

TENTATIVE RULINGS: CIVIL LAW & MOTION

Wednesday, April 24, 2024 at 3:00 p.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. 23CV00090, Humphrey v. Avatar

Defendant Leo Avatar's ("Defendant") motion to set aside default judgment entered against him is **DENIED**, per Code of Civil Procedure ("C.C.P.") sections 473(b) and 473.5(b).

Plaintiff shall submit a written order to the Court consistent with this tentative ruling and in compliance with Rule of Court 3.1312(a) and (b).

PROCEDURAL HISTORY

Plaintiff Spencer Humphrey ("Plaintiff") commenced this action against Defendant for breach of a promissory note. Plaintiff's process server effectuated service of the summons and complaint by substituted service at 3660 Roblar Road in Petaluma, at which address Defendant concedes he currently resides, and which was listed under his name in the caption for this motion. Defendant claims he does not

receive mail at this address and that he has never been personally served. Defendant has not apprised the Court of any different address at which he does receive mail.

Plaintiff's counsel attached a copy of a voicemail message transcript received December 26, 2023, from phone number (707) 787-8809. Although the transcript is riddled with spelling errors, it can be discerned that the caller received mail that apprised him he was named as a defendant in an action and a request for entry of default was pending against him. The caller claimed he never received any information and was never served. Per the caption on Defendant's motion to set aside, his phone number is (707) 787-8809, so it appears Defendant was the caller.

MOTION TO SET ASIDE

Legal Standard

C.C.P. section 473.5(a) allows a defaulted party to move to set aside the default entered against them when "service of a summons has not resulted in actual notice to a party in time to defend the action and a default or default judgment has been entered against him or her in the action." The timeline for filing such motion is the earlier of these deadlines: "(i) two years after entry of a default judgment against him or her; or (ii) 180 days after service on him or her of a written notice that the default or default judgment has been entered." The motion shall be filed with an affidavit under oath that the defaulted party's lack of actual notice was not caused by his or her avoidance of service or inexcusable neglect. (C.C.P. § 473.5(b).) The motion shall also be accompanied by a copy of the answer or other pleading proposed to be filed in the action. (*Ibid.*)

C.C.P. section 473(b) allows the court to relieve a party from judgment entered against that party due to the party's mistake, inadvertence, surprise, or excusable neglect. The court may also correct clerical mistakes or errors on its own motion or on a party's motion. (C.C.P. § 473(d).)

Per Civil Code section 1788.61(a)(1), "if a service of summons has not resulted in actual notice to a person in time to defend an action brought by a debut buyer and a default or default judgment has been entered against the person in the action, the person may serve and file a notice of motion and motion to set aside the default or default judgment and for leave to defend..."

Moving Papers

Defendant requests relief from default judgment for lack of actual notice arguing he was never served personally, and the substituted service was effectuated at the wrong addresses. Plaintiff argues that Defendant has failed to demonstrate any mistake, surprise, or excusable neglect, and also failed to enclose a proposed answer or responsive pleading with the motion. Plaintiff notes that the Petaluma Postmaster has confirmed that 3660 Roblar Rd, Petaluma, CA 94952 is still the address at which Defendant is receiving mail and no other change of address order is on file.

Application

Defendant's motion is substantively and procedurally deficient. He did not sufficiently show that he lacked actual notice when, per the papers and supportive documents provided by the parties, the Roblar Road address is in fact where he currently resides, and he conceded he received mail there per the transcript of the call he made to counsel. Furthermore, Defendant has not attached any answer or responsive pleading to the motion which he proposes to file should the Court grant the motion. As such, the motion is denied entirely.

CONCLUSION

Based on the foregoing, Defendant's motion is **DENIED**. Plaintiff shall submit a written order to the Court consistent with this tentative ruling and in compliance with Rule of Court 3.1312(a) and (b).

2. 23CV00397, Pienta v. Trunnell

Plaintiffs Travis Pienta and Misty Lenwell ("Plaintiffs") move to compel further responses from Defendant Santa Rosa City Schools ("Defendant") regarding Plaintiffs' Request for Production of Documents, Set One, per Code of Civil Procedure ("C.C.P.") section 2031.310. The motion is **partially GRANTED**. The time period of the requested records shall be limited to seven years preceding March 1, 2023, because ten and thirteen years are overbroad and unjustified.

