These are the tentative rulings for civil law and motion matters set for Tuesday, October 8, 2013, at 8:30 a.m. in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by 4:00 p.m. today, Monday, October 7, 2013. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.

EXCEPT AS OTHERWISE NOTED, THESE TENTATIVE RULINGS ARE ISSUED BY COMMISSIONER MICHAEL A. JACQUES AND IF ORAL ARGUMENT IS REQUESTED, ORAL ARGUMENT WILL BE HEARD IN DEPARTMENT 40, LOCATED AT 10820 JUSTICE CENTER DRIVE, ROSEVILLE, CALIFORNIA.

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1. M-CV-0055733 Tanner, Kelly vs. Canales, Nicholas

Plaintiff's Motion to Compel Further Responses to Form Interrogatories, Set One, is granted. As a preliminary matter, the motion was timely made. Plaintiff was required to file and serve her motion to compel within 45 days of service of verified responses to the subject discovery. Service of unsworn responses is tantamount to no response at all. *Appleton v. Superior Court* (1988) 206 Cal.App.3d 632, 636.

Defendant's responses to the subject form interrogatories are deficient in that they do not comply with the Code of Civil Procedure. Each answer in response to an interrogatory must be "as complete and straightforward as the information reasonably available to the responding party permits. If an interrogatory cannot be answered completely, it shall be answered to the extent possible." Code Civ. Proc. § 2030.220(a), (b). "If the responding party does not have personal knowledge sufficient to respond fully to an interrogatory, that party shall so state, but shall make a reasonable and good faith effort to obtain the information by inquiry to other natural persons or organizations, except where the information is equally available to the propounding party." Code Civ. Proc. § 2030.220(c). The responding party must make reasonable effort to obtain the information sought, and if unable to do so, must specify why the information is unavailable and what efforts he or she made to obtain it. *Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 782.

In responding to the form interrogatories at issue, defendant primarily asserts an inability to respond because discovery had just begun. Defendant does not respond to any interrogatories to the extent possible, and does not set forth reasonable efforts made to obtain the missing information. Defendant's responses are evasive and provide no facts or evidence in response to any request. Defendant also fails to justify any objections stated in response to the interrogatories.

Defendant shall serve full and complete further responses to the form interrogatories at issue in the instant motion by no later than October 22, 2013. Plaintiff's request for attorneys'

fees is denied, as the notice of motion fails to cite the appropriate legal authority for the request for sanctions. Code Civ. Proc. § 2023.040; Local Rule 20.2.4(E).

2. M-CV-0057989 CACH, LLC vs. Carr, Michael

Plaintiff's Motion for Judgment on the Pleadings is denied without prejudice. There is no proof of service in the court's file which establishes that the motion was served on defendant. Plaintiff is also advised that the notice of motion must include notice of the court's tentative ruling procedures. Local Rule 20.2.3(C).

3. M-CV-0058024 Perry, Todd vs. Wells Fargo Home Mortgage

This tentative ruling is issued by the Honorable Charles D. Wachob. The hearing shall be held at 8:30 a.m. in Department 42:

The appearance of the parties is required on defendant Wells Fargo Banks' Demurrer, defendant Regional Service Corporation's Joinder to the Demurrer, and the hearing on consolidation and reclassification of cases.

4. M-CV-0058391 Portfolio Recovery Associates, LLC vs. Garrett, Shaun R.

Plaintiff's Motion to Compel the Court to Direct the Clerk to Enter a Clerk's Judgment is granted. Upon submission of the proposed judgment by plaintiff, the clerk is directed to enter default judgment in favor of plaintiff in the principal amount of $3,841.43, plus costs of $238.50.

5. M-CV-0058607 Capital One Bank USA, N.A. vs. Neverov, Anna

Plaintiff's Motion to Compel the Court to Direct the Clerk to Enter a Clerk's Judgment is granted. Upon submission of the proposed judgment by plaintiff, the clerk is directed to enter default judgment in favor of plaintiff in the principal amount of $2,737.46, plus costs of $282.50.

6. S-CV-0025882 Ruiz, Elias, et al vs. Vanderbeek Motors, Inc.

This tentative ruling is issued by the Honorable Mark S. Curry. The Motion for Attorneys' Fees and Motion to Tax Costs are continued to October 29, 2013 at 8:30 a.m. in Department 32. The court apologizes for any inconvenience to the parties.

