TENTATIVE RULINGS
LAW & MOTION CALENDAR
Wednesday, May 3, 2023 3:00 p.m.
Courtroom 17 –Hon. Bradford DeMeo
3035 Cleveland Avenue, Santa Rosa

PLEASE NOTE: In accordance with the Order of the Presiding Judge, a party or representative of a party may appear in Department 17 in person or remotely by Zoom, a web conferencing platform. Whether a party or their representative will be appearing in person or by Zoom must be part of the notification given to the Court and other parties as stated below.

CourtCall is not permitted for this calendar.

If the tentative ruling is accepted, no appearance is necessary via Zoom unless otherwise indicated.

TO JOIN ZOOM ONLINE:

D17 – Law & Motion
Meeting ID: 895 5887 8508
Passcode: 062178
https://us02web.zoom.us/j/89558878508?pwd=L2MySDFXWEtMa1JsdGUxUDFDOVNyZz09

TO JOIN ZOOM BY PHONE:
By Phone (same meeting ID and password as listed for each calendar):
+1 669 900 6833 US (San Jose)

The following tentative rulings will become the ruling of the Court unless a party desires to be heard. If you desire to appear and present oral argument as to any motion, **YOU MUST NOTIFY** Judge DeMeo's Judicial Assistant by telephone at **(707) 521-6725**, and all other opposing parties of your intent to appear, and **whether that appearance is in person or via Zoom**, by ***4:00 p.m. the court day immediately preceding the day of the hearing.***

1. SCV-265803, Zakasky v. State Farm General Insurance Company

Motion for Summary Adjudication DENIED as to issue 1, the cause of action for bad faith. The motion is GRANTED as to issue 2, punitive damages, based on the parties' stipulation.

Facts

Plaintiffs, alleging that they own and reside on real property at 3727 Paxton Place, Santa Rosa, California ("the Property") and that at the applicable time the Property was insured through a policy ("the Policy") obtained from Defendants, complaint that Defendants provided inadequate insurance coverage to compensate them following fire damage to the Property ("the Loss"), and in bad faith failed to pay amounts owed under the Policy for the loss. They allege that Defendant State Farm General Insurance Company ("State Farm") had issued the Policy, while Defendants Christine Cline ("Christine"), Ethan Cline ("Ethan"), and Katie Chase ("Katie") were insurance brokers or agents who had procured the Policy from State Farm on behalf of Plaintiffs. Plaintiffs further allege that the Loss occurred when a fire ("the Fire") caused extensive damage to the Property on or about October 9, 2017. Plaintiffs allegedly tried to obtain compensation for the Loss but State Farm allegedly refused to pay the full amounts owed under the Policy and claimed that the Policy was insufficient to provide full coverage for the Loss. Plaintiffs add that they had requested sufficient coverage to fully rebuild the improvements on the Property and they relied on Defendants' representations expertise and promises that the Policy would be sufficient to provide full replacement coverage, but that Defendants failed to provide the requested coverage.

Plaintiffs assert a cause of action for bad faith based on State Farm's alleged failure to pay all sums owed in a timely manner or investigate the Claim in a proper and timely manner, and for its knowing decision to provide insufficient coverage which failed to provide the coverage requested despite knowing that Plaintiffs had been falsely told that the coverage would meet their requirements. They also assert a cause of action based on breach of contract for failing to pay the Policy benefits in a timely manner, and for negligence and negligent misrepresentation in failing to provide the requested coverage.

Motion

The matter has come on calendar for Defendant State Farm's Motion for Summary Adjudication in which State Farm seeks summary adjudication of two issues: 1) the First Cause of Action for Bad Faith is without merit because State Farm has paid all Policy benefits that are owing and it acted reasonably and in good faith when handling Plaintiffs' claim; and 2) Plaintiffs cannot establish by clear and convincing evidence that State Farm acted with oppression, fraud, or malice, precluding Plaintiffs from obtaining punitive damages. State Farm is, accordingly, not addressing the causes of action based on breach of contract for failing to pay the Policy benefits in a timely manner or for negligence in allegedly failing to provide the requested coverage sufficient to cover the full cost of replacement.

Plaintiffs oppose the motion. They argue that State Farm fails to meet its burden of demonstrating that, as a matter of law, its conduct did not amount to bad faith in light of the issues of fact regarding bad faith. They also argue that State Farm owed them a duty not to mislead them, or make representations, about the terms of the Policy, including the sufficiency of the coverage provided, and that it acted in bad faith when refusing to pay sums promised.

State Farm replies, arguing that after it filed this motion, the parties agreed that there are no unpaid amounts owing to Plaintiffs on the Policy as written, and the claim was adjusted in a reasonable manner and consistent with State Farm's obligations; the only remaining dispute regarding bad faith is Plaintiffs' contention that State Farm refused to abide by its captive agents' alleged promises," and Plaintiff stipulate that they are no longer seeking punitive damages, so the court should summarily adjudicate and dismiss that claim. It also objects to some of Plaintiffs' evidence.

Authority Governing Motions for Summary Adjudication

Any party may move for summary judgment or summary adjudication. Code of Civil Procedure ("CCP") section 437c(a), (f). For summary adjudication, the party may seek adjudication of, among others, one or more causes of action or claims for punitive damages if the party contends that the cause of action has no merit or that there is no merit to a claim for damages "as specified in" Civil Code section 3294. CCP section 437c(f)(1).

When a defendant moves for summary adjudication, the moving party has the burden of demonstrating that plaintiff cannot establish at least one elements of each cause of action at issue or each claim for punitive damages, or there is a complete defense. CCP §437c(f)(1), (o); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.

A defendant can show that an element cannot be established only if its undisputed facts negate plaintiff's allegations *as a matter of law* and would make it impossible for plaintiff to show a *prima facie* case. *Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1597.

Once the moving party has met its burden, the party opposing summary judgment or summary adjudication has the burden of demonstrating that there is a triable material issue of fact. CCP section 437c; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850. The opposing party must merely make a prima facie showing that there is such a triable issue. *Ibid*.

A party bringing such a motion may also prevail by showing that opposing party *both lacks, and is not reasonably likely to produce,* the requisite evidence. *Hagen v. Hickenbottom* (1995) 41 Cal.App.4th 168, 186. Mere argument is insufficient and the "tried and true" method for the moving party to meet its burden is to present evidence that negates an essential element of a claim as a matter of law. *Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal.4th 317, 334.

However, it is possible for a moving party to rely on factually devoid discovery responses to show that the other party does not possess and cannot reasonably obtain evidence to support one or more elements of that party's contentions. *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854-855. This applies where a party has had adequate opportunity to conduct discovery, in which case that party's factually devoid discovery responses may demonstrate that the party is unable to establish one or more elements of its claim or lacks and cannot reasonably obtain, the necessary evidence. *Ibid*; *Union Bank v. Sup.Ct.* (1995) 31 Cal.App.4th 573, 590. For example, in *Union Bank*, Defendant's interrogatories asked Plaintiff to state "all facts" and identify witnesses and documents supporting Plaintiff's fraud claim and Plaintiff's response stated that he "believed" that Defendant "knowingly and fraudulently" committed the alleged acts. *Ibid*. This response was considered to be devoid of facts and thus sufficient to raise an inference that Plaintiff lacked the evidence necessary to establish his claims. *Ibid*.

This is not the same as merely showing "an absence of evidence" supporting the other party's claims, which is insufficient to meet the burden of the party seeking summary judgment or adjudication. *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854-855. The Supreme Court in *Aguilar* explained the distinction by stressing that a party moving for summary judgment or adjudication must not only show that the other party lacks the necessary evidence but also must demonstrate that the party cannot reasonably obtain it. Thus, a mere lack of evidence, or discovery responses lacking the evidence where the other party has not yet had an opportunity to conduct discovery, is insufficient.

A party may not rely on that party's own interrogatory responses to support its proffered facts in a motion for summary judgment or adjudication. *Great American Ins. Companies v. Gordon Trucking, Inc.* (2008) 165 Cal.App.4th 445, 450. CCP section 2030.410 states that only other parties may use interrogatory responses as evidence against the responding party.

Inferences from circumstantial evidence can create a triable issue, as long as they are not based on speculation or surmise. *Joseph E. DiLoreto, Inc. v.* O'Neill (1991) 1 Cal.App.4th 149, 161; *Aguilar v. Atlantic Richfield Corp.* (2000) 78 Cal.App.4th 79, 117. These inferences must be "more likely than not." *Aguilar,* 117; *Leslie G. v. Perry & Assocs.* (1996) 43 Cal.App.4th 472, 487. There is also a policy to liberally construe the opposition's evidence and strictly construe the evidence of the moving party. *D'Amico v. Bd. of Medical Examiners* (1974) 11 Cal.3d 1, 21; *Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 839.

Civil Code section 3294 describes the requirements for punitive damages in civil cases such as this one. That provision states that a party may recover punitive damages "[i]n an action for the breach of an obligation not arising from contract," where the party demonstrates "clear and convincing evidence" of oppression, fraud, or malice.

According to section 3294(c)(1), "malice" is conduct intended "to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." "Oppression" is "despicable conduct" subjecting one "to cruel and unjust hardship in conscious disregard of that person's rights." CC section 3294(c)(2). Subsection (c)(3) defines "fraud" as intentional misrepresentation deceit or concealment of fact with the intent to induce reliance. Plaintiff must show *intent* to injure *or* a conscious disregard of another's safety or rights *and despicable conduct*. *College Hospital, Inc. v. Sup.Ct. (Crowell)* (1994) 8 Cal.4th 704; *Cyrus v. Haveson* (1976) 65 Cal.App.3d 306, 317.

