**TENTATIVE RULINGS**
**LAW & MOTION CALENDAR**
**Wednesday, August 9, 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. MCV-257612, Wells Fargo Bank, N.A. v. Trice**

**Motion for Judgment on the Pleadings CONTINUED** to September 8, 2023, at 3:00 p.m. in this department. As explained herein, nothing indicates service on Defendant of any notice of the hearing. Plaintiff must serve Defendant and file timely and proper proof of service prior to the new hearing.

## Facts and History

On January 10, 2022, Wells Fargo Bank, N.A. ("Plaintiff") filed a complaint against Glen Allen Trice ("Defendant") alleging breach of contract and common counts.

On May 11, 2022, Defendant filed an answer.

On June 17, 2022, Plaintiff served Requests for Admissions, Set One ("RFAs"), on Defendant. Plaintiff subsequently moved the court to order the Requests for Admissions, Set One, be deemed admitted against Defendant. The court granted the motion in full after the hearing of December 14, 2022.

## Motion

Plaintiff moves the court for judgment on the pleadings in it favor on its complaint against Defendant. It argues that the court deemed the RFAs admitted and that these demonstrate that there is no defense to the complaint.

There is no opposition.

## Service

Plaintiff's only proof of service for the motion shows service on June 1, 2023, before the motion was filed and a hearing date assigned. Nothing indicates service on Defendant of any notice of the hearing. Unless Plaintiff demonstrates that this has been cured, the court will CONTINUE the motion to allow Plaintiff an opportunity to serve Defendant and file timely and proper proof of service.

## Substantive Analysis

A motion for judgment on the pleadings is basically the same as a *general* demurrer but is brought after the time to bring a demurrer has expired. CCP §438; *Lance Camper Mfg. Corp. v. Republic Indem. Co. of America* (1996) 44 Cal.App.4th 194, 198. The grounds are thus limited to lack of subject-matter jurisdiction or failure to state facts sufficient to constitute a cause of action. CCP §438(c).

When brought by a plaintiff, a motion for judgment on the pleadings must be based on the assertion "that the complaint states facts sufficient to constitute a cause or causes of action against the defendant and the answer does not state facts sufficient to constitute a defense to the complaint." CCP §438(c)(1)(A).

If the court grants leave to amend, it must allow 30 days to do so, under CCP section 438(h)(2).

Otherwise, the rules governing demurrers basically apply. *Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 999. As with a demurrer, the motion must rest on the face of the pleading and on matters judicially noticeable. *Consolidated Fire Protection Dist. v. Howard Jarvis Taxpayers' Assn.* (1998) 63 Cal.App.4th 211, 219; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.

Plaintiff seeks judicial notice of the pleadings, the RFAs which were the subject of the prior motion, and the court order deeming the RFAs admitted. These are all papers in the court file so the court may judicially notice them. The court may judicially notice these documents, the contents, and the purported legal effect but may not judicially notice the truth of factual assertions made therein. With this limitation, the court grants the request.

The complaint allegations state facts sufficient to constitute a cause of action for the common counts and breach of contract. They show that Defendant became indebted to Plaintiff on the alleged account for a certain stated sum for some consideration and Defendant has failed to pay the sum on demand. See *Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 460; see 4 Witkin, Cal.Proc. (6th Ed.2021, March 2023 Update) Pleading, section 565. As the court

explained in *Farmers Ins. Exchange, supra*, '[t]he only essential allegations of a common count are "(1) the statement of indebtedness in a certain sum, (2) the consideration, i.e., goods sold, work done, etc., and (3) nonpayment." [Citation.] A cause of action for money had and received is stated if it is alleged the defendant "is indebted to the plaintiff in a certain sum 'for money had and received by the defendant for the use of the plaintiff.' " [Citation.]'

The complaint allegations are also sufficient to show breach of contract, since they show an enforceable contract between Plaintiff and Defendant, performance or excused nonperformance by Plaintiff, Defendant's breach, and damage. See 4 Witkin, Cal.Proc. (6th Ed. 2021, March 2023 Update), Pleading, section 525.

Defendant denied some of Plaintiff's allegations but, as Plaintiff argues, the judicially noticeable RFAs and court order deeming the RFAs admitted resolve the problem for Plaintiff. These RFAs, attached to the motion which the court granted, ask Defendants to admit that he had the account, received regularly billing statements, never notified Plaintiff of a dispute over the amounts owed, became delinquent on the account by failing to pay, the balance owed is as Plaintiff alleges and is still unpaid. The court ordered these deemed admitted, eliminating any dispute and fully supporting Plaintiff's claims.

Should the court find there to be proper service and notice and is therefore able to reach the substantive merits of the motion, the court will grant the motion.

## 2. MCV-259916, Looney v. Ruelas

**Motion to Compel Answers to Post Judgment Discovery; and for Award of Monetary Sanctions GRANTED in full**. Sanctions of $60 awarded to Plaintiff against Defendants.

### Facts and History

Plaintiff complains that Defendants, operating El Charro Restaurant at 415 Main Street in Woodland, California, entered into a written contract with Plaintiff's assignor, Youngs Market Company ("Youngs") to purchase alcoholic beverages but that although Youngs performed, Defendants breached the contract by failing to pay the amount owed. Plaintiff filed this action to collect the debt, allegedly $3,614.10, plus costs, legal fees, and interest.

Defendants failed to appear so Plaintiff took their default on January 10, 2023 and obtained a default judgment against them on March 6, 2023 for $4,412.26.

