

**TENTATIVE RULINGS  
LAW & MOTION CALENDAR  
Wednesday, July 30, 2025 3:00 pm  
Courtroom 19 –Hon. Oscar A. Pardo  
3055 Cleveland Avenue, Santa Rosa**

The 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, **YOU MUST NOTIFY** the Judge’s Judicial Assistant by telephone at **(707) 521-6602**, and all other opposing parties of your intent to appear, **and whether that appearance is in person or via Zoom**, no later 4:00 p.m. the court day immediately preceding the day of the hearing.

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

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**1. 23CV00060, Marcus v. Beatie**

Plaintiffs Jordan Marcus and Rachel Marcus (“Plaintiffs”, or “Buyers”), filed the complaint against defendants Leonard Beatie, Andrea Beatie (together with Leonard Beatie, “Sellers”), Daniel Casabonne (“Casabonne”) Sotheby’s International Realty, Inc. (together with Casabonne, “Sellers’ Agent”), Robert Ross (“Ross”), VOMR, Inc. (together with Ross, “Buyers’ Agent”) (Sellers, Sellers’ Agent, and Buyers’ Agent together, “Defendants”) and Does 1-50 arising out of alleged misconduct in representing Plaintiffs in a real estate transaction (the “Complaint”). The Complaint contains causes of action for: 1) breach of contract; 2) negligence; 3) negligent misrepresentation; 4) fraud; 5) failure to disclose; 6) violations of Business and Professions Code § 17200 (“UCL Claim”); 7) rescission; and 8) breach of fiduciary duty.

In turn, Buyers’ Agent has filed the currently operative first amended cross-complaint against (“BAFXC”) Sellers, Sellers’ Agent, Level One Home Inspection (“Level One”), Evan Marcus (“Marcus”, together with Sellers, Sellers’ Agent, and Level One, “BAXC Cross-Defendants”). Sellers Agent has also filed a cross-complaint (“SAXC”) against Sellers and Buyers’ Agent. Sellers have filed their own currently operative first amended cross complaint (“SFXC”) against Sellers’ Agent, Buyers’ Agent, Level One, and Marcus.

This matter comes on calendar for Sellers' Demurrer as to Buyer's Agents' First Amended Cross-Complaint (BAFXC). The Sellers' Demurrer is **SUSTAINED with leave to amend**.

## **I. Governing Law**

### **A. Demurrers**

A demurrer can be used only to challenge defects that appear on the face of the pleading under attack or from matters outside the pleading that are judicially noticeable. CCP § 430.30(a). Furthermore, a demurrer can be used only to challenge defects that appear on the face of the pleading under attack or from matters outside the pleading that are judicially noticeable. CCP § 430.30(a).

“On a demurrer a court’s function is limited to testing the legal sufficiency of the complaint. [Citation.] ‘A demurrer is simply not the appropriate procedure for determining the truth of disputed facts.’ [Citation.] The hearing on demurrer may not be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of documents whose truthfulness or proper interpretation are disputable. [Citation.]”). *Bounds v. Sup. Ct.* (2014) 229 Cal.App.4th 468, 477-478. “(A) court cannot by means of judicial notice convert a demurrer into an incomplete evidentiary hearing in which the demurring party can present documentary evidence and the opposing party is bound by what that evidence appears to show.”

*Fremont Indem. Co. v. Fremont Gen. Corp.* (2007) 148 Cal.App.4th 97, 115.

At demurrer, all facts properly pleaded are treated as admitted, but contentions, deductions and conclusions of fact or law are disregarded. *Serrano v. Priest* (1971) 5 Cal.3d 584, 591. Similarly, opinions, speculation, or allegations contrary to law or facts which are judicially noticed are also disregarded. *Coshov v. City of Escondido* (2005) 132 Cal.App.4th 687, 702. Generally, the pleadings “must allege the ultimate facts necessary to the statement of an actionable claim. It is both improper and insufficient for a plaintiff to simply plead the evidence by which he hopes to prove such ultimate facts.” *Careau & Co. v. Security Pac. Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1390; *FPI Develop., Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 384. Each evidentiary fact that might eventually form part of a party’s proof does not need to be alleged. *C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 872. Conclusory pleadings are permissible and appropriate where supported by properly pleaded facts. *Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6. “The distinction between conclusions of law and ultimate facts is not at all clear and involves at most a matter of degree.” *Burks v. Poppy Const. Co.* (1962) 57 Cal.2d 463, 473. If the demurrer is sustained, leave to amend should generally be granted liberally where there is some reasonable possibility that a party may cure the defect through amendment. *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *The Swahn Group, Inc. v. Segal* (2010) 183 Cal.App.4th 831, 852.

## B. Indemnity

“Indemnity” refers to the right of a party to be compensated for loss or damage he has incurred. Civ. Code, § 2772; *Rossmoor Sanitation, Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 628. Civil Code section 2778 sets forth general rules for the interpretation of indemnity contracts, “unless a contrary intention appears.” Civ. Code §2778. When a duty to indemnify arises from express contractual language, the extent of that duty must be determined from the contract. *Rossmoor, supra*, 13 Cal.3d at 628; see also, *Markley v. Beagle* (1967) 66 Cal.2d 951, 961.

## C. Third Party Beneficiaries

“A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.” Civ. Code, § 1559. A party may assert that they are a third party beneficiary where they show: “(1) whether the third party would in fact benefit from the contract, but also (2) whether a motivating purpose of the contracting parties was to provide a benefit to the third party, and (3) whether permitting a third party to bring its own breach of contract action against a contracting party is consistent with the objectives of the contract and the reasonable expectations of the contracting parties. All three elements must be satisfied to permit the third party action to go forward.” *Goonewardene v. ADP, LLC* (2019) 6 Cal.5th 817, 830. As to the second element, “the contracting parties must have a motivating purpose to benefit the third party, and not simply knowledge that a benefit to the third party may follow from the contract.” *Ibid.*

A third party should not be permitted to enforce covenants made not for his benefit, but rather for others. He is not a contracting party; his right to performance is predicated on the contracting parties' intent to benefit him. (*Lucas v. Hamm* (1961) 56 Cal.2d 583, 590—591, 15 Cal. Rptr. 821, 364 P.2d 685; 4 Corbin, *Contracts* (1951) ss 775—777, pp. 8—28; 2 Williston, *Contracts* (1959) s 356A, pp. 835—842.) As to any provision made not for his benefit but for the benefit of the contracting parties or for other third parties, he becomes an intermeddler. Permitting a third party to enforce a covenant made solely to benefit others would lead to the anomaly of granting him a bonus after his receiving all intended benefit.

*Murphy v. Allstate Ins. Co.* (1976) 17 Cal.3d 937, 944.

“(A) third party beneficiary of an arbitration agreement may enforce it.” *Fuentes v. TMCSF, Inc.* (2018) 26 Cal.App.5th 541, 552 (“*Fuentes*”) (internal quotations omitted). “[T]o invoke the third party beneficiary exception, a third party beneficiary has to show that *the arbitration clause ... was made expressly for its benefit*” *Ibid* (internal quotations omitted).

“(T)he third element does not focus upon whether the parties specifically intended third party enforcement but rather upon whether, taking into account the language of the contract and all of the relevant circumstances under which the contract was entered into, permitting the third party to bring the proposed breach of contract action would be ‘consistent with the objectives of the contract and the reasonable expectations of the contracting parties.’ [...] In other words, this

element calls for a judgment regarding the potential effect that permitting third party enforcement would have on the parties' contracting goals, rather than a determination whether the parties actually anticipated third party enforcement at the time the contract was entered into." *Goonewardene v. ADP, LLC* (2019) 6 Cal.5th 817, 830–831.

## II. Analysis

Sellers demur to the BAFXC, asserting that Buyers' Agent has not adequately pled standing under the contract to list the Property between Seller and Seller's Agent (the "Listing Agreement"). Sellers contend that Buyers' Agent cannot display either the necessary intent to benefit, nor that allowing the cause of action is consistent with the objectives of the Listing Agreement. Sellers also argue that the express indemnity term, as pled, appears to strictly construe the parties capable of asserting that provision, as there is no language expanding the party to be indemnified beyond Sellers Agent.

Buyers' Agent asserts, even in the BAFXC, that their ability to assert third party beneficiary standing under the Listing Agreement is predicated on the principles contained in *Goonewardene v. ADP, LLC* (2019) 6 Cal.5th 817. See BAXC ¶ 27. Buyers' Agent asserts that they are clearly a beneficiary under the Listing Agreement because the listing agreement provides that a buyer's agent is entitled to a portion of the commission. Buyers' Agent argues that because they are entitled to payment under the Listing Agreement, they are an intended beneficiary and accordingly may assert the express indemnity term.

The factors argued by Sellers appear to be related but not synonymous issues related to other particular provisions of contracts asserted by third parties. This issue appears analogous to, but not controlled by, *Fuentes v. TMCSF, Inc.* (2018) 26 Cal.App.5th 541. In that case, one of the defendants moved to compel arbitration on several grounds, including asserting that they were a third-party beneficiary to the contract. *Id.* at 545. The trial court disagreed, and the court of appeal affirmed. *Id.* at 545. The court of appeal opined that the language of the arbitration clause was clear that its' application was not applied to third party beneficiaries, and as such the appellant had failed to show that provision of the contract was intended to benefit them. *Id.* at 552. The fact that appellant was the beneficiary of loan proceeds under the contract was not sufficient to support finding third-party beneficiary status to the arbitration clause. *Ibid.*

There appears to be strong similarity in function between arbitration provisions and indemnity clauses such that the same intent to benefit must arise in the provision of the contract, and not merely the contract as a whole. In application, that would require Buyers' Agent to plead adequate facts to show that the indemnity provision was intended for their benefit. This is supported by more general jurisprudence applied to third party beneficiaries. Our supreme court opined in another case the underlying philosophy on which *Fuentes* relied. "As to any provision made not for his benefit but for the benefit of the contracting parties or for other third parties, he becomes an intermeddler." *Murphy v. Allstate Ins. Co.* (1976) 17 Cal.3d 937, 944 ("*Murphy*"). Buyer's Agent has pled a benefit in receiving their commission related to the sale of the Property under the Listing Agreement, but they have not pled any facts connecting that to the additional benefit of being subject to the indemnity provision. "Permitting a third party to enforce a covenant made solely to benefit others would lead to the anomaly of granting him a bonus after

his receiving all intended benefit.” *Ibid*. There is no indication that *Murphy* is still not binding authority. See *Goonewardene v. ADP, LLC* (2019) 6 Cal.5th 817, 830 (citing *Murphy* and emphasizing that “our intent-to-benefit case law remains pertinent in applying this element of the third-party beneficiary doctrine.”).

