SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 05/02/25 TIME: 1:30 P.M. DEPT: E CASE NO: CV2000495

PRESIDING: HON. ANDREW SWEET

REPORTER: CLERK: G. STRATFORD

PLAINTIFF: JOHN BRIAN REED, ET AL vs. DEFENDANT: JON BARRY PEARLSTONE, ET AL	

NATURE OF PROCEEDINGS: 1) CASE MANAGEMENT CONFERENCE
2) MOTION – RELIEVE COUNSEL
3) MOTION – RELIEVE COUNSEL
4) MOTION – RELIEVE COUNSEL
5) MOTION – RELIEVE COUNSEL

RULING

The following Tentative Decision was originally posted on April 24, 2025:

"Heather M. McKeon's four Motions to be Relieved as Counsel are continued to May 2, 2025, at 1:30 p.m. The case is also set for a Case Management Conference on May 2, 2025, at 1:30 p.m. The following persons are ordered to appear either in person or by Zoom:

- Heather M. McKeon
- Jon Pearlstone
- Susan Pearlstone
- Daniel Pearlstone"

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

The Zoom appearance information for May, 2025 is as follows:
https://marin-courts-ca-gov.zoomgov.com/j/1615162449?pwd=e5SqeATq2HOsxxD7Fhrl3Q7qPFgFZa.1
Meeting ID: 161 516 2449
Passcode: 073961

If you are unable to join by video, you may join by telephone by calling (669) 254-5252 and using the above-provided passcode. Zoom appearance information may also be found on the Court's website: https://www.marin.courts.ca.gov

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 05/02/25 TIME: 1:30 P.M. DEPT: E CASE NO: CV2002478

PRESIDING: HON. ANDREW SWEET

REPORTER: CLERK: G. STRATFORD

PLAINTIFF: KEN MAYER vs. DEFENDANT: JOHN KOZUBIK, ET AL	

NATURE OF PROCEEDINGS: MOTION – ATTORNEY'S FEES

RULING

Defendants John Kozubik, individually and as trustee of The Kozubik Family Trust and Shannon Kozubik, individually ("Defendants") motion for attorneys fees is granted.

BACKGROUND

This is a dispute over a home renovation. In 2019, Defendants hired Plaintiff Ken Mayer, doing business as Mayer & Company ("Plaintiff"), to serve as the contractor for an extensive home remodeling project. The parties' written contract called for Plaintiff to partially demolish, remodel, and build an addition on the property. Plaintiff hired Reyes Construction to perform "demolition, concrete, framing and siding work." Of the work done on the project in those categories, Reyes Construction performed approximately 90%, with the balance performed by Plaintiff personally.
Defendants paid all of Plaintiff's invoices except the last one, Invoice No. 200310, dated March 10, 2020, which was for $98,449.23.

On August 31, 2020, Plaintiff filed his Complaint alleging that Defendants breached the contract by failing to pay the final invoice, among other alleged breaches. (Complaint, ¶ 15.) Plaintiff additionally asserted causes of action for monies due, quantum meruit, account stated, and foreclosure of mechanic's lien.

On June 27, 2024, after a bench trial pursuant to Business and Professions Code section 731, the Court found: "subcontractor Reyes General Contractors, Inc. and its employee Lorenzo were unlicensed while performing the contract and Plaintiff Ken Mayer may not recovery any money on the unlicensed work done on the project." The Court also set a hearing "on decision on whether unlicensed subcontractor work that has already paid for is in play" and permitted further briefing on the issue. At the hearing, the Court found Plaintiff was not properly licensed during the entirety of the project and as such was not able to maintain the action. Defendants requested

the Court expunge the mechanics lien, which the Court granted. On November 25, 2025, the Court entered judgment in favor of Defendants.

On December 16, 2024, Defendants filed their Memorandum of Costs. Defendants now move for an award of attorney fees and costs of $101,642.46.

LEGAL STANDARD

In general, a prevailing party may recover attorney fees only when a statute or an agreement of the parties provides for fee shifting. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 606; see also Code Civ. Proc., § 1033.5 (a)(10)(A) [attorney fees allowable as costs under section 1032 when authorized by contract].)

Civil Code section 1717 (a) provides, in part, that:

> In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs. [¶] Where a contract provides for attorney's fees, as set forth above, that provision shall be construed as applying to the entire contract... .

(Civil Code, § 1717.)

Attorney fees are available under Civil Code section 1717 only if the party prevails in an action "on a contract." (*Hyduke's Valley Motors v. Lobel Fin. Corp.* (2010) 189 Cal.App.4th 430, 435.) "If a cause of action is 'on a contract,' and the contract provides that the prevailing party shall recover attorney fees incurred to enforce the contract, then attorney fees must be awarded on the contract claim in accordance with Civil Code section 1717. [Citation.]" (*Gil v. Mansano* (2004) 121 Cal.App.4th 739, 742.)

The party seeking an award of fees has the burden of establishing entitlement to an award and of documenting the appropriate hours spent and the hourly rates. (*Lunada Biomedical v. Nunez* (2014) 230 Cal.App.4th 459, 486.) A party who claims that the fees are excessive because too many hours of work are claimed has the burden of identifying the items that are challenged, with sufficient argument and citations to the evidence. General arguments that the fees claimed are excessive, duplicative, or unrelated are insufficient. (*Id.*, at 488.)

DISCUSSION

Plaintiff initially argues the motion is "premature" because he has appealed the judgment. Under Code of Civil Procedure section 916, subdivision (a), the filing "of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order." Motions for attorney's fees and costs are not affected by an appeal. (*United Grand Corp.*

v. Malibu Hillbillies, LLC (2019) 36 Cal.App.5th 142, 166; *Bankes v. Lucas* (1992) 9 Cal.App.4th 365, 368; *In re Marriage of Sherman* (1984) 162 Cal.App.3d 1132, 1140.) "[T]he filing of a notice of appeal does not deprive the trial court of jurisdiction to award attorney fees as costs post trial." (*Bankes*, *supra*, 9 Cal.App.4th at 368.) As such, this argument by Plaintiff lacks merit.

On the merits, Defendants seek a total of $101,642.46 in fees and costs. Defendants rely on the parties contract at Section 9 titled "In the Event of a Dispute," which states at paragraph 9.3, "In the event of legal proceedings relating to this Contract, the prevailing party shall be awarded legal fees, costs, and expert expenses, actually incurred." (Complaint, Exh. A.) Here, Defendants are the prevailing parties on the contract because the Court granted judgment in their favor.

Plaintiff argues that the contractual fee provision has not been triggered because attorney fees are only recoverable "as a result of a jury trial or if both parties agree to have the trial heard by a judge." Plaintiff contends this provision is contained within the parties' contract at Exhibit F, paragraph D. Plaintiff purports to quote the language from paragraph D in his opposition, which he represents addresses alternative dispute resolution. However, in the Court's review of the contract Plaintiff attached to the complaint, there is no such paragraph D. The Court additionally disregards the unauthorized sur-reply filed by Plaintiff on April 29, 2024 wherein he asserts prior counsel improperly attached and produced the incomplete contract.

Plaintiff states in passing that Defendants claims to prevailing party status ignores unresolved issues and states the action is "ongoing." (Oppo., p. 4.) However, this argument ignores the judgment.

Defendants request for $101,642.46 in fees and costs is broken down as follows:

Bassi, Edlin, Huie and Blum fees and costs (Pre-litigation counsel):	$ 16,319.44
Bowles & Verna LLP fees and costs through Dec. 31, 2024:	$ 85,386.22
Subtotal:	$101,705.66
Less Costs listed on memorandum of costs filed Dec. 16, 2024:	- $ 5,258.20
Total through Dec. 31, 2024:	$96,447.46
Plus fees and costs associated with this motion:	$ 5,195.00
Total sought:	$101,642.46

Plaintiff generally argues the fee request is excessive and unreasonable because the "time was not reasonably incurred, duplicative work, excessive hourly rates and charges for clerical tasks." (Oppo., p. 4.) "Ascertaining the fee amount is left to the trial court's sound discretion." (*Christian Research Inst.*, *supra*, 165 Cal.App.4th 1315, 1321 citing *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132; see also *Jackson v. Yarbray* (2009) 179 Cal.App.4th 75, 92 [the court is not constrained by the amount sought by the prevailing party and must only award a "reasonable" amount].) The Court may rely on its own experience in determining whether the hourly rate sought or hours spent in the matter are reasonable. (*EnPalm, LLC v. Teitler* (2008) 162 Cal.App.4th 770, 774.)

The Court has reviewed the declarations filed in support of the motion, and the billing statements and finds the hourly rates of $395 and $400 reasonable and consistent with the rates charged in the community. Having determined that the requested hourly rate is reasonable, the Court must consider whether the number of hours Defendant's attorney spent on litigation were reasonable. (*Serrano v. Priest (Serrano III)* (1977) 20 Cal.3d 25, 48-49.) Generally, hours are reasonable if they were necessary to the conduct of the litigation. (*Robertson v. Fleetwood Travel Trailers of California, Inc.* (2006) 144 Cal.App.4th 785, 818.) If presented with detailed and comprehensive billing records, it is incumbent on a party opposing an attorney fee motion to provide some explanation why the efforts of counsel were inefficient or duplicative. (*Christian Research Inst. v Alnor* (2008) 165 Cal.App.4th 1315, 1321.) The hours spent both in prelitigation activity by Bassi, Edlin, Huie and Blum and the nearly four and one half years of litigation work by Bowles & Verna LLP appear reasonable and necessary. Plaintiff fails to challenge any specific rates or time entries that he contends are excessive.

Therefore, the Court finds it appropriate to award attorney fees and costs in the amount requested. As such, the Court grants the motion for attorney fees.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

The Zoom appearance information for May, 2025 is as follows:
https://marin-courts-ca-gov.zoomgov.com/j/1615162449?pwd=e5SqeATq2HOsxxD7Fhrl3Q7qPFgFZa.1
Meeting ID: 161 516 2449
Passcode: 073961

If you are unable to join by video, you may join by telephone by calling (669) 254-5252 and using the above-provided passcode. Zoom appearance information may also be found on the Court's website: https://www.marin.courts.ca.gov

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 05/02/25 TIME: 1:30 P.M. DEPT: E CASE NO: CV2203266

PRESIDING: HON. ANDREW SWEET

REPORTER: CLERK: G. STRATFORD

PLAINTIFF: GOLDEN GATE BELVEDERE, LLC vs. DEFENDANT: CITY OF BELVEDERE	

NATURE OF PROCEEDINGS: 1) MOTION – STRIKE
2) WRIT OF MANDATE HEARING

RULING

Petitioner Golden Gate Belvedere, LLC's ("Petitioner") CTL penalty appeal is REMANDED to the Belvedere City Council with instructions that the City Council make the findings of fact required under applicable law, as discussed below. (*Glendale Memorial Hosp. & Health Center v. Department of Mental Health* (2001) 91 Cal.App.4th 129, 140.) Respondent City of Belvedere's ("Belvedere" or "the City") motion to strike is GRANTED. (Code Civ. Proc., § 1094.5, subd. (e).)

BACKGROUND

This case concerns an extensive remodel to a luxury home at 339 Golden Gate Avenue in Belvedere. (Verified Petition,[1] ¶ 1.) Petitioner owns the property on behalf of its manager, David Flaherty ("Flaherty"), who lives there with his wife, Julie. (*Id.* at ¶ 2.) In 2017, the City received an application for permission to substantially remodel the property. (AR00036-AR00091; Verified Petition, ¶ 36.) When the City issued a building permit for the project in November 2017, it informed Petitioner that the project needed to be completed within 18 months under Belvedere's Construction Time Limit ("CTL") Ordinance. (AR00725.) The CTL Ordinance requires the City to set time limits within which one must complete certain construction projects. (See Resp. RJN in Opp. to Pet's Mot. for Judgment ("Opp. RJN"), Ex. A [Belvedere Municipal Code ("BMC") § 20.04.035].) If the project is not complete when the time limit expires, the City issues a compliance order directing that it be completed within 30 days. (*Id.* at BMC § 20.04.035(E)(1).) After that, the City begins assessing increasing financial penalties for every day the project remains incomplete. (*Ibid.*) The penalties begin at $600 per day and escalate to $1,200 per day. (*Ibid.*) The maximum CTL penalty is $300,000 or 10% of the project's value, whichever is less. (*Ibid.*)

[1] The Court relies on the Verified Petition only to provide context for the dispute and does not consider it as evidence in its ruling on either of these two motions.

