

## **TENTATIVE RULINGS: CIVIL LAW & MOTION**

Wednesday, October 16, 2024 at 3:00 p.m.  
Courtroom 18 –Hon. Christopher M. Honigsberg  
**Civil and Family Law Courthouse**  
**3055 Cleveland Avenue**  
**Santa Rosa, California 95403**

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Any party who wishes to be heard in response or opposition to the Court's tentative ruling **MUST NOTIFY** the Court's Judicial Assistant by telephone at **(707) 521-6723** and **MUST NOTIFY all other parties of their intent to appear, the issue(s) to be addressed or argued and whether the appearance will be in person or by Zoom.** Notifications must be completed no later than 4:00 p.m. on the court (business) day immediately before the day of the hearing.

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### **1-2. SCV-272299, Abraham v. Foppoli**

Defendant's request for judicial notice is **GRANTED**. The demurrer is **OVERRULED** as to the first cause of action and otherwise **SUSTAINED WITH LEAVE TO AMEND**. The motion to strike is **GRANTED WITH LEAVE TO AMEND** as to paragraphs 6 and 7 of the prayer portion of the First Amended Complaint, and otherwise **DENIED**.

Counsel for Defendant is directed to prepare a written order consistent with this ruling and compliant with California Rules of Court, rule 3.1312.

#### **I. Background**

Defendant Dominic Foppoli ("Foppoli") is a politician, the former mayor of Windsor, and the owner of the Christopher Creek Winery. The winery is operated by defendant Two Kings Wine Co., LLC ("2KW"). Plaintiff Farrah Abraham ("Plaintiff") alleges that Foppoli sexually assaulted her at a wine-tasting event in Palm Beach, Florida, on or about March 28, 2021.

Plaintiff initiated the instant lawsuit by filing a complaint on December 21, 2022. On April 20, 2024, 2KW demurred and moved to strike several aspects of the prayer for relief. Hearing on the motion was set for July 5. However, Plaintiff filed a First Amended Complaint (“FAC”) on June 21, 2024. Leave of court was not required because the FAC was filed “no later than the date for filing an opposition to the demurrer or motion to strike.” (CCP § 472.)

This matter comes on calendar for 2KW’s demurrer to, and motion to strike portions of, the FAC.

## **II. Judicial notice**

2KW’s requests for judicial notice of the First Amended Complaint are granted.

## **III. Standard on demurrer**

A demurrer tests whether the complaint sufficiently states a valid cause of action. (*Hahn v. Merda* (2007) 147 Cal.App.4th 740, 747.) Complaints are read as a whole, in context and are liberally construed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; see also *Stevens v. Superior Court* (1999) 75 Cal.App.4th 594, 601.) In reviewing the sufficiency of a complaint, courts accept as true all material facts properly pleaded, but not contentions, deductions, conclusions of fact or law, the construction of instruments pleaded, or facts impossible in law. (*Rakestraw v. California Physicians’ Service* (2000) 81 Cal.App.4th 39, 43; see also *South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 732.) Matters which may be judicially noticed are also considered. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591.)

A court abuses its discretion by denying leave to amend where there is any reasonable possibility that the plaintiff can state a valid cause of action. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) However, “[l]eave to amend should be denied where the facts are not in dispute and the nature of the claim is clear, but no liability exists under substantive law.” (*Lawrence v. Bank of America* (1985) 163 Cal.App.3d 431, 436.) The burden is on the plaintiff to show how the complaint can be amended, and how that amendment will change the legal effect of the pleading. (*Goodman, supra*, at p. 349.)

## **IV. Demurrer**

### **A. First cause of action: sexual assault and battery (Civ. Code § 1708.5)**

Despite having alleged that “Defendant Fopoli was acting within the course and scope of his employment with Defendant Winery at the time of the wine tasting” (FAC, ¶ 38), Plaintiff does not argue that 2KW is liable for Foppoli’s misconduct on a respondeat superior theory. Instead, Plaintiff proposes several other rationales for 2KW’s liability, one of which is that 2KW’s ratification of Foppoli’s misconduct created an agency relationship between them. (Oppo at p. 5.)

