SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 10
Honorable Frederick S. Chung
Rachel Tien, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408-882-2210

DATE: June 11, 2024 TIME: 9:00 A.M.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.

The courthouse is open: Department 10 is now fully open for in-person hearings, as of April 18, 2023. The court strongly prefers **in-person** appearances for all contested law-and-motion matters. For all other hearings (*e.g.*, case management conferences), the court strongly prefers either **in-person or video** appearances. Audio-only appearances are permitted but disfavored, as they cause significant disruptions and delays to the proceedings. Please use telephone-only appearances as a last resort.

Scheduling motion hearings: Please go to https://reservations.scscourt.org or call 408-882-2430 between 8:30 a.m. and 12:30 p.m. (Mon.-Fri.) to reserve a hearing date for your motion *before* you file and serve it. You must then file your motion papers no more than five court days after reserving the hearing date, or else the date will be released to other cases.

CourtCall is no longer available: Department 10 uses Microsoft Teams for remote hearings. Please click on this link if you need to appear remotely, and then scroll down to click the link for Department 10: https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml. Again, the court strongly prefers in-person or video appearances. Telephonic appearances are a sub-optimal relic of a bygone era.

Recording is prohibited: As a reminder, most hearings are open to the public, but state and local court rules prohibit recording of court proceedings without a court order. This prohibition applies to both in-person and remote appearances.

Court reporters: Unfortunately, the court is no longer able to provide official court reporters for civil proceedings (as of July 24, 2017). If any party wishes to have a court reporter, the appropriate form must be submitted. See https://www.scscourt.org/general_info/court_reporters.shtml.

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 10
Honorable Frederick S. Chung
Rachel Tien, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408-882-2210

DATE: June 11, 2024 TIME: 9:00 A.M.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.

LINE #	CASE #	CASE TITLE	RULING
LINE 1	20CV373765	Robert D. Hall et al. v. 405 Alberto Way, LLC et al.	Order of examination: parties to appear.
LINE 2	20CV373765	Robert D. Hall et al. v. 405 Alberto Way, LLC et al.	Order of examination: parties to appear.
LINE 3	22CV398575	Julia Minkowski v. James Hann et al.	Click on LINE 3 or scroll down for ruling.
LINE 4	22CV408205	Aurel Foglein v. The Home Depot U.S.A., Inc. et al.	Click on LINE 4 or scroll down for ruling.
LINE 5	23CV416988	Susan Wallman v. Kia America, Inc.	Click on LINE 5 or scroll down for ruling.
LINE 6	22CV399647	Chinh Nguyen v. Expert Home Builders, Inc.	Click on LINE 6 or scroll down for ruling.
LINE 7	22CV408411	Mahesh Anand Karoshi v. City of Campbell	Click on LINE 7 or scroll down for ruling.
LINE 8	2015-1-CV-287933	Thuan Ethan Nguyen v. Mario Lleverino et al.	Motion to set aside dismissal: this case was dismissed after multiple failures to appear by plaintiff's counsel. The court finds that the failures to appear were the result of mistake, inadvertence, and excusable neglect under CCP § 473(b) and therefore GRANTS the motion. The case is reinstated and set for a case status review re: default on September 26, 2024 at 10:00 a.m., if necessary. In the meantime, plaintiff should submit a judgment order in accordance with the court's July 10, 2023 minute order.

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 10
Honorable Frederick S. Chung
Rachel Tien, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408-882-2210

DATE: June 11, 2024 TIME: 9:00 A.M.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.

LINE #	CASE #	CASE TITLE	RULING
LINE 9	17CV310152	Bank of America, N.A. v. Wira A. Soedarmono	Claim of exemption: judgment debtor Soedarmono does not explain how the amounts in his spouse's checking account are exempt under CCP § 704.100 (life insurance policy benefits or the loan value of unmatured life insurance policies). Absent such a showing, the claim of exemption is DENIED as to the $8,142.93 in the Chase checking account.
LINE 10	21CV381712	Feridon Ahmadkhani v. Costco Wholesale Corporation	Motion to be relieved as counsel: parties to appear.
LINE 11	23CV414393	Ruby Gonzalez v. Collection Sites LLC	Motion to be relieved as counsel: parties to appear.

- oo0oo -

Calendar Line 3
Case Name: *Julia Minkowski v. James Hann et al.*
Case No.: 22CV398575

I. BACKGROUND

This is a legal malpractice action brought by plaintiff Julia Minkowski against defendant James Hann and his law firm, who represented Minkowski in a divorce case in Santa Clara County starting in 2019 (Case No. 19FL004302). The original complaint in this case, filed on May 24, 2022 while Minkowski was self-represented, stated claims for (1) Breach of Contract (a legal retainer agreement), (2) Legal Malpractice, and (3) Breach of Fiduciary Duty against Hann and the Hann Law Firm (collectively, "Hann"). The original complaint did not allege when Hann's representation ended.

A first amended complaint ("FAC"), filed on August 3, 2022 after Minkowski obtained legal representation, similarly stated claims against Hann for (1) Breach of Contract (now styled an Attorney-Client Fee Agreement), (2) Legal Malpractice, and (3) Breach of Fiduciary Duty. The FAC alleged that the representation ended "in or about May 2021." (FAC, ¶ 50.) The FAC further alleged that "Plaintiff became 'pro per' representing herself" on "May 25, 2021." (*Id.* at ¶ 75.) A copy of the "Attorney-Client Fee Agreement" was attached to the FAC as Exhibit A.

Hann demurred to the FAC, arguing that all three causes of action were time-barred under Code of Civil Procedure section 340.6, which sets forth a one-year limitations period. The court agreed, sustaining the demurrer with leave to amend.[1] The court's decision was based on Minkowski's allegation that she had been injured by Hann by March 3, 2021, as well as on the judicially noticed fact that Minkowski consented to Hann's withdrawal on May 10, 2021, ending any tolling of the limitations period. While noting that it had "doubts that any amendment to the FAC will change the conclusion that the causes of action are time-barred, given Minkowski's undisputed consent to Hann's withdrawal on May 10, 2021," the court granted Minkowski 20 days' leave to amend. (See January 18, 2024 Order, pp. 10:15-11:6.)

Minkowski filed the operative second amended complaint ("SAC") on February 7, 2024. It states the same three causes of action against both Hann defendants: (1) Breach of Contract (Attorney-Client Fee Agreement), (2) Legal Malpractice, and (3) Breach of Fiduciary Duty. The SAC again attaches a copy of the Attorney-Client Fee Agreement as Exhibit A. Attached as Exhibits B through F are copies of documents allegedly from Hann's files relating to the representation of Minkowski.

The SAC contradicts the FAC's allegation that Minkowski became self-represented on May 25, 2021. It now alleges that she became self-represented "in June 2021." (SAC, ¶¶ 52, 89.)

Currently before the court is Hann's demurrer to the SAC, filed on March 18, 2024.

---

[1] The court takes judicial notice of its January 18, 2024 order on its own motion under Evidence Code section 452, subdivision (d).

II. REQUEST FOR JUDICIAL NOTICE

Hann has submitted a request for judicial notice in support of the demurrer. "Judicial notice may not be taken of any matter unless authorized or required by law." (Evid. Code, § 450.) A precondition to judicial notice in either its permissive or mandatory forms is that the matter to be noticed be relevant to the material issue before the Court. (*Silverado Modjeska Recreation and Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 307, citing *People v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 422, fn. 2.) It is the court, and not the parties, that determines relevance. Evidence Code section 453, subdivision (b), requires a party seeking notice to "[furnish] the court with sufficient information to enable it to take judicial notice of the matter."