The City deemed Petitioner's project final on March 21, 2022. (AR00726.) It notified Petitioner that it was liable for the maximum CTL penalty of $300,000. (AR01902.) Petitioner appealed the penalty to the City Council in the manner set forth in the CTL Ordinance. (See Opp. RJN, Ex. A at BMC § 20.04.035(E)(4)-(6); AR01904-AR01909.) After a hearing on July 11, 2022, the City Council denied the appeal and affirmed Petitioner's $300,000 CTL penalty. (AR01971-AR01972.)

The Court now considers Petitioner's petition for a writ of administrative mandamus (Code Civ. Proc., § 1094.5) commanding the City to reverse its decision upholding its CTL penalty and to refrain from enforcing the penalty against him. (Verified Petition, ¶ 126.) Concurrently, the Court considers the City's request that the Court strike certain materials Petitioner submitted with its moving papers and reply brief. Although the City has styled this request, in part, as a motion to strike, the Court construes the City's request as an evidentiary objection to these materials.

MOTION TO STRIKE

LEGAL STANDARD

Generally, a court hearing a petition for administrative mandamus is limited in its scope of review to materials that were before the administrative agency at the time it made the decision at issue (the "closed record rule"). (*Toyota of Visalia, Inc. v. New Motor Vehicle Bd.* (1987) 188 Cal.App.3d 872, 881.) If a petitioner contends that the administrative record certified by the agency is incomplete, or that the court should review evidence that was not before the agency ("extra-record evidence") under an exception to the closed record rule, the proper remedy is a motion to augment the record. (Asimow et al., Cal. Practice Guide: Administrative Law Highlights (The Rutter Group 2024) ¶ 20:195.)

Code of Civil Procedure, section 1094.5, subdivision (e) provides that the record may be augmented with relevant extra-record evidence "only if that evidence 'in the exercise of reasonable diligence, could not have been produced [at the hearing before the agency], or . . . was improperly excluded' " at such hearing. (*Sierra Club v. California Coastal Com.* (2005) 35 Cal.4th 839, 863 [quoting Code Civ. Proc., § 1094.5, subd. (e).) The burden to show these requirements is on the petitioner. (*Id.* at p. 863.) "Augmentation of the administrative record is permitted only within the strict limits set forth in section 1094.5, subdivision (e) . . . In the absence of a proper preliminary foundation showing that one of the exceptions noted in [that provision] applies, it is error for the court to permit the record to be augmented." (*Ibid.* [quoting Code Civ. Proc., § 1094.5, subd. (e) and *State of California v. Superior Court* (1974) 12 Cal.3d 237, 257] [emphasis added]; see also *Toyota of Visalia, supra*, 188 Cal.App.3d 872, 881 [Section 1094.5(e) "operates as a limitation upon the court's authority to admit new evidence"].)

Assuming augmentation is proper, the reviewing court itself may consider the extra-record evidence only "in cases in which the court is authorized by law to exercise its independent judgment on the evidence[.]" (Code Civ. Proc., § 1094.5, subd. (e); *Town of Tiburon v. Bonander* (2009) 180 Cal.App.4th 1057, 1076; *Nightlife Partners v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 89.) Otherwise, the court is limited to "enter[ing] judgment . . . remanding the case to be reconsidered in the light of that evidence[.]" (Code Civ. Proc., § 1094.5, subd. (e).)

DISCUSSION

With its motion for judgment, Petitioner submitted two declarations, one from John D. O'Connor (Petitioner's attorney) and one from Flaherty. The City of Belvedere moves to strike those declarations. The City has also objected to a second declaration from Flaherty submitted in support of Petitioner's reply brief.

The Court agrees with the City that Petitioner's submitting these extra-record materials is properly construed as a motion to augment the administrative record, so the Court cannot consider these materials unless Petitioner has made the showing required by Section 1094.5(e). (*Sierra Club*, *supra*, 35 Cal.4th 839, 863; see also *Metropolitan Water District of Southern California v. Winograd* (2018) 24 Cal.App.5th 881, 897 [trial court construed submission of declaration alongside opposition to petition for writ of administrative mandate as motion to augment the administrative record; appellate court found trial court did not err in refusing to consider the declaration and its exhibits absent the showing required by Section 1094.5(e)]; see also O'Connor Dec., ¶ 2 [identifying "reasons I believe justify supplementation of the administrative record"].) The Court considers the declarations[2] for the limited purpose of determining whether augmentation is proper, as it cannot decide that question without reference to the substance of the evidence at issue.

Petitioner argues that these materials could not have been presented at the hearing and/or were improperly excluded from consideration because of the constrained scope of the City's CTL penalty appeal hearings. The provision of the BMC describing the right to appeal reads as follows:

> "A [CTL penalty] may be appealed[.] . . . The appeals committee may consider any evidence provided by the applicant in determination of the appeal, and shall consider, based on the evidence presented, whether the applicant was unable to comply with the construction time limit for reasons beyond the control of the applicant and/or his or her representatives. For purposes of this Section, reasons beyond the control of the applicant and/or his or her representatives shall include, but not be limited to: administrative appeals of the project filed by third parties; delays required by the unforeseen discovery of archaeological remains on the building site; labor stoppages; acts of war or terrorism; and natural disasters. For purposes of this Section, reasons beyond the control of the applicant and/or his or her representatives shall not include: delays caused by the winter rainy season; failure of subcontractors to complete their work according to schedule; the use of custom and/or imported materials; the use of highly specialized subcontractors; significant, numerous, and/or late design changes; or by failure of materials suppliers to provide said materials in a timely manner. . . . The appeals committee shall make a written recommendation to the City Council whether the applicant's appeal should be granted or denied. The City Council shall thereafter hold a public hearing on the appeal and shall affirm or modify the penalty."

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[2] Petitioner's argument for augmentation appears in part in the O'Connor Declaration itself. Including legal argument in declarations is "a sloppy practice which should stop. . . . [I]t makes a mockery of the requirement that declarations be supported by statements made under penalty of perjury. The proper place for argument is in points and authorities, not declarations." (*In re Marriage of Heggie* (2002) 99 Cal.App.4th 28, 30 fn.3.)

(Opp. RJN, Ex. A [BMC 20.04.035(E)(4), (E)(6)].)

Petitioner argues that by the terms of this ordinance, the scope of a CTL penalty appeal is limited to a single issue: whether the failure to complete the project within the applicable CTL was attributable to "reasons beyond the control of the applicant and/or his or her representatives." Petitioner contends that the BMC does not recognize a right to appeal on any other ground, so penalized parties who believe their penalty was unjustified for any other reason (for example, because the City incorrectly calculated the applicable CTL date or incorrectly identified the date on which the project was complete) have no recourse.

Consistent with Petitioner's interpretation of the statute, the Compliance Order the City sent to Petitioner to warn it that it was in violation of its CTL and would soon start incurring penalties stated, "If you incur a penalty, you will be served with a notice of the amount to pay. Such a penalty may be appealed to the City Council, *but only if* you are unable to comply for reasons beyond your control as set forth in Subsection 20.04.035(E)(4)[.]" (AR01884 [emphasis added].) The Notice of Penalty advising Petitioner of its $300,000 fine said, "If you believe you were unable to comply for reasons beyond your control, as set forth in Subsection 20.04.035(E)(4), you may appeal to the City Council."[3] (AR01902.) Petitioner argues that this implies that the City "would not consider, or would improperly exclude" "evidence, argument, or legal interpretation" bearing on any argument other than that the penalized party failed to satisfy the deadline for reasons beyond his control. (Pet.'s Opp. to Resp.'s Mot. to Strike, p. 6.)

The Court need not decide the scope of a CTL penalty appeal proceeding at this juncture. Petitioner's argument that this extra-record evidence should be considered "improperly excluded" under Section 1094.5(e) relies on the assumption that the City would exclude or otherwise decline to consider this evidence if given the chance. Section 1094.5(e) does not operate in hypotheticals. For extra-record evidence to be admitted in court in administrative mandamus proceedings on the basis of improper exclusion, it must be the case that the evidence "*was* improperly excluded[.]" (Code Civ. Proc., § 1094.5, subd. (e) [emphasis added].) An administrative body cannot "exclude" something it was never requested to include in the first place. It follows that an administrative mandamus petitioner relying on the "improper exclusion" ground for the admission of extra-record evidence must demonstrate that he attempted to have the agency consider the evidence and the agency rejected those attempts. Petitioner has not presented any evidence that it ever attempted to place these materials before the City at its CTL penalty appeal proceedings.

All that remains to Petitioner is the argument that the narrow scope of the BMC's CTL appeal (accepting for purposes of argument its interpretation of the ordinance) means it "could not have

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[3] Before this Court, the City rejects Petitioner's interpretation of the appeals provision: "It appears that Petitioner may argue that it was limited to appealing based on 'reasons beyond the control of the applicant' under the language of the CTL Ordinance. . . . [T]he CTL Ordinance is not exhaustive in listing the circumstances under which the City Council could reduce or remove a CTL penalty; it merely lists examples of factors that bear on whether the construction time limit was exceeded for reasons beyond the applicant's control." (Resp.'s Opp. to Mot. for Judgment, p. 21, fn. 8.) Based on the statements in the Compliance Order and the Notice of Penalty, the Court is skeptical that the City in fact interpreted the appeals provision this way before it became beneficial to its position in this case to do so. The City's position outside of court has been that the exclusive ground for appealing a CTL penalty is that the penalized party was not at fault for his inability to meet the deadline.

. . . produced" this evidence below. The Court reads Petitioner to argue not that it *could* not produce it, but that it *did* not produce it because it presupposed that the City would reject or ignore it. (See, e.g., Memorandum, p. 17; O'Connor Dec. in Supp. of Mot. for Judgment, ¶ 19; Flaherty Dec. in Supp. of Mot. for Judgment, ¶ 34.) The BMC's appeal provision, regardless of how it limits or does not limit the scope of the appeal, explicitly states that "[t]he appeals committee may consider *any evidence provided by the applicant* in determination of the appeal[.]" (Opp. RJN, Ex. A, BMC § 20.04.035(E)(4).) This means the CTL Appeals Committee was explicitly empowered to consider the evidence Petitioner now seeks to admit. Petitioner has not directed the Court to any authorities limiting the evidence that is admissible in CTL appeal proceedings, so there is no indication that it was unable to put this material before the CTL Appeals Committee or the City Council. There is likewise no evidence that the material Petitioner now seeks to admit was unavailable to Petitioner in advance of the proceedings. Whether the CTL Appeals Committee or the City Council would have meaningfully considered this evidence given the apparently narrow scope of a CTL penalty appeal is a hypothetical question that is not before the Court.[4]

Cranston v. City of Richmond (1985) 40 Cal.3d 755, cited by Petitioner, does not require a different outcome. There, the petitioner was fired from his job as a police officer for the City of Richmond under Richmond City Personnel Rule XII(2)(a), which permitted a city employee to be fired for "conduct unbecoming an employee of the City Service[.]" (*Cranston, supra*, 40 Cal.3d 755, 759, 762-763.) The city's personnel board determined that the petitioner had engaged in qualifying conduct and sustained the decision to fire him, and the petitioner unsuccessfully sought a writ of administrative mandamus. (*Id.* at pp. 759, 782.) During the writ proceedings, the petitioner argued that Rule XII(2)(a) was unconstitutionally vague. (*Id.* at p. 790.) He did not raise this issue in the proceedings before the city personnel board, but raised it for the first time in the writ proceedings before the trial court. (*Ibid.*) The city introduced portions of the city's manual on the conduct expected of police officers during the writ proceedings to respond to the petitioner's argument that Rule XII(2)(a) was unconstitutional. (*Ibid.*) The Supreme Court held that the superior court did not abuse its discretion by permitting the city to introduce this evidence. (*Ibid.*) It reasoned that "[u]ntil [the petitioner] raised the [constitutional] issue in his petition for mandamus, [the city] had no reason to anticipate that such a challenge would be made and, consequently, had no reason to offer into evidence those portions of the manual which were relevant to [the petitioner's] constitutional challenge." (*Ibid.*) *Cranston* does not help Petitioner because Petitioner is not exclusively seeking admission of evidence it had no reason to believe would be relevant at its CTL penalty appeal proceedings. Instead, it is asking the Court to consider declarations from Flaherty and Petitioner's attorney that cover a wide range of topics, many of which Petitioner had reason to believe were relevant to the proceedings below. Petitioner's declaration covers background information (¶¶ 1-6), information about the applicability of an extension associated with Tubbs fire (¶ 7), information