Based on the BAFXC as pled, Sellers are correct that there is insufficient pleading to conclude that Buyers’ Agent has third party beneficiary standing as to the indemnity clause. Sellers are persuasive that the closed language of the indemnity provision does not appear to contemplate the inclusion of parties beyond Sellers’ Agent. There does not, as a result, appear to be an intent for Buyers’ Agent to benefit from that provision.

The demurrer to the Fourth Cause of Action is SUSTAINED.

### **III. Leave to Amend**

Buyers’ Agent contends that this issue is capable of resolution with further pleading of the terms of the Listing Agreement, or its possible attachment to the BAFXC. This is the first ruling on a demurrer as to Buyers’ Agent’s cross-complaint. Leave to amend therefore appears appropriate.

### **IV. Conclusion**

The demurrer to the Fourth Cause of Action in the BAFXC is SUSTAINED WITH LEAVE TO AMEND.

Seller shall submit a written order to the Court consistent with this tentative ruling and in compliance with Rule of Court 3.1312(a) and (b). Thereafter, they must serve the signed order in compliance with CCP § 1019.5.

## **2. 24CV02434, Ruff v. Papalotzin, D.D.S.**

### **I. Facts**

Plaintiff complains that Defendants negligently provided professional health-care services when diagnosing and treating her on or about November 30, 2023, and as a result injured Plaintiff. She asserts one cause of action for professional negligence.

### **II. Motion**

Defendant Guadalupe Papalotzin, D.D.S. (“Papalotzin” or “Defendant”) moves for summary judgment in her favor against Plaintiff. She argues that the evidence, including expert testimony from Reuben Johnson, D.D.S. (“Johnson”) and Christopher Chan, D.D.S. (“Chan”) set forth in their respective declarations demonstrate that Defendant at all times acted within the standard of care.

Plaintiff opposes the motion by arguing that Defendant’s expert declarations are lacking in sufficient factual support and analysis. Plaintiff claims Defendant’s evidence, including expert

opinions, disputes her proffered facts and demonstrates that she owed specific duties of care. Plaintiff also claims Defendant failed to comply with the applicable professional standard of care which caused Plaintiff's injuries. Plaintiff's opposition is also supported by expert declarations from Louis H. Berman, D.D.S. ("Berman") and Mouhammed Husain, D.D.S.

In reply, Defendant reiterates her arguments and objects to some of Plaintiff's evidence.

### **III. Authority Governing Motions for Summary Judgment**

#### **A. Generally**

Any party may move for summary judgment. Code of Civil Procedure ("CCP") section 437c(a). A party is entitled to summary judgment if it demonstrates "that the action has no merit or that there is no defense to the action or proceeding." CCP section 437c(a).

When a defendant moves for summary judgment, it has the burden of first making a *prima facie* showing that plaintiff *cannot establish* at least one element of any cause of action, or there is a *complete defense* to every cause of action. CCP §437c; *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 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 the opposing party *both lacks, and is not reasonably likely to produce*, the requisite evidence. *Hagen v. Hickenbottom* (1995) 41 Cal.App.4th 168, 186. 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. Regarding reliance on factually devoid evidence, the court in *Union Bank, supra*, at 592-593, found that a plaintiff could not dispute a moving party's facts, based in part on a showing that plaintiff's discovery responses were devoid of any facts, by simply relying on vague declarations which themselves contained conclusory assertions devoid of facts. The court added that the plaintiff could not use these to construe some basis for wrongdoing in light of plaintiff's more specific prior admissions in discovery.

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.

The motion and opposition papers must include a separate statement of material facts presented in the manner specified. CCP section 437c(b); California Rule of Court ("CRC") 3.1350.

A party may not, on a motion for summary judgment or adjudication, rely on *declarations* that *directly* contradict that declarant's own admissions such as in deposition testimony, absent a sufficient explanation. *D'Amico v. Board of Med. Examiners* (1974) 11 Cal.3d 1, 21; *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1120; *Scalf v. D.B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1522; see also, *AARTS Productions, Inc. v. Crocker Nat'l Bank* (1986) 179 Cal.App.3d 1061 (discussing when it is proper to disregard a declaration based on admissions).

#### **B. Elements of Malpractice, i.e., Professional Negligence**

For malpractice claims such as this, the elements are a duty of the professional to use skill, prudence, and diligence as other members of the profession possess and exercise commonly; breach of that duty; proximate cause; and actual loss or damage. *Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th 463, 468 n.2; *Hanson v. Grode* (1999) 76 Cal.App.4th 601, 606.

#### **C. Expert Opinions and Declarations**

Liability for medical malpractice requires a proximate causal connection between the negligent conduct and the injury. *Dumas v. Cooney* (1991) 235 Cal.App.3d 1593, 1603. Defendant's negligent conduct must be a cause in fact, a substantial factor in causing the injury. *Bromme v. Pavitt* (1992) 5 Cal.App.4th 1487, 1498. Causation must also be proven within a reasonable medical probability, generally based upon expert testimony. *Dumas, supra*; *Salasguevara v. Wyeth Laboratories, Inc.* (1990) 222 Cal.App.3d 379, 385.

The Supreme Court explained in *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, at 772, with emphasis added, that a:

“trial court's preliminary determination whether the expert opinion is founded on sound logic is not a decision on its persuasiveness. The *court must not weigh an opinion's probative value or substitute its own opinion for the expert's opinion*. Rather, the court must *simply determine whether the matter relied on can provide a reasonable basis for the opinion or whether that opinion is based on a leap of logic or conjecture*. The court does not resolve scientific controversies. Rather, it conducts a “*circumscribed inquiry*” to “*determine whether, as a matter of logic, the studies and other information cited by experts adequately support the conclusion that the expert's general theory or technique is valid.*” [Citation.] The goal of trial court gatekeeping is simply to *exclude “clearly invalid and unreliable” expert opinion*. [Citation.] In short, the gatekeeper's role “is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” [Citation.]

The court in *Garrett v. Howmedica Osteonics Corporation* (2013) 214 Cal.App.4th 173, at 186-189, explained that an expert declaration in opposition to summary judgment did not need to set forth all the processes or explanations needed to show how the evidence the expert cited supported his conclusion, as long as the expert set forth the evidence and it appeared to be proper, reasonable type of evidence that could logically be relied on. It looked to *Sargon, supra*, but rejected the defendants’ arguments that under *Sargon* the declaration required an explanation as to how the evidence supported the conclusion. It distinguished *Sargon* on the basis that *Sargon* involved evidence submitted in trial and thus the potential for greater exploration of the validity and reasoning behind the opinions. The court noted that summary judgment involves, and allows of, no such thorough evidentiary explanation or dissection and also relied on the principle that in summary judgment *opposition* declarations are to be construed more liberally and leniently than moving declarations, applying this standard to the explanatory requirements supporting an expert conclusion. The court held that therefore it was an abuse of discretion for the trial court to sustain an objection to the opposition expert declaration on the ground that it lacked a description of the processes or explanation of how the evidence he described lead to the conclusion reached.

#### **IV. Analysis**

##### **A. Objections**

In objection 1, Defendant objects to the declaration of Plaintiff’s expert, Louis Berman (“Berman Dec.”). Plaintiff claims that Defendant may not take positions inconsistent with their discovery responses, cannot rely on new theories or issues not raised in the complaint, and cannot rely on evidence not presented in discovery. Plaintiff also contends that the declaration lacks foundation or support of admissible evidence or personal knowledge, calls for speculation, and improperly relies on assumptions of fact without evidentiary support.

This objection is unpersuasive. Defendant sets forth her version of the law but offers absolutely no explanation or analysis as to why it supports any objections. This is tantamount to a boilerplate objection without substance. Plaintiff offers no indication of which statements in the declaration are improper on these grounds, or why. Defendant also fails to explain any basis for the other objection grounds, making only vague, conclusory assertions.

In her reply brief, rather than the objection document, she does assert that the evidence from Berman raises a theory of liability and alleged errors which are not alleged in the complaint or indicated in discovery. However, this is unpersuasive. Defendant is correct that the pleadings frame the issues and that in opposing a motion for summary judgment a plaintiff may not rely on issues or theories outside the scope of the complaint. However, the complaint here contains broad allegations of negligence which encompass the possible specific acts of negligence as set forth in the Berman Dec. and Plaintiff's opposition. The court further notes that Defendant directly contradicts this position by asserting in fact 13 that Plaintiff alleges the very negligent acts which Berman describes in his declaration. Defendant fails to demonstrate that discovery responses do not indicate the possible negligence discussed in the opposition and, moreover, even if it did that would not inherently bar providing new evidence of negligence or different types of negligence. Berman also details the evidence on which he relies and the evidence is facially appropriate as a basis for an expert opinion, including, among others, Defendant's own deposition testimony and the x-rays and other records from Plaintiff's treatment. In line with the authority regarding such declarations set forth above, Berman identifies the evidence on which he relies, which includes Defendant's own deposition testimony and records; he details the standards; he provides a detailed explanation supporting his conclusions; and he provides clear and concrete conclusions. Finally, the court notes that if the declaration is lacking in actual evidence sufficient to support any asserted facts, the court will simply find that the evidence does not establish any dispute or the facts which Plaintiff asserts, even absent an objection because a role of the court here is to determine if the cited evidence actually is sufficient to establish facts or create a dispute. The court OVERRULES this objection set.

In objection 2, Defendant objects to the statement at ¶10 of the Berman Dec. that Defendant stated that she "debrided the pulp using hand files ((#25)" on the ground that this misstates Defendant's testimony because Defendant stated that she debrided the pulp with "various hand files up to size 25." Defendant is correct about the specific wording of the hand files used but this does not negate the evidence underlying the Berman Dec. or alter the fact that Berman correctly stated that Defendant debrided the pulp using size 25 hand files. Moreover, Berman's opinions and conclusions about Defendant's conduct and whether she breached the standard of care are not related to the size of the files used or based on the determination that Defendant used only size 25 files, so any discrepancy on this point is immaterial here. The court OVERRULES this objection.

In objection 3, Defendant objects to Berman's statement that Defendant "injected until there was a backflow of the calcium hydroxide out of the endodontic access" on the ground that she did not so testify in her deposition. Defendant fails to demonstrate that this description of what occurred is false or incorrect. She cites only to a portion of her testimony which addresses this conduct and that testimony is not clear as to whether there was or was not "backflow" but could be interpreted to mean that there was. Moreover, Berman's declaration is based on his examination

of numerous evidentiary sources describing the procedure and Defendant provides nothing showing that this interpretation of the events is incorrect or not based on the underlying evidence. At most, the declaration provides a basis for possibly finding that it may not be correct, an issue which this court does not address on this motion. Moreover, this detail is not in of itself dispositive regarding Berman's conclusions. The court OVERRULES the objection.

