TENTATIVE RULINGS

DEPT C21

LAW AND MOTION CALENDAR

Judge Deborah C. Servino

Date: April 26, 2024

Please read the applicable rules carefully. Do not call the department unless submitting on the tentative.

The court will endeavor to post tentative rulings on the Court's website by 3 p.m. on the preceding Thursday. However, ongoing proceedings may prevent posting by that time. Do not call the department for tentative rulings if none are posted. The court will not entertain a request for continuance once a ruling has been posted and no additional papers will be considered once a ruling has been posted.

If you wish to submit on the tentative and do not want to appear, please inform the clerk by calling **(657) 622-5221**, and inform opposing counsel.

The Law and Motion Calendar is heard on Fridays at 10 a.m. All arguments will be heard at that time. Unless otherwise indicated in the tentative ruling, the prevailing party will give Notice of Ruling. If no one appears for the hearing, the court shall determine whether the matter is taken off calendar or whether the tentative ruling shall become the final ruling.

APPEARANCES: The Court offers remote appearances for the Law and Motion Calendar via Zoom. All counsel and self-represented parties appearing remotely for the Law and Motion Calendar must check-in online through the Court's website at **https://www.occourts.org/media-relations/civil.html,** then click on the gold ribbon that states "Click here to appear/check-in for civil small claims/limited/unlimited/complex remote proceedings", and then click on Department C21 (to check-in). However, counsel and self-represented parties preferring to appear in-person may do so. The Court's "Appearance Procedures and Information - Civil Unlimited," "Guidelines for Remote Appearances," remote video appearance instructions, Orange County Superior Court Local Rule 375 on Remote and In-Person Proceedings in Civil, Administrative Order No. 23/06 (Updated Remote Appearance Guidelines for Civil and Probate), and an instructional video are also available through the Court's website at **The Superior Court of California - County of Orange (occourts.org).** If you encounter difficulty checking-in online or connecting remotely, please call Department C21 for assistance at (657) 622-5221.

COURT REPORTERS: Official court reporters (i.e. court reporters employed by the Court) are NOT typically provided for law and motion matters in this department. Please see the Court's website for further information. The Court's policy on privately-retained court reporters is available on the Court's website at: Privately-Retained Court Reporter Policy**.**

No filming, broadcasting, photography, or electronic recording is permitted of the video session pursuant to California Rules of Court, rule 1.150 and Orange County Superior Court rule 180.

#	Case Name	Tentative
50	Belmont Asset Solutions, LLC, et al. v. Hall, et al. 30-2022-01281344	Plaintiffs Belmont Asset Solutions, LLC and Chad Ullery's motion to compel inspection of vehicle pursuant to amended notice of inspection, is granted. The court declines to consider the untimely-filed opposition, which was filed seven days late and without the requisite showing of good cause. (Cal. Rules of Court, rule 3.1300(d); *Choi v. Sagemark Consulting* (2017) 18 Cal.App.5th 308, 322.) Defendants' evidentiary objections are overruled. Plaintiffs move for an order against Defendant Brian T. Hall, Defenders Northwest, LLC, Michelle A. Hall, and Autohome USA, Inc., compelling the inspection of the vehicle (1984 Land Rover, VIN # SALLDHMC7BA219342) that is the subject of this case. Under Code of Civil Procedure section 2031.010, any party may obtain discovery by inspecting, copying, testing, or sampling "documents, tangible things, land or other property, and electronically stored information in the possession, custody, or control of any other party to the action." (Code Civ. Proc., § 2031.010, subd. (a).) "A party may demand that any other party produce and permit the party making the demand, or someone acting on the demanding party's behalf, to inspect and to photograph, test, or sample any tangible things that are in the possession, custody, or control of the party on whom the demand is made." (Code Civ. Proc., § 2031.010, subd. (c).) Where, as here, the party responds to the demand by serving objections, only, "the demanding party may move for an order compelling further response to the demand if the demanding party deems that any of the following apply: . . . An objection in the response is without merit or too general." (Code Civ. Proc., § 2031.310, subd. (a)(3).) The motion must set "specific facts showing good cause justifying the discovery sought" and "be accompanied by a meet and confer declaration under Section 2016.040." (Code Civ. Proc., § 2031.310, subd. (b).) Here, Plaintiffs have made sufficient efforts to meet and confer before bringing this motion and have set forth good cause for the discovery. Defendants' objections to the amended notice of inspection are overruled. Within 20 days of the notice of ruling, Defendants are ordered to comply with the amended notice of inspection (Assanti Decl., Exh. D [ROA 223]), unless Plaintiffs agree to a later date. Plaintiffs are awarded monetary sanctions against Defendants. (Code Civ. Proc., § 2031.300, subd. (c).) Within