### Post-Judgment Discovery

Plaintiff served Defendants by mail with post-judgment discovery on March 27, 2023; the discovery included one set of production demands and one set of interrogatories; responses were due on May 3, 3023, within the standard 30 days; however, Defendants have not responded even though plaintiff made efforts to meet and confer.

### Motion

Plaintiff moves the court to compel Defendants to respond to the post-judgment discovery. Plaintiff also seeks monetary sanctions of $60 in costs.

Judgment creditors may propound written post-judgment interrogatories and demands for production on judgment debtors. CCP §§708.020(a), 708.030. These may be enforced in the same manner as regular discovery. CCP §§708.020(c), 708.030(a). This applies any time that "a money judgment is enforceable." CCP section 708.010. One limitation is that the judgment creditor may not serve this discovery on a judgment debtor if the latter has, within the preceding

120 days, responded to such discovery previously served under the provisions, or been examined. CCP §§708.020(b), 708.030(b).

Under CCP §§2030.290 and 2031.300, when no response has been made, the propounding party may move to compel responses. The moving party need simply demonstrate that the interrogatories were served, the time has expired, and no response has been made. There is no meet-and-confer requirement for a motion to compel response where none has been made. Nor is there a deadline other than the discovery cut-off, prohibiting the court from hearing a discovery motion within 15 days of trial, which logically would not apply to post-judgment discovery. CCP §§2024.010, 2024.020.

Plaintiff has met its burden. In addition to showing that Defendants have failed to respond to properly served discovery, it meets the requirements for post-judgment discovery in §§708.020(b), 708.030(b).

The court GRANTS the motion.

**Sanctions**

According to CCP §§2030.290, 2031.300, 2023.010, and 2023.030, if a party has failed to respond to interrogatories and a production request, the court may impose sanctions of the reasonable costs. If the moving party asks for sanctions that appear reasonably related to the filing costs and the opponent does not refute the reasonableness, the sanctions should be granted. *Ghanooni v. Super Shuttle* (1993) 20 Cal.App. 4th 256.

The sanctions which pro-per litigants may recover is limited to out-of-pocket costs such as paying for legal research, copies, transportation, and the like. *Argaman v. Ratan* (1999) 73 Cal.App.4th 1173, 1179.

Plaintiff requests sanctions for the actual out-of-pocket expense of the filing fee, $60. This is reasonable and proper. The court AWARDS Plaintiff $60 as requested.

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. MCV-260034, Looney v. Rice by Mama, Inc., a California Corporation

**Motion to Compel Answers to Post Judgment Discovery; and for Award of Monetary Sanctions GRANTED in full**. Sanctions of $60 awarded to Plaintiff against Defendants.

**Facts and History**

Plaintiff complains that Defendants, operating Rice by Mama, Inc. at 419 E. Main Street in Ventura, California, entered into a written contract with Plaintiff's assignor, Youngs Market Company ("Youngs") to purchase alcoholic beverages but that although Youngs performed, Defendants breached the contract by failing to pay the amount owed. Plaintiff filed this action to collect the debt, allegedly $3,500.13, plus costs, legal fees, and interest.

Defendants failed to appear so Plaintiff took their default on March 9, 2023 and obtained a default judgment against them on March 6, 2023 for $6,281.63.

**Post-Judgment Discovery**

Plaintiff served Defendants by mail with post-judgment discovery on April 4, 2023; the discovery included one set of production demands and one set of interrogatories; responses were due on May 11, 3023, within the standard 30 days; however, Defendants have not responded even though plaintiff made efforts to meet and confer.

**Motion**

Plaintiff moves the court to compel Defendants to respond to the post-judgment discovery. Plaintiff also seeks monetary sanctions of $60 in costs.

Judgment creditors may propound written post-judgment interrogatories and demands for production on judgment debtors. CCP §§708.020(a), 708.030. These may be enforced in the same manner as regular discovery. CCP §§708.020(c), 708.030(a). This applies any time that "a money judgment is enforceable." CCP section 708.010. One limitation is that the judgment creditor may not serve this discovery on a judgment debtor if the latter has, within the preceding 120 days, responded to such discovery previously served under the provisions, or been examined. CCP §§708.020(b), 708.030(b).

Under CCP §§2030.290 and 2031.300, when no response has been made, the propounding party may move to compel responses. The moving party need simply demonstrate that the interrogatories were served, the time has expired, and no response has been made. There is no meet-and-confer requirement for a motion to compel response where none has been made. Nor is there a deadline other than the discovery cut-off, prohibiting the court from hearing a discovery motion within 15 days of trial, which logically would not apply to post-judgment discovery. CCP §§2024.010, 2024.020.

Plaintiff has met its burden. In addition to showing that Defendants have failed to respond to properly served discovery, it meets the requirements for post-judgment discovery in §§708.020(b), 708.030(b).

The court GRANTS the motion.

**Sanctions**

According to CCP §§2030.290, 2031.300, 2023.010, and 2023.030, if a party has failed to respond to interrogatories and a production request, the court may impose sanctions of the reasonable costs. If the moving party asks for sanctions that appear reasonably related to the filing costs and the opponent does not refute the reasonableness, the sanctions should be granted. *Ghanooni v. Super Shuttle* (1993) 20 Cal.App. 4th 256.