Defendant is ordered to notify all necessary individuals prior to the release of the requested educational records that pertain to them. Prior to disclosure, Defendant is also ordered to redact any private and confidential information, including personal identification information, private medical information, and private financial information that are not relevant to this action. Defendant shall also produce a privilege log that indicates what portions of the productions have been redacted and why these portions are privileged. The parties shall meet and confer as outlined in the "Conclusion" of this ruling.

Plaintiffs shall submit a written order to the Court consistent with this tentative ruling and in compliance with Rule of Court 3.1312(a) and (b).

PROCEDURAL HISTORY

Plaintiffs commenced this action against named defendants for negligence and wrongful death after their son ("Decedent") was stabbed multiple times by cross-defendant D. Pulido ("Pulido") on campus at Montgomery High School and subsequently passed away due to fatal injuries. Plaintiffs' complaint claims that Montgomery High School's acts and omissions allowed the school campus to become unsafe for its students and alleges specific acts and omissions in paragraph 19 of the complaint that led to this unsafe environment. The complaint also alleges that defendants knew of Pulido's multiple

instances of violence on campus for which he was suspended multiple times and did not take appropriate measures against him to prevent escalating his actions against other students.

Plaintiffs propounded Request for Production of Documents and Things, Set One, on Defendant seeking the following documents:

1. Full pupil records of Decedent and Pulido;
2. All photos and videos of Decedent and Pulido on school grounds;
3. All reports, complaints, and/or accusations of violence by Decedent and Pulido while they were students within the Santa Rosa City Schools;
4. All disciplinary action taken against Decedent and Pulido while they were students within Santa Rosa City Schools;
5. All law enforcement action taken against Decedent and Pulido while they were students within Santa Rosa City Schools;
6. Student violence at Montgomery High School during the 10 year period preceding Decedent's death;
7. Data on student explosions (sic) at Montgomery High School during the 13-year period preceding Decedent's death;
8. The March 1, 2023, stabbing of Decedent by Pulido;
9. Interactions between Pulido and employees of the Santa Rosa City Schools on March 1, 2023, and during the preceding 7 days;
10. Surveillance video of Pulido captured on or about Montgomery High School on March 1, 2023;
11. The activities of Defendants Adam Paulson and Tyler Ahlborn while acting in their capacity as Principal and Vice Principal for Montgomery High School on March 1, 2023, and during the preceding 7 days; and
12. The personnel files of Defendants Adam Paulson and Tyler Ahlborn, including, the decision to hire, suspend, and/or terminate their employment.

After multiple extensions, Defendant served mainly objection-only responses apart from the few responses stating that the requested information was publicly available or that there were no responsive documents. The objection-only responses were based on privacy rights violations or stated that the request was overbroad. Plaintiffs now seek to compel their responses and the production of these documents, which Defendant opposes. The Discovery Facilitator has submitted a report regarding the motion. The parties met and conferred prior to the bringing of this motion and agreed that the Court would need to issue an order addressing the discovery requested from Defendant before they could produce the requested documentation.

ANALYSIS

Legal Standard

Motion to Compel Further Responses to Document Demand

A party to whom a document demand is directed must respond to each item in the demand with an agreement to comply, a representation of inability to comply, or an objection. (C.C.P. §2031.210(a).) If a responding party is not able to comply with a particular request, or part thereof, that party “shall affirm that a diligent search and a reasonable inquiry has been made in an effort to comply with that demand.” (C.C.P. § 2031.230.) The response shall also specify “whether the inability to comply is because the particular item or category has never existed, has been destroyed, has been lost, misplaced, or stolen, or has never been, or is no longer, in the possession, custody, or control of the responding party” and also must set forth the “name and address of any natural person or organization known or believed by that party to have possession, custody, or control of that item or category of item.” (*Ibid.*) Otherwise, if a responding party is objecting to a demand only, then the responding party must identify the demanded document, tangible thing, land, or electronically stored information to which an objection is being made, set forth the grounds for objection, and if privileged, provide a privilege log for the demanded items that are privileged. (CCP § 2031.240.)

For compelling responses to production requests, the court shall impose monetary sanctions on the losing party unless that party acted with substantial justification, or other circumstances make sanctions unjust. (C.C.P. § 2031.300.) Courts may otherwise impose monetary sanctions for fees and costs upon a party engaging in the misuse of the discovery process (C.C.P. § 2023.030.) Misuses include, but are not limited to, failing to respond or to submit to an authorized method of discovery and making an evasive response to discovery. (C.C.P. § 2023.010.)