Applicable Authority Governing Causes of Action Against Insurers

Insurers and insurance agents may be liable for errors in policy writing, at least where the agent procuring the policy is the agent of the insurer rather than a "broker" acting on behalf of the insured. *Rutherford v. The Prudential Ins. Co. v. America* (1965) 234 Cal.App.2d 719. The court explained, at 726-727, that these rules are based on a policy of requiring fair dealing by all involved, stating that courts in this state have followed a general principal imposing a "requirement of fair dealing is laid on both parties to the contract. This requirement entails a duty on the part of the insured to read the contract and the application in accordance with her representations and to report to the company any misrepresentations or omissions."

An insurer may also potentially be liable for misrepresentations made in the context of an insurance application if its agent was responsible. See *Home Indem. Co. v. Mission Ins. Co*. (1967) 251 Cal.App.2d 942, 952; *LA Sound USA, Inc. v. St. Paul Fire & Marine Ins. Co*. (2007) 156 Cal.App.4th 1259, 1268.

The court in *Home Indem. Co. v. Mission Ins. Co*. (1967) 251 Cal.App.2d 942, at 952, explained that "[t]he insurance company, and not the applicant, is charged with the agent's error, if any, in the selection of and completion of the application." The insured is entitled to rely on the insurer's representations that a policy provides the requested coverage. *Laing v. Occidental Life Ins. Co. of California* (1966) 244 Cal.App.2d 811, 819. Similarly, the court in *Free v. Republic Ins. Co*. (1992) 8 Cal.App.4th 1726, at 1730, found an that insurer may be liable for damages if the insured asked for insurance sufficient to cover the destruction of the insured's home, the insurer told the insured that the coverage provided would cover this full cost, and in fact the policy did not provide sufficient coverage. The court explained,

> Here plaintiff sought to be protected against a very specific eventuality—the destruction of his home. It appears from the record before us that there were at least two methods by which he could have achieved his goal: (1) he could have requested a guaranteed replacement endorsement as part of his homeowners policy; or (2) he could have had the

> value of the building determined and a specific valuation named in the policy as provided by Insurance Code section 2052. Defendants apprised him of neither option. Nor did they decline to offer an opinion. Rather, they assured plaintiff his coverage was sufficient. Under the circumstances, defendants must be deemed to have assumed additional duties, which, if breached, could subject them to liability.

The *Laing* court noted even that "[a]n insured has the right to rely on the presumption that the policy he receives is in accordance with his application; and his failure to read it will not relieve the insurer or its agent from the duty of so writing it."

The Supreme Court in *Haynes v. Farmers Ins*. (2004) 32 Cal.4th 1198, at 1210-1211, explained,

> For nearly a hundred years we have recognized that " 'the rule [presuming parties are familiar with contract terms] should not be strictly applied to insurance policies. It is a matter almost of common knowledge that a very small percentage of policy-holders are actually cognizant of the provisions of their policies.... The insured usually confides implicitly in the agent securing the insurance, and it is only just and equitable that the company should be required to call specifically to the attention of the policy-holder such provisions as the one before us.' " (*Raulet v. Northwestern etc. Ins. Co*. (1910) 157 Cal. 213, 230, 107 P. 292 [discussing a lien provision].) Thus, an insurer's direction to the subscriber to read the entire policy "is not a substitute for notice to the subscriber of a loss of benefit." (*Fields v. Blue Shield of California, supra,* 163 Cal.App.3d at p. 583, 209 Cal.Rptr. 781.)

Accordingly, an insurer may be estopped from denying coverage or asserting a policy right or defense where it has by words or conduct caused the insured reasonably to change position to the insured's detriment. *Chase v. Blue Cross of California* (1996) 42 Cal.App.4th 1142, 1157; *DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Café* (1994) 30 Cal.App.4th 54; *Colony Ins. Co. v. Crusader Ins. Co*. (2010) 188 Cal.App.4th 743, 751.

The terms of an insurance policy may be reformed if, by mutual mistake or fraud or other misconduct by one of the parties, they do not reflect the actual intent and agreement. *American Sur. Co. of N.Y. v. Heise* (1955) 136 Cal.App.2d 689, 695-696; *American Home Ins. Co. v. Travelers Indem. Co.* (1981) 122 Cal.App.3d 951, 963. The court in *American Sur. Co. of N.Y.* explained,

> reformation of an insurance policy may be had, in general, where, by reason of fraud, inequitable conduct or mutual mistake, the policy as written does not express the actual and real agreement of the parties. More particularly, if by inadvertence, accident, or mistake the terms of a contract of insurance are not fully or correctly set forth in the policy, it may be reformed in equity so as to express the actual contract intended by the parties, if the mistake is mutual or if there has been fraud or inequitable conduct by one of the parties to the contract.

As stated in *Storek & Storek, Inc. v. Citicorp Real Estate, Inc*. (2002) 100 Cal.App.4th 44, at 55, "every contract imposes upon each party a duty of good faith and fair dealing in the performance of the contract such that neither party shall do anything which will have the effect

of destroying or injuring the right of the other party to receive the fruits of the contract." See also *Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 349; *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1393. *Love v. Fire Insurance Exchange* (1990) 221 Cal.App.3d 1136, at 1151, explained that for breach of the covenant of good faith and fair dealing "there are at least two separate requirements to establish breach of the implied covenant: (1) benefits due under the policy must have been withheld; and (2) the reason for withholding benefits must have been unreasonable or without proper cause."

Breach of the covenant is inherently based on contract but may, depending on the circumstances, support or tort or contract cause of action. *Careau & Co., supra,* 222 Cal.App.3d 1392-1393. In either case, it requires breach of "something beyond breach of the contractual duty itself" and requires some "unfair dealing." *Congleton v. National Union Fire Ins. Co.* (1987) 189 Cal.App.3d 51, 59; *Careau & Co., supra,* 222 Cal.App.3d 1394. Thus, a party pleading it must allege other than mere breach of the contract and must show conduct, whether or not actually breaching the obligations under the contract, which is conscious and deliberate and "which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement." *Careau & Co., supra,* 222 Cal.App.3d 1395. Should a party allege nothing more than a mere breach of the contract, then the court allegations asserting breach of this covenant may be disregarded as stating no additional cause of action or breach. Ibid.

Love v. Fire Insurance Exchange (1990) 221 Cal.App.3d 1136, at 1151, explained that for breach of the covenant of good faith and fair dealing "there are at least two separate requirements to establish breach of the implied covenant: (1) benefits due under the policy must have been withheld; and (2) the reason for withholding benefits must have been unreasonable or without proper cause."

As the court explained in *Chateau Chamberay Homeowners Association v Associated International Insurance Co*. (2001) 90 Cal.App.4th 335, at 350, '[a]lthough an insurer's bad faith is ordinarily a question of fact to be determined by a jury by considering the evidence of motive, intent and state of mind, "[t]he question becomes one of law ... when, because there are no conflicting inferences, reasonable minds could not differ. [Citations.]" [Citation.]'

Request for Judicial Notice

State Farm requests judicial notice of the complaint in this action and a recorded grant deed showing that Plaintiffs obtained real property at 437 Countryside Cir., Santa Rosa, California ("the New Property"). Plaintiffs do not oppose or object to the request. The court may judicially notice these documents, their contents, and their purported legal effect but it may not judicially notice the truth of factual assertions made therein. With this limitation, the court grants the request.

Objections

State Farm in its Reply objects to some of Plaintiffs' evidence in the Alan White declaration. The objections, for lack of relevance, conclusory statement, and lack of foundation are unpersuasive. That said, State Farm has a point that ultimately the evidence is not relevant because of the parties' stipulation, addressed below, given that the evidence goes to State Farm's compliance with the Policy as written and the parties have stipulated that it did so comply and did not commit bad faith in that regard. Accordingly, the objections are overruled but the items of evidence they address have no impact on the outcome of this motion.

Facts and Separate Statement

State Farm presents 29 facts under issue 1 and repeats these same facts, with the same numbering, for issue 2. Plaintiffs admit that most of these are undisputed but they claim that facts 19, 21, 27, 28, and 29 are disputed.

Undisputed Facts

In fact 1), State Farm shows it issued the Policy to Plaintiffs for the Property and it was in effect at all relevant times, including October 9, 2017. Fact 2) shows that the Policy protected Plaintiffs' residence, dwelling extensions, and personal property from various risks, including fire, up to the Policy limits. Fact 3) show that on October 9, 2017, the Policy hod the following limits:

- Coverage A (dwelling) limits of $548,064.00;
- Coverage A (dwelling extension) limits of $54,806.40;
- Coverage B (personal property) limits of $411,048.00;
- Coverage C (additional living expense) benefits for up to twenty-four months.
- Additional 20% in dwelling and dwelling extension coverage (Option ID), in the event the repair costs exceed the Coverage A limits;
- Additional 10% coverage for statutory or building code compliance costs (Option OL);
- Additional $2,500 for damaged jewelry/furs (Option JF)

In fact 4), State Farm shows the dwelling and contents on the Property were destroyed on or about October 9, 2017 in a wildfire. Fact 5) shows Plaintiffs promptly reported the Loss and State Farm accepted the Loss, assigning it Claim No. 05-1679-V54. Fact 6) shows that State farm claims personnel spoke to Plaintiffs within days of the Loss to explain the coverage and claim processes. Fact 7) shows State Farm issued a $10,000 Coverage B advance on October 12, 2017. Fact 8) shows State Farm on October 25, 2017 provided Plaintiffs an additional advance of $113,314.40. Fact 9) shows that by early November 2017, State Farm had issued Plaintiffs advance payments of $123,314.30. Fact 10 shows that State Farm on January 12, 2018 issued a Coverage A payment of $772,156.28. Fact 11) shows that State Farm issued a supplemental Coverage A payment of $55,824.96 on June 11, 2018. Facts 12-13) show that State Farm has paid $827,981.21 under Coverage A, the full limit under the Policy. Fact 14) shows that State Farm in January 2018 offered to advance 75% of the amount for personal property. Fact 15) shows that in February 1, 2018, after receiving signed attestation, State Farm issued payment of $184,971.60 which, with prior payments, amounted to 75% of the limit for personal property. Fact 16) shows that State Farm on February 18, 2019 issued payment of $105,262 under Coverage B. Facts 17-18) show that State Farm has paid Plaintiffs $413,548.00 under Coverage B, the full limit. Fact 20) shows that State farm has Plaintiffs a total of $183,102.05 under Coverage C. Fact 22) shows that Plaintiffs bought the New Property at 437 Countryside Circle, Santa Rosa, in February 2018. Fact 23) shows that Plaintiff began living at the New Property by November 2018. Fact 24) shows that State Farm has paid Plaintiffs a total of $1,424,631.29 on the claim, including $827,981.24 on the Coverage A dwelling coverage, $413,548.00 for personal property under Coverage B, and $183,102.05 for additional living expenses under Coverage C. Facts 25-26) again show that State Farm has paid Plaintiffs the Policy limits for Coverage A and B.