[4] Section 1094.5(e) does not provide for the admission of evidence outside the administrative record on the ground that the administrative body failed to give that evidence due consideration. First, by definition, if evidence was not in the administrative record, the agency had no opportunity to give it any consideration at all. Second, that the agency failed to give evidence within the record due consideration goes to the merits of the writ. (Code Civ. Proc., § 1094.5, subd. (b) [among the bases for issuance of a writ of administrative mandamus: "the respondent has not proceeded in the manner required by law" or "the findings are not supported by the evidence"].)

about a dispute between Petitioner and the City over Petitioner's planting certain olive trees (¶¶ 9-14, 17-22, 39-40), neighbor complaints about lighting (¶ 16), AB 1561 (¶¶ 23-25), Petitioner's dispute with Commissioner Peter Mark and Mr. Mark's alleged vendetta toward Flaherty (¶¶ 26-30, 47), the City's stated bases for the CTL fines (¶¶ 35-37, 41), and its due process arguments (¶¶ 44-48). Plaintiff's attorney's declaration covers a similarly sprawling range of issues, including (but not limited to) the olive trees (¶¶ 16-17), Mr. Mark pulling a hearing from the calendar (¶¶ 16, 26-28), and AB1561 (¶¶ 46-50). Petitioner plainly had reason to believe that at least the olive trees, neighbor complaints about lighting, AB 1561, and Mr. Mark's alleged wrongdoing would be at issue in the appeal proceedings, as Petitioner itself raised those issues in the letter to the City whereby it initiated the appeal. (AR01904-AR01909.) It also candidly admits that Flaherty's state of mind when he planted the olive trees (i.e., whether he was intentionally flouting the City) was the subject of "robust discussion" during the administrative proceedings. (Memorandum, p. 19.)

Petitioner's request to augment the record is not even limited to the declarations Respondent has challenged. Petitioner is asking to be permitted to present *yet-to-be-identified* evidence "as necessary" to address specified issues. (O'Connor Dec., ¶¶ 6, 20, 23, 24.) The Court cannot admit evidence without knowing what it is.

The Court notes that Petitioner's statements to the City during the early stages of the appeal belie the idea that Petitioner thought it was either impermissible or futile to make arguments other than its own lack of blameworthiness in bringing about the delay. The letter Petitioner submitted to the City to open the appeal raised arguments having nothing to do with that. (See AR01907-AR01909.)

Petitioner also asserts that "it is questionable whether Defendant's attempt to restrict Plaintiff to the Administrative Record applies at all to the [Amended Petition's] second cause of action for constitutional violations." (Pet.'s Opp. to Resp. Mot. to Strike, p. 8.) This is not a legal argument. If Petitioner's position is that the material it seeks to admit may be considered in connection with the Amended Petition's other cause of action notwithstanding Section 1094.5(e), then it needs to cite legal authority that supports that. (See *Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99 ["Issues do not have a life of their own: if they are not raised or supported by argument or citation to authority, [the court] consider[s] the issues waived."].) A court cannot issue an order based on the mere suggestion that the order *might* be legally proper.

Petitioner's request to augment the administrative record is denied. The City's motion to strike is granted and its objection to the Flaherty Reply Declaration is sustained.

Through a declaration submitted in support of its motion to strike, the City presents an executed version of a settlement agreement Petitioner and the City entered into on October 26, 2021. (McGinley-Stempel Dec. in Supp. of Resp. Mot. to Strike, ¶ 2 & Ex. 1.) The City "acknowledges that [this document] should have been included in the administrative record and requests that this Court augment the Administrative Record by moving [the document] into the Administrative Record." (*Id.* at ¶ 6.) The City never articulates the legal ground on which it contends this document should be added to the administrative record. As the City itself has acknowledged, the Court cannot augment the administrative record in the absence of a showing that one of Section

1094.5(e)'s exceptions applies. (*Sierra Club*, *supra*, 35 Cal.4th 839, 863.) Accordingly, the Court will not consider this material.

MOTION FOR JUDGMENT

LEGAL STANDARD

Code of Civil Procedure, section 1094.5 governs writs of administrative mandamus. It provides for the issuance of a writ "for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer[.]" (Code Civ. Proc., § 1094.5, subd. (a).) The inquiry on a petition for administrative mandamus "shall extend to the questions whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion." (Code Civ. Proc., § 1094.5, subd. (b).) "Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (*Ibid.*) "[A] hearing on a writ of administrative mandamus is conducted solely on the record of the proceeding before the administrative agency." (*Toyota of Visalia*, *supra*, 188 Cal.App.3d 872, 881.)

An agency's findings of fact are, generally speaking, reviewed according to the substantial evidence standard. (Asimow et al., *supra*, ¶ 17:234; Code Civ. Proc., § 1094.5, subd. (c).) Under this standard, the court must determine whether "the findings are . . . supported by substantial evidence in the light of the whole record[,]" meaning a "reasonable person could have drawn the same factual conclusions as the agency." (*Ibid.*; see *Environmental Law Foundation v. State Water Resources Control Bd.* (2023) 89 Cal.App.5th 451, 482.) In applying the substantial evidence standard, " 'the court may not reconsider or reevaluate the evidence presented to the administrative agency' " and must resolve " '[a]ll conflicts in the evidence and any reasonable doubts . . . in favor of the agency's findings and decision.' " (*Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, 596 [quoting *Citizens of Goleta Valley v. Board of Supervisors* (1988) 197 Cal.App.3d 1167, 1177].) The court's duty is to " 'determine whether there is any evidence (or any reasonable inferences which can be deduced from the evidence), whether contradicted or uncontradicted, which, when viewed in the light most favorable to an administrative order or decision or a court's judgment, will support the administrative or judicial findings of fact.' " (*Young v. City of Coronado* (2017) 10 Cal.App.5th 408, 427 [quoting *Antelope Valley Press v. Poizner* (2008) 162 Cal.App.4th 839, 849, fn. 11].) The petitioner carries the burden of demonstrating that the agency's decision is properly set aside. (See *Schreiber v. City of Los Angeles* (2021) 69 Cal.App.5th 549, 558.)

DISCUSSION

Requests for Judicial Notice

Petitioner's request for judicial notice is denied as to Exhibit A, a copy of "the current version of [Belvedere's] CTL Ordinance" (Pet.'s Request for Judicial Notice, p. 1), because Petitioner concedes that this version of the law is not the version that applies to its case. (See Memorandum, pp. 15, 21-22; see also *AL Holding Co. v. O'Brien & Hicks, Inc.* (1999) 75 Cal.App.4th 1310, fn. 4 [material must be relevant to be judicially noticeable].) Petitioner's request is likewise denied as to Exhibit B, because the purported relevance of Exhibit B lies in

the fact that it is incorporated by reference into Exhibit A's inapplicable version of Belvedere's CTL ordinance. (Pet.'s Request for Judicial Notice, p. 2.)

The City's request for judicial notice is granted as to Exhibit A, which is a copy of the version of BMC § 20.04.035 that was in effect when Petitioner's building permit was issued. (Evid. Code, § 452, subds. (b), (c); *Trinity Park, L.P. v. City of Sunnyvale* (2011) 193 Cal.App.4th 1014, 1027 [local ordinances are judicially noticeable under these provisions] [disapproved on unrelated grounds by *Sterling Park, L.P. v. City of Palo Alto* (2013) 57 Cal.4th 1193, 1210].) Petitioner has not opposed the request for judicial notice of this material. Judicial notice is denied as to Exhibit B to the City's request. Given the way this City uses this material in its brief, it has relevance only if its contents are true (that is, the bare existence of a tax assessor record for Petitioner's property is irrelevant). The truth of facts stated in materials generally subject to judicial notice is not itself subject to judicial notice. (*Tenet Healthsystem Desert, Inc. v. Blue Cross of California* (2016) 245 Cal.App.4th 821, 836.) Accordingly, this material is irrelevant.

The City's request for judicial notice of Exhibit C is denied for the same reason the Court refused to take judicial notice of the same material in connection with the City's demurrer. (See Resp.'s Request for Judicial Notice in Supp. of Demurrer [filed Feb. 16, 2023], Ex. G; Jul. 7, 2023 Order, p. 4 [denying request for judicial notice of "Exhibit G"].)
The Court notes that due to the manner in which it resolves these motions, it had no occasion to consider any material for which either party sought judicial notice other than Exhibit A to the City's request in any event.

Sufficiency of the City Council's Findings
"[I]mplicit in section 1094.5 is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order." (*Topanga Assn. for a Scenic Community v. County of Los Angeles* ("*Topanga I*") (1974) 11 Cal.3d 506, 515.) One of the functions of this requirement is to "enable the reviewing court to trace and examine the agency's mode of analysis." (*Id.* at p. 516; see also *id.* at 515 ["[T]he Legislature sought to direct the reviewing court's attention to the analytic route the administrative agency traveled from evidence to action. . . . [The language of Section 1094.5] leaves no room for the conclusion that that Legislature would have been content to have a reviewing court speculate as to the administrative agency's basis for decision."].) "Absent such roadsigns, a reviewing court would be forced into unguided and resource-consuming explorations; it would have to grope through the record to determine whether some combination of credible evidentiary items which supported some line of factual and legal conclusions supported the ultimate order or decision of the agency." (*Id.* at p. 516.)

Other functions of *Topanga I*'s findings standard are "to conduce the administrative body to draw legally relevant subconclusions supportive of its ultimate decision" and thereby "minimize the likelihood that the agency will randomly leap from evidence to conclusions"; to "enable the parties to the agency proceeding to determine whether and on what basis they should seek review"; and to "serve a public relations function by helping to persuade the parties that administrative decision-making is careful, reasoned, and equitable." (*Topanga I, supra*, 11 Cal.3d 506, 516-517.) To meet the *Topanga I* standard, the agency's findings must "expose [the agency's] mode of analysis to an extent sufficient to serve" these purposes. (*Id.* at p. 517, fn. 16.)

Sufficient findings need not be "extensive or detailed" nor "as precise or formal as would be required of a court." (*Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection* ("*EPIC*") (2008) 44 Cal.4th 459, 516; *McMillan v. American Gen. Fin. Corp.* (1976) 60 Cal.App.3d 175, 183.) Moreover, "findings are to be liberally construed to support rather than defeat the decision under review." (*Topanga I, supra*, 214 Cal.App.3d 1348, 1356.) The agency may simplify its task by including in the findings references to the administrative record to inform the reader of the theory by which it arrived at its conclusion. (*EPIC, supra*, 44 Cal.4th 459, 516, 517 [findings referred to "specific document" that enabled the reviewing court to trace the administrative agency's analytic route]; see also *Topanga I, supra*, 214 Cal.App.3d 1348, 1356.) However, " 'mere conclusory findings without reference to the record are inadequate.' " (*Great Oaks Water Co. v. Santa Clara Valley Water Dist.* (2009) 170 Cal.App.4th 956, 971 [quoting *EPIC, supra*, 44 Cal.4th 459, 516-517.) Additionally, the agency may not "set forth findings solely in the language of the applicable legislation." (*Topanga I, supra*, 11 Cal.3d 506, 517, fn. 16; *Topanga Assn. for a Scenic Community v. County of Los Angeles* ("*Topanga II*") (1989) 214 Cal.App.3d 1348, 1363.)