Moving Papers

Plaintiffs argue that the Court has the authority to order the disclosure of pupil records and educational records “upon condition that parents and the students are notified of such orders... in advance of the compliance therewith by the education institution or agency.” (20 U.S.C. § 1232g(b)(2)(B).) As the requested records are directly relevant to Plaintiffs’ causes of action in the complaint, Plaintiffs request the Court to order disclosure. Plaintiffs cites *Williams v. Superior Court* (2017) 3 Cal.5th 531, 552, which court held that a party asserting a privacy right must establish that there is a legally protected privacy interest, an objectively reasonable expectation of privacy, and a threatened intrusion of that interest that is serious. Per *Williams*, when the privacy interest is one fundamental to personal autonomy, then a compelling interest is necessary before disclosure; however, when a lesser interest is at stake, then the “strength of the countervailing interest sufficient to warrant disclosure of private information var[ies]

according to the strength of the privacy interest itself, the seriousness of the invasion, and the availability of alternatives and protective measures.”

Defendant opposes the motion and cites to the 4th Amendment to the U.S. Constitution and the Family Educational Rights and Privacy Act as the source for the privacy privilege claimed as the basis for objections in the discovery responses. Defendant argues that Plaintiffs have not articulated any justification for the invasive document demands and some of the demands are overbroad, such as the request for the entire personnel files of the principal and vice principal at the time of the incident. Defendant points out that Plaintiffs successfully petitioned the Juvenile Court for the release of Reporters’ Transcripts for the Juvenile Court Trial of Pulido and that the Hon. Kenneth J. Gness has ordered some of the items of evidence introduced at trial to be produced by the Santa Rosa Police Department as well. Defendants have also not released any of Decedent’s educational records, arguing that they would have to also be disclosed to cross-defendants when they appear in the matter, too. However, Defendant does not object to releasing these records if Plaintiffs agree to them being disclosed to cross-defendants.

In reply, Plaintiffs argue that Defendant has failed to establish there is any privacy right in some of the records requested, such as the data on violence, expulsion at Montgomery High School over the preceding 10 years before the incident, and the official activities of the principal and vice principal during the preceding 7 days before Decedent was stabbed. For the records requested that do trigger a privacy right, Plaintiffs argue that their need for discovery outweighs the privacy interests because the requested records are directly relevant to the core factual and legal issues in this action. Plaintiffs alleged a growing violence on the campus of Montgomery High School and that Defendant knew of escalating and violent interactions between Pulido and Decedent that ultimately led to his death. Plaintiffs argue they need the records to facilitate an ascertainment of the truth as of Plaintiffs’ allegations and the sufficiency (or lack thereof) of Defendants’ supervision and protection of students at Montgomery High School. Plaintiffs also mention that the juvenile court transcripts and Santa Rosa Police Department Records do not cover all of the records that they requested from Defendant, so the release of these records do not preclude Plaintiffs from the discovery requests made to Defendant.

The Discovery Facilitator filed a report regarding this motion. While some of the records requested are protected by privacy rights, the Discovery Facilitator reports that it is unclear how the entire personnel files of the vice principal and principal are directly relevant to this action.

However, Defendant has not referred to specific portions of the personnel files that should be excluded or redacted from production. The Discovery Facilitator’s opinion is that the educational records requested are directly relevant, but that Defendant’s assertion that provisions should be made for maintaining confidentiality in disclosed information is well-based in legal authority.

Application

Per the moving papers and supporting evidence, the Court finds that the educational records requested are both directly relevant to this action and also protected by important constitutional privacy rights. The Court also finds that a portion of the administrative personnel files are also likely to contain relevant information, but also a lot of irrelevant private and confidential information. However, private and confidential information that is irrelevant to this matter may be redacted prior to disclosure to protect the individuals' privacy rights. Here, Plaintiff is trying to establish that there was not sufficient supervision for the students at Montgomery High School and that the school's acts or omissions caused a generally unsafe environment on campus. Plaintiffs are also trying to establish that Defendant knew of escalating aggressions between Decedent and Pulido which might have been prevented. The requested records likely contain information directly relevant to these claims.

For the above reasons, the Court will grant the motion. However, the Court finds that ten or thirteen years preceding the incident on March 1, 2023, is too overbroad of a time period to request records and will be burdensome to Defendant. The Court will limit the time period of information and documents to be produced to only seven years preceding March 1, 2023, and the time afterwards. To protect the privacy rights of individuals included in the productions, Defendant shall redact any irrelevant private and confidential information that does not pertain to this matter. This includes any private personal identification information (date of birth, phone numbers, addresses, social security numbers, etc.), private medical information, or financial information pertaining to all uninvolved students and school administrative personnel. For all of the information redacted, Defendant shall produce a privilege log indicating where information has been redacted and why that information has been redacted.

