TENTATIVE RULINGS
LAW & MOTION CALENDAR
Wednesday, August 12, 2026 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. 24CV08002, City of San Rafael v. Kimley-Horn & Associates, Inc.

Plaintiff the City of San Rafael ("Plaintiff") filed the currently operative second amended complaint (the "SAC") in this action against Kimley-Horn and Associates, Inc. ("Defendant") and Does 1-10, for express contractual indemnity resulting from a contract to design a public transportation project.

This matter is on calendar for Plaintiff's motion to compel appearance and production of documents under subpoena served upon non-party Chaudhary & Associates under California Code of Civil Procedure ("CCP") §§ 2025.480, 1987.2 and 2023.030. The Motion is **GRANTED**. Sanctions are DENIED.

I. Governing Law

Parties have a right to serve deposition notices to nonparties, for both appearance at deposition and production of records. CCP § 2020.510. If a nonparty disobeys a deposition subpoena, the subpoenaing party may seek a court order compelling the nonparty to comply with the subpoena within 60 days after completion of the deposition record. (CCP §2025.480(b).) The objections or other responses to a business records subpoena are the "deposition record" for purposes of measuring the 60-day period for a motion to compel. *Unzipped Apparel, LLC v. Bader* (2007)156 Cal.App.4th 123, at 132-133; *Rutledge v. Hewlett-Packard Co.* (2015) 238 Cal.App.4th 1164, 1192. A nonparty opposing such motion without substantial justification may be subject to sanctions per CCP §§1987.2(a), 2020.030, 2025.480.

"California law provides parties with expansive discovery rights." *Lopez v. Watchtower Bible & Tract Society of N.Y., Inc.* (2016) 246 Cal.App.4th 566, 590-591. Specifically, the Code provides that "any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." CCP § 2017.010; see also, *Garamendi v. Golden Eagle Ins. Co*. (2004) 116 Cal.App.4th 694, 712, fn. 8. "For discovery purposes, information is relevant if it 'might reasonably assist a party in evaluating the case, preparing for trial, or facilitating settlement…" See *Lopez, supra,* 246 Cal.App.4th at 590-591, citing *Garamendi, supra,* 116 Cal.App.4th at 712, fn. 8. "Admissibility is not the test and information[,] unless privileged, is discoverable if it might reasonably lead to admissible evidence." *Ibid*. "These rules are applied liberally in favor of discovery, and (contrary to popular belief), fishing expeditions are permissible in some cases." *Ibid.* The scope of discovery is one of reason, logic and common sense. *Lipton v. Superior Court* (1996) 48 Cal.App.4th 1599, 1612. The right to discovery is generally liberally construed. *Williams v. Superior Court* (2017) 3 Cal.5th 531, 540.

CCP § 2025.480(j) (relating to motions to compel deposition) provides that a monetary sanction "shall" be imposed against the party losing a motion to compel further responses unless the court finds "substantial justification" for that party's position or other circumstances making sanctions "unjust." In contrast, sanctions under the nonparty subpoena statute are discretionary, not mandatory. See CCP § 1987.2 ("[T]he court **may** in its discretion award the amount of the reasonable expenses uncured in making or opposing the motion including reasonable attorneys' fees, if the court finds the motion was made or opposed in bad faith or without substantial justification, or that one or more of the requirements of the subpoena were oppressive").

II. Analysis

Defendant moves the Court to compel compliance with document subpoena served on January 27, 2026 for Chaudhary's records reflecting the work done on the project at issue in this case. No opposition was filed by either Chaudhary or Defendant.

Plaintiff served the subpoena to Chaudhary personally to the assistant office manager on January 27, 2026, for a deposition to occur on February 20, 2026. Plaintiff has never received any response to the subpoena and has tried to contact Chaudhary multiple times. Chaudhary has not filed an opposition. Compelling responses appears appropriate. Plaintiff's motion is GRANTED.

III. Sanctions

Sanctions against nonparties on motions to compel under CCP § 1987.1 are discretionary. CCP § 1987.2 (a). The Court may only grant "reasonable expenses". CCP § 2023.030(a). Plaintiff's request for sanctions is ill taken for two reasons. Plaintiff, throughout the motion references CCP § 2025.480. This is the incorrect statute for sanctions here. First, the sanctions under CCP § 2025.480 applies to either those that **oppose** the motion (CCP § 2025.480(j)), or **party** deponents (CCP § 2025.480 (k)). No opposition was filed. The motion repeated concedes that Chaudhary is a non-party. Plaintiff's contention that they are entitled to sanctions as a matter of right is flawed. Plaintiff also mentions only in the notice of motion, and fails to provide exposition on, CCP § 1987.2. The primary distinction on that is that under CCP § 1987.2, sanctions are discretionary.

Second, Plaintiff's Non-Opposition asks that the Court confirm the full $2,040 amount requested, but a cursory review of the Miletic Declaration shows that is unjustified. The Miletic Declaration states that counsel's rate is $330 an hour and only 2.5 hours of time were actually expended on the motion. It also had a $60 filing fee. This only justifies a sanction of $885, indicating a substantial overstatement of sanctions. The other 3.5 hours come from expected time that Counsel did not earn. This is impermissible to grant for discovery sanctions, which are required to compensate for *actual* costs. Between this conduct, and the citation to the incorrect statute, sanctions do not appear properly justified.

IV. Conclusion

The Motion to Compel is **GRANTED**. Deponents will produce all responsive documents outlined above within 30 days of notice of this order. Sanctions are DENIED.

Plaintiff 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).

2. 25CV03735, Hernandez v. Ayala

Plaintiff Rubi Hernandez ("Plaintiff") filed the complaint ("Complaint") in this action against defendants Jose Reyes Ayala and Victorino Reyes Pineda (together "Defendants"), and Does 1-20.

Plaintiff's Counsel, Thomas Jeffrey, seeks to be relieved on the basis of an irreparable breakdown in the attorney client relationship. The Court notes that the Declaration in Support states that Plaintiff was served via mail at her last known address as confirmed by email.

The Court notes that Counsel has failed to **serve or file** a copy of the proposed order, as required by Rule of Court, Rule 3.1362 (e). This appears to be a curable defect. There is no opposition, and no apparent reason to deny the motion based on the record. There are no pending motions, and trial is more than three months away.

Therefore, Counsel's motion to be relieved as counsel for Plaintiff is **GRANTED, conditioned on the service and filing** of a proposed order by August 14, 2026.

3. 25CV06504, Vistajet US, inc. v. Malvesta

Plaintiff Vistajet US, Inc. ("Plaintiff") filed the complaint against defendant Stephen Malvesta ("Defendant") and Does 1-50 for causes of action arising out of alleged contractual breach (the "Complaint"). This matter is on calendar for Plaintiff's motion to compel production of documents under subpoenas served upon non-party William Papariella ("Nonparty") under California Code of Civil Procedure ("CCP") §§ 1987.1, and 2025.480.

