TENTATIVE RULINGS: CIVIL LAW & MOTION

Friday, April 19, 2024 at **8:30 a.m.**
Courtroom 18 –Hon. Christopher M. Honigsberg
Civil and Family Law Courthouse
3055 Cleveland Avenue
Santa Rosa, California 95403

The Court's Official Court Reporters are "not available" within the meaning of California Rules of Court, Rule 2.956, for court reporting of civil cases.

CourtCall is not permitted for this calendar.

If the tentative ruling does not require appearances, and is accepted, no appearance is necessary.

Any party who wishes to be heard in response or opposition to the Court's tentative ruling **MUST NOTIFY** the Court's Judicial Assistant by telephone at **(707) 521-6723** and **MUST NOTIFY all other parties of their intent to appear, the issue(s) to be addressed or argued and whether the appearance will be in person or by Zoom**. Notifications must be completed no later than 4:00 p.m. on the court (business) day immediately before the day of the hearing.

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Unless notification of an appearance has been given as provided above, the tentative ruling shall become the ruling of the Court the day of the hearing at the beginning of the calendar.

1-2. 23CV00620, Jamgotchian v. Sonoma County Fair and Exposition, Inc.

Defendant's Motion to Quash Subpoenas and for Protective Order and Sanctions is GRANTED, as explained herein. Sanctions of $1,480 are awarded to Defendant against Plaintiff.

Defendant's Motion for Protective Order Re: Discovery Requests; Request for Sanctions is GRANTED in part, as explained herein. Sanctions of $1,480 are awarded to Defendant against Plaintiff.

Defendant's counsel shall submit a written order consistent with this tentative ruling and in compliance with Rule 3.1312.

Facts

Plaintiff filed this action on September 19, 2023, alleging that he owns a racehorse, "Undisturbed," complaining that Defendant improperly charged Plaintiff a $146 per-start fee for entering Undisturbed in horse races at the Sonoma County Fair (the "Fair"). He alleges that as he is simply an

owner of a racehorse and thus not legally required to maintain workers' compensation insurance for the jockey riding the horse, since only the trainer, who hires the jockey, is an employer obligated to maintain such insurance. He also alleges that Defendant has improperly charged other owners this fee as well. He asserts that pursuant to the rules and regulations of the California Horse Racing Board ("CHRB") and the California Horse Racing Law at Business and Professions Code ("B&P Code") at section 19400, et seq., jockeys are considered "employees" only for purposes of worker's compensation and that their "employers" are the trainers, not the owners. He alleges at ¶¶18-19 that he is investigating the practice of charging this fee against owners but that:

> To the extent a per start fee is charged to an Owner, including Plaintiff, by SONOMA (or anyone else) for workers' compensation insurance for the jockey, such a fee is therefore wrongful and without any statutory basis….
>
> …
>
> To the extent Defendants charged, and continue to charge Owners, including Plaintiff, a per start fee for workers compensation insurance for the jockey, the taking of that fee from any Owner, including Plaintiff, amounts to permanent taking or conversion of that money from the Owners, including Plaintiff, without legal justification for which Defendants have been unjustly enriched.

On April 5, 2024, this Court granted Plaintiff's motion for leave to file a first amended complaint ("FAC"). In this FAC, Plaintiff adds new 4th through 7th causes of action for violation of Insurance Code section 70, et seq., negligent and intentional misrepresentation regarding the need for Plaintiff to pay the $146 in order to ensure that worker's compensation insurance covered the jockey riding his horse, Business and Professions Code section 17200, et seq., and related additions to the prayer.

Motions

Defendant brings two motions to bar or limit Plaintiff's discovery attempts in this action, a Motion for Protective Order Re: Discovery Requests; Request for Sanctions and a Motion to Quash Subpoenas and for Protective Order and Sanctions. In both motions, it contends that this is a simple, straightforward action involving only Plaintiff himself, not other owners, and that the dispute is based on clear legal definitions as to the employees of jockeys, rendering the discovery at issue irrelevant and unnecessary. It also contends that due to the amount in controversy, $146, this should be a small claims case, which has no discovery, and that even if it were a limited civil action, the discovery sought exceeds that normally allowed.

In the Motion to Quash Subpoenas and for Protective Order and Sanctions, Defendant moves the Court to quash deposition subpoenas which Plaintiff has served on eight non-parties, along with a

protective order and monetary sanctions against Plaintiff in the amount of $3,408. It notes that the subpoenas seek roughly 8 years' worth of documents such as invoices, agreements, insurance records, various communications, and records of third-party horse owners, among others.

In the Motion for Protective Order Re: Discovery Requests; Request for Sanctions, Defendant moves the court for a protective order limiting Plaintiff's discovery requests to 35 "based upon the actual controversy in this case," and that any requests beyond that be barred. It contends that the requests are excessive, overly burdensome, not relevant, and intended to annoy, threaten, and cause undue burden and expense. It seeks monetary sanctions of "no less than" $3,400.

There is no timely opposition to these motions. Plaintiff filed an opposition four days late, arguing that the discovery is proper in light of the FAC allegations.

Opposition

On Friday, April 12, 2024, Plaintiff filed purported opposition to these motions. The opposition is untimely. Unless otherwise specified, papers opposing a motion must be served and filed at least 9 court days before the hearing, unless the court permits a shorter time. Code of Civil Procedure ("CCP") §1005(b); California Rule of Court ("CRC") 3.1300(a). Plaintiff filed, and served, his opposition papers only 5 court days before the hearing. The court disregards the opposition papers on this basis. However, the Court notes that even considering the opposition, substantively it does not alter the Court's ruling, as set forth below. Further, the opposition is conclusory and provides no argument or authority for Plaintiff's discovery requests.

Motion to Quash and for Protective Order

A party, witness, consumer, or employee may bring a motion to quash, condition, or modify a subpoena requiring attendance or production of items before a court, at trial, or a deposition. CCP section 1987.1. The court may also on such a motion make an order "as appropriate to protect the person from unreasonable or oppressive demands…." Ibid. See also CCP sections 1985.3(g), 1985.6(f). A party of course may obtain a protective order since the court "for good cause shown, may make any order that justice requires to protect any party... from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense." CCP sections 2017.020; 2019.030; 2025.420; 2030.090; 2031.060; 2033.080(b).