Hann submits seven documents (Exhibits A-G) under Evidence Code section 452, subdivision (d). (See Request at p. 1:17.) Exhibit A is a copy of the original complaint in this matter. Exhibit B is the FAC. Exhibit C is Hann's Notice of Demurrer and Demurrer to the FAC. Exhibit D is the court's January 18, 2024 order on the demurrer to the FAC. Exhibit E is the SAC. Exhibit F is a March 4, 2021 stipulation and order in Case No. 19FL004302 (the divorce case) that continues the trial date so that the parties can hire private judge Michael Smith to adjudicate all issues. Exhibit G is a copy of the substitution of attorney form filed in the divorce case on May 25, 2021 but signed by Minkowski on May 10, 2021.

The court grants judicial notice of Exhibits A, B, D, E, F, and G under Evidence Code section 452, subdivision (d). The court denies judicial notice of Exhibit C, as it is irrelevant to the material issues before the court.

III. DEMURRER TO THE SAC

A. General Standards on a Demurrer

The court, in ruling on a demurrer, treats it "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp*. (1983) 35 Cal.3d 197, 213-214.) Allegations are not accepted as true on demurrer if they contradict or are inconsistent with facts judicially noticed. (See *Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1474 [rejecting allegation contradicted by judicially noticed facts]; see also Witkin, *California Evidence* (5th Ed., 2012) 2 Judicial Notice §3(3) ["It has long been established in California that allegations in a pleading contrary to judicially noticed facts will be ineffectual; i.e., judicial notice operates against the pleader."].)

As the court previously determined in its January 18, 2024 order, the March 4, 2021 stipulation and order in Case No. 19FL004302 establishes that Minkowski suffered "actual injury" for purposes of Code of Civil Procedure section 340.6 by March 4, 2021 at the latest. It shows that Minkowski expressly consented to the appointment of a private judge and, once again, controls over the inconsistent allegation in the SAC that the appointment was made without her consent. (See SAC, ¶ 28.) Exhibit G establishes that Minkowski consented to

Hann's withdrawal as her counsel on May 10, 2021, ending any tolling of the section 340.6's one-year limitation period based on the concept of continuing representation.

Where, as here, a demurrer is to an amended complaint, the court "may consider the factual allegations of prior complaints, which a plaintiff may not discard or avoid by making contradictory averments, in a superseding, amended pleading." (*Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1034, internal quotations omitted; see also *Larson v. UHS of Rancho Springs, Inc*. (2014) 230 Cal.App.4th 336, 343 [noting "well-established precedent" allowing "courts to consider omitted and inconsistent allegations from earlier pleadings when ruling on a demurrer."]; *Doe v. United States Youth Soccer Assoc.* (2017) 8 Cal.App.5th 1118, 1122 [citing *Berg & Berg*].)

This means that the court can and does still consider the allegations in the FAC that, consistent with the judicially noticed March 4, 2021 stipulation and order, Minkowski suffered actual injury from Hann's alleged malpractice on March 3, 2021 based on Hann "wrongfully and erroneously" advising her to consent to the appointment of a temporary private judge, and the judge's alleged submission of inflated bills. (See FAC, ¶¶ 14, 24-26, 31, 42-48, 93-95, and 102-103.) These allegations control over the new allegations in the SAC (at ¶¶ 138-140) that Minkowski did not suffer any injury until the private judge in the divorce case recused himself on September 16, 2021. The court must also conclude that the allegation in the FAC that she became self-represented "on May 25, 2021" (FAC, ¶ 75) overcome any contrary allegations in the SAC of a June 2021 date or May 2022 date. (See SAC, ¶¶ 52, 89, 96-97.) "While inconsistent theories of recovery are permitted, a pleader cannot blow hot and cold as to the facts positively stated." (*Manti v. Gunari* (1970) 5 Cal.App.3d 442, 449.)

The court cannot consider extrinsic evidence in ruling on a demurrer. The court has considered the declaration of Dale Bellitto in support of the demurrer only to the extent that it discusses the meet-and-confer efforts required by statute. The court has not considered the attached exhibit.

B. Discussion

As with the FAC, Hann argues again that all three causes of action in the SAC fail to state sufficient facts because they are all time-barred by Code of Civil Procedure section 340.6. (See March 18, 2024 Notice of Demurrer and Demurrer, pp. 1:23-2:1.)

1. Section 340.6 Applies to the SAC in the Same Way it Applied to the FAC

As the court previously noted: "A complaint showing on its face the cause of action is barred by the statute of limitations is subject to general demurrer." (*Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 Cal.App.4th 990, 995.) The running of the statute must appear clearly and affirmatively from the dates alleged—it is not enough that the complaint might be barred. (*Committee for Green Foothills v. Santa Clara County Board of Supervisors* (2010) 48 Cal.4th 32, 42.) "Generally, the limitations period starts running when the last element of a cause of action is complete." (*NBCUniversal Media, LLC v. Super. Ct.* (2014) 225 Cal.App.4th 1222, 1231.)

Code of Civil Procedure section 340.6 states that an action against an attorney for a "wrongful act or omission, other than for actual fraud, arising in the performance of

professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date or the wrongful act or omission, whichever occurs first." The running of the statute shall be tolled during any of the following: "(1) The plaintiff has not sustained actual injury; (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred; (3) The attorney willfully conceals the wrongful act or omission occurred; and (4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action." "Actual injury" occurs "when the plaintiff suffers any loss or injury legally cognizable as damages in a legal malpractice action based on the asserted errors or omissions." (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 743, emphasis added.) "An existing injury is not contingent or speculative simply because future events may affect its permanency or the amount of monetary damages eventually incurred." (*Id.* at p. 754.)

The one-year statute of limitations in section 340.6 applies to all three causes of action in the SAC. "[S]ection 340.6 means exactly what it says: an action against an attorney for a wrongful act (except actual fraud) arising in the performance of professional services must be commenced within one year of discovery of the facts constituting the wrongful act." (*Bergstein v. Stroock & Stroock & Lavan LLP* (2015) 236 Cal.App.4th 793, 821.) "The words of the statute are quite broad, but they are not ambiguous: any time a plaintiff brings an action against an attorney and alleges that attorney engaged in a wrongful act or omission, other than fraud, in the attorney's performance of his or her legal services, that action must be commenced within a year after the plaintiff discovers, or should have discovered, the facts that comprise the wrongful act or omission." (*Yee v. Cheung* (2013) 220 Cal.App.4th 184, 194-195; see also *Connelly v. Bernstein* (2019) 33 Cal.App.5th 783, 789-798; *Garcia v. Rosenberg* (2019) 42 Cal.App.5th 1050, 1060.)

Minkowski has alleged that she suffered "actual injury" by March 3, 2021, as a result of Hann "wrongfully and erroneously" advising her to hire Michael Smith as a temporary judge in the divorce case. (See FAC, ¶¶ 14, 24-26, 31, 42-48, 93-95, 102-103, 117, and 126 [allegations that Smith improperly inflated his bills and was biased in his actions in favor of the lawyer for Minkowski's husband]; see also SAC, ¶¶ 14, 26, 28, 33, 45-47, and 50.)