The Motion is **DENIED.**

I. <u>Governing Law</u>

Parties have a right to serve deposition notices to nonparties, for both appearance at deposition and production of records. CCP § 2020.510. CCP § 2025.450 states that if a party fails to attend a deposition and produce documents without serving valid objections, the party seeking the deposition may request a court order compelling attendance. This applies where a party, "without having served a valid objection under subdivision (g), fails to appear for examination, or to proceed with it, or to produce... any document or tangible thing described in the deposition notice...." *Id*. The party moving to compel deposition attendance need only inquire as to what happened, not attempt to meet and confer. CCP §2025.450. CCP § 2025.450 expressly apply to motions to compel attendance where the party fails to appear "without having served a valid objection." An objection to defects or errors in a deposition notice must be served at least 3 days before the deposition date. CCP § 2025.410(a), (b). If a party serves a timely objection, no deposition shall be used against the objecting party if that party does not attend the deposition and the objection was valid. CCP § 2025.410(b). If a nonparty disobeys a deposition subpoena, the subpoenaing party may seek a court order compelling the nonparty to comply with the subpoena within 60 days after completion of the deposition record. (CCP §2025.480(b).) The objections or other responses to a business records subpoena are the "deposition record" for purposes of measuring the 60-day period for a motion to compel. *Unzipped Apparel, LLC v. Bader* (2007)156 Cal.App.4th 123, at 132-133; *Rutledge v. Hewlett-Packard Co.* (2015) 238 Cal.App.4th 1164, 1192. A nonparty opposing such motion without substantial justification may be subject to sanctions per CCP §§1987.2(a), 2020.030, 2025.480; see *Person v. Farmers Ins. Group of Cos.* (1997) 52 Cal.App.4th 813, 818.

Code of Civil Procedure Section 1987.1 states in relevant part that "[w]hen a subpoena requires the…production of books, documents or other things ... the court, upon motion reasonably made…may make an order quashing the subpoena entirely, modifying it, or directing compliance with it upon such terms or conditions as the court shall declare, including protective orders..." CCP §1987.1; see also, *Monarch Healthcare v. Superior Court* (2000) 78 Cal.App.4th 1282, 1287-1288. "In addition, the court may make any other order as may be appropriate to protect the person from unreasonable or oppressive demands, including unreasonable violations of the right of privacy of the person." *Ibid*.

Although Code of Civil Procedure section 1985(b) states in part that "an affidavit shall be served with a subpoena duces tecum issued before trial, showing good cause for the production of the matters and things described in the subpoena," Code of Civil Procedure section specifically states that "[a] deposition subpoena that commands only the production of business records for copying need not be accompanied by an affidavit or declaration showing good cause for the production of the business records designated in it." See CCP §§1985(b) and 2020.410(c); see also, *City of Woodlake v. Tulare County Grand Jury* (2011) 197 Cal.App.4th 1293, 1301 ["good cause affidavits are not always required…[f]or example, under the statutes providing for pretrial discovery in civil proceedings, a party may seek the production of business records for copying…" and "[a] deposition subpoena that commands only the production of business records for copying need not be accompanied by an affidavit or declaration showing good cause for the production of the business records designated in it."], quoting Code Civ. Proc. §2020.410(c); Cal. Prac. Guide Civ. Pro. Before Trial Ch. 8E-6, §8:547.5 ["A subpoena for the production of business records need not be accompanied by an affidavit or declaration showing good cause for production of the records."].

"California law provides parties with expansive discovery rights." *Lopez v. Watchtower Bible & Tract Society of N.Y., Inc.* (2016) 246 Cal.App.4th 566, 590-591. Specifically, the Code provides that "any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." CCP § 2017.010; see also, *Garamendi v. Golden Eagle Ins. Co*. (2004) 116 Cal.App.4th 694, 712, fn. 8. "For discovery purposes, information is relevant if it 'might reasonably assist a party in evaluating the case, preparing for trial, or facilitating settlement…" See *Lopez, supra,* 246 Cal.App.4th at 590-591, citing *Garamendi, supra,* 116 Cal.App.4th at 712, fn. 8. "Admissibility is not the test and information[,] unless privileged, is discoverable if it might reasonably lead to admissible evidence." *Ibid*. "These rules are applied liberally in favor of discovery, and (contrary to popular belief), fishing expeditions are permissible in some cases." *Ibid.* The scope of discovery is one of reason, logic and common sense. *Lipton v. Superior Court* (1996) 48 Cal.App.4th 1599, 1612. The right to discovery is generally liberally construed. *Williams v. Superior Court* (2017) 3 Cal.5th 531, 540.

Compelling need is not always the test to apply in determining whether discovery is permissible, as "Courts must instead place the burden on the party asserting a privacy interest to establish its extent and the seriousness of the prospective invasion, and against that showing must weigh the countervailing interests the opposing party identifies". *Williams v. Superior Court* (2017) 3 Cal.5th 531, 557. Good cause should be shown on requests for production from non-parties as well as parties. *Calcor Space Facility, Inc. v. Superior Court* (1997) 53 Cal.App.4th 216, 223–224 ("*Calcor Space Facility*"). Good cause can be met through showing specific facts of the case and the relevance of the requested information. *Associated Brewers Distributing Co. v. Superior Court of Los Angeles County* (1967) 65 Cal.2d 583, 586–587. "(T)he good cause which must be shown should be such that will satisfy an impartial tribunal that the request may be granted without abuse of the inherent rights of the adversary. There is no requirement, or necessity, for a further showing." *Greyhound Corp. v. Superior Court In and For Merced County* (1961) 56 Cal.2d 355, 388. As the right to discovery is liberally construed, so too is good cause. *Id.* at 377-378. "(A) party seeking to compel production of records from a nonparty must articulate specific facts justifying the discovery sought; it may not rely on mere generalities. (Citation). In assessing the party's proffered justification, courts must keep in mind the more limited scope of discovery available from nonparties." *Board of Registered Nursing v. Superior Court of Orange County* (2021) 59 Cal.App.5th 1011, 1039; citing *Calcor Space Facility* at 567; *see also Catholic Mutual Relief Society v. Superior Court* (2007) 42 Cal.4th 358, 366.

II. Analysis

Plaintiff moves to compel production of records from Nonparty regarding two categories. Nonparty has filed an opposition.

A. Request ¶ 1

Nonparty was served with the following request for documents:

> All WRITINGS, including but not limited to COMMUNICATIONS, that RELATE to the aerospace business and refer to MALVESTA, directly or indirectly, during the TIME PERIOD.

Plaintiff opines that Defendant's interaction with Nonparty is material to their claims against him in this case, and that discovery is broadly construed in California. Nonparty opposes, arguing that discovery from non-parties is substantially more narrow than that available from parties to the litigation.

Plaintiff and Nonparty's attorneys are familiar with the Court's position under remarkably similar facts. The most illustrative case remains *Calcor Space Facility, Inc. v. Superior Court* (1997) 53 Cal.App.4th 216 ("*Calcor*"). That case involved a commercial litigation between a supplier and purchaser for gun mounts. *Id*. at 219. Buyer refused delivery, claiming the product did not meet specifications, and in turn contracted for the mounts to instead be provided by the eponymous Calcor. *Ibid*. Supplier and buyer became embroiled in resulting litigation, eventually resulting in a subpoena by supplier for production of records from non-party Calcor. *Ibid.* Calcor refused to produce in response to the subpoena, filed for a protective order, and supplier moved to compel. *Id.* at 220. The trial court granted the motion to compel and denied the protective order, but was reversed on appeal. *Id*. at 221. The court of appeal noted the burdensome nature of the discovery requests, amounting to an overly broad demand tendered to a nonparty. "Although facially detailed and particularized, the demand, in effect, is very simple. It orders Calcor to produce everything in its possession which has anything to do with gun mounts (including the gun mount assemblies themselves)." *Id*. at 220. "Although facially Thiem's detailed description of categories, combined with the three pages of 'definitions' and another three pages of 'instructions' would seem to satisfy a requirement of 'particularity,' it is, in effect, a blanket demand and hardly constitutes 'reasonable' particularity." *Id*. at 222. It also noted that nonparties are not properly the target of fishing expeditions. *Id*. at 225. "As between parties to litigation and nonparties, the burden of discovery should be placed on the latter only if the former do not possess the material sought to be discovered. An exception to this may exist where a showing is made the material obtained from the party is unreliable and may be subject to impeachment by material in possession of the nonparty." *Ibid*.

