Tentative Rulings for November 30, 2023
Department 403

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.

23CECG00604 ***In Re: 3611 E. IOWA Ave., Fresno, CA 93702-2134***

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

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 403

Begin at the next page

(20) **Tentative Ruling**

Re: ***Romero v. BNSF Railway Co., et al.***
Superior Court Case No. 21CECG00013

Hearing Date: November 30, 2023 (Dept. 403)

Motion: Monsanto Co.'s Motion for Summary Judgment and/or Adjudication

Tentative Ruling:

To deny summary judgment. To grant summary adjudication of the sixth, seventh and eighth causes of action. (Code Civ. Proc., § 437c, subd. (c), (f).)

Explanation:

This is a product liability action arising from plaintiff Tony Romero's exposure to RoundUp, and subsequent illness of non-Hodgkin's lymphoma ("NHL"), while employed by BNSF Railway Company.

As applicable here, plaintiff seeks to hold Monsanto Co. responsible for his NHL, asserting eight claims against it: (1) strict liability – failure to warn; (2) strict liability – design and manufacturing defect; (3) breach of express warranty; (4) breach of implied warranty; (5) negligence; (6) negligent misrepresentation; (7) fraud (intentional misrepresentation); and (8) fraud by concealment (CA Civil Code §§ 1709, 1710). Plaintiff also seeks punitive damages. Plaintiff contends that Roundup, produced by Monsanto, caused his non-Hodgkin's lymphoma ("NHL") and that Monsanto should have included cancer warnings on those products.

Initially the court notes its rulings on Monsanto's objections to plaintiff's evidence. Objection nos. 5-10 are sustained, and nos. 1-4 are overruled.

Statute of Limitations

The primary issue raised in this motion is whether plaintiff's action against Monsanto is barred by the statute of limitations. Code of Civil Procedure section 340.8, subdivision (a), sets a limitations period of two years:

> In any civil action for injury or illness based upon exposure to a hazardous material or toxic substance, the time for commencement of the action shall be no later than either two years from the date of injury, or two years after the plaintiff becomes aware of, or reasonably should have become aware of, (1) an injury, (2) the physical cause of the injury, and (3) sufficient facts to put a reasonable person on inquiry notice that the injury was caused or contributed to by the wrongful act of another, whichever occurs later.

Because the gravamen of each cause of action, including those sounding in fraud, was injury resulting from exposure to toxic chemicals, the two-year limitations period applies. (See *Rivas v. Safety-Kleen Corp.* (2002) 98 Cal.App.4th 218, 229.)

Here, plaintiff was employed by BNSF from 1969 to 2004, and claims exposure to Roundup while working for BNSF. (UMF 1, 2.) Plaintiff also sprayed Roundup on a few occasions at home (though as discussed below that is irrelevant to plaintiff's claims in this action). (UMF 5, 6.) Plaintiff was first diagnosed with large cell follicular lymphoma on October 8, 2007, and was later diagnosed with mantle cell lymphoma in March 2019. (UMF 8.) The Complaint was filed on January 3, 2021. Accordingly, given the 2007 diagnosis, plaintiff was required to bring his cause of action no later than October 8, 2009, unless the delayed discovery rule applies.

Clearly plaintiff became aware of his physical injury in October 2007 when he was diagnosed with non-Hodgkin's lymphoma ("NHL"). The question is whether he was "aware of, or reasonably should have become aware of, . . . sufficient facts to put a reasonable person on inquiry notice that the injury was caused or contributed to by the wrongful act of another" at any point prior to January 4, 2019 (two years before he filed suit).

"The discovery rule protects those who are ignorant of their cause of action through no fault of their own. It permits delayed accrual until a plaintiff knew or should have known of the wrongful conduct at issue." (*April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 832.)

> "A plaintiff has reason to discover a cause of action when he or she 'has reason at least to suspect a factual basis for its elements.' (*Norgart, supra,* 21 Cal.4th at p. 398, 87 Cal.Rptr.2d 453, 981 P.2d 79, citing *Jolly [v. Eli Lilly Co.* (1988), 44 Cal.3d 1103,] 1110, 245 Cal.Rptr. 658, 751 P.2d 923; see also *Gutierrez v. Mofid* [(1985) 39 Cal.3d 892,] 897, 218 Cal.Rptr. 313, 705 P.2d 886 ['the uniform California rule is that a limitations period dependent on discovery of the cause of action begins to run no later than the time the plaintiff learns, or should have learned, the *facts* essential to his claim'].) Under the discovery rule, suspicion of one or more of the elements of a cause of action, coupled with knowledge of any remaining elements, will generally trigger the statute of limitations period. (*Norgart, supra,* 21 Cal.4th at p. 398, fn. 3, 87 Cal.Rptr.2d 453, 981 P.2d 79; *Jolly, supra,* 44 Cal.3d at p. 1112, 245 Cal.Rptr. 658, 751 P.2d 923.)"

(*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 807.)

A plaintiff "discovers" a cause of action when he or she "has reason at least to suspect a factual basis for its elements." (*Doe v. Roman Catholic Bishop of Sacramento* (2010) 189 Cal.App.4th 1423, 1430.)

"So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her." (*Jolly, supra,* 44 Cal. 3d at p. 1111; *see also Fox, supra,* 35 Cal.4th at p. 807 ["Under the discovery rule, suspicion of one or more of the elements of a cause of action, coupled with knowledge of any remaining elements, will generally trigger the statute of limitations period."]; *Knowles v. Sup.Ct.* (2004) 118

Cal.App.4th 1290, 1300 ["The limitations period begins when the plaintiff's suspicions are aroused."].)

The undisputed evidence shows that plaintiff was apprised that Roundup may have caused his condition at a union meeting of railroad workers. (UMF 9.) The question is when that union meeting occurred.

Monsanto relies on deposition testimony from plaintiff that indicates that the meeting occurred "within a couple of years of" his 2004 retirement from the railroad. Plaintiff also mentioned that he "waited more than ten years" to file suit. (UMF 9.)

However, the evidence cited in the moving papers does not clearly indicate that the meeting happened shortly after the 2007 diagnosis, or in that general timeframe. The court cannot grant summary judgment based solely on the use of the word "couple," in light of the context of the testimony and lack of clarity with which plaintiff spoke about dates and timing.

Plaintiff also testified that he did not remember when the meeting happened. (T. Romero Depo., 199:15-17.) Monsanto contends that this is sham testimony, citing *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 22, for the proposition that subsequent, self-serving testimony contradicting admissions does not create a trialbe issue of fact sufficient to defeat summary judgment. *D'Amico* cited *King v. Andersen* (1966) 242 Cal.App.2d 606:

> the rule providing for liberal construction of counteraffidavits was held not to require reversal of a summary judgment for defendants where the plaintiff in an assault case, although having stated in his counteraffidavit that unnecessary force was used, nevertheless had stated in a previous deposition that no force was used; refusing to find that a triable issue was thus presented, the court said: "Where, as here, however, there is a clear and unequivocal admission by the plaintiff, himself, in his deposition ... we are forced to conclude there is no *substantial* evidence of the existence of a triable issue of fact." (242 Cal.App.2d at p. 610.)

(*D'Amico, supra,* 11 Cal.3d at p. 21.)

Here, plaintiff's deposition testimony about when the meeting occurred is far from a clear and unequivocal admission. He clarified in the same deposition minutes later that he did not remember when the meeting happened, and that it was possible that the meeting happened after the second time he was diagnosed with cancer. (T. Romero Depo., 199:15-20.) He said his wife Betty Romero ("Betty") would know the date better (200:13-15), and that he may have learned about Roundup and cancer close to the time he hired a lawyer (207:23-208:1), which appears to be close to the time he filed suit.

This is not a situation in which plaintiff made clear admissions in deposition, and then contradicted himself in a declaration filed in opposition to the summary judgment motion. All of the above testimony was given in the same deposition, and the admissions relied upon by Monsanto are not at all clear about the timing of the meeting.

While Betty testified in her deposition that the meeting took place in the spring of 2019, her testimony on that issue is inadmissible, as she fails to show personal knowledge of the fact. But she did testify that plaintiff has suffered two strokes, and that since then his memory is poor and he confuses dates. (B. Romero Depo.. 82-83.) This would explain his apparent inability to testify clearly about when the meeting occurred. The court concludes that Monsanto does not meet its burden on this issue, or at the least there is a triable issue of fact.

Arguing that the delayed discovery rule does not apply, Monsanto also points to commercials sponsored by law firms that plaintiff saw, making a connection between Roundup use and Lymphoma. (See T. Romero Depo., 150:1-24, 151:7-22, 207:10-13.) However, he could not testify to when he saw these commercials. (Q. … Was it before 2010 you think? … THE WITNESS: I don't know.") There is no clear evidence in the record when any commercials could have plaintiff on notice.