Objections 4-31 are merely repeats of the vague, unexplained, unsupported, and unpersuasive arguments set forth in objection 1, but directed to specific portions of the declaration. For the reasons stated above, these are unpersuasive and OVERRULED.

**B. Separate Statements and Facts**

Defendant sets forth 18 facts in her separate statement, of which facts 5-18 are disputed. Plaintiff also asserts her own additional facts numbered 19-60.

**1. Undisputed Facts**

Defendant's undisputed facts 1-4 demonstrate basic contextual facts. These show that Plaintiff alleges Defendant was negligent in the care and treatment of tooth 20 on or about November 30, 2023. On January 30, 2023, Paula Gardner, D.D.S. ("Gardner") evaluated Plaintiff with complains of pain in the left lower tooth with decay in tooth 20 and abnormal responses in pulp testing but Plaintiff indicated a desire to try to save the tooth. Plaintiff presented to Defendant at Defendant Redwood Family Dentistry on October 25, 2023, for a new patient oral evaluation and informed Defendant that she had pain in the lower left region of her mouth. Examination, radiographs, and photographs revealed multiple missing teeth, significant decay and heavy tartar accumulation, so Defendant recommended a treatment plan including endodontic care, root canal therapy ("RCT") on the lower left first premolar identified as tooth 20, and a crown on tooth 20, plus scaling and root planning throughout the mouth. After obtaining Plaintiff's informed consent, on November 29, 2023, Defendant performed a full-mouth periodontal scaling, root planning, and polishing without complication under local anesthesia.

**2. Disputed Facts**

In fact 5, Defendant shows that Plaintiff returned for root canal on November 30, 2023, Defendant performed that treatment and identified the tooth as having a single 16mm canal, which was irrigated and treated as set forth in the fact, including medication with calcium hydroxide. She advised Plaintiff to return for completion and a permanent crown. Defendant obtained imaging of the tooth. In her opposition fact, Plaintiff shows that the imaging was obtained after the treatment and depicted extruded calcium hydroxide paste in the area of the alveolar nerve.

In fact 6, Defendant shows that Dr. Salek ("Salek") next saw Plaintiff on January 3, 2024, for persistent lip numbness following Defendant's treatment of her, and recommended a referral to an endodontist and oral surgeon for completing the treatment and evaluation. Plaintiff responded that she would consider this and update the office. Plaintiff responds by showing that the chart notes that Plaintiff wanted to "give it more time" to decide because Defendant's office had told

her that the numbness sometimes occurs when the calcium hydroxide “goes pass [sic] the apex” and “can go away after a month or maybe longer” on its own. Plaintiff also testified in her deposition that Salek basically told her to wait a little longer because it might clear up.

Defendant in fact 7 shows that endodontist Dr. Sahar Dadvand (“Dadvand”) next saw Plaintiff on March 8, 2024, noted that tooth 20 had been treated, x-rays and a scan show calcium hydroxide and a temporary filling in the tooth, and the treatment plan included endodontic therapy once paresthesia subsides with a follow-up in three months. Plaintiff responds by showing that the x-rays and scans also showed calcium hydroxide in the area of the mental foramen, mental nerve, and inferior alveolar nerve in addition to inside the tooth.

In fact 8, Defendant demonstrates that Plaintiff was evaluated at UCSF on July 23, 2024, where she reported a nine-month history of numbness in the lower left lip and chin following the treatment of tooth 20, the UCSF personnel assessed paresthesia due to nerve injury and noted that she was not a candidate for surgery. Defendant’s cited evidence, as Plaintiff notes in her response, also shows that Plaintiff was noted as not being a surgery candidate “at this time,” instead of saying that she was not a surgery candidate at all, and in fact they noted that the tooth may need to be extracted in the future. Plaintiff also correctly points out that Defendant’s own evidence shows that Plaintiff’s nine-month history included not simply numbness but also paresthesia and dysesthesia, with both being post-RCT, i.e., following the treatment by Defendant, and the UCSF personnel also noted that the condition was “most concerning” and that the cause was “likely either over-instrumentation or extrusion of the RCT materials.”

Defendant shows in fact 9 that her expert, Johnson, opines that Defendant complied with the standard of care at all times. Plaintiff rebuts with specific opinions from Berman showing that Defendant breached the standard of care because 1) she owed a duty not to inject so much calcium hydroxide paste into Plaintiff’s canal so that it extruded out of the tooth apex; 2) Defendant breached the standard of care because she inserted an excessive amount of calcium hydroxide paste into the tooth canal, causing it to extrude beyond the tooth apex into the area of the mental nerve and inferior alveolar nerve; 3) this must have resulted from Defendant improperly either applying too much pressure when applying the paste, improperly pushing the applicator too far, or improperly applying too much, and any of these causes is a breach of the standard of care; 4) Defendant owed a duty of care to make a post-insertion assessment of the extent, location or position of the inserted paste to verify whether it only filled the canal or extruded beyond into the nerve area; 5) Defendant breached the standard of care by failing to make such an assessment; 6) Defendant owed a duty of care to recognize on the post-insertion radiograph the location of the paste to make sure that it was not extruded into the nerve area; 7) Defendant breached the standard of care by ignoring or failing to recognize this on the radiograph; 8) the post-insertion radiograph which Defendant did take shows the paste extruded into the nerve area and even extending beyond the view of the radiograph, so Defendant owed a duty to conduct another radiograph to determine how far the paste extended; 9) Defendant breached the duty of care by failing to do another radiograph; 10) Defendant owed a duty of care to recognize that the nerves are, even normally, in such close proximity to the tooth 20 that post-insertion investigation for extruded paste is required; 11) Defendant breached that duty by failing to recognize this and that Plaintiff’s jaw and nerve anatomy are within normal limits so that Defendant should have known of this issue and should have taken action to make sure that there

was no paste in the area; 12) Defendant owed a duty of care to make a timely referral to an oral surgeon so remove the extruded paste and she breached this standard by failing to make the referral; 13) Defendant owed a duty of care to inform Plaintiff of the complication and instruct Plaintiff to contact the office if numbness persisted after a few hours and Defendant failed to do so, breaching this standard of care; 14) Defendant breached the standard of care by failing to inform Plaintiff of the extruded paste or to contact Defendant of the numbness persisted after a few hours, which is the normal time which it takes local anesthetic to subside; 14) Defendant owed a duty of care to have her office contact Plaintiff following the procedure in order to find out the post-treatment condition and Defendant breached this by failing to do so.

In fact 10, Defendant shows that she obtained Plaintiff's informed consent for the treatment. Plaintiff, however, demonstrates that technically Defendant did not obtain Plaintiff's informed consent for the treatment, a root canal treatment or "RCT," but instead that Defendant's own exhibit and record shows that she instead obtained informed consent only for a root canal *retreatment*, a different procedure which is only performed on a tooth which had already undergone an RCT, which was not the case here.

Defendant shows in fact 11 that Johnson opines that her technique was within the standard of care. Plaintiff responds that Berman opines that Defendant's technique was not within the standard of care, setting forth the same details as described above in Plaintiff's response to fact 10.

In fact 12, Defendant shows that Johnson opines that her reliance on the radiographs was within the standard of care. Plaintiff responds that no evidence demonstrates that Defendant looked at the radiographs, and Defendant testified that she did not remember if she looked at the images to see if there was material outside the tooth. She also shows that, in Berman's opinion, Defendant breached the standard of care either by not looking at the images or by failing to observe the paste outside the tooth as shown in the imagery.

In fact 13, Defendant demonstrates that Plaintiff alleges that she suffered injury to nerves resulting from extrusion of the paste during the treatment of tooth 20. She also shows that Johnson opines that imagery indicates that Plaintiff's nerves were located higher than normal and unusually close to the tooth apex. He adds that this is not obvious on the standard radiographs and was not foreseeable. Plaintiff disputes this with the evidence, as detailed above in fact 10, which includes Berman's opinion that the location of Plaintiff's nerve was within the normal range, Plaintiff's anatomy in this area is not abnormal, Defendant should have known that Plaintiff's nerves could be in this area, and Defendant should have made an examination to determine if this was the case, so that Defendant's conduct violates the standard of care. Plaintiff also cites the declaration of another expert, Mohammed Husain, D.D.S. ("Husain"), who provides further details about the nerve location and the extrusion of the paste to the nerve area. Husain supports Berman, showing that the nerve position is within the normal range and that the paste in the imagery extends to the nerve area. Together, both dispute Johnson's statements and Defendant's asserted fact.

Defendant shows in fact 14 that, in Johnson's opinion, the complications resulted from an unforeseeable and rare anatomical variation in the positioning of Plaintiff's nerves, not a

deviation from the standard of care. Plaintiff responds with the details regarding this issue from Berman and Husain set forth above. Both dispute Johnson's statements and Defendant's asserted fact.

In fact 15, Defendant reiterates that Johnson opines that nothing which Defendant did or did not do caused or contributed to Plaintiff's injury. Plaintiff disputes this with detailed evidence, as set forth above, from Berman and Husain which show that Defendant did negligently cause the injury through a breach of the standard of care.

In fact 16, Defendant essentially repeats, with slightly different details and support from another expert, Christopher Chan, D.D.D., M.D. ("Chan"), the same basic facts as set forth above in facts 13-15. Specifically, the information addresses the nerve location and indicates that the injury could occur without negligence. Plaintiff again disputes this with the details set forth above in facts 13-15.

In fact 17, Defendant again cites Chan's statements and reiterates the factual assertions from 14-15 that the injuries did not result from any act or omission of Defendant but instead resulted from an anatomical anomaly. Once again, Plaintiff provides the above-cited testimony and details, explained in facts 13-16, disputing this and showing that there was no anatomical anomaly and that instead Defendant negligently caused the injury, breaching the standard of care.

In fact 18, Defendant reiterates the assertion from fact 15, but based on Chan, that Chan opines that nothing which Defendant did or did not do caused or contributed to Plaintiff's injury. Plaintiff disputes this with detailed evidence, as set forth above, from Berman and Husain which show that Defendant did negligently cause the injury through a breach of the standard of care.