7. S-CV-0026797 Pollack, Kirsten, et al vs. Rocklin Foreign Car, et al

Defendant Teraflex, Inc. dba Tera Manufacturing's Motion for Order Determining Good Faith Settlement is granted. Based on the factors set forth in *Tech-Bilt v. Woodward Clyde & Associates* (1985) 38 Cal.3d 488, the settlement at issue is within the reasonable range of the settling parties' proportionate share of liability for plaintiff's injuries, and therefore is in good faith within the meaning of Code of Civil Procedure sections 877 and 877.6.

8. S-CV-0029093 Hammer Lane Management, LLC, et al vs. HLMS, LLC

This tentative ruling is issued by the Honorable Charles D. Wachob. If oral argument is requested, such argument shall be held at 8:30 a.m. in Department 42:

Plaintiff Richard Samra's (Samra) Motion for Determination of Privilege Claim and Request for Sanctions

Ruling on Request for Judicial Notice

Samra's request for judicial notice as to Exhibits 1 through 22 is granted pursuant to Evidence Code section 452. Samra's request as to Exhibit 23 is denied.

Ruling on Motion

Samra's current motion seeks three forms of relief. The first is a determination that defendant CVM Law Group LLP's (CVM) former clients, that appeared in Hammer Lane R.V. & Mini-Storage LP et al. v. HLMS LLC et al, Sacramento Court Case No. 34-2008-00023098, have affirmatively waived the attorney-client privilege and those clients provided CVM with notice of this waiver. Although not designated in Samra's noticed motion, the determination Samra seeks is aimed at defendant Sharon Schofield, individually and as Trustee for the Sharon Schofield Family Trust (Schofield); Lance Leffler (Leffler); the Gwerder Family Trust (Gwerder); and Diversified Foundation, L.P. (Diversified). His second request is for an order directing CVM to release all responsive documents related to defendant Joseph O'Neil's deposition that were previously withheld based upon the attorney-client privilege. Finally, Samra seeks $4,947.50 in sanctions pursuant to Code of Civil Procedure sections 2023.010, 2023.030, and 2025.480(j).

As to defendant Schofield, there is no dispute regarding a waiver of the attorney-client privilege. (Schofield's Non-Opposition to Samra's Motion filed September 25, 2013.) Thus, the court determines that defendant Schofield has waived the attorney-client privilege as to CVM, Robert D. Collins, Peter Von Elton, Joseph D. O'Neil, Jack S. Johal, and Hansen Bridgett LLP.

The court declines to make a determination on the issue of waiver as it pertains to Leffler, Gwerder, and Diversified. The attorney-client privilege is an absolute privilege and disclosure may not be ordered without regard to the relevance, necessity, or any particular circumstances peculiar to the case. (*Costco Wholesale Corp. v. Superior Court (2009) 47 Cal.4th 725, 732.*) It is the client, not the attorney, who is the holder of the privilege. (*Evidence Code sections 953, 954.*) This means that the holder of the privilege may assert the privilege even if he or she is not a party to the action. (*Evidence Code section 954;* see *Mylan Laboratories Inc. v. Soon-Shiong (1999) 76 Cal.App.4th 71, 80.*) Samra's notice of motion is addressed to "defendants and their attorneys of record". (Samra's Notice of Motion filed September 18, 2013.) A review of the court file shows that Leffler, Gwerder, and Diversified are not current parties to this action. Gwerder apparently was not named as a party. While Leffler and Diversified were named as defendants, both were dismissed from the action on June 20, 2011. Samra's proof of service does not establish that either Leffler, Gwerder, or Diversified were served with a copy of the

motion. Although not raised by the parties, the court is concerned that these three holders of the privilege have not been afforded notice and an opportunity to be heard prior to any determination by the court that a waiver of the attorney-client privilege exists. For reasons of due process, the general rule is that notice of motion must be given whenever the order sought may affect the rights of an adverse party. Accordingly, the court declines at this time to determine the privileged has been waived as to those parties.