The one-year limitations period is tolled while "[t]he attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred." (See Code Civ. Proc., § 340.6(a)(2).) In this case the "specific subject matter" was the divorce case. "Code of Civil Procedure section 340.6 does not expressly state a standard to determine when an attorney's representation of a client regarding a specific subject matter continues or when the representation ends, and the legislative history does not explicitly address this question." (*Gonzalez v. Kalu* (2006) 140 Cal.App.4th 21, 28 (*Gonzalez*); see also *Wang v Nesse* (2022) 81 Cal.App.5th 428, 439 (*Wang*), quoting *Gonzalez*.) "Ordinarily, an attorney's representation ends 'when the client discharges the attorney *or consents to a withdrawal*, the court consents to the attorney's withdrawal, or upon completion of the tasks for which the client retained the attorney.'" (*Wang*, *supra*, at 439, internal quotations marks omitted, emphasis added.) "'[T]he inquiry into when representation has terminated does not focus on the client's subjective beliefs about whether the attorney continues to represent him or her in the matter. Instead, the test is objective and focuses on the client's reasonable expectations in light of the particular facts of the attorney-client relationship.' In determining whether an attorney

continues to represent a client, 'we objectively examine 'evidence of an ongoing mutual relationship and of activities in furtherance of the relationship.' Representation ends 'when the client actually has or reasonably should have no expectation that the attorney will provide further legal services.'" (*Wang*, *supra*, at p. 440 [internal citations omitted].)

Once again, the judicially noticed substitution of counsel form in the divorce case (Exhibit G to Hann's current request for judicial notice) establishes that Minkowski expressly consented to Hann's withdrawal on May 10, 2021, and any tolling based on continuing representation ended at that point.

2. Minkowski's New Allegations and Arguments

The newly added allegations in the SAC regarding Hann's retention of the case file and further contacts between Minkowski and Hann after her express consent to Hann's withdrawal on May 10, 2021 do not alter this conclusion.

As an initial matter, allegations that Hann withheld the client file after the representation ended (SAC at ¶¶ 89-100) do not change the conclusion that any tolling of the one-year limitations period ended on May 10, 2021 when Minkowski expressly consented to Hann's withdrawal. As the court already noted in its prior order: "The transfer of the files was a clerical, ministerial activity . . . . Firm one's possession of client's files after November 8, 2012, and its transfer of the files on November 15, 2012, are not 'evidence of an ongoing mutual relationship.' (*Ibid.*) Nor do they constitute 'activities in furtherance of the relationship.' (*Ibid.*) The relationship ended no later than November 8, 2012, when client consented to firm one's withdrawal." (January 18, 2024 Order at p. 10:17-25 [quoting *Go-Tek Energy, Inc v. SoCal IP Law Group, LLP* (2016) 3 Cal.App.5th 1240, 1248].)

Allegations of sporadic communications between Hann and Minkowski after she expressly consented to the end of the attorney-client relationship also do not alter the conclusion that the representation, and any associated tolling, ended on May 10, 2021. (See SAC, ¶¶ 104-110.) These allegations do not describe "an ongoing *mutual* relationship and . . . activities in furtherance of the relationship." (*Wang*, *supra*, at p. 440 [emphasis in the original].)

Further, no alleged action or inaction by the court's Self-Help Center in June 2021 could resurrect an attorney-client relationship that had already ended by express consent or create a reasonable belief that Hann still represented Minkowski under the applicable objective standard. Nor do the allegations that an associate of the Hann Law Firm had not *personally* filed a notice of withdrawal after Minkowski had expressly consented to ending the attorney-client relationship on May 10, 2021. (See SAC, ¶¶ 111-116.) "[W]hether termination of representation has ended for purposes of section 340.6(a)2) does not depend on whether the attorney has formally withdrawn from representation, such as by securing a court order granting permission to withdraw. Section 340.6(a)(2) contains no such requirement, and courts have been unwilling to add language to the statute it does not contain." (*Nguyen v. Ford* (2020) 49 Cal.App.5th 1, 13.)

Additionally, allegations that Minkowski "continued to look to Defendants for guidance," even after she had retained limited scope representation elsewhere, do not establish

any continuing legal representation under an objective standard and do not toll the limitations period. (See SAC, ¶¶ 116-129.)

Finally, Minkowski's claim that she did not subjectively realize that she was harmed "until the private judge recused in September 2021" does not negate the allegation of "actual injury" by March 4, 2021 in the FAC; nor does it negate the court's prior finding that this constitutes the date of actual injury.

Thus, for essentially the same reasons that the court sustained the demurrer to the FAC, the court now SUSTAINS Hann's demurrer to all three causes of action in the SAC. The court also does so WITHOUT leave to amend.

Minkowski's opposition does not indicate how any further amendment could cure the time bar in this case. Instead, she simply states that "[i]f the SAC were somehow to be insufficient to overcome the statutes of limitation, Plaintiff should be granted, and requests time for discovery on the statutes of limitation and leave to amend based on additional evidence." (Opposition, p. 10:13-15.) This is not sufficient. "The onus is on the plaintiff to articulate the 'specifi[c] ways' to cure the identified defect, and absent such an articulation, a trial or appellate court may grant leave to amend 'only if a potentially effective amendment [is] both apparent and consistent with the plaintiff's theory of the case. [Citation.]'" (*Shaeffer v. Califia Farms, LLC* (2020) 44 Cal.App.5th 1125, 1145.) Given the judicially noticed facts and the prior factual allegations in the FAC that Minkowski cannot discard or avoid by making contradictory allegations, the court discerns no potentially effective amendment to the SAC. The court therefore denies further leave to amend.

- oo0oo -

Calendar Line 4
Case Name: *Aurel Foglein v. The Home Depot U.S.A., Inc. et al.*
Case No.: 22CV408205

I. BACKGROUND

This is a products liability action by plaintiff Aurel Foglein against defendants Home Depot U.S.A., Inc. ("Home Depot"), Tricam Industries, Inc. ("Tricam"), and various Doe defendants. Foglein filed his original complaint, a form complaint, on December 6, 2022 against Home Depot and "Trimark Companies LLC dba Gorilla Ladder." On January 11, 2023, Foglein dismissed "Trimark Companies LLC." He filed the operative first amended complaint ("FAC"), also a form complaint, on February 2, 2023, stating a single cause of action for products liability against Home Depot, Tricam, and Does 1-10.[2]

The narrative portion of the FAC's products liability attachment states that on November 20, 2020, "[a] Gorilla Ladder purchased from and manufactured by Defendants collapsed when being used properly by Plaintiff." (See FAC, Prod. L-1.)

Attachment 1 to the FAC further alleges: "It was not until early 2021 when Plaintiff saw another version of the Gorilla Ladder at Defendant's East Palo Alto, CA store that he realized it was faulty design which caused his ladder to collapse the year before and cause his injuries, due to the insecure placement and strength of its connecting bolts. The new version was much better designed and its bolts were sturdier and better placed to support the weight of the user, than the ladder he had purchased in 2020 and which had since been withdrawn from sale by Defendants." There are no exhibits attached to the FAC.[3]

Foglein dismissed this case the same day he filed the FAC, on February 2, 2023, but then the parties stipulated to set aside this dismissal, which the court signed on November 28, 2023. Currently before the court is a demurrer to the FAC by Home Depot and Tricam, filed on March 18, 2024. Foglein filed his opposition on March 25, 2024.

