

Tentative Rulings for April 30, 2024
Department 502

For any matter where an oral argument is requested and any party to the hearing desires a remote appearance, such request must be timely submitted to and approved by the hearing judge. In this department, the remote appearance will be conducted through Zoom. If approved, please provide the department's clerk a correct email address. (CRC 3.672, Fresno Sup.C. Local Rule 1.1.19)

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).) *The above rule also applies to cases listed in this "must appear" section.*

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

23CECG00216 *Paul McKenney v. Mark Johnson* is continued to Tuesday, June 4, 2024, at 3:30 p.m. in Department 502

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Tentative Ruling

Re: **Guillermo Rivas v. United Health Centers of San Joaquin Valley**
Superior Court Case No. 22CECG01766

Hearing Date: April 30, 2024 (Dept. 502)

Motion: By Defendant to Compel Responses to Form Interrogatories, Special Interrogatories, and Request for Production of Documents, and For Evidence, Terminating and Monetary Sanctions

Tentative Ruling:

To grant the motions and impose terminating sanctions against plaintiff Guillermo Rivas pursuant to Code of Civil Procedure section 2023.010, subdivisions (d) and (g), for failure to respond or to submit to an authorized method of discovery and disobeying court orders to provide discovery. The action will be dismissed as to defendant United Health Centers of San Joaquin Valley. (Code Civ. Proc. § 2023.030, subd. (d)(3).)

Explanation:

On 5/5/23 defendant propounded on plaintiff Form Interrogatories, Special Interrogatories and Request for Production of Documents. Plaintiff served responses that were disorganized, incomplete, unintelligible and unverified. On 10/25/23 defendant filed a Request for Pretrial Discovery Conference. Plaintiff did not respond, resulting in the court ordering plaintiff "to provide verified responses to all disputed discovery without objection within 20 days of the date of this order." (See 11/7/23 Order.) After plaintiff did not provide verifications or further/initial responses (most items were not responded to initially; there were some responses but it was difficult to ascertain what plaintiff was responding to) as ordered by the court, defendant filed another motion to compel responses, or alternatively for terminating sanctions.

On 3/5/24 the court continued the motion to 4/30/24 "to afford plaintiff **one final opportunity** to comply with the court's order dated 11/7/2023." Plaintiff still has not provided the discovery responses.

Once a motion to compel discovery is granted, continued failure to comply may support a request for more severe sanctions. Code of Civil Procedure section 2023.010, subdivision (g), makes "[d]isobeying a court order to provide discovery" a "misuse of the discovery process." For failure to obey the court's discovery orders, the court may:

"[M]ake those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Chapter 7 (commencing with Section 2023.010). In lieu of or in addition to that sanction, the court may impose a monetary sanction under Chapter 7 (commencing with Section 2023.010)...."

(Code Civ. Proc., § 2025.450, subd. (d).)

"A decision to order terminating sanctions should not be made lightly. But where a violation is willful, preceded by a history of abuse, and the evidence shows that less severe sanctions would not produce compliance with the discovery rules, the trial court is justified in imposing the ultimate sanction. [Citation.]" (*Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 262, 279-280.)

In light of plaintiff's failure to comply with the court order on this discovery dispute, and having given the court multiple chances to provide discovery, the court intends to take the next step and grant terminating sanctions. There appears to be little likelihood that any compliance with the discovery rules or the court's orders will be forthcoming. (See *Lang v. Hochman* (2000) 77 Cal.App.4th 1225, 1244.)

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: **KCK** **on** **04/26/24** .
 (Judge's initials) (Date)

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Tentative Ruling

Re: **Zahi Saleh v. General Motors, LLC**
Superior Court Case No. 23CECG01505

Hearing Date: April 30, 2024 (Dept. 502)

Motion: By Defendant General Motors, LLC on Demurrer and Motion to Strike Punitive Damages from the First Amended Complaint

Tentative Ruling:

To sustain the demurrer as to the fifth cause of action for fraudulent inducement, with leave to amend. (Code Civ. Proc. § 430.10, subd. (e).) To grant the motion to strike the prayer for punitive damages, with leave to amend. Plaintiff Zahi Saleh shall serve and file an amended complaint within 10 days of the date of service of this order. All new allegations shall be in **boldface**.

Explanation:

Demurrer

Defendant General Motors, LLC ("Defendant") demurs to the fifth cause of action, for fraudulent concealment of the First Amended Complaint ("FAC") by plaintiff Zahi Saleh ("Plaintiff").

On a demurrer a court's function is limited to testing the legal sufficiency of the complaint. A demurrer is simply not the appropriate procedure for determining the truth of disputed facts. (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 113-114.) In determining a demurrer, the court assumes the truth of the facts alleged in the complaint and the reasonable inferences that may be drawn from those facts. (*Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 883.) The court must determine if the factual allegations of the complaint are adequate to state a cause of action under any legal theory. (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 103.)

Contentions, deductions, and conclusions of law, however, are not presumed as true. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) A plaintiff is not required to plead evidentiary facts supporting the allegation of ultimate facts; the pleading is adequate if it apprises the defendant of the factual basis for the plaintiff's claim. (*Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6.)