That is a viable theory. “As an alternate theory to respondeat superior, an employer may be liable for an employee’s act where the employer either authorized the tortious act or subsequently ratified an originally unauthorized tort. [Citations.] The failure to discharge an employee who has committed misconduct may be

evidence of ratification. [Citations.] The theory of ratification is generally applied where an employer fails to investigate or respond to charges that an employee committed an intentional tort, such as assault or battery. [Citations.] Whether an employer has ratified an employee's conduct is generally a factual question. [Citation.]" (*Baptist v. Robinson* (2006) 143 Cal.App.4th 151, 169–170.)

"Ratification is the voluntary election by a person to adopt in some manner as his own an act which was purportedly done on his behalf by another person, the effect of which, as to some or all persons, is to treat the act as if originally authorized by him." (*Rakestraw v. Rodrigues* (1972) 8 Cal.3d 67, 73.) Both parties cite to that definition. 2KW focuses on "done on his behalf," and argues that 2KW did not ratify Foppoli's alleged sexual battery because Foppoli did not do it on behalf of 2KW. (Reply at p. 3.) 2KW overlooks what *Rakestraw* says next: that a purported agent's act "may be adopted by implication based on conduct of the purported principal from which an intention to consent to or adopt the act may be fairly inferred." (*Rakestraw* at p. 73.) Plaintiff's position is that 2KW's failure to take any action to prevent Foppoli from committing sexual battery, despite knowing of his history of doing so, rose to such conduct. For purposes of the instant demurrer, the Court agrees.

*C.R. v. Tenet Healthcare Corp.* (2009) 169 Cal.App.4th 1094 is closely on point. C.R. sued Tenet after being sexually molested by a nurse's assistant, Gaspar, while a patient at one of Tenet's hospitals. The trial court sustained Tenet's demurrer without leave to amend on the basis that "there was no allegation that defendant, a corporation, committed the acts of sexual abuse; the sexual assaults were alleged to have been committed by an individual; the statute does no[t] impose liability on a business establishments such as a hospital; and a corporate entity cannot be held vicariously liable for sexual torts." (*Id.* at p. 1101.) The reviewing court disagreed, holding that "there were sufficient allegations [Tenet] ratified Mr. Gaspar's alleged sexual misconduct." (*Id.* at p. 1112.) Those allegations included that "several of defendant's 'managing agents and supervisors' knew Mr. Gaspar was sexually abusing patients and 'refused to take any action'; the managing agents and supervisors 'hid' this information so Mr. Gaspar could continue to work for it; while this was occurring, Mr. Gaspar sexually assaulted a female employee and the information was 'hid' so he could continue his employment; with knowledge of Mr. Gaspar's sexual misconduct, no disciplinary action was taken and he was allowed to be alone with women who were patients." (*Ibid.*) The court accordingly directed the trial court to overrule the demurrer. (*Id.* at p. 1113.)

The few differences between the instant case and *C.R.* are insignificant. One is that C.R.'s primary cause of action was under Civ. Code § 51.9, which specifically addresses sexual harassment by defendants who have "a business, service, or professional relationship" with the plaintiff, but there is no reason to suppose that the reviewing court's reasoning does not apply with equal force to sexual battery in violation of Civ. Code § 1708.5. Another is that Tenet was alleged to have actively destroyed documents reflecting other

instances of sexual molestation by Gaspar. (*C.R.*, *supra*, at p. 1099.) While there is no analogous allegation here, the Court does not read *C.R.*'s holding as depending on that point.

*C.R.* stands for the proposition that an employer who is aware of an employee's propensity to commit sexual torts while engaged in his employment, and who takes no action to discharge the employee, discipline him, otherwise discourage him, or keep him out of contact with potential victims, may be held liable for the employee's torts on the basis of agency created through ratification. That is what Plaintiff alleges 2KW has done here. The allegations are sufficient to withstand demurrer.