The Propriety of the Discovery Sought

Defendant persuasively argues that the discovery is not warranted in this case. These subpoenas seek a broad range of documents, such as all documents reflecting the amount of money the recipients charged owners for "Jockey Insurance/Per Start Fees"; copies of checks the recipients paid for such insurance; agreements with the applicable insurer; worker's compensation policies; all writings or

correspondence regarding such insurance; all information sent to any horse owner regarding such insurance; and more.

On the face of this lawsuit, none of this information seems potentially relevant. This lawsuit, as currently pleaded and framed by the pleadings, consists of Plaintiff's claim that Defendant improperly charged him $146 for one instance of submitting Undisturbed for races, and his claims that this was illegal and improper based specifically on the applicable statutes, rules, and regulations. There is no basis for obtaining the evidence requested since it has no bearing on Plaintiff's claims. No information about the recipients' transactions, communications, or dealings with each other, with Defendant, or with other owners, who are not parties to this lawsuit, has any bearing on the claims presented in the complaint. The information is thus facially not likely to lead to the discovery of admissible evidence and appears solely intended to be unnecessarily and improperly harassing, overly burdensome, and oppressive. There is no substantial justification for the discovery sought in these subpoenas. When Plaintiff served the discovery, he had not even filed the motion for leave to file the FAC, so that the issues as framed in the pleadings at the time of this discovery were unequivocally limited to the original complaint.

Even considering the additions to the FAC, there is no evident basis for the discovery sought. The FAC still names only Plaintiff himself, rendering information for any other parties other than the transaction between Plaintiff and Defendant, irrelevant. Plaintiff has not timely opposed this motion and his untimely opposition does not provide any explanation as to why this information could potentially lead to admissible evidence.

The Court does note that some categories in the subpoenas seek facially relevant documents but still finds the subpoenas improper even as to these items. Specifically, some items request production of CHRB rules or statutory authority, or the like, which may allow Defendant to charge an owner a per-start fee, and this information is facially relevant. However, there is no basis for requesting anyone to provide statutory or other authority in discovery, which is essentially an improper attempt to use discovery to make another do a party's own legal research, as opposed to searching for admissible evidence. CCP section 2017.010 sets forth the basic standards as to who is entitled to conduct discovery and what is generally discoverable. It states, in pertinent part and with emphasis added, "any party may obtain discovery regarding any matter… if the matter either is itself *admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence*." Related to this is the principle that, in general, it is improper for a party to "attempt to place the burden and cost of supplying information equally available to both solely upon' others. *Greyhound Corp. v. Sup.Ct*. (1961) 56 Cal.2d 355, 384-385. The Supreme Court in *Greyhound* applied this principle specifically to efforts to shift the burdens of research to other parties. The Court in *Calcor Space Facility, Inc. v. Sup.Ct*. (1997) 53 Cal.App. 4th 216, at 225, later reiterated the principle and clarified that it also extends, even more

strongly, to situations where a party seeks to "fish" from a non-party. The *Calcor* Court explained, 'The concerns for avoiding undue burdens on the "adversary" in the litigation expressed in *Greyhound* apply with even more weight to a nonparty.'

Defendant is not, however, persuasive regarding the limitations on discovery applicable to small claims matters or limited jurisdiction matters. This case is an unlimited jurisdiction case and that designation remains in effect. Moreover, despite Plaintiff's underlying claims being limited to $146, Plaintiff raises additional claims which may be outside the scope of small claims or limited jurisdiction. The Court merely notes the existence of the issue, however, and makes no determination on that point because no party has raised or briefed it or put the issue before the Court. The Court also finds the issue of such limitations to have no effect on the outcome of this motion because, as explained above, Plaintiff's discovery efforts via these subpoenas are improper in the context of the current pleadings.

Notice to Third-Party Consumers

Defendant in part argues that Plaintiff failed to provide a notice to the third-party owners that he is seeking, among others, their records, and that they have objected to the subpoenas on this basis.

Anyone serving a deposition subpoena for records of a consumer or employee must serve that consumer or employee with a notice of privacy rights and copy of the subpoena "[p]rior to the date called for in the subpoena" as well as at least 5 days prior to service upon the custodian of records, and 10 days prior to the date for production. CCP sections 1985.3(b), 1985.6(b). The party serving the subpoena must also serve the custodian with proof that the party had served the consumer or employee whose records are sought. CCP sections 1985.3(c), 1985.6(c), 2020.410(d). Failure to comply with these requirements invalidates the service of the subpoena so that the witness/custodian need not comply and if the evidence is produced, gives grounds to object to its admission. CCP sections 1985.3(k), 1985.6(j); see *Sasson v. Katash* (1983) 146 Cal.App.3d 119, 125. CCP section 1985.3(b) states, in pertinent part, and with emphasis added,

> (b) Prior to the date called for in the subpoena duces tecum for the production of personal records, the subpoenaing party shall serve or cause to be served on the consumer whose records are being sought a *copy of the subpoena duces tecum*, *of the affidavit* supporting the issuance of the subpoena, if any, *and of the notice* described in subdivision (e), *and proof of service* as indicated in paragraph (1) of subdivision (c).. *This service shall be made as follows*:
>
> (1) To the consumer personally, or at his or her last known address, or in accordance with Chapter 5…, or, if he or she is a party, to his or her attorney of record.
>
> …
>
> (2) Not less than 10 days prior to the date for production specified in the subpoena duces tecum, plus the additional time provided by Section 1013 if service is by mail.

(3) *At least five days prior to service upon the custodian of the records, plus the additional time provided by Section 1013 if service is by mail*.

A "consumer whose personal records are sought" or "employee" or "[a]ny other consumer or non-party" whose records are sought may either move to quash a subpoena or serve written objections prior to the date set for production. CCP sections 1985.3(g), 1985.6(f)(2).