Monsanto points to testimony that plaintiff did research on the internet about Roundup. But he did not testify when that occurred, or what information he gleaned from it. (See T. Romero Depo., 153:4-20, 193:7-14.) This testimony does nothing to move the needle one direction or the other as far as this analysis goes.

Monsanto then goes on to reference published research classifying glyphosate as a carcinogen, beginning in 2015, contending that he is charged with information he would have discovered had he diligently investigated the connection between Roundup and NHL.

Monsanto merely argues,

> … by 2015 when the International Agency for Research on Cancer ("IARC") announced its determination that glyphosate is a probable carcinogen and published its monograph online, there was widespread public coverage of the alleged link between Roundup and NHL. SUMF 13-15. Thus, he is charged with the knowledge available at that time, and he clearly should have discovered his claim before January 4, 2019 (two years before filing suit).

(Monsanto MPA 15:1-9.)

However, Monsanto points to no evidence about when plaintiff first began to suspect a connection between his lymphoma and his exposure, other than that discussed above. "The statute of limitations does not begin to run when some members of the public have a suspicion of wrongdoing, but only 'once the plaintiff *has* a suspicion of wrongdoing.'" (*Nelson v. Indevus Pharms., Inc.* (2006) 142 Cal.App.4th 1202, 1206, internal citations omitted, emphasis original.) "Indevus's argument amounts to a contention that, having taken a prescription drug, Nelson had an obligation to read newspapers and watch television news and otherwise seek out news of dangerous side effects not disclosed by the prescribing doctor, or indeed by the drug manufacturer, and that if she failed in this obligation, she could lose her right to sue. We see no such obligation." (*Id.* at p. 1208.) Monsanto fails to establish that plaintiff is held to the referenced generally available knowledge or information.

Accordingly, the court cannot grant the motion on statute of limitations grounds.

State Law Preemption

Monsanto contends that all of plaintiff's claims are barred because they are entirely displaced by California's statutory and regulatory regime governing pesticides.

Monsanto points out, the California Supreme Court has long recognized that a statutory and regulatory regime for a specific subject matter can "supplant the common law" where "it appears that the Legislature intended to cover the entire subject or, in other words, to occupy the field." (*I.E. Associates v. Safeco Title Ins. Co*. (1985) 39 Cal.3d 281, 285.) In addition, a state statute can "clearly and unequivocally disclose[] an intention to depart from, alter, or abrogate the common-law rule concerning [a] particular subject matter." (*Cal. Ass'n of Health Facilities v. Dep't of Health Servs*. (1997) 16 Cal. 4th 284, 297.)

Monsanto includes a lengthy discussion of the regulations under the Food and Agricultural Code, which states that it intends to "occupy the whole field of regulation regarding the registration, sale, transportation, or use of pesticides to the exclusion of all local regulation." (Food & Ag. Code, § 11501.1, subd. (a).) Monsanto cites to *Jacobs Farm/Del Cabo, Inc. v. Western Farm Serv., Inc.* (2010) 190 Cal.App.4th 1502:

> Regulating [pesticide use and registration] at the state level gives growers and others in the agricultural industry some measure of predictability when choosing to use, or not to use, pesticides. The scientific expertise and judgment involved in regulating the use of these economically important, highly toxic materials cannot be overestimated. Limiting regulation to the state level ensures that standards will be uniform statewide. Local decisions regulating pesticide use, varying from county to county, can be justified only if applied within the context of the overall regulatory scheme. **When private litigation threatens to interfere with the Legislature's clearly expressed policies, it is precluded**. If it were not, the potential for conflict between the Legislature's balance of the various competing interests and those asserted by individuals in a private dispute would generate an intolerable amount of uncertainty for the litigants and for the agricultural industry as a whole.

(*Jacobs Farm*, 190 Cal. App. 4th at 1522 (emphasis added and citations omitted).)

However, no provision of the Food and Agricultural Code expressly precludes tort claims. This is not a step the court can take without clear and express statutory expression of such legislative intent, or an appeals court so finding.

Federal Preemption

To preserve its appeal rights, Monsanto contends that plaintiff's claims are preempted under federal law. This contention was rejected by *Pilliod v. Monsanto Company* (2021) 67 Cal.App.5th 591, which Monsanto recognizes is binding on this court. Obviously the court will not grant the motion on this ground.

Fraud Claims

Monsanto contends that there is no evidence that Monsanto and plaintiff had the type of relationship necessary to support any fraud or misrepresentation claims. Plaintiff did not purchase the Roundup that allegedly caused his injury, but rather his employer allegedly purchased it. He testified that he didn't purchase the Roundup that he used at home. Additionally, plaintiff cannot show reliance on any representation by Monsanto, and in fact does not even plead it.

In response, plaintiff contends and points to deposition testimony that he purchased and used Roundup on two-to-three occasions when he resided at a property on West Clinton and Cornelia. (See Oppo. pp. 18-19.) But the opposition does not address Monsanto's reliance on *Bingler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, which set forth the standard for when a claim of fraud based on concealment may proceed in a products liability action.

> This court examined the circumstances giving rise to a duty to disclose in *LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 60 Cal.Rptr.2d 539 (*LiMandri*). In that case, we explained, "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.' " (*Id.* at p. 336, 60 Cal.Rptr.2d 539.) Where, as here, 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." (*Id.* at pp. 336–337, 60 Cal.Rptr.2d 539.) "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." ' " (*Shin v. Kong* (2000) 80 Cal.App.4th 498, 509, 95 Cal.Rptr.2d 304.)
>
> Our Supreme Court has described the necessary relationship giving rise to a duty to disclose as a "transaction" between the plaintiff and defendant: "In *transactions* which do not involve fiduciary or confidential relations, a cause of action for non-disclosure of material facts may arise in at least three instances: (1) the defendant makes representations but does not disclose facts which materially qualify the facts disclosed, or which render his disclosure likely to mislead; (2) the facts are known or accessible only to defendant, and defendant knows they are not known to or reasonably discoverable by the plaintiff; (3) the defendant actively conceals discovery from the plaintiff." (*Warner Construction Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 294, 85 Cal.Rptr. 444, 466 P.2d 996, italics added, fns. omitted.) Other cases have described the requisite relationship with the same term. (See, e.g., *Hoffman v. 162 North Wolfe LLC* (2014) 228 Cal.App.4th 1178, 1187, 175 Cal.Rptr.3d 820 (*Hoffman*); *LiMandri, supra*, 52 Cal.App.4th at p.

> 337, 60 Cal.Rptr.2d 539 ["As a matter of common sense, such a relationship can only come into being as a result of some sort of *transaction* between the parties."].) **Such a transaction must necessarily arise from direct dealings between the plaintiff and the defendant; it cannot arise between the defendant and the public at large**.

(*Bigler-Engler*, 7 Cal.App.5th at p. 311-312, emphasis added.)

While no evidence of a transaction between plaintiff and defendant is required for strict product liability (in which case there is a duty to warn of a product's hazards and faults), this does not extend to a cause of action for fraud under a theory of concealment. (*Id.* at p. 312.)

As directed at plaintiff's fraud-based claims, the motion is premised on the fact that "Plaintiff **did not purchase or use** the Roundup that forms the basis of his claim." (Monsanto MPA 19:23-24.) That is true as to the Roundup used by BNSF, but plaintiff contends that for personal use, he did personally purchase the Roundup products (T. Romero Depo., 111:12-15) and read their labels (*ibid.,* 107:3-4, 188:6-10.)

While there might be triable issues of fact regarding whether plaintiff purchase or used Roundup at home, that evidence is beyond the scope of the claims he asserts in this action. In responses to interrogatories asking about his personal use or application of Roundup, and what labels he read, plaintiff repeatedly responded that such information is inapplicable, immaterial, irrelevant, and not intended to lead to the discovery of admissible evidence. In his discovery responses plaintiff explicitly limited his claims in this action against Monsanto to his exposure to Roundup in the course and scope of his employment with BNSF Railway Company. When asked about his purchases of Roundup, plaintiff refused to provide the requested information, instead responding, "Plaintiff did not purchase the Roundup and/or the sprayer. Plaintiff directs Monsanto Company to Defendant, BNSF Railway." When asked about the Roundup labels that plaintiff read, and other questions about his personal use of Roundup, plaintiff refused to provide responsive information, instead responding, "Not applicable. Plaintiff was exposed to Roundup through the course and scope of his employment with BNSF Railway and did not personally use, mix, or spray Roundup." (Cools Decl., Exh. B.) In light of the fact that in responding to discovery plaintiff expressly disclaimed making any claim based on his personal, private use of Roundup, plaintiff cannot now raise a triable issue of fact by pointing to snippets of deposition testimony referencing personal, private use of Roundup on a few occasions.

With regards to workplace exposure to Roundup, it is undisputed that plaintiff was not a purchaser, did not apply the product, and did not read any labels. Based on *Bigler-Engler*, Monsanto owed no duty to disclose to plaintiff, a member of the general public. The court therefore intends to grant summary adjudication of the sixth, seventh and eighth causes of action.