The demurrer is overruled as to the first cause of action.

**B. Third cause of action: unfair competition (Bus. & Prof. Code §§ 17200 et seq.)**

A private individual may bring an action under the Unfair Competition Law ("UCL") if he or she "has suffered injury in fact and has lost money and property as a result of unfair competition." (Bus. & Prof. Code § 17204.) "The court may make such orders or judgments . . . as may be necessary to restore to any person any money or property, real or personal, which may have been acquired by means of such unfair competition." (Bus. & Prof. Code § 17203.) "[U]nder the UCL, '[p]revailing plaintiffs are generally limited to injunctive relief and restitution.'" (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1144, citing *Cel-Tech Communications v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 179.) "[I]t is well established that individuals may not recover damages." (*Id.* at p. 1150, citing *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1266.)

"'Restitution' is an ambiguous term, sometimes referring to the disgorging of something that has been taken and sometimes referring to compensation for injury done." (*People ex rel. Kennedy v. Beaumont Investment* (2003) 111 Cal.App.4th 102, 134, quoting Calamari & Perillo, *The Law of Contracts* (3d ed. 1987).) In the UCL context, however, it means "compelling a UCL defendant to return money obtained through an unfair business practice to those persons in interest from whom the property was taken, that is, to persons who had an ownership interest in the property . . . ." (*Kraus v. Trinity Management Services* (2000) 23 Cal.4th 116, 126-127; see generally *Madrid v. Perot Systems Corp.* (2005) 130 Cal.App.4th 440, 453.)

2KW argues, in effect, that Plaintiff fails to state a UCL cause of action because she is seeking damages rather than restitution. 2KW frames this argument in two different ways: first, that Plaintiff lacks standing to bring the claim; and second, that Plaintiff seeks an impermissible remedy. Plaintiff responds that she "has lost money because of [2KW]'s unfair competition," explaining that she suffered monetary loss because Foppoli assaulted her as the result of 2KW's failure to prevent his conduct. (Oppo at p. 6.) In support of that contention, Plaintiff cites to the FAC's allegation that she has suffered various forms of injury, of which the only one involving financial loss is "medical bills." (Oppo at p. 7; FAC, ¶ 40.)

The Court disagrees with the standing framing, but agrees with the remedy one. "[I]neligibility for restitution is not a basis for denying standing under section 17204 . . . ." (*Kwikset Corp. v. Superior Court*

(2011) 51 Cal.4th 310, 337.) Plaintiff's allegation that she has incurred medical bills due to 2KW's alleged unfair business practices is sufficient to confer standing. However, she cannot recover her expenditures on medical bills from 2KW by suing under the UCL, because they were not "acquired" by 2KW, and therefore 2KW cannot be compelled to "restore" them. (Bus. & Prof. Code § 17203.) Medical bills are damages, not restitution.

The demurrer is sustained as to the third cause of action.

### **C. Fourth cause of action: negligence**

The bulk of the allegations in the fourth cause of action simply repeat the general factual allegations about the incident at the center of this lawsuit. (Compare FAC ¶¶ 66-76 with ¶¶ 12-22.) The remaining allegations all refer to "Defendants," with no distinction between 2KW and Foppoli: "Defendants breached their duty," "as a proximate result of Defendants' failures," "Defendants' actions caused Plaintiff to suffer." (FAC, ¶¶ 77-80.) The obvious intent is to allege that Foppoli was negligent and both defendants are liable for it, in Foppoli's case directly and in 2KW's vicariously.

Presumably in response to 2KW's argument that it had no duty to Plaintiff (MPA at pp. 9-10), Plaintiff argues in her opposition that 2KW is directly liable to her for "its negligent retention of Foppoli." (Oppo at p. 7.) There is no question that negligent retention is a viable theory of negligence. (See, e.g., *Philips v. TLC Plumbing* (2009) 172 Cal.App.4th 1133, 1139-1140 and cases there cited.) But it is not the theory alleged in the FAC. Nothing about the fourth cause of action suggests that 2KW's liability is based on a different theory than Foppoli's.