Allegedly Disputed Facts

The remaining facts, as noted above, Plaintiffs claim to be disputed. Fact 19) shows that the Policy included Coverage C for additional living expenses and that this states,

SECTION I -COVERAGES
COVERAGE C - LOSS OF USE
Additional Living Expense. When a Loss Insured causes the 24 months residence premises to become uninhabitable, we will cover the necessary increase in cost you incur to maintain your standard of living for up to 24 months. Our payment is limited to incurred costs for the shortest of: (a) the time required to repair or replace the premises; (b) the time required for your household to settle elsewhere; or (c) 24 months. This coverage is not reduced by the expiration of this policy.

Plaintiff do not directly dispute this language in the Policy but instead claim that State Farm made an agreement with Plaintiffs' public adjuster to resolve the issue for additional living expenses with monthly payments of $7,220.00 for the necessary period, up to the policy limit of 24 months, based on Plaintiffs "renting the inferior replacement dwelling to themselves." In Fact 21) State Farm shows that it paid Plaintiffs for additional living expenses through July 31, 2019. It claims that it owes no further payments for loss of use but fails to establish this as it is based on an supported and explained statement which is a mere legal conclusion, rendering this portion of fact 21 not established. Plaintiffs respond with the same fact and evidence about the agreed monthly payment which they present int fact 19. In fact 27) State Farm claims that it paid all benefits due under Coverage C and that it owes no further benefits under the Policy but no evidence supports this conclusion so the fact is not established. Plaintiffs respond again with the same fact and evidence about the agreed monthly payment which they present int fact 19. In fact 28), State Farm claims that its handling of the claim was diligent, reasonable, and consistent with applicable regulations. The cited evidence is a self-serving statement in a declaration setting forth this conclusion with no other evidence. This is not established. In Fact 29) State Farm shows that Plaintiffs filed this action against it and Christine on January 7, 2020, setting forth causes of action for bad faith, breach of contract, negligence, and negligent misrepresentation. Plaintiffs do not dispute this fact, which is evident from the complaint, but correctly assert that they also named other Defendants.

Stipulation Regarding the Motion for Summary adjudication

As State Farm points out in its reply, Plaintiffs show in their own opposition that after State Farm filed this motion, the parties agreed that there are no unpaid amounts owing to Plaintiffs on the Policy as written, and the claim was adjusted in a reasonable manner and consistent with State Farm's obligations; the only remaining dispute regarding bad faith is Plaintiffs' contention that State Farm refused to abide by its captive agents' alleged promises," and Plaintiffs stipulate that they are no longer seeking punitive damages, and that the court should dismiss that claim with prejudice. Brown Dec., Ex.1.

This significantly limits the issues and arguments before the court and effectively reduces Plaintiffs' claims to one based on Defendants' failure to provide the insurance coverage requested.

Analysis

As noted above, the stipulation leaves Defendants' failure to provide the insurance coverage requested as the only basis for any cause of action. It also means that the court must grant the motion as to issue 2, punitive damages, leaving only issue 1, the claim for bad faith, and leaving it based solely on Defendants' alleged failure to provide the insurance coverage requested.

State Farm argues that it cannot be liable for this because it is up to the client insured to make sure that the coverage obtained is sufficient and the insurers has no duty to advise on the type or amount of insurance needed. This argument, however, is not the entire analysis because, as explained above, and insurer and its agent may be liable for failing to provide coverage requested, including type or amount, particularly where they represent that they have, in fact provided coverage which meets all of the client's requests.

State Farm also relies on *Carson v. Mercury Insurance Co.* (2012) 210 Cal.App.4th 409, at 430, and *Vulk v. State Farm General Insurance Company* (2021) 69 Cal.App.5th 243, at 262, for the proposition that a claim for insurance bad faith may not be based on conduct prior to the creation of the policy or for failure to provide a policy which provides enough coverage.

In *Vulk*, the parties entered into a factual stipulation similar to the one in this case the motion for summary judgment which was the subject of the appeal. However, it was different in that, as the court said, 'The parties also stipulated that, in light of these stipulations, "the only allegations remaining as to Andrighetto's breach of contract and bad faith causes of action are that: State Farm had a duty under the contract to use a reasonably complete replacement cost estimate that complied with 10 Cal. Code of Reg. section 2695.183 [i.e., the replacement cost regulation] and other California law when renewing [his] [p]olicy."' The court explained, at 262-263 that the insured argued

> that State Farm and its agent, "having undertaken to provide a 'full coverage' homeowner policy, ... owed [him] a contractual duty to perform reasonably and adequately." He adds that "when [he] requested the 'best policy' and State Farm's agent told [him] his replacement cost policy provided 'full coverage,' that created a duty to provide coverage that was within a reasonable margin of error of the actual replacement cost of [his] house. That duty can be enforced by a lawsuit either in contract or in tort." As for his claim for breach of the implied covenant of good faith and fair dealing, Andrighetto argues, as he did below, that State Farm failed to advise him that its agents do not provide a reasonably accurate estimate of the cost to replace his home.
>
> We conclude Andrighetto's appellate arguments are barred by the parties' stipulation. Parties may, as here, agree by stipulation to limit the issues presented to the trial court and the court will respect such stipulation. [Citation.] The plain terms of the parties' stipulation make clear that Andrighetto's arguments are outside the scope of issues the parties agreed would be presented to the trial court. Therefore, he cannot obtain a reversal of the trial court's summary judgment ruling based on these contentions.

In other words, there was no claim or argument before the court that the insurer could be liable for bad faith for knowingly issuing an insurance policy which it knew did not provide the coverage which the insured had requested, and when knowing that its own agent had falsely told the insureds that the policy provided the coverage requested. *Vulk* does not support State Farm's argument.

Similarly, *Carson* does not support State Farm's position, either. The full discussion in *Carson* of which State Farm cites in part states, and with emphasis added,

> Finally, we address Carson's argument it was a breach of the covenant of good faith and fair dealing *to write a policy which eliminates the need to cover diminution in value.* This

argument is nonsensical. The nature and extent of the duty imposed under a covenant of good faith is dependent on the contractual purpose and agreed upon benefits of the bargain. As stated above, " 'Every contract imposes on each party a duty of good faith and fair dealing in each performance and in its enforcement.' [Citations.]" [Citation.] We found no authority, and Carson cites to none, holding the covenant of good faith is triggered before the agreement is formed *and also imposes a duty to draft an agreement in a particular way*.

Here, Plaintiffs claim that Defendants in bad faith knowingly breached the duty, bargained for and represented by Defendants themselves, to provide a certain coverage which the insureds expressly requested.

The court **DENIES** the motion as to Issue 1, the cause of action for bad faith. The court **GRANTS** the motion as to Issue 2, punitive damages, based on the stipulation.

Conclusion

The court **DENIES** the motion as to issue 1 and **GRANTS** the motion as to issue 2. Plaintiffs shall prepare and serve a proposed order consistent with this tentative ruling within five days of the date set for argument of this matter. Opposing counsel shall inform the preparing counsel of objections as to form, if any, or whether the form of order is approved, within five days of receipt of the proposed order. The preparing party shall submit the proposed order and any objections to the court in accordance with California Rules of Court, Rule 3.1312.

2. SCV-267181, Anabi Oil Corporation, a California corporation v. Petersen

Motion for Protective Order and Sanctions DENIED. Sanctions of $860 awarded to the opposing party against moving parties and their attorney.

Facts

Plaintiff Anabi Oil Corporation ("Plaintiff") filed the verified complaint (the "Complaint") in this action against Defendants Harold Petersen, Steven Petersen and Bethany Zoe (together "Defendants") arising out of a right of first refusal in a lease agreement for real property located at 801 E. Washington Street, Petaluma (the "Property"). The Estate of Harriet Knott (the "Estate"), through its administrator Patrick Galligan ("Galligan"), filed a complaint against Plaintiff which has been consolidated into this case with a cause of action for unlawful detainer ("Estate's Consolidated Complaint"). Harold Petersen, Edward Petersen, James Petersen, Steve Petersen and Robert Keith ("Cross-Complainants") filed a cross-complaint ("Cross-Complaint") against cross-defendant Galligan ("Cross-Defendant") with two causes of action for 1) legal malpractice, and 2) breach of fiduciary duty. Cross-Complainants also filed an unlawful detainer case in case MCV-253858 with a second amended complaint against Plaintiff, which has been consolidated with SCV-267181 ("Consolidated Complaint").