II. DEMURRER TO THE FAC

A. General Standards

The court, in ruling on a demurrer, treats it "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp*. (1983) 35 Cal.3d 197, 213-214.) A plaintiff is not ordinarily required to allege "'each

---

[2] While the FAC checks boxes for three different "counts," it alleges only one cause of action for products liability, given that there is only one attachment. The form complaint requires "a separate cause of action form for each cause of action."

[3] It is not clear from the FAC where Foglein purchased the original Gorilla Ladder, but if it was the East Palo Alto store (which is in San Mateo County), then that raises the question as to why this action has been brought in Santa Clara County.

evidentiary fact that might eventually form part of the plaintiff's proof . . . .' [Citation.]" (*Ferrick v. Santa Clara University* (2014) 231 Cal.App.4th 1337, 1341.) The allegations of the complaint must be liberally construed, with a view to substantial justice between the parties. (*Glennen v. Allergan, Inc*. (2016) 247 Cal.App.4th 1, 6.)

The court considers only the pleading under attack, any attached exhibits, and any facts or documents for which judicial notice is properly requested and may be granted. The court cannot consider extrinsic evidence in ruling on a demurrer or motion to strike. This includes declarations. The court has only considered the declaration of Zachary Tolson to the extent that it discusses the meet-and-confer efforts required by statute. The court has not considered the contents of the exhibit attached to this declaration.

Code of Civil Procedure section 430.60 states, "A demurrer shall distinctly specify the grounds upon which any of the objections to the complaint, cross-complaint, or answer are taken. Unless it does so, it may be disregarded." The rules of court also require that the demurrer itself specify the target of any objection and the grounds. (See Cal. Rules of Court, rule 3.1103(c), 3.1112(a), 3.1320(a) ["Each ground of demurrer must be in a separate paragraph and must state whether it applies to the entire complaint, cross-complaint, or answer, or to specified causes of action or defenses."]; see also 5 Witkin, *Cal. Procedure* (5th ed., 2019) Pleading, § 953 ["Each ground of demurrer must be in a separate paragraph and must state whether the demurrer applies to the entire complaint, cross-complaint, or answer, or to specified causes of action or defenses."].)

Finally, "points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before." (*Proctor v. Vishay Intertechnology, Inc*. (2013) 213 Cal.App.4th 1258, 1273; See also *REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489, 500 ["This court will not consider points raised for the first time in a reply brief for the obvious reason that opposing counsel has not been given the opportunity to address those points."].)

B. Discussion

The court SUSTAINS the demurrer with leave to amend, as follows.

Home Depot and Tricam contend that the FAC is "barred by California's two-year statute of limitations[,] and the 'discovery rule' does not render [Foglein's] claims timely." (Notice of Demurrer and Demurrer, pp. 1:26-2:1.) The demurrer itself fails to identify the statute of limitations relied upon, but the supporting memorandum identifies it as Code of Civil Procedure section 335.1. (Memorandum, pp. 2:25-3:7.) Section 335.1 states that "[a]n action for assault, battery, or injury to, or for the death of, an individual caused by the wrongful act or neglect of another," must be brought "[w]ithin two years." This is the statute of limitations applicable to products liability causes of action. (See *Fox v. Ethicon Endo-Surgery, Inc*. (2005) 35 Cal.4th 797, 809 fn. 3 ("*Fox*").)

"A complaint showing on its face the cause of action is barred by the statute of limitations is subject to general demurrer." (*Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 Cal.App.4th 990, 995.) The running of the statute must appear clearly and affirmatively from the dates alleged—it is not enough that the complaint *might* be barred. (*Committee for Green Foothills v. Santa Clara County Board of Supervisors* (2010) 48 Cal.4th

32, 42.) Here, Home Depot and Tricam assert that because the FAC admits that Foglein was injured on November 20, 2020 and the original complaint was not filed until December 6, 2022, the running of the two-year statute of limitations is apparent on the face of the FAC. (See Memorandum, p. 3:2-7.)

In his brief opposition, Foglein does not dispute that Code of Civil Procedure section 335.1 is the applicable statute of limitations or that the two-year limitations period appears to have run on the face of the original complaint and FAC. Nevertheless, he argues that the delayed discovery allegations of Attachment 1 to the FAC are sufficient to overcome the demurrer. The court ultimately concludes that this argument is not persuasive.

"Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her. The limitations period begins once the plaintiff has notice or information of circumstances to put a reasonable person on inquiry. A plaintiff need not be aware of the specific 'facts' necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. 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." (*Mills v. Forestex Co*. (2003) 108 Cal.App.4th 625, 642-643 [internal citations omitted].) "The fact that a plaintiff does not know the identity of each and every defendant who has caused the harm, does not toll the running of the statute of limitations. The identity of the defendant is not an element of the cause of action. Once a plaintiff is aware of the injury, the limitations period is presumed to afford sufficient opportunity to discover the identity of all the defendants." (*Burdette v. Carrier Corp*. (2008) 158 Cal.App.4th 1668, 1693 [internal citations omitted].)

"In order to rely on the discovery rule for delayed accrual of a cause of action, '[a] plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence.' In assessing the sufficiency of the allegations of delayed discovery, the court places the burden on the plaintiff to 'show diligence'; 'conclusory allegations will not withstand demurrer.'" (*Fox*, *supra*, 35 Cal.4th at 808, internal citations omitted; see also *E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1319, 1324-1325 [to be entitled to the benefit of the delayed discovery rule a plaintiff must specifically plead the time and manner of discovery and show the following: 1) the plaintiff had an excuse for late discovery; 2) the plaintiff was not at fault in discovering facts late; 3) the plaintiff did not have actual or presumptive knowledge to be put on inquiry; 4) the plaintiff was unable to make earlier discovery despite reasonable diligence].)

The perfunctory language in Attachment 1 to the FAC, quoted above, does not satisfy these requirements. It is not enough for Foglein to allege that he learned, serendipitously, that his injury from 2020 was caused by "defendant's negligence" when he happened to see a new model of the Gorilla Ladder in "early 2021" at a Home Depot store. (Opposition, p. 4:9-14.) As Home Depot and Tricam point out, he must still allege and show "diligence" in order to establish that that point in time—early 2021—is when the products liability claim should be deemed to have accrued. Otherwise, the logical import of Foglein's position is that he could have waited an unlimited and "indefinite period of time until [he saw] some feature or design that [he felt] would have avoided [the] incident, and thereby defeat the statute of limitations in

perpetuity." (Reply, p. 5:4-6.) It could have been 20 years later, and under Foglein's logic, the cause of action would only have begun to accrue at that point. The court cannot accept such an extreme position.

A plaintiff bears the burden of proving that an amendment would cure the defect in the cause of action identified on demurrer. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) Foglein does not meet this burden, as the opposition does not identify how his cause of action could be amended; in fact, the opposition does not even request leave to amend—it simply argues that the demurrer should be overruled. Although leave to amend could be denied on this basis alone (see *Shaeffer v. Califia Farms, LLC* (2020) 44 Cal.App.5th 1125, 1145 ["The onus is on the plaintiff to articulate the 'specifi[c] ways' to cure the identified defect, and absent such an articulation, a trial or appellate court may grant leave to amend 'only if a potentially effective amendment [is] both apparent and consistent with the plaintiff's theory of the case.'" [citation omitted]]), the court will grant 10 days' leave to amend, given that this is the first pleading challenge in this case.