The demurrer is sustained as to the fourth cause of action.

### **D. Sixth cause of action: intentional infliction of emotional distress**

2KW argues that Plaintiff fails to state a claim for intentional infliction of emotional distress against it, as distinct from Foppoli, because she does not allege that 2KW's conduct, regardless of how extreme or outrageous it may have been, was intended specifically to cause *her* emotional distress. (MPA at pp. 10-11; Reply at p. 5.) Plaintiff responds by noting that "[t]he FAC is replete with allegations and details of Defendant's extreme and outrageous conduct justifying imposition of damages for emotional distress," and complains that 2KW "attempts to obtain summary adjudication by having this court determine that their conduct was insufficient to cause emotional distress." (Oppo at p. 8.)

The Court agrees with 2KW that Plaintiff's argument misses the point. The point is that the word "intentional," in the context of "intentional infliction of emotional distress," means that the defendant has to intend to inflict emotional distress *on the plaintiff*, not just on the general public. (*Miller v. National Broadcasting Co.* (1986) 187 Cal.App.3d 1463, 1489 ["law limits claims of intentional infliction of emotional distress to egregious conduct *toward plaintiff* proximately caused by defendant," emphasis supplied]; *Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903 ["It is not enough that the conduct be

intentional and outrageous. It must be conduct directed at the plaintiff, or occur in the presence of a plaintiff of whom the defendant is aware”]; *Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001; 9 Witkin, Summary of Cal. Law (11th ed.) Torts, § 527(2); see also CACI no. 1600.)

The FAC does not allege that 2KW intended its conduct prior to the events of March, 2021 to cause emotional distress to Plaintiff personally – which is not surprising since, as 2KW notes, “[t]here is no claim 2KW was even aware of plaintiff prior to Foppoli’s alleged assault and abuse.” (MPA at p. 11.) Nor is there any allegation that 2KW intended its actions after the alleged abuse to cause emotional distress to Plaintiff personally. Thus, the FAC does not state a cause of action against 2KW for intentional infliction of emotional distress.

The demurrer is sustained as to the sixth cause of action.

#### **E. Vagueness**

As defined in the FAC, the term “Defendants” refers collectively to Foppoli, 2KW, and 20 Doe defendants. (FAC, ¶ 6.) 2KW argues that the term is frequently used in a manner that makes it unclear whether the defendant being referred to is 2KW or Foppoli. Plaintiff disagrees, noting that there are only two named defendants, and stating that “[i]t is clear when Plaintiff is referring to Foppoli or [2KW] individually with the use of ‘Defendant Foppoli’ and ‘Defendant Winery’ throughout the FAC.” (Oppo at p. 9.)

The FAC identifies the specific defendant under discussion in many cases. (See, e.g., the “General Allegations” section, ¶¶ 11-22.) There are also numerous references to “Defendants” collectively, but most of them are reasonably understood as truly meaning *all* of the defendants, e.g. “Defendants’ acts against Plaintiff were carried out with a malicious intent . . . .” (FAC, ¶ 41.) There is no reason to suppose that means anything but “Foppoli’s, 2KW’s, and all of the Does’ acts.” In some cases, the collective term is inappropriate but the meaning is nevertheless clear; for example, “Defendants took no action against Defendant Foppoli” has to mean that 2KW took no action, since it would make no sense to allege that Foppoli took no action against himself. (FAC, ¶ 25.)

However, in some cases “Defendants” is simply wrong. The prime example is the entirety of the second cause of action for violation of the Ralph Act. It was alleged against all defendants in the original complaint, but in the FAC it is alleged only against Foppoli and the Doe defendants. Therefore, it is now inappropriate and confusing to allege, for example, that “Defendants knew or should have known that the actions would likely injure Plaintiff.” (FAC, ¶ 45.) In light of the definition of “Defendants,” this alleges that 2KW knew or should have known that, but since 2KW is no longer accused of violating the Ralph Act, there is no reason for such an allegation.