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: JS on 11/17/2023 .
(Judge's initials) (Date)

(34)

Tentative Ruling

Re:	***Yaralian v. General Motors, LLC*** Superior Court Case No. 22CECG04130
Hearing Date:	November 30, 2023 (Dept. 403)
Motion:	Defendant General Motors, LLC's Demurrer and Motion to Strike the First Amended Complaint

Tentative Ruling:

To sustain the demurrer as to the fifth cause of action for fraudulent inducement-concealment, 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 Varak Yaralian shall serve and file an amended complaint within ten (10) days of the date of service of this order. All new allegations shall be in **boldface**.

Explanation:

Demurrer

Defendant GM demurs to the fifth cause of action for "Fraudulent Inducement-Concealment" on the basis that it is barred by the three-year statute of limitations. (Code Civ. Proc. § 430.10, subd. (e).) Plaintiff purchased a 2017 GMC Sierra 1500 truck on April 19, 2017 and this action was not filed until December 23, 2022. Defendant contends the first amended complaint ("FAC") fails to allege facts justifying the late filing. Defendant contends the attempt to invoke the delayed discovery rule is insufficiently plead, as plaintiff has failed to plead "facts showing he was not negligent in failing to make the discovery sooner and that [Plaintiff] had no actual or presumptive knowledge of facts sufficient to put [Plaintiff] on inquiry." (*Hobart v. Hobart Estate Co*. (1945) 26 Cal.2d 412, 437; *Johnson v. Ehrgott* (1934) 1 Cal.2d 136, 137.) Based on the allegations that defects and nonconformities manifested themselves during the express warranty period, defendant asserts plaintiff cannot demonstrate that he could not with reasonable diligence have discovered the action giving rise to his claim within the limitations period. (FAC ¶¶ 13, 26-30.) By defendant's interpretation, the allegation that the vehicle was delivered to plaintiff with defects means he should reasonably have been able to discover the defects as of the date of purchase. This argument is not supported when the complaint is interpreted in a reasonable manner and the allegations read in context.

Plaintiff alleges that he first presented the vehicle to an authorized dealership with complaints regarding the transmission, brakes, electrical and infotainment issues on April 12, 2018 and continued to present the vehicle for repairs related to the transmission and other concerns and was advised the vehicle had been repaired. (FAC ¶¶ 26-33.) Plaintiff alleges it was not until shortly before the filing of the complaint that he became suspicious of the concealment of latent defects and defendant's inability to repair the vehicle. (FAC, ¶ 33.) Additionally, plaintiff alleges defendant having issued service bulletins and recalls purporting to fix the symptoms of the defect made discovery of the defect more

difficult. (FAC ¶ 32.) Taking these allegations as true on demurrer, the plaintiff has sufficiently pled facts supporting application of the delayed discovery rule. As a result, the court intends to overrule the demurrer on the basis that the cause of action is barred by the statute of limitations.

Defendant GM additionally demurs on the basis that the fifth cause of action fails to state facts sufficient to constitute a cause of action for fraud because plaintiff has failed to plead specific facts identifying the individuals who concealed material facts or made the misrepresentations, their authority to speak, GM's knowledge of the alleged defects in plaintiff's vehicle at the time of purchase, interactions between plaintiff and GM, and GM's intent to induce reliance by plaintiff to purchase the vehicle at issue. Likewise, defendant contends that it cannot be held liable for fraudulent concealment because it had no duty to disclose any facts about the vehicle to plaintiff, as it did not sell the vehicle directly to him and it had no "transactional relationship" with him. (*Bigler-Engler v. Breg, Inc*. (2017) 7 Cal.App.5th 276, 311.)

However, to the extent that defendant argues that plaintiff has not alleged specific facts about who made the representations about the vehicle to plaintiff, when they were made, etc., defendant is attempting to impose the standard for pleading a fraudulent misrepresentation claim rather than the standard for pleading a fraudulent concealment cause of action. Here, plaintiff has alleged a claim for fraudulent concealment, not fraudulent misrepresentation. Fraudulent concealment claims do not require an affirmative misrepresentation, so it is not necessary for plaintiff to allege specific facts about misrepresentations made by defendant or its agents or employees.

"'Not every fraud arises from an affirmative misstatement of material fact. "The principle is fundamental that '[deceit] may be negative as well as affirmative; it may consist of suppression of that which it is one's duty to declare as well as of the declaration of that which is false.' Thus section 1709 of the Civil Code provides: 'One who wilfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers.' Section 1710 of the Civil Code in relevant part provides: 'A deceit, within the meaning of the last section, is either: ... 3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact....'"'" (*Jones v. ConocoPhillips Co.* (2011) 198 Cal.App.4th 1187, 1198, citations omitted.) As a result, the fact that plaintiff has not alleged any specific misrepresentations by defendant or its agents does not render the fraud cause of action defective.

"'[T]he elements of a cause of action for fraud 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.' "'" (*Ibid*, citation omitted.)

Here, plaintiff has alleged that defendant concealed or suppressed material facts from him, namely that the vehicle he purchased had a defective 8-speed transmission

that was likely to have problems with hard or harsh shifts, jerking, lurching, and hesitation on acceleration, surging and/or inability to control the vehicle's speed, acceleration or deceleration. (FAC, ¶¶ 62-64.) The defects defendant failed to disclose are material, in that a reasonable person would have considered the performance of the transmission as important in deciding whether or not to purchase the vehicle. (*Id*. at ¶ 74.) Prior to the purchase plaintiff saw GM's television advertisements and received flyers in the mail for the GMC Sierra, neither of which disclosed the transmission defect. (*Id*. at ¶ 8.) Prior to purchase plaintiff also spoke with sales representatives at defendant's authorized dealer, Sequoia Chevrolet Buick GMC, where the sales representatives told him about the key features and components of the vehicle but did not mention the transmission defect. (*Id*. at ¶ 9.) Had GM and its dealership revealed the transmission defect in these disclosures, plaintiff would have been aware of it and not purchased the vehicle. (*Id*. at ¶¶ 8-9, 65, 69.) Defendant intentionally concealed the design defect from plaintiff. (*Id*. at ¶ 62-71.) Plaintiff was ignorant of the facts, and was damaged as a result of the defendant's concealment of the defective transmission, as he unknowingly exposed himself to the risk of liability, accident and injury due to the transmission defect. (*Id*. at ¶ 76.)

The 8-speed transmission also presented a safety risk to plaintiff and other consumers, as the defective transmission may cause the vehicle to suddenly and unexpectedly cause the driver to be unable to control the speed and acceleration or deceleration of the vehicle exposing plaintiff and passengers and those sharing the road to a serious risk of accident or injury. (*Id*. ¶ 63.) Also, GM was the only party with knowledge of the transmission defect, based on internal reports, testing data, customer complaints, and technical service bulletins. (*Id*. at ¶¶ 64, 72a-72b.) None of this information was available to the public, nor did defendant disclose the information to plaintiff. (*Ibid*.)

Plaintiff has adequately alleged that defendant intentionally concealed or failed to disclose material facts to him regarding the defective transmission that were in defendant's exclusive possession, and that its concealment induced plaintiff to purchase the vehicle, causing him to suffer damages. However, before these allegations are of consequence, there must be a duty for defendant to disclose the alleged defect. Defendant argues the allegations of the first amended complaint fail to allege a transactional relationship giving rise to a duty to disclose these material facts. The court agrees.

Here, plaintiff has alleged GM and plaintiff entered into a warranty contract regarding the vehicle, and that advertising by GM and the sales representatives at GM's authorized dealer told plaintiff about key features and components of the vehicle but failed to mention it had a transmission defect. (FAC, ¶¶ 6-9.) Plaintiff's allegation that he and defendant entered into a warranty contract is conclusory and lacking the specificity required of a fraud-based cause of action. There are no allegations supporting interactions between plaintiff and defendant directly in the formation of the warranty contract such that defendant had the opportunity to disclose the alleged defect but did not.

The transactional relationship contemplated as giving rise to a duty to disclose "must necessarily arise from direct dealings between the plaintiff and the defendant; it cannot arise between the defendant and the public at large." (*Bigler-Engler v. Breg, Inc*.

(2017) 7 Cal.App.5th 276, 311.) Here, the only alleged "interaction" between plaintiff and defendant before the purchase of the vehicle is defendant's advertising, which was directed to the public at large rather than plaintiff specifically.

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

Motion to Strike

Defendant also moves to strike the prayer for punitive damages from the first amended complaint. Defendant contends that plaintiff has not alleged any facts to support his fraud claim, and there are no facts supporting the allegation that defendant acted with malice or oppression, so the prayer for punitive damages is improper and should be stricken. (Civil Code § 3294.)

Punitive damages are awardable in an action for a breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice. (Civ. Code § 3294, subd. (a).) If the facts and circumstances are not set out clearly, concisely, and with sufficient particularity to apprise the opposite party of what is called on to answer, the pleading is insufficient to support a claim for punitive damages. (*Lehto v. Underground Const. Co.* (1977) 69 Cal.App.3d 933, 944.)