Even if Samra had properly noticed the motion, there are still defects that prevent the court from affording him the relief sought. Specifically, there is insufficient evidence to support that the waiver applied to Diversified. From the evidence presented by Samra, Diversified appears to be a limited partnership and Mark Zimmerman is a general partner. (COE Exhibit B – Mark Zimmerman Deposition of January 13, 2010, pp. 34:11-35:12; Exhibit C – Marie Zimmerman Deposition of January 13, 2010, p. 16:2-13; Exhibit C – Marie Zimmerman Deposition of January 13, 2010, p. 16:2-5; Exhibit D.) Each general partner is an agent of the limited partnership and the actions of the general partner bind the partnership unless the general partner acted outside the scope of his or her authority. (*Corporations Code section 15904.02(a)*.) When it is not apparent that the actions of the general partner are for the ordinary course of business, those actions will not bind the limited partnership unless it was actually authorized by all the other partners. (*Corporations Code section 15904.02(b)*.) There is conflicting evidence as to whether Mark Zimmerman is the only general partner for Diversified. (COE Exhibit B – Mark Zimmerman Deposition of January 13, 2010, pp. 34:22-35:2; Exhibit C – Marie Zimmerman Deposition of January 13, 2010, p. 16:2-5.) It cannot be determined whether his actions alone are sufficient to waive the attorney-client privilege for Diversified. Nor can it be determined by the evidence presented that Mark Zimmeman acted on behalf of the entire limited partnership or was authorized to act in a manner that would allow for the waiver of the attorney-client privilege.

The prior orders issued by the Sacramento Court do not assist in resolving the issue of whether the waiver applies to Diversified. Samra includes the amended deposition notice for Mark Zimmerman, which was the subject of the orders that purported to find a waiver of the attorney-client privilege. (COE Exhibit D.) While the amended deposition notice refers to Mark Zimmerman as "the General Partner of Diversified Foundation LP", the deposition notice does not specifically define that he is answering within his official capacity as general partner. (COE Exhibit D.) When the Sacramento Court issued its discovery orders, it refered to "Mark Zimmerman" without any designation as to his capacity as general partner of Diversified. (RJN Exhibits 8, 13.) This, coupled with the recent assertion by Diversified's counsel that it did not waive the attorney-client privilege, prevents the court from making such a determination. (Jacob declaration ¶58.)

In light of the court's ruling on the privilege determinations, CVM is directed to release any documents it may have withheld based upon the attorney-client privilege so far as it extends to defendant Schofield. In all other respects, the request is denied.

The final issue to address is sanctions. Samra seeks $4,947.50 in sanctions pursuant to Code of Civil Procedure sections 2023.010(e) [misuse of discovery process based upon unmeritorious objection to discovery]; 2023.010(i) [failure to meet and confer]; 2023.030

[misuse of the discovery process]; and 2025.480(j) [unsuccessfully opposing a motion to compel deposition answers or documents]. The court has carefully reviewed the moving papers, declarations, and exhibits submitted by the parties. In light of the court's prior ruling on the privilege determination, the court does not find any misuse of the discovery process. Nor can it be said that CVM unsuccessfully opposed Samra's motion. As to the request for sanctions based upon a failure to meet and confer, there is insufficient evidence before the court to make such a determination. For the foregoing reasons, sanctions are denied.

To reiterate the ruling of the court, the motion is granted so far as it extends to defendant Schofield. In all other respects, the motion is denied and sanctions are denied in their entirety.

9. S-CV-0029717 Rego, Brant, et al vs. Lincoln Hills Town Center, et al

Rulings on Request for Judicial Notice and Evidentiary Objections

Plaintiffs' request for judicial notice is granted. The court takes judicial notice of the existence of the documents, but not the truth of the matters stated therein.

Plaintiffs' Evidentiary Objections to the Declaration of Roy Rodriguez are ruled on as follows: Objection Nos. 1-2 and 5-14 are overruled. Objection Nos. 3-4 are sustained. Plaintiffs' Evidentiary Objections to the Declaration of Paul Dooley are ruled on as follows: Objection Nos. 1-5 are overruled. Objection Nos. 6-11 are sustained. Defendants' Objections to Evidence Offered by Plaintiffs are ruled on as follows: Objection Nos. 1-13, 16-17, 18 (except for the last sentence), 19 and 20 are overruled. Objection Nos. 14-15 and 18 (last sentence only) are sustained.