With Cross-Defendants' then-operative unlawful detainer complaint being the second amended unlawful detainer complaint ("UDSAC"), Cross-Complainants eventually filed a motion to amend and reclassify the unlawful detainer complaint, which the court granted on October 14, 2022. The court noted that opposition had raised possible deficiencies but that under the applicable standard, in general a court should not deny leave to amend based on possible deficiencies in the pleading. Cross-Defendants filed their third amended unlawful detainer complaint ("UDTAC") on October 21, 2022.

Plaintiff moved the court to strike portions of the UDTAC seeking attorneys' fees because the UDTAC identified no statutory or contractual authority for the request for attorneys' fees. This court, after the hearing of January 25, 2023, granted that motion with leave to amend. Cross-Defendants filed a fourth amended unlawful detainer complaint ("UD4AC") on February 6, 2023.

Trial was first set for September 9, 2022 but continued to December 16, 2022 after the court granted Galligan's ex parte request to continue the trial. That application also sought to continue all pre-trial dates and deadlines pursuant to the Code of Civil Procedure and the order also granted that request, stating that all such pre-trial dates related to the trial were continued to "correspond to the newly set trial date." The court again continued the motion, at a December 1, 2022 case management conference ("CMC"), to March 10 2023. It was continued yet again by ex parte application to June 9, 2023, and then again by ex parte application of Defendant Bethany Zoe ("Zoe") to September 8, 2023.

After discussions regarding Cross-Complainants' efforts to depose Galligan's expert, resulting in a September 2022 deposition which the expert did not attend, on January 20, 2023 Galligan e-mailed Cross-Complainants asking to depose their experts. Kelly Dec. Cross-Complainants responded that discovery was closed based on the pre-trial discovery cut-off. Ibid. Galligan asserted that there had been an agreement to extend the discovery cut-off and on January 30, 2023 noticed the depositions for Cross-Complainants' experts. Ibid.

Motion

Cross-Complainants move the court for a protective order barring Galligan from deposing their expert witness in accord with the deposition notices which Galligan served on the basis that Galligan served them after the discovery cut-off, pursuant to Code of Civil Procedure ("CCP") sections 2024.020 and 2024.030. They seek monetary sanctions.

Galligan opposes the motion, arguing that he had noticed the experts' depositions on November 7, 2022, with the deposition set for November 29 and 30, 2022, prior to the cut-off for the then-scheduled trial date of December 16, 2022. He seeks monetary sanctions.

A party or subpoenaed witness may "promptly" seek a protective order before, during, or after a deposition. CCP sections 1987.1, 2025.420.

On a motion for a protective order, the court, "for good cause shown, may make any order that justice requires to protect any party... from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense." CCP section 2025.420. The burden of proof is on the party seeking the protective order to demonstrate "good cause." *Emerson Elec. Co. v. Sup.Ct.* (1997) 16 Cal.4th 1101, 1110.

Parties may conduct discovery up through 30 days, and bring discovery motions up through 15 days, "before the date *initially* set for the trial of the action." Code of Civil Procedure ("CCP") section 2024.020(a), emphasis added. Parties may conduct expert discovery up through 15 days before trial, and bring discovery motions up through 10 days, "before the date *initially* set for the trial of the action." CCP section 2024.030, emphasis added.

The parties agree that the initial trial continuance re-set the discovery cut-off to be based on the new December 16, 2022 trial date, and that no trial continuance thereafter also continued the discovery cut-off. The parties argue over the dates of Galligan's deposition notices, however, with Cross-Complainants arguing that Galligan served the notices in January 2023, more than two months after the close of the discovery cut-off. Galligan notes that he initially served the notices in November and that these were timely under the cut-off.

Galligan is correct that his depositions notices as originally served in November 2022 were timely based on the discovery cut-off. He also shows that in correspondence Cross-Complainants stated that they would not produce their experts for deposition as noticed in November and that they instead wished to wait until December in order to find out how the court was going to handle the schedules in the case and to reschedule the depositions for after the hearing on the motions for summary judgment ("MSJs") in December 2022. Holaday Dec., Exs.5-6. Cross-Defendants agreed that their experts' depositions "will go forward at some point after we know the outcome of those pending matters referenced above," the matters being the status conference and MSJs. Ibid. The parties, he contends, thus agreed to conduct the expert discovery later, only for Cross-Complainants subsequently to refuse on the basis that the discovery cut-off had closed.

Gallagan's argument is persuasive. Despite the discovery cut-off, he served timely deposition notices and, prior the close of the cut-off, he and Cross-Complainants agreed in writing to conduct the depositions after the discovery cut-off, with Cross-Complainants expressly stating in writing that they would do this, and based on their own written suggestion. They then simply refused on the basis of a discovery cut-off which they had in writing stated that they would ignore for the depositions. The matter is clear and Cross-Defendants may not now hide behind the discovery cut-off.

The motion is DENIED.

Sanctions

CCP sections 2017.020(b) and 2025.420(d) state that on a motion for a protective order the court "shall" impose monetary sanctions on the losing party pursuant to CCP section 2023.010, et seq., unless that party acted with substantial justification or other circumstances make sanctions unjust. The sanctions are limited to the "reasonable expenses" related to the motion. *Ghanooni v. Super Shuttle of Los Angeles* (1993) 20 Cal.App.4th 256, 262.

In discovery, the court may impose the monetary sanctions against the party, person, or attorney. CCP section 2023.030(a). It is appropriate to award sanctions against a party's attorney if the court finds that the attorney decided to engage in, or recommend, the behavior at issue. CCP section 2023.030(a); *Ghanooni v. Super Shuttle* (1993) 20 Cal.App.4th 256, 261. If sanctions are sought against an attorney, the burden shifts to the attorney to demonstrate that he or she did not recommend that conduct. *Corns v. Miller* (1986) 181 Cal.App.3rd 195, 200-201.

Galligan seeks sanctions of $1,360 for 1.8 hours meeting and conferring and 3.5 hours spent preparing the opposition, plus 1.5 hours anticipated, at $200 an hour. Holaday Dec., ¶¶18-20. This is reasonable but the court may only award sanctions for expenses actually incurred. Thus far, Galligan has incurred fees of $860, for 4.3 hours. The court AWARDS this amount to Galligan against Cross-Defendants and their attorney.

Unless the court grants leave to conduct discovery or bring motions after the cut-off under CCP section 2024.050 or the parties so agree under section 2024.060, the continuance of a trial date does not continue the discovery cut-off or otherwise re-open discovery. CCP sections 2024.020(b), 2024.050, 2024.060.

Conclusion

The prevailing party shall prepare and serve a proposed order consistent with this tentative ruling within five days of the date set for argument of this matter. Opposing counsel shall inform the preparing counsel of objections as to form, if any, or whether the form of order is approved, within five days of receipt of the proposed order. The preparing party shall submit

the proposed order and any objections to the court in accordance with California Rules of Court, Rule 3.1312.

3. SCV-268370, Nellessen v. Sierra Pacific Mortgage, Inc.

Plaintiff's Motion to Compel Further Special Interrogatory Answers Without Objection from Sierra Pacific Mortgage, Inc. GRANTED based on Plaintiff's representations that the interrogatories are in fact simply contention interrogatories, as further explained herein. Any further response is limited to identifying contentions. Sanctions regarding this motion are denied for both parties.

Defendant's Motion to Compel Further Responses to Form Interrogatories and Special Interrogatories from Plaintiff Amy Nellessen; Request for Monetary Sanctions GRANTED in full. Sanctions of $1,095 are awarded to the moving party against Plaintiff.

Defendant's Motion to Compel Further Responses to Requests for Admission from Plaintiff Amy Nellessen; Request for Monetary Sanctions GRANTED in full. Sanctions of $1,095 are awarded to the moving party against Plaintiff.

Defendant's Motion to Compel Further Responses to Requests for Production of Documents from Plaintiff Amy Nellessen; Request for Monetary Sanctions GRANTED in full. Sanctions of $1,095 are awarded to the moving party against Plaintiff.

Facts

Alleging that she owns real property at 4756 Sunshine Avenue, Santa Rosa, California ("Property") and that she owes a debt on a mortgage loan ("Loan") secured against the Property, Plaintiff complains that Defendant breached and misrepresented the terms of a mortgage deferral program ("Program") for her Loan payments, failed to release her from the Program when required, failed to apply her Loan payments properly, and misreported her credit and payment history. Plaintiff identified one defendant, Sierra Pacific Mortgage, Inc., aka Loan Care LLC ("SPM"). SPM answered, denying that it is also known as Loan Care LLC. Plaintiff later served LoanCare, LLC ("LoanCare") separately and then moved the court to enter a default and default judgment against LoanCare. LoanCare appeared and opposed the motion, which the court denied after a hearing of July 8, 2022.

Discovery

Plaintiff served SPM with Special Interrogatories, Set Three on July 5, 2022; Plaintiff received SPM's responses on August 8, 2022; after Plaintiff met and conferred over claimed deficiencies in the responses, SPM served supplemental responses which Plaintiff received on November 7, 2022; Plaintiff still found the responses defective so met and conferred in order to resolve the situation but this was in vain. Nellessen Dec.

SPM served Plaintiff on July 1, 2022 with Form Interrogatories, Set One; Special Interrogatories, Set One; Requests for Admission, Set One; and Requests for Production of Documents, Set One. Parra Declarations ¶2. Plaintiff served responses to all on October 14, 2022 but SPM found the responses deficient so met and conferred to obtain further responses and Plaintiff provided supplemental responses on December 14, 2022 but Defendant found them still deficient and further efforts to meet and confer proved fruitless. Parra Declarations.

Motions

In one motion, Plaintiff moves the court to compel SPM to provide further responses to the special interrogatories and she seeks sanctions of $1,560 for 3.9 hours spent at $400 an hour.

SPM opposes Plaintiff's motion. It reiterates its objections and argues that under *Sav-On Drugs, Inc. v. Superior Court* (1975) 15 Cal.3d 1, a party need not respond to discovery requests which amount to legal research of laws readily available to the party seeking the information, or which seek legal reasoning.