As above, the FAC fails to plead fraud with sufficient specificity as to Defendant. Moreover, a corporate employer may be liable for punitive damages only if the knowledge, authorization, ratification or act of wrongful conduct was on the part of an officer, director or managing agent of the corporation. (*Grieves v. Superior Court* (1984) 157 Cal.App.3d 159, 167.)

The court finds that the FAC is insufficiently pled to support a prayer for punitive damages under Civil Code section 3294. Accordingly, the motion to strike the prayer for punitive damage is granted, with leave to amend

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: JS on 11/28/2023.
(Judge's initials) (Date)

(03)

Tentative Ruling

Re: ***Ansaldo v. Basmajian***
Superior Court Case No. 23CECG00299

Hearing Date: November 30, 2023 (Dept. 403)

Motion: Plaintiff/Cross-Defendant's Special Motion to Strike (Anti-SLAPP) Portions of Defendant/Cross-Complainant's Cross-Complaint

Tentative Ruling:

To grant plaintiff/cross-defendant's special motion to strike defendant/cross-complainant's cross-complaint in part and deny in part. To deny defendant's request for an award of attorney's fees and costs against plaintiff.

Explanation:

Defendant's Procedural Objections: First, to the extent that defendant argues that the court should refuse to hear the merits of the motion to strike because of various procedural defects, the court will overrule the objections and hear the merits of the motion. Defendant argues that the motion was not properly served on defense counsel by electronic delivery, as plaintiff served the motion on the wrong email address. However, defendant has waived the objection to the allegedly improper service by filing a substantive opposition to the entire motion, and by failing to make any showing that she was prejudiced by the allegedly improper service.

"It is well settled that the appearance of a party at the hearing of a motion and his or her opposition to the motion on its merits is a waiver of any defects or irregularities in the notice of motion. This rule applies even when no notice was given at all. Accordingly, a party who appears and contests a motion in the court below cannot object on appeal or by seeking extraordinary relief in the appellate court that he had no notice of the motion or that the notice was insufficient or defective." (*Tate v. Superior Court* (1975) 45 Cal.App.3d 925, 930, citations omitted; see also *Carlton v. Quint* (2000) 77 Cal.App.4th 690, 697.)

Here, defendant has filed a lengthy opposition to the motion rather than simply objecting to the allegedly improper service. Also, defendant has made no attempt to show that the allegedly improper service resulted in any prejudice to her. In fact, her counsel admits that they received the motion months ago, and they filed opposition to the prior ex parte application to advance the hearing date for the motion in September. Thus, defendant has not shown that she was prejudiced by the alleged defect in service, and the court will not refuse to hear the merits of the motion due to the allegedly improper service.

Defendant also objects to the motion on the ground that it is not supported by any declarations or other admissible evidence, and thus it cannot be granted. Under Code of Civil Procedure section 425.16, subdivision (b)(2), "In making its determination,

the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based. (Code Civ. Proc., § 425.16, subd. (b)(2).)

Thus, the anti-SLAPP statute does require the court to consider affidavits that are submitted by the parties. However, it does not state that the moving party must submit affidavits or other evidence when moving to strike the other party's pleading. Indeed, the statute allows the court to consider a motion to strike based purely on the allegations of a complaint or cross-complaint that, on its face, is based on protected activity.

Here, it is true that plaintiff has not submitted any affidavits or other evidence to support her motion to strike. However, she relies on the allegations of the cross-complaint, which appear to show on their face that the defendant's cross-claims are based on protected activities like filing civil complaints in Superior Court and making reports to the City of Fresno's Water Conservation agency. (Cross-Complaint, ¶¶ 2, 21, 26, 35(g), 41(g), 53, 68(e), 85, 98(9).) Therefore, plaintiff does not have to submit additional evidence in order to make her prima facie showing under the anti-SLAPP statute that the cross-complaint is based on protected activity. As a result, the court will not refuse to hear the merits of the motion due to the lack of evidence submitted in support of the motion.

Defendant also objects to the motion on a variety of other minor procedural grounds, such as the notice of motion listing the wrong department on the first page, filing an excessively long brief combined as one document without a proper caption, and failure to show service of the motion on the Judicial Council. Again, however, the court will not decline to consider the merits of the motion based on these minor defects. Defendant has waived her procedural objections to the motion by filing a substantive opposition and failing to show any prejudice from the defects.

Also, to the extent that defendant contends that plaintiff must provide a proof of service showing that the motion was served on the Judicial Council, the anti-SLAPP statute contains no such requirement. Code of Civil Procedure section 425.16, subdivision (j)(1) only states that "[a]ny party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by email or facsimile, a copy of the endorsed, filed caption page of the motion or opposition..." (Code Civ. Proc., § 425.16, subd. (j)(1).)

Thus, section 425.16(j)(1) only requires the moving party to send a copy of the cover page of the motion to the Judicial Council after the motion has been filed. There is nothing in the statute that requires the moving party to also file a proof of service with the court, stating that the Judicial Council was served with the motion. Nor is there anything in the statute that indicates that failure to serve the Judicial Council deprives the court of jurisdiction to hear the motion. Therefore, the court intends to hear the merits of the motion despite the lack of a proof of service showing that the Judicial Council was served with the motion.

The Merits of the Motion to Strike: Plaintiff argues that the entire cross-complaint should be stricken because it is based on plaintiff's protected activities of filing civil complaints against defendant, as well as making protected reports of excessive water usage to the City of Fresno. However, while it does appear that portions of the cross-complaint are based on protected activity and should be stricken, other parts of the

cross-complaint are based on non-protected activities and therefore the court intends to deny the motion with regard to the rest of the cross-complaint.

Under Code of Civil Procedure section 425.16, "[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, subd. (b)(1).) "In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (Code Civ. Proc., § 425.16, subd. (b)(2).)

"As used in this section, '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." (Code Civ. Proc., § 425.16, subd. (e).)

Also, "in any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover that defendant's attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5." (Code Civ. Proc., § 425.16, subd. (c)(1).)

"Resolution of an anti-SLAPP motion involves two steps. First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success. We have described this second step as a 'summary-judgment-like procedure.' The court does not weigh evidence or resolve conflicting factual claims. Its inquiry is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. It accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law. '[C]laims with the requisite minimal merit may proceed.'" (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384–385, citations and footnotes omitted.)

In *Baral*, the California Supreme Court dealt with the issue of whether an anti-SLAPP motion should be granted where the plaintiff alleged claims that were based on both protected and unprotected activity. The Supreme Court disapproved the holding of *Mann v. Quality Old Time Service, Inc*. (2004) 120 Cal.App.4th 90, which had held that, where the plaintiff's claims are based on allegations of both protected and unprotected activity, as long as the plaintiff has shown a probability of prevailing on *any part* of their claim, the motion to strike must be denied. The Supreme Court held that "it is not the

general rule that a plaintiff may defeat an anti-SLAPP motion by establishing a probability of prevailing on *any part* of a pleaded cause of action. Rather, the plaintiff must make the requisite showing as to each challenged claim that is based on allegations of protected activity. How the plaintiff does that will vary from case to case, depending on the nature of the complaint and the thrust of the motion. But when the defendant seeks to strike particular claims supported by allegations of protected activity that appear alongside other claims within a single cause of action, the motion cannot be defeated by showing a likelihood of success on the claims arising from unprotected activity." (*Id.* at p. 392, italics in original.)

The Supreme Court explained that, "[s]everal Courts of Appeal have pointed out that the *Mann* rule permits artful pleading to evade the reach of the anti-SLAPP statute. By mixing allegations of protected and unprotected activity, the pleader may avoid scrutiny of the claims involving protected activity, as happened in *Mann*. We agree that the application of section 425.16 cannot reasonably turn on how the challenged pleading is organized. Had the *Mann* complaint stated its defamation claim in two counts, one based on the protected statements and another on the unprotected statements, the plaintiff would have been required to establish a probability of prevailing on the claim arising from the protected speech. It is arbitrary to hold that the same claim, supported by allegations of protected and unprotected activity in a single cause of action, escapes review if the plaintiff shows a probability of prevailing on the allegations that are not covered by the anti-SLAPP statute." (*Id*. at pp. 392–393, citations omitted.) "The anti-SLAPP procedures are designed to shield a defendant's constitutionally protected *conduct* from the undue burden of frivolous litigation. It follows, then, that courts may rule on plaintiffs' specific claims of protected activity, rather than reward artful pleading by ignoring such claims if they are mixed with assertions of unprotected activity." (*Id.* at p. 393, italics in original.)