In her additional facts 19-62, Plaintiff essentially repeats, with detail including some additional specifics, the factual assertions as set forth above in her responses to Defendant's facts. In summary, these show that Plaintiff's anatomy, specifically the location of her nerves, is within the normal range and Defendant should have been aware of the basic location and presence of the nerves; Defendant should have been aware of the danger to the nerves from the paste used in the RCT; Defendant negligently allowed or caused paste to extrude outside the tooth into the nerve area during the RCT procedure; Defendant either negligently failed to observe the paste on the post-procedure images or negligently failed to examine those images; Defendant did not remember looking at the images; Defendant negligently failed to inform Plaintiff to contact her office if the numbness did not subside within a few hours and negligently failed to have her office check on Plaintiff's condition; Defendant breached her duty to make a timely referral to an oral surgeon to remove the extruded paste; timely intervention to remove the paste was necessary and Defendant should have known of this urgency but failed to take proper measures; Defendant's conduct breached the standard of care for the reasons detailed in the facts and supporting evidence, all of which contain specific and detailed discussion. Moreover, Plaintiff shows that the UCSF records and her experts indicate that extruded paste from the RCT procedure caused the nerve injury while her experts opine that Defendant's breach of the standard of care, the for specific reasons detailed in the facts and evidence, was a substantial factor in causing Plaintiff's injuries. Facts 28, 58-62.

### C. Discussion

Ultimately, even assuming that Defendant has met her burden, Plaintiff unequivocally demonstrates material issues of dispute sufficient to defeat this motion. Although Plaintiff does not set forth evidentiary objections as such, in her opposition brief, Plaintiff points out that Defendant's two expert declarations are lacking in detail and explanation demonstrating clearly how the experts reached their conclusions. For example, Plaintiff notes that Johnson opines that Defendant's reliance on the radiographs was reasonable and complied with the standard of care but fails to explain how the opinion was reached if there is no evidence Defendant examined the images. Plaintiff demonstrates in her opposition facts, as set forth above, that Defendant testified that she did not remember looking at the images. By contrast, Plaintiff's two expert declarations contain far more detail with analysis and application of their reasoning to the evidence. Plaintiff, as detailed in the facts set forth above, disputes all of Defendant's facts and, in short, provides evidence with clearly appropriate expert declarations, showing that Defendant owed specific duties of care; Defendant breached the duties and failed to comply with the applicable professional standards; how and why Defendant breached those duties; and how and why Defendant's negligence caused Plaintiff's injuries.

The court notes that Defendant argues that Plaintiff's evidence fails to take into account the possibility that Plaintiff had an anatomical anomaly regarding the nerve location which may have been a causal factor and not necessarily foreseeable. This is unpersuasive. As explained above, Plaintiff demonstrates with clear and detailed evidence that Plaintiff had no anomaly in any manner, including her nerve location. Even if this was an anomaly, the possibility that it was not, and that it was not a causal or contributing factor, still requires the court to deny the motion. Defendant will in the end prevail only if the established facts show *unequivocally* that Defendant *could not* have been negligent *as a matter of law*. If the evidence and established facts leave open a possible basis for an alternative conclusion, a motion for summary judgment must be denied.

The Court DENIES the motion in full.

### **V. Conclusion**

Defendant Papalotzin's Motion for Summary Judgment, or in the alternative, Summary Adjudication is **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 party shall inform the preparing party 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. 24CV04528, Swami v. Harris- FROM D17**

The hearing on Defendants Oracle Consulting, Inc. and David Harris' motion to set aside default is **CONTINUED** to August 27, 2025, at 3:00 P.M. in Department 17.

Defendants noted in Paragraph 7 of the Memorandum of Points and Authorities that they submitted a proposed responsive pleading concurrently with the motion as is required under C.C.P. section 473(b). However, the Court did not see the proposed responsive pleading attached as any of the 21 exhibits submitted in support of the motion. As the proposed pleading may have been omitted as a result of mistake, Defendants are permitted to file a supplemental declaration with the proposed responsive pleading attached for the Court's consideration. If Defendants fail to do so before the next hearing date, the Court will deny this motion.

#### 4. 24CV04732, Serrano Dominguez v. Midha

Plaintiff Lisette Juliana Serrano Dominguez ("Plaintiff") filed the complaint in this action (the "Complaint") against defendants Nitin Midha ("Nitin"<sup>1</sup>), Timsi Midha ("Timsi", together with Nitin, the "Midhas"), Jeremy William Bradley ("Jeremy"), Phillip John Bradley ("Phillip", together with Jeremy, the "Bradleys") (all named defendants together, "Defendants"), and Does 1-50. This matter is on calendar for the motions by the Bradleys to compel answers from Plaintiff to requests for production of documents ("RPODs"), form interrogatories ("FIs"), and special interrogatories ("SIs"), pursuant to Cal. Code Civ. Proc. ("CCP") §§ 2030.290(b)-(c) and 2031.300(b), and monetary sanctions.

Plaintiff has provided subsequent responses, and therefore the motion to compel appears to be **MOOT**, leaving the matter of sanctions. The Plaintiff's request for sanctions is **GRANTED** in the amount of \$660.00.

##### I. Relevant Law

When a party serves response after a motion to compel is filed, the court maintains jurisdiction within its discretion to determine whether the original answers were sufficient in order to determine whether sanctions remain appropriate. *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 410-411. Sanctions are mandatory under the CCP for discovery abuses, absent substantial justification. If a party fails to serve a code compliant response to interrogatories, the court shall impose sanctions unless it finds that the party subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. CCP §2030.300(d). The purpose of monetary sanctions is to mitigate the effects of the necessity of discovery motions and responses on the prevailing party. There is no requirement that the failure to comply with discovery be willful for the court to impose monetary sanctions. *Ellis v. Toshiba America Information Systems, Inc.* (2013) 218 Cal.App.4th 853, 878.

##### II. Analysis

Plaintiff has served responses to the relevant FIs, SIs, and RPODs after the filing of this motion. The Bradleys concede that further responses have been served, and therefore the substance of the motion is MOOT. Therefore, the Court turns its analysis to sanctions.

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<sup>1</sup> Multiple defendants share different surnames, and so first names are utilized for clarity and convenience. No disrespect is intended.

The Bradleys served the discovery requests at issue on March 26, 2025. Defendant served no responses before time to respond lapsed. Defendant had received no extensions to respond. The motion was filed May 30, 2025. Even though there is no obligation to meet and confer when no responses are served, the Bradleys contacted Plaintiff by email twice in an effort to elicit responses without a motion. See Declaration of Lydia Goldman, ¶¶ 7-8. Plaintiff did not serve responses until after July 21, 2025. See Discovery Facilitator's 7/21/25 Report. The motion therefore appears to have been necessary.

Therefore, sanctions are proper. Plaintiff seeks \$660.00, representing attorney work of 3 hours for the motions at \$200/hour, and \$60 in costs to file the motion. Goldman Declaration ¶ 11. While the motion requests one of the hours for the preparation of a reply, no reply was filed. However, the Bradleys were forced to expend the additional time meeting and conferring with the discovery facilitator in order to resolve the issue and preparing her declaration under Local Rule 5.4. Three hours is reasonable and appears to be actual. The Bradleys ask for sanctions against both Plaintiff and her counsel. The Declaration of Lydia Goldman under Local Rule 5.4 describes the conduct of Plaintiff's counsel in the course of meet and confer efforts. This appears to be sufficient to find that the discovery abuse at issue stems in significant part from the conduct of counsel. The Bradley's request for sanctions is **GRANTED**. Plaintiff and/or her counsel are to pay \$660.00 to the Bradleys within 30 days of this order.

### III. Conclusion

For the reasons above, the Motion is **MOOT**, but sanctions are **GRANTED**. Plaintiff and/or her counsel are to pay \$660.00 to the Bradleys within 30 days of notice of this order.

The Bradleys shall submit a written order to the Court consistent with this tentative ruling and in compliance with Rule of Court 3.1312(a) and (b). Thereafter, they must serve the signed order in compliance with CCP § 1019.5.

### **5-7. 24CV05294, Cohodes v. Cohodes- FROM D17**

The Court rules as follows on the parties' motions:

1. Plaintiff Marc Cohodes' ("Marc") unopposed motion to seal portions of papers submitted in support of Defendant Aurora Cohodes' ("Aurora") motion to disqualify is **GRANTED**;
2. Marc's unopposed motion to seal portions of opposition to Aurora's motion to disqualify is **GRANTED**; and
3. Aurora's motion to disqualify The Norton Law Firm PC as counsel for Marc is **GRANTED**.

### I. PROCEDURAL HISTORY

Marc and Aurora were married and had a social relationship with counsel Norton, who with his own family were guests at the parties' wedding reception. (Motion to Disqualify Memorandum

of Points and Authorities [“Disqualify”], 1:9-11.) The parties separated nine years later, at which time they entered into a Confidential Separation Agreement. (Disqualify, 1:11-13.)

Prior to the separation, Aurora had both a social and professional relationship with counsel Norton through which she confided in him for the purpose of seeking confidential legal advice. (*Id.* at 1:17-19.) Aurora also was in contact with David Shapiro, who works at the Norton Law Firm PC also. (*Id.* at 2:1-4.)

Aurora now moves to disqualify counsel Norton and the Norton Law Firm PC because it may be likely that counsel Norton will have to serve as a percipient witness in this action and because he admitted to the parties that he cannot be adverse to either of them because of his involvement in their past. (Disqualify, 2:21-28, 3:1-20.) Aurora is also concerned that counsel Norton will use confidential information he knows about her against her in this matter. (*Id.* at 3:21-28, 4:1-11.)

Marc opposed the motion to disqualify his counsel and also filed two motions to seal in connection with the motion to disqualify, neither of which Aurora opposed. Aurora filed a reply brief to the opposition to the motion to disqualify.

## **II. PLAINTIFF MARC’S MOTIONS TO SEAL**

### **A. Legal Standard**

California Rules of Court (“C.R.C.”), rules 2.550-2.551 allow the sealing and unsealing of records by court order.

Rule 2.550(c)-(e) set forth factors to consider with respect to sealing court records. The factors needed to seal records are that: (1) there is an overriding interest overcoming the right of public access; (2) the overriding interest supports sealing the record; (3) a substantial probability exists that not sealing the record will prejudice the overriding interest; (4) the proposed sealing is narrowly tailored; and (5) no less restrictive means exist to achieve the overriding interest. (C.R.C., rule 2.550(d).) An order to seal records must specifically state the facts supporting the findings and order seals only those documents or pages that contain the material that should be sealed; if the records are voluminous, the court may appoint a referee. (C.R.C., rule 2.550(e).)

To file a record under seal, rule 2.551(b) requires the requesting party to file a motion or application including a memorandum and declaration containing facts sufficient to justify the sealing. The requesting party must serve copies of the moving papers on all parties who have appeared in the case. (C.R.C., rule 2.551(b)(2).)

### **B. Two Motions to Seal**

Marc moves unopposed to seal:

1. Portions of Aurora’s papers submitted in support of her motion to disqualify counsel Norton and his firm; and

2. Portions of Marc’s opposition to Aurora’s motion to disqualify his counsel.

Marc submitted redacted and unredacted versions of the documents at issue and clearly designated line by line which portions of the opposition and of Aurora’s supporting papers that are to be sealed. (Motion to Seal Portions of Opposition, 1:8-28, 2:1-4; Motion to Seal Portions of Papers in Support of Motion to Disqualify, 1:8-27.)