CONCLUSION

Based on the foregoing, Plaintiffs motion to compel further responses from Defendant is **partially GRANTED**. As stated above, the time period of the requested records shall be limited to seven years preceding March 1, 2023. Defendant is ordered to notify all necessary individuals prior to the release of the requested educational records that pertain to them. Prior to disclosure, Defendant is also ordered to redact any private and confidential information that is not relevant to this action, including personal identification information, private medical information, and private financial information. Defendant shall also produce a privilege log that indicates what portions of the productions have been redacted and why these portions are privileged.

The parties are ordered to meet and confer as to whether a protective order is necessary for unredacted, but still protected private information, including student names. For example, assuming Plaintiff meant expulsions rather than explosions, the Court believes that information is relevant, but it

should, presumably, remain private and not be publicly disclosed during the discovery process without a court order. Alternatively, the parties may agree that Defendant can provide the information Plaintiff seeks without using student names. For example, if six students were expelled in 2018, Defendant may redact names and state that the data Plaintiff seeks by referring to students as “2018Student A” or “2018Student B” etc. Similarly, if Mr. Paulson was meeting with students during the seven days preceding March 1, 2023, the parties should meet and confer as to whether the names of those students should be redacted or are subject to a protective order.

Plaintiffs shall submit a written order to the Court consistent with this tentative ruling and in compliance with Rule of Court 3.1312(a) and (b).

3. MCV-256755, Bank of America, N.A. v. Murphy

Plaintiff Bank of America, N.A.’s (“Plaintiff” or “Bank of America”) unopposed motion to vacate the dismissal and entered judgment pursuant to Code of Civil Procedure (“C.C.P.”) section 664.6 is **GRANTED**. Judgment shall be entered in the amount of **\$11,499.90** against Defendant Murphy (“Defendant”) for the outstanding debt plus costs.

PROCEDURAL HISTORY

Plaintiff brought this action against Defendant to collect payment on credit card debt she owed. The parties entered into a Stipulation for Entry of Judgment and Settlement and Release and Dismissal (the “Stipulation”), according to which Defendant agreed to pay Plaintiff \$17,155.12 to satisfy the debt. (Declaration of Soo, Exhibit 1.) Defendant agreed to make monthly payments of \$350.00 and a final payment of \$5.12 until she satisfied the debt. (*Ibid.*) Per the Stipulation, if she defaulted on paying, she would owe the entire remaining balance minus the amount she already paid along with Bank of America’s court costs. (Declaration of Soo, Exhibit 1.) Defendant defaulted after paying off \$5,950.00 of the debt owed. (*Id.* at ¶ 7.)

ANALYSIS

If parties to a pending litigation agree to sign a written stipulation for settlement of the case, then the court may upon noticed motion enter judgment pursuant to the terms of the settlement. (C.C.P. § 664.6(a).) The court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement if the parties request it. (*Ibid.*) “Section 664.6 was enacted to provide a summary procedure for specifically enforcing a settlement contract without the need for a new lawsuit.” (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 809.)

Bank of America requests to vacate the dismissal and moves for entry of judgment per the Stipulation and section 664.6. (Motion, 3:3-5.) Bank of America has properly served notice of this motion

on Defendant, who has not opposed. Bank of America now moves the Court to enter judgment in the amount of \$11,499.90 against Defendant, which includes the balance remaining on the debt and court costs of \$460.77, \$225.00 for Defendant's first appearance fee, \$9.78 for e-filing fees, and \$60.00 for filing fees of this motion. (Declaration of Soo, ¶ 7.)

Bank of America has sufficiently demonstrated that the parties entered into a valid written and signed settlement agreement that was subject to C.C.P. section 664.6, under which Defendant continues to owe after he defaulting on her payment obligations. Per the motion, the parties' Stipulation, and section 664.6, the Court finds it reasonable to enter judgment in the amount of \$11,499.90 against Defendant, for the remaining debt she owes and Bank of America's court and filing costs in bringing this motion.