Also, "[w]e agree with the *Cho* and *Wallace* courts that the Legislature's choice of the term 'motion to strike' reflects the understanding that an anti-SLAPP motion, like a conventional motion to strike, may be used to attack parts of a count as pleaded." (*Id.* at p. 393, citations omitted.) On the other hand, "[a]ssertions that are 'merely incidental' or 'collateral' are not subject to section 425.16. Allegations of protected activity that merely provide context, without supporting a claim for recovery, cannot be stricken under the anti-SLAPP statute." (*Id*. at p. 394, citations omitted.)

"The scope of the term 'cause of action' in section 425.16(b)(1) is evident from its statutory context. When the Legislature declared that a 'cause of action' arising from activity furthering the rights of petition or free speech may be stricken unless the plaintiff establishes a probability of prevailing, it had in mind *allegations of protected activity that are asserted as grounds for relief*. The targeted claim must amount to a 'cause of action' in the sense that it is alleged to justify a remedy. By referring to a 'cause of action against a person arising from *any act* of that person in furtherance of' the protected rights of petition and speech, the Legislature indicated that *particular* alleged acts giving rise to a claim for relief may be the object of an anti-SLAPP motion. Thus, in cases involving allegations of both protected and unprotected activity, the plaintiff is required to establish a probability of prevailing on any claim for relief based on allegations of protected activity. Unless the plaintiff can do so, the claim and its corresponding allegations must be stricken. Neither the form of the complaint nor the primary right at stake is determinative." (*Id*. at p. 395, italics in original, citation omitted.)

Finally, the Supreme Court noted that, "[a]lthough the issue arose here at the second step of the anti-SLAPP procedure, identification of causes of action arising from protected activity ordinarily occurs at the first step. For the benefit of litigants and courts involved in this sometimes difficult area of pretrial procedure, we provide a brief summary of the showings and findings required by section 425.16(b). At the first step, the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them. When relief is sought based on allegations of both protected and unprotected activity, the unprotected activity is disregarded at this stage. If the court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached. There, the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated. The court, without resolving evidentiary conflicts, must determine whether the plaintiff's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment. If not, the claim is stricken. Allegations of protected activity supporting the stricken claim are eliminated from the complaint, unless they also support a distinct claim on which the plaintiff has shown a probability of prevailing." (*Id.* at p. 396.)

With regard to the showing required under the first prong of the anti-SLAPP statute, " '[T]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute. Moreover, that a cause of action arguably may have been "triggered" by protected activity does not entail [*sic*] that it is one arising from such. In the anti-SLAPP context, the critical consideration is whether the cause of action is *based* on the defendant's protected free speech or petitioning activity.' Moreover, 'a defendant in an ordinary private dispute cannot take advantage of the anti-SLAPP statute simply because the complaint contains some references to speech or petitioning activity by the defendant.... [W]hen the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute.'" (*D'Arrigo Bros. of California v. United Farmworkers of America* (2014) 224 Cal.App.4th 790, 799, citations omitted.)

"[A] claim is not subject to a motion to strike simply because it contests an action or decision that was arrived at following speech or petitioning activity, or that was thereafter communicated by means of speech or petitioning activity. Rather, a claim may be struck only if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted." (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1060, italics in original.)

"Thus, in evaluating anti-SLAPP motions, 'courts should consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability.'" (*Wong v. Wong* (2019) 43 Cal.App.5th 358, 364, quoting *Park, supra*, at p. 1063.)

In the present case, plaintiff has moved to strike defendant's entire cross-complaint on the ground that it is based on plaintiff's protected activities of filing civil complaints against defendant and making complaints to the City of Fresno about defendant's allegedly excessive water use. However, while it does appear that some of the cross-claims are based, at least in part, on plaintiff's protected activities of filing

litigation and making water use complaints against defendant, other portions of the cross-complaint are not based on protected activities. Also, while some of the allegations of the cross-complaint refer to protected activity, they appear to be alleged for the purpose of incidental background information rather than as the basis for a specific cause of action.

For example, in paragraph 2 of the cross-complaint, defendant alleges that, "[b]y filing the Complaint, [plaintiff] violated the Declaration of Covenants, Conditions, Restrictions & Easements for Brandon Knolls Tract No. 3723 (the 'CC&RS'), the governing documents regarding the real properties that are the subject of the Complaint and now this Cross-Complaint, since [plaintiff] failed to submit the dispute between her, on the one hand, and [defendant] and the Tract No. 3723 Association for Brandon Knolls (hereinafter the 'Association') to arbitration, as required pursuant to 18.13.1 of the CC&Rs. [Defendant] reserves her right and will file a motion to compel [plaintiff] to arbitrate the claims set forth in her Complaint." (Cross-Complaint, ¶ 2.)

This allegation does refer to protected activity, since the filing of a civil complaint is clearly protected as petitioning activity under the First Amendment of the United States Constitution. However, defendant never alleges a specific cause of action for breach of the CC&Rs' arbitration provision, so this allegation is not subject to being stricken under section 425.16. The allegation seems to be simply an attempt to preserve defendant's right to compel arbitration under the arbitration clause of the CC&Rs.

Plaintiff argues that the declaratory relief claim incorporates the allegations of paragraph 2 regarding the alleged violation of the CC&Rs and other governing documents for the HOA, so the entire declaratory relief claim is improperly based on plaintiff's filing of the civil complaint against defendant and it should be stricken. However, the declaratory relief claim only generally alleges that there is a dispute between the parties over their property ownership rights and their respective rights and duties under the governing documents for their properties. (Cross-Complaint, ¶¶ 66, 69.) The declaratory relief claim is primarily based on the allegation that plaintiff continues to enter defendant's property without consent or necessity, conducts surveillance on defendant's property, uses defendant's property for parking and blocks access to the property, destroys or removes portions of the fence between the properties, intrudes on defendant's privacy, and "threatens to establish through the legal process that she has the right, title, estate, lien, or interest to take and use the [defendant's property], including the Disputed Area, as she so wishes, *inter alia*." (*Id*. at ¶ 68.) These allegations have nothing to do with the allegations of paragraph 2 of the cross-complaint, which alleges a breach of the CC&Rs' arbitration clause.[1] Thus, the court will not strike paragraph 2 of the cross-complaint, as it does not attempt to state a claim based on protected activity, and is instead merely alleged as incidental background information and to support a potential motion to compel arbitration.

Defendant alleges in paragraphs 16 to 21 that plaintiff has filed two prior civil actions against defendant, one in small claims court and one in Superior Court, regarding

[1] On the other hand, the allegation that plaintiff "threatens to establish through the legal process" her rights to the disputed portion of the properties, does appear to be based on plaintiff's First Amendment right to bring litigation to establish or protect her property rights. See discussion below.

disputes over their properties. (*Id*. at ¶¶ 16-21.) She further alleges that the parties entered into a settlement and release of the two civil actions. (*Id*. at ¶ 20.) Defendant then alleges that plaintiff has judicially admitted in her present civil complaint that she has breached the settlement and release agreement, as "she has again asserted claims against [defendant] that were settled and released by the Release." (*Id*. at ¶ 21.) She further alleges that plaintiff made judicial admissions in her current civil complaint that the subject tree was located on defendant's property and constituted a nuisance, as its roots and branches encroached on and damaged defendant's property, as well as dropping flowers that constituted a slip and fall hazard. (*Id*. at ¶ 22, 23.)

Defendant then alleges that the parties entered into a mutual stay away agreement in October of 2021, in which plaintiff agreed not to harass, stalk, contact, attack, keep under surveillance, threaten, strike, destroy personal property, destroy real property, follow, batter, disturb the peace, make obscene gestures, and block access to the easement between the properties. (*Id*. at ¶ 24.) Defendant alleges that "by and through her Complaint", plaintiff has admitted that she breached her obligations under the mutual stay away agreement. (*Id*. at ¶ 25.) She also alleges that plaintiff violated the stay away agreement by "contacting, texting, threatening, harassing and disturbing the peace." (*Id*. at ¶ 26." In addition, defendant alleges that plaintiff "has filed a complaint with the City Water Conservation agency, triggering an inspection by the agency's employees of [defendant] and [her property]. The agency determined the complaint was frivolous, without merit or any factual basis, which clearly evidences the intent by [plaintiff] to further harass, frustrate, vex and annoy [defendant]." (*Ibid*.) Defendant's cross-claims then incorporate and sometimes reiterate the allegations above in order to support defendant's claims against plaintiff.

First Cross-Claim: In the first cross-claim for quiet title, defendant alleges that plaintiff has asserted adverse interests to defendant's property rights, including by (a) entering on her property without consent or necessity, (b) using, parking on, and blocking use of her property, (c) destroying or removing portions of the shared fence between the properties, (d) intruding on defendant's privacy, (e) harassing, assaulting, screaming at, and threatening defendant and her guests, (f) frustrating the quiet use and enjoyment of defendant's property, and (g) plaintiff "has repeatedly threatened and commenced prior suits against [defendant] to establish [plaintiff's] purported right to take and use [defendant's] PROPERTY, including the Disputed Area, as she so wishes, *inter alia*." (*Id*. at ¶ 35(a)-(g).) Defendant seeks a judgment stating that she has fee simple title to her property and that she is the exclusive owner of the property, including the disputed area and the easements of record as of February 1, 2012. (*Id*. at ¶ 37, and p. 20, Request for Judgment, First Cause of Action.)