The findings underlying the City's decision to affirm Petitioner's $300,000 CTL penalty appear at AR01974-1975. (Opposition, p. 21.) The overwhelming majority of the "findings" merely announce background information unrelated to the merits of the issues presented on the appeal. The City's train of thought, as illustrated through the findings, goes like this: Petitioner's initial CTL deadline to complete its remodeling project was May 28, 2019. (AR01974.) The City Council approved various extensions that brought Petitioner's CTL deadline to at least January 2, 2020. Petitioner was assessed a $300,000 penalty for violating its CTL deadline. Petitioner appealed. The CTL Appeals Committee recommended upholding the $300,000 penalty "because the time lost due to construction delays did not effectively address the length of time needed to complete the project[.]" (*Ibid.*) Belvedere law "provides that the City Council may uphold or reduce a CTL penalty if the time limit was exceeded for reasons beyond the applicant's control[.]" (*Ibid.*) The City Council "determined that, while some of the construction delay was due to reasons beyond the applicant's control, it did not effectively address the length of time needed to complete the project[.]" (*Ibid.*) The City Council therefore voted to affirm Petitioner's $300,000 penalty.

"A statement of a finding of the administrative agency in the terms of the ultimate requirement of a statute governing its action does not meet *Topanga [I]*'s test. There must also be findings of fact on 'relevant sub-conclusions supportive of the ultimate decision so that a reviewing court may trace and examine the agency's mode of analysis." (*City of Rancho Palos Verdes v. City Council* (1976) 59 Cal.App.3d 869, 889 [quoting *Topanga I, supra*, 11 Cal.3d 506, 516-517 & fn. 16].) In *Rancho Palos Verdes*, the applicable statute provided that relief was available only where " 'the city council finds, from all the evidence submitted, that any street or part thereof . . . is unnecessary for present or prospective public street purposes[.]'" (*Id.* at p. 876 [quoting Sts. & Hy. Code, § 8323].) The city council "found only that Deep Valley Drive, as presently located, is unnecessary for present or future public street purposes." (*Id.* at p. 889.) The Second District found these findings insufficient because there were "no findings on the sub-issues leading to the ultimate determination[,]" leaving the reviewing court unable to determine whether the city's decision was supported by substantial evidence. (*Ibid.*)

By far the most substantive "finding" the City made (if not the *only* substantive finding) is that "while some of the construction delay was due to reasons beyond the applicant's control, it did not effectively address the length of time needed to complete the project[.]" (AR01974.) This finding is deficient for the same reason as the finding in *Rancho Palos Verdes*. The applicable law states that faced with an appeal of a CTL penalty, the appeals committee "shall consider, based on the evidence presented, whether the applicant was unable to comply with the construction time limit for reasons beyond the control of the applicant[.]" (Opp. RJN, Ex. A, BMC 20.04.035(E)(4), (E)(6).) In other words, the ordinance states that the appellant is entitled to relief from his CTL fine to the extent he can show that he exceeded the time limit for reasons beyond his control, and the finding in the first sentence of this paragraph states that the City determined that Petitioner was not able to do that to a degree meriting any relief. This finding merely recites the ultimate requirement of the statute governing the City's action.

The City cites *Levi Family Partnership, L.P. v. City of Los Angeles* (2015) 241 Cal.App.4th 123, 132 for the proposition that *Topanga I* " 'does not bar the agency from stating [its] findings in the language of the ordinance, and does not oblige the agency to support them with subfindings.' " (Opposition, p. 21.) The City has selectively and misleadingly quoted this case. The full quotation states that when an ordinance authorizes an agency to take a particular action "*upon making specified factual findings*, *Topanga I* does not bar the agency from stating those findings in the language of the ordinance, and does not oblige the agency to support them with subfindings." (241 Cal.App.4th 123, 132 [emphasis added].) This is consistent with other cases' statements of the scope of the exception to the prohibition on stating findings in the language of the ordinance. (See *Jacobson v. County of Los Angeles* (1977) 69 Cal.App.3d 374, 391 ["[*Topanga I*'s] requirement that the administrative decision disclose the 'legally relevant sub-conclusions supportive of its ultimate decision' can be fully met by findings in the language of the ordinance *when the ordinance requires that the relevant sub-conclusions be specifically stated.* [The ordinance at issue] requires the zoning board to reach seven specific subconclusions and, moreover, it describes these as the 'findings' which must be made."] [internal citations omitted] [emphasis added] [quoting *Topanga I*, *supra*, 11 Cal.3d 506, 516]; *Young*, *supra*, 10 Cal.App.5th 408, 421-423; *Topanga II*, 214 Cal.App.3d 1348, 1363 [ok for findings to be stated in the language of the statute where the statute enumerated specific facts that needed to be "substantiat[ed] to the hearing officer[,]" with the implication that the hearing officer could not grant relief unless those facts were proven].)

Belvedere's CTL ordinance does not list the specific facts the City Council must find in order to affirm, deny, or modify a CTL penalty. The only directive it gives the City Council is that the Council must, after receiving the CTL Appeals Committee's written recommendation as to whether the appeal "should be granted or denied," "hold a public hearing on the appeal and shall affirm or modify the penalty." (Opp. RJN, Ex. A, BMC § 20.04.035(E)(6).) It does not say that the City Council must make any findings in relation to the CTL Appeals Committee's written recommendation (i.e., that the Council must state whether it adopts the recommendation, and to what extent) or even that the Council must do anything at all with the written recommendation other than receive it. Even if it did, by the City's own reading of the CTL Ordinance, it does not specify what findings of fact *the CTL Appeals Committee* needs to make in order to recommend that the City Council grant or deny the appeal. As a matter of fact, it does not state even "the general conclusion required to support the ultimate decision" that the appeal should be granted or denied. (*Jacobson*, *supra*, 69 Cal.App.3d 374, 391.) How could it, when according to the City

itself, the ordinance does not even provide an exhaustive list of *what the grounds for appeal are?* (Opposition, p. 21, fn. 8 ["Petitioner may argue that it was limited to appealing based on 'reasons beyond the control of the applicant' under the language of the CTL Ordinance. [] But the CTL Ordinance is not exhaustive in listing the circumstances under which the City Council could reduce or remove a CTL penalty[.]"].)

The lack of any subfindings leaves fundamental questions about the basis for the City's decision unanswered. The Court is at a loss as to how to test the City's findings against the evidence, given that the findings provide no information about *what* evidence played a role in the City's decision and *how* that evidence led to the ultimate outcome. (Code Civ. Proc., § 1094.5; see also *McAllister v. California Coastal Com.* (2008) 169 Cal.App.4th 912, 941 ["Without appropriate written findings, the trial court cannot properly perform its function in a proceeding for administrative mandamus and determine whether the agency's decision is supported by its findings and its findings are supported by the evidence."].) The City's findings needed to tell the Petitioner and a reviewing court how it reached its conclusions and why it rejected Petitioner's challenge "in other than conclusory terms." (*Next Century Associates, LLC v. County of Los Angeles* (2018) 29 Cal.App.5th 713, 723-724; see also *West Chandler Boulevard Neighborhood Assn. v. City of Los Angeles* (2011) 198 Cal.App.4th 1506, 1521 [findings insufficient where they gave "no indication of the reason for the ultimate decision" and "no indication of the analytic route between the raw evidence and the ultimate decision"].) How did the City arrive at the $300,000 figure? On what dates did CTL penalties begin accruing and stopped accruing, in the City's view? The City admits that certain activities do not run CTL fines (Opposition, p. 22), so what was the basis for the City's conclusion that CTL fines were accruing during any given period? The City concluded that "some" of the delay was due to reasons beyond Petitioner's control – for what portion of the total delay did it draw that conclusion, and how did that affect the amount of the fine? What, if anything, did the City conclude as to *any* of the specific arguments Petitioner raised in its appeal letter?

The Court does not intend to suggest that the City's findings needed to explicitly answer all of those questions or describe every single link in the logical chain that led to the City's decision to affirm Petitioner's fine. (See *Farr v. County of Nevada* (2010) 187 Cal.App.4th 669, 686 ["[I]t is not necessary for the findings to cover every evidentiary matter[.]"]; accord *Topanga II, supra*, 214 Cal.App.3d 1348, 1356 ["[G]reat specificity is not required."].) It poses the questions above only to illustrate the extent to which the Court lacks any actionable information about the City's reasons for ruling the way it did. But at a minimum, the findings needed to identify what *some* of the links in the logical chain are. In their current form, the City's findings merely state the City Council's ultimate conclusion. They do not set forth any of the facts that purportedly led to that conclusion. The result is that they are effectively review-proof.

The City urges the Court to view the findings "in the context of the record as a whole." (Opposition, pp. 21-22.) This reads as a request that the Court "grope through the record" – "unguided" – "to determine whether some combination of credible evidentiary items which supported some line of factual and legal conclusions supported the ultimate order or decision of the agency." (*Topanga I, supra*, 11 Cal.3d 506, 516 & fn. 15.) Preventing a reviewing court from having to do this is one of the express purposes of *Topanga I*'s standard. (*Ibid.*; see also *Dore v. County of Ventura* (1994) 23 Cal.App.4th 320, 328.) This purpose is particularly critical in cases like this one, where the facts are technical and complex. In such cases, sufficient findings are

critical if the Court is to know where within the evidentiary morass it should focus its attention. (See *Eureka Teachers Assn. v. Board of Education* (1988) 199 Cal.App.3d 353, 368 [satisfying *Topanga I* standard "particularly crucial where the decision may be based on one or more of several theories, each relating to different factual considerations"].) Likewise, "that in reviewing administrative findings, a court is not limited to the four corners of the findings themselves and may supplement these findings with relevant references or oral statements on the record" (*Paramount Pictures Corp. v. County of Los Angeles* (2023) 95 Cal.App.5th 1246, 1263-1264) does not help the City. It is true that conclusory findings may be deemed sufficient provided the court is nevertheless easily able to trace the agency's analytic route by reference to the record. (*West Chandler*, *supra*, 198 Cal.App.4th 1506, 1521-1522.) However, in this case, as in *West Chandler*, the raw administrative record does not permit the Court to "discern the analytic route the city council traveled from evidence to action." (*Id.* at 1522.)

"When the administrative agency's findings are not adequate, an appropriate remedy is to remand the matter so that proper findings can be made." (*Glendale, supra,* 91 Cal.App.4th 129, 140; see also *Eureka Teachers*, *supra*, 199 Cal.App.3d 353, 369.) Accordingly, the Court remands this matter back to the Belvedere City Council so that it can articulate factual findings that are sufficient under the law.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

The Zoom appearance information for May, 2025 is as follows:
https://marin-courts-ca-gov.zoomgov.com/j/1615162449?pwd=e5SqeATq2HOsxxD7Fhrl3Q7qPFgFZa.1
Meeting ID: 161 516 2449
Passcode: 073961

If you are unable to join by video, you may join by telephone by calling (669) 254-5252 and using the above-provided passcode. Zoom appearance information may also be found on the Court's website: https://www.marin.courts.ca.gov

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 05/02/25 TIME: 1:30 P.M. DEPT: E CASE NO: CV2301277

PRESIDING: HON. ANDREW SWEET

REPORTER: CLERK: G. STRATFORD

PLAINTIFF: ADAM FISH vs. DEFENDANT: SHANNON NGUYEN, ET AL	

NATURE OF PROCEEDINGS: MOTION – APPOINT RECEIVER

RULING

The Motion by Adam Fish, Trustee of the Adam R. Fish Living Trust, dated April 29, 2021 ("Plaintiff" or "Fish") for Appointment of a Receiver is DENIED without prejudice.

BACKGROUND

The property at issue is a single-family home located at 85 Tamalpais Avenue, Mill Valley, California (the "Property"). The Property was purchased by Plaintiff and Shannon Nguyen, Trustee of the Shannon Nguyen Trust dated April 3, 2015 ("Defendant" or "Nguyen") at a time when they were romantically involved. Plaintiff owns a 35% in the Property and Defendant owns 65%. Plaintiff and Defendant entered into a Co-Ownership Agreement with respect to the Property. They later executed two addendums to that agreement. Upon the demise of their romantic relationship, Fish vacated the Property and seeks to terminate their co-ownership under the terms of that agreement.