CONCLUSION

Accordingly, the unopposed motion is **GRANTED**. Judgment shall be entered in the amount of **\$11,499.90** against Defendant for the outstanding debt plus costs. Unless the parties request and appear for oral argument, the Court will sign the proposed order setting aside the dismissal and the proposed judgment filed with this motion.

4. MCV-261072, Looney v. Cuvee 727, LLC

Plaintiff Gary Looney's ("Plaintiff") moves unopposed to appoint Landon McPherson as the receiver to seize and sell Defendant Cuvee 727, LLC doing business as Taurus Steakhouse' ("Defendant") California Liquor License number 610073 (erroneously referred to as 622536 in the notice of motion) to satisfy the \$2,928.50 judgment entered September 25, 2023. The motion is **GRANTED**, per California Code of Civil Procedure ("C.C.P.") section 564(b)(3).

This Court entered a judgment against Defendant for \$2,928.50 on September 25, 2023, but Plaintiff has been unable to enforce it. Plaintiff moves to appoint Mr. McPherson as receiver to take possession of and, if necessary, sell Defendant's California Liquor License number 610073 to satisfy the outstanding judgment. (Motion, 2:5-22.) Defendant's license is not subject to any security interests except for obligations under California. (*Id.* at 2:20-22.) Plaintiff provided sufficient notice of the motion's hearing. Defendant did not oppose.

Per C.C.P. section 564(b)(3), a court may appoint a receiver to carry out a judgment entered into effect. The receiver may enforce the judgment where the judgment creditor has shown that, considering the interests of both the judgment creditor and debtor, the appointment of a receiver is will reasonably allow the fair and orderly satisfaction of the judgment. (C.C.P. § 708.620.) Specifically, a court can appoint a receiver to transfer the judgment debtor's interest in an alcoholic beverage license for the purpose of satisfying a judgment. (C.C.P. § 708.630.)

Here, Plaintiff has sufficiently shown that the appointment of a receiver is warranted because Defendants have never responded to the complaint, to any post-judgment discovery requests, and to any of Plaintiff's efforts to enforce the judgment entered. Plaintiff proposes Landon McPherson to be appointed as receiver. Mr. McPherson is a consultant broker for CAL ABC License Services and specializes in the acquisition and sale of liquor licenses in California with over 15 years of experience in the field. Thus, Plaintiff has satisfied the minimum requirements for the appointment of a receiver.

Based on the foregoing, Plaintiff's motion to appoint Landon McPherson as receiver is **GRANTED** to take possession of and if necessary, sell Defendants' California Liquor License number 610073 to satisfy the \$2,928.50 judgment. Plaintiff shall submit a written order to the Court consistent with this tentative ruling. Due to the lack of opposition and lack of response to the complaint and post-judgment discovery, compliance with Rule of Court 3.1312 is excused.

5. SCV-260482, Ramos v. Wallahan

Defendant Wallahan's motion to amend the judgment is **CONTINUED** to October 16, 2024, at 3:00 p.m. in Department 18. The parties have not notified the Court about whether Plaintiffs' ongoing bankruptcy proceedings have concluded. Therefore, the matter remains stayed, and the motion is continued.

6-7. SCV-268124, M.A. Silva Corks, USA, LLC v. Ursus Development Group, Inc., et al.

Defendant GAF Materials, LLC's Demurrer to the Second Amended Complaint

Defendant GAF Materials LLC, incorrectly sued as GAF Corporation's demurrer to the Second Amended Complaint ("SAC") is **SUSTAINED** in part and **OVERRULED** in part. The demurrer is **SUSTAINED** as to the Fourth Cause of Action for Breach of Express Warranty, with leave to amend. The demurrer is **OVERRULED** as to the Eighth Cause of Action for Reformation. Defendant's request for judicial notice is **GRANTED** as to Exhibits 1-2, and 5-9 and **DENIED** as to Exhibits 3-4, as they are disputable evidence. The cases cited in support of the request for judicial notice of Exhibits 3-4 do not require the Court take judicial notice of these documents and they are not persuasive. Defendant's counsel shall submit a written order consistent with this tentative ruling and in compliance with Rule 3.1312.

Analysis:

I. 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.) Complaints are read as a whole, in context and are liberally construed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; see also, *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, but not contentions, deductions, or conclusions of fact or law, or the construction of instruments pleaded, or facts impossible in law. (*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.) Matters which may be judicially noticed are also considered. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591.)