While paragraphs 35(a) to (f) do not allege any protected activity by plaintiff and thus are not subject to being stricken, paragraph 35(g) does allege that plaintiff's filing of prior litigation and threats to file future actions to establish her rights in the property also constitute a challenge to her title in her property. However, defendant does not seek any money damages or injunctive relief with regard to the first cause of action. She only seeks a judicial determination that she is the fee simple owner of her property, including the disputed area, and that plaintiff has no rights in the property. (*Id*. at ¶ 37, and p. 20, Request for Judgment, First Cause of Action.) In other words, she only seeks to quiet title to the property without seeking any additional relief.

Such quiet title claims do not appear to fall within the type of actions contemplated under section 425.16, as a quiet title action does not seek to punish, deter, or chill the exercise of free speech or petitioning rights. Defendant simply seeks to resolve the dispute over the property line and the alleged easement between her property and plaintiff's property. The fact that plaintiff has filed prior actions regarding the properties and threatens to file other actions in the future appears to be alleged only as evidence of the fact that plaintiff has asserted a claim to the disputed area of the properties. Such incidental allegations are not sufficient to justify granting a special motion to strike. "[W]hen the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute.'" (*D'Arrigo Bros. of California v. United Farmworkers of America*, *supra*, 224 Cal.App.4th at p. 799, citations omitted.) Here, the allegations regarding the protected activity are only incidental to the rest of the quiet title claim, which is not primarily based on protected activity. Therefore, the court intends to deny the motion to strike the first cause of action.

Second Cross-Claim: The second cause of action alleges that plaintiff engaged in non-protected activity that constitutes a nuisance, including (a) entering on defendant's property without consent or necessity, (b) using defendant's property to park and otherwise blocks or impedes use of her property, (c) destroying or removing portions of the shared fence between the properties, (d) intruding on defendant's privacy by trespassing and surveillance, (e) harassing, assaulting, screaming at, and threatening defendant and her guests and agents, (f) impeding, hindering, and frustrating the quiet use and enjoyment of the defendant's property, and (g) "has repeatedly threatened and commenced prior suits against [defendant] to establish]plaintiff's] purported right to take and use the [defendant's] PROPERTY, including the Disputed Area, as she so wishes, *inter alia*." (*Id*. at ¶ 41.) Defendant also alleges that plaintiff has maintained, installed, and constructed improvements and personal property on defendant's property, including landscaping and stakes, that encroach on defendant's property in violation of the building code, the fire code, and the governing documents of the HOA. (*Id*. at ¶ 42.) Defendant prays for compensatory and punitive damages as a result of the plaintiff's conduct, as well as seeking an injunction against plaintiff to prevent her from entering or using her property or the disputed area. (*Id*. at ¶¶ 43-49, and pp. 20-21, Request for Judgment, Second Cause of Action.)

Most of the allegations of the second cause of action do not mention any protected activity. However, paragraph 41(g) does allege that plaintiff has filed prior actions against defendant, and threatens to do so again in the future. She alleges that such litigation activity constitutes a nuisance. (*Id*. at ¶ 41(g).) Defendant is also seeking compensatory and punitive damages against plaintiff for creating an alleged nuisance, as well as injunctive relief. Thus, to the extent that defendant has alleged that plaintiff's filing of prior and potential future lawsuits constitutes a nuisance, plaintiff has met her burden of showing that defendant's claim falls within the definition of a SLAPP action. Therefore, the burden shifts to defendant to show by admissible evidence that she has a probability of prevailing on her nuisance claim. (Code Civ. Proc., §425.16, subd. (b).)

In opposition to the motion, defendant has submitted several declarations, including a declaration from herself, as well as a declaration from her attorney, and another from a former neighbor who was allegedly forced to move after being harassed

by plaintiff.[2] However, none of these declarations show that defendant has a probability of prevailing on her nuisance claim to the extent that it asserts that the filing of prior or potential future civil complaints constitutes a nuisance. At most, defendant's own declaration shows that plaintiff engaged in other, non-protected activities that constituted a nuisance, such as trespassing on defendant's property, destroying portions of the shared fence, interfering with her easement, interfering with and harassing her and her guests or agents, etc. (Basmajian decl., ¶ 62.) Defendant has therefore failed to present admissible evidence showing that she has a probability of prevailing on her nuisance claim based on plaintiff's filing of civil complaints against her. Nor does it appear that she can do so, as the filing of civil complaints is privileged. (Civil Code §47, subd. (b).) As a result, the court intends to strike the allegations of the second cross-claim that refer to plaintiff filing prior or future litigation against defendant to establish her right to take and use defendant's property. (Cross-Complaint, pp. 8:28-9:3, ¶ 41(g).) However, the court intends to deny the motion to strike the rest of the second cross-claim.

Third Cross-Claim: Defendant alleges that plaintiff has intentionally, recklessly, or negligently entered onto defendant's land without consent or necessity. (*Id*. at ¶ 52.) She continues to enter onto defendant's land, and has maintained, installed, and constructed improvements and personal property on defendant's property. (*Ibid*.) She has refused to remove such encroachments. (*Id*. at ¶ 53.) Also, she "has repeatedly threatened to commence and in fact has commenced litigation against [defendant] to establish purported rights to enter, use and encroach on the [defendant's] PROPERTY, and the Disputed Area, all to harass and annoy [defendant]." (*Ibid*.) Defendant prays for compensatory and punitive damages, as well as injunctive relief. (*Id*. at ¶ 57, and Request for Judgment, pp. 21-22.)

Thus, defendant's third cause of action alleges that plaintiff has engaged in both protected and non-protected activity that constitutes a trespass on her property. To the extent that defendant alleges non-protected conduct, the court intends to deny the motion to strike, as such conduct does not fall within the ambit of section 425.16. However, to the extent that defendant alleges that plaintiff filed or threatens to file civil lawsuits to allow her to continue entering on and encroaching upon defendant's property, such activity is protected. Therefore, defendant has the burden of showing that she has a probability of prevailing on her claim.

However, defendant's opposition fails to provide any admissible evidence that would tend to show that she has a probability of prevailing on her trespass claim to the extent that it is based on the filing of prior or future lawsuits against her. Defendant's own declaration shows, at most, that plaintiff engaged in non-protected activity that constituted a trespass on her land, such as entering the land without permission, surveilling her, and installing landscaping that encroaches on her property. (Basmajian decl., ¶ 63.) Therefore, she has failed to show that she has any probability of prevailing on her claim based on plaintiff's filing of civil complaints against her. Nor does it appear that she could make such a showing, as the filing of civil complaints is privileged. (Civil Code, § 47, subd. (b).)

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[2] Plaintiff has objected to the declarations of Basmajian and Reyes-Aguilar. The court intends to overrule all of the objections to Basmajian's declaration. However, the court intends to sustain the objections to Reyes-Agular's declaration and disregard her declaration.

As a result, the court intends to grant the motion to strike the allegations of the third cross-claim to the extent that defendant attempts to state a claim based on the plaintiff's filing of prior or future lawsuits against her. (Cross-Complaint, ¶ 53, p. 10:18-20 ["… and has repeatedly threatened to commence and in fact has commenced litigation against BASMAJIAN to establish purported rights to enter, use and encroach on the BASMAJIAN PROPERTY, and the Disputed Area…"].) The court intends to deny the motion to the extent that plaintiff seeks to strike the rest of the third cross-claim, however.

Fourth Cross-Claim: The fourth cause of action alleges that plaintiff has "intentionally intruded and conducted surveillance" at defendant's property and curtilage, without consent or necessity. (Cross-Complaint, ¶ 60.) Defendant alleges that she has been harmed and continues to be harmed by the intrusion. (*Id*. at ¶¶ 61-62.) However, defendant does not allege that plaintiff engaged in any protected conduct, such as filing a civil complaint or making water use complaints to the City of Fresno about her. Therefore, there is no basis for the court to strike any portion of the fourth cause of action under section 425.16, and the court intends to deny the motion as to that cause of action in its entirety.[3]

Fifth Cross-Claim: The fifth cross-claim alleges a cause of action for declaratory relief based on the allegation that there is an actual controversy between the parties regarding their rights and duties regarding the defendant's property, including the Disputed Area, and plaintiff's property. (Cross-Complaint, ¶ 66.) Both parties contend that they have rights to the properties and Disputed Area. (*Id*. at ¶¶ 67-68.) In addition, defendant alleges that plaintiff (a) enters her property without consent, (b) conducts surveillance on the property, (c) uses the property, parks on it, and impedes its use, (c) [*sic*] destroys or removes portions of the shared fence, (d) [*sic*] intrudes on defendant's privacy, and (e) [*sic*] "threatens to establish through the legal process that she has the right, title, estate, lien or interest to take and use the [defendant's] PROPERTY, including the Disputed Area, as she so wishes, *inter alia*." (*Id*. at ¶ 68.) She seeks a judicial determination of the rights and duties of each party under their respective grant deeds, the governing documents of the development, as to each of their properties. (*Id*. at ¶ 69.) She also seeks compensatory damages. (*Id*. at p. 22, Request for Judgment, Fifth Cause of Action.)