		30 days of the notice of ruling, Plaintiffs shall pay $3,271.25 to A.G. Assanti & Associates, P.C. Plaintiffs shall give notice of the ruling.
51	Casanas, et al. v. Garden Park Care Center, L.L.C., et al. 30-2023-01300297	Plaintiffs Cesar Casanas and Mary Venzon's motion to compel further responses to special interrogatories, set one, nos. 13, 14, and 15, from Defendant Garden Park Care Center, L.L.C. ("Defendant"), is denied. A party may move to compel further responses to interrogatories on the grounds that the answer is evasive or incomplete. (Code Civ. Proc., § 2030.300, subd. (a)(1).) If a timely motion to compel has been filed, the burden is on the responding party to justify any objection or failure to fully answer the interrogatories. (*Fairmont Ins. Co. v. Superior Court* (2000) 22 Cal.4th 245, 255.) The interrogatories at issue seek the names and contact information for: (1) all roommates of Casanas at the facility during the period of August 6, 2021 through August 7, 2022 (no. 13); (2) the responsible party for all residents of the facility during the period of August 6, 2021 through August 7, 2022 (no. 14); and (3) the resident representative for all residents of the facility during the period of August 6, 2021 through August 7, 2022 (no. 15). Plaintiffs contend these individuals are "likely to possess information relevant to Plaintiffs' actions—or relevant to Defendant's defenses" because "[o]ther residents of Garden Park and their representatives likely witnessed the conditions of and ongoings at Defendant's facility first-hand." They further argue that because they have seen complaints about Defendant Garden Park on Yelp and through the CDPH's website, they "have multiple reasons to believe Mr. Casanas' roommates and other residents' representatives and responsible parties have information relevant to Plaintiffs' allegations and/or are likely to lead to the discovery of admissible evidence." (Mot., at pp. 6-7.) "Although the scope of civil discovery is broad, it is not limitless." (*Digital Music News LLC v. Superior Court* (2014) 226 Cal.App.4th 216, 224, citation omitted.) Defendant contends the information sought is protected by the privacy interests of the residents (including roommates), their responsible persons, and their representatives, and that disclosure is barred by California's Confidentiality of Medical Information Act ("CMIA"; Civ. Code § 56, et seq.) and the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA"; 42 U.S.C. § 1320d(4).) The CMIA states in relevant part: "A provider of health care, health care service plan, or contractor shall not disclose

		medical information regarding a patient of the provider or health care or an enrollee or subscriber of a health care service plan without first obtaining an authorization, except as provided in subdivision (b) or (c)." (Civ. Code, § 56.10, subd. (a).) For purposes of this provision, "medical information," means "any individually identifiable information, in electronic or physical form, in possession of or derived from a provider of health care, health care service plan, pharmaceutical company, or contractor regarding a patient's medical history, mental or physical condition, or treatment." (Civ. Code, § 56.05, subd. (i).) "Individually identifiable," means "that the medical information includes or contains any element of personal identifying information sufficient to allow identification of the individual, such as the patient's name, address, electronic mail address, telephone number, or social security number, or other information that, alone or in combination with other publicly available information, reveals the identity of the individual." (*Ibid.*) Notably, this provision expressly permits disclosure where the same is compelled by order of a court. (Civ. Code, § 56.10, subd. (b)(1).) Similarly, under federal law, "[a] covered entity or business associate may not use or disclose protected health information," except in specified circumstances. (45 C.F.R. §164.502(a).) "[H]ealth information," means any information that "is created or received by a health care provider" and "relates to the past, present or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present or future payment for the provision of health care to an individual." (42 U.S.C. § 1320d(4).) As was the case with the CMIA, however, exceptions exist which apply to discovery and legal proceedings. Pursuant to 45 Code of Federal Regulations section 164.512(e), "[a] covered entity may disclose protected health information in the course of any judicial administrative proceeding . . . [i]n response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order . . ." (45 C.F.R. § 164.512(e)(1)(i).) Additionally, disclosure is permitted "[i]n response to a subpoena, discovery request, or other lawful process that is not accompanied by an order of a court," where sufficient efforts have been taken, either, to provide the relevant individual with notice or to protect the information with a protective order. (45 C.F.R. § 164.512(e)(1)(ii).) Ultimately, both the CMIA and HIPPA, permit disclosures following a discovery order. While these provisions could