The Court does give weight to the "factual showing" of Nonparty's emails to Defendant, *even after Defendant's employment ended*. While Nonparty asserts that the fact that the communication came from a work email and that they were after the "TIME PERIOD", that does not mean that it is irrelevant to good cause.

However, this case is also significantly further along with no indication that Plaintiff intends to pursue discovery from Defendant, instead electing to use subpoenas to burden parties outside the case. It is perplexing why Plaintiff has now filed *four* motions to compel further responses from non-parties but has failed to file any motion related to Defendant's supposed discovery recalcitrance. The continued use of non-party discovery appears to be Plaintiff's method of first resort, rather than its last. Accordingly, they have failed to make a good cause showing under *Calcor*, as they have not shown that Defendant does not have the material required, nor that his substantive responses are "unreliable". *Calcor, supra,* 53 Cal.App.4th at 225. What is more, Defendant has, since the filing of this motion, produced substantial documents to Plaintiff, but this motion remains on calendar. Plaintiff has not attempted to withdraw the motion or file an amended motion showing that Defendant has not served responsive documents. This is part of Plaintiff's moving burden to show good cause, and their belated attempt on reply to cure the issue is insufficient. Indeed, their contention on reply that Defendant has failed to produce some documents further reinforces the above finding that Plaintiff is targeting nonparties before proceeding with party discovery. This raises concern that Plaintiff may be using nonparty discovery to harass associates of Defendant.

Therefore, Plaintiff has not shown good cause for production from a Nonparty, as they have failed to show that the documents were not already produced from Defendant, or that Defendant was not in possession of those documents, or that Defendant's production was unreliable.

B. Request ¶ 2

Plaintiff's Request ¶ 2 is more expansive in scope that Request ¶ 1. It demands:

> All WRITINGS, including but not limited to COMMUNICATIONS, RELATED TO MALVESTA and the aerospace business during the TIME PERIOD.

The category being broader than its predecessor, Plaintiff's showing of good cause similarly fails.

Plaintiff's motion is DENIED.

C. Sanctions

First, the Court notes that sanctions related to subpoenas to nonparties are generally distinguishable from other forms of sanctions falling under the Civil Discovery Act. Sanctions against parties or nonparties on motions to compel under CCP § 1987.1 are discretionary. CCP § 1987.2 (a). "(T)he court may in its discretion award the amount of the reasonable expenses incurred in making or opposing the motion, including reasonable attorney's fees, if the court finds the motion was made or opposed in bad faith or without substantial justification or that one or more of the requirements of the subpoena was oppressive." *Ibid*. The Court may only grant "reasonable expenses" for sanctions under the discovery act. CCP § 2023.030(a). For sanctions to be granted, the notice of motion must "identify every person, party, and attorney against whom the sanction is sought". CCP § 2023.040. The request must be accompanied by a declaration setting for facts supporting the amount of any monetary sanction sought. *Ibid*.

Nonparty claims attorney's fees of $20,000. No evidence of the rate of counsel is provided, only noting the expenses are "actually incurred". Nonparty avers that the motion here required 5 hours of review by a partner, and 10 hours of review by each of two associates. This is a shocking expenditure of time before considering the prospective expenditure of 5 more partner hours, and 2-3 hours more per associate. More concerning, this motion is denied because it is indicative of continued conduct by Plaintiff, and the Court notes that the arguments in opposition of that motion were made by the same attorneys and were largely duplicative of the prior work. The averment that this required 25 attorney hours shocks the conscience. This is before reaching the underlying fact that the average including both partner and associate time reaches $800 per hour, an amount not in keeping with the locality. The request is so unmoored from reasonableness, the appropriate remedy is outright denial.

The request for sanctions is therefore DENIED.

III. Conclusion

The Motion to Compel is **DENIED**. Nonparty's request for sanctions is DENIED.

Nonparty 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).

4-5. 25CV08959, Miller v. Sultana, M.D.

Plaintiff, Chris Miller ("Plaintiff"), individually and as personal representative of the Estate of Kathy Zamba ("Decedent"), has filed the complaint (the "Complaint") against defendants, TrueNorth Health LLC ("THLLC"), TrueNorth Health Foundation (the "Foundation"), Peter Sultana, M.D. ("Sultana"), Alan C. Goldhamer ("Goldhamer", together with all other defendants, "Defendants"), and Does 1-10 with thirteen causes of action related to alleged property disputes and violations of tenant protection laws.

This matter is on calendar for demurrer to the Complaint filed by Sultana for failure to state a cause of action, and the motion to strike punitive damages and attorney's fees from the TAC. The Demurrer is **SUSTAINED with leave to amend as to the Second, Third, Fourth, Fifth, Seventh and Eighth causes of action.** The Motion to strike is GRANTED with leave to amend.

I. Governing Law

A. Motions to Strike

A motion to strike lies where a pleading contains "irrelevant, false, or improper matter[s]" or is "not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court." CCP § 436(b). However, "falsity," must be demonstrated by reference to the pleading itself or of judicially noticeable matters, not extraneous facts. *See* CCP § 437. In general, as with showing fraud, oppression, or malice sufficient to support punitive damages, while plaintiffs must plead facts, with respect to intent and the like, a "general allegation of intent is sufficient." *Unruh v. Truck Insurance Exchange* (1972) 7 Cal.3d 616, 632.). A motion to strike is properly directed to unauthorized claims for damages, meaning damages which are not allowable as a matter of law. *See, e.g., Commodore Home Systems, Inc. v. Sup. Ct.* (1982) 32 Cal.3d 211, 214 (motion to strike lies against request for punitive damages when the claim sued upon would not support an award of punitive damages as a matter of law). Punitive damages may be stricken where the facts alleged do not rise to the level of "malice, fraud or oppression" required to support a punitive damages award. *See, e.g. Turman v. Turning Point of Central Calif., Inc.* (2010) 191 Cal.App.4th 53, 63.

Civil Code § 3294 authorizes the recovery of punitive damages in noncontract cases "where the defendant has been guilty of oppression, fraud, or malice…" "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others. "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury. Civ. Code § 3294. A conscious disregard for the safety of others may constitute malice. *G. D. Searle & Co. v. Superior Court* (1975) 49 Cal.App.3d 22, 28 ("*Searle*"). "When nondeliberate injury is charged, allegations that the defendant's conduct was wrongful, willful, wanton, reckless or unlawful do not support a claim for exemplary damages; such allegations do not charge malice." *Id.* at 29. "The central spirit of the exemplary damage statute, the demand for evil motive, is violated by an award founded upon recklessness alone." *Id.* at 32. "Conscious disregard of safety as an appropriate description of the Animus malus which may justify an exemplary damage award when nondeliberate injury is alleged." *Ibid.* "In order to justify an award of punitive damages on this basis, the plaintiff must establish that the defendant was aware of the probable dangerous consequences of his conduct, and that he wilfully and deliberately failed to avoid those consequences." *Taylor v. Superior Court* (1979) 24 Cal.3d 890, 895-896. In general, as with showing fraud, oppression, or malice sufficient to support punitive damages, while plaintiffs must plead facts, with respect to intent and the like, a "general allegation of intent is sufficient." *Unruh v. Truck Insurance Exchange* (1972) 7 Cal.3d 616, 632 (superseded by statute on other grounds).