Ruling on Motion for Summary Judgment

Defendants' Motion for Summary Judgment, or in the Alternative, Motion for Summary Adjudication, is granted. The complaint in this action alleges a single cause of action against all defendants for negligence. Defendants moving for summary judgment must show either that one or more elements of plaintiffs' cause of action cannot be established, or that there is a complete defense to the cause of action. Code Civ. Proc. § 437c(p)(2). Once defendants meet this burden, the burden shifts to plaintiffs to show the existence of a triable issue of fact regarding that element of their cause of action or that defense. *Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 468. However, if defendants fail to meet their burden, the burden does not shift to plaintiffs, and the motion must be denied. *Id.*

Defendants contend that summary judgment is appropriate because there is no triable issue of material fact regarding a duty of care owed by defendants to plaintiffs. "[B]efore liability may be thrust on a landlord for a third party's injury due to a dangerous condition on the land, the plaintiff must show that the landlord had actual knowledge of the dangerous condition in question, plus the right and ability to cure the condition." *Stone v. Center Trust Retail Properties, Inc.* (2008) 163 Cal.App.4th 608, 612. Defendants submit evidence to show that they had no actual knowledge of the dangerous condition in question. (Deft. SSUF 13-14, 24-25.) In response, plaintiffs fail to submit evidence to establish a triable issue of material fact regarding

defendants' actual knowledge. Plaintiffs Brant Rego and Renee Heilmann submit declarations stating that they provided either written or verbal notice to their employer, Safeway, Inc., which is not a party to this action. This is insufficient to establish actual notice to any defendants in this action.

Plaintiffs submit that constructive notice may be sufficient to establish a duty of care, if the owner of the property should have known of the condition in the exercise of reasonable care. Thus plaintiffs argue that because the lease provisions required defendants to maintain and repair certain aspects of the subject property, including the walls, knowledge of what a reasonable inspection would have revealed will be imputed to them. However, even if deemed to have actual notice of what a reasonable inspection of the premises would have revealed, plaintiffs submit no evidence to support their argument that a reasonable inspection would have revealed the presence of mold or moisture in the subject premises, given that the existence of mold was not discovered until remodeling revealed mold development in the interior of the wall cavity. (Deft. SSUF 15.) Plaintiffs offer no evidentiary support for the proposition that a reasonable inspection of the premises would have necessarily included the tearing down of walls adjacent to the pharmacy.

In light of the foregoing, defendants' motion for summary judgment is granted. If oral argument is requested, plaintiffs' request for telephonic appearance is granted. Effective July 1, 2013, all telephonic appearance must be arranged through CourtCall.

10. S-CV-0030889 Innocent, Lyle, et al vs. Wells Fargo Bank, N.A., et al

Defendants' Demurrer to the First Amended Complaint is overruled. The first amended complaint ("FAC") alleges a single cause of action for violation of Civil Code section 2923.5. Civil Code section 2923.5 requires, before a notice of default may be filed, that a lender contact the borrower in person or by phone to assess the borrower's financial situation and explore options to prevent foreclosure. A notice of default may be filed where the mortgagee, beneficiary or authorized agent has not contacted the borrower if the mortgagee, beneficiary or authorized agent has exercised due diligence in attempting to contact the borrower, as defined by Civil Code section 2923.5.

Plaintiffs allege that although a declaration of diligence was attached to the notice of default in this case, said declaration is false in that, despite their availability and willingness to discuss their financial status and alternatives to foreclosure, no attempts were made to contact them by telephone or in person prior to the notice of default being filed. (FAC, ¶ 12, 13.) While plaintiffs admit contact with defendants, the contacts alleged are limited to collection calls wherein no alternatives to foreclosure were discussed. (FAC, ¶ 13.) Plaintiffs adequately allege facts supporting a cause of action for violation of Civil Code section 2923.5. Plaintiffs are not required to allege tender for purposes of asserting a claim under this statute. *Mabry v. Superior Court* (2010) 185 Cal.App.4th 208, 225.

Defendants shall file and serve their answer to the FAC by no later than October 22, 2013. If oral argument is requested, defendants' request for telephonic appearance is granted. Effective July 1, 2013, all telephonic appearances must be arranged through CourtCall.

11. S-CV-0031317 Tina Marie Gomez Executor of The Estate vs. Langle, Gerald

Defendant Gerald Langle's ("Langle's") objections to evidence are ruled on as follows: Objection No. 1 is sustained. The remainder of the objections are overruled. Plaintiff's objections set forth in the separate statement are also overruled. Objections must be to evidence, not to facts set forth in the separate statement.

Langle's Motion for Summary Judgment is denied. Langle's Motion for Summary Adjudication is granted in part, and denied in part. The trial court shall grant a motion for summary judgment if "all papers submitted show that there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law." Code Civ. Proc. § 437c(c); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850. "A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. That plaintiff or cross-complainant may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto." Code Civ. Proc. § 437c(p)(2).