The sanctions which pro-per litigants may recover is limited to out-of-pocket costs such as paying for legal research, copies, transportation, and the like. *Argaman v. Ratan* (1999) 73 Cal.App.4th 1173, 1179.

Plaintiff requests sanctions for the actual out-of-pocket expense of the filing fee, $60. This is reasonable and proper. The court AWARDS Plaintiff $60 as requested.

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.

**4. SCV-262816, Tommasi Landry v. Tommasi**

Based on the Conditional Notice of Settlement filed on August 7, 2023, and with permission of moving parties, the Motion for Attorney's Fees and the Motion to Set Aside Interlocutory Judgment are DROPPED from calendar.

**5. SCV-263677, French v. Patrinellis, M.C.**

**APPEARANCES REQUIRED for the Motion to Reserve Jurisdiction over and Apportion Settlement.** The parties must address service on, and notice to, Defendants with respect to the request to retain jurisdiction. The Plaintiffs also must address how to proceed regarding apportionment, including the need for an evidentiary hearing.

**Facts**

Plaintiffs complain that Defendants, in providing medical care to their daughter Vanessa French ("Decedent"), negligently caused Decedent's death. They allege that Decedent sought medical care from Defendants for a combination of physical and emotional complaints which included skin conditions, back pain, severe depression, and suicidal ideations, but that Defendants negligently failed to provide proper treatment, resulting in Decedent handing herself.

Plaintiff Wendy French ("Wendy" or "Mother Plaintiff"), individually and as successor and heir of Decedent filed the original complaint in this action against Defendants Andrew Patrinellis, M.D. and Napa Valley M.D. arising out of Decedent's death. Meanwhile, after Wendy had filed her complaint in this action, Decedent's father Patrick French ("Patrick" or "Father Plaintiff") filed a separate action against Defendant Patrinellis ("Defendant") arising out of Decedent's death. Patrick's action was consolidated with the present action per order entered on December 2, 2020. Pursuant to a stipulation and order, Wendy's first amended complaint ("FAC") and Patrick's second amended complaint ("SAC") were filed; they are substantively identical complaints (the "Complaints").

After several discovery disputes arose, the court on July 27, 2022, entered an order upon stipulation to appoint a discovery referee to handle specified discovery disputes and all other discovery disputes arising between then and November 9, 2022. Trial was originally set for November 18, 2022, but subsequently continued by court order after the court granted Patrick's ex parte application to continue the trial on October 11, 2022. A later discovery motion was dropped in May 2023.

On May 30, 2023, Plaintiff Patrick filed a notice of conditional settlement of the entire case ("Settlement").

**Motion**

Plaintiff Patrick moves the court for an order that the court retain jurisdiction over the case and the Settlement pursuant to Code of Civil Procedure section 664.6, and to apportion the single settlement recovery and the litigation costs 50-50 between the two plaintiffs. He also requests the court to hold a hearing regarding apportionment.

Plaintiff Wendy opposes the motion, arguing that she should be entitled to the entire Settlement proceeds and that Patrick should bear his own costs. She contends that Patrick has suffered no damages since his relationship with Decedent was distant while she had a close relationship with Decedent as her caretaker. She does not oppose the request for continuing jurisdiction.

**Service and Notice**

There is no proof of service for the motion or notice of the hearing. Although Wendy has filed opposition on the merits without claiming lack of service or notice, there is no indication that Defendants have received notice. As discussed below, the issue of apportionment is only between Plaintiffs and Defendants have no interest in that, so they notice to them is not necessary for that portion of the motion. However, Defendants do have an interest in whether the court retains jurisdiction, so service on them is required.

**Retained Jurisdiction**

The court retains jurisdiction to enforce a settlement under CCP section 664.6, even after a dismissal, but only if the parties request retention of jurisdiction before the dismissal. *Hines v. Lukes* (2008)167 Cal.App.4th 1174, 1182. The request must be made either in a writing signed by the parties or orally before the court. *Ibid*. Otherwise, "voluntary dismissal of an action or special proceeding terminates the court's jurisdiction over the matter." *In re Conservatorship of Martha P*. (2004) 117 Cal.App.4th 857, 867.

The matter has not been dismissed and although she opposes the apportionment of the Settlement recovery and costs, Wendy does not oppose the request for the court to retain jurisdiction.

Should the court find adequate notice to Defendants, the court will grant the motion as to the retention of jurisdiction.

**Apportionment**

A cause of action for wrongful death is based in statute, specifically Code of Civil Procedure ("CCP") sections 377.60-377.62. It is not a survival of a decedent's cause of action and instead this 'statutorily created "wrongful death action gives to the representative a totally new right of action, on different principles. [Citation.]" [Citation.]' *Armijo v. Miles* (2005) 127 Cal.App.4th 1405, 1424. As explained in *Ford Motor Co. v. Sup.Ct.* (1981) 120 Cal.App.3d 748, at 751, "[a] plaintiff in a wrongful death action is not similarly situated to all other tort plaintiffs. He asserts a right which was specially created by statute, the right to recover on his own behalf for harm which was done to another." The cause of action belongs to those specified in the statute. *Wilson v. John Crane, Inc.* (2000) 81 Cal.App.4th 847, 860-861. The damages awarded are compensation for injury to the heir, such as loss of financial support, services, advice, pecuniary value of decedent's society and companionship, but not grief or sentimental value. *Nelson v. County of Los Angeles* (2003) 113 Cal.App.4th 783, 793. The court in *Nelson* stated, "A plaintiff in a wrongful death action is entitled to recover damages for his own pecuniary loss, which may include (1) the loss of the decedent's financial support, services, training and advice, and (2) the pecuniary value of the decedent's society and companionship—but he may not recover for such things as the grief or sorrow attendant upon the death of a loved one, or for his sad emotions, or for the sentimental value of the loss. [Citation.]"