B. Demurrers Generally

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). In the event a demurrer is sustained, leave to amend should be granted where the complaint's defect can be cured by amendment. *The Swahn Group, Inc. v. Segal* (2010) 183 Cal.App.4th 831, 852. 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. *Coshow 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. 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.

Demurrers shall not be sustained based on statute of limitations unless the complaint shows clearly and affirmatively that the action is so barred. *Geneva Towers Ltd. Partnership v. City of San Francisco* (2003) 29 Cal.4th 769, 780. "It is not enough that a complaint shows that the action may be barred." *Id*. If the failure of the cause of action due to the statute of limitations is apparent on the face of the complaint, the demurrer must be sustained. *SLPR, L.L.C. v. San Diego Unified Port District* (2020) 49 Cal.App.5th 284, 321. Where the allegations are that the incident occurred "on or about" a particular date, the demurrer should be overruled, as it is sufficient for the purposes of pleading that the claim may be timely. *Childs v. State of California* (1983) 144 Cal.App.3d 155, 160. Where a series of wrongs or injuries may be viewed as each triggering its own limitations period, a suit for relief may be partially time barred as to older events, but timely as to events within the statute of limitations, per the principle of continuing accrual. *Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1192.

C. Negligent Supervision

"California follows the rule set forth in the Restatement Second of Agency section 213, which provides in pertinent part: 'A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless: ... [¶] (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others[.]'" *Evan F. v. Hughson United Methodist Church* (1992) 8 Cal.App.4th 828, 836. "Liability for negligent supervision and/or retention of an employee is one of direct liability for negligence, not vicarious liability." *Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 815. "An employer can be held liable for negligent supervision if it knows or has reason to believe the employee is unfit or fails to use reasonable care to discover the employee's unfitness." *Alexander v. Community Hospital of Long Beach* (2020) 46 Cal.App.5th 238, 253. "[T]here can be no liability for negligent supervision 'in the absence of knowledge by the principal that the agent or servant was a person who could not be trusted to act properly without being supervised.'" *Ibid,* quoting *Juarez v. Boy Scouts of America, Inc*. (2000) 81 Cal.App.4th 377, 395.

D. Negligence

"The elements of a cause of action for negligence are: duty; breach of duty; legal cause; and damages." *Friedman v. Merck & Co.* (2003) 107 Cal.App.4th 454, 463. Whether a duty of care is owed is a question for the court and not a jury. *Ballard v. Uribe* (1986) 41 Cal.3d 564, 572. "Legal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done." *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 434.

"The elements of a negligence claim and a premises liability claim are the same: a legal duty of care, breach of that duty, and proximate cause resulting in injury." *Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1158; see also *Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1205; Civ. Code, § 1714(a). "'[P]roperty owners are liable for injuries on land they own, possess, or control.' But … the phrase 'own, possess, *or* control' is stated in the alternative. A defendant need not own, possess and control property in order to be held liable; control alone is sufficient." *Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1162 (original italics, internal citations omitted). The law considers that one who is in possession, occupation, *or* control of the land is the one in the best position to discover a danger or control the activities on the premises. CC § 1714(a). "The complaint in an action for damages for negligent injury to person or property must allege (1) defendant's legal duty of care toward plaintiff, (2) defendant's breach of duty (the negligent act or omission), (3) injury to plaintiff as a result of the breach (proximate or legal cause); and (4) damage to plaintiff." *Wise v. Superior Court* (1990) 222 Cal.App.3d 1008, 1013. In addition, a plaintiff suing for premises liability has the burden of proving that the owner had actual or constructive knowledge of a dangerous condition in time to correct it, or that the owner was "able by the exercise of ordinary care to discover the condition." *Ortega, supra*, 26 Cal.4th at 1206. Plaintiff is required to plead facts regarding knowledge to have adequately articulated the duty of a landowner. *Melton v. Boustred* (2010) 183 Cal.App.4th 521, 537.

E. <u>The Unfair Competition Law ("UCL")</u>

Business & Professions Code section 17200, prohibits "any unlawful, unfair or fraudulent" business practices. Bus. & Prof. Code §17200. "Since section 17200 is [written] in the disjunctive, it establishes three separate types of unfair competition" and "prohibits practices that are either 'unfair' or 'unlawful,' or 'fraudulent.'" *Pastoria v. Nationwide Ins.* (2003) 112 Cal.App.4th 1490, 1496; see also *CelTech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, (1999) 20 Cal.4th163, 180 (1999).

A party may bring a section 17200 claim only if he or she shows that he or she "suffered injury in fact and has lost money or property as a result of the unfair competition." Bus. & Prof. Code § 17204. To have standing, a plaintiff must sufficiently allege that (1) he has "lost 'money or property' sufficient to constitute an 'injury in fact' under Article III of the Constitution" and (2) there is a "causal connection" between the defendant's alleged UCL violation and the plaintiff's injury in fact. See, *Rubio v. Capital One Bank* (9th Cir. 2010) 613 F.3d 1195, 1203-1204. The UCL incorporates other laws and treats violations of those laws as unlawful business practices independently actionable under state law. *Chabner v. United Omaha Life Ins. Co.* (9th Cir. 2000) 225 F.3d 1042, 1048. Violation of almost any federal, state, or local law may serve as the "unlawful" basis for a UCL claim. *Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 838-839. In addition, a business practice may be "unfair or fraudulent in violation of the UCL even if the practice does not violate any law." *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 827.

Where plaintiff's UCL claim is entirely derivative of other fatally flawed causes of action, the UCL claim also fails. See, *Hawran v. Hixson* (2012) 209 Cal.App.4th 256, 277 [finding plaintiff's "UCL claim is derivative of [his] defamation cause of action, that is, it is based on the same [allegations] and likewise that cause of action stands or falls with that underlying claim."]. "A breach of contract may ... form the predicate for Section 17200 claims, *provided it also constitutes conduct that is 'unlawful, or unfair, or fraudulent.*" *Puentes v. Wells Fargo Home Mortgage, Inc.* (2008) 160 Cal.App.4th 638, 645 (internal quotations omitted, emphasis original).

"With respect to the *unlawful* prong, virtually any state, federal or local law can serve as the predicate for an action under section 17200." *People ex rel. Bill Lockyer v. Fremont Life Ins. Co.* (2002) 104 Cal.App.4th 508, 515 (internal quotations omitted). "'Unfair' simply means any practice whose harm to the victim outweighs its benefits." *Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 839. There are two applicable tests resulting from a district split to determine whether conduct is unfair. *Drum v. San Fernando Valley Bar Assn.* (2010) 182 Cal.App.4th 247, 256. For the tether test, "the public policy which is a predicate to a consumer unfair competition action under the 'unfair' prong of the UCL must be tethered to specific constitutional, statutory, or regulatory provisions." *Bardin v. DaimlerChrysler Corp.* (2006) 136 Cal.App.4th 1255, 1260–1261. For the second, the Section 5 test, "the factors that define unfairness under the section 5 test are: (1) the consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided." *Davis v. Ford Motor Credit Co. LLC* (2009) 179 Cal.App.4th 581, 597–598.

"Unlike common law fraud, a UCL fraud claim 'can be shown even without allegations of actual deception, reasonable reliance and damage'; what is required to be shown is that members of the public are likely to be deceived." *Collins v. eMachines, Inc.* (2011) 202 Cal.App.4th 249, 258 (internal quotations omitted)("*Collins*"). Fraud claims under the UCL must be stated with "reasonable particularity". *Gutierrez v. Carmax Auto Superstores California* (2018) 19 Cal.App.5th 1234, 1261; *Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 619.