LEGAL STANDARD

Appointment of a receiver is an extreme provisional remedy that the Court should only grant when facts are presented, by admissible evidence that clearly establishes a receiver is necessary to protect the property and maintain the status quo. (*Barclays Bank of California v. Superior Court* (1977) 69 Cal.App.3d 593, 597.) A receiver may not be appointed except in the classes of cases expressly set forth in the statutes. (*Turner v. Superior Court.* (1977) 72 Cal.App.3d 804, 811.) Code of Civil Procedure section 564 contains a principal source of authority for trial courts to appoint receivers. (*Ibid.*) "The requirements of Code of Civil Procedure section 564 are jurisdictional, and without a showing bringing the receiver within one of the subdivisions of that section the court's order appointing a receiver is void." (*Id. Internal citations omitted.)*

Appointment of a receiver is left to the discretion of the court. *(Barclays Bank of California v. Superior Court, supra,* at p. 602.) The court may decline where there are countervailing equities. California rigidly adheres to the principle that the power to appoint a receiver is a delicate one which is to be exercised sparingly and with caution. (*Morand v. Superior Court* (1974) 38 Cal.App.3d 347, 35.)

DISCUSSION

With this Motion, Plaintiff seeks the appointment of a receiver to effectuate the terms of the Co-Ownership Agreement. Plaintiff argues that the appointment of a receiver is justified under Code of Civil Procedure section 564, subdivision (b)(9), which states a receiver can be appointed, "in all other cases where necessary to preserve the property rights of any party."

Defendant opposes, arguing insufficient notice, improper motion for reconsideration, and that Plaintiff has failed to meet his burden to show that the order is necessary to protect Plaintiff's property rights and that no other less drastic remedies exist. With respect to Notice, the Court notes that an opposition has been filed. If Defendant was unable to respond in full due to the delayed notice, the Court is amenable to continuing the hearing upon request. However, as to the argument that this is an improper motion for reconsideration, the Court disagrees. This Motion seeks to appoint a receiver to effectuate the terms of the Co-Ownership Agreement. Accordingly, the Motion does not seek reconsideration of the Court's prior Order on the Motion for Interlocutory Judgment for Partition.

However, the Court agrees that Plaintiff has failed to demonstrate that the appointment of a pre-judgment receiver is necessary to protect his property rights. There are no allegations that Defendant has failed to pay the mortgage or maintain the property. Plaintiff states that he cannot purchase his own home until the buyout occurs and he is taken off the loan. He argues that he is wasting unnecessary money on rent in the meantime.

The Court is sympathetic to Plaintiff's frustration with the delay. However, trial is set for July 15, 2025. This is only two and half months away. The appointment of a receiver prior to judgment would be an unnecessary expense since there is no immediate threat to Plaintiff's property rights or other rights. For these reasons, the Court denies the Motion for Appointment of a Receiver without prejudice.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

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https://marin-courts-ca-gov.zoomgov.com/j/1615162449?pwd=e5SqeATq2HOsxxD7Fhrl3Q7qPFgFZa.1
Meeting ID: 161 516 2449
Passcode: 073961

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 05/02/25 TIME: 1:30 P.M. DEPT: E CASE NO: CV0000974

PRESIDING: HON. ANDREW SWEET

REPORTER: CLERK: G. STRATFORD

PLAINTIFF: GERALDINE RANDALL vs. DEFENDANT: VILLA MARIN HOMEOWNERS ASSOCIATION, A NON-PROFIT MUTUAL BENEFIT CORPORATION	

NATURE OF PROCEEDINGS: 1) MOTION – RELIEVE COUNSEL
2) CASE PROGRESS CONFERENCE

RULING

The motion to be relieved as counsel for plaintiff Geraldine Randall ("Plaintiff") by attorney Douglas N. Akay ("Counsel") is granted. (Code Civ. Proc., § 284, subd. (2); Cal. Rules of Court, rule 3.1362.)

DISCUSSION

Where, as here, a client fails to consent to the attorney's withdrawal from the case, the attorney can file a motion to withdraw pursuant to Code of Civil Procedure section 284, subdivision (2).[1] (Code Civ. Proc., § 284, subd. (2); Cal. Rules of Court, rule 3.1362.) The attorney may request a withdrawal for a number of reasons, as set forth under the Rules of Professional Conduct. (Rules Prof. Conduct, rule 1.16 [formerly rule 3-700(C)].)

An attorney moving to be relieved as counsel under Code of Civil Procedure section 284 subdivision (2) must meet the requirements set out in California Rules of Court, rule 3.1362. To comply with rule 3.1362, the moving party must submit the following forms: (1) Notice of Motion and Motion to be Relieved as Counsel (form MC-05 1); (2) Declaration in Support of Attorney's Motion to be Relieved as Counsel (form MC-052); and (3) Order Granting Attorney's Motion to be Relieved as Counsel (form MC-053). (Cal. Rules of Court, rule 3.1362(a), (c), (e).) The moving party must serve the aforementioned forms on the client and all other parties who have appeared in the case. (Cal. Rules of Court, rule 3.1362(d).) Further, when the client is

[1] Plaintiff indicates that she terminated Mr. Akay's representation on March 18, 2025, "for all purposes other than collection of his attorney's fees and costs to which [she is] entitled by law or contract." (Declaration of Geraldine Randall, ¶ 4, filed April 8, 2025.)

served by mail, the attorney's declaration must show that the client's address was confirmed within the last 30 days and how it was confirmed. (*Ibid.*)

Here, Counsel submits all of the mandatory forms. Counsel provides proof of service of the instant papers.

The attorney in an action may be relieved at any time before or after judgment or final determination either upon consent of both client and attorney, or upon order of the court. (Code Civ. Proc., § 284.) A motion to be relieved as counsel under Code Civ. Proc, section 284, subd. (2) must comply with the requirements set forth in Cal. Rules of Court, rule 3.1362. Specifically, the accompanying declaration "must state in general terms and without compromising the confidentiality of the attorney client relationship why a motion under Code of Civil Procedure section 284(2) is brought instead of filing a consent under Code of Civil Procedure section 284(1)." (Cal. Rules of Court, rule 3.1362(c).)

Under California Rules of Professional Conduct, 1.16, subdivision (b), ". . . a lawyer may withdraw from representing a client if: . . . (4) The client by other conduct renders it unreasonably difficult for the lawyer to carry out the representation effectively. . . ."

The determination of whether to grant a motion to withdraw as counsel lies in the sound discretion of the trial court. (See *Manfredi & Levine v. Super. Ct.* (1998) 66 Cal.App.4th 1128, 1133; see also *People v. Brown* (1988) 203 Cal.App.3d 1335, 1340.) Even if all of the requirements are met, "the court has discretion to deny an attorney's request to withdraw where such withdrawal would work an injustice or cause undue delay in the proceeding." (*Mandell v. Superior Court* (1977) 67 Cal.App.3d 1, 4.)

Plaintiff argues Counsel should continue to provide at least limited representation so she can collect his attorney fees to which she is entitled. Counsel, however, asserts several valid reasons for withdrawal, e.g., there has been a breakdown in the attorney-client relationship between Counsel and Plaintiff, such that Counsel cannot carry out the representation effectively, client breached a material term of an agreement with the lawyer relating to the representation, and continuation of the representation will likely result in violation of the Rules of Professional Conduct, *inter alia*. (Rules Prof. Conduct, rule 1.16(b)(4), (5) & (9).) Counsel provides the required forms under rule 3.1362 of the California Rules of Court and has served the client and the opposing parties with the same. After consideration of al of the pleading submitted to date, the court finds that permitting Counsel to withdraw will not work and injustice or cause undue delay in the proceedings.

There being good cause to grant Counsel's request to withdraw, Douglas N. Akay's Motion to Be Relieved as Counsel is GRANTED.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 05/02/25 TIME: 1:30 P.M. DEPT: E CASE NO: CV0002128

PRESIDING: HON. ANDREW SWEET

REPORTER: CLERK: G. STRATFORD

PLAINTIFF: BARBARA BYERS vs. DEFENDANT: GENERAL MOTORS, LLC	

NATURE OF PROCEEDINGS: 1) DEMURRER
2) MOTION – STRIKE

RULING

Defendant's demurrer to the Second Amended Complaint is sustained with leave to amend. The motion to strike is granted with leave to amend.

Procedural Deficiency

The Court again draws Defendant's attention to Local Rule 2.8(C)2, which requires attachment of the operative pleading as an exhibit to the demurrer and motion to strike.

Procedural Background

Plaintiff filed her Complaint on against Defendant General Motors LLC on February 23, 2024, alleging that on January 1, 2017, she entered into a warranty contact with Defendant regarding a certified pre-owned 2015 Cadillac Escalade (the "Vehicle"). Plaintiff's first four causes of action alleged violations of the Song-Beverly Consumer Warranty Act (the "Act"). The Fifth Cause of Action for fraudulent inducement- concealment alleged that Defendant committed fraud by allowing the Vehicle to be sold to Plaintiff without disclosing that the Vehicle and its 8-speed transmission were defective and susceptible to sudden and premature failure. Plaintiff filed an Amended Complaint on August 5, 2024, again asserting four causes of action based on alleged violations of the Act and a cause of action for fraudulent inducement- concealment based on similar allegations as the original Complaint. Defendant demurred to the Fifth Cause of Action for fraudulent inducement-concealment and moved to strike the request for punitive damages. The demurrer was sustained and the motion to strike was granted, both with leave to amend.

Plaintiff filed a Second Amended Complaint on December 31, 2024.

Demurrer

I. Standard

"The function of a demurrer is to test the sufficiency of the complaint as a matter of law, and it raises only a question of law." (*Holiday Matinee, Inc. v. Rambus, Inc.* (2004) 118 Cal.App.4th 1413, 1420.) A complaint "ordinarily is sufficient if it alleges ultimate rather than evidentiary facts" (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 550), but the plaintiff must set forth the essential facts of his or her case "with reasonable precision and with particularity sufficient to acquaint [the] defendant with the nature, source and extent" of the plaintiff's claim. (*Doheny Park Terrace Homeowners Assn., Inc. v. Truck Ins. Exchange* (2005) 132 Cal.App.4th 1076, 1099 [citation and internal quotations omitted].) Legal conclusions are insufficient. (*Id.* at 1098–1099; *Doe,* 42 Cal.4th at 551, fn. 5.) The court "assume[s] the truth of the allegations in the complaint, but do[es] not assume the truth of contentions, deductions, or conclusions of law." (*California Logistics, Inc. v. State of California* (2008) 161 Cal.App.4th 242, 247.)

II. Discussion

A. Statute of Limitations

Plaintiff alleges that she entered into the warranty contract with Defendant on January 1, 2017. (Second Amended Complaint ("SAC"), ¶6.) In her Fifth Cause of Action for fraudulent inducement-concealment, Plaintiff alleges that Defendant committed fraud by allowing the Vehicle to be sold to Plaintiff without disclosing that the Vehicle and its 8-speed transmission were defective and susceptible to sudden and premature failure. (*Id.*, ¶71.) She further alleges that Defendant was aware of these problems but failed to disclose them to Plaintiff prior to and at the time of sale and thereafter. (*Id.*, ¶¶72-74, 79, 81.) Had Defendant disclosed these problems, Plaintiff would not have purchased the Vehicle, so the contract for the Vehicle was fraudulently induced. (*Id.*, ¶¶75, 84.) From February 9, 2017 through June 21, 2024, Plaintiff brought the Vehicle in for repairs and was told each time that the Vehicle had been repaired. (*Id.*, ¶¶21-32.)

Defendant demurs to the Fifth Cause of Action on the ground that it is barred by the three-year statute of limitations for fraud under Code of Civil Procedure Section 338(d) because Plaintiff leased/purchased the Vehicle in 2017 and did not file this action until February 23, 2024. Defendant cites to Plaintiff's allegation in paragraph 11 that the alleged "[d]efects and nonconformities to warranty manifested themselves within the applicable express warranty period . . . ."

An action based on fraudulent inducement must be commenced within three years after the cause of action accrues. (Code Civ. Proc., § 338(d).) A cause of action for fraud does not accrue "until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." (*Ibid.*) "[T]hat date is the date the complaining party learns, or at least is put on notice, that a representation was false." (*Brandon G. v. Gray* (2003) 111 Cal.App.4th 29, 35.)