The court reminds Foglein that when a demurrer is sustained with leave to amend, that leave must be construed as permission to the pleader to amend the causes of action to which the demurrer has been sustained, not to add entirely new causes of action. (*Patrick v. Alacer Corp.* (2008) 167 Cal.App.4th 995, 1015.) To raise claims entirely unrelated to those originally alleged requires either a new lawsuit or a noticed motion for leave to amend. In other words, the court does not grant leave to add new claims or parties—only to amend the delayed discovery allegations in Attachment 1 to the FAC.

- oo0oo -

Calendar Line 5
Case Name: *Susan Wallman v. Kia America, Inc.*
Case No.: 23CV416988

I. BACKGROUND

This is a "lemon law" action brought under the Song-Beverly Consumer Warranty Act by plaintiff Susan Wallman against defendant Kia Motors America, Inc. ("Kia") based on Wallman's acquisition of a 2017 Kia Sorrento that allegedly suffered from defects in its "Theta II" engine—*e.g.*, stalling while in operation and a non-collision engine fire, among other problems.

The original complaint "for statutory violations" was filed on May 30, 2023 and stated five causes of action: (1) Violation of Civil Code section 1793.2(d); (2) Violation of Civil Code section 1793.2(b); (3) Violation of Civil Code section 1793.2(a)(3); (4) Breach of the Implied Warranty of Merchantability; and (5) Fraud (*i.e.*, alleging that Kia committed fraud by allowing the subject vehicle to be sold "without disclosing that the Subject Vehicle and its 2.4L GDI engine was defective and susceptible to sudden and catastrophic failure"). (Complaint, ¶ 109.) There were no exhibits attached to the complaint.

According to the complaint, Wallman "leased and/or purchased" the subject vehicle. (Complaint, ¶¶ 57-58, 110c, 112, 113-114.) "On or about November 09, 2016, Plaintiff entered into a warranty contract with Defendant regarding a 2017 Kia Sorrento . . . which was manufactured and or distributed by Defendant." (*Id*. at ¶ 6.) This contract allegedly included a "bumper to bumper warranty," a "powertrain warranty," and an "emissions warranty." (See Complaint at ¶ 7.) Wallman stated that she acquired the vehicle on November 9, 2016. (*Id*. at ¶ 6.)

Kia filed a demurrer to and motion to strike portions of the complaint, which was heard by the court on February 1, 2024. In a written order issued that same day, the court overruled the demurrer as to all five causes of action on uncertainty grounds, sustained the demurrer to the first, second, and third causes of action on statute of limitations grounds, with leave to amend, sustained the demurrer to the fourth cause of action for failure to state sufficient facts, with leave to amend, and sustained the demurrer to the fifth cause of action on statute of limitations grounds only (rejecting arguments that it was barred by the economic loss rule and was not pled with sufficient specificity), with leave to amend. The court denied the motion to strike, largely on the basis that it was moot, considering the rulings on the demurrer.[4]

The operative first amended complaint ("FAC") for "violation of statutory obligations" was filed on February 9, 2024. The FAC states the same five causes of action. A copy of the written warranty agreement is attached to the FAC as Exhibit A. The FAC again alleges that Wallman entered into the warranty contract on November 9, 2016. (See FAC, ¶ 25.) Wallman has admitted in her opposition to the prior demurrer and the current opposition that this was also the date she acquired the subject vehicle. Her original complaint was filed more than six years later.

---

[4] The court takes judicial notice of the February 1, 2024 order on its own motion, pursuant to Evidence Code section 452, subdivision (d).

Currently before the court is Kia's demurrer to the FAC, filed on March 12, 2024.[5] Wallman's tardy opposition was filed on May 30, 2024, one day after the deadline. The court has exercised its discretion to consider the late opposition.

II. DEMURRER TO THE FAC

A. General Standards

The court, in ruling on a demurrer, treats it "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688 (*Piccinini*), citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp*. (1983) 35 Cal.3d 197, 213-214.) A plaintiff is not ordinarily required to allege "'each evidentiary fact that might eventually form part of the plaintiff's proof . . . .' [Citation.]" (*Ferrick v. Santa Clara University* (2014) 231 Cal.App.4th 1337, 1341.)

The court considers only the pleading under attack, any attached exhibits, and any facts or documents for which judicial notice is properly requested. Where, as here, a demurrer is to an amended complaint, the court "may consider the factual allegations of prior complaints, which a plaintiff may not discard or avoid by making contradictory averments, in a superseding, amended pleading." (*Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1034, internal quotations omitted; see also *Larson v. UHS of Rancho Springs, Inc*. (2014) 230 Cal.App.4th 336, 343 [noting "well-established precedent" allowing "courts to consider omitted and inconsistent allegations from earlier pleadings when ruling on a demurrer."]; *Doe v. United States Youth Soccer Assoc.* (2017) 8 Cal.App.5th 1118, 1122 [citing *Berg & Berg*].)

The court cannot consider extrinsic evidence in ruling on a demurrer. The court has therefore considered the declaration of Mariah Emmons only to the extent that it discusses the meet-and-confer efforts required by statute. The court has not considered the attached exhibit.

Under Code of Civil Procedure section 430.41(b), "A party demurring to a pleading that has been amended after a demurrer to an earlier version of the pleading was sustained shall not demur to any portion of the amended complaint, cross-complaint, or answer on grounds that could have been raised by demurrer to the earlier version of the complaint, cross-complaint, or answer."

Under Code of Civil Procedure section 430.60, "A demurrer shall distinctly specify the grounds upon which any of the objections to the complaint, cross-complaint, or answer are taken. Unless it does so, it may be disregarded." The rules of court also require that that the demurrer itself (distinct from a supporting memorandum) specify the target of any objection

---

[5] Kia also attempted to file a motion to strike but this was rejected by the clerks' office on March 12, and Kia made no attempt to refile. Accordingly, the court does not have a copy of the motion to strike or its supporting memorandum. The court has received an opposition and reply brief to the motion to strike, but without an opening motion, the court cannot do anything with these papers.

and the grounds. (See Cal. Rules of Court, rules 3.1103(c), 3.1112(a), 3.1320(a) ["Each ground of demurrer must be in a separate paragraph and must state whether it applies to the entire complaint, cross-complaint, or answer, or to specified causes of action or defenses."]; see also 5 Witkin, *Cal. Procedure* (5th ed., 2019) Pleading § 953 ["Each ground of demurrer must be in a separate paragraph and must state whether the demurrer applies to the entire complaint, cross-complaint, or answer, or to specified causes of action or defenses."].)

B. Summary of Kia's Demurrer

Kia makes several challenges to the FAC. It repeats the prior demurrer to the first, second, and fifth causes of action on the already overruled ground of uncertainty. It once again contends that the first, second, and third causes of action alleging violations of the Song-Beverly Act are time-barred by the four-year statute of limitations in California Uniform Commercial Code section 2725, subdivision (1). It also argues that the first and second causes of action fail to state sufficient facts because Wallman "had not made a pleading adequately describing a contract/warranty." (See Notice of Demurrer and Demurrer, p. 2:11-26.) It contends that the third cause of action fails to state sufficient facts because it fails to identify "any facility relevant to Plaintiff's claims" and does not identify what "literature or replacement parts" were unavailable." (See Notice, p. 3:2-4.)