"[A]s its name suggests, California's false advertising law bars any advertising device ... which is untrue or misleading." *Shaeffer v. Califia Farms, LLC* (2020) 44 Cal.App.5th 1125, 1136. (internal citations and quotation omitted). "Because [the FAL] and the fraudulent prong of the unfair competition law substantively overlap (*Citation*), the plaintiff's burden under these provisions is the same: To prevail on a claim under the false advertising law, she must show that members of the public are likely to be deceived. [Citation]" (*Citation*) and must do so as adjudged through the eyes of "the reasonable consumer" (*Citation*)." *Ibid* (internal citations and quotation omitted).

F. Negligent Misrepresentation

"The elements of a negligent misrepresentation are '(1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage.'" *Borman v. Brown* (2020) 59 Cal.App.5th 1048, 1060; *Tindell v. Murphy* (2018) 22 Cal.App.5th 1239, 1252; see also, *Hasso v. Hapke* (2014) 227 Cal.App.4th 107, 127; *Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 196. A cause of action for negligent misrepresentation sounds in fraud and therefore, "each element must be pleaded with specificity." *Daniels v. Select Portfolio Servicing, Inc*. (2016) 246 Cal.App.4th 1150, 1166; see also, *Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 185, fn. 14 [the elements of negligent misrepresentation "must be pled with particularity…"]. This means "a plaintiff must allege facts showing how, when, where, to whom, and by what means the representations were made, and, in the case of a corporate defendant…the names of the persons who made the representations [and] their authority to speak on behalf of the corporation..." *West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 793; see also, *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645. Thus, "general and conclusory allegations do not suffice," and "the policy of liberal construction of the pleadings...will not ordinarily be invoked to sustain a pleading defective in any material respect." *Lazar, supra,* 12 Cal.4th at 645.

II. <u>Motion to Strike</u>

A. <u>Punitive Damages</u>

Plaintiff has prayed for punitive damages in the Complaint. Sultana avers that the Complaint alleges conduct which is reliant on his provision of medical services, and accordingly Plaintiff must comply with CCP§ 425.13.

The instant facts represent what appears to be a matter of first impression. Both parties argue their respective side without acknowledging or engaging with a significant legal issue. Sultana is a licensed physician. However, TrueNorth Health Center (the "Center") is an unlicensed "wellness" facility. The relevant legal question raised is whether a licensed physician, performing health care functions in an unlicensed facility, is subject to the protections of MICRA. The present complaint fails to provide sufficient allegations to make such connection plausible.

The cases in this field largely address the expansive nature of "health care" in the contexts of licensed facilities and businesses. They relate to expansive subjects, such as the provision of human tissue and medical review of insurance records. *Cryolife, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1145, 1160; *Palmer v. Superior Court* (2002) 103 Cal.App.4th 953, 963. They are distinguishable from the case at bar because each of these cases relate to a licensed healthcare facility.

Nonetheless, the Court is persuaded that the conduct alleged against Sultana is, at its gravamen, the provision of professional health care services. Sultana is alleged to have performed, as part of Decedent's admission, a medical exam where he affirmed that she was an appropriate candidate for the fasting program. "[T]he test is not the degree of skill required, but whether negligence occurred in rendering services for which a provider is licensed." *Johnson v. Superior Court* (2002) 101 Cal.App.4th 869, 884. Plaintiff's very allegations are that Sultana failed to provide *medical care*. Plaintiff cannot separate the professional nature of the claims asserted simply because Sultana act as a doctor within an unlicensed medical environment. Plaintiff's claims against Sultana relate to the provision of health care in a professionally negligent manner.

Once that is established, the caselaw is also quite clear that such protections extend to *even intentional torts*. *Central Pathology Service Medical Clinic, Inc. v. Superior Court* (1992) 3 Cal.4th 181, 192; *Divino Plastic Surgery, Inc. v. Superior Court* (2022) 78 Cal.App.5th 972, 987 (battery and fraud still fall under MICRA when brought related to health care claims). Plaintiff, in failing to address the more subtle legal issue, does not engage with any distinction between the asserted claims.

Facially, Plaintiff has failed to comply with the requirements of CCP § 425.13. There is no order from the court allowing punitive damages to be included in the Complaint. CCP § 425.13(a). Accordingly, their claim for punitive damages are infirm, and the motion to strike must be granted as to punitive damages.

B. Attorney's Fees

Below, the demurrer is sustained to the UCL and FAL causes of action. The causes of action being inadequately pled, they cannot form the basis for recovery of attorney's fees here.

Plaintiff mentions in passing that the action is brought in the public interest, but Plaintiff requests no benefit to the public at large, only personal monetary compensation. With the deficiencies in the UCL claim, the benefit to the public writ large under CCP § 1021.5 is insufficiently stated.

The motion to strike is GRANTED WITH LEAVE TO AMEND.

C. Demurrer

A. Uncertainty

Sultana's averments of uncertainty are unprevailing on the face of the Complaint. Uncertainty is a disfavored form of demurrer, requiring the Complaint to be drawn in a manner to which Sultana could not respond. Nothing here falls so short of coherence that Sultana can credibly claim any inability to respond, as is clear from the extensive argument related to the demurrer for failure to state a cause of action. The Complaint is coherent, the true question at bar is whether it pleads facts sufficient to state the relevant causes of action.

Sultana also avers that the negligence causes of action are repetitive, but fails to provide authority showing that is a basis on which to sustain demurrer. Accordingly, it merits no further consideration.

B. Negligent Hiring, Supervision, or Retention

While Sultana avers that the cause of action for negligent hiring, supervision and retention cannot be stated against him, because it is also alleged that Sultana himself was not adequately supervised, that fails to be persuasive at the demurrer stage. However, the Complaint specifically states that the "TRUENORTH DEFENDANTS" failed to adequately hire, supervision, or retention. Complaint ¶¶ 59-64. While this appears easily curable, it is clearly not alleged that Sultana failed to supervise other employees.

Between these deficiencies, the demurrer is SUSTAINED with leave to amend.

C. Premises Liability

Premises liability is a tort in the family of negligence but arises where the liability relates to the condition of a property. Sultana avers that the cause of action is entirely repetitious of the negligence cause of action. However, Sultana fails to provide any case where that forms the basis for a demurrer to a cause of action. Sultana also argues that Plaintiff has pled no facts related to the condition of the property, and accordingly he has failed to allege premises liability, as opposed to garden variety negligence. Plaintiff in turn argues that the pleading standard for negligence is low, and because premises liability is in the family of negligence, Plaintiff has alleged sufficient facts.

The Court notes that Plaintiff is unpersuasive. Plaintiff in part relies on *Flores v. Presbyterian Intercommunity Hospital* (2016) 63 Cal.4th 75, but that case makes clear that premises liability relates to the condition of the property, and not Plaintiff's blanket claim that negligence occurred there or within it. "Consistent with these considerations, we conclude that whether negligence in maintaining hospital equipment or premises qualifies as professional negligence depends on the nature of the relationship between the equipment or premises in question and the provision of medical care to the plaintiff." *Flores v. Presbyterian Intercommunity Hospital* (2016) 63 Cal.4th 75, 88. Additionally, what is clear here is that Plaintiff has alleged many facts, but none that supports a duty required for premises liability. Failure to plead facts related to foreseeability of the harm occurring at the property means that Plaintiff has failed to plead facts sufficient to support duty, and accordingly the cause of action is not sufficiently stated. *Melton v. Boustred* (2010) 183 Cal.App.4th 521, 538.

