

**SUPERIOR COURT, STATE OF CALIFORNIA  
COUNTY OF SANTA CLARA**

**Department 6, Honorable Theodore C. Zayner Presiding**

Maggie Castellon, Courtroom Clerk

TBA, Court Reporter

191 North First Street, San Jose, CA 95113

Telephone: 408-882-2160

**To contest the ruling, call (408) 808-6856 before 4:00 P.M.**

**LAW AND MOTION TENTATIVE RULINGS  
FOR DEPARTMENT 8**

**DATE: 1-22-19      TIME: 9 A.M.**

**PREVAILING PARTY SHALL PREPARE THE ORDER**

(SEE [RULE OF COURT 3.1312](#) – PROPOSED ORDER MUST BE E-FILED BY  
COUNSEL AND SUBMITTED PER 3.1312(C))

**EFFECTIVE JULY 24, 2017, THE COURT WILL NO LONGER PROVIDE  
OFFICIAL COURT REPORTERS FOR LAW AND MOTION HEARINGS.  
SEE COURT WEBSITE FOR POLICY AND FORMS.**

**TROUBLESHOOTING TENTATIVE RULINGS**

If you do not see this week's tentative rulings, either they have not yet been posted, or your web browser cache (temporary internet files) is pulling up an older version. You may need to "REFRESH", or "QUIT" your browser and reopen it – or adjust your internet settings so you only see the current version of the web page. Otherwise, your browser may continue to show an older version of the web page even after the current tentative rulings have been posted.

<b>LINE #</b>	<b>CASE #</b>	<b>CASE TITLE</b>	<b>RULING</b>
<a href="#">LINE 1</a>	18CV334358	Quezada v General Motors LLC	Control/Click <a href="#">Line 1</a> for tentative ruling.
<a href="#">LINE 2</a>	18CV334358	Quezada v General Motors LLC	Control/Click <a href="#">Line 1</a> for tentative ruling.
<a href="#">LINE 3</a>	18CV329716	Kravchuk v KB Home	Control/Click <a href="#">Line 3</a> for tentative ruling.
<a href="#">LINE 4</a>	18CV329716	Kravchuk v KB Home	Control/Click <a href="#">Line 3</a> for tentative ruling.
<a href="#">LINE 5</a>	2015-1-CV-276252	Rajaratnam v Saller	Continued to 1/31/19 at 9 a.m. in Department 8.
<a href="#">LINE 6</a>	2015-1-CV-276252	Rajaratnam v Saller	Continued to 1/31/19 at 9 a.m. in Department 8.
<a href="#">LINE 7</a>	2015-1-CV-276252	Rajaratnam v Saller	Continued to 1/31/19 at 9 a.m. in Department 8.

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**LAW AND MOTION TENTATIVE RULINGS  
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<a href="#">LINE 8</a>	17CV316504	San Jose Nihonmachi LLC v Miraido Corporation et al	Plaintiff/Cross-Defendant's motion for attorney's fees under CCP §425.16 is GRANTED, in part. As moving party prevailed only in part on its prior 425.16 motion, a partial award of fees allegedly incurred is warranted. (See: Malin v. Singer (2013) 217 Cal.App.4 <sup>th</sup> 1283.) The Court awards \$10,300 as moving party prevailed on only one of three causes of action.
<a href="#">LINE 9</a>	17CV316504	San Jose Nihonmachi LLC v Miraido Corporation et al	Motion to stay 5 <sup>th</sup> cause of action asserted in cross-complaint and compel arbitration of this claim is GRANTED. Opposition relies solely on alleged waiver of arbitration, which the court does not find on the facts presented. The parties do not dispute the existence of the arbitration agreement nor its applicability to this cause of action. The 5 <sup>th</sup> cause of action only is therefore stayed while the case proceeds in this court.
<a href="#">LINE 10</a>	17CV320438	Ternian v Ternian	Control/Click <a href="#">Line 10</a> for tentative ruling.
<a href="#">LINE 11</a>	18CV337059	Gucinski v Ramesh	Petition to compel mediation and arbitration according to the contract between the parties, and for contractual attorney's fees is unopposed and is GRANTED. Although the filed petition and documents do not include the referenced exhibits, the verified petition and lack of opposition where counsel has acknowledged receipt on behalf of respondents is sufficient to grant the petition. \$2,935 in attorney's fees and costs is awarded (5 hours @ \$500 + \$435).