		justify Defendant's initial objections and hesitancy to release information without a court order, they do not necessarily establish complete barriers to discovery. Defendant objects on the basis the interrogatories violate the referenced individuals' right to privacy. As explained by the California Supreme Court in *Williams v. Superior Court* (2017) 3 Cal.5th 531, "[t]he party asserting a privacy right must establish a legally protected privacy interest, an objectively reasonable expectation of privacy in the given circumstances, and a threatened intrusion that is serious." (*Id.* at p. 552.) "The party seeking information may raise in response whatever legitimate and important countervailing interests disclosure serves, while the party seeking protection may identify feasible alternatives that serve the same interests or protective measures that would diminish the loss of privacy. A court must then balance these competing considerations." (*Ibid.*) "If there is a reasonable expectation of privacy and the invasion of privacy is serious, then the court must balance the privacy interest at stake against other competing or countervailing interests, which include the interest of the requesting party, fairness to litigants in conducting the litigation, and the consequences of granting or restricting access to the information." (*Puerto v. Superior Court* (2008) 158 Cal.App.4th 1242, 1251.) The discovery must be "directly relevant" and it is not enough if the discovery might lead to admissible evidence. (*Board of Trustees v. Superior Court* (1981) 119 Cal.App.3d 516, 526, disapproved of on other grounds by *Williams v. Superior Court, supra,* 3 Cal.5th 531.) With respect to contact information, like home addresses and phone numbers, courts have recognized a privacy interest exists, but, depending on the context, this information need not necessarily be considered sensitive. (See *County of Los Angeles v. Los Angeles County Employee Relations Com.* (2013) 56 Cal.4th 905, 927; *Life Technologies Corp. v. Superior Court* (2011) 197 Cal.App.4th 640, 653, disapproved in part by *Williams v. Superior Court* (2017) 3 Cal.5th 531, 557, fn. 8; compare *Puerto v. Superior Court* (2008) 158 Cal.App.4th 1242, 1253-1254.) In this situation, the context suggests some degree of disclosure of medical information. Necessarily, in identifying other residents of the facility, Defendant will be revealing that such individuals "have a medical condition which needs visits by a physician at least every 60 days and constantly available skilled nursing services." (Cal. Code Regs., tit. 22, § 51335, subd. (j).) First, Plaintiffs have not shown the information sought is directly relevant. Plaintiffs are seeking contact information for

		a number of persons, none of whom are described as having any information specific to Casanas. Plaintiffs speculate about who could possibly have information of "the conditions and ongoings at Defendant's facility first-hand". There are other ways to get information about the conditions of the facility. Furthermore, as Defendant points out in its opposition, Plaintiff Casanas was in the sub-acute care unit, which has different staffing requirements than the other three units at the facility. (Gunnell Decl., at ¶¶ 4-11.) The third-parties have a reasonable expectation of privacy as it relates to their relationship with the facility and in their private information. The privacy interests at issue for other residents of Defendant's facility, their responsible parties, and representatives and the invasion of those interests, outweigh Plaintiffs' need for information. On reply, Plaintiffs pare down their requests and state they would agree to limit their interrogatories to "to apply only to the Subacute Unit at Garden Park." (Reply, at p. 6.) However, the pared down requests still do not cure the speculative nature that the nonparty residents, their representatives, and responsible parties in the subacute care unit "may have evidence". Such speculation is insufficient to establish that the nonparty contact information that plaintiffs seek to discover is directly relevant to their claims about Casanas' care. Accordingly, the motion is denied. Defendant shall give notice of the ruling.
52	Chan v. Haroutoonian, et al. 30-2012-00582125	Defendants/Cross-Complainants/Judgment Creditors tagTrends, Inc. and Eureka Shine Hart's motion for order assigning to them any and all accounts receivable and/or other debts owed to Judgment Debtors Pui Fung Chan aka Joe Chan, Tagtrends Global, Limited, aka TT Global and Princo Global, Inc., is denied. Any notice, order or other paper required to be served on the judgment debtor must be served on the judgment debtor*,* not on his or her attorney. (Code Civ. Proc. § 684.020, subd. (a).) Furthermore, Code of Civil Procedure section 708.510 requires that motions for assignment orders be served on the judgment debtor personally or by mail. (Code Civ. Proc., §708.510, subd. (b).) The motion was only served by email on Judgment Debtors' counsel. (ROA 1826.) Accordingly, the motion is denied. Judgment Creditors shall give notice of the ruling.
53	Doe, et al. v. Morgan, et al. 30-2022-01281665	**MOTION TO FILE CROSS-COMPLAINT** Defendant Darren Morgan's ("Defendant") motion for leave to file a cross-complaint is granted.