Again, most of the fifth cause of action does not allege any protected activity, and the cause of action appears to be based primarily on non-protected activity such as acts of physical trespass onto defendant's property. However, the allegation that plaintiff "threatens to establish through the legal process that she has the right, title, estate, lien or interest to take and use the [defendant's] PROPERTY, including the Disputed Area, as she so wishes" does allege protected activity based on the filing, or potential filing, of civil lawsuits regarding the properties. Therefore, the burden shifts to defendant to show by admissible evidence that she has a probability of prevailing on her claim based on protected activity.

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[3] Plaintiff has argued that, by incorporating the other allegations of the cross-complaint into the fourth cross-claim, the entire claim is effectively alleging a claim based on protected activity. However, while the fourth cause of action does incorporate the other allegations of the cross-complaint, such incorporated allegations are merely incidental to the cause of action alleged and do not attempt to form the primary basis for the claim. As a result, the court will deny the motion to strike the fourth cross-claim.

However, defendant has not presented any admissible evidence showing that she has a probability of prevailing on her claim based on the filing of civil lawsuits against her regarding the property. Defendant's declaration only addresses the other, non-protected activities that form the basis for her claim. (Basmajian decl., ¶ 65.) Nor does it appear that defendant could state a valid claim based on the filing of lawsuits by plaintiff, as such activity would be privileged. (Civil Code, § 47, subd. (b).) Therefore, the court intends to grant the motion to strike the portion of the fifth cross-claim that alleges that plaintiff "threatens to establish through the legal process that she has the right, title, estate, lien or interest to take and use the BASMAJIAN PROPERTY, including the Disputed Area, as she so wishes, *inter alia*." (Cross-Complaint, ¶ 68.) On the other hand, the court will deny the motion to strike the rest of the fifth cross-claim.

Sixth Cross-Claim: The sixth cross-claim seeks injunctive relief against plaintiff to prevent her from interfering with defendant's exclusive use and enjoyment of her property, including the Disputed Area and the easements of record. (*Id*. at ¶ 72.) Defendant again alleges that plaintiff continues to interfere with her property rights, and she will continue doing so unless enjoined. (*Id*. at ¶¶ 72, 73.)

The sixth cross-claim makes no mention of plaintiff's filing of prior or future lawsuits regarding the property, nor does it mention that plaintiff filed a complaint with the City against defendant regarding excessive water use. Therefore, the cross-claim is not based on any protected activity, and the court will deny the motion to strike the sixth cross-claim under section 425.16.

Seventh Cross-Claim: The seventh cross-claim alleges a claim for breach of contract. Defendant alleges that, by filing the present complaint, plaintiff breached the settlement and release agreement with defendant that settled their two prior lawsuits. (*Id*. at ¶¶ 76-80.) "ANSALDO, by and through her Complaint, which sets forth causes of action for Nuisance and Trespass, amongst other causes of action, has made a judicial admission that she has breached the Release in that she has again asserted claims against BASMAJIAN that were settled and released by the Release." (*Id*. at ¶ 77.) "ANSALDO breached the Release by doing something that the Release prohibited her from doing, i.e., filing the Complaint, which set forth causes of action for nuisance and trespass, based upon the same conduct released in the Release." (*Id*. at ¶ 80.) Defendant seeks general and special damages for the alleged breach of the settlement agreement. (*Id*. at pp. 23:27 - 24:2.)

The seventh cause of action is thus entirely based on protected activity, namely plaintiff's filing of the present lawsuit against defendant. Such activity is clearly encompassed by section 426.16, and as a result defendant has the burden of showing by admissible evidence that she has a probability of prevailing on her claim.

In her declaration, defendant alleges that her claim for breach of the settlement agreement is based on the fact that the parties entered into a settlement agreement to resolve their prior litigation, and that plaintiff breached the settlement and release by filing the new complaint against defendant. (Basmajian decl., ¶¶ 52, 67.) She also attaches copies of the present complaint, the complaint she filed against plaintiff in April of 2021, the prior cross-complaint filed by plaintiff against defendant, and a copy of the settlement agreement. (Exhibits 2, 3, and 7.)

In the settlement agreement, the parties agreed to a mutual release of "any and all claims and causes of action that any Party had or now has, against all persons or entities to be released as described in Paragraph 2, *infra*, for any and all alleged actions or inaction of the persons or entities released, including any claim for any alleged injuries or damages of any type or description *arising out of or in any way connected with the Disputes, including all claims and causes of action which were or could have been asserted as of the Effective Date of this Agreement*." (Settlement Agreement, p. 3 of 8, ¶ 1, Full and Final Release, italics added.)

The parties also agreed to "absolutely, completely and forever discharge and release each other of or from any and all demands, rights liens, liabilities, causes of action and/or claims of any kind, whether known or unknown, which they had, now have, or in the future may have *arising out of the claims or causes of action, answers, or affirmative defenses which either were alleged in or related to the Disputes, or which could have been asserted as of this date*", as well as releasing the other party from "all liabilities, causes of action, charges, complaints, suits, claims, obligations, costs, losses, damages, rights, attorneys' fees, expenses, and all other legal responsibilities of any form whatsoever whether known or unknown, whether suspected or unsuspected, whether fixed or contingent, including but not limited to those *arising from acts or omissions occurring prior to the effective date of this Agreement*… which they had or may claim to have against any of them by reason of any and all matters *from the beginning of time to the present, arising out of the Disputes* (collectively referred to as 'Released Matters')." (*Id*. at pp. 3-4 of 8, ¶ 2, italics added.) The release also included a waiver of the parties' rights under Civil Code section 1542. (*Id*. at p. 4 of 8, ¶ 3.)

Thus, the settlement agreement covered only claims that the parties either already had raised against each other in the prior litigation, or could have raised up to the time of the execution of the agreement, and that arose out of the disputes that were raised in the prior cases. The parties executed the settlement agreement on October 27, 2021. (Exhibit 3 to Basmajian decl., p. 8 of 8.) On the other hand, the plaintiff's complaint in the present case alleges events that occurred in April of 2022, about six months after the parties settled their prior litigation. The plaintiff's complaint does reference events that occurred before the settlement, but it is primarily based on the defendant's removal of the tree that was located near the property line between the two properties. That event allegedly occurred on April 30, 2022. (Complaint, ¶¶ 24-32.) Plaintiff also alleges numerous other incidents, including continued harassment and trespassing by defendant, and damage from defendant's sprinklers. (*Id*. at ¶¶ 47-51.) Thus, all of the incidents alleged by plaintiff as the basis for her present claims arose after the execution of the settlement agreement, and her complaint does not appear to violate the terms of the settlement, which only released claims that arose on or before the effective date of the agreement.

Consequently, defendant has failed to show a probability of prevailing on her claim for breach of the settlement agreement, and the court intends to grant the motion to strike the seventh cross-claim. Furthermore, it does not appear that there is any way for defendant to cure the defect in her claim, as the settlement agreement does not bar future claims based on newly occurring events like the ones alleged in plaintiff's complaint.

Eighth Cross-Claim: The eighth cross-claim alleges a cause of action for breach of the mutual stay away agreement entered into by the parties as part of the settlement of

their prior litigation. (Cross-Complaint, ¶ 83.) "On October 27, 2021, [defendant] and [plaintiff] entered into the Mutual Stay Away Agreement wherein [plaintiff] agreed that she would no longer directly or indirectly do any of the following to [defendant], her invitees, agents, contractors, family members or gardeners: harass, stalk, contact, attack, keep under surveillance, threaten, strike, destroy personal property, destroy real property, follow, batter, disturb the peace, make obscene gestures, and block access of the easement (as described in the Amendment) between their properties." (Cross-Complaint, ¶ 83.)

Defendant then alleges that plaintiff "by and through her Complaint, has made judicial admissions that she has breached her obligations under the Mutual Stay Away Agreement." (*Id*. at ¶ 84.) "Further, [plaintiff] has breached her obligations under the Mutual Stay Away Agreement by contacting, texting, threatening, harassing and disturbing the peace, amongst other things. Also, [plaintiff] has filed a complaint with the City Water Conservation agency, triggering an inspection by the agency's employees. The agency determined the complaint was frivolous, without merit or any factual basis, which is further evidence of [plaintiff's] acts to harass, vex, annoy and frustrate BASMAJIAN." (*Id*. at ¶ 85.)