Defendant asserts that Plaintiff never complied with the notice requirements set forth above. The copies of the subpoenas attached as Ex. G to the King Declaration support this contention. Defendant also asserts that at least some of the third-party owners whose documents the subpoenas seek have objected, but it provides no evidence of this. The failure to comply with the notice requirements, regardless of whether the third parties objected, is a basis for granting this motion as well.

Conclusion: Motion to Quash and for Protective Order

The Court GRANTS the Motion to Quash Subpoenas and for Protective Order and Sanctions. The Court also notes that this ruling is without prejudice to Plaintiff to again seek the information should the pleadings in this case change and raise new facts, issues, or causes of action which may potentially warrant the discovery which the Court is currently barring or limiting.

Sanctions

The prevailing party on a motion regarding a subpoena may be entitled to sanctions if the losing party lacked substantial justification. CCP sections 1987.2(a); 2025.260(d). In order to obtain sanctions, the moving party must request sanctions in the notice of motion, identify against whom the party seeks the sanctions, and specify the kind of sanctions. CCP section 2023.040. The sanctions are limited to the "reasonable expenses" related to the motion. *Ghanooni v. Super Shuttle of Los Angeles* (1993) 20 Cal.App.4th 256, 262.

In its motion, Defendant only states that it seeks monetary sanctions for Plaintiff's alleged discovery abuses, without specifying if they are to be against Plaintiff, his attorney, or both.

Defendant seeks $3,408 for time spent objecting, meeting and conferring, and bringing this motion, but only states that it "will easily exceed 12 hours at 284 an hour…." King Dec. There is no evidence of the time spent and the Court may not compensate for time only anticipated and not actually spent. Absent further evidence, the Court finds five hours at the stated rate of $284 an hour to be reasonable, resulting in a total of $1,420. With the $60 filing fee, the total of $1,480. The court AWARDS sanctions of $1,480 in favor of Defendant against Plaintiff personally since the motion apparently only seeks sanctions against Defendant.

Motion for Protective Order Re: Discovery Requests; Request for Sanctions

In addition to noticing and conducting the deposition of Defendant's designated person most qualified ("PMQ") and serving the deposition subpoenas discussed above, Plaintiff initially served 18

requests for admission ("RFAs") and 19 requests for production ("RFPs"), followed by 22 additional RFAs, 16 more RFPs, and two sets of form interrogatories. King Dec., ¶¶9-13. Defendant has objected to the discovery requests in part but has agreed to respond to some. Id., ¶11. The two sets of RFAs together amount to 40 RFAs. The second set includes a declaration for additional discovery.

The Discovery Act sets forth some express limitations on written discovery demands but these are specific and do not apply to all types. There is no limit to the number of production request demands which a party may serve. See CCP section 2031.010, et seq. As for RFAs, there is also no limit on RFAs regarding genuineness of documents but otherwise each party has a right to serve up to 35 RFAs on each other party with the ability to serve more with a sufficient declaration of necessity. CCP section 2033.030. There is no limit on the number of form interrogatories which a party may serve but each party has a right to serve only 35 special interrogatories on each other party, with the ability to serve more with a sufficient declaration of necessity. CCP section 2030.030. The declaration must "substantially" contain the statements set forth in CCP sections 2030.040(a), 2030.050.

Thus, a party need not answer special interrogatories or RFAs over 35 unless the propounding party has provided a declaration of necessity but the responding party must respond to the first 35. When a party provides a declaration of necessity, the responding party may challenge it by a motion for protective order. CCP sections 2030.090, 2033.080. The implication is that therefore merely objecting to additional interrogatories or RFAs as being over 35 when they include the required declaration is insufficient. See *Catanese v. Sup.Ct.* (1996) 46 Cal.App.4th 1159, 1165. The responding party may, among other things, seek a protective order that the set, or particular requests in the set, need not be answered at all or that, contrary to the representations made in a declaration submitted under Section 2033.050, the number of admission requests is unwarranted. CCP sections 2030.090, 2033.080.

That said, as discussed above, a party may generally seek a protective order since the court "for good cause shown, may make any order that justice requires to protect any party... from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense." CCP sections 2017.020; 2019.030; 2025.420; 2030.090; 2031.060; 2033.080(b). CCP section 2019.030 expressly states that this be used to limit the frequency or extent of discovery if unreasonably cumulative or duplicative, unduly burdensome or expensive. The burden of proof is on the party seeking the protective order to demonstrate "good cause." *Emerson Elec. Co. v. Sup.Ct.* (1997) 16 Cal.4th 1101, 1110. The burden is "undue" only if the expense and inconvenience clearly outweigh the likely benefits. CCP sections 2017.020; 2019.030; 2025.420; 2030.090; 2031.060; 2033.080(b).

By contrast, when a party seeks a protective order to challenge a declaration of necessity for extra RFAs or special interrogatories, however, the burden is on the party propounding the discovery to justify the extra number. CCP sections 2030.040(b), 2033.040(b).

The Court again notes that when Plaintiff served the discovery, he had not yet filed the motion for leave to file the FAC, so the issues as framed in the pleadings at the time of this discovery were unequivocally limited to the original complaint. Even so, the Court is considering the additions to the FAC. The FAC still names only Plaintiff himself, rendering information for any other parties other than the transaction between Plaintiff and Defendant facially of no relevance. Plaintiff has not opposed this motion to argue to the contrary or provided any explanation as to why this information could potentially lead in any way to admissible evidence. As explained below, however, the new allegations do otherwise provide some basis for a limited portion of the discovery items which, based on the original complaint, would not have been proper.

Defendant is partly persuasive on this point. RFAs 1-13, 22-29, 31-40 on their face do seek information either directly relevant to the allegations in the original complaint or seem reasonably calculated to lead to admissible evidence. Additionally, many are tied specifically to Plaintiff's assertion that under applicable statutes, rules, and regulations, he is not an "employer" and has no duty to provide worker's compensation insurance while others at least touch reasonably on the events involving Plaintiff personally. Regardless of whether these are otherwise objectionable, an issue not before this Court at this time, these are facially reasonable and narrowly tailored to the allegations. Defendant fails to demonstrate that a protective order is appropriate as to them. RFAs 14-21 and 29-30 also do relate facially to the new causes of action for misrepresentation. The Court DENIES the motion as to the RFAs.

