme Court in Stevenson *v. Superior Court* (1997) 16 Cal.4th 880, at 896-897, expressly found that violation of FEHA also may support a cause of action for wrongful termination, specifically that "FEHA's policy against age discrimination in employment is sufficiently substantial and fundamental to support a tort claim for wrongful discharge."

The court OVERRULES the demurrers on this basis.

Sixth Cause of Action

In attacking the sixth cause of action, Defendant argues that Plaintiff fails to plead whether the underlying contract is written, oral, or implied.

As stated in *Storek & Storek, Inc. v. Citicorp Real Estate, Inc*. (2002) 100 Cal.App.4th 44, at 55, "every contract imposes upon each party a duty of good faith and fair dealing in the performance of the contract such that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." See also *Guz v. Bechtel Nat. Inc*. (2000) 24 Cal.4th 317, 349; *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1393.

The covenant requires each contracting party to refrain from doing "anything which will injure the right of the other to receive the benefits of the agreement." *Kransco v. American Empire Surplus Lines Ins. Co*. (2000) 23 Cal.4th 390, 400; see also *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 818. The implied covenant rests upon the existence of a specific

contractual obligation and "cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." *Agosta v. Astor* (2004) 120 Cal.App.4th 596, 607; see also *Racine & Laramie, Ltd. v. California Dept. of Parks & Rec*. (1992) 11 Cal.App.4th 1026, 1031-32. However, it requires breach of "something beyond breach of the contractual duty itself" and requires some "unfair dealing." *Congleton v. National Union Fire Ins. Co.* (1987) 189 Cal.App.3d 51, 59; *Careau & Co., supra,* 222 Cal.App.3d 1394. Thus, a party pleading it must allege other than mere breach of the contract and must show conduct, whether or not actually breaching the obligations under the contract, which is conscious and deliberate and "which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement." *Careau & Co., supra,* 222 Cal.App.3d 1395.

As Plaintiff argues, she has asserted not a cause of action for breach of contract, but one for breach of the covenant of good faith and fair dealing. While it is ultimately based on the contract it is a distinct cause of action based on conduct different from simply breaching the contractual terms. Moreover, this demurrer's ultimate intent is simply to determine which statute of limitations applies or whether the statute of frauds bars the claim. The latter appears inapplicable while nothing indicates that any statute of limitations for any form of contract would bar this cause of action given that Plaintiff filed the complaint less than two years after the alleged conduct. CCP section 339 sets a two-year statute of limitation for contracts not founded upon a writing while section 338 establishes a 4-year period for contracts founded upon a writing. Accordingly, even if this demurrer could apply here, it is meaningless. It is therefore, a meaningless and purely technical argument in this case, and cannot be sustained as a result. See *Miles v. Deutsche Bank Nat'l Trust Co.* (2015) 236 Cal.App.4th 394, at 401 (rejecting this demurrer where it was found to be "purely technical" because it was already clear that Defendant knew which contract was at issue).

The court OVERRULES this demurrer.

Motion to Strike

A motion to strike may attack any "irrelevant, false, or improper matter" in any pleading, or to strike a pleading that is "not drawn or filed in conformity with the laws of this state." CCP §436. As with demurrers, the defect must appear on the face of the pleading or in matters judicially noticeable. CCP §437. The policy is to construe pleadings liberally "with a view to substantial justice." CCP §452.

Defendant argues, rather tersely, that Plaintiff fails to allege sufficiently the oppression, fraud, or malice necessary to support a claim for punitive damages under Civil Code section 3294. This argument is groundless. Plaintiff has clearly and specifically alleged both fraud in inducing Plaintiff to move from Hawaii for the employment, and intentional violation of FEHA as discussed above. Both causes of action are sufficient to support punitive damages here, Defendant fails to demonstrate the contrary, and the allegations are specific and detailed.

The court DENIES this motion.

Request for Informal Conference and Sanctions

The court finds the argument regarding the informal conference and sanctions, and the issues regarding the declarations to be immaterial and unpersuasive. The court also denies any request for sanctions.

Conclusion

The court OVERRULES the demurrers in full and DENIES the motion to strike.

The prevailing party shall prepare and serve a proposed order consistent with this tentative ruling within five days of the date set for argument of this matter. Opposing counsel shall inform the preparing counsel of objections as to form, if any, or whether the form of order is approved, within five days of receipt of the proposed order. The preparing party shall submit the proposed order and any objections to the court in accordance with California Rules of Court, Rule 3.1312.