Plaintiff has filed a reply.

SPM brings three motions to compel further responses to its discovery requests: a Motion to Compel Further Responses to from Plaintiff Amy Nellessen; Request for Monetary Sanctions, Motion to Compel Further Responses to Requests for Admission from Plaintiff Amy Nellessen; Request for Monetary Sanctions, and Motion to Compel Further Responses to Requests for Production of Documents from Plaintiff Amy Nellessen; Request for Monetary Sanctions. For each motion, it seeks monetary sanctions of $1,825 for 3 hours of attorney time preparing each motion plus 2 hours anticipated for the reply and hearing.

Plaintiff opposes all of SPM's motions and SPM has filed a reply for each motion.

Authority Governing Motions to Compel Further Responses

When a propounding party is dissatisfied with responses to interrogatories or requests for production or inspection ("RFP"), that party may move to compel further responses. Code of Civil Procedure ("CCP") sections 2030.300, 2031.310. The moving party must make adequate attempts to meet and confer. Ibid. Generally, once a timely, proper motion to compel further responses has been made, the responding party has the burden to justify objections or incomplete answers. *Coy v. Sup.Ct.* (1962) 58 Cal.2d 210, 220-221.

A party moving to compel further responses to a production request, however, must demonstrate "good cause" for seeking the items. CCP section 2031.310(b)(1). This requires a showing that the items are relevant to the subject matter of the litigation and a showing of specific facts justifying discovery. *Glenfed Develop. Corp. v. Sup.Ct.* (1997) 53 Cal.App.4th 1113, 1117. Whether there is an alternative source for the information is relevant though not dispositive. *Associated Brewers Distrib. Co. v. Sup.Ct.* (1967) 65 Cal.2d 583, 588. Once the moving party demonstrates good cause, the responding party must justify its objections. See *Hartbrodt v. Burke* (1996) 42 Cal.App.4th 168.

Requests must identify the documents sought by describing a category with "reasonable particularity" CCP section 2031.030(c)(1). This description must be particularized from the point of view of the person on whom the demand is made, such as by describing categories which bear some relationship to the manner in which the documents are kept. See *Calcor Space Facility, Inc. v. Sup.Ct.* (1997) 53 Cal.App.4th 216, 222.

A party has a duty to provide "complete" responses and to make them as straightforward as possible. CCP sections 2030.220; 2031.210-2031.230. Requests must be answered to the extent possible and an answer that contains only part of the information requested or which evades a meaningful response is improper. *Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 783.

It is also not proper to respond by simply referring to other documents such as a deposition transcript. *Deyo, supra.* If a party does refer to other documents, it should generally also specify the source and summarize the information to make the response itself complete. *Ibid.* A responding party also has a duty to make a reasonable, good-faith effort to obtain the requested information and if it is unable to comply, it must state that it made a reasonable and diligent search. CCP sections 2030.220 2031.230; *Deyo, supra*, 84 Cal.App.4th 783.

According to *Sav-On Drugs, Inc. v. Superior Court* (1975) 15 Cal.3d 1, a party need not respond to discovery requests which amount to legal research of laws readily available to the party seeking the information, or which seek legal reasoning.

When a propounding party is dissatisfied with responses to requests for admission ("RFAs"), that party may move to compel further responses. CCP section 2033.290. The moving party must make adequate attempts to meet and confer. Ibid. Generally, once a timely, proper motion to compel further responses has been made, the responding party has the burden to justify objections or incomplete answers. *Coy v. Sup.Ct.* (1962) 58 Cal.2d 210, 220-221. With respect to RFAs, the motion may not be used to compel admissions of facts *unqualifiedly* denied. *Holguin v. Sup.Ct.* (1972) 22 Cal.App.3d 812, 820.

No interrogatory or request for admission ("RFA") may "contain subparts, or a compound, conjunctive, or disjunctive" question or request unless it is part of an approved Judicial Council form discovery. CCP section 2030.060(f), 2033.060(f). However, it is not entirely clear when discovery violates this rule and discovery does not necessarily violate it simply by including words such as "and" in the language. See *Clement v. Alegre* (2009) 177 CA4th 1277, 1291. The court in Clement indicated that those interrogatories or RFAs which seek responses to different, discrete subjects violate the rule but that others which include conjunctions or arguably different items are appropriate as long as they seek information on only one overall topic, such as first and last name and telephone number.

For compelling further responses, the court shall impose monetary sanctions on the losing party unless that party acted with substantial justification, or other circumstances make sanctions unjust. CCP §§2023.010, 2023.030, 2030.300, 2031.310, 2033.290. In order to obtain sanctions, the moving party must state in the notice of motion that he is seeking sanctions, identify against whom he seeks the sanctions, and specify the kind of sanctions. CCP section 2023.040. The sanctions are limited to the "reasonable expenses" related to the motion. *Ghanooni v. Super Shuttle of Los Angeles* (1993) 20 Cal.App.4th 256, 262.

In discovery, the court may impose monetary sanctions against the party, person, or attorney. CCP section 2023.030(a). It is appropriate to award sanctions against a party's attorney if the court finds that the attorney decided to engage in, or recommend, the behavior at issue. CCP section 2023.030(a); *Ghanooni v. Super Shuttle* (1993) 20 Cal.App.4th 256, 261. If sanctions are sought against an attorney, the burden shifts to the attorney to demonstrate that he or she did not recommend that conduct. *Corns v. Miller* (1986) 181 Cal.App.3rd 195, 200-201.

Plaintiff's Motion

Plaintiff seeks further responses to special interrogatories 34 and 35, in which Plaintiff asks SPM to identify all Federal or State statutes, respectively, which LoanCare LLC ("LoanCare") potentially violated in its handling of SPM's Program as to Plaintiff. Defendant objected to both as improperly containing subparts or being compound or disjunctive or conjunctive, unduly vague or overly broad as to scope and time and as to the term "Loan Modification Program," and as a question of pure law, rather than application of law to facts. It adds that Plaintiff failed to identify or explain "Loan Modification Program" but that it made a reasonable effort to identify any laws which LoanCare may have violated and found none.

Plaintiff correctly argues that these are not improperly conjunctive or disjunctive, or compound, and do not improperly contain subparts.

Plaintiff explains that she is merely asking SPM to identify those statutes which SPM contends LoanCoare violated in handling the Program as to her. She points out that SPM has claimed that it is separate from LoanCare and that any violations regarding Plaintiff were the fault of LoanCare.

Plaintiff is persuasive that the interrogatories are not vague or ambiguous, regarding the Program or in any other way. It is evident that Plaintiff as referring to the Program, a loan deferral or modification program as alleged in the complaint.

As worded, Plaintiff's interrogatories are, however, arguably somewhat confusing or overly broad and improper in asking SPM to identify all statutes which LoanCare potentially violated. Such a request may amount to a request to do legal research or to provide legal analysis.

Plaintiff's explanation of what she is requesting, however, clarifies and resolves this issue. She explains in the motion that she is simply asking SPM to identify those statutes which SPM contends LoanCare has violated, if any. The court therefore interprets the interrogatories as so limited. They are, therefore, merely standard contention interrogatories and they properly ask SPM to identify those laws which SPM is contending LoanCare has violated in handling Plaintiff's account under the Program. This is distinguishable from the situation in *Sav-On Drugs, supra.* SPM must therefore respond to the interrogatories in this regard. If SPM is making no such claims, then it may, it must, say so in its responses. If Plaintiff's interrogatories are in fact to be interpreted differently from the way in which the court has herein explained its understanding of what Plaintiff seeks, then Plaintiff must explain that. Otherwise, the interrogatories are limited to the information about SPM's contentions which this court has identified.

With the interpretation and limitation noted above, the court GRANTS Plaintiff's motion.

Sanctions

The court DENIES the request for sanctions. Plaintiff's motion is valid and persuasive but, as noted above, there was a fundamental ambiguity in the wording of the interrogatories. The court finds that Plaintiff has rectified this in the motion, but the ambiguity was sufficient for SPM reasonably not to understand what Plaintiff actually requested. The court finds that no party is entitled to sanction on Plaintiff's motion.

SPM's Motion to Compel Further Responses to Interrogatories

SPM seeks further responses to form interrogatories 2.5, 6.1-6.7, 8.1-8.8, 9.1, 9.2, 17.1, 50.1, and 50.6. The response to 2.5 is a substantive response without objection but is incomplete, failing to provide or address all of the information requested. The responses to 6.1-6.7 consist solely of an objection that these standard contention interrogatories violate the right to privacy, without explaining why or how. Plaintiff otherwise states only that she had only claimed economic damages. These responses are deficient and the objection as it stands is unpersuasive. Although some possibly responsive information may be subject to the right to privacy, the questions seek standard, basic information about what Plaintiff contends so the right to privacy does not apply. Moreover, on the face of the matter based on the information before the court, Plaintiff has waived the privacy protection for responsive information by putting these contentions directly at issue. Interrogatories 8.1-8.8 similarly are standard contention questions. Plaintiff responded that they are not relevant but she responded to 8.1, asking if she attributes any loss of income or earning capacity to the events, by stating that she "has not alleged loss of income or earning capacity." SPM persuasively argues that the objection is unpersuasive but fails to recognize that Plaintiff nonetheless responded and stated that she is not seeking such damages. The responses to 9.1 and 9.2 lack objections but are incomplete. The responses to 17.1, regarding RFAs to which Plaintiff responded with anything other than an unqualified admission, and 50.1, regarding all documents related to each alleged agreement in the pleadings,

are similarly incomplete and fail to respond in full or address all of the information sought. The response to 50.6 is unclear, and confusing, and does not appear to be fully responsive.