		Leave of court to file a cross-complaint must be obtained unless the cross-complaint is filed before or at the same time as the answer, or it is filed before the court sets the first trial date. (Code Civ. Proc., § 428.50.) There is a liberal policy regarding the filing of cross-complaints. ((Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2021) ¶ 6:564.) Where the proposed cross-complaint arises out of the same transaction as plaintiff's claim, leave to file must be granted as long as defendant is acting in good faith. (Code Civ. Proc., § 426.50.) Here, Defendant's proposed cross-complaint asserts a single cause of action for breach of contract related to Plaintiffs' alleged failure to pay two years of rent and damages to the property. The proposed cross-complaint is compulsory. Defendants' breach of contract claim arises from the same transaction as Plaintiffs' claims in their Complaint regarding their tenancy. There is no evidence of bad faith. In opposition, Plaintiffs argue that granting the motion would be prejudicial as it would delay the case. At the time the opposition to the motion was filed on January 12, 2024, trial was set for March 11, 2024. Trial has since been continued to October 21, 2024. (1/19/2024 Minute Order.) Thus, Plaintiffs' argument regarding prejudice from delay appears to be moot. In addition, Plaintiffs contend that the "doctrine of disentitlement" warrants denying the motion. Plaintiff references the action of defense attorney Steven David Silverstein, Esq., who they assert was arraigned on two counts of criminal contempt. The doctrine of disentitlement provides that "an appellate court may stay or dismiss an appeal by a party who has refused to obey the trial court's legal orders." (*In re A.K.* (2016) 246 Cal.App.4th 281, 284.) "The rationale underlying the doctrine is that a party to an action cannot seek the aid and assistance of an appellate court while standing in an attitude of contempt to the legal orders and processes of the courts of this state." (*Gwartz v. Weilert* (2014) 231 Cal.App.4th 750, 757.) Attorney Silverstein is not counsel of record in the instant case. Plaintiffs have not established that the doctrine of disentitlement applies to this motion or this case. As a result, the motion is granted. No later than May 6, 2024, Defendant shall file and serve the Cross-Complaint, attached as Exhibit A to his motion. (ROA 116.) **DISCOVERY MOTIONS** Defendant moves to compel Plaintiff John Doe's responses to the first sets of form interrogatories, special interrogatories, and requests for production of documents, set one.

		Defendant propounded form interrogatories, special interrogatories, and requests for production of documents on John Doe on November 27, 2023. (Holiday Decl., at ¶¶ 3-4, Exh. A.) Responses were due on January 2, 2024. By failing to serve timely responses, John Doe waived "any objection to the demand, including one based on privilege or on the protection for work product under Chapter 4 (commencing with Section 2018.010)." (Code Civ. Proc., §§ 2030.290, subd. (a), 2031.300, subd. (a).) On December 27, 2023 and January 11, 2024, defense counsel called John Doe and left a message regarding the discovery, among other things. (Holiday Decl., at ¶¶ 8-9.) As of January 11, 2024, Defendant had not received any responses from John Doe. (Holiday Decl., at ¶ 5.) In his opposition, John Doe states that he has since served responses to the outstanding discovery requests. (John Doe Decl., Exhs. 1-3.) Defendant correctly points out that the responses should not have included any objections as they had been waived. (Reply, at p. 5.) To the extent Defendant contends John Doe's responses are unsatisfactory, his remedy is to bring motions to compel further responses. (Code Civ. Proc., §§ 2030.300, 2031.310.) Defendant is awarded sanctions against Plaintiff John Doe. Within 30 days of the notice of ruling, John Doe shall pay a total of $1,680 to Wellman & Warren LLP. (Code Civ. Proc., §§ 2030.290, subd. (c), 2031.300, subd. (c), 2023.010; Cal. Rules of Court, rule 3.1348(a).) Defendant shall give notice of the rulings.
54	Espinosa v. John, et al. 30-2020-01176012	The motion of the Law Office of Wayne McClean and Law Offices of Marvin Kay to be relieved as counsel of record for Plaintiff Letty J. Espinosa, by and through her guardian ad litem Alisha Espinosa, is granted. Upon the signing of the order, Law Office of Wayne McClean shall serve the signed order on Plaintiff and all parties. the Law Office of Wayne McClean and Law Offices of Marvin Kay will be relieved as counsel of record for Plaintiff, effective upon the filing of the proof of service of the signed order upon the client and all parties. As a legally incompetent person, Plaintiff cannot represent herself in this litigation. (*Torres v. Friedman* (1985) 169 Cal.App.3d 880, 888; see *J.W. v. Superior Court* (1993) 17 Cal.App.4th 958, 965-967.) Her guardian ad litem, Alisha Espinosa, is not an attorney. Plaintiff through her guardian ad litem Alisha Espinosa must obtain counsel to represent her in these proceedings. If Plaintiff through her guardian ad litem