Plaintiff establishes a triable issue of material fact regarding whether Langle committed a breach of fiduciary duty with respect to his former client, Sally Jane Darling-Newfarmer ("Newfarmer"). (Pltf. SSUF 3, Pltf. ADF 24, 25, 27, 29, 32.) A triable issue of material fact also exists regarding whether plaintiff unreasonably delayed in bringing this action under the doctrine of laches, as plaintiff contends that she had no reason to file the instant action until Langle commenced foreclosure proceedings against the subject property. (Pltf. SSUF 19.)

However, summary adjudication as to some causes of action is appropriate based on the applicable statutes of limitations. When alleging breach of fiduciary duty, the claim must be commenced within one year after the client discovers, or with reasonable diligence should have discovered, the facts constituting the act or omission, or within 4 years of from the date of the act or omission, whichever occurs first. Code Civ. Proc. § 340.6. Plaintiff's constructive fraud, cancellation of instrument, and slander of title claims are governed by a three year statute of limitations. Code Civ. Proc. §§ 338(d), (g). Plaintiff's breach of contract and rescission claims are governed by a four year statute of limitations. Code Civ. Proc. §§ 337(1), (3). Plaintiff contends that the statute of limitations on each of these claims would not have begun to run until Langle initiated foreclosure on the subject property. In fact, the alleged act which proximately caused plaintiff's damages as stated in this action for purposes of each of these claims was Langle's insistence that Newfarmer execute a promissory note and deed of trust, and Langle's recordation of the deed of trust as a lien against the property, which occurred in August 2006. Once the deed of trust was recorded, Langle had stated a lien against Newfarmer's property, of which Newfarmer and her family had actual notice. Plaintiff cannot claim ignorance of this act, which created the lien on the property, by stating an assumption that Langle would never take steps to collect on the debt he claimed he was owed, and which Newfarmer had promised to pay.

Summary adjudication is granted with respect to plaintiff's second cause of action for constructive fraud, third cause of action for breach of contract, sixth cause of action for rescission, seventh cause of action for cancellation of instruments, and eighth cause of action for slander of title.

Summary adjudication is denied with respect to plaintiff's first cause of action to quiet title, fourth cause of action for injunctive relief and fifth cause of action for declaratory relief. No applicable statute of limitations bars these claims. *See Muktarian v. Barmby* (1965) 63 Cal.2d 558, 560-561 (no statute of limitations runs against a plaintiff seeking to quiet title while he is in possession of the property).

12. S-CV-0031359 Hart, Karen E. vs. BMW of North America, et al

Rulings on Objections to Evidence

Plaintiff's Objections to the Declaration of Neil Mitchell are ruled on as follows: Objection Nos. 1, 3, 5 and 6 are overruled. Objection Nos. 2 and 4 are sustained.

Defendant's Objections to Plaintiff's Evidence are ruled on as follows: Objection Nos. 1-9, 12, 13, 17-22, 24 (except last sentence), 25 (except last sentence), 26 (except last sentence), 27, 28 (except last sentence), 29, 30, 33 and 34 are overruled. Objection Nos. 10, 11, 14-16, 23, 24 (last sentence only), 25 (last sentence only), 26 (last sentence only), 28 (last sentence only), 31 and 32 are sustained.

Ruling on Motion for Summary Judgment, or in the Alternative, Summary Adjudication

Defendant CarMax Auto Superstores California, LLC's ("CarMax's") Motion for Summary Judgment is denied. CarMax's Motion for Summary Adjudication is granted in part, and denied in part.

The trial court shall grant a motion for summary judgment if "all papers submitted show that there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law." Code Civ. Proc. § 437c(c); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850. "A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. That plaintiff or cross-complainant may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto." Code Civ. Proc. § 437c(p)(2).

Summary adjudication is denied as to plaintiff's first cause of action for breach of implied warranty of merchantability under the Song-Beverly Warranty Act, second cause of action for breach of express warranty under the Song-Beverly Warranty Act, third cause of

action for breach of express warranty under the Magnuson-Moss Warranty Act, and fourth cause of action for breach of the implied warranty of merchantability under the Magnuson-Moss Warranty Act.