The portions to be sealed are subject to the parties’ confidential agreements, which Marc argues would prejudice him if the terms of those agreements were disclosed. Marc states that he is a short seller with more than 170,000 Twitter followers and has a history of criticizing fraudulent conduct by publicly traded companies, which has made him enemies in that field, so public disclosure might lead to security issues for him. Marc also argues that the proposed sealing is narrowly tailored and there is no less restrictive means to achieve the overriding interest of maintaining his confidentiality.

Aurora did not oppose either motion.

C. Application

The Court finds that: (1) there is an overriding interest in protecting the confidential terms of the parties’ agreements from public access; (2) this overriding interest supports sealing the portions of the opposition and supporting papers of the motion to disqualify; (3) there is a substantial probability that not sealing the record will prejudice the overriding interest and potentially bring harm to Marc with disclosure; (4) the proposed sealing is narrowly tailored; and (5) there are no less restrictive means to achieve the overriding interest. As such, the Court GRANTS the two unopposed motions to seal the portions as described in the motions.

**III. DEFENDANT AURORA’S MOTION TO DISQUALIFY**

A. Legal Standard

Pursuant to C.C.P. section 128, courts have the power to take steps necessary to preserve and enforce order in their proceedings and to ensure obedience of their judgments, orders, and processes.

The motion also cites a previous rule in the California Rules of Professional Conduct, Rule 3-310, which requires avoiding the representation of adverse interests of a client or former client. As of November 1, 2018, Rule 3-310 became ineffective when the current version of the approved rules went into effect. The Court notes that the current Rule 1.7 similarly requires that: “(a) a lawyer shall not, without informed written consent from each client and compliance with paragraph (d), represent a client if the representation is directly adverse to another client in the same or a separate matter.”

B. Motion to Disqualify

Per C.C.P. section 128 and previous Rule 3-310, Aurora moves to disqualify the Norton Law Firm PC and counsel Norton as counsel of record for Marc on the grounds that Aurora

previously provided them with confidential information that can be used against her in this action. Aurora argues that it would be unethical for counsel Norton or his firm to proceed with legal representation of Marc in this matter.

### C. Opposition

Marc opposes the motion arguing that because counsel Norton and his firm do not currently represent Aurora or have ever represented her in any matter related to the claims involved in this action but concede that some of the Norton Law Firm PC's attorneys have previously represented Aurora in two discrete legal matters. Marc also disputes whether Aurora divulged some of the confidential information to those lawyers that Aurora claims she did and otherwise disputes the nature of the confidential information that was actually shared with the Norton Law Firm PC attorneys.

### D. Reply

Aurora points out that nothing in the Opposition changes the fact that she did provide confidential information to the Norton Law Firm PC and its attorneys on multiple occasions in the past and that this information can still be used against her in this litigation. A substantial relationship still exists between Aurora, the Norton Law Firm PC, and its attorneys because of their representation of her in the past, and counsel Norton has already admitted a conflict of interest in the present litigation in his email sent to them in May of 2024.

### E. Application

The Court finds that an unavoidable conflict of interest has been highlighted in Aurora's motion to disqualify because there was a substantial social and professional relationship between Aurora and the Norton Law Firm PC and their attorneys in the past. She sought legal guidance from them several times, including situations involving Marc. Counsel Norton has conceded in writing to both of the parties that he has a conflict of interest and should not serve as counsel for either of them in this action.

The Court also finds it highly probable that counsel Norton or other lawyers from the firm may be called as witnesses in this action to testify as to the confidential matters that Aurora spoke with them about involving Marc. Furthermore, the firm and its attorneys know enough confidential information about Aurora and her relationship with Marc that could potentially be used adversely against her in this action. As such, the Court will grant the motion to disqualify per C.C.P. section 128 and California Rules of Professional Conduct, Rule 1.7.

## IV. CONCLUSION

Based on the foregoing, the unopposed motions to seal are **GRANTED**. The motion to disqualify is also **GRANTED**. Moving parties shall submit a written order on their respective motions that are consistent with this tentative ruling and in compliance with Rule of Court 3.1312(a) and (b).

**8. 25CV00489, Bennett v. Clark**

Plaintiff James Coryell Bennett (“Plaintiff”), filed the currently operative first amended complaint (“FAC”) in this action against defendants Rebecca Guyette (“Representative”), in her capacity as representative of the estate of August William Bennett (“Decedent”), UC Davis Foundation (“UC Davis”), and Does 1-100 arising out of alleged failure by Decedent to provide for a bequest in his will. This matter is on calendar for UC Davis’s demurrer to the FAC pursuant to Cal. Code Civ. Proc. (“CCP”) § 430.10(e) for failure to state facts sufficient to constitute a cause of action. Representative has filed a joinder in the demurrer. The Demurrer is **SUSTAINED with leave to amend.**

**I. Governing Law**

**A. Demurrers**

A demurrer can be used only to challenge defects that appear on the face of the pleading under attack or from matters outside the pleading that are judicially noticeable. CCP § 430.30(a). Furthermore, a demurrer can be used only to challenge defects that appear on the face of the pleading under attack or from matters outside the pleading that are judicially noticeable. CCP § 430.30(a).

“On a demurrer a court’s function is limited to testing the legal sufficiency of the complaint. [Citation.] ‘A demurrer is simply not the appropriate procedure for determining the truth of disputed facts.’ [Citation.] The hearing on demurrer may not be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of documents whose truthfulness or proper interpretation are disputable. [Citation.]”  
*Bounds v. Sup. Ct.* (2014) 229 Cal.App.4th 468, 477-478. “(A) court cannot by means of judicial notice convert a demurrer into an incomplete evidentiary hearing in which the demurring party can present documentary evidence and the opposing party is bound by what that evidence appears to show.”

*Fremont Indem. Co. v. Fremont Gen. Corp.* (2007) 148 Cal.App.4th 97, 115.

At demurrer, all facts properly pleaded are treated as admitted, but contentions, deductions and conclusions of fact or law are disregarded. *Serrano v. Priest* (1971) 5 Cal.3d 584, 591. Similarly, opinions, speculation, or allegations contrary to law or facts which are judicially noticed are also disregarded. *Coshov v. City of Escondido* (2005) 132 Cal.App.4th 687, 702. Generally, the pleadings “must allege the ultimate facts necessary to the statement of an actionable claim. It is both improper and insufficient for a plaintiff to simply plead the evidence by which he hopes to prove such ultimate facts.” *Careau & Co. v. Security Pac. Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1390; *FPI Develop., Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 384. Each evidentiary fact that might eventually form part of a party’s proof does not need to be alleged. *C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 872. Conclusory pleadings are permissible and appropriate where supported by properly pleaded facts. *Perkins v.*

*Superior Court* (1981) 117 Cal.App.3d 1, 6. “The distinction between conclusions of law and ultimate facts is not at all clear and involves at most a matter of degree.” *Burks v. Poppy Const. Co.* (1962) 57 Cal.2d 463, 473. If a demurrer is sustained, leave to amend should generally be granted liberally where there is some reasonable possibility that a party may cure the defect through amendment. *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *The Swahn Group, Inc. v. Segal* (2010) 183 Cal.App.4th 831, 852.

#### B. Statute of Frauds, Contracts for Testamentary Acts, and Equitable Estoppel

“A contract is an agreement to do or not to do a certain thing.” Civ. Code, § 1549. Contracts require capable parties, the consent of those parties, a lawful object, and mutual consideration. Civ. Code § 1550. “The object of a contract is the thing which it is agreed, on the part of the party receiving the consideration, to do or not to do.” Civ. Code, § 1595. “The object of a contract must be lawful when the contract is made, and possible and ascertainable by the time the contract is to be performed.” Civ. Code, § 1596. “An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.” *City of Moorpark v. Moorpark Unified School Dist.* (1991) 54 Cal.3d 921, 930, quoting Restatement 2d Contracts § 24. “To be enforceable, a promise must be definite enough that a court can determine the scope of the duty and the limits of performance must be sufficiently defined to provide a rational basis for the assessment of damages.” *Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 770.

The elements of a cause of action for breach of contract are: “(1) the contract, (2) plaintiff’s performance or excuse for nonperformance, (3) defendant’s breach, and (4) the resulting damages to plaintiff.” See *Coles v. Glaser* (2016) 2 Cal.App.5th 384, 391; quoting *Hamilton v. Greenwich Investors XXVI, LLC* (2011) 195 Cal.App.4th 1602, 1614, 126 Cal.Rptr.3d 174.

Where a condition is required to be performed by the plaintiff, the general allegation that the condition has been performed is sufficient. CCP § 457. However, “a general allegation of due performance will not suffice if the plaintiff also sets forth what has actually occurred, and such specific facts do not constitute due performance.” *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1390. “The pleading of excuse or waiver of performance of conditions precedent requires specific not general allegations.” *Id.* at 1391.

Contracts formed between January 1, 1985, and December 31, 2000, to make a will are controlled by former Probate Code § 150 (see Prob. Code § 21700(c)), which provided in relevant part:

- (a) A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if made after December 31, 1984, can be established only by one of the following:
  - (1) Provisions of a will stating material provisions of the contract.
  - (2) An express reference in a will to a contract and extrinsic evidence proving the terms of the contract.
  - (3) A writing signed by the decedent evidencing the contract.
- (b) The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.

Prob. Code, § 150.

“In order to assert equitable estoppel, the following four elements must be present: (1) the party to estopped must be apprised of the facts; (2) he must intend that his conduct be acted on, or must so act that the party asserting estoppel had a right to believe it was so intended; (3) the party asserting estoppel must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.” *Citizens for a Responsible Caltrans Decision v. Department of Transportation* (2020) 46 Cal.App.5th 1103, 1128. “To establish estoppel as an element of a suit the elements of estoppel must be especially pleaded in the complaint with sufficient accuracy to disclose [sic] facts relied upon.” *Chalmers v. County of Los Angeles* (1985) 175 Cal.App.3d 461, 467. “Whether equitable estoppel applies is normally a question of fact. (Citation.) However, where the complaint pleads undisputed facts establishing that equitable estoppel does not apply, the issue may be resolved on demurrer.” *Sofranek v. County of Merced* (2007) 146 Cal.App.4th 1238, 1251. “Estoppel is an equitable doctrine. It acts defensively only. It operates to prevent one from taking an unfair advantage of another, but not to give an unfair advantage to one seeking to invoke the doctrine.” *Estate of Hafner* (1986) 184 Cal.App.3d 1371, 1395.