II. Plaintiffs Have Not Stated a Claim for Breach of Express Warranty (Fourth Cause of Action)

“[T]o prevail on a breach of express warranty claim, the plaintiff must prove (1) the seller's statements constitute an ‘affirmation of fact or promise’ or a ‘description of the goods’; (2) the statement was ‘part of the basis of the bargain’; and (3) the warranty was breached.” (*Weinstat v. Dentsply Internat., Inc.* (2010) 180 Cal.App.4th 1213, 1227.) “[B]reach of express warranty arises in the context of contract formation in which reliance plays no role.” (*Ibid.*)

Defendant cites *Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 142, which provides “In order to plead a cause of action for breach of express warranty, one must allege the exact terms of the warranty, plaintiff's reasonable reliance thereon, and a breach of that warranty which proximately causes plaintiff injury.” However, as demonstrated by *Weinstat, supra*, the law no longer requires a showing of reliance for breach of express warranty. (See also for reference *Corbett v. PharmaCare U.S., Inc.* (2021) 567 F.Supp.3d 1172, 1187-1188 and *In re ConAgra Foods, Inc.* (2015) 90 F.Supp.3d 919, 984-985.) The *Weinstat* case controls.

Defendant makes several arguments why this cause of action fails. The most compelling argument is that the express language of the EverGuard Diamond Pledge NDL Roof Guarantee (“GAF Guarantee”) narrows the reach of the express warranty and Plaintiffs have not sufficiently alleged that it applies to them. The GAF Guarantee, which is attached as Exhibit 2 to Plaintiffs’ SAC, states “GAF guarantees to you, *the original owner of the building* described above, that GAF will provide ‘Edge to Edge’ protection by repairing leaks through the GAF roofing membrane...” (Italics added.) It further states, “THIS GUARANTEE IS EXPRESSLY IN LIEU OF ANY OTHER GUARANTEES OR WARRANTIES, EXPRESS OR IMPLIED...” The guarantee also provides that any transfer or assignment of the guarantee to a subsequent owner of the building could be made only if 1) the request is in writing to GAF within 60 days after ownership transfer, 2) the original owner makes repairs to the building that are identified by GAF as necessary to preserve the integrity of the GAF Roofing Materials, and 3) the original owner pay an assignment fee of \$500. Otherwise, “This guarantee is NOT otherwise transferable or assignable by contract or operation of law, either directly or indirectly.”

Ursus Development Group, Inc. is listed as the original owner of the building. Thus, by its express terms, the GAF Guarantee was solely issued to Ursus Development Group, Inc. Plaintiffs have not alleged that any of the three factors which must have occurred prior to transfer or assignment did occur. Thus, Plaintiffs have failed to allege that the GAF Guarantee constitutes any affirmation of fact or promise to them specifically.

Defendant further alleges that Plaintiffs have failed to state this cause of action because the alleged warranty is not a “warranty,” but is rather a “guarantee.” Defendant has not cited any authority that legally distinguishes a “warranty” from a “guarantee.” This argument is unpersuasive.

III. Plaintiffs Have Stated a Valid Claim for Reformation (Eighth Cause of Action)

a. Plaintiffs Have Sufficiently Alleged Mistake

Defendant argues “the four corners of the SAC read with matters subject to judicial notice demonstrate that Plaintiffs cannot meet the *Komorsky* factors for mutual or unilateral mistake.” (Defendant’s Memorandum, p. 15.) The Court has denied the request for judicial notice of the documents which Defendant has heavily relied upon in making its arguments against this cause of action because the documents are disputable evidence and Defendant did not cite any binding authority compelling the Court to judicially notice them. Defendant is in essence requesting the Court judicially notice evidence and make a factual determination regarding the parties’ intentions at the time of contracting on review of a demurrer. This is not appropriate for demurrer, the function of which is to determine the sufficiency of the allegations in the accusatory pleading based on the applicable pleading standards.

“A complaint for reformation based on mutual mistake must allege “facts showing how the mistake was made, whose mistake it was, and what brought it about, so that the mutuality may appear.” (*Komorsky v. Farmers Ins. Exch.* (2019) 33 Cal.App.5th 960, 974.) Plaintiffs have alleged these facts. Defendant also argues that Plaintiffs failed to allege these facts because Plaintiffs failed to attach referenced documents in support of each fact. This argument is unsupported by any authority and is unpersuasive.

b. It is Not Apparent from the Face of the Complaint that the Cause of Action is Time Barred