A triable issue of material fact exists regarding the expiration of the express warranty provided by CarMax in this case. Civil Code section 1795.6(b) states that a warranty shall not be deemed expired if the warranty repairs or service performed upon the nonconforming goods did not remedy the nonconformity. Plaintiff submits evidence setting forth that she presented the subject vehicle to CarMax within the 30-day express warranty period for concerns relating to the brakes. (Hart decl., ¶ 7.) However, the issue with the brakes was not remedied by the repairs performed by CarMax, and plaintiff informed CarMax of the same, and brought the vehicle back for further repairs on August 17, 2011. Accordingly, plaintiff establishes a triable issue of material fact regarding whether the express warranty had expired by August 17, 2011, when plaintiff informed CarMax of a problem relating to the transmission.

Plaintiff establishes a triable issue of material fact regarding whether the problem relating to the transmission continues to constitute a nonconformity that has not been remedied. "Nonconformities" are defined as problems that substantially impair the use, value or safety of the vehicle. Civ. Code § 1793.22(e)(1). Plaintiff still experiences problems with transmission hesitation while driving, although the problems are experienced intermittently, and with less intensity that before CarMax's repairs. This is sufficient to raise a triable issue of material fact.

Plaintiff also raises a triable issue of material fact regarding her claims for breach of the implied warranty of merchantability. As defined in the Act, an implied warranty of merchantability guarantees that "consumer goods meet each of the following: (1) pass without objection in the trade under the contract description; (2) are fit for the ordinary purposes for which such goods are used; (3) are adequately contained, packaged, and labeled; and (4) conform to the promises or affirmations of fact made on the container or label." Civ.Code, § 1791.1(a); *Mocek v. Alfa Leisure, Inc.* (2003) 114 Cal.App.4th 402, 406. A breach of the implied warranty of merchantability means the product did not possess even the most basic degree of fitness for ordinary use. *Mocek v. Alfa Leisure, Inc., supra,* 114 Cal.App.4th at 406 However, merely because a vehicle provides transportation from point A to point B does not necessarily mean that the implied warranty of merchantability is not violated. *Isip v. Mercedes-Benz USA, LLC* (2007) 155 Cal.App.4th 19, 27. The problems experienced by plaintiff with transmission hesitation raise a triable issue of material fact regarding the fitness of the vehicle for ordinary use.

Based on the above, plaintiff also raises a triable issue of material fact with respect to her claim for violation of Business and Professions Code sections 17200, *et seq.*, regarding the sale of a vehicle not in compliance with the Vehicle Code.

Summary adjudication is granted with respect to plaintiff's sixth cause of action for negligent misrepresentation, seventh cause of action for intentional misrepresentation, and eighth cause of action for concealment. Plaintiff asserts that defendant CarMax made misrepresentations and/or concealed information from her regarding whether the vehicle had previously been in an accident, and whether the vehicle had frame damage at the time of the sale. Plaintiff contends that she never was shown or received an AutoCheck Vehicle History report

which disclosed a previous accident. However, she offers no explanation regarding her signature on a form which expressly confirms that she was provided and understood the contents of the AutoCheck Vehicle History report relating to the subject vehicle. Plaintiff does not create a disputed issue of material fact by disclaiming receipt of a document which she acknowledged in writing that she received. *See Stewart v. Preston Pipeline, Inc.* (2005) 134 Cal.App.4th 1565, 1588. As plaintiff fails to adequately dispute her acknowledgment of receipt of the AutoCheck Vehicle History report, she fails to raise a triable issue of material fact regarding misrepresentations and/or concealments made by defendants relating to the prior accident history of the subject vehicle.

With respect to purported misrepresentations and/or concealments relating to frame damage, although plaintiff's expert opines that frame damage existed at the time of the sale of the vehicle, she offers no foundation for this opinion. Nor does plaintiff offer any admissible evidence to raise a triable issue of material fact regarding whether CarMax knew, or reasonably should have known of any frame damage, and whether it concealed such information from plaintiff with the intent to defraud her.

13. S-CV-0032319 Snider Leasing Corp. vs. Manumaleuna, Brandon, et al

The Motion Regarding Payment on the Motion to Quash is dropped. No moving papers were filed.

14. S-CV-0032406 Beadle, Marva E. vs. Allied Trustee Services, et al

This tentative ruling is issued by the Honorable Charles D. Wachob. The hearing shall be held at 8:30 a.m. in Department 42:

The appearance of the parties is required on defendant Allied Trust Services' Demurrer and defendant Auburn Woods I HOA and Frei Real Estate Services' Demurrer.