“Although the statute requires that an agreement to make a provision by will be in writing (Citation.) a party will be estopped from relying on the statute where fraud would result from refusal to enforce an oral contract (Citation). The doctrine of estoppel has been applied where an unconscionable injury would result from denying enforcement after one party has been induced to make a serious change of position in reliance on the contract or where unjust enrichment would result if a party who has received the benefits of the other's performance were allowed to invoke the statute.” *Day v. Greene* (1963) 59 Cal.2d 404, 409–410. The exception for equitable estoppel to the statute of frauds continues to apply during the effective period of Probate Code § 150. *Estate of Housley* (1997) 56 Cal.App.4th 342, 355.

The oral agreement will be held binding, regardless of the absence of any representation by the defendant [that no writing is required], if (a) the plaintiff, in reliance upon it, has so changed his position that unconscionable injury would be suffered, *or* (b) the defendant, having accepted the benefits of the oral contract, would be unjustly enriched by nonenforcement. Although the plaintiff's change of position could take place without the defendant being unjustly enriched, and vice versa, both elements are so frequently present that the same decisions may be cited on both theories.

*Estate of Housley* (1997) 56 Cal.App.4th 342, 352, quoting 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 325.

### C. Complaints Against Deceased Persons

“(A) cause of action against a decedent that survives may be asserted against the decedent's personal representative or, to the extent provided by statute, against the decedent's successor in interest.” CCP, § 377.40. “An action may not be commenced against a decedent's personal representative on a cause of action against the decedent unless a claim is first filed as provided in this part and the claim is rejected in whole or in part.” Prob. Code, § 9351. “The heirs **may** be

joined as parties in [a] quiet title action, but they [are] neither necessary nor indispensable parties.” *Jay v. Dollarhide* (1970) 3 Cal.App.3d 1001, 1031.

#### D. Unjust Enrichment

“(T)here is no cause of action in California for unjust enrichment.” *Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779, 793. “The phrase ‘Unjust Enrichment’ does not describe a theory of recovery, but an effect: the result of a failure to make restitution under circumstances where it is equitable to do so.” *Lauriedale Associates, Ltd. v. Wilson* (1992) 7 Cal.App.4th 1439, 1448. “Unjust enrichment is synonymous with restitution.” *Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1370.

“The theory of unjust enrichment requires one who acquires a benefit which may not justly be retained, to return either the thing or its equivalent to the aggrieved party so as not to be unjustly enriched.” *Otworth v. Southern Pac. Transportation Co.* (1985) 166 Cal.App.3d 452, 460. “The fact that one person benefits another is not, by itself, sufficient to require restitution. The person receiving the benefit is required to make restitution only if the circumstances are such that, as between the two individuals, it is *unjust* for the person to retain it.” *First Nationwide Savings v. Perry* (1992) 11 Cal.App.4th 1657, 1663. It is not sufficient that the benefit was conferred to the defendant, the conveyance must have been unjust because the benefit was conferred by mistake, fraud, coercion or request. *Nibbi Brothers, Inc. v. Home Federal Sav. & Loan Assn.* (1988) 205 Cal.App.3d 1415, 1422.

“(A) benefit is conferred not only when one adds to the property of another, but also when one saves the other from expense or loss.” *Ghirardo v. Antonioli* (1996) 14 Cal.4th 39, 51.

“Typically, the defendant's benefit and the plaintiff's loss are the same, and restitution requires the defendant to restore plaintiff to his or her original position.” *County of San Bernardino v. Walsh* (2007) 158 Cal.App.4th 533, 542. “[I]t is not essential that money be paid directly to the recipient by the party seeking restitution.” *Shersher v. Superior Court* (2007) 154 Cal.App.4th 1491, 1500. “The emphasis is on the wrongdoer's enrichment, not the victim's loss.” *American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1482. Where a party has participated in their own wrongdoing, they cannot then claim that the incidental beneficiary of their wrongdoing was unjustly enriched. *Stein v. Simpson* (1951) 37 Cal.2d 79, 86; cf. *De Garmo v. Goldman* (1942) 19 Cal.2d 755, 761 (a party coming to the court requesting equity must come with clean hands).

#### E. Promissory Estoppel

“The elements of promissory estoppel are (1) a promise, (2) the promisor should reasonably expect the promise to induce action or forbearance on the part of the promisee or a third person, (3) the promise induces action or forbearance by the promisee or a third person, and (4) injustice can be avoided only by enforcement of the promise.” *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism* (2016) 6 Cal.App.5th 1207, 1225, *aff'd* (2018) 4 Cal.5th 637. The reliance on the promise must be reasonable. *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transp. Authority* (2000) 23 Cal.4th 311, “[W]hether the reliance was reasonable is a question of fact unless reasonable minds could reach only one conclusion based on the

evidence, in which case the question is one of law. *Flintco Pacific, Inc. v. TEC Management Consultants, Inc.* (2016) 1 Cal.App.5th 727, 734.

#### F. Constructive Trust

“A constructive trust is an equitable remedy that compels a wrongdoer—one who has property or proceeds to which he is not justly entitled—to transfer same to its rightful owner.” *Shoker v. Superior Court of Alameda County* (2022) 81 Cal.App.5th 271, 278. Constructive trust “is not an independent cause of action but merely a type of remedy for some categories of underlying wrong.” *Glue-Fold, Inc. v. Slautterback Corp.* (2000) 82 Cal.App.4th 1018, 1023, fn. 3.

### II. Request for Judicial Notice

UC Davis contends that the Court may take judicial notice of Plaintiff’s discovery responses. This appears to be an issue subject to a split of authority. Courts have held that discovery responses are *not* properly the subject of judicial notice. *TSMC North America v. Semiconductor Manufacturing Internat. Corp.* (2008) 161 Cal.App.4th 581, 594. In contrast, other courts have held that discovery responses that are inconsistent with pleadings are judicially noticeable. *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604. However, this is constrained by the caution that “in doing so, [t]he hearing on demurrer may not be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of affidavits, declarations, depositions, and other such material which was filed on behalf of the adverse party and which purports to contradict the allegations and contentions of the plaintiff.” *Bounds v. Superior Court* (2014) 229 Cal.App.4th 468, 477, quoting *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604. Here, the requested conclusions to be drawn appear outside the scope of what is properly judicially noticeable for purposes of a demurrer. The request for judicial notice is DENIED.

### III. Analysis

#### A. Misjoinder

UC Davis contends that it is not a proper defendant to the lawsuit, and that therefore a demurrer should be sustained for misjoinder. UC Davis’s theory of misjoinder is not persuasive based on the permissive language of the statute, and their primary authority, *Jay v. Dollarhide* (1970) 3 Cal.App.3d 1001, 1031 disapproved of on other grounds by *Morris v. Thogmartin* (1973) 29 Cal.App.3d 922. As Plaintiff points out in opposition “(t)he heirs **may** be joined as parties in this quiet title action, but they were neither necessary nor indispensable parties.” *Jay v. Dollarhide* (1970) 3 Cal.App.3d 1001, 1031 (emphasis added). The facts of Jay further promote permissive joinder in this manner. On Reply, UC Davis argues the Probate Code § 9351 makes the administrator the *exclusive* appropriate defendant. But they provide no language in that statute which says that this makes beneficiaries an improper defendant. That statute appears to only determine the process by which a claim is tendered to the administrator, and the necessity of naming the administrator as a party in the subsequent action. It reads in full:

An action may not be commenced against a decedent's personal representative on a cause of action against the decedent unless a claim is

first filed as provided in this part and the claim is rejected in whole or in part.

Prob. Code, § 9351.

This does not appear to preclude causes of action against successors in interest. Numerous cases support the inclusion of UC Davis here, including *Jay*. UC Davis fails to cite the relevant statute. “(A) cause of action against a decedent that survives may be asserted against the decedent's personal representative or, to the extent provided by statute, against the decedent's successor in interest.” CCP, § 377.40. This does not appear to constrain the applicable statutes to those under the Probate Code, nor does UC Davis identify a Probate Code statute precluding being named as a defendant where they have an ascertainable property interest. UC Davis has a right to participate in proceedings which affect a property in which they have a beneficial interest. *In re Finch's Estate* (1927) 202 Cal. 612, 615. It is proper to join a party as a defendant to the action if there is “(a) claim, right, or interest adverse to them in the property or controversy which is the subject of the action.” CCP, § 379 (a)(2).

It is a general rule that all parties interested in a controversy, or who may be affected by a decree rendered therein, should be made parties; all who are nominally or really interested may therefore be joined, although the interests of all may not be affected alike by the relief which may be granted, and the court may, in the final disposition of the case, dismiss as to some of them on the ground that they neither have nor claim any interest in the controversy. Upon the face of the complaint, both Clyde and the corporation were proper, if not necessary, parties to a complete determination and settlement of the questions involved in the controversy.

*Raynor v. Mintzer* (1885) 67 Cal. 159, 164.

While UC Davis is correct to the degree that their omission would not have been erroneous, that does not mean that they are an improper party against whom Plaintiff *cannot* maintain a suit. It appears substantially more beneficial to their interest to be able to be appraised of and appear in this action which may result in the loss of substantial property interest. While Plaintiff did not need to name UC Davis, he has done so, and UC Davis has a cognizable property interest in the ranch.

The demurrer for misjoinder is OVERRULED.

#### B. Breach of Contract

UC Davis demurs to breach of contract, arguing that the statute of frauds, and specifically the form of the statute of frauds which was in effect when the alleged contract was formed, that the lack of written agreement precludes Plaintiff's claim.

Plaintiff makes the following allegations: Plaintiff worked for Decedent for six years over the course of an eleven-year period during his majority. It was in 1985 that Decedent first used the

family's ranch to induce Plaintiff. FAC ¶ 16. Decedent told Plaintiff, "If you don't move to the ranch, I won't help you pay for college and you won't get the ranch." *Ibid*. Plaintiff worked for Decedent from 1985 to 1989. *Ibid*. Plaintiff left in 1989, and he and Decedent had a resulting falling out. FAC ¶ 18. In 1993, Decedent and Plaintiff ran into one another and Decedent told Plaintiff he was saving the ranch for him. FAC ¶ 20. Plaintiff returned to working at the ranch without remuneration in 1994. FAC ¶ 21. During an altercation between 1994 and 1996, Decedent threatened Plaintiff that if Plaintiff ever got married the ranch was gone, and that if plaintiff ever had children the ranch was gone. *Ibid*. Plaintiff stopped working at the ranch in June of 1996. FAC ¶ 22. Decedent barred Plaintiff from the ranch in December of 1996. *Ibid*. In 1997, Decedent called Plaintiff and asked to meet behind a Safeway store and threatened to "teach (him) a lesson". FAC ¶ 24. Decedent and Plaintiff never spoke again. Plaintiff never married or had children. FAC ¶ 29. At various points, Decedent's will reflected a bequest to Plaintiff of the ranch. FAC ¶¶ 17, & 30. Decedent's last will was executed on December 16, 2020, which left the ranch to UC Davis. FAC ¶ 33.