		fails to retain new counsel, Plaintiff's action may be dismissed without prejudice. The court sets a status conference regarding Plaintiff's counsel for June 28, 2024, at 10 am in Department C21. The Law Office of Wayne McClean shall give notice of the ruling and of the June 28, 2024 status conference regarding Plaintiff's counsel.
55	Jahromi, et al. v. Shirzadegan, et al 30-2023-01319196	Plaintiffs Ali Jahromi, Arshia P. Enterprise, Inc., Iraj Jahromi, Advance Auto Care, Inc., and Joe Moeen's motion enforce a settlement with Defendants Masoud Shirzadegan and Shirzadeh's Enterprises, is denied. Plaintiffs contend that at the deposition of Defendant Shirzadegan, the parties (including Defendant Shirzadeh's Enterprises, Inc) entered into a global settlement that was put on the record by the court reporter. (Amd. Mot., at pp. 3-5 & Exh. 1 [ROA 97]; Nedjapour Reply Decl., Exh. 2 [ROA 150].) Code of Civil Procedure section 664.6 provides: "If parties to pending litigation stipulate, in a writing signed by the parties outside of the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement." (Code Civ. Proc., § 664.6, subd. (a).) The statute "was enacted to provide a summary procedure for specifically enforcing a settlement contract without the need for a new lawsuit." (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 809.) Courts have consistently held that an oral stipulation to settle made by party litigants at a deposition, but not in the presence of a judge or any other person serving in an officially recognized judicial capacity, does not satisfy the "before the court" requirement of Code of Civil Procedure section 664.6, even if the stipulation is placed on the record before a certified reporter. (See *In re Marriage of Assemi* (1994) 7 Cal.4th 896, 906; *City of Fresno v. Maroot* (1987) 189 Cal.App.3d 755, 760; *Datatronic Systems Corp. v. Speron, Inc.* (1986) 176 Cal.App.3d 1168, 1173–1174.) Here, Plaintiffs do not contend that Defendants have signed a stipulation or settlement agreement. Rather, the parties stipulated to settle during a deposition, on the record before a certified reporter. No judge or any other person serving in an official recognized judicial capacity was present at that deposition. This stipulation does not satisfy the "before the

		court" requirement of Code of Civil Procedure section 664.6. Accordingly, the motion is denied. Defendants shall give notice of the ruling.
56	Konrad v. City of Laguna Niguel, et al. 30-2020-01138380	Defendant/Cross-Complainant/Cross-Defendant, S&S Directional Drilling, Inc. moves for summary judgment on Plaintiff Michael Konrad's Complaint and Defendants/Cross-Complainants City of Laguna Niguel's (the "City") and NX Utilities, LLC's Cross-Complaints. NX Utilities and the City also move for summary judgment on Plaintiff's Complaint and on the issues raised in NX Utilities' Cross-Complaint against S&S Directional Drilling. The motions for summary judgment are denied. <u>Relevant Background</u> Plaintiff Michael Konrad filed a Complaint alleging that the subject accident occurred on December 19, 2018. The Complaint alleges that Plaintiff was properly and lawfully riding his bicycle when he unknowingly encountered a damaged portion in the road and was violently thrown from his bicycle to the ground and sustained serious bodily injuries. (Compl., at ¶ 18.) The first cause of action for dangerous condition of public property is against the City and Does 1 to 30. (Compl., at pp. 4-6.) The dangerous condition is alleged to be "deep and large depressions in the asphalt within the intersection of Golden Lantern Street and Hidden Hills Road". (Compl., at ¶ 12.) The second cause of action for negligence is against NX Utilities and Does 1 to 30. (Compl., at pp. 6-7.) Plaintiff amended the Complaint by adding S&S Directional Drilling as Doe 1. (ROA 49.) NX Utilities filed a Cross-Complaint against Roes 1 through 20 alleging causes of action for: (1) total indemnity; (2) declaratory relief - implied partial indemnity; (3) declaratory relief - equitable apportionment; and (4) express indemnity. (NX Utilities Cross-Compl.) NX Utilities amended its Cross-Complaint by adding S&S Directional Drilling as Roe 1. (ROA 96.) The City filed a Cross-Complaint against NX Utilities and Roes 1 through 10. (ROA 16.) The City amended its Cross-Complaint by adding S&S Directional Drilling as Roe 1. (ROA 97.) The City has since dismissed its Cross-Complaint that was the subject of S&S Directional Drilling's motion for summary judgment. (ROA 210.) <u>Summary Judgment Standard</u>