Therefore, the demurrer to the third cause of action is SUSTAINED with leave to amend.

D. Negligent Infliction of Emotional Distress ("NIED")

Sultana argues that the cause of action for negligent infliction of emotional distress is both repetitive and insufficiently pled. They argue that Plaintiff does not express a basis for either direct or bystander emotional distress personally.

The Court has already addressed Sultana's arguments regarding repetitive theories above.

Plaintiff's claim for bystander emotional distress is not supported by the required facts. Plaintiff avers that he was intermittently in contact with his wife, and that is sufficient. He provides no analogous case, and the case he cites makes clear that he has not pled similar facts. Plaintiff relies on *Ko v. Maxim Healthcare Services, Inc.* (2020) 58 Cal.App.5th 1144, 1159, averring that "virtual" contemporaneous sensory awareness is sufficient to state an NIED claim. However, in *Ko*, the plaintiffs "were virtually present through modern technology that streamed the audio and video on which they watched [defendant] assaulting [their child] in real time". *Ibid*. Most illustrative is *Bird v. Saenz* (2002) 28 Cal.4th 910, 917, where (some) plaintiffs were at the hospital with their mother when she suffered complications from surgery and died. During the incident, they caught a fleeting glance of their mother being transported between rooms having turned blue from internal bleeding. *Ibid.* Their subsequent claims for bystander emotional distress were deficient, as they neither perceived, nor understood the medical issue that had arisen. *Id*. at 921. Here, Plaintiff merely alleges that he was texting with his wife the day of her death. Complaint ¶ 40. There is no allegation that Plaintiff meets the standard of observing the harm with his "senses", nor that he contemporaneously was aware of the nature of the harm. Accordingly, he does not meet the standard for bystander emotional distress.

Plaintiff does not satisfy the factors for direct emotional distress claims. Plaintiff pleads no facts sufficient to show he was owed a duty by Sultana, and accordingly the claim fails.

Nor does Decedent provide a basis upon which to make this claim. Upon the death of the party who suffered the wrong, the personal representative may maintain the action, but cannot recover for "pain, suffering, or disfigurement". CCP § 377.34 (a). This precludes causes of action related to emotional distress of the decedent, as "[a] wrong without damages is not actionable…" *Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 530 (Intentional infliction of emotional distress claim could not be asserted on behalf of decedent). Accordingly, Decedent cannot form the basis for the NIED cause of action.

The Demurrer to the cause of action for negligent infliction of emotional distress is SUSTAINED with leave to amend.

E. Negligent Misrepresentation

Plaintiff argues that negligent misrepresentation does not require the same specificity as fraud causes of action, citing *Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 173-174. Plaintiff relies on outdated cases, and this is an inaccurate recitation of California law. California has required such specificity for two decades, and Plaintiff's averment to the contrary is specious. *Daniels v. Select Portfolio Servicing, Inc*. (2016) 246 Cal.App.4th 1150, 1166; see also, *Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 185, fn. 14.

Negligent misrepresentation requires the same level of specificity expected of fraud. This means that Plaintiff must plead the essential, specific facts showing "who, what, when, and how" the misrepresentation occurred. Plaintiff is required to plead who made the misrepresentation, what the false statement was, when it was made, and how it was communicated. Plaintiff avers that it *is* sufficiently specific because it identifies who (Defendants), when (September 16, 2024), how (during Zoom pre-screening call), and what (the offer of medically supervised fasting where allegedly no supervision occurred). Of these, the issue of "who" appears to be the most clearly lacking. Plaintiff makes no allegations regarding, and particularly when dealing with Plaintiff's generalized allegations of agency, Sultana is entitled to the specificity in pleading which would put him on notice as to the identity of the speaker. Also falling short, the averment of a promise of "medically supervised fasting" is also quite vague, and with such ambiguous terms, the precise wording used appears incredibly salient to misrepresentation allegations. Plaintiff is clear that "No medical doctor rounded on, checked in on, visited, or attended to DECEDENT during her stay at the CENTER…" Complaint ¶ 39. However, Plaintiff provides no specificity as to what "medically supervised" means within the representations made to Decedent. Accordingly, the claim fails to be sufficiently specific.

As to the cause of action for Negligent Misrepresentation, the Demurrer is SUSTAINED with leave to amend.

F. Unfair Competition Law

Plaintiff pleads two causes of action under the Unfair Competition Law, one under the UCL itself, and one under the False Advertising Law (B&P § 17500). Sultana avers that the UCL cause of action fails because it fails to plead intent to deceive.

Sultana is incorrect that restitution is subsumed in the damages under the negligence claim. Restitution is a remedy that Plaintiff may elect in lieu of damages, and Plaintiff need not make that determination until post-verdict.

Nor is intent to deceive required. For the FAL, “Intent of the disseminator and knowledge of the customer are both irrelevant.” *People v. Overstock.com, Inc.* (2017) 12 Cal.App.5th 1064, 1079. Since violations of the FAL “necessarily” violate the UCL (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 950), the same intent appears to apply.

Nonetheless, they are subject to stringent standing requirements. Sultana’s claim that the Complaint does not contain adequate allegations for restitution are false. The Complaint clearly alleges that Decedent paid over $8,000 for the service. Sultana’s position represents a misreading of *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 335, as all that is required is that Decedent paid more for a service than she otherwise would have without the unfair competition. However, standing also requires that Plaintiff has experienced the unfair competition at issue.

Plaintiff’s UCL and FAL causes of action both sound in fraud, but they come to distinguishable results. As to specificity, Sultana is incorrect that the pleading standard is identical to that for fraud. Instead actions under the UCL fall under the lower standard of “reasonable particularity”. Here, while the Court found that the fraud causes of action insufficiently specific, the allegations also appear short of “reasonably” particular. Again, Plaintiff makes their allegations merely averring that there was a promise of medical supervision that never came to pass.

For the UCL claims, Plaintiff’s allegations remain short specifically on the false statement. While the specificity required is not as high as those required for fraud, the common thread of the numerous cases related to the FAL and UCL show that claims about false adverts typically require sufficient information to show exposure to advertising, or what that advertising said. For the UCL, there just isn’t sufficient information to determine whether the use of the vague term medical supervision is a complete representation of what was communicated, or what it means in the context Plaintiff alleges.

Moreover, Plaintiff’s claims for violations of B&P 17500 suffer an additional defect. Plaintiff pleads no *facts* related to advertising or marketing, rather just concluding that marketing occurred. Reminiscent of other jurisprudence, “[t]he complaint refers to an ‘effect’ of ‘misleading’ appellant's customers, but the facts clearly do not involve deceptive advertising…” *Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 619. Plaintiff does not state any particular false advert, and accordingly also fails to allege that Decedent was “actually” exposed to the false advertisement. Seeing the false advertisement is an element of standing for FAL claims. *Salazar v. Target Corporation* (2022) 83 Cal.App.5th 571, 578.

Therefore, as to the UCL and FAL causes of action, Demurrer is SUSTAINED with leave to amend.

D. Conclusion

Based on the foregoing, the Demurrer is **SUSTAINED with leave to amend as to the Second, Third, Fourth, Fifth, Seventh and Eighth causes of action.**

The motion to strike is **GRANTED WITH LEAVE TO AMEND**.

Sultana 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).