With respect to the form interrogatories, in each set, Plaintiff only marked 17.1 as needing a response, leaving the others unmarked. These relate to the RFAs and Defendant must respond to them.

Of the 19 RFP items Plaintiff served in its RFP set, some are appropriate but others appear improper and should be subject to a protective order.

RFPs 7-8, 12, and 17, are clearly relevant because they go directly to the transaction involving Plaintiff and are limited in scope. They are proper and the Court thus DENIES the motion and the request for a protective order as to those.

RFPs 5-6, and 11 are overly broad in that they seek documents for an unlimited period of time going to all transactions, not just Plaintiff's, while any such documents other than those specific to Plaintiff's transaction are on their face overly burdensome and not reasonably calculated to led to admissible evidence. The Court GRANTS the motion as to a limited protective order regarding these and issues a protective order limiting 5-6 and 11 to those specific contracts involving Plaintiff, his horse Undisturbed, the jockey who rode his horse, and the trainer for that jockey. Defendant must respond as to those items as limited.

The other RFPs on their face are overly burdensome and not reasonably calculated to lead to admissible evidence. The court GRANTS the motion as to these and thus issues a protective order shielding Defendant from the need to respond to those.

The Court notes the limitations of its order regarding a protective order. Regarding the discovery for which the Court has denied or only partly granted a protective order, and to which Defendant must therefore respond, this order has no bearing on whether Defendant may assert objections in its responses, or what those objections may be. The Court also notes that this ruling is without prejudice to Plaintiff to again seek the information should the pleadings in this case change and raise new facts, issues, or causes of action which may potentially warrant the discovery which the Court is currently barring or limiting. This Court's current determination is limited to the current claims as framed by the complaint.

Sanctions

As with a motion to quash subpoena, CCP sections 2017.020(b) and 2025.420(d) state that on a motion for a protective order the court "shall" impose monetary sanctions on the losing party pursuant to CCP section 2023.010, et seq., unless that party acted with substantial justification or other circumstances make sanctions unjust. In order to obtain sanctions, the moving party must request sanctions in the notice of motion, identify against whom the party seeks the sanctions, and specify the kind of sanctions. CCP section 2023.040. The sanctions are limited to the "reasonable expenses" related to the motion. *Ghanooni v. Super Shuttle of Los Angeles* (1993) 20 Cal.App.4th 256, 262.

In its motion, Defendant again only states that it seeks monetary sanctions for Plaintiff's alleged discovery abuses, without specifying if they are to be against Plaintiff, his attorney, or both.

Defendant seeks at least $3,400 for time spent objecting, meeting and conferring, and bringing this motion, but, as on the motion to quash, only states that it "will easily exceed 12 hours at 284 an hour…." King Dec. There is no evidence of the time spent and the Court may not compensate for time only anticipated and not actually spent. Absent further evidence, the Court finds five hours at the stated rate of $284 an hour to be reasonable, resulting in a total of $1,420. With the $60 filing fee, the total of $1,480. The Court AWARDS sanctions of $1,480 in favor of Defendant against Plaintiff personally since the motion apparently only seeks sanctions against Defendant.

Conclusion: Motion for Protective Order Re: Discovery Requests; Request for Sanctions

The Court GRANTS the motion in part, as specified above, and AWARDS sanctions of $1,480 to Defendant and against Plaintiff.

Conclusion

The court GRANTS the motions as set forth above, with the above limitations. Defendant's counsel shall submit a written order consistent with this tentative ruling and in compliance with Rule 3.1312.

3-4. 23CV01904, Zomouse v. General Motors, LLC

This matter is on calendar for Defendant's demurrer to the fourth cause of action (fraud) and the fifth cause of action (unfair competition), and their motion to strike the prayer for punitive damages. No opposition has been filed to either motion.

Defendant's request for judicial notice is GRANTED. The demurrer is SUSTAINED WITH LEAVE TO AMEND. The motion to strike is DENIED without prejudice. If Plaintiff amends the complaint and Defendant brings another demurrer to the amended complaint, Defendant may also bring another motion to strike. Defendant's counsel shall submit a written order consistent with this tentative ruling and in compliance with Rule 3.1312.

Background

Plaintiffs purchased a new Chevrolet Bolt ("Vehicle"), an all-electric passenger car, from Defendant Roseville Chevrolet on January 13, 2020. The Vehicle was manufactured by Defendant General Motors ("GM"). It came with a warranty, which included an 8-year, 100,000-mile warranty on the battery. In 2021, GM issued a recall notice for the Vehicle. The notice indicated that there was a danger of fire when the Vehicle's battery was charged to over 90% capacity or when it had less than 70 miles of range remaining, and that the Vehicle should not be parked indoors overnight.

Plaintiffs allege three causes of action against GM under the Song-Beverly Consumer Warranty Act, plus two others: the fourth, for common-law fraud, including affirmative misrepresentation of the Vehicle's range and safety and fraudulent concealment of known issues with the battery overheating and causing fires; and the fifth, for violation of Bus. & Prof. Code §§ 17200 et seq., the Unfair Competition Law ("UCL"). All of these causes of action are based on the allegation that the Vehicle is defective because its battery cannot safely be fully charged or used until it is fully discharged, and that, therefore, the Vehicle's range – that is, the distance it can be driven on a single charge – is less than what GM advertised it to be. There is also a sixth cause of action for negligent repair against defendant Roseville Chevrolet.

In the two instant motions, Defendant demurs to the fourth (fraud) and fifth (UCL) causes of action and moves to strike the prayer for punitive damages from Plaintiffs' complaint.