It is worth noting that Plaintiff's Opposition repeatedly asserts 17 years of work for Decedent as consideration for the alleged promise to convey the ranch. This allegation is not expressly in the FAC. Plaintiff alleges that he was born in 1967, and that during his minority he was "participating in the operation of the ranch". FAC ¶ 14. Without delving into the complexities of the obligations of minors to their parents, this is still irrelevant. Plaintiff does not allege that there was any discussion of his receipt of the ranch until 1985. Accordingly, anything that occurred before this date appears irrelevant. Plaintiff's work for Decedent for approximately six years thereafter is the only factor that appears salient to determining Plaintiff's conditions precedent and performance thereon.

UC Davis argues that Plaintiff's cause of action for breach of contract is clearly in contravention of the applicable statute of frauds, former Probate Code § 150. To vitiate this claim, Plaintiff relies on equitable estoppel.

Plaintiff argues actions undertaken in reliance on Decedent's representation, relying heavily on *Estate of Housley* (1997) 56 Cal.App.4th 342, 349. Plaintiff's reliance on the block quoted section of *Estate of Housley* is erroneous. That portion of the case analyzes the statute of frauds within the scope of Civil Code § 1624(6), which applied to contracts with decedents that were made before December 31, 1984. As of January 1, 1985, to December 31, 2000, Prob. Code, § 150 controlled the application of statute of frauds to contracts to make a will.

Despite this, the *Housley* court still addressed Probate Code § 150, so the omission does not appear material to the result. The *Housley* court was clear in its holding. "(D)espite the possibility that an oral agreement may be fabricated, we conclude that in its present form section 150 does not preclude the application of equitable estoppel principles where the promisor is deceased.<sup>11</sup> Accordingly, equitable estoppel principles are available under either section 150 or Civil Code section 1624(b) to enforce the type of oral agreement [plaintiff] alleged in this case." *Estate of Housley* (1997) 56 Cal.App.4th 342, 358. Equitable estoppel having possible application, the question is whether Plaintiff has adequately alleged the elements of his cause of action, and the equitable estoppel elements necessary to avoid the statute of frauds.

In order for Plaintiff to plead a breach of contract claim, he must plead sufficient facts that there was a contract. UC Davis argues that the FAC fails to state sufficiently definite terms to plead the existence of a contract, citing *Owens v. McNally* (1896) 113 Cal. 444, 451–452. This is persuasive. On a careful reading of the FAC, Plaintiff does not allege that Decedent ever promised the ranch in exchange for undertaking particular tasks. In 1985, Decedent asserts the inverse, that Plaintiff would *not* receive the property if he did not work at the ranch. In 1993, Decedent told Plaintiff he was “saving” the ranch for him. Later, during an argument, Decedent told Plaintiff that if he got married or had children, “the ranch is gone”. While Decedent’s statements were clearly intended to incite particular action by Plaintiff, none of these are a clear and unambiguous affirmation that Decedent *would* convey the ranch to Plaintiff for the work he performed. The breach of contract claim is not adequately pled, because there is no definite term pled obliging Decedent to perform the act Plaintiff asks as his remedy.

UC Davis also argues that Plaintiff has failed to perform his condition precedent, in that he failed to continue working for Decedent until Decedent’s death. Plaintiff has in turn argued that the FAC alleges sufficient facts to plead that Decedent rendered this act impossible. At demurrer, it appears sufficient to plead threats of violence in tendering the performance of the contract impracticable.

UC Davis also contends that Plaintiff’s six years of work on the ranch are insufficient to show detrimental reliance. Plaintiff in turn argues the “17 years” of work performed are sufficient to raise an issue of fact not capable of resolution at demurrer. The Court has already addressed the 17-year contention, but even six years of labor performed without compensation appears sufficient at this stage. At demurrer, the pleadings are entitled to liberal construction, and the allegations of detrimental reliance appear sufficient at the pleading stage.

While Plaintiff does allege that he never married or had children, he does not allege that this was an action undertaken in particular reliance on the demands of Decedent. Plaintiff’s dependence on the principle of equitable estoppel requires him to plead reliance on whatever terms he posits are relevant to the estoppel claim. That not being present here, this provision appears irrelevant for the purposes of equitable estoppel, as it is missing a specific element allowing application. *Chalmers v. County of Los Angeles* (1985) 175 Cal.App.3d 461, 467. It remains relevant for determining if Plaintiff complied with his conditions precedent under the alleged contract.

In sum, Plaintiff has not pled the existence of a sufficiently definite contract. As to the First cause of action, the demurrer is SUSTAINED with leave to amend.

### C. Second, Third, and Fourth Causes of Action

Plaintiff has pled three additional causes of action for “Breach of Contract - Detrimental Reliance”, Breach of Contract – Unjust Enrichment”, and “Breach of Contract – Constructive Trust”. UC Davis argues that Plaintiff appears to be pleading a cause of action for promissory estoppel on these terms. Plaintiff responds in their opposition, seeming to concede the position, but this is all generally unpersuasive.

First, it does not appear coherent for Plaintiff to plead four causes of action for breach of contract. Plaintiff's FAC is clearly predicated on recovery for a single overarching alleged "promise"<sup>1</sup>. To the degree that the FAC alleges multiple contracts on which Plaintiff relies, it fails to express them with any particularity. Accordingly, the Court turns to the secondary label attached to each cause of action.

Constructive trust is not a cause of action, but a remedy. *Glue-Fold, Inc. v. Slautterback Corp.* (2000) 82 Cal.App.4th 1018, 1023, fn. 3. Nor is detrimental reliance or unjust enrichment, which are elements of other claims, not claims themselves. See, e.g., *Estate of Housley* (1997) 56 Cal.App.4th 342, 352 (detrimental reliance or unjust enrichment are elements of equitable estoppel). To the degree that Plaintiff may contend that unjust enrichment is occasionally a label applied to quasicontractual theories, that too is not persuasive for the statement of a cause of action. Plaintiff's FAC is predicated entirely on the recovery of the Property. Claims under quasi-contract theory only entitle a plaintiff to recovery of that which they **expended** or its **monetary equivalent**, restoring him to the position he would otherwise be in without the exchange. *Welborne v. Ryman-Carroll Foundation* (2018) 22 Cal.App.5th 719, 725. Plaintiff has pled no facts which would allow recovery of the ranch on quasi-contract theory, to say nothing of the fact that Plaintiff outlaid this labor over twenty-five years ago.

Plaintiff is required by the Rules of Court to plead each cause of action with the nature of the claim. Cal. Rule of Court 2.112 (2). Given that none of the above are causes of action which are described with sufficient specificity for either UC Davis or the Court to adequately identify Plaintiff's intent without making assumptions either beneficial or detrimental to Plaintiffs, this is not sufficiently descriptive for the Court to ascertain the nature of the claims. This is a proper basis to sustain with leave to amend. *A.J. Fistes Corp. v. GDL Best Contractors, Inc.* (2019) 38 Cal.App.5th 677, 695.

As to the second, third, and fourth causes of action, the demurrer is **SUSTAINED with leave to amend**.

#### **IV. Additional Remedies**

UC Davis also asks that the Court provide a variety of additional remedies at this stage, including dismissal and entry of judgment. These requests are premature. The demurrer was sustained with leave to amend. The request for granting of attorneys' fees is also premature and requested without providing any authority for the request.

UC Davis's additional remedies are DENIED.

#### **V. Conclusion**

The demurrer is SUSTAINED WITH LEAVE TO AMEND.

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<sup>1</sup> The quotes here denote the Court's analysis above as to the allegations within the FAC as pled and their sufficiency in establishing a promise. It is without prejudice to whatever amendment Plaintiff may make.

Defendants shall submit a written order to the Court consistent with this tentative ruling and in compliance with Rule of Court 3.1312(a) and (b). Thereafter, they must serve the signed order in compliance with CCP § 1019.5.

**9. 25CV04497; Beck v. Ramos**

There is no proof of service reflecting that Respondent was ever given notice of the hearing date. Petitioner must serve notice of the hearing at least 15 days prior to the hearing date. Cal. Civ. Code § 8486(b). Therefore, the Petition is **DENIED** without prejudice.

**10. SCV-273199, Mendez v. Bello**

Plaintiffs, Richard Mendez (“Mendez”), Natasha Khallouf (“Khallouf”) and Sean Musgrove (“Musgrove, together with Mendez and Khallouf, “Plaintiffs”), filed the operative first amended complaint (“FAC”) against defendants Tony Bello, trustee of the Tony Bellow Living Trust Date 06/26/1997 (“Bello”), PLM Loan Management Services Inc. (“PLM”, together with Bello, “Defendants”), and Does 1-25 regarding the property commonly known as 6972 Saint Helena Road, Santa Rosa, California (the “Property”), with causes of action for: 1) wrongful foreclosure; 2) cancellation of instrument; 3) quiet title; 4) violation of Civ. Code § 2924f; 5) violation of Civ. Code § 2923.5; and 6) violation of Business and Professions Code § 17200 et. seq.

In turn, Bello has filed a cross-complaint (the “Cross-Complaint”) against Plaintiffs, Michael Musgrove, Ronald Cupp (“Cupp”), the Trust Knot Us Foundation (“TKU”, together with Michael Musgrove, Cupp and Plaintiffs, “Cross-Defendants”), and Does 1-100, for causes of action for: 1) Ejection; 2) Money Judgment on Note; and 3) Avoidance and Recovery of Fraudulent Transfer. Michael Musgrove has in turn filed a cross-complaint for indemnity and abrogation of damages against the other Cross-Defendants.

This matter is on calendar for Plaintiffs’ motion for reconsideration of the previous ruling on the Court granting PLM’s Motion for Summary Judgment.

The Motion is DENIED.

**I. Procedural History**

Plaintiffs filed the instant case on May 8, 2023. The parties are set for trial on August 1, 2025. PLM filed a motion for summary judgment on April 4, 2025, which was heard by the Court on July 2, 2025. The Court issued a tentative ruling in advance describing the reasons that PLM’s motion was granted. At the hearing, and after hearing oral arguments from all parties, the Court then took the matter under submission. On July 10, 2025, the Court then issued a “Ruling Issued on Submitted Matter Re: Motions for Summary Judgment” (the “Order”).