Plaintiff argues that her claim is timely under the discovery rule because she alleges that Defendant's fraudulent concealment occurred not only at the time of sale in 2017, but every time that Plaintiff presented Vehicle to Defendant's dealership(s) with concerns related to the

transmission defect and up through June 2024. (SAC ¶¶ 21-32.) She argues that she had no way of uncovering Defendant's deception because when she brought the Vehicle for repair in this timeframe, she was told the Vehicle had been repaired. Plaintiff also argues that Defendant's fraudulent concealment tolled the statute of limitations because Defendant minimized the scope, cause, and dangers of the defect with inadequate repair procedures and refused to investigate and remedy the defect. (See *Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1192 ["The doctrine of fraudulent concealment tolls the statute of limitations where a defendant, through deceptive conduct, has caused a claim to grow stale"].) Finally, Plaintiff argues that her claim is tolled under the repair doctrine. (See *Aced v. Hobbs–Sesack Plumbing Co.* (1961) 55 Cal.2d 573, 585 ["The statute of limitations is tolled where one who has breached a warranty claims that the defect can be repaired and attempts to make repairs"]; *A&B Painting & Drywall, Inc. v. Superior Court* (2002) 25 Cal.App.4th 349, 355 ["Tolling during a period of repairs rests upon the same basis as does an estoppel to assert the statute of limitations, i.e., reliance by the plaintiff upon the words or actions of the defendant that repairs will be made"].)

The demurrer is overruled to the extent it is based on statute of limitations grounds. "[F]or a demurrer based on the statute of limitations to be sustained, the untimeliness of the lawsuit must clearly and affirmatively appear on the face of the complaint and matters judicially noticed." (*Coalition for Clean Air v. City of Visalia* (2012) 209 Cal.App.4th 408, 420; see also *Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403 ["In order for the bar of the statute of limitations to be raised by demurrer, the defect must clearly and affirmatively appear on the face of the complaint; it is not enough that the complaint shows that the action may be barred"].) "If the dates establishing the running of the statute of limitations do not clearly appear in the complaint, there is no ground for general demurrer. The proper remedy 'is to ascertain the factual basis of the contention through discovery and, if necessary, file a motion for summary judgment . . .'" (*Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 324-325 [citation omitted].) "When a plaintiff reasonably should have discovered facts for purposes of the accrual of a case of action or application of the delayed discovery rule is generally a question of fact, properly decided as a matter of law only if the . . . allegations in the complaint and facts properly subject to judicial notice [] can support only one reasonable conclusion." (*Broberg v. Guardian Life Ins. Co. of America* (2009) 171 Cal.App.4th 912, 921.) In light of Plaintiff's allegations regarding her repair attempts through February 2024 and representations made to her in connection with those attempts, the dates establishing the running of the statute of limitations do not clearly appear in the Second Amended Complaint and do not support only one reasonable conclusion that the claim is untimely.

B. Pleading Fraud with Specificity

"[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." (*Lovejoy v. AT&T Corp.* (2004) 119 Cal.App.4th 151, 157-158 [citation and internal quotations omitted].) Fraud, including concealment, must be pleaded with specificity. (*Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1472.)

Defendant argues that Plaintiff fails to allege fraud with the requisite specificity because she does not allege (i) the specific "facts" that Defendant allegedly failed to disclose; (ii) that Defendant knew of those facts at the time Plaintiff purchased the Vehicle; (iii) the specific advertisements, brochures, or other materials where Defendant could have disclosed the allegedly omitted facts that Plaintiff reviewed and relied upon in purchasing the Vehicle; (iv) how long before purchasing the Vehicle Plaintiff viewed those materials; and (v) whether those materials, if any, were prepared by Defendant or someone else (such as a dealership). (See *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645 ["[G]eneral and conclusory allegations do not suffice . . . This particularity requirement necessitates pleading *facts* which show how, when, where, to whom, and by what means the representations were tendered" [citations and internal quotations omitted] [emphasis in original].)

The requirement under *Lazar* to plead how, when, where, to whom, and by what means "is intended to apply to affirmative misrepresentations. If the duty to disclose arises from the making of representations that were misleading or false, then those allegations should be described. However . . . it is harder to apply this rule to a case of simple nondisclosure. How does one show how and by what means something didn't happen, or when it never happened, or where it never happened?" (*Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009) 171 Cal.App.4th 1356, 1384 [citation and internal quotations omitted].) "The pertinent question in a concealment case is not who said what to whom; the question, among others, is whether [the defendant] . . . intentionally concealed" information from the plaintiff "so that they would proceed with the transaction." (*Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, 296.)

"California courts apply the same specificity standard to evaluate the factual underpinnings of a fraudulent concealment claim at the pleading stage, even though the focus of inquiry shifts to the unique elements of the claim. For instance . . . the court must determine whether the plaintiff has alleged a sufficient factual basis for establishing a duty of disclosure on the part of the defendant independent of the parties' contract. If the duty allegedly arose by virtue of the parties' relationship and defendant's exclusive knowledge or access to certain facts . . . the complaint must also include specific allegations establishing all the required elements, including (1) the content of the omitted facts, (2) defendant's awareness of the materiality of those facts, (3) the inaccessibility of the facts to plaintiff, (4) the general point at which the omitted facts should or could have been revealed, and (5) justifiable and actual reliance, either through action or forbearance, based on the defendant's omission. [M]ere conclusionary allegations that the omissions were intentional and for the purpose of defrauding and deceiving plaintiff[ ] ... are insufficient for the foregoing purposes." (*Rattagan v. Uber Technologies, Inc.* (2024) 17 Cal.5th 1, 43-44 [citations and internal quotations omitted].)

Plaintiff's Second Amended Complaint sufficiently alleges facts required under *Rattagan*. Plaintiff has alleged the content of the omitted facts (i.e., that the 8-speed transmission were defective and susceptible to sudden and premature failure), Defendant's awareness of the materiality of these facts (SAC ¶¶ 73, 74, 76-78, 81), the inaccessibility of those facts to Plaintiff when she purchased the Vehicle, including in advertisements and other marketing material (¶¶74, 75), the general point at which the facts should have been revealed (¶¶71, 76, 79), and justifiable and actual reliance (¶¶84, 88). Plaintiff is not required to allege more specific facts in order to adequately state a cause of action.

C. Existence of a Transactional Relationship

"There are four circumstances in which nondisclosure or concealment may constitute actionable fraud: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts. Where . . . a fiduciary relationship does not exist between the parties, only the latter three circumstances may apply. These three circumstances, however, presuppose[ ] the existence of some other relationship between the plaintiff and defendant in which a duty to disclose can arise. A duty to disclose facts arises only when the parties are in a relationship that gives rise to the duty, such as seller and buyer, employer and prospective employee, doctor and patient, or parties entering into any kind of contractual arrangement." (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 311 [citations and internal quotations omitted].) "Such a transaction must necessarily arise from direct dealings between the Plaintiff and defendant; it cannot arise between the defendant and the public at large." (*Ibid.*) This rule was recently reiterated by the California Supreme Court in *Rattagan, supra,* 17 Cal.5th at p. 41.

Defendant argues that Plaintiff does not allege a transactional relationship or direct dealings between the parties, as Plaintiff does not allege that Plaintiff purchased or leased the Vehicle directly from Defendant. As a result, Defendant argues, there could not have been any actionable concealment by Defendant that allegedly induced Plaintiff's purchase of the Vehicle.

Here, Plaintiff alleges that in January 2017, she entered into a warranty contract with Defendant for the Vehicle, which was manufactured and/or distributed by Defendant, and that she purchased the Vehicle at Defendant's authorized dealer, Fremont Cadillac GMC Buick in Fremont. (SAC, ¶6.) She alleges that Defendant committed fraud by allowing the Vehicle to be sold to Plaintiff without disclosing that the Vehicle and its 8-speed transmission were defective and susceptible to sudden and premature failure. (*Id.*, ¶71.)

In her Opposition, Plaintiff first argues that a transactional relationship is not required. In making this argument, she relies on the four circumstances of nondisclosure or concealment identified in *Bigler-Engler*, noted above, but then ignores the additional requirement of *Bigler-Engler* that the latter three circumstances presuppose the existence of a relationship between the parties in which a duty to disclose can arise. Plaintiff then argues that she adequately alleges the requisite relationship under *Dhital v. Nissan North America, Inc.* (2022) 84 Cal.App.5th 828, in which the court found that the plaintiff sufficiently alleged a transactional relationship under somewhat similar facts: "In its short argument on this point in its appellate brief, 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 (and in the absence of a more developed argument by Nissan on this point), 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." (*Id.* at 844.)[1]

Dhital is distinguishable as the plaintiff there alleged that the car manufacturer's authorized dealerships were its agents for purposes of the sale of vehicles to customers. (*Id.* at p. 844.) Here, the Second Amended Complaint does not contain any similar allegation. Rather, Plaintiff alleges only that the seller was Defendant's "authorized dealer" and nothing more. (SAC, ¶6.) An agency relationship between a car manufacturer and dealer is not presumed. (See *Ford Motor Warranty Cases* (2023) 89 Cal.App.5th 1324, 1341-1342.) The Court will not read an agency allegation into the Second Amended Complaint where Plaintiff specifically fails to make one. (See *Carroll v. Nissan North America, Inc.*, Case No. 2:22-cv-05783-SB-AS, 2023 WL 3433590 (C.D. Cal. Feb. 27, 2023, *3 ["Plaintiff has not alleged any relationship between her and Defendant that supports Defendant's liability. Plaintiff alleges that she purchased her vehicle at one of Defendant's authorized dealerships, Compl. ¶75, but does not allege that 'Nissan's authorized dealerships are its agents for purposes of the sale of Nissan vehicles to consumers,' *Dhital*, 84 Cal. App. 5th at 844. Without a factual allegation supporting the existence of one of the four recognized relationships between the parties, Plaintiff fails to state a fraud claim"].)

Plaintiff also argues that her allegation that she entered into to a warranty relationship with Defendant is sufficient to establish any transactional relationship required under *Bigler-Engler*. However, this is not the contract pursuant to which she purchased the Vehicle – that contract was with the dealership – and she alleges she would not have purchased the Vehicle had the defects been disclosed to her. The Second Amended Complaint does not allege any details regarding the purchase contract, including whether it occurred at the same time Plaintiff received the warranty from Defendant or whether the two contracts were part of the same overall transaction pursuant to which Plaintiff acquired the Vehicle. Thus there are insufficient allegations to tie the warranty agreement with Defendant to Plaintiff's decision to purchase the Vehicle. Further, while the *Dhital* court noted in its ruling that the defendant manufacturer had backed the car with an express warranty, it also found that the plaintiff adequately alleged the existence of an agency relationship between the defendant and the dealership which sold the vehicle. Both factors (the warranty agreement and the agency relationship with the dealer) were relevant to the *Dhital* court's decision. Here, as noted above, Plaintiff has not alleged any agency relationship between Defendant and the dealership.

The demurrer is sustained on the ground that Plaintiff fails to adequately allege a transactional relationship or direct dealings with Defendant. The Court will allow Plaintiff one more opportunity to state a cause of action for fraudulent concealment based on the discussion above.

Motion to Strike

Defendant moves to strike Plaintiff's demand for punitive damages.

[1] The California Supreme Court previously granted review in *Dhital*, but review was dismissed on December 18, 2024.

I. Standard

The court may, upon a motion made pursuant to Code of Civil Procedure § 435, strike out any "irrelevant, false, or improper matter inserted in any pleading." (Cal. Code Civ. Proc. § 436.) Improperly pled damages claims may be challenged by motion to strike. (*Grieves v. Superior Court* (1984) 157 Cal.App.3d 159, 164.)