6. 26CV02525, Wasso v. General Motors, LLC

Plaintiff JEREMIAH WASSO AND FIVE STAR ASPHALT AND CONSTRUCTION (“Plaintiff”) filed the complaint (the “Complaint”) in this action against defendants General Motors, LLC (“Defendant”) and Does 1-10. The Complaint contains causes of action for violations of the Song-Beverly Consumer Warranty Act, Civ. Code § 1790 et seq. (the “Act”) and fraudulent inducement – concealment.

This matter is on calendar for Defendant’s demurrer to the fifth cause of action for fraudulent inducement within the Complaint pursuant to Cal. Code Civ. Proc. (“CCP”) §§ 430.10(e) for failure to state facts sufficient to constitute a cause of action. As to the fifth cause of action, the Demurrer is **SUSTAINED WITH LEAVE TO AMEND.**

I. Procedural Issues

It is apparently clear that Plaintiff has filed an opposition without having reviewed the demurrer. Plaintiff argues the economic loss rule, an issue Defendant does not raise. Plaintiff has apparently used a recycled brief without regard for the matter in which it was submitted. Plaintiff’s counsel practices extensively before this Court and is cautioned to display the necessary diligence in submitting briefs only as to the issues before the Court. It is disrespectful of both the Court and Defendant’s time for Plaintiff to tender no effort toward the present matter. The Court makes special note that any time Plaintiff claims to have spent on the demurrer, should they prevail and be entitled to attorney’s fees, would likely be found not to proper.

Of equal concern is that Defendant appears to have submitted an equally recycled brief on reply, **and therefore equally appears to have considered their own moving papers**.

II. Governing Law

A. Standards on the Demurrer

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). In the event a demurrer is sustained, leave to amend should be granted where the complaint's defect can be cured by amendment. *The Swahn Group, Inc. v. Segal* (2010) 183 Cal.App.4th 831, 852. A demurrer tests whether the complaint sufficiently states a valid cause of action. *Hahn v. Merda* (2007) 147 Cal.App.4th 740, 747. Complaints are read as a whole, in context and are liberally construed. *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; see also, *Stevens v. Superior Court* (1999) 75 Cal.App.4th 594, 601. In reviewing the sufficiency of a complaint, courts accept as true all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law, or the construction of instruments pleaded, or facts impossible in law. *Serrano v. Priest* (1971) 5 Cal.3d 584, 591; *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43; see also, *South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 732. Matters which may be judicially noticed are also considered. *Serrano v. Priest* (1971) 5 Cal.3d 584, 591. Opinions, speculation, or allegations contrary to law or facts which are judicially noticed are also disregarded. *Coshow 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.

"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.

B. Statute of Limitations

Demurrers shall not be sustained based on statute of limitations unless the complaint shows clearly and affirmatively that the action is so barred. *Geneva Towers Ltd. Partnership v. City of San Francisco* (2003) 29 Cal.4th 769, 780. "It is not enough that a complaint shows that the action may be barred." *Id*. If the failure of the cause of action due to the statute of limitations is apparent on the face of the complaint, the demurrer must be sustained. *SLPR, L.L.C. v. San Diego Unified Port District* (2020) 49 Cal.App.5th 284, 321. Where the allegations are that the incident occurred "on or about" a particular date, the demurrer should be overruled, as it is sufficient for the purposes of pleading that the claim may be timely. *Childs v. State of California* (1983) 144 Cal.App.3d 155, 160.

"Generally speaking, a cause of action accrues at 'the time when the cause of action is complete with all of its elements.' (*Citation*.) An important exception to the general rule of accrual is the "discovery rule," which postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action." *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806–807 (internal citations omitted). "In order to rely on the discovery rule for delayed accrual of a cause of action, '[a] plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery *and* (2) the inability to have made earlier discovery despite reasonable diligence.' (*Citation*.) In assessing the sufficiency of the allegations of delayed discovery, the court places the burden on the plaintiff to 'show diligence'; 'conclusory allegations will not withstand demurrer.'" *Id*. at 808. "Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her." *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110.

C. Fraud in the Inducement

"The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638; see also Civ. Code §§ 1571-1574. Fraud may be accomplished though suppression of a fact by one who is bound to disclose it. Civ. Code § 1710 (3). "The required elements for fraudulent concealment are (1) concealment or suppression of a material fact; (2) by a defendant with a duty to disclose the fact; (3) the defendant intended to defraud the plaintiff by intentionally concealing or suppressing the fact; (4) the plaintiff was unaware of the fact and would have acted differently if the concealed or suppressed fact was known; and (5) plaintiff sustained damage as a result of the concealment or suppression of the material fact." *Rattagan v. Uber Technologies, Inc.* (2024) 17 Cal.5th 1, 40. "A duty to disclose a material fact can arise if (1) it is imposed by statute; (2) the defendant is acting as plaintiff's fiduciary or is in some other confidential relationship with plaintiff that imposes a disclosure duty under the circumstances; (3) the material facts are known or accessible only to defendant, and defendant knows those facts are not known or reasonably discoverable by plaintiff (i.e., exclusive knowledge); (4) the defendant makes representations but fails to disclose other facts that materially qualify the facts disclosed or render the disclosure misleading (i.e., partial concealment); or (5) defendant actively conceals discovery of material fact from plaintiff (i.e., active concealment). *Rattagan v. Uber Technologies, Inc.* (2024) 17 Cal.5th 1, 40; *Collins v. eMachines, Inc.* (2011) 202 Cal.App.4th 249, 255; *Heliotis v. Schuman* (1986) 181 Cal.App.3d 646, 651; see also *LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 336.

"'[I]n California, fraud must be pled specifically; general and conclusory allegations do not suffice. [Citations.] "Thus 'the policy of liberal construction of the pleadings ... will not ordinarily be invoked to sustain a pleading defective in any material respect.'[Citation.] [¶] This particularity requirement necessitates pleading facts which 'show how, when, where, to whom, and by what means the representations were tendered.'" *Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 993; *see Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1166-1167 [" 'the plaintiff must allege the names of the persons who made the representations, ... to whom they spoke, what they said or wrote, and when the representation was made' "]; *see also Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645. In pleading fraud claims, "(e)very element of the cause of action must be alleged in full, factually and specifically." *Tindell v. Murphy* (2018) 22 Cal.App.5th 1239, 1249. In general, as with showing fraud, oppression, or malice sufficient to support punitive damages, while plaintiffs must plead facts, with respect to intent and the like, a "general allegation of intent is sufficient." *Unruh v. Truck Insurance Exchange* (1972) 7 Cal.3d 616, 632; see *Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1060 (in pleading promissory fraud, a general allegation that the promise was made without intent to perform was sufficient); see also *Stevens v. Superior Court* (1986) 180 Cal.App.3d 605, 608 (pleading that a hospital intentionally withheld that a health practitioner was operating without a medical license was sufficient to meet the pleading requirements for intent). To establish reliance on fraud, reliance upon the truth of the fraudulent misrepresentation does not have to be a predominant factor, but it must be a substantial factor in the plaintiff's subsequent conduct. *OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 864. Plaintiffs in fraud by concealment claims must show that if the information had not been omitted, plaintiff would have been aware of it and therefore would have behaved differently. *Id.* The pleading must be adequately specific to show actual reliance on the omission, and that the damages causally resulted therefrom. *Id*. California law "requires a plaintiff to allege specific facts not only showing he or she actually and justifiably relied on the defendant's misrepresentations, but also how the actions he or she took in reliance on the defendant's misrepresentations caused the alleged damages." *Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1499.

III. Demurrer

Defendant demurs on two theories. First, that Plaintiff has failed to plead adequate facts to meet the specificity required for fraud claims. Second, Manufacturer argues that the statute of limitations precludes the cause of action.

