PROPOSED TENTATIVE

On November 25, 2024, plaintiff Jose Manuel Almanza-Zamudio, Jr. (plaintiff), in *propria persona*, filed a complaint on standard Judicial Council forms against defendants Dan McCall and Pamela McCall (defendants), advancing two causes of action – general negligence and an intentional tort. Plaintiff does not identify the nature of the intentional tort. Further, the entirety of the factual allegations as to both causes of action consist of the following: 1) the date when the torts alleged occurred on November 13, 2024; 2) the location at which the both torts occurred -- 2280 Skyway Drive, Santa Maria; and 3) and an almost indecipherable handwritten cursive notation with regard to the negligence cause of action - "Review cameras [*sic*] has happened multiple times"; and with regard to the intentional tort cause of action - "Review Cameras[.]" Nothing further is alleged.

Defendants have filed a nonstatutory motion to dismiss, contending that the complaint as written fails to state facts sufficient to constitute either a negligence or intentional tort cause of action. No opposition has been filed as of this writing.

The court will detail the legal background that frames the inquiry; examine defendants' judicial notice request and meet and confer efforts; and then address the merits of the demurrer. The court will conclude with a summary of its conclusions.

A) Legal Background

There is no statutory authority for using a motion to dismiss as a method to challenge opposing pleadings. Under the Code of Civil Procedure, dismissal motions are expressly authorized only on specified grounds, including nonjoinder of necessary parties (Code Civ. Proc, § 389(b)), failure to pay fees after a venue transfer order (*Stasz v. Eisenberg* (2010) 190 CA4th 1032, 1037), and delay in service of summons or prosecution of the action (Code Civ. Proc., §§ 581, 583.110 et seq.). That being said, and despite the lack of statutory authority, courts, under their *inherent judicial power* to dismiss cases in which no valid cause of action or defense is stated, have indicated that a nonstatutory motion to dismiss may serve the same function as a general demurrer, and can be filed in lieu of a demurrer. (See, e.g., *Barragan v. Banco BCH* (1986) 188 Cal.App.3d 283, 299 ["A motion to dismiss may be substituted for a demurrer as the first pleading"]; *Citizens For Parental Rights v. San Mateo County Bd. of Education* (1975) 51 Cal.Ap..3d 1, 38 [a nonstatutory motion to dismiss is the legal equivalent of a general demurrer]; *McKay v. County of Riverside* (1959) 175 Cal.App.2d 247, 249; see generally Code Civ. Proc., § 581, subd. (m) [grounds stated in dismissal statute not "an exclusive enumeration of the court's power to dismiss an action or dismiss a complaint"].)

That being said, Witkin's observations about this procedure seem compelling: "The most elusive of the substitutes for a general demurrer is the 'motion to dismiss.' Motions to dismiss

are recognized by statute and case law for several conventional purposes, such as lack of prosecution [citation], collusive, moot, or other nonjusticiable controversy [citation]; or lack of jurisdiction of subject [citation]. And dismissal is the appropriate judgment to be rendered after a demurrer or objection to the evidence is sustained and no amendment is allowed or offered, its purpose being to end the action that lacks a valid pleading. [Citation.] But a motion to dismiss on the ground that the complaint fails to state a cause of action or is subject to conclusive bar is, at first glance, rather startling. Why would the motion be judicially recognized for the precise purpose served by the statutory genera demurrer and motion for judgment on the pleadings? . . . [¶] The authorities, including California decisions, upholding the dismissal in the absence of statutory authority, have explained it as an exercise of the inherent power of a court, in unusual circumstances, to prevent abuse of the judicial process. [Citation.] [¶] Another justification has been suggested: On appeal from the judgment of dismissal, any procedural error in eliminating the complaint, challenges defects that could not have been raised by general demurrer. . . ." (5 Witkin California Procedure (6th ed. 2024), Pleading, § 1004.) The solution offered by Witkin seems persuasive – courts should treat the motion to dismiss under the same standards as would apply to a general demurrer. "If the motion is 'non-speaking' i.e., merely challenges the sufficiency of the complaint without bringing in extrinsic facts by affidavit, it may be treated as the functional equivalent of a general demurrer." (5 Witkin, *supra,* § 1006.) As defendant's challenge goes only to the sufficiency of the allegations in the operative pleading – and it does not rely on extra-pleading evidence – the court will apply the traditional rules attendant for general demurrers despite the name "motion to dismiss." (*Citizens for Parental Rights, supra,* at p. 38.)

The standards for a general demurrer are well established. A demurrer tests the sufficiency of a complaint by raising questions of law. (*Rader Co. v. Stone* (1986) 178 Cal.App.3d 10, 20.) "In reviewing the sufficiency of a complaint against a general demurrer, [courts] are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.' " (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Because the demurrer tests the allegations of the pleading, courts do not consider whether those allegations are supported by evidence. And courts do not consider factual contentions not contained in the complaint unless they are matters subject to judicial notice. (*Ibid.*; *Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 483, fn. 5 ["It is through this limited lens that we consider the sufficiency of [the] complaint against ... demurrer"].) Courts give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. Moreover, "in ruling on a demurrer, the trial court is obligated to look past the form of a pleading to its substance." (*Saunders v. Cariss* (1990) 224 Cal.App.3d 905, 908; see *McBride v. Boughton* (2004) 123 Cal.App.4th 379, 387 [courts look past ' "[e]rroneous or confusing labels" ' to "the actual gravamen of [plaintiff's] complaint to determine what cause of action, if any, he stated"].) Ordinarily, "leave to amend is liberally allowed as a matter of fairness, unless the complaint shows on its face that it is incapable of

amendment." (*City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 747.) "If we see a reasonable possibility that the plaintiff could cure the defect by amendment, then [an appellate court will] conclude that the trial court abused its discretion in denying leave to amend." (*Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 320.)