CCP section 337.61 governs the recoverable damages and rights to an award. It states, in full, "In an action under this article, damages may be awarded that, under all the circumstances of the case, may be just, but may not include damages recoverable under Section 377.34. The court shall determine the respective rights in an award of the persons entitled to assert the cause of action."

As the Supreme Court explained in *Corder v. Corder* (2007) 41 Cal.4th 644, at 652, 'While each heir designated in section 377.60 has a personal and separate wrongful death cause of action, the actions are deemed joint, single and indivisible and must be joined together in one suit. [Citation.] Accordingly, "the court or jury must compute the damages, if any, by considering the pecuniary damage suffered by all the heirs and return a verdict for one sum."

[Citation.]' The court in Corder, at 661, further explained that, '[a]s a general matter, damages for wrongful death " 'are measured by the financial benefits the heirs were receiving at the time of death, those reasonably to be expected in the future, and the monetary equivalent of loss of comfort, society and protection.' " [Citation.]' See also *Boeken v. Philip Morris USA Inc*. (2013) 217 Cal.App.4th 992, at 997 (quoting *Corder*).

The court in *Smith v. Premier Alliance Ins. Co*. (1995) 41 Cal.App.4th 691, at 698, explained, a defendant in an action for wrongful death may settle with any or all of the heirs and if the heirs' claims are within a lump-sum settlement, the court has authority to apportion the settlement. The court also explained that the right to a share fo the settlement is based not on an heir's statutory intestate share, but on the proportion of each heir's personal damage compared to the others. The court added that the apportionment is an issue solely between the heirs and the defendant has no interest in the matter. In the words of the court,

> A wrongful death defendant can settle the case, with either all of the heirs or less than all of them. When the claims of all heirs are encompassed in a lump-sum settlement, the court has authority to apportion the settlement. [Citations.] The right to share in a wrongful death settlement is not based on an heir's statutory share under intestacy, but is based on the proportion that the heir's personal damage bears to the damage suffered by the others. [Citations.] The apportionment of a wrongful death settlement is of no interest to the settling defendant; it is a matter among the heirs alone. [Citations.]

Patrick shows that the Settlement was a result of mediation and includes terms requesting the court to hold a hearing to apportion the Settlement between the two Plaintiffs. He also asserts that it involves payments over a period of years. However, no party has provided a copy of the Settlement.

The parties dispute their respective rights to the Settlement and apportionment of costs. Patrick asks the court to split the Settlement award and costs evenly while Wendy contends that she should receive the entire Settlement award and Patrick should simply bear his own costs. Wendy argues that she had a close relationship with Decedent while Patrick did not, with the result that Patrick suffered no actual damages from the death. She provides her own declaration as well as attached exhibits, and declarations from Decedent's brother and his wife, which include some evidentiary support for her position. Patrick, on the other hand, provides his own declaration, with attached exhibits, demonstrating his relationship with Decedent and contrary to the position of Wendy.

At this point, the court is unable to make a proper determination of the apportionment. As Patrick has requested, the court may need to conduct an evidentiary hearing. The court requires the appearances of the parties to discuss how to address this issue, including the need for, and scheduling of, a hearing.

**Conclusion**

The court REQUIRES APPEARANCES to address the service on, and notice to, Defendants, as well as the handling of apportionment and the need for a hearing regarding apportionment.

**6. SCV-271979, County of Sonoma v. Sanchez**

**Motion to Set Aside Dismissal GRANTED.**

**Facts and History**

Plaintiff brought this action to abate public nuisances on real property at 18050 Greger Street, Sonoma ("the Property"), including various code violations and illegal hazardous uses. Plaintiff alleges failed efforts to obtain voluntary abatement and details the violations, including unpermitted improvements and re-roofing of a structure in violation of applicable codes and unlawful construction of a paved private driveway in Plaintiff's right-of-way. Plaintiff alleges that Defendants own the Property and have constructed or maintained the unpermitted improvements and nuisance conditions, Plaintiff issued and served notices and orders to abate the nuisances or be subject to penalties, fees, and costs, but Defendants failed to appeal the determinations or comply.

Plaintiff obtained a default against Defendants on January 9, 2023. Plaintiff subsequently moves the court to enter Default judgment and Permanent Injunction and for Money Judgment for Costs, Fees, and Delinquent Civil Penalties. It seeks a total of $58,414.03, including $1,019.03 in abatement costs, $410 in litigation costs, $6,354 in attorney's fees, and $50,640 in civil penalties. It has submitted a completed CIV-100 form for default judgment with the moving papers. There was no opposition and moving party filed a reply regarding the non-opposition. The court granted the motion on May 17, 2023.

Plaintiff then filed a dismissal of the entire action without prejudice on June 7, 2023.

**Motion**

Plaintiff now moves the court to set aside the dismissal on the ground that it was a mistake because a paralegal for Plaintiff inadvertently marked box 5 on the form dismissal, instead of box 6, and Plaintiff had authorized only marking box 6 to dismiss the Does. Plaintiff did not authorize dismissal of the entire action as to all parties. Plaintiff relies on Code of Civil Procedure ("CCP") section 473(d) and *Romadka v. Hoge* (1991) 232 Cal.App.3d 1231.