To the extent that defendant alleges non-protected conduct by plaintiff such as "contacting, texting, threatening, harassing and disturbing the peace", a special motion to strike under section 425.16 will not lie, as defendant's claim is not based on any protected petitioning or free speech activity. However, to the extent that defendant alleges that plaintiff harassed her by filing a complaint with the City of Fresno Water Conservation agency, the claim is based on protected activity.

Section 425.16, subdivision (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: … 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." (Code Civ. Proc., § 425.16, subd. (e)(4).) Here, plaintiff filed a complaint with the City of Fresno's Water Conservation agency regarding defendant's allegedly excessive water use. As water use and conservation is a matter of public interest, plaintiff's complaint to the Water Conservation agency was protected speech. Thus, plaintiff has met her burden of showing that defendant's cause of action is partially based on protected activity, and the burden shifts to defendant to show by admissible evidence that she has a probability of prevailing on her claim.

Defendant has submitted her own declaration to support her claim that plaintiff violated the mutual stay away agreement by continuing to surveil and harass her, as well as filing an allegedly meritless complaint with the Water Conservation agency in an effort to harass her. (Basmajian decl., ¶¶ 52-59, 68.) She also claims that plaintiff has harassed other people in the neighborhood, including Monica Reyes-Aguilar, who has also submitted her own declaration in support of the opposition. Ms. Reyes-Aguilar claims that she was forced to move after plaintiff continually harassed her and filed bogus complaints about her to the HOA. (See Reyes-Aguilar decl.)

However, the court intends to disregard Reyes-Aguilar's declaration, as regardless of whether plaintiff harassed Reyes-Aguilar, her testimony is irrelevant to the question of whether plaintiff violated the mutual stay away agreement with defendant.

Also, defendant's own declaration fails to establish that she has a probability of prevailing on her cause of action for breach of the stay away agreement to the extent that it is based on the allegation that plaintiff made false and harassing complaints to the City of Fresno about defendant's water use. Even if plaintiff did make false complaints with the Water Conservation agency about defendant, such complaints are privileged under Civil Code section 47, subdivision (b)(3). Therefore, defendant has not met her burden of showing that she has a probability of prevailing on her eighth cross-claim to the extent that it relies on the allegation that plaintiff filed a complaint against defendant with the City Water Conservation agency, and the court will strike that portion of the claim. (Cross-Complaint, ¶ 85, p. 15:10-13 ["Also, ANSALDO has filed a complaint with the City Water Conservation agency, triggering an inspection by the agency's employees. The agency determined the complaint was frivolous, without merit or any factual basis, which is further evidence of ANSALDO's acts to harass, vex, annoy and frustrate BASMAJIAN."]) However, the court will not strike the rest of the cross-claim, as it alleges other non-protected activity.

Ninth Cross-Claim: Defendant alleges that plaintiff has been unjustly enriched because defendant spent money to maintain, trim, and care for the subject tree, which plaintiff now alleges was hers "as set forth in her complaint." (Cross-Complaint, ¶ 91.) Defendant contends that it would be unconscionable and against fundamental principles of justice, equity, and good conscience to allow plaintiff to retain the benefit of the compensation paid by defendant to maintain the tree for the past eleven years. (*Id*. at ¶ 92.) Therefore, she seeks to have plaintiff reimburse her for the payments she made to maintain the tree. (*Id*. at ¶ 93.) She also alleges that the tree was a nuisance and caused substantial harm to defendant's property, and that it was necessary to abate the nuisance. (*Id*. at ¶ 94.) Defendant seeks reimbursement for the cost of abating the nuisance caused by the tree. (*Id*. at ¶ 95.)

None of the defendant's allegations are based on protected activity, so there is no basis to strike them under section 425.16. While defendant does refer to the fact that plaintiff has admitted in her complaint that the tree belonged to her, the cause of action is not based on the filing of plaintiff's complaint. Instead, the allegation is incidental information that defendant has alleged to demonstrate why the plaintiff is liable for the cost of maintaining and ultimately removing the tree. She is not suing plaintiff for filing the complaint against her, but instead seeks to be reimbursed for the cost of maintaining and later removing the tree. Therefore, the court will deny the motion to strike the ninth cross-claim, in its entirety.

Tenth Cross-Claim: The tenth cross-claim alleges a cause of action for intentional infliction of emotional distress against plaintiff based on her continuing trespass on defendant's property, her alleged use of the property and disputed area, her intrusion on defendant's privacy, her harassment of defendant, and "(9) repeatedly threatening and commencing frivolous lawsuits against [defendant] to establish [plaintiff's] purported right to take and use [defendant's] PROPERTY, including the Disputed Area, and the easements of record, as she so wishes, *inter alia*, and (10) failing and refusing to honor her obligations under the Release and Mutual Stay Away Agreement and intentionally breaching them both to mentally and physically harm [defendant]." (Cross-Complaint, ¶ 98.) She seeks general damages, lost wages, and punitive damages. (*Id*. at ¶¶ 101-103.)

Most of the allegations of the tenth cross-claim do not rely on protected activity, since defendant is alleging that plaintiff has trespassed on her property, harassed her, and interfered with the use and enjoyment of her property. Such allegations are not subject to a motion to strike under section 425.16, since they are not based on protected activity. However, the allegations of paragraph 98 (9) and (10) do allege that plaintiff's filing of lawsuits and refusing to honor her obligations of the release and stay away agreement are based on protected activity. As discussed above with regard to the breach of contract claims, defendant has not shown a probability of prevailing on her claims for breach of the settlement agreement and mutual stay away agreement. Therefore, the court intends to grant the motion to strike those allegations. (Cross-Complaint, ¶ 98, p. 17:10-15 ["(9) repeatedly threatening and commencing frivolous lawsuits against BASMAJIAN to establish ANSALDOs' purported right to take and use the BASMAJIAN PROPERTY, including the Disputed Area, and the easements of record, as she so wishes, *inter alia*; and (10) failing and refusing to honor her obligations under the Release and Mutual Stay Away Agreement and intentionally breaching them both to mentally and physically harm BASMAJIAN."] However, the court intends to deny the motion to strike the remainder of the tenth cross-claim.

Defendant's Request for Sanctions: Defendant has requested an award of attorney's fees and costs against plaintiff for bringing a frivolous motion to strike. Under Code of Civil Procedure section 425.16, subdivision (c)(1), "If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5." Here, since the court intends to grant the motion in part, the motion was not frivolous or entirely without merit. Therefore, there is no basis for awarding sanctions to defendant here, and the court will deny the request for sanctions.

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: JS on 11/28/2023.
(Judge's initials) (Date)

(27)

Tentative Ruling

Re: ***Transportation Alliance Bank Inc., a Utah Corporation v. Baljit Singh***
Superior Court Case No. 23CECG02044

Hearing Date: November 30, 2023 (Dept. 403)

Motion: Plaintiff's Application for a Writ of Possession

Tentative Ruling:

To deny, without prejudice.

Explanation:

Plaintiff's application for a writ of possession is not accompanied by a proof of service. Neither is there a proof of service of summons and complaint on file. Consequently, it is unclear whether defendants have notice of this proceeding.

A writ of execution may be obtained through an ex parte application, however, "a taking such as that involved in claim and delivery procedure violates due process if it occurs prior to a hearing on the merits unless justified by weighty state or creditor interests." (*Blair v. Pichess* (1971) 5 Cal.3d 258, 278; see also *Sea Rail Truckloads, Inc. v. Pullman, Inc.* (1982) 131 Cal.App.3d 511, 515 ["An ex parte writ of possession is a drastic remedy which is disfavored except in the narrowly drawn, exigent circumstances set forth in this statute."].) Accordingly, to justify ex parte relief, there must be facts supporting the statutory requirements, e.g. "*an immediate danger that the property will become unavailable to levy* by reason of being transferred, concealed or removed from the state." (*Sea Rail Truckloads, Inc. v. Pullman, Inc., supra,* 131 Cal.App.3d 511, 515.)

Similarly, the Code of Civil Procedure provides that "A writ of possession may be issued ex parte pursuant to this subdivision if probable cause appears that any of the following conditions exists: [¶] (3) The defendant acquired possession of the property in the ordinary course of his trade or business for commercial purposes and: (i) The property is not necessary for the support of the defendant or his family; and (ii) There is an immediate danger that the property will become unavailable to levy by reason of being transferred, concealed, or removed from the state or will become substantially impaired in value by acts of destruction or by failure to take care of the property in a reasonable manner; and (iii) The ex parte issuance of a writ of possession is necessary to protect the property." (Code Civ. Proc., § 512.020, subd. (b).)

Plaintiff supports their application for an ex parte writ of possession by a declaration from its custodian of record Leighanne Bishop who purports to have personal knowledge of defendant's accounts and market value of the collateral. However, in addition to the lack of service, the declaration is absent of any evidence that the property is only for commercial purposes and that there is a danger of it becoming

unavailable. In essence, the evidence is currently insufficient for the court to make the required findings, especially in the absence of notice.

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: JS on 11/28/2023.
(Judge's initials) (Date)