The Court also agrees with 2KW regarding “Defendants created a culture of drinking and sexual assaults. The organization attracted sexual predators, encouraged a rape culture, and failed to stop predators

like Defendant Foppoli from assaulting women” and, a few paragraphs later, “Defendants breached their duty by failing to protect Plaintiff from the risk Defendants created . . . .” (FAC, ¶¶ 65, 77.) Who is the subject of the verb “created” in these passages? That is, is the allegation that the “culture” and “risk” were created by 2KW, Foppoli, or both? The use of “the organization” in the second sentence of paragraph 65 adds to the confusion.

The special demurrer on the grounds of vagueness is sustained as to the sections of the FAC described above, and otherwise denied.

## **V. Motion to strike**

In the prayer section of the FAC, “Plaintiff prays for judgment against Defendants as follows.” (FAC at p. 13.) As discussed above, “Defendants” refers collectively to Foppoli, 2KW, and the Doe defendants. 2KW moves to strike portions of the prayer that seek damages for which 2KW is not liable. As discussed next, the motion is granted in part and denied in part.

### **A. Punitive damages**

2KW’s motion to strike the prayer for punitive and exemplary damages is denied. (FAC, Prayer ¶ 5.) Such damages are available in a civil action for sexual battery. (Civ. Code § 1708.5(b).) As discussed above, Plaintiff has adequately alleged that 2KW is liable for such damages on a ratification theory.

### **B. Injunctive relief**

Plaintiff prays for preliminary and permanent injunctions “ordering Defendant Foppoli and his agents” to refrain from releasing images of Plaintiff and to stay away from Plaintiff’s home and workplace. (FAC, Prayer ¶¶ 3 and 4.) 2KW observes that “Plaintiff does not asse[r]t 2KW is an agent of Foppoli, and in fact asserts the opposite,” and that, therefore, “the requested injunctive relief has no relevance to 2KW.” (MPA at p. 5.) Both observations are correct. Therefore, despite the fact that these two paragraphs are introduced by “Plaintiff prays for judgment against Defendants,” it is sufficiently clear that the prayers for injunctive relief are restricted to “Defendant Foppoli and his agents,” and that “his agents” does not include 2KW. 2KW faults Plaintiff for failing to distinguish between defendants, but in this case she has done so.

Accordingly, the motion to strike the prayers for injunctive relief is denied.

### **C. Attorney fees and statutory penalty**

Plaintiff prays for “Attorneys’ fees pursuant to Civil Code Sections 52.1(h), 52(b)(3), 52.4, and 1708.6,” as well as “A statutory civil penalty of \$25,000 pursuant to Civil Code Section 52(b)(2).” (FAC, Prayer ¶¶ 6 and 7.) Unlike the prayers for injunctive relief, nothing in these prayers suggests that they do not apply to both Foppoli and 2KW.

Civ. Code § 52.1(h) is part of the Tom Bane Civil Rights Act, Civ. Code § 52.1. It is not the part that addresses attorney’s fees; Plaintiff presumably meant subdivision (i) of the statute, which provides that “in

an action brought pursuant to subdivision (c), the court may award the petitioner or plaintiff reasonable attorney's fees." Nothing in the FAC suggests that any aspect of the instant case was brought pursuant to Civ. Code § 52.1(c).

Civ. Code § 52(b)(3) provides for attorney's fees to a prevailing plaintiff in an action under Civ. Code § 51.7 (the Ralph Act) or Civ. Code § 51.9 (sexual harassment by defendant with professional or business relationship with plaintiff). The FAC does not allege a cause of action under Civ. Code § 51.9. Civ. Code § 52(b)(2) provides that a \$25,000 civil penalty may be awarded to the prevailing plaintiff in a Ralph Act action. The FAC does allege a Ralph Act cause of action, but only against Foppoli. Therefore, 2KW cannot be liable for either the civil penalty under Civ. Code § 52(b)(2) or attorney's fees under Civ. Code § 52(b)(3).