II. Discussion

Defendant argues that punitive damages are not available for violations of the Act (the first four causes of action) and Plaintiff fails to allege sufficient facts supporting a request for punitive damages in connection with her fraudulent inducement-concealment cause of action. The motion is granted as Plaintiff has failed to state a fraudulent inducement-concealment cause of action for the reason set forth above.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

The Zoom appearance information for May, 2025 is as follows:
https://marin-courts-ca-gov.zoomgov.com/j/1615162449?pwd=e5SqeATq2HOsxxD7Fhrl3Q7qPFgFZa.1
Meeting ID: 161 516 2449
Passcode: 073961

If you are unable to join by video, you may join by telephone by calling (669) 254-5252 and using the above-provided passcode. Zoom appearance information may also be found on the Court's website: https://www.marin.courts.ca.gov

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 05/02/25 TIME: 1:30 P.M. DEPT: E CASE NO: CV0002937

PRESIDING: HON. ANDREW SWEET

REPORTER: CLERK: G. STRATFORD

PLAINTIFF: JANE DOE, A MINOR, BY AND THROUGH HER GUARDIAN AD LITEM vs. DEFENDANT: COUNTY OF MARIN, A PUBLIC ENTITY, ET AL	

NATURE OF PROCEEDINGS: DEMURRER

RULING

Defendant San Rafael City Schools' ("the District") demurrer to Plaintiff Jane Doe's ("Plaintiff") First Amended Complaint ("FAC") is SUSTAINED with leave to amend as to the First ("Respondeat Superior"), Second (Lack of Adequate Supervision/Training/Hiring/Retention), and Third (Dangerous Condition of Public Property) Causes of Action. (Code Civ. Proc., §§ 430.10, subds. (e), (f).) It is OVERRULED as to the Fourth (Negligent Infliction of Emotional Distress) and Tenth (Failure to Perform Mandatory Duty to Protect Student) Causes of Action.

BACKGROUND

This case concerns alleged student-against-student violence at Terra Linda High School. Plaintiff asserts that while she was a student at the school, she was bullied, harassed, and physically victimized by several other students while on or near school premises. (FAC, ¶¶ 2, 6, 12.) The operative complaint alleges two specific incidents of physical abuse, one in which Plaintiff was physically beaten by several students while walking home from class and one in which she was drugged and sexually assaulted on the campus baseball field's dugout. (*Id.* at ¶¶ 14, 17.) These incidents were allegedly recorded and circulated among the student body, compounding Plaintiff's victimization. (*Id.* at ¶¶ 15, 17.)

Plaintiff takes issue with the District's handling of what happened to her, generally contending that the District failed to protect her from being harmed by fellow students. The District now demurs to certain of her causes of action.

LEGAL STANDARD

The function of a demurrer is to test the legal sufficiency of the challenged pleading. (*Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497.) As a general rule, in testing a pleading against a demurrer, the facts alleged in the pleading (including those in any exhibit attached to

the pleading) are deemed to be true, however improbable they may be. (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604; *Mead v. Sanwa Bank California* (1998) 61 Cal.App.4th 561, 567-568.) A complaint must be liberally construed and all reasonable inferences must be drawn in favor of its allegations. (*Teva Pharmaceuticals USA, Inc. v. Superior Court* (2013) 217 Cal.App.4th 96, 102; see also Code. Civ. Proc., § 452.) The court gives the pleading a reasonable interpretation by reading it as a whole and all of its parts in their context. (*Moore v. Regents of Univ. of Calif.* (1990) 51 Cal.3d 120, 125.)

In a demurrer proceeding, the defects must be apparent on the face of the pleading or via proper judicial notice. (*Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994.) The face of the complaint includes matters shown in exhibits attached to the complaint and incorporated by reference. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.) "The only issue involved in a demurrer hearing is whether the complaint, as it stands, unconnected with extraneous matters, states a cause of action." (*Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 747.)

If the complaint fails to state a cause of action, the court must grant the plaintiff leave to amend if there is a reasonable possibility that the defect can be cured by amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 317.)

DISCUSSION

First Cause of Action: Respondeat Superior

"Under the doctrine of respondeat superior, an employer may be held vicariously liable for torts committed by an employee within the scope of employment. . . . The doctrine is a departure from the general tort principle that liability is based on fault" and is based on the principle "that it would be unjust for an enterprise to disclaim responsibility for injuries occurring in the course of its characteristic activities." (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 208.)

As pleaded, this cause of action is uncertain. The claim purports to be one sounding in vicarious liability, but alleges that *all* of the defendants subject to this claim owed Plaintiff various duties and breached those duties, resulting in injury. (See, e.g., ¶¶ 44, 47, 48, 50, 52.) That describes a *direct* theory of tort liability. (See *de Villers v. County of San Diego* (2007) 156 Cal.App.4th 238, 247; see also *Chee v. Amanda Goldt Property Management* (2006) 143 Cal.App.4th 1360, 1375 [" ' Vicarious liability "means that the act or omission of one person . . . is imputed by operation of law to another," ' without regard to fault."] [quoting *Srithong v. Total Investment Co.* (1994) 23 Cal.App.4th 721, 726].)

Additionally, the reader cannot tell *which* tort(s) Plaintiff is attempting to hold the District, or any particular defendant, liable for, vicariously or otherwise. The allegations specific to this cause of action mention at least dangerous condition of public property (FAC, ¶ 51) and breach of mandatory duty (*id.* at ¶¶ 47, 49, 55), but the FAC separately asserts those claims against the District as the Third and Tenth Causes of Action respectively, raising the question of how the First Cause of Action differs from those.

The Court does not see how Defendant can "reasonably respond" to this claim as pleaded. (*Mahan v. Charles W. Chan Ins. Agency, Inc.* (2017) 14 Cal.App.5th 841, 848, fn. 3 [discussing demurrers for uncertainty].) Accordingly, the demurrer is sustained with leave to amend.

Second Cause of Action: Lack of Adequate Supervision, Training and/or Hiring
This cause of action alleges that "Defendants and DOES 10-100, and each of them" owed to Plaintiff a duty "to adequately . . . hire, train, . . . and supervise its instructors, faculty and employees in order to protect its students from harm caused by other students[.]" (FAC, ¶ 64.) Plaintiff states that "Defendants and DOES 10 through 100, inclusive, and each of them" exercised these duties carelessly and recklessly and "knew or should have known that their instructors and employees were unfit . . . and posed a danger to students[.]" (*Id.* at ¶¶ 66, 67, 68.) Thus, "Defendants are vicariously liable for the acts and omissions of their employees, acts and/or independent contractors." (*Id.* at ¶ 66.)

In *C.A. v. William S. Hart Union High School District* (2012) 53 Cal.4th 861, the Supreme Court considered the existence and scope of two different types of liability in the public school setting: (1) *direct* liability of *individual public school employees* for negligent hiring, supervision and retention of a fellow employee who harms a student, and (2) *vicarious* liability of the school district predicated on the *direct* liability described in (1). (53 Cal.4th 861, 868-869, 879.) As to the latter, the Supreme Court held that within certain identified "limits," "a public school district may be held vicariously liable under section 815.2 for the negligence of administrators or supervisors in hiring, supervising and retaining a school employee who sexually harasses and abuses a student."[1] (53 Cal.4th 861, 879.)

Plaintiff indicates that she brings this claim against the District pursuant to *C.A.* (Opposition, p. 7.) However, *C.A.* did not hold that a school district may be held *directly* liable for negligently hiring, supervising, and/or retaining an employee, and Plaintiff's opposition concedes that this is the nature of her claim:

> "Plaintiff has specifically alleged in paragraphs 66-68 that the District failed in its mandatory duties relating to supervision. Paragraph 67 explicitly states that the District 'knew or should have known that their instructors and employees were unfit for the specific tasks to be performed during the course of their employment and posed a danger to students on campus.' . . . The complaint sufficiently apprises the District of the basis for this claim by alleging specific facts regarding the District's failures to provide adequate supervision. Paragraph 18 alleges that the District 'rendered a total lack of supervision or ineffective supervision[.]' Further, paragraphs 27 and 29 detail the District's reckless conduct, including 'not monitoring, controlling, maintaining, regulating, disciplining and/or otherwise supervising the dangerous students.' . . . Paragraph 28 alleges the District had affirmative duties to investigate, screen, and hire competent staff to protect students."

(Opposition, p. 6 [quoting FAC].) Plaintiff does allege that "Defendants are vicariously liable for the acts and omissions of their employees, agents, and/or independent contractors" (FAC, ¶ 66), but this is a legal conclusion that may be disregarded. (*Wexler v. California FAIR Plan*

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[1] Here, Plaintiff does not allege that any negligently supervised, trained, or hired District employee physically harmed her. Instead, she alleges that District employees who were negligently supervised, hired, or retained allowed her to be injured by other students. (FAC, ¶ 64.) The Court does not have occasion to consider whether *C.A.*'s holding extends to those facts, but notes that the First District has been reticent to extend the case beyond the context of a negligently supervised employee causing physical harm to the plaintiff student. (*Thomas v. Regents of University of California* (2023) 97 Cal.App.5th 587, 625-627.)

Association (2021) 63 Cal.App.5th 55, 70.) Plaintiff's non-conclusory allegations assert a theory of *direct* liability against the District for negligently supervising, training, and/or hiring employees whose conduct allowed Plaintiff to be harmed by other students. (See, e.g., FAC, ¶¶ 64-66 [alleging that "Defendants and DOES 10-100" owed Plaintiff a duty of care to properly hire, train, and supervise their employees and violated that duty]; 10 [defining "Defendants" to mean the District and Does 10-100].) *C.A.* does not support the idea that this is a viable theory of liability, and the Court has found no authority that does. (See *Koussaya v. City of Stockton* (2020) 54 Cal.App.5th 909, 943 [noting lack of authority for holding a public entity directly liable for negligent hiring or supervision].) In its opinion in *C.A.*, the Supreme Court made a point of clarifying that certain cases purporting to entertain that theory of liability did not actually do so. (See 53 Cal.4th 861, 875.)

The demurrer to this cause of action is sustained with leave to amend for failure to state a claim and uncertainty.

Third Cause of Action: Dangerous Condition of Public Property

> "Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either: (a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or (b) The public entity had actual or constructive notice of the dangerous condition under [Government Code, section] 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition."

Government Code, section 835.

The gist of this cause of action is that certain areas of the Terra Linda High School campus "remote from school buildings," including "the dug-out areas of the baseball field" where Plaintiff was allegedly sexually assaulted, were "easily accessible to students[,] . . . but out of view of others," such that students could evade adult supervision. (FAC, ¶ 73.) Plaintiff states that these areas presented an unreasonable risk of serving as the sites of assaults and batteries like what she says happened to her. (*Ibid.*)

Plaintiff has not pleaded that the District had either actual or constructive notice of the allegedly dangerous condition of its property. (Gov. Code, § 835, subd. (b).) She relies on the allegation that prior to the incidents giving rise to this litigation, her mother placed the school and the District "on notice of the egregious conduct enacted by the school's students on Plaintiff." (FAC, ¶ 12.) Her mother allegedly advised the school that Plaintiff had been being bullied since 2021 and requested special accommodations to ensure Plaintiff's safety. (*Ibid.*) But none of that concerns the dangerous condition of the dug-out area, or any part of the campus. The allegation that "Defendants, DOES 10-100, and each of them either knew, or should have known, of a dangerous condition within the meaning of [Government Code, section 840.2, subdivision (b)]" (*id.* at ¶ 73) does not sufficiently plead notice. Setting aside its conclusory nature, this allegation says nothing about *when* the District acquired that knowledge, and Plaintiff needed to plead that the District had notice of the dangerous condition "a sufficient time prior to the injury to have

taken measures to protect against the dangerous condition." (Gov. Code, section 835, subdivision (b); see also *Peter W. v. San Francisco Unified Sch. Dist.* (1976) 60 Cal.App.3d 814, 819 ["[T]o state a cause of action against a public entity, every fact material to the existence of its statutory liability must be pleaded with particularity."]; accord *Mittenhuber v. City of Redondo Beach* (1983) 142 Cal.App.3d 1, 5.)

This cause of action would be able to survive demurrer regardless had Plaintiff alleged facts indicating that "[a] negligent or wrongful act or omission of an employee of [the District] within the scope of his employment created the dangerous condition[,]" as that is an independent basis for liability under Section 835. (Gov. Code, § 835, subd. (a).) If such an allegation were present, it would be able to sustain the cause of action. (See *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 119 ["A demurrer must dispose of an entire cause of action to be sustained."].) But the Court cannot locate any such allegation.

The demurrer to this cause of action is sustained with leave to amend. The Court does not have occasion to consider whether the defect Plaintiff alleges amounts to a "dangerous condition" under the law.