I. Motion for judicial notice

Defendant asks the Court to take judicial notice of a web page published by the EPA that lists fuel range figures for the 2020, 2021, and 2022 models of the Chevrolet Bolt. The motion is GRANTED to the extent that the Court takes judicial notice of the web page's existence and content. The Court notes that judicial notice is unnecessary here because a copy of the same web page, which Defendant's counsel declares to be true and correct, is attached to counsel's declaration.

II. Governing law

A. Standard on demurrer

A demurrer tests whether the complaint sufficiently states a valid cause of action. (*Hahn v. Merda* (2007) 147 Cal.App.4th 740, 747.) A demurrer may only challenge defects that appear on the face of the pleading under attack or from matters outside the pleading that are judicially noticeable. (CCP § 430.30(a).) In the event a demurrer is sustained, leave to amend should be granted where the complaint's defect can be cured by amendment. (*The Swahn Group, Inc. v. Segal* (2010) 183 Cal.App.4th 831, 852.)

Complaints are read as a whole, in context, and are liberally construed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Stevens v. Superior Court* (1999) 75 Cal.App.4th 594, 601.) In reviewing the sufficiency of a complaint, courts accept as true all material facts properly pleaded and matters that may be judicially noticed, but not contentions, deductions, or conclusions of fact or law, or the construction of instruments pleaded, or facts impossible in law. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591; *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43; see also *South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 732.) Opinions, speculation, or allegations contrary to law or judicially noticed facts are also disregarded. (*Coshow v. City of Escondido* (2005) 132 Cal.App.4th 687, 702.)

Generally, the pleadings "must allege the ultimate facts necessary to the statement of an actionable claim. It is both improper and insufficient for a plaintiff to simply plead the evidence by which he hopes to prove such ultimate facts." (*Careau & Co. v. Security Pac. Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1390; *FPI Development v. Nakashima* (1991) 231 Cal.App.3d 367, 384.) Each evidentiary fact that might eventually form part of a party's proof does not need to be alleged. (*C.A. v. William S. Hart Union High School Dist*. (2012) 53 Cal.4th 861, 872.) Conclusory pleadings are permissible and appropriate where supported by properly pleaded facts. (*Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6.)

B. Motion to strike

1. Generally

A motion to strike lies where a pleading contains "irrelevant, false, or improper matter[s]" or is "not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court." (CCP § 436(b).) However, "falsity" must be demonstrated by reference to the pleading itself or judicially noticeable matters, not extraneous facts. (*See* CCP § 437.)

2. Punitive damages

A motion to strike is also properly directed to unauthorized claims for damages, i.e. damages that are not allowable as a matter of law. (*See, e.g. Commodore Home Systems, Inc. v. Sup. Ct.* (1982) 32 Cal.3d 211, 214.)

Punitive damages are available in noncontract cases "where the defendant has been guilty of oppression, fraud, or malice . . . ." (Civ. Code § 3294.) "Malice" means conduct that is intended by the defendant to cause injury to the plaintiff or despicable conduct carried on by the defendant with a willful and conscious disregard of the rights or safety of others. "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury. (*Ibid.*) A conscious disregard for the safety of others may constitute malice. (*G. D. Searle & Co. v. Superior Court* (1975) 49 Cal.App.3d 22, 28.) Punitive damages may be stricken where the facts alleged do not rise to the level of "malice, fraud or oppression." (See, e.g., *Turman v. Turning Point of Central Calif., Inc.* (2010) 191 Cal.App.4th 53, 63.)

For an employer to be liable for punitive damages for the actions of an employee, it must be shown that "the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice." (Civ. Code § 3294(b).) "With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation." (*Ibid.*) Where punitive damages are alleged against an employer under Civil Code § 3294(b), the knowledge on the part of the employer stands as their equivalent of oppression, fraud or malice otherwise required under Civ. Code § 3294 (a); no oppression, fraud or malice on the part of the employer need be shown. (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1154.) Plaintiff must plead facts sufficient to show either knowledge or ratification by an officer, otherwise claims for punitive damages are inadequately pled. (*Hart v. National Mortgage & Land Co.* (1987) 189 Cal.App.3d 1420, 1433.)

C. Fraud

1. Elements

"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; see also Civ. Code §§ 1571-1574.*)* Suppression of a fact by one who is bound to disclose it may constitute fraud. (Civ. Code § 1710(3).) "(T)he elements of an action for fraud and deceit based on concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff

must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage." (*Marketing West, Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 612–613.) "A failure to disclose a fact can constitute actionable fraud or deceit in four circumstances: (1) when the defendant is the plaintiff's fiduciary; (2) when the defendant has exclusive knowledge of material facts not known or reasonably accessible to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations that are misleading because some other material fact has not been disclosed." (*Collins v. eMachines, Inc.* (2011) 202 Cal.App.4th 249, 255.)

2. Pleading requirements

"In California, fraud must be pled specifically; general and conclusory allegations do not suffice. Thus, the policy of liberal construction of the pleadings . . . will not ordinarily be invoked to sustain a pleading defective in any material respect. This particularity requirement necessitates pleading *facts* which show how, when, where, to whom, and by what means the representations were tendered." *(Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645, internal citations and quotation marks omitted; *see Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1166-1167.)

"Intent . . . is a fact. Hence, the averment that the representation was made with the intent to deceive the plaintiff, or any other general allegation with similar purport, is sufficient." (5 Witkin, *California Procedure* § 725; see also *Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1060 [in pleading promissory fraud, general allegation that the promise was made without intent to perform was sufficient].)

To establish reliance on fraud, reliance upon the truth of the fraudulent misrepresentation does not have to be a predominant factor in the plaintiff's subsequent conduct, but it must be a substantial factor. (*OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 864.) Plaintiffs in fraud-by-concealment claims must show that if the information had not been omitted, the plaintiff would have been aware of it and therefore would have behaved differently. (*Ibid.*) The pleading must be adequately specific to show actual reliance on the omission, and that the damages causally resulted therefrom. (*Ibid*.) California law "requires a plaintiff to allege specific facts not only showing he or she actually and justifiably relied on the defendant's misrepresentations, but also how the actions he or she took in reliance on the defendant's misrepresentations caused the alleged damages." (*Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1499.)