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**LAW AND MOTION TENTATIVE RULINGS  
FOR DEPARTMENT 8**

<a href="#">LINE 12</a>	2013-1-CV-256987	Cach, LLC v Alemu	Defendant's motion to set aside default judgment entered February 13, 2014 is DENIED as untimely under Code of Civil Procedure §473(b). Motion is also brought untimely under §473.5.
<a href="#">LINE 13</a>			
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## Calendar lines 1 – 2

**Case Name:** *Quezada v. General Motors, LLC*

**Case No.:** 18CV334358

Defendant General Motors, LLC demurs to the complaint (“Complaint”) filed by plaintiff Guadalupe Quezada and moves to strike portions contained therein.

### **I. Factual and Procedural Background**

This is a lemon law action brought by plaintiff Guadalupe Quezada (“Plaintiff”) against defendant General Motors, LLC (“Defendant”). According to the allegations of the Complaint, on January 1, 2012, Plaintiff purchased a 2012 GMC Acadia (the “Vehicle”), which was manufactured and/or distributed by Defendant. (Complaint, ¶ 6.) In connection with the purchase, Plaintiff received an express warranty pursuant to which Defendant was to preserve or maintain the Vehicle’s utility or performance, or provide compensation in the case of failure to either for a specified period of time. (*Id.*, ¶ 7.) The warranty further provided that in the event a defect developed with the Vehicle during the warranty period, Plaintiff could deliver the Vehicle for repair services to Defendant’s representative and it would be repaired. (*Id.*)

During the warranty period, the Vehicle contained or developed numerous defects relating but not limited to the following: the steering system; the cooling system; the engine; the seatbelts; the air conditioning system; the suspension system; and the breaks. (Complaint, ¶ 8.) Defendant knew since 2010, if not earlier, that the 2009-1012 GMC Acadia vehicles contained one or more design and/or manufacturing defects in their integral steering system that could cause it to intermittently and drastically fail while the Vehicle is in motion, creating a serious safety risk. (*Id.*, ¶ 10.) Defendant is alleged to have concealed and failed to disclose the aforementioned defects to customers such as Plaintiff, who would not have purchased the Vehicle if she had known that it suffered from steering defects. (*Id.*, ¶ 14.)

Based on the foregoing allegations, Plaintiff filed the Complaint on September 4, 2018, asserting the following claims: (1) violation of Civil Code § 1793.2, subdivision (d) (i.e., the Song-Beverly Consumer Warranty Act (“Song-Beverly Act”)); (2) violation of Civil Code § 1793.2, subdivision (b); (3) violation of Civil Code § 1793.2, subdivision (a)(3); (4) breach of express written warranty; (5) breach of implied warranty of merchantability; (6) violation of the Magnuson-Moss Warranty Act; and (7) fraud by omission. On October 26, 2018, Defendant filed the instant demurrer to the seventh cause of action in the Complaint on the grounds of failure to state facts sufficient to constitute a cause of action and uncertainty. (Code Civ. Proc., § 430.10, subs. (e) and (f).) Defendant also filed the motion to strike portions of the Complaint. (Code Civ. Proc., §§ 435 and 436.) Plaintiff opposes both motion.

### **II. Demurrer**

As set forth above, Defendant demurs to a single cause of action in the Complaint- the seventh for fraud by omission- on two grounds, failure to state sufficient facts and uncertainty. The demurrer based on uncertainty can be disposed of quite readily as such a demurrer is generally disfavored and will be sustained only where the allegations of the complaint are so

unintelligible that the defendant cannot reasonably respond to them. (See *Khoury v. Maly's of Calif., Inc.* (1993) 14 Cal.App.4<sup>th</sup> 612, 616 [“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”].) The allegations of Plaintiff’s Complaint cannot accurately be described as unintelligible, with the nature of her fraud claim against Defendant relatively straightforward and clear. Consequently, Defendant’s demurrer to the seventh cause of action on the ground of uncertainty is OVERRULED.

With regard to its demurrer on the remaining ground, Defendant makes the following arguments: (1) Plaintiff’s fraud claim is time-barred; (2) Plaintiff fails to plead the necessary elements of a cause of action for fraud based on omission; (3) Plaintiff’s concealment allegations are insufficient as a matter of law; (4) Plaintiff’s seventh cause of action lacks the requisite specificity; and (5) Plaintiff’s fraud claim is barred by the economic loss rule.

As a general matter, a court may sustain a demurrer on the ground of failure to state sufficient facts if “the complaint shows on its face the statute [of limitations] bars the action.” (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4<sup>th</sup> 1308, 1315.) A demurrer is *not* sustainable if there is only a possibility the cause of action is time-barred; the statute of limitations defense must be clearly and affirmatively apparent from the allegations in the pleading. (*Id.* at pp. 1315-16.) When evaluating whether a claim is time-barred, a court must determine (1) which statute of limitations applies and (2) when the claim accrued. (*Id.* at p. 1316.)