A demurrer on the ground of the bar of the statute of limitations will not lie where the action *may be*, but is not necessarily, barred. (*Childs v. State of California* (1983) 144 Cal.App.3d 155, 161.) “It must appear *affirmatively* that, upon the facts stated, the *right of action is necessarily barred*. (*Ibid.*, citing *Valvo v. University of Southern Cal.* (1977) 67 Cal.App.3d 887, 895. Italics in original.) “[W]e consider the pleading of ‘on or about’ June 10, 1980, sufficient to withstand a general demurrer, as it reveals only that plaintiff’s action *may be* barred.” (*Ibid.* See also *Moseley v. Abrams* (1985) 170 Cal.App.3d 355, 359-360 [where Plaintiff broadly alleged “on or about July of 1977”, the Court found that a demurrer could

not be sustained on the basis of the statute of limitations].)

Defendant argues that, regardless of whether Plaintiffs sufficiently alleged mistake, the demurrer should be sustained because the cause of action is time barred and does not relate back to the original filing date as the reformation cause of action alleges different facts than those originally pleaded. Claims for reformation are subject to a three-year limitations period. (CCP § 338.) “The statute, however, does not begin to run until the mistake is discovered, or until the plaintiff, by reasonable diligence could and should have discovered it.” (*Laing v. Occidental Life Ins. Co. of Cal.* (1966) 244 Cal.App.2d 811, 820.) Thus, it does not begin to run on the date that the original complaint was filed. Based on the allegations of the SAC, it is not apparent from the face of the complaint that the mistake was discovered or should have been discovered more than three years from the date of filing. The Court need not analyze whether the claim relates back. The demurrer on this ground is overruled.

Defendant Brigitta Brondi’s Motion for Summary Judgment

Defendant Brigitta Brondi’s motion for summary judgment is DENIED. Plaintiffs’ objection to the declaration of Brigitta Brondi number 7 is SUSTAINED for hearsay, lack of personal knowledge and lack of foundation. Plaintiffs’ other objections are OVERRULED. Plaintiffs’ request for judicial notice is GRANTED as to Exhibits A-C, and E and DENIED as to Exhibit D. Plaintiff’s counsel shall submit a written order consistent with this tentative ruling and in compliance with Rule 3.1312.

Standards on Summary Judgment:

A party moving for summary judgment must show that there is no triable issue as to any material fact and the moving party is entitled to a judgment as a matter of law. (CCP § 437c(c).) A party moving for summary adjudication of a cause of action must prove that the cause of action has no merit and summary adjudication may only be granted if it completely disposes of the cause of action. (CCP § 437c(f)(1).) “A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if the party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to the cause of action.” (CCP § 437c(p)(2).) “Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto.” (*Ibid.*)

“From commencement to conclusion,” the moving party bears the burden of persuasion and production to make a prima facie showing that there are no triable issues of material fact. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) “There is no obligation on the opposing party... to establish anything by affidavit unless and until the moving party has by affidavit stated facts establishing

every element...necessary to sustain a judgment in his favor.” (*Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 468.) Defendants can meet their burden by showing a cause of action has no merit by showing that one or more elements of the cause of action “cannot be established.” (See CCP § 437c(p)(2).) Once the defendant has met that burden, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or defense. (*Aguilar, supra*, 25 Cal.4th at p. 849.)

Analysis:

I. Defendant’s Motion is Untimely.

CCP § 437c(a)(2) provides that the notice of motion and supporting papers shall be served on all parties at least 75 days before the hearing on the motion. CCP § 437c(a)(3) provides that the hearing on the motion must be heard at least 30 days before the date of trial. Read together, subdivisions (a)(2) and (a)(3) require the notice of motion and supporting papers to be served at least 105 days before the date of trial. Motions served electronically must be served at least 107 days before the date of trial. (CCP § 1010.6; *Cole v. Superior Court (Zeiner)* (2022) 87 Cal.App.5th 84, 87-88.) “[T]he 30–day time limit on summary judgment hearings should be calculated based on the trial date in existence when the motion is noticed...” (*Green v. Bristol Myers Co.* (1988) 206 Cal.App.3d 604, 609.)

Here, the trial date in existence at the time this motion was noticed was February 16, 2024. The cut-off for noticing the motion electronically prior to February 16, 2024 (107 days) was November 1, 2024. Defendant did not notice this motion until December 27, 2024, nearly two months later. While Defendant did join in another Defendant’s motion to continue the trial date and the trial continuance was ultimately granted, the Court noted in the Court’s ruling on that motion that the Court was not considering the motions for summary judgment as a basis for continuing the trial because they appeared to have been untimely noticed. (See January 19, 2024 Minute Order.) The Court also noted that the issue of whether the granting of a motion to continue trial provides a reprieve for the untimely filing of the motions to allow the Court to hear and rule on the motions was not before the Court at that time.