Among the Court’s rulings in the Order were findings that some of the filings of Plaintiffs were procedurally defective and were therefore properly disregarded. The Order also addressed the following issues now raised in Plaintiff’s Motion for Reconsideration:

“Plaintiffs assert that the property is subject to the Homeowner’s Bill of Rights, and therefore the foreclosure notice was inadequate. On examination of the evidence presented by Plaintiffs, they concede facts sufficient to find that the Property does not fall under Civ. Code § 2924.15 and therefore is not subject to the Homeowner’s Bill of Rights provisions. Plaintiffs proffer evidence that they “intend” to live at the Property once permanent structures have been raised. (Khallouf Decl. ¶3, ¶5-¶6; Musgrove Decl. ¶3-¶5). The statute is unambiguous. “For purposes of this section, ‘owner-occupied’ means that the property is the principal residence of the borrower and is security for a loan made for personal, family, or household purposes.” Civ. Code, § 2924.15 (b); see also former version of Civ. Code, § 2924.15 (a)(1)(B), eff. January 1, 2022, to December 31, 2022. Plaintiffs’ contention of intent to occupy the property once restored fails to raise a triable issue of material fact as to application of the HBOR. At oral argument, Mendez reiterates this argument, asserting that there is an exception which must be applied because the Property was not occupied due to an act of god. Mendez provides no legal authority for this contention, and the statute provides no basis for an exception of this nature. Only actual occupancy appears relevant for the purpose of Civ. Code, § 2924.15’s definition of owner occupancy.” (Order at 14:7-23).

“The HBOR having no application, many of Plaintiffs' arguments fail accordingly. Plaintiffs attempt to raise violations of Civ. Code § 2924.17, arguing that the declaration of Bello in support of default was false, and therefore the entire foreclosure is void. See PLM's Exhibit 16. For this proposition, Plaintiffs cite to particular lines of Bello's deposition which do not reflect the facts averred. Bello merely states that he doesn't understand the document at the time of his deposition. At most, this reflects an attack on Bello's credibility, and not a contradictory fact. Summary judgment cannot be denied on such a basis. CCP, § 437c (e). On examination of the Plaintiffs' own evidence, Plaintiffs have conceded that they did not reside at the Property at the time of foreclosure, and therefore HBOR protections did not apply. Bello's declaration only reflects that the HBOR does not apply to the Property. Plaintiffs' argument that Bello's declaration is fraudulent is not supported by evidence as a result. Plaintiffs' evidence in this regard is entirely conclusory, alleging that Bello fraudulently induced PLM's foreclosure, but they fail to express fraud beyond this allegation. (Order at 15:13-26).

“Plaintiffs also attempt to argue that they are exempt from the tender requirement PLM having authority to sell, the sale is merely voidable as opposed to void. "Consequently, as a condition precedent to an action by the borrower to set aside the trustee's sale on the grounds that the sale is voidable because of irregularities in the sale notice or procedure, the borrower must offer to pay the full amount of the debt for which DO 0 the property was security." *Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89,

112. The burden has been shifted, Plaintiffs must present evidence to support their exceptions to the tender requirement. As noted above, no triable issue of fact exists as to the validity of PLM's status as trustee, therefore the Plaintiffs must provide evidence to show that tender would be inequitable. Plaintiffs evidence shows that they had invested \$200,000 in restoration efforts. Khallouf Dec. Opposition, pg. 9-10, 17 4. Had Plaintiffs been able to raise other triable issues of fact, this may have been sufficient to meet Plaintiffs' shifted burden. However, tender is but one of the deficient elements of the causes of action asserted, and Plaintiffs have failed to raise triable issues as to the other missing elements.” (Order at 17:15-18:1).

“PLM has shown evidence that no statutes were violated in their performance of the foreclosure, and as a result there is no "unlawful" conduct as contemplated by the UCL. Moreover, on examination of the FAC, the UCL cause of action does not pray for any relief which can be accorded under that provision. Plaintiffs plead for damages, special damages, punitive damages and attorney's fees under their UCL cause of action. FAC, Prayer, ¶¶17-23. The UCL allows a consumer to recover restitution or injunctive relief, neither of which is prayed for in the FAC. *Zhang v. Superior Court* (2013) 57 Cal.4th 364, 371. Accordingly, the UCL claims fail with the other causes of action. PLM has shifted their burden, and therefore the Plaintiffs must meet the shifted burden with evidence of triable issues of material fact.” (Order at 13:24-14:3).

Plaintiffs’ motion for reconsideration followed thereafter on July 14, 2025.

## **II. Governing Law**

CCP §1008 reads in relevant part:

(a) When an application for an order has been made to a judge, or to a court, and refused in whole or in part, or granted, or granted conditionally, or on terms, any party affected by the order may, within 10 days after service upon the party of written notice of entry of the order and **based upon new or different facts, circumstances, or law**, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order. The party making the application shall state by affidavit what application was made before, when and to what judge, what order or decisions were made, **and what new or different facts, circumstances, or law are claimed to be shown**.

Code Civ. Proc., § 1008 (emphasis added).

Contentions that the court has made an error of law or refused to consider evidence is not a new fact as required for a motion under CCP § 1008. *Jones v. P.S. Development Co., Inc.* (2008) 166 Cal.App.4th 707, 724 disapproved of on other grounds by *Reid v. Google, Inc.* (2010) 50 Cal.4th

512. New facts mean facts which were not available to the party at the time of the hearing. *In re Marriage of Herr* (2009) 174 Cal.App.4th 1463, 1468. To prevail on a motion for reconsideration based on new facts, a party must provide a satisfactory explanation for failing to offer the evidence in the first instance. *New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 212. The new facts offered must be accompanied by a showing of strong diligence in discovery and bringing the new facts, and absent a strong showing of diligence, the motion will be denied. *Forrest v. Department of Corporations* (2007) 150 Cal.App.4th 183, 202 disapproved of on other grounds by *Shalant v. Girardi* (2011) 51 Cal.4th 1164. That oral argument did not occur on a motion is not a new fact for the purposes of CCP § 1008, as oral argument is merely collateral to the merits of the underlying motion. *Gilberd v. AC Transit* (1995) 32 Cal.App.4th 1494, 1500. Where the motion for reconsideration brings no valid new fact to the merits of the underlying motion, and merely contends a collateral matter, reconsideration will be denied. *Id.*

Contentions that the court has made an error in failing to consider or weighing evidence in a motion for summary judgment is not a new fact as is required for reconsideration. *Jones v. P.S. Development Co., Inc.* (2008) 166 Cal.App.4th 707, 724 disapproved of on other grounds by *Reid v. Google, Inc.* (2010) 50 Cal.4th 512. “A motion for reconsideration must be based on new or different facts, circumstances or law (*ibid.*), and facts of which the party seeking reconsideration was aware at the time of the original ruling are not ‘new or different.’” *In re Marriage of Herr* (2009) 174 Cal.App.4th 1463, 1468.

### **III. Evidentiary Issues**

Plaintiffs request judicial notice of various items, including various statutes under the Homeowners Bill of Rights, a declaration attached to the Notice Default; the Notice of Trustee Sale; and deposition transcripts in this matter. Having reviewed most of the matters submitted, they are not appropriate for judicial notice and appear to be matters already placed before the Court at Summary Judgment. The Court considers them, but not as matters judicially noticeable except for the legislative history of the Homeowners Bill of Rights.

### **IV. Analysis**

Plaintiffs have moved the Court for reconsideration based on the Court granting PLM’s Motion for Summary Judgment. PLM opposes the motion arguing that no new fact is displayed, nor have Plaintiffs made any showing of diligence in bringing these facts before the Court in the first instance.

First, to Plaintiffs’ contention that their pro per status justifies leniency, the case they cite does not appear to have any such holding. See *Weir v. Snow* (1962) 210 Cal.App.2d 283, 290. Pro per parties are not entitled to any special consideration. *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246. Litigants who choose to represent themselves must be treated in the same manner as other litigants and attorneys and must follow the correct rules of procedure. *Rapplevea v Campbell* (1994) 8 C4th 975, 984–985; *Grabowski v Kaiser Found. Health Plan, Inc.* (2021) 64 CA5th 67, 75 n2. Self-represented parties must comply with statutory deadlines and are not immune from the consequences of a failure to do so. *Stover v Bruntz* (2017) 12 CA5th 19, 31 (failure to comply

with time limit for responding to requests for admissions). This includes following all the procedural rules applicable to civil litigation. *McComber v. Wells* (1999) 72 Cal.App.4th 512, 522.

Plaintiffs have not displayed any new facts. In large part, Plaintiffs merely re-argue the matters put before the Court in opposition to summary judgment. The same legal arguments are re-asserted without having displayed how the information is new or different than what was before the Court at the time of summary judgment. Plaintiffs continue to attempt to present evidence regarding failure to comply with the Homeowners Bill of Rights but fail to provide new evidence which would affect the Court's prior determination that it has no application at the time of the foreclosure. Plaintiffs did not submit any evidence that the property was "owner occupied" at the time of the foreclosure. Plaintiffs continued attempt to expand the statute to create some exception for acts of god when no such exception is in either the statute or caselaw fails to present a new fact or law. These are arguments that Plaintiffs already presented in substance (if not in the form of the legislative history) which fail to raise a new fact. *Jones v. P.S. Development Co., Inc.* (2008) 166 Cal.App.4th 707, 724. To the degree the legislative history is new, it presents nothing salient to the Court's decision. The Homeowner's Bill of Rights has no mention of acts of god, and Plaintiffs presented no evidence in opposition to the motion that they qualified under the language of the statute. The legislative history does not lead to a contrary conclusion.

The Court properly treated Plaintiffs as it would any litigant who filed their papers late and in a manner not conforming with the statute and made determinations in the interest of due process and considering matters on the merits. The Court extensively reviewed Plaintiffs' evidence. Resubmission of the same depositions does not raise triable issues of fact.

Furthermore, Plaintiffs present no evidence that they were not aware of these facts at the time they filed their untimely opposition, and given that the Court considered the evidence submitted thereon, Plaintiffs have no cause to call these facts new or different. Plaintiffs must be unaware of the facts at the time of the original ruling. *In re Marriage of Herr* (2009) 174 Cal.App.4th 1463, 1468. Given that many of the facts are repetitious, and no representation is made regarding the "discovery" of new facts, Plaintiffs cannot credibly represent now that the facts are recent discoveries.

Plaintiffs have also not displayed any cause to find that there was satisfactory diligence in presenting these facts in the first instance. Many of these are facts that have already been presented. No satisfactory diligence in presenting these facts has been displayed.

There are no new facts or law offered as related to the merits, which is required for the Court to reconsider the previous ruling. The motion for reconsideration is DENIED.

## **V. Conclusion**

Based on the foregoing, Plaintiffs' motion for reconsideration is DENIED.

PLM shall submit a written order to the Court consistent with this tentative ruling and in compliance with Rule of Court 3.1312(a) and (b).

**\*\*This is the end of the Tentative Rulings.\*\***