Kia attempts, for the first time, to argue that the fourth cause of action is also time-barred by Uniform Commercial Code section 2725, subdivision (1). It also argues once again that the fourth cause of action fails to state sufficient facts because it "does not plead specific facts to support the allegation that vehicle was not merchantable, as defined under Civ. Code § 1792.1, at the time of purchase or within one year thereafter." (See Notice, p. 3:10-20.)

Kia contends that the fifth cause of action fails to state sufficient facts because it does not adequately plead a fraud claim against a corporate defendant, it fails "to establish the existence of a duty to disclose and further fails to allege any damages independent of the breach of warranty." It also contends that the fifth cause of action is time-barred under the three-year limitations period set forth in Code of Civil Procedure section 338(d). (See Notice of Demurrer, pp. 3:23-4:3.)

C. Discussion

1. Uncertainty

"'[D]emurrers for uncertainty are disfavored, and are granted only if the pleading is so incomprehensible that a defendant cannot reasonably respond.' 'A demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures.'" (*A.J. Fistes Corp. v. GDL Best Contractors, Inc.* (2019) 38 Cal.App.5th 677, 695, internal citations omitted.)

Kia's demurrer to the FAC's first, second, and fifth causes of action on the ground of uncertainty is OVERRULED for the second time. It is distinctly improper for a party to make a repeat demurrer on a ground that was previously overruled.

2. Failure to State Sufficient Facts

a) The Song-Beverly Act (First, Second, and Third Causes of Action)

Kia argues that the "Song-Beverly claims," which it now contends also include the fourth cause of action, are time-barred under the four-year statute of limitations in California Uniform Commercial Code ("UCC") section 2725, subdivision (1).

"A complaint showing on its face the cause of action is barred by the statute of limitations is subject to general demurrer." (*Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 Cal.App.4th 990, 995.) The running of the statute must appear clearly and affirmatively from the dates alleged—it is not enough that the complaint *might* be barred. (*Committee for Green Foothills v. Santa Clara County Board of Supervisors* (2010) 48 Cal.4th 32, 42.) "Generally, the limitations period starts running when the last element of a cause of action is complete." (*NBCUniversal Media, LLC v. Super. Ct.* (2014) 225 Cal.App.4th 1222, 1231.)

A claim under the Song-Beverly Act is governed by the four-year limitations period for breach of warranty in sales contracts set forth in UCC section 2725. (*Jensen v. BMW of North America, Inc*. (1995) 35 Cal.App.4th 112, 132; *Krieger v. Nick Alexander Imports, Inc*. (1991) 234 Cal.App.3d 205, 213-215 [holding that the special statute of limitations in UCC section 2725, which specifically governs actions for breach of warranty in a sales contract, controls over the general provisions of Code of Civil Procedure section 338(a) in warranty cases].) UCC section 2725, subdivision (1), states that, "[a]n action for breach of contract for sale must be commenced within four years after the cause of action has accrued." Section 2725, subdivision (2), further provides that "[a] cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach." (U. Com. Code, § 2725, subd. (1) & (2).) "A breach of warranty occurs when tender of delivery is made, *except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the times of such performance the cause of action accrues when the breach is or should have been discovered*." (U. Com. Code, § 2725, subd. (2), emphasis added.)

The italicized language above is often referred to as the "future performance" exception. This exception is narrowly construed and applies "only when the seller has expressly agreed to warrant its product for a specific and defined period of time." (*Cardinal Health 301, Inc. v. Tyco Electronics Corp*. (2008) 169 Cal.App.4th 116, 130 (*Cardinal*); see *Carrau v. Marvin Lumber & Cadar Co*. (2001) 93 Cal.App.4th 281, 291 [stating that where an express warranty is made that extends for a specific period of time, "the policy reasons behind strict application of the limitations period do not apply . . ."].) Nevertheless, "the argument that a warranty necessarily extends to future performance merely because it contains promises regarding the manner in which the goods will perform after tender of deliver[y]" has been rejected by the courts. (*Cardinal*, *supra*, 169 Cal.App.4th at p. 131.) Moreover, "[b]ecause an implied warranty is one that arises by operation of law rather than by an express agreement of the parties, courts have consistently held it is not a warranty that explicitly extends to future performance of the goods . . . ." (*Id*., at p. 134, internal citations and quotations omitted.)

The court SUSTAINS the demurrer to the first, second, and third causes of action, without leave to amend, on the ground that they are time-barred under Commercial Code section 2725, as follows.

Both the original complaint and the FAC admit that Wallman entered into a warranty contract with Kia on or about November 9, 2016, the same date she acquired the subject vehicle. (See Opposition, p. 5:7-8.) The original complaint was not filed until May 30, 2023, over six years later, making apparent a statute of limitations defense to the first, second, and third causes of action on their face.

"When a plaintiff relies on a theory of fraudulent concealment, delayed accrual, equitable tolling, or estoppel to save a cause of action that otherwise appears on its face to be time-barred, he or she must specifically plead facts which, if proved, would support the theory." (*Mills v. Forestex Co*. (2003) 108 Cal App 4th 625, 641 (*Mills*).) "In order to rely on the discovery rule for delayed accrual of a cause of action, '[a] plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence.' In assessing the sufficiency of the allegations of delayed discovery, the court places the burden on the plaintiff to 'show diligence'; '*conclusory allegations will not withstand demurrer*.'" (*Fox v. Ethicon Endo-Surgery, Inc*. (2005) 35 Cal.4th 797, 808 [internal citations omitted, emphasis added] (*Fox*).) To be entitled to the benefit of the delayed discovery rule, a plaintiff must specifically plead the time and manner of discovery and show the following: 1) the plaintiff had an excuse for late discovery; 2) the plaintiff was not at fault in discovering facts late; 3) the plaintiff did not have actual or presumptive knowledge to be put on inquiry; and 4) the plaintiff was unable to make earlier discovery despite reasonable diligence. (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1319, 1324-1325 (*E-Fab*).)

The present opposition brief repeats the arguments from the opposition to the prior demurrer, claiming that the FAC does not "affirmatively disclose" a statute of limitations defense and that it has "specifically" pleaded tolling. (See Opposition, pp. 2:15-2:13, 6:4-19.)

As noted above, the FAC discloses a statute of limitations defense on its face, and Wallman has still failed to comply with the pleading requirements for delayed discovery, as set forth in *Mills, Fox*, and *E-Fab*, *supra*, despite the court's prior order addressing the issue. The allegations in paragraphs 7, 11, 12, 14, 50 and 113c of the FAC remain inadequate to establish a claim of delayed discovery by Wallman.

As was the case with the original complaint, the various tolling allegations in the FAC (at ¶¶ 6-24) are "so bland, generic and conclusory that they are legal and factual conclusions that cannot be accepted as true on demurrer." (Feb. 1, 2024 Order, p. 7:11-13 [citing *Piccinini*, *supra*, 226 Cal.App.4th at p. 688].) Although additional portions of the subject vehicle's repair history have been added in the FAC (see ¶¶ 42-47) these continue to be "so generic and repetitive in nature that they fail to rebut the statute of limitations issue." (Feb. 1, 2024 Order, p. 7:9-10.) Indeed, it is obvious that a number of these paragraphs have been cut and pasted from other pleadings in other cases—for example, when it refers to Wallman as "Plaintiffs." (E.g., FAC, ¶¶ 11-14, 18-23.) More critically, the FAC fails to explain when and how Wallman discovered Kia's allegedly wrongful conduct—the generic allegation that she did so "shortly before filing this Complaint as the Subject Vehicle continued to exhibit symptoms of

the defects following Defendant's unsuccessful attempts to repair them" is glaringly insufficient. (FAC, ¶ 50.) While the court sustains the demurrer on statute of limitations grounds, it also finds that the first, second, and third causes of action are also—still—not alleged with the level of detail required for statutory claims. (See *Lopez v. Southern California Rapid Transit District* (1985) 40 Cal.3d 780, 795; *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790.)