The elements which give rise to a tort action for fraud are: (1) a misrepresentation (concealment); (2) knowledge of the falsity; (3) intent to defraud or induce reliance; (4) justifiable reliance; and (5) resulting damages. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974.) Fraud must be pled specifically; general and conclusory allegations do not suffice. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645.) The policy

of liberal construction of pleadings will not ordinarily be invoked to sustain a pleading defective in any material respect for allegations of fraud. (*Ibid.*)

Here, the FAC relies on general and conclusory allegations that Defendant and its agents concealed material information to induce Plaintiff to purchase the vehicle in question. (E.g., FAC, ¶¶ 74-75.) Defendant is alleged to be a corporation. (FAC, ¶ 4.) A corporation can speak and act only through its officers and agents. (*Mason v. Drug, Inc.* (1939) 31 Cal.App.2d 697, 703.) It is material to state the names of the agents and officers, what they said and did, material to the cause of action which the pleader is attempting to set forth, when the event happened, and such facts and circumstances as the pleader relied upon as proof of the fraud or deceit. (*Ibid.*) Nothing in the FAC identifies how, when, or through whom Defendant intentionally concealed the material information that the FAC alleges Defendant knew about. At best, the FAC contends that Plaintiff “interacted with sales representatives, considered Defendant GM’s advertisement, and/or other marketing materials concerning GM vehicles prior to purchasing the [subject vehicle].” (FAC, ¶ 62.) These allegations lack the specificity required to support a claim for a fraud cause of action.

Plaintiff opposes, and cites to *Alfaro v. Community Housing Improvement System and Planning Association, Inc.* ((2009) 171 Cal.App.4th 1356 [“*Alfaro*”]). *Alfaro* noted that a claim of fraud based on nondisclosure may arise when there is a confidential relationship, when the defendant has made a representation most likely to mislead absent a disclosure, when there is active concealment of the undisclosed matter, or when one party has sole knowledge or access to material facts and knows that such facts are not known to or reasonably discoverable by the other party and has a duty to disclose. (*Id.* at p. 1382.) None of the circumstances described in *Alfaro* are clearly stated in the FAC. At most, the FAC relies on an active concealment of an undisclosed matter. However, there are no allegations to state at what point Defendant was active in its alleged concealment from Plaintiff that induced Plaintiff to purchase the vehicle.¹ Moreover, the FAC identifies that Plaintiff worked with an authorized sales representative at Michael Chevrolet Cadillac, who appears to be a non-party. (FAC, ¶ 9.) The court cannot conclude under the circumstances that Defendant is equally positioned to know the specific facts necessary to support the fraud cause of action.

For the reasons above, the demurrer to the fifth cause of action for fraudulent inducement is sustained, with leave to amend.

¹ Plaintiffs further rely on *Dhital v. Nissan North America, Inc.* ((2022) 84 Cal.App.5th 828, 843-844.) However, the California Supreme Court has granted review. (*Dhital v. Nissan North America*, review granted February 1, 2023, S277568.) That review remains pending to date. Accordingly, while the matter is pending review, the opinion has no binding or precedential effect, and may be cited for persuasive value only. (Cal. Rules of Court, rule 8.1115(e)(1).) Upon review of the First District Court of Appeal’s opinion, because no reasoning was provided to support the bare conclusion that, on alleged facts similar to the pleading at issue, a fraud claim is adequately pled (see *Dhital v. Nissan North America, Inc.*, *supra*, 84 Cal.App.5th at p. 844), the court is unpersuaded by the opinion.

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Tentative Ruling

Re: **D.L. v. County of Fresno**
Superior Court Case No. 22CECG01756

Hearing Date: April 30, 2024 (Dept. 502)

Motions: (1) County of Tulare's Motion for Change of Venue;
(2) County of Tulare's Demurrer and Motion to Strike Portions of the Second Amended Complaint; and
(3) County of Kings' and County of Tulare's Joint Demurrer to the Second Amended Complaint

Tentative Ruling:

To continue the hearings to Tuesday, May 7, 2024, at 3:30 p.m., in Department 502, to allow the County of Tulare to file a proof of service indicating that the necessary parties have been properly served with notice of the motion for change of venue. In the event the parties have not been properly served, the court will allow for a further continuance to allow time for such service *if* the County of Tulare files a declaration expressing the necessity of a further continuance. County of Tulare must file either a proof of service or a declaration requesting for a further continuance no later than on Wednesday, May 1, 2024, at 5:00 p.m.

Explanation:

“[A]ll moving and supporting papers shall be served and filed at least 16 court days before the hearing.” (Code Civ. Proc., § 1005, subd. (b).) A proof of service establishing compliance with Code of Civil Procedure section 1005 must be filed at least five court days prior to the hearing. (Cal. Rules of Court, rule 3.1300(c).) Here, a proof of service was not filed in support of the County of Tulare's motion for change of venue. Without a proof of service, the court can only assume that the necessary parties were not served with notice of the motion. However, rather than deny the motion for faulty service, it appears appropriate to continue the matter to allow for additional notice.

A motion for transfer operates as a stay of any other motion or proceeding then pending or thereafter filed. (*Pickwick Stages System v. Superior Court* (1934) 138 Cal.App.448, 449.) Accordingly, the pending demurrers and motion to strike are also continued.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: KCK on 04/29/24 .
 (Judge's initials) (Date)