The issue is now before the Court, and it is in the Court’s discretion to consider an untimely filed motion for summary judgment. However, Defendant has not provided any compelling explanation for why her summary judgment motion was not timely filed relative to the February trial date. Defendant’s deposition was taken on October 20, 2024, over two months prior to the filing and notice of this motion. Defendant did not attach any portion of her own deposition in support of this motion. The only evidence attached to support this motion, aside from the declaration of Defendant herself and former-Defendant Jennifer Strobel, is a certificate of dissolution, a grant deed and an owner change order. However, the Court has sustained the objection to the certificate of dissolution because it was improperly presented.

There are no deposition transcripts provided, there is no documentary evidence to support the assertions regarding ownership or leadership roles, there are no declarations from witnesses who are qualified to testify regarding Defendant's role in the company —such as other employees of Ursus Development Group. Defendant has provided no plausible explanation for why Defendant could not have timely filed the motion. This is especially so given the indication, from the lack of evidence presented, that the extra time was not taken in order to collect additional evidentiary support for the motion.

The untimeliness of the motion is one basis for denial. The merit of the motion is the other.

II. Defendant Has Failed to Show There are No Triable Issue of Fact.

This matter arises out of the development of a building by Defendant Ursus Development Group, Inc. Plaintiffs allege that moving Defendant Brigitta Brondi was the majority controlling shareholder and managing agent of Ursus Development Group and as such was primarily responsible for the lease negotiations on behalf of Ursus and negotiated, planned, designed, managed and supervised the tenant improvements at the subject property. Plaintiffs allege Breach of Contract, Negligence, Breach of Implied Warranty, Breach of Express Warranty, Negligence per se, and Nuisance against this defendant.

Defendant asserts in her motion that she is not an owner nor a managing agent of Ursus Development Group, Inc. and thus cannot be personally liable for Plaintiffs' claims. Defendant also asserts that, even if she were an owner of Ursus Development Group, the Corporate Shield protects her from personal liability. Furthermore, Defendant argues that the dissolution exception of the Corporate Shield Doctrine does not apply because, though Ursus Development Group has been dissolved, it was dissolved over four years ago and Corporations Code § 2011 bars such recovery after four years from the corporation's dissolution.

In support of this motion, Defendant has provided her own declaration attesting to the facts she asserts are true and the declaration of former-Defendant Jennifer Strobel. Defendant's declaration is supported only by a copy of the certificate of dissolution, to which the Court has sustained Plaintiffs' objection. There is no other documentary evidence provided.

Jennifer Strobel's declaration speaks mostly to her own involvement in the underlying project and little to Defendant's role in the company. Where the declaration mentions Defendant, it speaks to her supervisory role over Ms. Strobel. Assuming Ms. Strobel were qualified to testify to these issues, the declaration is silent as to Defendant's ownership interest in Ursus Development Group, whether Defendant was a managing agent, the dissolution of Ursus Development Group, or facts that should speak to the applicability of the Corporate Shield.

So, the only evidence that Defendant has provided to support her argument that there are no triable issues of material fact as to her liability is her own declaration that is unsupported by documentary

evidence. While this declaration might support Defendant's overall defense against these allegations, it does not establish the lack of a triable issue of material fact as to Defendant's liability. The declaration of Jennifer Strobel likewise does not establish the lack of triable issue of material fact. Defendant has failed to meet her burden on this motion. The burden of proof never shifted to Plaintiffs.

8. SCV-272813, H. v. Wagner, Jr., D.C.

Plaintiff's motion for protective order is **GRANTED**. It appears to the Court that the parties are generally willing to stipulate to using the form model protective order available on the Superior Court of California's website, a copy of which is attached as Exhibit H to the declaration in support of the Plaintiff's reply brief. In Defendant Wagner's response and supportive declaration, he suggests using a heavily redlined version of the model protective order. As Plaintiff has not agreed to any of the redline changes, the Court orders that the parties use the form model protective order available on the Court's website. The parties may only add additional terms if all parties have conferred on and agreed to those terms. Plaintiff shall submit a written order to the Court consistent with this tentative ruling and in compliance with Rule of Court 3.1312(a) and (b).