The court notes there is no opposition. Plaintiff has served Defendant, although Defendant has never appeared in this action. Plaintiff also had already taken the default and obtained a judgment against Defendant. Plaintiff also has filed a statement indicating that it has received no opposition.

According to CCP § 473(d), the court may correct clerical mistakes or set aside any void judgment or order. The court in *Romadka v. Hoge* (1991) 232 Cal.App.3d 1231 reversed an order denying a plaintiff's motion to vacate a dismissal with prejudice where the plaintiff demonstrated that the attorney had marked the wrong box on the dismissal and plaintiff had not authorized a dismissal with prejudice, only without prejudice. The court explained that it was error to deny the motion to vacate since the evidence meant that the attorney lacked authority to enter the dismissal with prejudice.

Plaintiff indeed demonstrates that a paralegal for Plaintiff inadvertently marked box 5 on the form dismissal, instead of box 6, Plaintiff had authorized only marking box 6 to dismiss the Does, and Plaintiff did not authorize dismissal of the entire action as to all parties. Raff Dec.; Linsenmeyer Dec.

The court GRANTS the motion in full. 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 party 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.

**7. SCV-271989, Lillis v. Phillips**

**Demurrer SUSTAINED** with leave to amend. Plaintiff has leave to amend within 10 days of the service of the notice of entry of this order. Defendants are to serve the notice of entry of this order within 5 days of entry of this order. California Rule of Court ("CRC") 3.1320(g).

**Facts**

Alleging that he owns real property at 21874 Russian River Ave. in Monte Rio, California (the "Property"), Plaintiff complains that Defendants, Katherine Phillips dba Key Properties ("Katherine"), Lloyd T. Phillips ("Lloyd"), Phillips Trust, and Phillips J & S Family Trust ("JS Trust") breached an agreement (the "Agreement") to manage the Property as a rental property. He alleges that his predecessor in interest as owner of the Property, the George and Rita Lillis Family Trust (the "Lillis Trust") entered into the Agreement with Defendant Katherine who, in return for payment, agreed to manage the Property and perform certain tasks such as conducting inspections, performing maintenance, making reasonably necessary alterations and repairs. "Defendant" continued to be obligated and regularly paid under the Agreement until about "3/1/2022" and after the trustees of the Trust first became incapacitated and later passed away. However, he contends, "Defendant" failed to perform and ceased conducting maintenance, making necessary alterations or repairs, or hire or supervise employees or contractors as needed, allowing the Property to fall "into extreme disrepair for lack of routine maintenance."

Defendants Lloyd and Phillips Family Trust, erroneously sued as "Phillips Trust" ("PF Trust") (collectively, the "Lloyd Defendants"). The court continued the demurrer from its original hearing of May 10, 2023, due to defective proof of service. It continued it again from the hearing of June 28, 2023, for the same reason, unaware at that time that Plaintiff had filed a responsive brief.

**Demurrer**

The matter is once again on calendar for the Lloyd Defendants' demurrer which had been continued from the two prior hearings. The "Lloyd Defendants" demur to the complaint on the ground that it fails to state facts sufficient to constitute a cause of action against them. They argue that the allegations involve only Katherine and there are no allegations that they were involved or owed or breached any duties or were, in fact, involved in any of the transactions alleged. They also contend that the complaint is untimely.

Plaintiff has filed a "Brief to Squash Defendants' Motion for Demurrer,"[sic] with affidavit, in response.

**Service**

There is now no proof of service for Plaintiff's opposition to the demurrer. However, unless Defendants raise this issue, the court will overlook it as immaterial given that the court will sustain the demurrer anyway.

**Discussion**

A demurrer can only challenge a defect appearing on the *face* of the complaint, exhibits thereto, and judicially noticeable matters. 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. One of the grounds, in subdivision (e), is the general demurrer that the pleading fails to state facts sufficient to constitute a cause of action.

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.

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, if a party directs a 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 failure to allege dates is irrelevant and will not support any demurrer because a party does not need to allege any specific dates. *Union Carbide Corp. v. Sup.Ct*. (1984) 36 Cal.3d 15, 25; *United Western Med. Ctrs. v. Sup.Ct*. (1996) 42 Cal.App.4th 500, 505. In *Union Carbide*, the Supreme Court rejected the argument that the plaintiff needed to plead facts negating the statute-of-limitations defense where the complaint did not allege any dates at all, explaining that because the complaint alleged that the events occurred "at a time unknown," the allegations were sufficient.

The normal standard for determining accrual, whether tort or contract, requires not only the wrongful conduct or injury but discovery of the injury itself and its wrongful cause. *Angeles Chemical Co. v. Spencer & Jones* (1996) 44 Cal.App.4th 112; *Jolly v. Eli Lilly & Co*. (1988) 44 Cal.3d 1103, 1110; see also 3 Witkin, Cal.Proc. (6th Ed. 2021, March 2023 Update) Actions, section 540, et seq.

The Lloyd Defendants are incorrect that the complaint is untimely. The allegations are not clear when the wrongful acts occurred or were discovered and at most indicate that the wrongful acts and injuries were discovered no earlier than March 2, 2022, with a possible indication that some breaches had occurred and were discovered in "fall" of 2019 but this is not clear. Plaintiff filed the action on November 14, 2022. The complaint indicates that the Agreement was written and the statute of limitations for breach of a written contract is 4 years. CCP section 337(1).