The court DENIES the motion as to form interrogatories 8.1-8.8 because Plaintiff provided a substantive response that she has not alleged the damages at issue in those. The court GRANTS the motion as to all of the other form interrogatories at issue.

SPM also seeks further responses to special interrogatories 1-33. SPM asks Plaintiff to set forth fact supporting specified claims or contentions, or the persons or documents with the information or agreements or loans at issue, or to provide relevant dates, or to identify real property, or to specify misrepresentations made to her, or to state how she has been damaged. For each one, Plaintiff set forth factual statements which are detailed. Plaintiff also provided a reference to the complaint allegations for each assertion and, in supplemental responses, provided additional facts, with discussion of "relevancy" with respect to the complaint. Defendant argues that Plaintiff has not responded properly because she merely referred to her allegations but this is not persuasive. For some of them, Plaintiff also posited objections mixed in with the factual recitations.

For interrogatories 1, 16, 19, 22, 27, 30, simply asking Plaintiff to set forth facts supporting her contentions, Plaintiff has on the face of the responses provided substantive responses, without objections, and these are facially responsive to the questions since they include factual assertions. The fact that Plaintiff has repeated statements from her complaint does not render the responses defective.

However, for the remaining interrogatories, the responses consisting merely of lengthy recitations of facts are not responsive and they are confusing and unclear.

The court DENIES the motion as to special interrogatories 1, 16, 19, 22, 27, 30 but GRANTS the motion as to all other special interrogatories.

The court notes that Plaintiff's opposition add nothing helpful or material regarding this motion. It contains some factual recitations and assertions regarding her claims and communications between her and SPM which are not fully clear or discussed, brief conclusory statements that the discovery is improper and "abusive," and no meaningful analysis.

Conclusion: SPM's Interrogatory Motion

The court DENIES the motion as to form interrogatories 8.1-8.8 because Plaintiff provided a substantive response that she has not alleged the damages at issue in those. The court GRANTS the motion as to all of the other form interrogatories at issue. The court DENIES the motion as to special interrogatories 1, 16, 19, 22, 27, 30 but GRANTS the motion as to all other special interrogatories.

Sanctions

DSPM seeks monetary sanctions of $1,825, for 3 hours of attorney time preparing the motion plus 2 hours anticipated for the reply and hearing. This amounts to $365 an hour. This is reasonable but the court may only award sanctions for time actually incurred and thus far this amounts to the 3 hours spent preparing the motion. The court awards Defendant sanctions of $1,095. The motion states only that SPM seeks sanctions and does not specify against whom. Accordingly, the court finds that SPM seeks the sanctions only from Plaintiff, not her attorney.

SPM's Motion to Compel Further Responses to Requests for Production

SPM moves the court to compel Plaintiff to provide further responses to RFPs 1-31. However, the motion does not address an RFP 22 or discuss it in the separate statement. The court therefore limits this ruling to RFPs 1-21 and 23-31. In these, SPM seeks various

documents related to the Loan and mortgage history and relationships, or supporting Plaintiff's contentions.

Plaintiff responded to 21, 24, 25, 26, 27, 28, 29, 30, and 31 as compound, unduly burdensome, and not reasonably particularized, but agreed to produce all relevant documents in her possession. Otherwise, her response to these is similar to the others.

Plaintiff responded to all of the other RFPs by agreeing to produce responsive documents. The responses are essentially the same and in supplemental responses she further agreed to produce documents. She referred to SPM's production of documents and simply referred to a bulk production of documents without providing specification.

SPM is correct that the objections to 21, 24, 25, 26, 27, 28, 29, 30, and 31 are unpersuasive. These seek documents supporting specified contentions and they appear directly relevant and not overly burdensome.

SPM is also correct that the responses to the extent of agreeing to provide documents are improperly vague and non-responsive. Plaintiff agreed to produce documents but provided only very general responses with apparently bulk production lacking specification of which documents are responsive to which items. Plaintiff's supplemental response referring to SPM's allegedly bulk production is immaterial.

Again, Plaintiff's brief opposition is conclusory and lacking in meaningful discussion or analysis.

The court GRANTS the motion as to all RFPs at issue, 1-21, and 23-31.

Sanctions

DSPM seeks monetary sanctions of $1,825, for 3 hours of attorney time preparing the motion plus 2 hours anticipated for the reply and hearing. This amounts to $365 an hour. This is reasonable but the court may only award sanctions for time actually incurred and thus far this amounts to the 3 hours spent preparing the motion. The court awards Defendant sanctions of $1,095. The motion states only that SPM seeks sanctions and does not specify against whom. Accordingly, the court finds that SPM seeks the sanctions only from Plaintiff, not her attorney.

SPM's Motion to Compel Further Responses to Requests for Admission

SPM in its third motion moves the court to compel Plaintiff to provide further responses to RFAs 6, 9, 12, 13, 15, 16, and 17. For each of these, Plaintiff provided a substantive response without objections. Plaintiff partly admitted and partly denied RFAs 9, 15, 16, and 17, and with lengthy factual assertions qualifying the responses. Plaintiff admitted RFAs 6, 12, and 13, but again provided lengthy explanations and factual assertions qualifying the admission.

SPM persuasively argues that all of these responses are somewhat unclear and confusing, with no real explanation of exactly what Plaintiff is actually admitting or denying, leaving the answers ambiguous.

Plaintiff must provide more clear answers explaining exactly what Plaintiff admits or denies, how, and why. The court GRANTS the motion in full.

Sanctions

DSPM seeks monetary sanctions of $1,825, for 3 hours of attorney time preparing the motion plus 2 hours anticipated for the reply and hearing. This amounts to $365 an hour. This is reasonable but the court may only award sanctions for time actually incurred and thus far this amounts to the 3 hours spent preparing the motion. The court awards Defendant sanctions of $1,095. The motion states only that SPM seeks sanctions and does not specify against whom. Accordingly, the court finds that SPM seeks the sanctions only from Plaintiff, not her attorney.

Conclusion

The court GRANTS Plaintiff's motion to compel as detailed above, based on the interpretation that the interrogatories are in fact simply contention interrogatories, as Plaintiff explains in the moving papers. The court denied all requests for sanctions regarding this motion.

The court GRANTS all three of SPM's motions to compel, as detailed above, and awards SPM sanctions of $1,095 for each motion, for reasonable expenses actually and thus far incurred.

The prevailing party on each motion shall prepare and serve a proposed order consistent with this tentative ruling within five days of the date set for argument of this matter. Opposing counsel shall inform the preparing counsel of objections as to form, if any, or whether the form of order is approved, within five days of receipt of the proposed order. The preparing party shall submit the proposed order and any objections to the court in accordance with California Rules of Court, Rule 3.1312.

5. SCV-269230, Fidelity National Title Company v. Darling

Demurrer to First Amended Cross-Complaint SUSTAINED IN PART, OVERRULED IN PART. The court SUSTAINS the demurrer to the identified fifth cause of action for fraud, without leave to amend. The court OVERRULES all other demurrers.

Motion to Strike First Amended Cross-Complaint DENIED.

Facts and History

Plaintiff and Cross-Defendant Fidelity National Title Company ("Fidelity") filed this action for interpleader on September 7, 2021, subsequently amending the complaint to the operative second amended complaint ("SAC"). In the SAC, Fidelity names Defendant William R. McCarty, Jr. ("McCarty"), individually and as successor trustee to the Della Mae McCarty Revocable Trust dated December 16, 2019 ("Della 2019 Trust"), Defendant Heidi Darling ("Darling") as successor trustee to the W.R. McCarty Revocable Trust dated June 4, 2010 ("WRM Trust") and the Della Mae McCarty Revocable Trust dated March 15, 2011 ("Della 2011 Trust"), and Defendant Debbie Darlene Shimon ("Shimon") as daughter of McCarty and Della Mae McCarty ("Della").

It alleges that McCarty and Della obtained title as tenants in common to real property at 6881 Day Road, Windsor ("the Property") on June 10, 2010, McCarty recorded a quitclaim of his interest in the Property to the WRM Trust the same day and Della later recorded a quitclaim of her interest in the Property to the Della 2011 Trust. It also alleges that on around October 1, 2019, the Della 2011 Trust granted its half interest in the Property to Della who by around April 1, 2020 had transferred the interest to the Della 2019 Trust. The Property was subsequently sold and Fidelity handled the close of escrow for the sale on about July 22, 2021. On the close of escrow, it adds, there was a balance due to the sellers of $1,119,381.65 ("the Sale Proceeds"), but it understood there to be a dispute between the Defendants regarding distribution of the Sale Proceeds, including a dispute as to whether Della had the capacity to revoke the Della 2011 Trust or transfer her interest in the Property. Plaintiff filed this action to deposit the Sale Proceeds with this court and obtain a determination as to whom it should distribute the Sale Proceeds.

McCarty filed a cross-complaint against Cross-Defendants Anthony Haberthur ("Haberthur"), Fidelity (collectively, Harberthur and Fidelity are "the FNTC Parties"), Darling individually and as trustee of the Della 2011 Trust, Shimon, and Sherri Cooper Johnston ("Johnston"), asserting causes of action for indemnification, apportionment of fault, declaratory

relief, and fraud. He alleged that he is the trustee of the Della 2019 trust and complained that he is entitled as such to the entire proceeds of the sale of the Della 2019 Trust's interest in the Property, and that the Cross-Defendants knowingly and without his consent sold the Della 2019 Trust's interest in the Property. He added that Cross-Defendants conspired together to sell the Property without his consent, the Property was sold at too low a price, depriving him of the full market value as well, and he seeks exemplary damages.

The FNTC Parties filed a demurrer to the cross-complaint on August 30, 2022. At the hearing on the demurrer on December 7, 2022, parties informed the court that McCarty had filed the first amended cross-complaint ("FACC") that same day. The court sustained the demurrer with leave to amend.