The seventh cause of action is for fraud by omission and the statute of limitations for any claim based on fraud is three years from the date of “the discovery, by the aggrieved party, of the facts constituting the fraud.” (Code Civ. Proc., § 338, subd. (d); see *Britton v. Girardi* (2015) 235 Cal.App.4<sup>th</sup> 721, 734 [the cause of action is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud].) Defendant maintains that it is clear that Plaintiff’s fraud claim is untimely on the face of the Complaint because she purchased the Vehicle on January 1, 2012, but did not file the instant action until well over three years later on September 4, 2018. (Defendant’s Opp. at 3:13-14.) In making this assertion, however, Defendant presumes that the limitations period for this claim began to run on the date of the purchase of the Subject Vehicle despite there being nothing in the Complaint which indicates that Plaintiff *discovered* the facts constituting the fraud on that date. In fact, Plaintiff specifically pleads that she did not become aware of the facts giving rise to her claims until May 2018. (Complaint, ¶ 60.) “When a plaintiff reasonably should have discovered facts for purposes of the accrual of a case of action or application of the delayed discovery rule is generally a question of fact, properly decided as a matter of law only if the evidence (or, in in this case, the allegations in the complaint and facts properly subject to judicial notice) can support only one reasonably conclusion.” (*Broberg v. The Guardian Life Ins. Co. of America* (2009) 171 Cal.App.4<sup>th</sup> 912, 921.) There are no allegations in the Complaint which establish, as a matter of law, that Plaintiff discovered or should have discovered Defendant’s alleged fraudulent acts more than three years before she filed the instant action. Accordingly, the alleged lack of timeliness of Plaintiff’s fraud claim is not

clearly and affirmatively apparent from the allegations of the Complaint and therefore Defendant's demurrer is not sustainable on this basis.<sup>1</sup>

Defendant next argues that Plaintiff fails to plead allegations of any specific, measurable misrepresentation or omissions that it purportedly made and further fails to set forth all of the necessary elements of this claim with the requisite specificity.

The general elements of a fraud claim are: (1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (or "scienter"); (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage. (*Lazar v. Superior Court* (1996) 12 Cal.4<sup>th</sup> 631, 638.) "Active concealment or suppression of facts by a nonfiduciary is the equivalent of a false representation, i.e., actual fraud." (*Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4<sup>th</sup> 282, 291 [internal citations omitted].) There are four scenarios "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." (*LiMandri v. Judkins* (1997) 52 Cal.App.4<sup>th</sup> 326, 336.) Where a fraud claim is predicated on concealment or nondisclosure, the following elements are essential: (1) the defendant had a duty to disclose the concealed or suppressed fact to the plaintiff; (2) the defendant intentionally concealed or suppressed the fact with the intent to defraud the plaintiff; and (3) the plaintiff was damaged as a result. (*Jones v. ConocoPhillips* (2011) 198 Cal.App.4<sup>th</sup> 1187, 1198.) Fraud must be pleaded with particularity and the doctrine of liberal construction of the pleadings does not apply. (*Lazar, supra*, 12 Cal.4<sup>th</sup> at 638.)

Defendant maintains that Plaintiff's fraud claim falls well short of the required specificity, with her failing to plead when, where and with whom she interacted relative to Defendant's sales representatives, how Defendant formed the intent to defraud her and also failing to articulate any statements on which she supposedly relied.

Defendant's argument evidences a partial misunderstanding of the theory underlying Plaintiff's fraud claim, as this cause of action is predicated *not* on affirmative misrepresentations to Plaintiff, but rather nondisclosure and/or concealment of material facts.

Defendant's argument fails to take into account the differences between a fraud claim based on affirmative misrepresentations and a fraud claim based on concealment or nondisclosure.

Though the particularity requirement generally mandates that a plaintiff plead facts establishing the aforementioned items, it is much more difficult to apply this rule in a case of nondisclosure because, as one court explained, "[h]ow does one show 'how' and 'by what means' something didn't happen, or 'when' it never happened, or 'where' it never happened?"