A plaintiff bears the burden of demonstrating that an amendment would cure the defect identified on demurrer. (See *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081; *Shaeffer v. Califia Farms, LLC* (2020) 44 Cal.App.5th 1125, 1145 ["The onus is on the plaintiff to articulate the 'specifi[c] ways' to cure the identified defect, and absent such an articulation, a trial or appellate court may grant leave to amend 'only if a potentially effective amendment [is] both apparent and consistent with the plaintiff's theory of the case. [Citation.]'"].) Wallman again fails to meet this burden, and simply asks for leave to amend "if the Court believes that Plaintiff has failed in adequately alleging these facts and demonstrating causes of action for relief against Kia." (Opposition, p. 7:19-27.)

Given that Wallman has already had multiple opportunities to allege delayed discovery or tolling, and to allege these claims with the level of detail required for statutory causes of action, the court determines that there is no basis for granting further leave to amend as to the first, second, and third causes of action.

b) Fourth Cause of Action (Implied Warranty of Merchantability)

The court OVERRULES Kia's demurrer to the fourth cause of action on statute of limitations grounds, as that challenge is plainly barred by Code of Civil Procedure section 430.41(b) (as Wallman points out). Having chosen not to demur to the fourth cause of action on statute of limitations ground in the prior demurrer, Kia cannot do so now.[6]

The court SUSTAINS Kia's demurrer to the fourth cause of action on the ground that it fails to state sufficient facts, as follows.

The fourth cause of action alleges that "[a]t the time of sale, the subject vehicle contained one or more latent defect(s) set forth above. The existence of the said defect(s) constitutes a breach of the implied warranty because the Vehicle (1) does not pass without objection in the trade under the contract description, (2) is not fit for the ordinary purposes for which such goods are used, (3) is not adequately contained, packaged and labelled, and (4) does not conform to the promises or affirmations of fact made on the contained or label." (FAC, ¶ 108.)

"Under the implied merchantability warranty, 'every sale of consumer goods that are sold at retail in this state shall be accompanied by the manufacturer's and the retail seller's implied warranty that the goods are merchantable.'" (*Brand v. Hyundai Motor America* (2014) 226 Cal.App.4th 1538, 1545 [quoting Civ. Code, § 1792].) "The warranty '"arises by operation of law"' and therefore applies despite its omission from a purchase contract.

---

[6] The reply brief does not acknowledge, much less address, the application of section 430.41(b) to this ground for demurrer to the fourth cause of action.

[Citations.]" (*Id.*) "Merchantability, as pertinent here, means that the goods '[p]ass without objection in the trade under the contract description,' and are 'fit for the ordinary purposes for which such goods are used.'" (*Ibid.*, quoting Civ. Code, § 1791.1, subd. (a).) To assert a proper breach of implied warranty claim, a plaintiff must allege a breach of warranty, occurring while the warranty is valid, and bring suit within the limitations period. (See *Mexia v. Rinker Boat Co., Inc.* (2009) 174 Cal.App.4th 1297, 1306 (*Mexia*).) The "implied warranty of merchantability may be breached by a latent defect undiscoverable at the time of sale." (*Id.* at p. 1304.) Thus, if a product is sold with a latent defect, the implied warranty is breached 'by the existence of the unseen defect, not by its subsequent discovery." (*Id.* at p. 1305.)

Kia argues here (once again) that the fourth cause of action "does not plead specific facts to support the allegation that the vehicle was not merchantable, as defined under Civ. Code § 1792.1, at the time of purchase or within one year thereafter." (See Notice of Demurrer, p. 3:10-20; Memorandum, p. 5:17-19.)

In response, Wallman argues briefly that the FAC's repair allegations adequately support the claim. (See Opposition, p. 7:3-17.) The court does not agree. As noted above with respect to the first, second, and third causes of action, the allegations in the FAC regarding the repair history of the subject vehicle continue to be too "generic and repetitive in nature" to state adequate claims for statutory violations, including the alleged violations of Civil Code sections 1791.1, 1794, and 1795.5, upon which the fourth cause of action is based. (See FAC, ¶¶ 106-109.) The alleged absence of merchantability in the automobile at issue cannot be inferred based solely on these generic allegations.

While not directly relevant to whether the fourth cause of action states sufficient facts, the opposition also continues to misconstrue the *Mexia* decision by claiming that it allows for delayed discovery of a breach of an implied warranty claim.[7] (See Opposition, pp. 3:25-5:3.) This is incorrect; "cases are not authority for propositions not considered." (*People v. Ault* (2004) 33 Cal.4th 1250, 1268 fn. 10.))

As the opposition fails to demonstrate how the fourth cause of action could be further amended to state sufficient facts, and no potentially effective amendment is apparent to the court, further leave to amend is DENIED.

c) Fraud by Omission (Fifth Cause of Action)

"The elements of fraudulent concealment are: (1) the defendant concealed or suppressed a material fact; (2) the defendant was under a duty to disclose the fact to the plaintiff; (3) the defendant intentionally concealed or suppressed the fact with the intent to defraud the plaintiff; (4) the plaintiff was unaware of the fact and would not have acted as he or she did if the plaintiff had known of the concealed or suppressed fact; and (5) as a result of the

---

[7] *Mexia* held that latent defects that exist in the first year after tender of delivery, even if they do not manifest until after the first year, can be a basis for a breach of implied warranty claim, so long as the claim is filed within four years of the date of sale. (*Mexia*, *supra*, 174 Cal.App.4th at pp. 1306-1307.) It cannot be read as stating that a breach of implied warranty claim accrues upon discovery of the alleged breach. *Mexia* did not articulate or purport to apply a delayed discovery rule, because resort to such a rule was unnecessary in that case: the action was filed within four years of the date of purchase of the item (a boat) that contained the latent defect. Here, Wallman's complaint was *not* filed within four years of her acquiring the subject vehicle.

concealment or suppression of the fact, the plaintiff sustained damage." (*Burch v. CertainTeed Corp*. (2019) 34 Cal.App.5th 341, 348, citing *Bigler-Engler v. Breg, Inc*. (2017) 7 Cal.App.5th 276, 310-311 (*Bigler*).) "With respect to concealment, 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. The latter three circumstances presuppose the existence of some other relationship between the plaintiff and defendant in which a duty to disclose can arise. This relationship has been described as a transaction, such as that between seller and buyer, employer and prospective employee, doctor and patient, or parties entering into any kind of contractual arrangement." (*Id*. at pp. 349-350, internal quotations and citations omitted.)

Kia once again first argues that the fifth cause of action is time-barred under the three-year statute of limitations in Code of Civil Procedure section 338, subdivision (d). Under that statute, a claim for fraud accrues, thereby triggering the three-year limitations period, on the date of "discovery, by the aggrieved party, of the facts constituting the fraud." (Code Civ. Proc., § 338(d); *Britton v. Girardi* (2015) 235 Cal.App.4th 721, 734.) The facts constituting the fraud here are the sale of the subject vehicle to Wallman in November 2016 without disclosure of the engine defect allegedly known to Kia.