III. Demurrer

A. Fourth cause of action: fraud

Defendant demurs to the fourth cause of action for fraud on five grounds: that the cause of action is not pled with adequate specificity; that it fails to allege that GM knew of the issues with the Vehicle

before purchase; that GM did not misrepresent the vehicle's range; that Plaintiff's losses are unrecoverable under the economic loss rule; and that the complaint fails to allege a relationship between Defendant and Plaintiffs giving rise to a duty to disclose. Each basis is discussed below.

1. Sufficiency of allegations of fraud

Defendant argues that the complaint fails to comply with the special specific-pleading requirements applicable to fraud actions "because Plaintiffs failed to allege (i) the identity of the individuals at GM who purportedly concealed material facts or made untrue representations about their Colorado (ii) their authority to speak and act on behalf of GM, (iii) GM's knowledge about alleged defects in Plaintiffs' Colorado at the time of purchase, (iv) any interactions with GM before or during the purchase of their Colorado, or (v) GM's intent to induce reliance by Plaintiffs to purchase the specific Colorado at issue."

To begin with, Defendant's emphasis on "*their* Colorado" throughout that passage suggests that Defendant's position is that even if GM knew that the particular model of Colorado Plaintiffs purchased had multiple reported problems with, for example, its transmission, they were not obliged to disclose that to Plaintiffs unless they also knew that the specific vehicle Plaintiffs were purchasing had those problems. If that is Defendant's position, the Court disagrees. Plaintiffs allege that if GM had disclosed the known issues with the type of transmission used in their vehicle, they would not have purchased it. (Complaint ¶ 49.) Therefore, the character of the information that GM allegedly concealed was not "your particular Colorado is going to have transmission problems"; it was "a great many vehicles with transmission just like the one in yours have had transmission problems."

The Court agrees with points (i), (ii), and (iv), with the proviso that references to GM are deemed to include GM's agents. Plaintiffs do not need to provide names of individuals whose names they do not know if those names are likely to be known to GM or its agent. (*Bradley v. Hartford Acc. & Indem. Co.* (1973) 30 Cal.App.3d 818, 825.) But the complaint should allege who concealed material information from Plaintiffs – that is, who, in their view, was in a position to disclose the history of problems with the eight-speed transmission used in their model of Colorado but failed to do so – in enough detail that Defendant can identify the individuals so described.

Regarding point (iii), the Court finds that the complaint adequately pleads that GM knew about defects in the particular model of Colorado that Plaintiffs purchased in advance of the purchase. (See, e.g., Complaint ¶¶ 47, 48, 50, 51, 52, 55.) If Defendant's rationale for point (iii) turns on GM's knowledge of specific facts about the exact vehicle that Plaintiffs purchased, the Court disagrees for the reasons set forth above.

As to point (v), the Court agrees that while Plaintiffs have pleaded that they "relied on Defendant GM's advertising materials which did not disclose the defect," they did not plead that GM intended to

induce them to rely on those materials by concealing the defect. Since intent to induce reliance is an element of fraud, that is a fatal defect in the complaint. However, in light of the principle that a general allegation of intent is sufficient (*Beckwith, supra,* 205 Cal.App.4th at p. 1060), the Court finds that the defect can be cured by amendment.

2. Allegations of GM's knowledge of the defect

Defendant argues that the complaint does not allege facts supporting the conclusion that GM knew about the problems with the Vehicle's battery prior to Plaintiffs' purchase of it. Defendant notes that the bulk of Plaintiffs' allegations refer to Bolts manufactured in different model years from the Vehicle, and asserts that "[t]he mere fact that fires occurred in a minuscule number of Bolts, GM issued a recall notice, and NHTSA opened an investigation is not enough to plausibly allege that GM knew of and intentionally misrepresented or concealed any material facts from Plaintiff at the time Plaintiff purchased the vehicle."

However, the plausibility of Plaintiffs' allegations is not at issue at this stage; the only issue in the context of a demurrer is whether the complaint makes sufficient allegations to state a cause of action. The complaint directly alleges that "All of the aforementioned events . . . informed GENERAL MOTORS of the significant defects with the vehicle's battery prior to Plaintiffs's [sic] September 6, 2020 acquisition of the subject vehicle." (Complaint ¶ 26.) *Writing here.*

3. Allegations of GM's fraudulent advertising

In multiple paragraphs of the complaint, Plaintiffs allege that GM falsely inflated the Vehicle's battery range in its advertising. (Complaint ¶¶ 15 ["over 200 miles"], 17 ["marketed as a 'long range' . . . vehicle"], 26 [marketed as long range], 35 ["marketing strategy that advertises a competitive mileage capacity"], 40 [marketing material suggests that vehicle is long-range], 80 [GM marketed Vehicle as having long range capability], 83 [GM's range advertisements], 84 [marketed as having long-range capability], 85 [GM "touted its specific mileage range"], 90 ["Defendant's advertising which stresses the long range of each vehicle"], 91 [representations regarding range "communicated through the Defendant's marketing material"].)

By way of both a motion for judicial notice and a declaration, Defendant draws the Court's attention to an EPA web page that gives the mileage range for the 2000, 2001, and 2002 models of the Chevrolet Bolt as 259 miles. Defendant then claims that Plaintiffs "assert that GM marketed the subject vehicle as having long range capability – i.e., 259 miles on a full charge." Therefore, Defendant argues, the advertisements to which the complaint alludes merely quoted EPA estimates, and car manufacturers are allowed to do that: "[n]o misrepresentation occurs when a manufacturer merely advertises EPA estimates." (*Gray v. Toyota Motor Sales* (9th Cir. 2014) 554 Fed. Appx. 608, 609.) And therefore, Defendant concludes, there can be no fraud based on misrepresentation because there *was* no misrepresentation.