However, the Lloyd Defendants are correct that although Plaintiff names them as Defendants, he sets forth no allegations whatsoever involving them. The allegations state that only Katherine entered into the Agreement and had the duties set forth, and they indicate that "Defendant" singular, also referred to as "her," breached her duties.

Plaintiff's apparent opposition brief does not change the analysis. He asserts some facts, with evidence, which may support a claim, but these are outside the pleadings and thus the scope of this analysis. Plaintiff may add additional allegations when he has leave to amend.

The court SUSTAINS the demurrer solely on the basis that Plaintiff fails to make any allegations that the Lloyd Defendants owed or breached any duties to Plaintiff. The court sustains the demurrer with leave to amend, at which time Plaintiff may add or alter the allegations in the complaint.

**Conclusion**

The court SUSTAINS the demurrer with leave to amend and solely on the basis that Plaintiff fails to make any allegations that the Lloyd Defendants owed or breached any duties to Plaintiff.

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.

**8. SCV-272547, Robert v. Kazemini**

**Demurrer to Plaintiff's Complaint OVERRULED.** Defendants are required to answer within 10 days of service of the notice of entry of the order. California Rule of Court ("CRC") 3.1320(g). Plaintiff is to serve the notice of entry of this order within 5 days of entry of this order. CRC 3.1320(g).

**Facts**

Plaintiff complains that she fell and suffered injuries as a result of a dangerous condition on Defendants' property at 1950 Piner Road, Santa Rosa (the "Premises"). She alleges that she was on October 24, 2022, lawfully walking in the parking lot of the Premises, through the landscaping section of the Premises, in order to enter the Yogurt Time business on the Premises, when she tripped and fell as a result of an overly high and dangerous curb. She complains that Defendants negligently owned, operated, and maintained the Premises, causing the dangerous condition. The complaint identifies two causes of action: 1) negligence, and 2) premises liability.

Demurrer

Defendants demur to the complaint, separately demurring to each cause of action on the grounds that it fails to state facts sufficient to constitute a cause of action and Plaintiff lacks legal capacity to sue. They rely in part on a purported lease for which they request judicial notice. They also argue that Plaintiff failed to serve the complaint in a timely manner and request sanctions.

Plaintiff opposes the demurrer, arguing that Defendant is improperly attempting to rely on extrinsic evidence which is not judicially noticeable and that the allegations are sufficient to state a cause of action. She also contends that the 17-day delay in serving Defendants resulted from the fact that the business address they had initially obtained for Defendants' agent for service was closed.

Defendants reply.

**Demurrer Authority**

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, are: (a) the court lacks subject-matter jurisdiction; (b) the person filing the complaint lacks legal capacity to sue; (c) another action pending between the same parties on the same cause of action; (d) defect or misjoinder of parties; (e) the pleading fails to state facts sufficient to constitute a cause of action;

(f) uncertainty; (g) it is unclear, in an action founded upon a contract, whether the contract is written, oral, or implied; and (h) no certificate has been filed in accordance with CCP section 411.35, which governs professional-negligence actions against architects, engineers, and land surveyors.

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.

Lack of capacity is a special demurrer set forth in CCP section 430.10 (b) and is based on the claim that the plaintiff lacks the legal capacity to sue, i.e., is not competent, is a minor, deceased, adjudicated insane, or a suspended corporation, or the like. See, e.g., *Color-Vue, Inc. v. Abrams* (1996) 44 Cal.App.4th 1599, 1603-1604 (stating that capacity is the right or ability "to come into court" while standing is the right to seek the relief, and explaining that suspension of corporate powers results not in lack of standing, but lack of capacity to sue); CCP section 372 (governing minors and incompetents).

Failure to state facts sufficient to constitute a cause of action can be based on, among other things, the lack of standing to sue. See *Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 100. Standing means that the plaintiff is a real party in interest, someone with the substantive right to sue, who holds title to the claim or property at issue. CCP §367; *Dino v. Pelayo* (2006) 145 Cal.App.4th 347, 353; *Gantman v. United Pac. Ins. Co.* (1991) 232 Cal.App.3d 1560, 1566; *Powers v. Ashton* (1975) 45 Cal.App.3d 783, 787.

Failure to state facts sufficient to constitute a cause of action can be based on, among other things, the lack of standing to sue. See *Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 100; see also Weil & Brown, section 7:72.

"Lack of standing" is not a demurrer ground but merely a reason why a complaint may fail to state facts sufficient to constitute a cause of action as to the named plaintiff. *Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 1004.

**Request for Judicial Notice**

Defendants request judicial notice of the purported Piner Center Lease Agreement (the "Lease") between Defendant Yogurt Time, LLC ("Yogurt") and Defendant Hassan Kazemini ("Kazemini").

Plaintiff objects to judicial notice of the Lease and Defendants respond with a brief in support filed with their reply. Plaintiff correctly notes that the Lease on its face, a private contract which is not a recorded instrument or included with the complaint or otherwise in the court record, does not fall into any of the categories of judicially noticeable documents or facts.

Defendants merely respond that Plaintiff does not actually dispute the existence or validity Lease or its terms. Plaintiff's lack of dispute of the Lease, its existence, or its terms, is immaterial. The Lease is not judicially noticeable at this point and there is no basis for the court to find that it is not subject to dispute. It is simple evidence extrinsic to the complaint at this point.