		"[F]rom commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Id.* at p. 851.) A defendant moving for summary judgment satisfies his or her initial burden by showing that one or more elements of the cause of action cannot be established or that there is a complete defense to the cause of action. (Code Civ. Proc., § 437c, subd. (p)(2).) The scope of this burden is determined by the allegations of the plaintiff's complaint. (*FPI Development v. Nakashima* (1991) 231 Cal.App.3d 367, 381-382 [pleadings serve as the outer measure of materiality in a summary judgment motion]; *580 Folsom Associates v. Prometheus Development Co.* (1990) 223 Cal.App.3d 1, 18-19 [defendant only required to defeat allegations reasonably contained in the complaint].) A cause of action cannot be established if the undisputed facts presented by the defendant prove the contrary of the plaintiff's allegations as a matter of law. (*Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1597.) Alternatively, a moving defendant can show that a cause of action cannot be established by submitting evidence, such as discovery admissions and responses, that plaintiff does not have and cannot reasonably obtain evidence to establish an essential element of his cause of action. (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at pp. 854-855; *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 590 [finding moving defendant may show plaintiff's lack of evidence by factually devoid discovery responses after plaintiff has had adequate opportunity for discovery]; see *Scheiding v. Dinwiddie Constr. Co.* (1999) 69 Cal.App.4th 64, 80-81 [finding *Union Bank* rule only applies where discovery requests are broad enough to elicit all such information].) Once a defendant meets its prima facie showing, the burden shifts to the plaintiff to show by reference to specific facts the existence of a triable issue as to that affirmative defense or cause of action. (*Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at p. 850.) To meet this burden, the plaintiff must present substantial and admissible evidence creating a triable issue. (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 163.) Theoretical, imaginative, or speculative submissions are insufficient to stave off summary judgment. (*Doe v. Salesian Society* (2008) 159 Cal.App.4th 474, 481; *Bushling v. Fremont Med. Center* (2004) 117 Cal.App.4th 493, 510.) <u>Applicable Law for Dangerous Condition of Public Property and Negligence</u>

		"A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." (Gov. Code, § 815, subd. (a).) Government Code section 835 creates an exception to this rule and provides in relevant part that a > public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and . . . [¶¶] [t]he public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition. (Gov. Code, § 835; see *Huckey v. City of Temecula* (2019) 37 Cal.App.5th 1092, 1103–1104 [citing Gov. Code, §§ 830, 835].) A public entity has actual notice of a dangerous condition "if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character." (Gov. Code, § 835.2, subd. (a).) It has constructive notice "only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character." (Gov. Code, § 835.2, subd. (b).) Government Code section 830 defines a "dangerous condition" to mean "a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used." (Gov. Code, § 830, subd. (a).) Government Code section 830.2 provides: "[a] condition is not a dangerous condition within the meaning of this chapter if the trial or appellate court, viewing the evidence most favorably to the plaintiff, determines as a matter of law that the risk created by the condition was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition created a substantial risk of injury when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used." (Gov. Code, § 830.2.) The elements of negligence are "(1) a legal duty to use due care; (2) a breach of such legal duty; [and] (3) the breach

was the proximate or legal cause of the resulting injury." (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917.)

S&S DIRECTIONAL DRILLING'S MOTION FOR SUMMARY JUDGMENT

As stated in the notice of motion for summary judgment, S&S Directional Drilling contends it is not responsible for the dangerous condition because it did not cause or contribute to it. (Mot., at p. 2.) Specifically, S&S Directional Drilling argues that its scope of work pursuant to its Subcontract Agreement with NX Utilities did not include final restoration of the relevant intersection. (Mot., at p. 8.)

NX Utilities and S&S Directional Drilling entered into a Subcontractor Agreement dated March 22, 2016 to perform boring / trenching work and place conduit at the relevant intersection. The Subcontractor Agreement stated in relevant part that:

> f. Minimum Requirements
>
> The following minimum requirements must be met for each construction project:
>
> i. Contractor shall meet Company's schedule for completing the Work.
>
> ii. Contractor shall contact the proper authorities/agencies to ensure proper and timely locating of all buried utilities in any areas of proposed excavation.
>
> iii. Contractor will be responsible for locating all underground facilities in work areas to insure that installation does not adversely affect existing equipment and is done consistent with work order or similar document providing Contractor with description of work. Contractor is responsible for adhering to all state and local locate [sic] laws.
>
> iv. Surfaces and all surrounding work areas shall be restored to their **original condition** following the completion of Contractor's work.
>
> v. Contractor agrees that its work will be performed in accordance with standard utility practices and the National Electrical Safety Code, and other such regulations as may be applicable for proper construction of said system. Deviations from above construction practices will be accomplished only on written order from the Company or its authorized