Fourth Cause of Action: Negligent Infliction of Emotional Distress

Negligent infliction of emotional distress is a form of the common law tort of negligence. (*Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.* (1989) 48 Cal.3d 583, 588.) Accordingly, to survive demurrer, a plaintiff must plead the "'traditional elements' of 'duty, breach, causation, and damages[.]'" (*Ibid.* [quoting *Slaughter v. Legal Process & Courier Service* (1984) 162 Cal.App.3d 1236, 1249].) "[T]here is no duty to avoid negligently causing emotional distress to another[.] . . . [U]nless the defendant has assumed a duty to plaintiff in which the emotional condition of the plaintiff is an object, recovery is available only if the emotional distress arises out of the defendant's breach of some other legal duty and the emotional distress is proximately caused by that breach of duty." (*Potter v. Firestone Tire & Rubber Co.*, 6 Cal.4th 965, 984-85.)

Here, Plaintiff alleges that by statute and by virtue of the relationship between her and the District, the District owed Plaintiff a duty to protect her from sexual harassment, sexual discrimination, sexual assault, battery, and molestation. (FAC, ¶ 77.) She then alleges that the District breached this duty when it "failed to protect Plaintiff from the physical assault and battery, as well as the SEXUALBATTERY [sic], assault, harassment and sexual discrimination perpetrated by her [sic] DOES 1-9." (*Ibid.*) She further alleges that the District "failed to adequately safeguard, protect, supervise, monitor, regulate and control its students, such that Plaintiff was physically battered and assaulted" by four female students and "sexually abused, battered and molested" by others (*id.* at ¶ 79), and that she suffered emotional injuries as a result. (*Id.* at ¶ 80.)

The District argues that even when a defendant owes a duty to a plaintiff based on a special relationship between the two, that duty does not include the duty to protect the plaintiff from unforeseeable criminal conduct by a third party. But the FAC asserts that prior to the assault and sexual battery incidents, Plaintiff's mother explicitly notified the District that Plaintiff was facing ongoing bullying from other students and had been since 2021. (FAC, ¶ 12.) Her mother allegedly specifically mentioned that this treatment included "assault" and "battery[.]" (*Ibid.*)

This adequately pleads that the third-party conduct Plaintiff alleges was the source of her emotional injury was foreseeable.

The District further argues that this claim is uncertain because the allegations specific to this cause of action cite ad nauseum to various statutes and regulations to identify the source of the duty allegedly owed to Plaintiff. (See FAC, ¶ 77.) The claim is sloppily pleaded, but even so, the Court was able to tease out the theory of NIED liability outlined above. It does not believe the allegations are so incomprehensible that the District cannot reasonably respond to them. (*Mahan, supra*, 14 Cal.App.5th 841, fn. 3.)

The demurrer to this cause of action is overruled.

Tenth Cause of Action: Failure to Perform a Mandatory Duty

To prevail on a claim for failure to perform a mandatory duty under Government Code, section 815.6, the plaintiff must ultimately prove that (1) an enactment imposes upon the defendant public entity a mandatory, not discretionary, duty; (2) the enactment is intended to protect against the risk of an injury of the kind the plaintiff suffered; and (3) the defendant's breach of the mandatory duty was a proximate cause of the plaintiff's injury. (*State of California v. Superior Court* (1984) 150 Cal.App.3d 848, 854; Gov. Code, § 815.6.) It follows that a plaintiff must plead all of these elements for a claim under Section 815.6 to survive demurrer. (See *Peter W., supra,* 60 Cal.App.3d 814, 819.) Also, "[s]ince the duty of a governmental agency can only be created by statute or 'enactment,' the statute or 'enactment' claimed to establish the duty must at the very least be identified." (*Searcy v. Hemet Unified School Dist.* (1986) 177 Cal.App.3d 792, 802.)

Plaintiff predicates this cause of action on a wide variety of statutes and regulations purportedly imposing a mandatory duty. (See generally FAC, ¶ 114.) The Court cannot sustain the District's demurrer only to the extent this cause of action rests on particular statutes. (See *Fremont, supra*, 148 Cal.App.4th 97, 119.) In order to eliminate Plaintiff's Tenth Cause of Action by way of demurrer, the District needed to show that *none* of the statutes or regulations on which Plaintiff bases this claim is capable of supporting it. (*Ibid.*)

The District states that "none" of the statutes Plaintiff cites impose a mandatory duty (Opposition, p. 10), but does not actually discuss the content of all of the statutes on which Plaintiff bases this cause of action. For example, the District does not address Education Code, sections 201, 218, 32260-32265, 32270, 32282-32283.5, 33546, or 46600, all of which the FAC pleads as statutory sources of the mandatory duty or duties at issue for purposes of this cause of action. (FAC, ¶ 114.) The Court will not independently examine each of the statutes cited by Plaintiff and not examined by the District to see whether they impose a mandatory duty. (*Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99 ["Issues do not have a life of their own: if they are not raised or supported by argument or citation to authority, [the court] consider[s] the issues waived."].) Because the District's argument does not address the entirety of the Tenth Cause of Action, it necessarily fails.

Relatedly, the District argues that even if some of the statutes Plaintiff cites create mandatory duties, she "has not alleged sufficient facts to constitute a separate cause of action under each separate statute." (Memorandum, pp. 14-15.) To get this cause of action past the pleading stage,

Plaintiff did not need to allege facts sufficient to state a claim based on *each* of the statutes she mentioned. She only needed to allege facts sufficient to state a claim based on *one*. (See *Fremont*, *supra*, 148 Cal.App.4th 97, 119.) Plaintiff alleges that nearly all of the statutes and regulations on which she bases this cause of action, specifically including several the District has not addressed, impose "a duty on the Defendants and DOES 10-100 to prevent bullying"; that plaintiff was being bullied, and no action was taken to prevent it; and that this failure to fulfill the duty to prevent bullying was the proximate cause of the two egregious incidents of physical bullying alleged in the FAC. (FAC, ¶¶ 114-115.) This is sufficient to state a claim under Government Code, section 815.6 based on at least one of the statutes mentioned in the last sentence of Paragraph 114 of the FAC. By declining to analyze every one of those statutes in its briefing, the District has waived the argument that as a matter of law, *none* of those statutes in fact impose a duty to prevent bullying. (*Jones*, *supra*, 26 Cal.App.4th 92, 99.) The result is that the District's attack on this claim is not capable of adequately supporting a demurrer, as opposed to a motion to strike. (See *Fremont*, *supra*, 148 Cal.App.4th 97, 119.)

The District also argues that this cause of action is uncertain because "the District cannot discern what specifically Plaintiff alleges against it." (Opposition, p. 10, fn. 4.) The Court agrees that one cannot derive, from the face of complaint, a complete list of *all* of the mandatory duties Plaintiff contends the District failed to uphold and *all* of the actions or omissions on which Plaintiff bases that contention. However, this is the kind of ambiguity that can be cleared up through discovery, making a demurrer for uncertainty improper. (*Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 616 [even a complaint that is "in some respects uncertain" can survive a demurrer for uncertainty, because "ambiguities can be clarified under modern discovery procedures"].)

The demurrer to this cause of action is overruled.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

The Zoom appearance information for May, 2025 is as follows:
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Meeting ID: 161 516 2449
Passcode: 073961

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 05/02/25 TIME: 1:30 P.M. DEPT: E CASE NO: CV0003210

PRESIDING: HON. ANDREW SWEET

REPORTER: CLERK: G. STRATFORD

PLAINTIFF: ROBIN RIVERA vs. DEFENDANT: FERNANDO PAUL LOPEZ REAL ESTATE, INC., ET AL	

NATURE OF PROCEEDINGS: 1) CASE MANAGEMENT CONFERENCE
2) MOTION – RELIEVE COUNSEL

RULING

The following persons are ordered to appear in person or by Zoom:

- Daivid Stromberg
- Robin Rivera

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 05/02/25 TIME: 1:30 P.M. DEPT: E CASE NO: CV0004886

PRESIDING: HON. ANDREW SWEET

REPORTER: CLERK: G. STRATFORD

PLAINTIFF: JANE DOE vs. DEFENDANT: TYLER BLANK, ET AL	

NATURE OF PROCEEDINGS: MOTION – ANTI-SLAPP 425.16

RULING

The unopposed special motion to strike by Jane Doe ("Cross-Defendant") is GRANTED in part. (Code Civ. Proc., § 425.16.)

Currently before the Court is Cross-Defendant's special motion to strike Tyler Blank's ("Cross-Complainant") first amended cross-complaint against her pursuant to the anti-SLAPP statute. (Code Civil Proc., §425.16.)

Legal Standard

Code of Civil Procedure section 425.16 sets forth the procedure governing anti-SLAPP motions. In pertinent part, the statute states, "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (Code Civ. Proc., § 425.16(b)(1).) The purpose of the statute is to identify and dispose of lawsuits brought to chill the valid exercise of a litigant's constitutional right of petition or free speech. (Code Civ. Proc., § 425.16(a); *Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049, 1055-1056.)

Courts employ a two-step process to evaluate anti-SLAPP motions. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 61.) To invoke the protections of the statute, the moving party must first show that the challenged lawsuit arises from protected activity, such as an act in furtherance of the right of petition or free speech. (*Ibid.*)

Code Civ. Proc.§ 425.16(e) states that,

> "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

If the moving party shows that challenged lawsuit arises from protected activity courts " 'presume the purpose of the action was to chill the defendant's exercise of First Amendment rights. It is then up to the opposing party to rebut the presumption by showing a reasonable probability of success on the merits.' " (*Ibid.*) In determining whether the opposing party has carried this burden, the trial court considers "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (Code Civ. Proc., § 425.16(b)(2); see *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291.)

Discussion

Cross-Defendant suggests that the entire first amended cross-complaint arises from her protected activity, which is the filing of her complaint in this case. The first amended cross complaint alleges seven causes of action: 1) Domestic Violence; 2) Assault and Battery, 3) Intentional Infliction of Emotional distress, 4) Defamation, 5) Interference with Prospective Economic Advantage, 6) Witness Tampering, and 7) Abuse of Process. The Abuse of Process cause of action arises from a judicial proceeding which is protected activity, which is the filing of the complaint. (First Amended Cross-Complaint, ¶¶ 51-52; *JSJ Ltd. Partnership v. Mehrban* (2012) 205 Cal.App.4th 1512, 1521–22.) The remaining causes of action do not arise from protected activity in that they do not arise from the filing of the complaint. They are all based on allegations that are completely independent from the allegations in the complaint. Cross-Defendant makes no cogent argument nor does she present any authority to support a finding that the remaining causes of action arise from protected activity.

Because Cross-Defendant has made a prima facie showing that the Abuse of Process cause of action "arises from" protected activity, the burden shifts to Cross-Complainant for the second prong, requiring him to establish a "probability" that he will prevail on this claim. (Code Civ. Proc., §425.16, subd. (b).) "To establish a probability, the Cross-Complainant 'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.' [Citations.]" (*Soukup, supra,* 39 Cal.4th 260, 291.) Since he failed to file an opposition, Cross-Complainant has not met this burden.

The Abuse of Process cause of action is factually and legally separate from the other causes of action and can be stricken without striking of the remaining causes of action. (*Computerxpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1004-1005.)

Consequently, the special motion to strike is granted as to the Abuse of Process cause of action only.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 05/02/25 TIME: 1:30 P.M. DEPT: E CASE NO: CV0005078

PRESIDING: HON. ANDREW SWEET

REPORTER: CLERK: G. STRATFORD

PLAINTIFF: ROBERT LAPIC vs. DEFENDANT: FANI DANADJIEVA HANSEN, ET AL	

NATURE OF PROCEEDINGS: MOTION – SET ASIDE/VACATE DEFAULT

RULING

The motion to set aside default filed by Defendant Menage, LLC ("Menage") is ordered off the court's calendar. The motion was filed by Fani Danadijieva Hansen, who is not an attorney, on behalf of Menage. "A corporation cannot represent itself in court, either in propria persona or through an officer or agent who is not an attorney," because "a corporation is a distinct legal entity from its stockholders and from its officers." (*Merco Construction Engineers, Inc. v. Municipal Court* (1978), 21 Cal.3d 724, 729.) The same rationale applies to a limited liability company, which is a legal entity separate and apart from its members. (See *PacLink Communications Intern., Inc. v. Superior Court* (2001) 90 Cal.App.4th 958, 963.)

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

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