The court DENIES the request for judicial notice.

**Capacity**

Defendants raise the demurrer that Plaintiff lacks capacity to sue. They present no arguments regarding capacity and nothing in the complaint or demurring papers in any way whatsoever indicates how Plaintiff might possibly lack capacity to sue, in light of the standards for this demurrer as set forth above. Defendants do argue that Plaintiff lacks standing, which is unrelated to capacity and not actually a demurrer ground in its own right, as explained above.

The court OVERRULES this demurrer to both causes of action.

**General Demurrer: Failure to State Facts Sufficient to Constitute a Cause of Action**

Defendants argue, as noted, that Plaintiff lacks standing to sue. This, however, is again a misunderstanding of standing. The argument is based on Yogurt's control over the portion of the Premises where Plaintiff allegedly fell. While this may be a valid basis for arguing that either Defendant is not liable, it has no bearing on Plaintiff's standing.

That said, Defendants are actually arguing that Yogurt, by the terms of the Lease, exercises no control over the portion of the Premises where Plaintiff fell, and thus cannot be liable. This argument is defective. It is based entirely on the Lease and, as explained above, the court denies the request to judicially notice the Lease while no allegations in the complaint give nay hint of possible to support to this argument.

Defendants also argue that the allegations in insufficient to demonstrate the requisite elements of the causes of action, an argument which is again unpersuasive. They contend that the allegations lack specific factual pleading sufficient to support the causes of action, but they cite to no authority indicating that Plaintiff need plead more than she does and inf act it is well settled that Plaintiff need plead nothing more.

The elements for negligence are, of course, defendant owed a legal duty to plaintiff to use due care, defendant breached that duty, actual and proximate causation, and resulting damage to plaintiff. See *County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 318; *Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917.

With some few exceptions, a complaint needs to allege the required elements of a cause of action, the "ultimate facts," ordinarily "evidentiary" facts and details are neither necessary nor, alone, sufficient, and the key is whether the complaint is adequate to give defendants fair "notice of the issues sufficient to enable preparation of a defense." *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 549-550. A cause of action for negligence requires an allegation showing that Defendant owed a legal duty of care to Plaintiff; Defendant's breach of that duty, i.e., the negligent act or omission; resulting injury with actual and proximate cause; and damage. See *Hoyem v. Manhattan Beach City School Dist*. (1978) 22 Cal.3d 508, 513; see also 4 Witkin, Cal.Proc. (6th Ed. 2021, March 2023 Update), Pleading, section 581; 4 Witkin, Cal.Proc. (5th Ed.2008) Pleading, sections 577, et seq. Thus, it is well established that while a complaint alleging negligence must do more than simply claim that "negligence caused the injury," and must allege the *conduct* that was negligent, it may do so generally and need not allege specific facts showing how the conduct was negligent. *Guilliams v. Hollywood Hosp*. (1941) 18 Cal.2d 97, 101; *Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 527; Stephenson v. Southern Pac. Co. (1894) 1-2 Cal.143, 147; 4 Witkin, Cal.Proc. (6th Ed. 2021, March 2023 Update), Pleading,

sections 585, 600-612; 4 Witkin, Cal.Proc. (5th Ed.2008) Pleading, sections 596-598. Simply alleging that defendants "carelessly managed and operated a truck" was found insufficient to support a claim of negligence against defendants for knowingly hiring an incompetent driver. *Wysock v. Borchers Bros*. (1951) 104 Cal.App.2d 571, 585; 4 Witkin, Cal.Proc. (6th Ed. 2021, March 2023 Update), Pleading, section 601.

A party claiming premises liability must show 1) the defendant was owner, occupant or lessor of premises; 2) defendant was negligent in the use, maintenance or management of premises; and 3) negligence was a cause of injury, damage, loss or harm to plaintiff. BAJI 8.00*; Brooks v. Eugene Burger Management Corp*. (1989) 215 Cal. App. 3d 1611, 1619 (stating "Premises liability is a form of negligence…." and citing BAJI 8.00); *Ursino v. Big Boy Rests*. (1987) 192 Cal. App. 3d 394, 397-98 (Landowner liability as to trivial defects generally is a question of fact, but courts sometimes rule as a matter of law, that under all of the circumstances, no liability exists, where reasonable minds cannot differ). As the court in *Brooks, supra*, also explained, "Premises liability is a form of negligence…."

Plaintiff has alleged that Defendants owned, operated, and maintained the Premises; Defendants did so negligently in a manner that created a dangerous condition in the form of a dangerously high curb which caused tripping; Plaintiff tripped and fell due to this condition, and Plaintiff suffered injury.

Defendants also argue that the allegations actually reveal that Plaintiff was at faut and that the injury was not the result of a dangerous condition. They point out that Plaintiff alleges that she fell when walking through the landscape portion of the Premises and contend that she was negligent in so doing, and used that area in an improper manner. Nothing, however, indicates exactly what this area was like or that Plaintiff was negligent in walking through that area, or that she was not supposed to walk through that area, or anything else indicating as a matter of law that Plaintiff was negligent and Defendants were not. It is impossible to make such a determination from the pleadings or anything properly before the court.

The court OVERRULES this demurrer.