B) Defendant's Request for Judicial Notice/Meet and Confer Efforts

Defendant asks the court to take judicial notice of the operative complaint filed by plaintiff. Although judicial notice is not required to examine the very operative pleading at issue in the present motion, it is the court's practice to grant requests for judicial notice that are unopposed. As the request is unopposed, it is granted.

The court has examined the meet and confer declaration filed by defense counsel, and feels obligated to make comment. The relevant statute (Code Civ. Proc., § 430.41, subd. (a)(2)) ***requires*** that the parties meet and confer at least 5 days before the date the responsive pleading is due, and if the parties are not able to meet at least 5 days before the date the responsible pleading is due, the demurring party shall be granted an automatic 30-day stay. Here, the complaint was filed on November 25, 2024, although there is no proof of service. Defendant filed the present motion on January 6, 2025, and in counsel's declaration, counsel indicates that the first meet and confer effort ***was by letter sent electronically on January 3, 2025***. This fails to comply with the five-day rule required by statute. However, as plaintiff has not filed opposition, and thus does not object, the court finds no prejudice and will move to the merits. The court nevertheless reminds counsel that the meet and confer deadlines mandated by our Legislature are to be taken seriously – and followed diligently.

C) Merits

Preliminarily, even though plaintiff has utilized a Judicial Council pleading form, that alone does not insulate the pleading from pretrial challenge. (*People ex rel. Dept. of Transportation v. Superior Court* (1992) 5 Cal.App.4th 1480, 1484 [while pleadings must be liberally construed - and while the Judicial Council forms have simplified the art of pleading, and have made the task of drafting easer; we must not liberally construe the allegations in the complaint so as to deny defendant adequate notice to defense the case].)

Second, in order to be demurrer-proof, a Judicial Council pleading complaint form must contain whatever ultimate facts are essential to state a cause of action under existing statutes of case law. (*Id.* at p. 1484.) Plaintiff has failed to do this for both causes of action. The elements of a negligence cause of action are 1) the existence of a duty, 2) a breach of that duty, 3) injury to the plaintiff caused by the defendant's breach, and 4) actual damages. (*Romero v. Los Angeles Rams* (2023) 91 Cal.App.5th 562, 567.) Plaintiff has failed to allege any ultimate facts as to duty, breach, causation, or injury. The court has no idea about any of these critical elements

from the allegations in the pleading. All the court is told is that the evidence "can be found on cameras." This is manifestly inadequate. The same is true for whatever intentional tort is being alleged – there are no ultimate facts offered in support. Defendant's motion to dismiss is granted as to both cause of action under rules associated with a general demurrer (and even though a general demurrer is sustained, not granted).

The court is cognizant of the fact that plaintiff has not filed opposition; it is also aware that it is generally plaintiff's obligation to demonstrate a reasonable possibility that the pleading defect can be cured by amendment. (*Blank, supra*, 39 Cal.3d at p. 318 [the burden of proving such reasonable possibility is squarely on plaintiff].) Nevertheless, in the case of the *original* complaint, as is the case here, case law indicates that plaintiff need not request leave to amend before given an opportunity to file an amended pleading. "Unless the complaint shows on its face that it is incapable of amendment, denial of leave to amend constitutes an abuse of discretion, irrespective of whether leave to amend is requested or not." (*McDonald v. Superior Court* (1986) 180 Cal.App.3d 297, 303-304; see *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 747 [if plaintiff has not had an opportunity to amend the complaint in response to a demurrer, leave to amend is liberally allowed as a matter of fairness unless the complaint shows on the face on its face that it is incapable of amendment]; see also *Association for Los Angeles Deputy Sheriffs v. County of Los Angeles* (2023) 94 Cal.App.5th 764, 800-801 [for an original complaint, regardless whether the plaintiff has requested leave to amend, it has long been the rule that a trial court's denial of leave to amend constitutes an abuse of discretion unless the complaint shows on its face that it is incapable of amendment].) As plaintiff seems capable of amending the pleading, leave to amend is granted.

Summary:

The court grants the motion to dismiss both causes of action, with leave to amend, ***and allows plaintiff 30 days from today's hearing to file a first amended pleading***. If plaintiff fails to amend within this time, defendant may file a motion to dismiss pursuant to Code of Civil Procedure section 581, subdivision (f). In making this determination, the court wants to be clear it will not afford plaintiff innumerable opportunities to cure the pleading defects. Good faith efforts to cure the defects identified above must be made. Plaintiff is placed on notice.

The parties are directed to appear. Zoom appearances are authorized.

If plaintiff does not appear at the hearing today, the clerk is ordered to enter this tentative as the court's final order, and to mail the order to plaintiff.