(*Alfaro v. Community Housing Imp. System & Planning Ass'n., Inc.* (2009) 171 Cal.App.4<sup>th</sup> 1356, 1384.) One of the purposes of the specificity requirement is to provide "notice to the defendant, to furnish the defendant with certain definite charged which can be intelligently met." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216 internal quotations omitted].) However, when "it appears from the nature

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<sup>1</sup> Given this conclusion, it is not necessary to consider the viability of Defendant's additional arguments regarding timeliness, or lack thereof, e.g., lack of tolling based on fraudulent conduct by Defendant and lack of tolling pursuant to the holding of *American Pipe & Construction Co. v. Utah* (1974) 414 U.S. 538, 552-556.

of the allegations that the defendant must necessarily possess full information concerning the facts of the controversy, even under strict rules of common law pleading, one of the canons was that less particularity is required when the facts lie more in the knowledge of the opposite party ....” (*Id.* at 217.)

Such is the circumstance here, where Defendant is alleged to possess exclusive and superior knowledge regarding various defects in the Subject Vehicle. (Complaint, ¶¶ 10.) Regarding Defendant’s intent to defraud Plaintiff, Plaintiff is not required to plead specific facts in support of this assertion because intent is a fact, and an allegation that a nondisclosure of material fact was made with the intent to deceive, or any other general allegation of a similar nature, is sufficient for pleading purposes. (*Woodruff v. Howes* (1891) 88 Cal. 184, 190; *Wennerholm v. Stanford University School of Medicine* (1942) 20 Cal. 2d 713, 716.)

Plaintiff’s allegation that Defendant “knowingly and intentionally concealed material facts” is therefore sufficient. (Complaint, ¶¶ 100, 101.)

Defendant additionally asserts that Plaintiff’s claim is deficiently pleaded because it did not owe Plaintiff a duty to disclose, but this assertion ignores Plaintiff’s allegations that it had exclusive knowledge of material facts not known to Plaintiff which it obtained through non-public, internal data about the various alleged defects. (Complaint, ¶ 10.) A duty to disclose arises in such a circumstance. (See *LiMandri v. Judkins*, *supra*, 52 Cal.App.4<sup>th</sup> at 336.) The Court therefore considers Plaintiff’s allegations sufficient in this regard and rejects Defendant’s assertions that the fraud claim is not sufficiently pleaded.

Defendant lastly contends that Plaintiff’s fraud claim is barred by the so-called “economic loss rule,” which provides that “where a purchaser’s expectations in a sale are frustrated because the product he brought is not working properly, his remedy is said to be in contract alone, for he has suffered only economic losses.” (*Robinson Helicopter Company v. Dana Corporation* (2004) 34 Cal.4<sup>th</sup> 979, 988.) This doctrine hinges on a “distinction drawn between transactions involving the sales of goods for commercial purposes where economic expectations are protected by commercial and contract law, and those involving the sale of defective products to individual consumers who are injured in a manner which has traditionally been remedied by resort to the law of torts.” (*Robinson*, *supra*, 34 Cal.4<sup>th</sup> at 988.) The rule requires a purchaser to recover solely in contract for purely economic loss due to disappointed expectations, unless he can demonstrate harm above and beyond a broken contractual promise. (*Id.*)

In *Robinson*, the California Supreme Court carved out an exception to this rule, holding that it does not bar claims for fraud and intentional misrepresentations, which are *independent* of the contract that is alleged to have been breached. (*Robinson*, *supra*, 34 Cal.4<sup>th</sup> at p. 991.) The court reasoned that a breach of contract remedy assumes the parties to a contract can negotiate the risk occasioned by a breach; given this negotiation, it is “appropriate to enforce only such obligations as each party voluntarily assumed, and to give him only such benefits as he expected to receive ....” (*Ibid.*, citing *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4<sup>th</sup> 503, 517.) However, because a party to a contract could not “rationally calculate the possibility that the other party will deliberately misrepresent terms critical to that contract,” the court explained that public policy demanded that the party who is deceived be permitted to recover damages not limited to the contract. (*Ibid.*) Thus, where one party commits fraud during the contract formation or performance, the injured party may

recover in contract *and* tort. (*Ibid.*; see also *Harris v. Atlantic Richfield Co.* (1993) 14 Cal.App.4th 79, 78.)

Here, such conduct by Defendant *has* been alleged, with Plaintiff pleading that she would not have purchased the Vehicle if Defendant had not failed to disclose the material fact of known steering defects. (Complaint, ¶¶ 14, 15, 102.) Defendant's assertion that the fraudulent inducement exception is limited to claims for fraud predicated on an affirmative misrepresentation is without merit. Accordingly, the economic loss rule does not apply to Plaintiff's fraud claim.

As none of the arguments asserted by Defendant in support of its demurrer to the fraud claim are persuasive, the demurrer to the seventh cause of action on the ground of failure to state facts sufficient to constitute a cause of action is **OVERRULED**.