In the first place, contrary to Defendant's assertion, the complaint never mentions the 259 mile figure. The complaint does say that GM predicted in 2016 that Bolts would have a range greater than 200 miles (Complaint ¶ 15), but that is the only mention of a specific mileage. With respect to the Vehicle's range, the gravamen of the complaint is not that it has some particular numerical range as distinct from some other particular numerical range; it is that the Vehicle effectively has less range than it was advertised to have because the battery cannot be either fully charged or fully discharged without the risk of fire.

More importantly, even if the complaint said something like "GM advertised that the vehicle had a range of 259 miles but in fact its range is only 175 miles" – which, again, it does not – that would not compel the conclusion that GM was advertising an EPA estimate. GM could have simply said "you should buy this Bolt because it gets 259 miles on a single charge" with no reference to the EPA, which would be an assertion that it gets 259 miles on a charge, not an assertion that the EPA says it gets 259 miles on a charge. Such a marketing claim would not be excused by the *Gray* rule. Indeed, the complaint directly alleges that GM's 2016 claim that Bolts would have a battery range over 200 miles "was made absent any reference to the EPA estimated mileage range." (Complaint ¶ 15.)

The Court finds that Plaintiffs have adequately alleged that GM misrepresented the Vehicle's range – again, in the sense that the range was not as big as it would have been if the battery could safely take a 100% charge and be driven until the battery was fully discharged. Of course, Plaintiffs will need to prove this at trial by entering actual advertisements, marketing material, or statements by GM representatives into evidence. If those advertisements say no more than "EPA-estimated 259 miles on a charge," as Defendant apparently thinks they will, Defendant may object to them on that basis.

4. Economic loss rule

Defendant argues that "Plaintiff's prayer for purely economic losses based on alleged fraudulent concealment is barred by the economic loss rule." That rule provides that "[i]n general, there is no recovery in tort for negligently inflicted 'purely economic losses,' meaning financial harm unaccompanied by physical or property damage." (*Sheen v. Wells Fargo Bank* (2022) 12 Cal.5th 905, 922.) Defendant's point is that since fraud is a tort, the remedy cannot include the value of the Vehicle because that is a purely economic loss. Defendant cites *Robinson Helicopter v. Dana Corp.* (2004) 34 Cal.4th 979, 988 for this proposition.

A recent opinion by the First District Court of Appeal takes the opposite position. In *Dhital v. Nissan North America* (2022) 84 Cal.App.5th 828, the trial court sustained Nissan's demurrer to a fraud cause of action based on their alleged intentional concealment of known problems with a vehicle's transmission. The First District disagreed, holding that "under California law, the economic loss rule does not bar plaintiffs' claim here for fraudulent inducement by concealment. Fraudulent inducement

claims fall within an exception to the economic loss rule recognized by our Supreme Court [citation], and plaintiffs allege fraudulent conduct that is independent of Nissan's alleged warranty breaches. The trial court erred by sustaining Nissan's demurrer to plaintiffs' fraud claim on the ground it was barred by the economic loss rule." *(Id.* at p. 843.) *Dhital* discusses *Robinson* extensively and distinguishes it on the basis that the fraud claims presented there involved conduct by the defendant "that occurred *during the performance* of a contract," as distinct from conduct that induced the plaintiff to enter into the contract in the first place. (*Id.* at p. 839, original emphasis.) Indeed, *Dhital* notes that "the *Robinson* court affirmed that tort damages *are* available in contract cases where the contract was fraudulently induced." (*Ibid.*, citing *Robinson, supra,* 34 Cal.4th at pp. 989-990.)

Dhital is currently under California Supreme Court review on this exact point: the Supreme Court's website notes that the issue is "are claims for fraudulent concealment exempted from the economic loss rule?" Therefore, it is not binding precedent and may be cited only as persuasive authority. (Cal. Rules of Court, rule 8.1115(e)(1).) That said, the Court finds the holding persuasive, and will therefore not sustain the demurrer on the basis of the economic loss rule.

5. Transactional relationship between the parties

Defendant argues that it does not matter whether Defendant concealed material information from Plaintiffs because Plaintiffs did not buy the vehicle directly from Defendant, and therefore Defendant had no duty to disclose anything to Plaintiffs. This issue was also addressed by *Dhital, supra*:

> "Nissan argues plaintiffs did not adequately plead the existence of a buyer-seller relationship between the parties, because plaintiffs bought the car from a Nissan dealership (not from Nissan itself). At the pleading stage . . . , we conclude plaintiffs' allegations are sufficient. Plaintiffs alleged that they bought the car from a Nissan dealership, that Nissan backed the car with an express warranty, and that Nissan's authorized dealerships are its agents for purposes of the sale of Nissan vehicles to consumers. In light of these allegations, we decline to hold plaintiffs' claim is barred on the ground there was no relationship requiring Nissan to disclose known defects."

(*Dhital, supra,* 84 Cal.App.5th at p. 844.) Plaintiffs have alleged that they bought the Vehicle "from Silveira Chevrolet, an authorized dealer and agent of GENERAL MOTORS," that "[a]s part of the transaction, GENERAL MOTORS issued an express warranty," and that "[t]he dealership is an agent of GENERAL MOTORS for purposes of the [sale] transaction." (Complaint ¶ 6.) That puts the instant case directly in line with the foregoing passage from *Dhital.* Again, *Dhital* is persuasive authority, not mandatory, because it is under California Supreme Court review. (Cal. Rules of Court, rule 8.1115(e)(1).) Again, the Court finds the analysis persuasive.

Defendant cites to *Bigler-Engler v. Breg* (2017) 7 Cal.App.5th 276 for the proposition that a transaction giving rise to a cause of action for fraudulent concealment "must necessarily arise from direct dealings between the plaintiff and defendant; it cannot arise between the defendant and the public at large." *Bigler-Engler* is distinguishable for two related reasons. First, the plaintiff there purchased the medical device at issue in the litigation from a distributor whose relationship with the defendant manufacturer was not necessarily identical to that between an auto manufacturer and its authorized dealership. Second, *Bigler-Engler* was an appeal following a jury trial, and therefore the Court of Appeal had clear factual findings regarding the relationship between the plaintiff, distributor, and defendant, whereas here the case has not advanced beyond the pleading stage.