Civ. Code § 52.4 provides that a prevailing plaintiff in an action for gender violence may be awarded attorney's fees. The fifth cause of action in the FAC alleges that Foppoli is liable for gender violence under Civ. Code § 52.4, but not 2KW. Therefore, 2KW cannot be liable for attorney's fees under that statute.

Civ. Code § 1708.6 provides civil liability for domestic violence, where the defendant "is a spouse, former spouse, cohabitant, former cohabitant [of the plaintiff], or person with whom the [plaintiff] has had a child or is having or has had a dating or engagement relationship." (Civ. Code § 1708.6(a)(2), Pen. Code § 13700(b).) There is no allegation in the FAC that Plaintiff had such a relationship with Foppoli, and certainly not with 2KW. Accordingly, Civ. Code § 1708.6 is simply not applicable to this case at all.

In her opposition, Plaintiff argues that "her request for attorney's fees is proper as they are available under statute, including Civil Code of Civil Procedure [sic] section 1021.5 . . . and Business and Professions Code section 17082 . . ." (Oppo at p. 3.) Since the FAC requests attorney's fees pursuant to four specific statutes, the Court need not and does not address Plaintiff's argument regarding the applicability of two other statutes.

The motion to strike is granted as to paragraphs 6 and 7 of the prayer section of the FAC.

## **VI. Conclusion**

The demurrer is overruled as to the first cause of action, and sustained as to the third, fourth, and sixth causes of action. The motion to strike is granted as to paragraphs 6 and 7 of the prayer section of the FAC. Leave to amend is granted.

## **3. 24CV02232, JPMorgan Chase Bank, N.A. v. Fukumoto**

Plaintiff's unopposed motion to deem matters in Plaintiff's Request for Admissions admitted is **GRANTED**. If no hearing is requested, the Court will sign the proposed order lodged with the moving papers.

Plaintiff served its Requests for Admissions on Defendant Paul Swensen, an individual, by mail on June 7, 2024. To date, Defendant has not served any response or responded to Plaintiff's meet and confer efforts. CCP § 2033.280(a) provides in relevant part that if a party to whom requests for admission are directed "fails to serve a timely response," the party to whom the requests are directed waives any objection. CCP § 2033.280(b) provides that "[t]he requesting party may move for an order that the genuineness of any documents and the truth of any matters specified in the requests be deemed admitted". CCP § 2033.280(c) provides that the court "shall make this order" unless it finds that the party to whom the requests have been directed has served a proposed response in substantial compliance with section 2033.220 before the hearing on the motion. Accordingly, Plaintiff's motion is granted. The truth of the matters set forth in Plaintiff's Requests for Admissions are deemed admitted.

#### **4. 23CV00186, Jooblay, Inc. v. Skolnik**

Counsel Kevin A. Carey's motion to be relieved as counsel for Jooblay, Inc. is **GRANTED**. Counsel has represented that there has been a breakdown in the attorney-client relationship with Jooblay, Inc. If no hearing is requested the Court will sign the proposed order lodged with the moving papers.

#### **5. 23CV01999, Jacobson v. Lichter-Gardner**

Defendants' motion to compel arbitration is **CONTINUED** to October 30, 2024 at 3:00 p.m. in Department 18. Plaintiff's counsel has submitted a declaration stating that Plaintiff does not oppose the motion, but rather stipulates to arbitrate the matter. Counsel represented that the parties are working on drafting a stipulation that was to be filed before this hearing. However, it has not yet been filed. Furthermore, Plaintiff's counsel represents that Defendant Kimberly Lichter-Gardner must still appear in the case in order to be bound by the order to arbitrate. Counsel for the moving defendants represented to Plaintiff's counsel that he also represents Defendant Kimberly Lichter-Gardner. Accordingly, the motion is continued to allow further time for the stipulation and order and the appearance of Kimberly Lichter-Gardner to be filed.