		representative. Contractor agrees to perform all work in a safe manner. (Barber Decl., Exh. A, emphasis added.) In support of its motion for summary judgment, S&S Directional Drilling provided the declaration of Walter Barber, the Superintendent of S&S Directional Drilling, who was personally involved in the work that S&S Directional Drilling performed and physically present at the intersection in question when the work was being completed. (Barber Decl., at ¶¶ 5, 8.) S&S Directional Drilling performed its work on August 28, 2018, August 29, 2018, September 5, 2018. It completed its work on September 11, 2018. S&S Directional Drilling contends that it completed its work when it installed a temporary asphalt patch. (Barber Decl., at ¶¶ 6-8.) When completed, the temporary asphalt patch installed by S&S Directional Drilling was flush with the existing surrounding asphalt at the intersection. (SSUF 11; Barber Decl., at ¶ 8.) The scope of S&S Directional Drilling's work did not include final restoration of the intersection, i.e. placing permanent asphalt. (Barber Decl., at ¶ 12.) S&S Directional Drilling was never advised by the City or NX Utilities of any defects or discrepancies in its work. (Barber Decl., at ¶ 13.) Even assuming S&S Directional Drilling met its prima facie burden, NX Utilities, the City, and Plaintiff have raised triable issues of material fact as to whether S&S Directional Drilling breached its duty to use due care in performing its work and whether the breach was a proximate cause of Plaintiff's injury. Barber admitted in his deposition that when S&S Directional Drilling started the project, permanent asphalt was in place. It installed temporary asphalt. Unlike temporary asphalt, permanent asphalt is "meant to be permanent." (Barber Depo., at p. 54; see Barber Depo., at p. 43.) The temporary asphalt patch placed over the trench could settle after September 11, 2018 and become uneven with the surrounding surface. When S&S Directional Drilling had completed its scope of work, Barber believed that NX Utilities was responsible for the permanent restoration of the asphalt. (Barber Depo., at pp. 57-58, 119.) Under the terms of the Subcontract Agreement, however, installing temporary asphalt arguably was not restoring the intersection to its original condition. (See Barber Decl., Exh. A.) The Schedule A Rate Sheet to the Subcontractor Agreement provided that S&S Directional Drilling was to provided services including Task IDs 100.BOR and 110.BOR, which included "restoring ROW to Original or Better Condition". (NX Utilities & the City Evid., Exh. A.) S&S Directional Drilling billed and received payment for the 100.BOR and 110.BOR. (Barber Decl., Exh. B.) Barber disputed that any of the invoices included permanent restoration of the roadway. (Barber Depo., at p. 142.) NX Utilities did not sign anything that released S&S

Directional Drilling from the job site. (Barber Depo., at p. 93.)

S&S Directional Drilling argues for the first time on reply that the sunken asphalt was a patent defect, rather than a latent one, and a reasonable inspection would have shown that there was only temporary asphalt installed. (Reply, at pp. 2-3.) The court will not consider arguments raised for the first time on reply. (*Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8; see generally, *Beltran v. Hard Rock Hotel Licensing, Inc.* (2023) 97 Cal.App.5th 865, 877 [noting that raising a new argument for the first time in a reply brief is unfair to the other parties].) Thus, S&S Directional Drilling's motion for summary judgment is denied.

NX UTILITIES AND THE CITY'S MOTION FOR SUMMARY JUDGMENT

The City and NX Utilities move for summary judgment as to Plaintiff's Complaint. They also move for summary judgment on the issues raised in NX Utilities' Cross-Complaint against S&S Directional Drilling, specifically, the obligation to defend and indemnify and hold harmless NX Utilities for damages arising out of the work performed by S&S Directional Drilling under the Subcontractor Agreement with NX Utilities.

As an initial matter, to the extent the City and NX Utilities intended to proceed with this motion alternatively as a motion for summary adjudication, the motion is procedurally deficient. For summary adjudication, the moving party must address or otherwise dispose of an entire cause of action or issue of duty in order to obtain summary adjudication of that cause of action or issue of duty. (Code Civ. Proc., § 437c, subd. (p)(2).) Where summary adjudication is sought, the notice must specify the "specific cause of action, affirmative defense, claims for damages, or issues of duty" sought to be adjudicated. (Cal. Rules of Court, rule 3.1350(b).) The court has no power to adjudicate others. (*Maryland Cas. Co. v. Reeder* (1990) 221 Cal.App.3d 961, 974 fn. 4; *Homestead Savings v. Superior Court* (1986) 179 Cal.App.3d 494, 498; *White Motor Corp. v. Teresinski* (1989) 214 Cal.App.3d 754, 765.) On a motion for summary adjudication, the separate statement must tie each "undisputed material fact" to the particular claim, defense or issue sought to be adjudicated: "[T]he specific cause of action, affirmative defense, claims for damages, or issues of duty must be stated specifically in the notice of motion and be repeated, verbatim, in the separate statement of undisputed material facts." (Cal. Rules of Court, rule 3.1350(b); see *Truong v. Glasser* (2010) 181 Cal.App.4th 102, 118.)