"'Although the statute does not expressly provide that the claim will accrue based upon either actual or inquiry notice of the claimant, California courts have long construed it in such a fashion.' As our Supreme Court has long held, under Code of Civil Procedure section 338, subdivision (d), a 'plaintiff must affirmatively excuse his [or her] failure to discover the fraud [or mistake] within three years after it took place, by establishing facts showing that he [or she] was not negligent in failing to make the discovery sooner and that he [or she] had no actual or presumptive knowledge of facts sufficient to put him [or her] on inquiry.'" (*Krolikowski v. San Diego City Employees' Retirement System* (2018) 24 Cal.App.5th 537, 561-562 [internal citations omitted].)

The opposition in turn again argues that the fifth cause of action is not time-barred because the FAC now adequately alleges delayed discovery and/or various forms of tolling. (See Opposition, pp. 5:4-6:19.) This is not persuasive; as discussed above, the delayed discovery and tolling allegations in the FAC continue to be boilerplate text that fails to allege specific facts describing Wallman's discovery of the alleged fraud as required by the *Mills, Fox* and *E-Fab* decisions. The demurrer to the fifth cause of action on statute of limitation grounds is therefore again SUSTAINED.

As the opposition fails to demonstrate how the fifth cause of action could be further amended to adequately allege delayed discovery or tolling, and no potentially effective amendment is apparent to the court, further leave to amend is DENIED.

- oo0oo -

Calendar Line 6
Case Name: *Chinh Nguyen v. Expert Home Builders, Inc.*
Case No.: 22CV399647

This is a motion to compel the person-most knowledgeable ("PMK") deposition of defendant Expert Home Builders, Inc. ("EHB") It appears that counsel for EHB first proposed dates for the deposition to counsel for plaintiff Chinh Nguyen after this motion was filed. The parties then agreed to conduct the deposition on May 21, 2024, but then because of an "emergency," EHB's witness had to request a postponement. Since then, the parties have been unable to find a date that works for both sides. In its opposition, EHB states that its most recent proposals were for either June 3, 2024 (which did not work for Nguyen's counsel) or June 24, 2024. In the reply brief, Nguyen does not clearly state one way or the other whether this June 24, 2024 date would work, only that EHB "have [sic] not yet confirmed a new date on any of the dates proposed by Plaintiff's counsel." That is a vague statement that is meaningless to the court.

The court finds that both sides have been unnecessarily inflexible in scheduling this deposition, and that it is truly lamentable that the parties have brought this scheduling dispute to the court. The court finds that EHB has unduly dragged its feet in offering dates for its PMK witness; at the same time, the court finds that Nguyen's efforts to meet and confer on all of the depositions in this case reflect an undue amount of posturing and rigidity. For example, the court takes a dim view of Nguyen's counsel's missive on December 11, 2024 regarding Rusti Blu's deposition: "If we do not reach a mutually agreeable deposition date for Rusti Blu by Friday, December 15, I will once again unilaterally schedule and will not then agree to change it." (DeMason Declaration, Exhibit D.) This does not reflect a good-faith effort to meet and confer.

The court orders that the deposition take place either on **June 24, 2024**, as suggested by EHB, or on a mutually agreeable date in **July 2024**, but no later. If June 24 does not work for Nguyen's counsel, then EHB shall propose **at least three non-consecutive weekdays** in July, and Nguyen shall select one of them. The court denies Nguyen's request for monetary sanctions.

GRANTED IN PART and DENIED IN PART.

- oo0oo -

Calendar Line 7
Case Name: *Mahesh Anand Karoshi v. City of Campbell*
Case No.: 22CV408411

Defendant City of Campbell (the "City") moves to compel a further response to an inspection demand that calls for the production of an audio recording of the medical examination conducted in this case. Plaintiff Mahesh Anand Karoshi opposes, arguing that the recording is protected from disclosure by the Civil Discovery Act—specifically, Code of Civil Procedure section 2032.510—as well as the attorney work product doctrine. The court concludes that Karoshi's objections are not well taken and that the recording is in fact discoverable. For the reasons that follow, the court grants the motion.

First, the court finds that the recording of the medical examination constitutes potentially relevant evidence. It may not be the most probative evidence of the examination—that is usually the doctor's report—and it may not even be admissible at trial (the court makes no determination as to admissibility here), but it is still corroborative of what occurred at the examination and is therefore discoverable. Balanced against the relatively low probative value of the recording is the fact that there is zero burden to Karoshi in producing it to the City. In addition, Karoshi identifies no privacy interest that would be implicated by its production in this case. To the extent that Karoshi believes that it contains confidential information or that there is some risk posed by wider dissemination, he can produce the recording subject to a stipulated protective order.

Second, contrary to Karoshi's contentions, the plain language of Code of Civil Procedure section 2032.510 does not place any limit on dissemination or discovery of any recording. To be sure, section 2032.510 makes it clear that only the examinee's attorney or representative can elect to make an audio recording of the medical examination—the party requesting the examination cannot force the examinee to be recorded—but once the examinee makes that election, there is nothing in section 2032.510 that serves to limit discoverability. Karoshi repeatedly emphasizes that the purpose of allowing only the examinee to choose to record the examination is "'to protect the plaintiff and insure the integrity of the reporting process.'" (Opposition, p. 3:9-10 [quoting *Edmiston v. Superior Court* (1978) 22 Cal.3d 699, 703].) The examinee's ability to record "serves to protect the examinee from the defense doctor conducting the examination" and "protect[s] laypersons from medical and legal overreach." (Opposition, pp. 3:21-22, 5:12-13.) But this is precisely why the recording should be available to both sides, if one is made. If a plaintiff were to claim that the "defense doctor" acted improperly or misrepresented the examination in the medical report, and the plaintiff relied on the recording to make this claim, then fairness would dictate that the defense have access to the recording, as well. The fact that the statutory language was designed to protect plaintiffs and provide them with an additional resource against potential abuse is an argument *in favor of* discoverability, not against it.

Third, the court rejects out of hand Karoshi's absurd contention that the recording is protected by the work product doctrine. There is nothing about a medical examination that makes it the "work product" of an attorney. It does not contain any mental "impressions, conclusions, opinions, or legal research or theories" of that attorney. (Code Civ. Proc., § 2018.030, subd. (a).) Moreover, the notion that the examination—performed by a doctor at the behest of the *opposing* attorney—can somehow be the *examinee* attorney's work product is counterintuitive and nonsensical.

Fourth, Karoshi claims that "other courts" have ruled in support of non-disclosure of IME recordings, but it attaches only one trial court tentative ruling from Los Angeles County. (Mahmood Declaration, Exhibit 3.) Given that there is no such thing as "horizontal stare decisis" in the state trial courts, this decision is not binding authority. Indeed, it is not even a final order. Further, the undersigned respectfully disagrees with the conclusion in the Los Angeles court's tentative ruling that "the Court . . . does not have the authority under the Discovery Act to compel the production of the audio recording or transcript." Under Code of Civil Procedure section 2017.010, the court may order discovery of "any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence . . . ." In other words, everything that is relevant to the subject matter is presumed to be discoverable. As noted above, the court has already concluded that the recording is potentially relevant.

The motion is GRANTED. The court orders Karoshi to supplement its written RFP response and produce the recording within 15 days of notice of entry of this order.

- oo0oo -