In the FACC, McCarty presents largely the same basic allegations as in his original cross-complaint, but with some modifications and different identified causes of action. He alleges that he is an "heir" of the Della 2019 Trust, the WRM Trust, and the Della 2011 Trust, and he is the trustee of the Della 2019 Trust. He alleges that Della transferred her half-interest in the Property from herself to the Della 2011 Trust and then to the Della 2019 Trust while the other half interest was deeded to the WRM Trust.

He complains that the Cross-Defendants knowingly and without his consent sold the Della 2019 Trust's half interest in the Property. Specifically, he complains, Darling, as successor trustee of the Della 2011 Trust, had filed a petition to transfer ownership of the half interest in the Property from the Della 2019 Trust back to the Della 2011 Trust (the "Property Transfer Petition") and then, while that action was still pending and without a court order allowing her to do so, she hired Johnston as real estate agent to list and sell the Property. They then completed a sale of the Property to Cross-Defendant Richard Carnation, Trustee of the Sunshine Investment Trust ("Carnation"). The FNTC Parties handled the transaction. The FNTC Parties allegedly were aware that the title history showed others as trustees of the various trusts so it requested documentation of Darling's authority regarding the trusts and interests in the Property and obtained documentation regarding Darling's role as successor trustee of the WRM Trust and Della 2011 Trust, but not the Della 2019 Trust. FNTC also allegedly prepared an affidavit for Darling stating that she had full authority for each of the trusts, including the Della 2019 Trust, to act on behalf of each trust, and Darling signed the affidavit. Eventually, after the Property sale was completed, on April 4, 2022 the court in Darling's Property Transfer Petition ruled against Darling, finding that Della had been competent to transfer her half interest in the Property to the Della 2019 Trust and that McCarthy was the trustee of the Della 2019 Trust.

McCarthy presents a first cause of action for declaratory relief against all Cross-Defendants regarding whether he is entitled to receive the entire gross proceeds of the sale of the Property as heir and trustee of the Della 2019 Trust; a second cause of action against solely Carnation to quiet title to the Property; a third cause of action for recovery of property against Carnation to recover the Property; a fourth cause of action for intentional tort against all Cross-Defendants for knowingly participating in the sale of the Della 2019 Trust's interest in the Property without the consent of the trustee of that trust and in knowing violation of the rights of McCarthy and the Della 2019 Trust; a fifth cause of action for fraud against all Cross-Defendants for knowingly and fraudulently selling the Della 2019 Trust's interest in the Property; and a sixth cause of action for negligence against all Cross-Defendants for negligently selling the Della 2019 Trust's interest in the Property.

Meanwhile Darling had demurred to McCarty's original cross-complaint, specifically the fourth cause of action for intentional tort and fifth cause of action for fraud on the grounds that

each fails to state facts sufficient to constitute a cause of action and is uncertain. Darling also moved to strike specified portions of the cross-complaint, specifically page 5, ¶5 allegations regarding knowing, intentional, fraudulent conduct and fraud, malice, or oppression, and page 11 section for exemplary damages.

Darling's demurrer and motion to strike were set to be heard on February 8, 2023. This court ordered them to be dropped in light of the fact that McCarty had filed her FACC after Darling had filed the demurrer and motion to strike, rendering them moot.

Demurrer and Motion to Strike

Fidelity and Haberthur (collectively, "the FNTC Parties") demur to McCarty's FACC and specific causes of action therein. They demur to the first cause of action for declaratory relief on the ground that it fails to state facts sufficient to constitute a cause of action, the fourth cause of action for intentional tort on the grounds that it is uncertain and fails to state facts sufficient to constitute a cause of action, the fifth cause of action for fraud on the ground that it fails to state facts sufficient to constitute a cause of action, and Haberthur alone demurs to the entire FACC on the ground that it fails to state facts sufficient to constitute a cause of action.

The FNTC Parties also move to strike the FACC's sixth cause of action for negligence in its entirety, pages 9-11, ¶¶37-46.

McCarthy has filed a single opposition brief against both the demurrer and motion to strike, arguing that the allegations are sufficient and the Cross-Defendants understand the facts and allegations presented.

Demurrer

A demurrer can only challenge a defect appearing on the *face* of the complaint, exhibits thereto, and judicially noticeable matters. Code of Civil Procedure ("CCP") section 430.30; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318. The grounds for a demurrer are set forth in CCP section 430.10. The grounds, as alphabetically identified in the statute, include (e) the pleading fails to state facts sufficient to constitute a cause of action and (f) uncertainty.

Demurrer for failure to state facts sufficient to constitute a cause of action is a general demurrer, which must fail if there is *any* valid cause of action. CCP §430.10(e); *Quelimane Co., Inc. v. Steward Title Guar. Co.* (1998) 19 Cal.4th 26, 38; *Fox v. JAMDAT Mobile, Inc*. (2010) 185 Cal.App.4th 1068, 1078 ("as long as a complaint consisting of a single cause of action contains any well-pleaded cause of action, a demurrer must be overruled even if a deficiently pleaded claim is lurking in that cause of action as well"). For example, if a party directs a general demurrer against a cause of action labelled "fraud" based on failure to state that cause of action, the demurrer will fail if the complaint sets forth a valid cause of action for malpractice. *Saunders v. Cariss* (1990) 224 Cal.App.3d 905, 908.

In pleading, the actual content of the allegations is more important than the express title or identification of causes of action. Accordingly, even a complaint which fails to allege the elements necessary for the cause of action expressly labeled in the complaint is sufficient to state any cause of action which the pleaded facts actually support, as long as "the pleaded facts state a cause of action on any available legal theory." *Saunders v. Cariss* (1990) 224 Cal.App.3d 905, 908. For example, therefore, if a party directs a general demurrer against a cause of action labelled "fraud" based on failure to state that cause of action but instead pleads malpractice, the demurrer will fail if the complaint sets forth a valid cause of action for malpractice. *Saunders, supra,* 224 Cal.App.3d 908.

The demurrer for uncertainty is not favored and will only be sustained if the responding party cannot reasonably comprehend what allegations are made against him and thus respond.

Khoury v. Maly's of Calif., Inc. (1993) 14 Cal.App.4th 612, 616. A demurrer for uncertainty must specify precisely how, why, and where the complaint is uncertain. See *Fenton v. Groveland Community Services Dist.* (1982) 135 Cal.App.3d 797, 809.

Request for Judicial Notice

The FNTC Parties request judicial notice of Fidelity's SAC in this action. The court may judicially notice this document, the contents, and the purported legal effect but it may not judicially notice the truth of factual assertions made therein. With this limitation, the court grants the request.

First Cause of Action for Declaratory Relief

The FNTC Parties demur to the first cause of action on the ground that it fails to state facts sufficient to constitute a cause of action, arguing that there is no actual, present controversy between them and McCarthy and because McCarthy does not seek prospective relief.

In order for a party to seek declaratory relief, there must be 1) an actual controversy about justiciable questions regarding the rights or obligations of a party which 2) involves a proper subject of declaratory relief. Code of Civil Procedure ("CCP") section 1060; *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 80; *Alameda County Land Use Assn. v. City of Hayward* (1995) 38 Cal.App.4th 1716, 1722; see also See 5 Witkin, Cal.Proc. (6th Ed. 2021, March 2023 Update), Pleading, section 859.

The cause of action for declaratory relief acts prospectively, not retroactively to redress past wrongs. *Gafcon v. Ponsor & Associates* (2002) 98 C.A.4th 1388, 1403; 5 Witkin, Cal.Proc. (6th Ed. 2021, March 2023 Update), Pleading, section 846.

Nonetheless, in generally, "[s]trictly speaking, a demurrer is not an appropriate weapon to attack a claim for declaratory relief inasmuch as the plaintiff is entitled to a declaration of its rights, even if adverse." *Farmers Ins. Exchange v. Zerin* (1997) 53 Cal. App. 4th 445, 460; see also *Maguire v. Hibernia Savings & Loan Soc.* (1944) 23 Cal.2d 719, 729; *Bennett v. Hibernia Bank* (1956) 47 Cal.2d 540, 549; see also 5 Witkin, Cal.Proc. (6th Ed. 2021, March 2023 Update), Pleading, section 875. According to the Supreme Court in *Bennett*, "the complaint is sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties.... If these requirements are met, the court must declare the rights of the parties whether or not the facts alleged establish that the plaintiff is entitled to a favorable declaration."

McCarthy does present a present controversy regarding interest in the Property and interest in the funds which are in dispute, based on the interest in the Property. The FNTC Parties are incorrect that this seeks to redress only past wrongs because the dispute is ongoing and, at the very least, the funds at issue have not been distributed. Even with respect to the Property itself, the dispute over whether McCarthy, or the Della 2019 Trust, is entitled to a half interest in the Property, is ongoing. The fact that the sale to Carnation already took place does not render this simply a claim for damages for past wrongs. Moreover, the FNTC Parties are incorrect in their claim that there is no dispute between McCarthy and them, merely because they have filed a complaint in interpleader allegedly disclaiming any interest in the funds deposited. The fact that they claim no interest does not mean that there is no controversy between them and McCarthy, while the fact that they have alleged that there is no controversy is not dispositive in light of the fact that McCarthy alleges that there is one. Nothing demonstrates that as a matter of law there is no actual dispute between these parties.

The court OVERRULES the demurrer to this cause of action.

Fourth Cause of Action for Intentional Tort

The FNTC parties demur to the fourth cause of action on the grounds that it is uncertain and fails to state facts sufficient to constitute a cause of action. They contend that it is uncertain because it is not clear "what" intentional tort he alleges and fails to state a valid cause of action because it is based not on failure to follow escrow instructions but on reliance on an affidavit of Darling. It notes that an escrow holder's duty is limited to complying with escrow instructions.