15. S-CV-0032749 Nole, Steven vs. Bank of New York Mellon, et al

Plaintiff's Motion Requesting Leave to File Amended Complaint is denied. Although not stated by plaintiff in his moving papers, defendants named in the proposed amended complaint previously demurred to plaintiff's complaint and obtained an order of the court dated August 15, 2013, sustaining their demurrer without leave to amend, and dismissing plaintiff's complaint with prejudice. The complaint having been dismissed with prejudice, the court lacks jurisdiction to entertain plaintiff's motion for leave to file an amended complaint.

If oral argument is requested, the parties' requests for telephonic appearance are granted. Effective July 1, 2013, all telephonic appearances must be arranged through CourtCall.

16. S-CV-0032945 Morales, Kelly, et al vs. Trinity Health and Wellness Center

Defendant Trinity Health and Wellness Center, Inc.'s ("Trinity's") request for judicial notice is granted. The court takes notice of the existence of the subject documents, but not the truth of the matters stated therein.

Trinity's Demurrer to First Amended Complaint is overruled. Plaintiffs adequately allege the right to relief arising out of the same transaction or series of transactions, and their claims have questions of law and/or fact in common. Trinity is not precluded from seeking bifurcation or severance of issues and claims at trial with the assigned trial judge in this matter. The first amended complaint ("FAC") adequately alleges that Trinity was the employer of both plaintiffs. A demurrer admits the truth of all material facts properly pleaded. *Aubry v. Tri-City Hosp. Dist.* (1992) 2 Cal.4th 962, 966-967. The FAC adequately alleges a claim for breach of the implied covenant of good faith and fair dealing. This cause of action requires an underlying agreement of some sort between the parties. *See Racine & Laramie, Ltd. v. Dept. of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1031-1032, 1033, n. 4. Plaintiffs adequately allege the existence of an employment agreement with Trinity, and breach of the implied covenant of good faith and fair dealing, which was the proximate cause of damages alleged by plaintiffs. Nothing further is required to allege a claim for breach of the implied covenant of good faith and fair dealing.

Trinity shall file and serve its answer to the FAC by no later than October 29, 2013.

17. S-CV-0032973 Stover, Gregory vs. Sherill, John, et al

<u>Donna Sherrill's Demurrer to Plaintiff's First Amended Complaint</u>

Donna Sherrill's Demurrer to Plaintiff's First Amended Complaint is sustained in part with leave to amend, and overruled in part.

The demurrer is overruled with respect to plaintiff's first cause of action for negligence. In general, a person owes no duty to control a third party's conduct, nor to warn those endangered by such conduct. *Koepke v. Loo* (1993) 18 Cal.App.4th 1444, 1451. However, where the defendant committed acts specifically inciting another to harm the victim, and intended to inflict harm, there may be sufficient foreseeability of injury or causal connection between the defendant's conduct and the injury to warrant imposing a special duty. *Cf. Hansra v. Superior Court* (1992) 7 Cal.App.4th 630, 644-646.

In determining the existence of a duty of care in a given case, a number of factors must be considered, including, "the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved. [Citations.]" *Rowland v. Christian* (1968) 69 Cal.2d 108, 113. In this case, plaintiff alleges that defendant Donna Sherrill witnessed a fight between her husband and plaintiff, went back to her residence to inform defendant Ryan Colaw

("Colaw") of the fight, and urged him to go outside to assist. (FAC, ¶ 10.) Plaintiff further alleges that Donna Sherrill knew that Colaw had 14 years of martial arts training, and was in possession of two 26 inch bamboo canes, which he had been trained to use in combat. (FAC, ¶¶ 19, 22.) Based on the allegations of the first amended complaint, foreseeability of harm is great, there is a close connection between Donna Sherrill's conduct and the ultimate harm to plaintiff, and there is moral culpability for Donna Sherrill's conduct which increased the risk of harm. Thus, based on the factors of *Rowland v. Christian, supra*, plaintiff adequately alleges a duty of care owed by Donna Sherrill to plaintiff.