B. Fifth cause of action: Unfair Competition Law

As relevant here, the Unfair Competition Law prohibits businesses from engaging in "any unlawful, unfair, or fraudulent business act or practice." (Bus. & Prof Code § 17200. Defendant challenges the fifth cause of action on the basis that none of these three "prongs" has been adequately pleaded. Regarding the "fraudulent" prong, Defendant incorporates its argument regarding the fraud cause of action, which the Court addressed in the previous section. As noted there, the Court will allow Plaintiffs to amend the complaint to address the deficiencies in the fourth cause of action, and such amendment may also justify the fifth cause of action under the "fraudulent" prong.

1. "Unlawful" prong

Defendant correctly notes that the only statutory violation alleged in connection with the "unlawful" prong of the UCL analysis is deceptive or misleading advertising in violation of Bus. & Prof. Code § 17500. Defendant argues that "such claims fail for the reasons discussed in Section IV, *supra*." Section IV of Defendant's memorandum is headed "ARGUMENT," encompasses eight pages, and has four subsections, so Defendant's point is not entirely clear. However, the Court assumes that Defendant refers to Section IV(C) of the memorandum, which contains Defendant's argument, discussed above, that GM cannot be liable for false or misleading advertising regarding the Vehicle's range when all it did was quote EPA estimates.

Again, the notion that the advertisements to which Plaintiffs refer merely quoted EPA estimates is Defendant's speculation; it is not apparent from the face of the complaint. (CCP §430.30.) The only reference to the EPA in the complaint is "The mileage representation was made absent any reference to the EPA estimated mileage range." (Complaint ¶ 15.) Defendant can make this argument after conducting discovery and determining exactly what advertisements Plaintiffs are referring to, but at this stage, Plaintiffs have adequately pleaded that GM misrepresented the Vehicle's range. Such misrepresentation, if proved, would violate Bus. & Prof. Code § 17500.

Of course, the operative phrase there is "if proved." If Defendant's speculation is correct, and if the advertised range figures were in fact qualified by something like "EPA-estimated," then Defendant's objection based on the rule set forth in *Gray, supra,* will be well taken. If Plaintiffs wish, they may amend the UCL cause of action to allege a violation of one or more different or additional statutes.

2. "Unfair" prong

Defendant cites to *McKell v. Washington Mutual* (2006) 142 Cal.App.4th 1457, 1473 for the proposition that "[a] business practice is unfair within the meaning of the UCL if it violates established public policy or if it is immoral, unethical, oppressive or unscrupulous and causes injury to consumers which outweighs its benefits." Defendant then submits that Plaintiffs "do not reference any established public policy that GM's actions have violated," which is true, but they do not need to because, under the quoted holding, "violates established public policy" is one of two disjunctively phrased definitions.

The other definition requires Plaintiffs to allege (at this point) and prove (ultimately) two things: that GM's business practices at issue here were immoral, unethical, oppressive, or unscrupulous; and that the injuries these practices caused outweighed their benefits. The latter requirement is also set forth in *Camacho v. Auto Club of Southern California* (2006) 142 Cal.App.4th 1394, 1403, which Plaintiffs cite in their complaint at ¶ 98. Plaintiffs have unquestionably made sufficient allegations to meet that requirement. (See, e.g., Complaint ¶¶ 99-105.) Defendant does not argue otherwise.

Defendant does argue, however, that Plaintiffs "do not . . . claim that [GM's] conduct is immoral, unethical, oppressive, or unscrupulous." The Court agrees. Plaintiffs make numerous allegations of conduct on GM's part that could reasonably be described by one or more of those adjectives; for example, paragraph 24 of the complaint alleges that a GM spokesperson publicly stated that Chevrolet Bolt batteries could safely be charged to 100% capacity even though GM knew at that time that doing so caused a risk of fire. But as noted above, pleadings must allege ultimate facts, not simply "the evidence by which [the plaintiff] hopes to prove such ultimate facts." (*Careau, supra,* 222 Cal.App.3d at p. 1390.) The "unfair" section of the fifth cause of action is inadequately pleaded for that reason. However, the Court believes that this deficiency can be cured by amendment.

IV. Motion to strike

Defendant moves to strike the prayer for punitive damages from the complaint. (Prayer, ¶ f.) Defendant correctly points out that punitive damages are not available under either the Song-Beverly Act or the Unfair Competition Law. Defendant's primary argument regarding the only cause of action that does support punitive damages, the fourth, is that that cause of action fails for the reasons addressed above in the context of Defendant's demurrer to it, and that, in consequence, there is no cause of action in the complaint that justifies punitive damages. As stated above, the Court agrees that the fourth cause of

action is improperly pled as it currently stands but will grant Plaintiffs leave to amend it. Therefore, the Court will not strike the punitive damages prayer on the basis that no cause of action supports it.

Defendant also notes that proving the type of fraud that supports punitive damages pursuant to Civ. Code § 3294 involves more than simply proving common-law fraud: it requires proof of an "intention on the part of the defendant of . . . depriving a person of property or legal rights or otherwise causing injury." (Civ. Code § 3294(c)(3).) That is true, although Defendant fails to mention that punitive damages are also available upon a showing of malice, "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others," or oppression, "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (Civ. Code § 3294(c)(1) and (2).) In any event, the Court disagrees with Defendant's assertion that "Plaintiff has not pled the required showing here." The Court finds that paragraph 82 of the complaint, which alleges that "Defendant GENERAL MOTORS knew the representations were false and intended Plaintiffs to rely on them," is sufficient, at the pleading stage, to justify the prayer for punitive damages. Whether Plaintiffs will be able to prove the elements of Civ. Code § 3294 at trial is, of course, a different question. But the Court will permit Plaintiffs to pray for punitive damages so long as the complaint contains a cause of action for fraud.

V. Conclusion

The demurrer is SUSTAINED WITH LEAVE TO AMEND. The motion to strike is DENIED. Defendant's counsel shall submit a written order consistent with this tentative ruling and in compliance with Rule 3.1312.