### **III. Motion to Strike**

With the instant motion, Defendant moves to strike Plaintiff's request for punitive damages and allegations relating thereto on the ground that Plaintiff's Song-Beverly and fraud by omission causes of action do not allow for the recovery of such damages.

Ultimately, the Court need not reach the merits of Defendant's Song-Beverly Act argument because, having sufficiently pleaded a claim for fraud by omission, Plaintiff has established a basis for the recovery of punitive damages. (See *Stevens v. Superior Court* (1986) 180 Cal.App.3d 605, 610 [stating that a properly pleaded fraud claim will by itself support the recovery of punitive damages].) Therefore, Defendant's motion to strike is **DENIED**.

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**Calendar line 2**

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### Calendar lines 3 – 4

**Case Name:** *Mariia Kravchuk, et al., v. KB Home*

**Case No.:** 18CV329716

On calendar are two motions to compel filed on behalf of plaintiffs AIIRAM LLC and Mariia Kravchuk: a motion to compel defendant's responses to special interrogatories set one; to form interrogatories set one; and to deem requests for admission admitted (Calendar Line 3) – and a motion to compel defendant to attend deposition (Line 4).

It appears no opposition has been filed to either motion, but both motions are DENIED in their entirety, as they fail to present sufficient admissible evidence and legal authority for any of the relief they request.

As to the motions to compel interrogatory responses and to deem requests for admission admitted, plaintiffs present no admissible evidence to establish defendants' failure to timely serve responses to any of this discovery.

As to the motion to compel deposition, plaintiffs fail to cite relevant legal authority for the relief requested, as well as failing to present admissible evidence of defendant's failure or refusal to appear for deposition. The motion appears to be brought under Code of Civil Procedure §2025.450 although that section is not expressly cited or referenced in the plaintiffs' motion. The memorandum of points and authorities cites only to §2025.450(c)(1) – which is a code section that does not appear in the Code of Civil Procedure. As the citation quoted refers only to sanctions, the court infers that plaintiffs' counsel meant to refer to §2025.450(g)(1).

Assuming the motion is intended to be brought under §2025.450, it fails for a number of reasons. First, as the court has already indicated, the motion wholly fails to cite the appropriate legal authority. Further, if brought under §2025.450, a meet and confer declaration conforming to §2016.040 is required under §2025.450(b)(2) – and no such declaration is provided which complies with these requirements of the Civil Discovery Act.

Finally, as to both motions plaintiffs fail to adequately request, and to support with credible admissible evidence, monetary sanctions. Although the court need not address this issue further as the motions are denied for the procedural and substantive reasons stated, the court determines it is appropriate to remind counsel of the proper manner in which monetary sanctions may be requested, if they may be appropriate. As the court found in its order of October 30, 2018 on plaintiffs' motion to compel document production, the declarations of plaintiffs' counsel in support of sanctions are inadequate as a factual basis for the court to make a determination of the reasonable fees and costs. Counsel's declarations for these two motions simply claim counsel spent 7.5 hours at \$985 per hour on each motion, and claim \$7,387.50 as a result. Neither the hours spent nor the hourly rate are factually justified by counsel – and both the hours and the rate claimed appear to this court to be excessive, unwarranted and unsupportable for these motions. Remarkably, counsel claims the *identical* amount of \$7,387.50 for all three motions to compel, including the motion decided on October 30. None of these simple, straightforward motions to compel would conceivably warrant so much attorney time (22.5 hours) at such an excessive hourly rate.

This order is without prejudice to plaintiffs seeking permissible discovery, including the written discovery and depositions referenced in the motions, as both parties may use the methods authorized in the Civil Discovery Act to seek appropriate discovery. The Court expects in the future that counsel will fulfill their obligations to meet and confer in a reasonable and good faith effort to achieve an informal resolution of any further discovery issues that may arise. The Court's expectation is that any further meet and confer on such issues be accomplished *in person or over the telephone*, and not merely by the exchange of writings such as emails or letters.

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**Calendar line 9**

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**Calendar line 10**

**Case Name:** *Ternian v. Ternian, et al.*

**Case No.:** 17CV320438

Defendant Arseen's motion to consolidate with case 18CV328105 is DENIED as defendant fails to show common questions of law or fact to justify the court's exercise of its discretion to consolidate the cases. The court notes that moving party has also failed to follow Rule of Court 3.350 in both cases, but this is not a basis for denial.

Case 18CV328105 is reassigned for all pretrial purposes to Department 8, and further Case Management Conference on both cases shall proceed in Department 8 on 2/5/19 at 10 a.m. Case Management Conference 1/22/19 in Department 19 for case 18CV328105 is VACATED, and reset per this order on 2/5/19 in Department 8.

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