The FNTC Parties are correct that ordinarily a title company, or escrow holder, owes a duty to the parties in a transaction solely to adhere to and effect the escrow instructions. *Lee v. Title Ins. & Trust Co.* (1968) 264 Cal.App.2d 160, 162; *Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 Cal.4th 705, 711; *Tribeca Companies, LLC v. First American Title Insurance Company* (2015) 239 Cal.App.4th 1088, 1114.

The court in *Lee* ruled that an escrow holder had no "fiduciary duty to go beyond the escrow instructions and notify each party to the escrow of any suspicious fact or circumstance which has come to his attention... [when] the fact or circumstance is not related to his specific escrow instructions."

More recently, the Supreme Court reaffirmed this principle and discussed the nature of escrow holders in *Summit Financial*, pointing out the limitations of an escrow holder's duty and liability, but also noting that an escrow holder may be liable for intentional and fraudulent misconduct. It stated at 711, that "[a]n escrow involves the deposit of documents and/or money with a third party to be delivered on the occurrence of some condition." An escrow holder therefore "is an agent and fiduciary of the parties to the escrow. [Citations.]" Breach of the duty may give rise to a cause of action for breach of contract. *Summit Financial*, 711. The agency, however, is "limited to the obligation of the escrow holder to carry out the instructions of each of the parties to the escrow. [Citations.]" *Ibid*. It noted that "[*a]bsent clear evidence of fraud*, an escrow holder's obligations are limited to compliance with the parties' instructions." Emphasis added. The court found no liability in the action before it but explained that this was because, "even though the escrow holder, CLTC, was aware of the assignment from Talbert to Summit, *there is no evidence CLTC was aware of any collusion or fraud* in the fund disbursement that would have adversely affected any party to the escrow."

Accordingly, escrow holders may, under certain circumstances be liable to third parties. *Summit Financial*, 711; *Tribeca Companies, LLC*, 1107-1108.

However, McCarthy here is alleging misconduct going beyond the mere handling of escrow. He alleges that all Cross-Defendants knew that the sale was in violation of the ownership interests of McCarthy as trustee of the Della 2019 Trust, that the Della 2019 Trust was the record owner of the Property and McCarty was its trustee, and that Darling had no authority to act on its behalf. He alleges that they all knowingly participated in the preparation of false documents regarding Darling's authority to sell the Della 2019 Trust's interest in the Property, in order to sell the Property and deprive the Della 2019 Trust its interest. He specifically alleges that the FNTC Parties prepared a title report showing the history of the Property title, including the Della 2019 Trust's interest, with McCarthy as trustee of that trust, and the dispute over ownership of the Property, yet they knowingly participated in creating false documents and selling the Property without the permission or knowledge of McCarthy or the Della 2019 Trust. McCarthy has, for reasons unclear, omitted the specific allegation of conspiracy amongst the Cross-Defendants which he had included in the original pleading, but the essence is still inherent in the allegations. Contrary to the FNTC Parties' contention, the allegations do indicate that they participated in making fraudulent documents, falsely indicating that Darling had the requisite interest and authority. McCarthy does not allege that they simply

relied on Darling's representations but that they prepared the false affidavits and that, again, they knew the actual history regarding the Property. As indicated above, an escrow or title company may be liable for misconduct other than failure to comply with escrow instructions such as fraudulent and intentional misconduct in knowingly preparing false papers and knowingly assisting in the sale of another's interest in property without that party's consent.

The cause of action is not fatally uncertain. Preliminarily, it is clear what McCarthy claims Cross-Defendants did, it is clear what he claims to be his injury, and it is clear what remedies he seeks. Moreover, his allegations inherently contain several possible identifiable causes of action, including conversion and trespass to chattel; that he fails to specify these by name is immaterial. This amounts to an example of pleading which is imperfect but not defective.

The elements of conversion are 1) Plaintiff's ownership or right to possession of personal property; 2) interference with plaintiffs "dominion" over the property, i.e., defendant's disposition of the property inconsistent with plaintiff's rights; and 3) resulting damages. *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 119 *Fischer v. Machado* (1996) 50 Cal.App.4th 1069, 1072; *Farmers Ins. Exchange v. Zerin* (1997) 53 Cal. App. 4th 445, 451. There must be actual interference with the plaintiff's rights regarding the property. *Zaslow v. Kroenert* (1946) 29 Cal.2d 541, 550; *Farmers Ins. Exchange, supra,* 53 Cal. App. 4th 451.

As the court explained in *Burlesci v. Petersen* (1998) 68 Cal.App.4th 1062, at 1066, "[c]onversion is a strict liability tort…. [T]he tort consists in the breach of an absolute duty; the act of conversion itself is tortious." See also 5 Witkin, Summary of Cal. Law (11th Ed.2017, May 2022 Update) Torts, section 825. Thus, the "action rests neither in the knowledge nor the intent of the defendant" with the result that not only is intent not an element but mistake, good faith or due care are generally irrelevant to the cause of action and will not alone constitute a defense. *Burlesci, supra*; see also *Chatterton v. Boone* (1947) 81 Cal.App.2d 943, 94; *Beverly Finance Co. v. American Cas. Co. of Reading, Pennsylvania* (1969) 273 Cal.App.2d 259, 264.

Nonetheless, a plaintiff may seek to recover punitive damages for conversion as long as the plaintiff demonstrates the required oppression, fraud, or malice. *McNulty v. Copp* (App. 1 Dist. 1954) 125 Cal.App.2d 697; *Ferraro v. Pacific Finance Corp.* (App. 1 Dist. 1970) 8 Cal.App.3d 339. Intent and knowledge are thus relevant for determining if the plaintiff may recover punitive damages.

As explained in *PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384, at 395, *money* cannot be the subject of a cause of action for conversion unless there is an identifiable sum. See also, 5 Witkin, Summary of Cal. Law (11th Ed.2017, May 2022 Update) Torts, section 815.

The allegations meet the above requirements. The demurring parties are, moreover, allegedly involved in what is in essence a conspiracy to deprive McCarthy of the Property and the revenue from its sale.

The court OVERRULES these demurrers.

Fifth Cause of Action for Fraud

The FNTC Parties argue that the fraud cause of action fails because McCarthy does not allege that they made misrepresentations or that he relied on them.

The FNTC Parties are correct that there is no cause of action for fraud as such because McCarthy does not allege that he relied on any misrepresentations and instead indicates that

others did. This still contains essentially other, unidentified causes of action but it is duplicative of the other allegations.

The court SUSTAINS this demurrer as to the cause of action for fraud specifically but not to any other cause of action inherent in the allegations.

Entire FACC as to Haberthur

Haberthur demurs to the entire FACC as to himself on the basis that he cannot be liable because he was acting solely as the agent and employee of Fidelity. This principle is correct but it is factually not apparent from the allegations. McCarthy alleges that Cross-Defendants all knowingly engaged in this activity, meaning that Haburthur was personally involved in intentional wrongful conduct and in fact it may have been he personally, rather than Fidelity, which was the actual wrongdoer. If Haberthur personally and knowingly engaged in the alleged misconduct, rather than simply taking instructions from his employer, Fidelity, as is possible under the allegations, then he may be personally liable and potentially Fidelity may not be, if his conduct was Haberthur's own wrongdoing and not sanctioned by Fidelity. The fact that Haberthur was Fidelity's employee does not as a matter of law shield him from all liability for misconduct simply because he was Fidelity's employee and Haberthur fails to cite any authority supporting such a conclusion.

An agent or employee is always liable for his or her own torts, regardless of whether the principal is liable or the fact that the agent acted at the principal's direction. Civil Code section 2343(3); *Perkins v. Blauth* (1912) 163 Cal. 782, 787; *Bayuk v. Edson* (1965) 236 Cal.App.2d 309, 320; *Michaelis v. Benavides* (1998) 61 Cal.App.4th 681, 686; *Bock v. Hansen* (2014) 225 Cal.App.4th 215, 226; 3 Witkin, Summary of Cal. Law (11th Ed.2017, May 2022 Update) Agency, section 210.

The court OVERRULES this demurrer.

Motion to Strike

A motion to strike may attack any "irrelevant, false, or improper matter" in any pleading, or to strike a pleading that is "not drawn or filed in conformity with the laws of this state." CCP section 436. As with demurrers, the defect must appear on the face of the pleading or in matters judicially noticeable. CCP section 437. The policy is to construe pleadings liberally "with a view to substantial justice." CCP section 452. A motion to strike may be based on failure to comply with form or procedures applicable to pleadings. *Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509, 528.

The FNTC Parties move to strike the sixth cause of action for negligence. They argue that McCarthy improperly added this because the court, after the last demurrer, merely granted leave to amend without stating that McCarthy could add new causes of action when amending, and on the basis that the FACC was untimely with respect to the prior demurrer hearing.

These arguments are unpersuasive. The court granted leave to amend and nothing about that limited McCarthy's ability to make any allegations as to the FNTC Parties. Although the FACC was technically untimely with respect to the prior demurrer hearing, the court and the parties addressed this at the last hearing and the court granted McCarthy leave to amend, making the FACC the operative pleading. The court DENIES this motion.

Conclusion

The court SUSTAINS the demurrer to the identified fifth cause of action for fraud, without leave to amend. The court otherwise OVERRULES the demurrers. The court DENIES the motion to strike. The prevailing party shall prepare and serve a proposed order consistent with this tentative ruling within five days of the date set for argument of this matter. Opposing

counsel shall inform the preparing counsel of objections as to form, if any, or whether the form of order is approved, within five days of receipt of the proposed order. The preparing party shall submit the proposed order and any objections to the court in accordance with California Rules of Court, Rule 3.1312.