The demurrer is sustained with respect to plaintiff's second cause of action for premises liability, with leave to amend. Premises liability for the criminal or negligent conduct of a third party that arises from the special relationship between the owner or occupier of real property and a person injured by the wrongful conduct of a third person requires that there be some connection between the harm suffered by the injured person and the actual condition of the property, or some activity being conducted on the property. *Cody F. v. Falletti* (2001) 92 Cal. App. 4th 1232, 1242. Plaintiff alleges that Colaw's presence on the Sherrills' property presented a dangerous condition simply because Colaw had 14 years of martial arts training and possessed two 26-inch bamboo canes. (FAC, ¶ 23.) However, the complaint also alleges that Colaw left the Sherrills' property, entered the property of plaintiff, and engaged in the altercation that is the subject of the complaint. No actions causing injury to plaintiff occurred on the Sherrills' property. Accordingly, plaintiff fails to state a claim for premises liability.

The demurrer is overruled with respect to plaintiff's third cause of action for negligent infliction of emotional distress. Defendant demurred to this cause of action on the grounds that plaintiff cannot plead the existence of any duty as to defendant. However, as noted above, the first amended complaint adequately alleges a duty of care owed by Donna Sherrill to plaintiff.

Any amended complaint must be filed and served by no later than October 29, 2013.

<u>John Sherrill's Demurrer to Plaintiff's First Amended Complaint</u>

John Sherrill's Demurrer to Plaintiff's First Amended Complaint is sustained with leave to amend.

John Sherrill demurs only to the second cause of action for premises liability. Premises liability for the criminal or negligent conduct of a third party that arises from the special relationship between the owner or occupier of real property and a person injured by the wrongful conduct of a third person requires that there be some connection between the harm suffered by the injured person and the actual condition of the property, or some activity being conducted on the property. *Cody F. v. Falletti* (2001) 92 Cal. App. 4th 1232, 1242. Plaintiff alleges that Colaw's presence on the Sherrills' property presented a dangerous condition simply because Colaw had 14 years of martial arts training and possessed two 26-inch bamboo canes. (Complt., ¶ 23.) However, the complaint also alleges that Colaw left the Sherrills' property, entered the property of plaintiff, and engaged in the altercation that is the subject of the complaint. No actions causing injury to plaintiff occurred on the Sherrills' property. Accordingly, plaintiff fails to state a claim for premises liability.

Any amended complaint must be filed and served by no later than October 29, 2013.

John Sherrill's Motion to Strike

John Sherrill's Motion to Strike is denied. A motion to strike is permitted on the grounds that the pleadings contain irrelevant, false or improper matter, or where pleadings are drawn in violation of a law, rule or court order. Code Civ. Proc. § 436. Moving party seeks to strike allegations regarding foreseeability of plaintiff's injuries based on John Sherill's knowledge of Colaw's martial arts experience, asserting that John Sherrill had no duty of care to plaintiff with respect to Colaw's actions.

In determining the existence of a duty of care in a given case, a number of factors must be considered, including, "the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved. [Citations.]" *Rowland v. Christian* (1968) 69 Cal.2d 108, 113. Plaintiff alleges that moving party entered his property, refused to leave, punched plaintiff in the face, and encouraged and directed Colaw to violently assault plaintiff. (FAC, ¶¶ 10, 14.) Based on the allegations of the first amended complaint, foreseeability of harm is great, there is a close connection between John Sherrill's conduct and the ultimate harm to plaintiff, and there is moral culpability for John Sherrill's conduct which increased the risk of harm. Thus, based on the factors of *Rowland v. Christian, supra*, plaintiff adequately alleges a duty of care owed by John Sherrill to plaintiff.

18. S-CV-0033053 Gudka, Shil, et al - In Re the Petition of

The Petition to Approve Compromise of Pending Action for Minor Shil Gudka is granted. The court approves the proposed order previously submitted. If oral argument is requested, appearance of the minor is excused.

19. S-CV-0033207 Central Copters, Inc. vs. Nebraska Gas Turbines, Inc., et al

This tentative ruling is issued by the Honorable Mark S. Curry. If oral argument is requested, it shall be heard on October 8, 2013 at 8:30 a.m. in Department 32.

Petitioner's Petition to Compel Compliance with Deposition Subpoena for Production of Business Records and Petition for OSC re Contempt is denied without prejudice. There is no proof of service in the court's file indicating that the petition was personally served on the nonparty deponent. Cal. R. Ct., rule 3.1346.

20. S-CV-0033363 Ibrahim, Fuaad vs. Bank of America, N.A.

The Demurrer to the Complaint is dropped as moot. A first amended complaint has been filed.

These are the tentative rulings for civil law and motion matters set for Tuesday, October 8, 2013, at 8:30 a.m. in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by 4:00 p.m. today, Monday, October 7, 2013. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.