Here, the notice of motion identifies some issues for "summary judgment". (Not., at p. 2.) But the separate

		statement does not identify any separate issues. (See ROA 173.) Accordingly, the court treats the instant motion only as a motion for summary judgment. The two main issues delineated in the notice of motion overlap. NX Utilities contends that it was not negligent because it was S&S Directional Drilling's job to complete the permanent asphalt in the intersection in question. Therefore, it should be indemnified by S&S Directional Drilling. Here, the motion fails to even address the first cause of action in Plaintiff's Complaint for dangerous condition of public property. For instance, the motion does not address whether the relevant intersection was in a dangerous condition at the time of Plaintiff's injury. The separate statement of material undisputed facts no. 6 states: "The temporary asphalt patch sank after September 11, 2018." Accordingly, the City and NX Utilities have failed to meet their prima facie burden. In any event, as discussed above, there are triable issues of material fact as to whether S&S Directional Drilling breached its duty to use due care in performing its work and whether the breach was a proximate cause of Plaintiff's injury. Plaintiff and S&S Directional Drilling have also raised triable issues of material fact as to whether NX Utilities breached its duty to use due care in performing its work, whether the breach was a proximate cause of Plaintiff's injury, and whether NX Utilities had the responsibility to place permanent asphalt after S&S Directional Drilling had completed its work. (Barber Depo., at pp. 33, 97-99, 103, 106, 113, 129-130, 141.) Accordingly, the motion for summary judgment is denied. Plaintiff shall give notice of the rulings.
57	Martin v. General Motors LLC 30-2023-01358039	Hearings on demurrer and motion to strike off-calendar. Demurrer and motion to strike rendered moot by filing of first amended complaint filed on 4/15/2024. Case management conference continued to 7/26/2024 per 4/22/2024 Order.
58	Max Laufer, Inc. v. Ensign Services, Inc., et al. 30-2023-01355397	Defendants Ensign Services, Inc., The Ensign Group, Inc., Somerset Subacute and Care LLC, and Matt Oldroyd's demurrer to the second cause of action of Plaintiff Max Laufer, Inc., dba MaxCare Ambulance's Complaint, is sustained with 15 days leave to amend. Although Plaintiff's complaint alleges the second cause of action for fraud is based on an intentional misrepresentation, Plaintiff's opposition appears to contend Plaintiff stated a cause of action for false promise. (Complaint, second cause of action, § FR-2(c); see Opp., at pp. 3:11-15, 4:23-25, 5:19-21.) Plaintiff did not select section FR-4 of the Judicial

		Council form complaint, which alleges a promise without intent to perform. (See Complaint.) Regardless of which species of fraud is alleged, Plaintiff did not allege sufficient facts with the required specificity to state a cause of action for fraud. The essential elements for intentional misrepresentation are (1) a misrepresentation, (2) knowledge of falsity, (3) intent to induce reliance, (4) actual and justifiable reliance, and (5) resulting damage. (*Chapman v. Skype Inc.* (2013) 220 Cal.App.4th 217, 230-231.) The elements of promissory fraud or fraud in the inducement are (1) the defendant made a promise to the plaintiff, (2) at the time the promise was made, the defendant did not intend to perform the promise; (3) the defendant intended to cause the plaintiff to rely on the promise; (4) the plaintiff reasonably relied on the promise; and (5) the plaintiff was harmed as a result. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638-639; *Muraoka v. Budget Rent-A-Car, Inc.* (1984) 160 Cal.App.3d 107, 119.) Promissory fraud (aka false promise) is sometimes referred to as a claim of "fraudulent inducement". (*Food Safety Net Services v. Eco Safe Systems USA, Inc.* (2012) 209 Cal.App.4th 1118, 1131.) To establish a claim of fraudulent inducement, one must show that the defendant did not intend to honor its contractual promises when they were made." (*Agosta v. Astor* (2004) 120 Cal.App.4th 596, 603.) Every element of fraud must be pleaded with specificity. The particularity requirement for fraud requires the pleading of facts showing how, when, where, to whom, and by what means the representations were made. (*Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 73.) This is to provide the defendant with notice and to give the court enough information to assess whether there is a foundation for the charge of fraud. (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216.) The requirement of specificity in a fraud action against a corporation requires the plaintiff to allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written. (*Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 157.) Nonetheless, "[l]ess specificity is required when it appears from the nature of the allegations that the defendant must necessarily possess full information concerning the facts of the controversy." (*Committee on Children's Television,* 35 Cal. 3d at 216 [citation and internal quote marks omitted].) The Complaint did not allege with sufficient specificity how, to whom, and by what means the alleged representations were made. For instance, Plaintiff did not allege any facts to show

		what actions Plaintiff took in justifiable reliance on Defendants' conduct or damages caused by the alleged fraud. (See Complaint, §§ FR-5 and FR-6.) Although Plaintiff points to allegations in support of the first cause of action, it did not incorporate these facts by reference. Even if the facts were incorporated, there is no allegation that the amount owed for the common counts is the same as the amount owed for ambulance runs made to Somerset. Accordingly, the general demurrer is sustained with 15 days leave to amend. The case management conference is continued to July 26, 2024, at 9 am in Department C21. Defendants shall give notice of the ruling and of the continued case management conference.