As a preliminary matter, the Court notes that both parties regularly cite unpublished authorities in their memorandum.[1] Both parties are admonished that unpublished authorities are not citable under the Rules of Court absent specific exception. Cal Rule of Court, Rule 8.1115 (a). They both also cite substantial federal authority, which is merely persuasive on issues of California law. *Michail v. Fluor Mining & Metals, Inc.* (1986) 180 Cal.App.3d 284, 286. Given that there is applicable binding authority, the Court need not rely on persuasive authorities here.

A. There is Adequate Specificity for Fraudulent Concealment Claims

[1] Plaintiff cites two unpublished cases. Defendant cites five. Future reliance on unpublished opinions may lead to the Court's imposition of monetary sanctions and possible reporting to the California State Bar.

Defendant claims that Plaintiff has failed to plead fraud with sufficient specificity. Particularly, Defendant avers that the Complaint omits two required elements of fraud by concealment. First, Defendant argues that the Complaint omits any particular allegation stating that the broadly defined “Transmission Defect” is present in the Vehicle, and therefore any omission regarding its existence lacks damages attributable to the fraud. Second, Defendant claims that the Complaint fails to have the required specificity showing “who made the alleged omissions” Third, Defendant opines that the Complaint does not contain sufficient allegations to state a claim for active concealment.

Defendant makes various allegations that active concealment is not sufficiently supported by the facts. Defendant poses the required elements of fraudulent concealment in an incomplete manner, failing to note that there are four different bases on which Defendant may be obligated to disclose facts sufficient to trigger a duty. *Collins v. eMachines, Inc.* (2011) 202 Cal.App.4th 249, 255. Plaintiff need not allege active concealment if any of the other factors are present. There is no allegation that a fiduciary duty may be present here, but two alternative theories of duty to disclose remain. Defendant attacks *one* of these, but Plaintiff states the other with sufficient factual assertions to withstand demurrer.

Defendant takes aim at Plaintiff’s pleading that Plaintiff has failed to plead facts sufficient to show that affirmative “incomplete” representations were made by a particular individual. This too would appear to be lacking. However, Plaintiff clearly alleges the facts sufficient to show that Defendant was in a position of superior knowledge, as the manufacturer of the product, to know of the Transmission Defect before Plaintiff’s purchase, and they failed to disclose the relevant information. Complaint ¶ 54. Given that Defendant makes no argument regarding the insufficiency of this section, Plaintiff appears to have pled facts with specificity sufficient to trigger a duty to disclose.

In contrast, the Complaint *is* deficiently stated when linking the averred fraudulent misrepresentation to the Vehicle. Plaintiff pleads various generalized complaints about the Vehicle, contending in broad and generalized language that the Vehicle suffers from “including but not limited to transmission defects, engine defects, electrical defects; among other defects and non-conformities.” Complaint ¶ 11. In contrast, when discussing fraud, Plaintiff alleges various particular symptoms comprising their defined “Transmission Defect.” Complaint ¶ 49. However, nowhere is there an allegation that the “Transmission Defect” is present in the Vehicle, nor that the “Transmission Defect” is synonymous with the generalized use of the term earlier in the Complaint. Given that fraud, including fraudulent concealment, must be pled with specificity (*OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 864), the Court cannot “read in” such inference, where Plaintiff clearly made effort to distinguish their defined terms. Accordingly, the fraudulent concealment cause of action is inadequately stated.

The demurrer to the Fifth cause of action is SUSTAINED with leave to amend.

B. <u>Statute of Limitations</u>

Defendant claims that the statute of limitations precludes Plaintiff's fifth cause of action, because the applicable statute of limitations began accruing no later than January 3, 2023, and Plaintiff fails to plead adequate facts to trigger delayed discovery. The statute of limitations for fraud is three years. *Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 607.

This contention fails for multiple reasons. First, Plaintiff particularly alleges that the warranty contract was entered "[o]n or about January 3, 2023". Complaint ¶ 6. On or about allegations are sufficient to overcome demurrer. *Childs v. State of California* (1983) 144 Cal.App.3d 155, 160. Second, Plaintiff alleges with particularity that Plaintiff discovered the fraud on November 14, 2025. This appears more than sufficiently pled.

The demurrer to statute of limitations to the fifth cause of action is OVERRULED.

IV. Conclusion

Based on the foregoing, the Demurrer is **SUSTAINED WITH LEAVE TO AMEND**.

Defendant's counsel 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).

7. 26SC00050, Carrillo v. Hernandez

This case is a small claims lawsuit filed by plaintiff Jose Guadalupe Carrillo ("Plaintiff") against defendant Cynthia Hernandez ("Defendant"). The matter is on calendar for Defendant's motion to vacate the small claims judgment pursuant to CCP § 116.730 in the amount of $13,445.00.

Defendant has filed three proofs of service. However, two of the proofs of service reflect electronic service, of which there is no evidence that would be proper in this case. Plaintiff is a self represented party, and there is no stipulation to electronic service. The proof of service reflecting mail service does not aver that Plaintiff's mailing address was the one served. Defendant served the motion to 18360 Sierra Dr., Apt. 4, Sonoma, CA 95476. Plaintiff's address is 18360 Sierra Dr., Apt. **7**, Sonoma, CA 95476. While it is likely that Defendant will argue that such service is "close enough" to ensure actual notice, there is no basis to rely on such optimism. Defendant did not mail serve Plaintiff at his address. Therefore, no service of the motion has occurred.

Second, there is no evidence at all that Defendant served Plaintiff with the hearing date. All Defendant's proofs of service were filed May 20, 2026, and the hearing date for this motion was not assigned by the Court until June 1, 2026. Accordingly, Plaintiff does not have notice of the hearing date.

Therefore, based on all the foregoing reasons, the Motion is **DENIED**.

8. SCV-273878, Parks v. Ensign

Plaintiff Michael Parks ("Plaintiff"), as successor-in-interest to decedent Robert Parks

(“Decedent”), filed the presently operative second amended complaint (the “SAC”) against defendants Ensign Montgomery, LLC (“Montgomery”), Flagstone Healthcare North, Inc. (“Flagstone”), The Ensign Group (“TEG”), Luke Ensign (“Individual Defendant”), Ensign Services, Inc. (“ESI”, together with other named defendants “Defendants”), and Does 1-50, arising out of Defendants’ care of Decedent. The SAC contains causes of action for: 1) elder neglect/abuse; 2) negligence; 3) Violations of the Patient’s Bill of Rights; 4) Violations of California’s Unfair Competition Law under Business and Professions Code § 17200 *et seq*. (the “UCL”); 5) fraud; and 6) wrongful death. A demurrer to the fraud cause of action has been sustained without leave to amend.

This matter is on calendar for the application by Lori D Proctor (“Applicant”) to appear pro hac vice on behalf of Defendants, in coordination with California-based counsel. Defendants bring this motion pursuant to California Rule of Court(“CRC”), Rule 9.40. There is no opposition. However, the Court cannot locate a proof of service reflecting service of the motion to the State Bar, either before or after the clerk had assigned the hearing date. As such, there is no evidence State Bar has been served with notice of the hearing date, as is required by CRC Rule 9.40 (c)(1). That provision particularly requires notice of the hearing be given in accordance with CCP § 1005. Furthermore, the declaration attached to the motion only notes that it “will” be forwarded to the state bar with the required fees. There is no evidence the application was submitted or the fees were paid. As such, the application is **DENIED without prejudice**.

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