**Delay in Service and Sanctions**

Defendants contend that Plaintiff failed to comply with CRC 3.110(b), requiring service of the complaint on all named Defendants within 60 days of filing the complaint, absent an extension. Subdivision (f) authorizes the court to issue an order to show cause ("OSC") why it should not impose sanctions if a party violates this requirement. It states, in full, "If a party fails to serve and file pleadings as required under this rule, and has not obtained an order extending time to serve its pleadings, the court may issue an order to show cause why sanctions shall not be imposed."

Under the circumstances, the court finds insufficient basis for imposing sanctions on Plaintiff. Moreover, at this point, the first step would be to issue an OSC to set a hearing on the matter. The court finds insufficient basis for doing so based on the papers presented.

Plaintiff, for her part, asks the court to impose sanctions on Defendants pursuant to CCP section 128.5 on the basis that the demurrer is in bad faith, frivolous, or solely intended to cause unnecessary delay.

At this point, the court also finds insufficient basis for imposing sanctions on Defendant.

**Conclusion**

The court OVERRULES the demurrers in full. All requests for sanctions are denied. 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.

**9. SCV-273342, Rowen v. Prasifka**

**Demurrer DROPPED**. It is moot in light of Petitioner's amendment to the petition presenting new allegations.

**Facts**

Petitioner seeks a writ of mandate or writ of prohibition regarding Respondents' alleged actions in suspending and revoking his license to practice medicine. He alleges that Respondents have suspended his license and are conducting proceedings to revoke his license based on a coerced guilty plea to the crime of tax evasion. He contends that Respondents have failed to act with due process, have failed to demonstrate that his alleged misconduct is related to the practice of medicine or puts health and safety of others at risk. He also raises other allegations regarding lack of authority or jurisdiction and the need for an oath of allegiance or "fidelity bond."

Petitioner filed an Amendment to Petition on July 26, 2023.

**Demurrer**

Respondents and Real Party in Interest ("RPI") Medical Board of California (the "Board") demur to the entire petition, setting forth five purported demurrers:

1. The court lacks jurisdiction to hear the subject matter of the cause of action for injunctive relief because Petitioner has not exhausted administrative remedies. (Code of Civ. Proc., § 430.10, subd. (a).)
2. The case and controversy are not ripe for adjudication as Petitioner has not yet had a hearing on the Automatic Suspension Order and Accusation that has been filed before the Board. (Code of Civ. Proc., § 430.10, subd. (a).)
3. Petitioner has no standing to bring this cause of action because he cannot show actual injury in fact. (Code of Civ. Proc., § 430.10, subd. (a).)
4. The court cannot provide a remedy for this cause of action as Respondents and Real Party in Interest must carry out the law as required by the California constitution and laws. (Code of Civ. Proc., § 430.10, subd. (a).)
5. Petitioner fails to state facts sufficient to constitute a valid cause of action against the Board. (Code of Civ. Proc., § 430.10, subd. (e).)

Petitioner opposes the demurrer, raising numerous procedural and substantive arguments.

**Demurrer Authority**

A demurrer can only challenge a defect appearing on the *face* of the complaint, exhibits thereto, and judicially noticeable matters. 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, are: (a) the court lacks subject-matter jurisdiction; (b) the person filing the complaint lacks legal capacity to sue; (c) another action pending between the same parties on the same cause of action; (d) defect or misjoinder of parties; (e) the pleading fails to state facts sufficient to constitute a cause of action; (f) uncertainty; (g) it is unclear, in an action founded upon a contract, whether the contract is written, oral, or implied; and (h) no

certificate has been filed in accordance with CCP section 411.35, which governs professional-negligence actions against architects, engineers, and land surveyors.

A "general" demurrer is either a demurrer on the ground that the pleading fails to state facts sufficient to constitute a cause of action or lack of subject-matter jurisdiction. *Buss v. J.O. Martin Co.* (1966) 241 Cal.App.2d 123, 133.

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.

The demurrer for lack of subject- matter jurisdiction will only lie where the face of the complaint demonstrates that the court is not competent to act and lacks the power to grant the relief requested. *Buss v. J.O. Martin Co.* (1966) 241 Cal.App.2d 123, 133; *Holiday Matinee, Inc. v. Rambus, Inc*. (2004) 118 Cal.App.4th 1413, 1421.

**Amendment**

As noted above, Petitioner filed an amendment to the Petition. He did after Respondents and RPI filed the instant demurrer.

Absent leave of the court, a party may only amend a pleading in accord with Code of Civil Procedure ("CCP") section 472. CCP sections 472, 473.

CCP section 472(a) states, "A party may amend its pleading once without leave of the court at any time before the answer, demurrer, or motion to strike is filed, or after a demurrer or motion to strike is filed but before the demurrer or motion to strike is heard if the amended pleading is filed and served no later than the date for filing an opposition to the demurrer or motion to strike."

The amendment is timely and was properly filed. The additional allegations render the demurrer moot. Should Respondents seek to demur to the petition as amended, they must file and serve a new demurrer which addresses the new allegations.

Respondents have filed an "Opposition to Petitioner's Request for Amendment of Petition" and Petitioner has responded to that document. Respondents raise substantive arguments regarding the adequacy of the new allegations as a basis for the court rejecting the amendment. However, this is immaterial. As explained above, Petitioner had a right to amend the petition without leave of the court as long as he did so by the deadline for responding to the demurrer. Petitioner has done that and the court may not reject the amendment on any other basis, much less consider substantive validity or adequacy of the allegations in the amendment.

The court DROPS the demurrer as moot on this basis.