TENTATIVE RULINGS
LAW & MOTION CALENDAR
Wednesday, August 28, 2024 3:00 p.m.
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. 23CV01033, Flores Sandoval v. Toyota Motor Sales, U.S.A., Inc.

Plaintiff Maria Del Carmen Flores Sandoval ("Plaintiff") filed the complaint (the "Complaint") in this action against defendants Toyota Motor Sales, U.S.A., Inc. ("Manufacturer" or "Defendant"), and Does 1-10, relating to Plaintiff's 2021 Toyota 4Runner (the "Vehicle") purchased from Freeman Motors ("Dealer"). The Complaint contains causes of action for: 1) violations of Civil Code § 1793.2 (d) under the Song-Beverly Consumer Warranty Act, Civ. Code § 1790 et seq. (the "Act"); 2) violations of Civil Code § 1793.2 (b); 3) violations of Civil Code § 1793.2 (a)(3); and 4) breach of implied warranty under the Act (Civ. Code §§ 1791.1, 1794, 1795.5.

Plaintiff purchased the Vehicle from Dealer. During the sales process Plaintiff and Dealer executed a "Retail Installment Sale Contract – Simple Finance Charge (With Arbitration Provision)" ("RISC"). *See* Declaration of Ali Ameripour ("Ameripour Decl.") – Exhibit B. The RISC contains an arbitration provision which Plaintiff signed but Manufacturer did not.

Plaintiff also received an express written warranty from Manufacturer referred to as the written warranty (*see* Complaint, Exhibit 1; the "Warranty"). *See* Complaint ¶ 6. Plaintiff further alleges that per the Warranty, Manufacturer "failed to conform the (Vehicle) to the applicable express

warranty after a reasonable number of attempts." *See* Complaint ¶ 26. Plaintiff's complaint alleges breaches as to Warranty but makes no references to the RISC. The Warranty contains no arbitration provision.

This matter is on calendar for the motion to compel arbitration filed by the Manufacturer pursuant to the Federal Arbitration Act ("FAA"), 9 USC §§ 1-16. The Motion is **DENIED**.

I. The Basis for the Motion

The RISC for the Vehicle proffered by the Manufacturer includes a prominent "arbitration clause" which states that "[A]ny claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this Arbitration Provision, and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors or assigns, which arises out of or relates to your credit application, purchase or condition of this vehicle, this contract or any resulting transaction relationship (including any such relationship with third parties would not sign this contract) shall, at our election, be resolved by neutral binding arbitration and not by a court action."

RISC defines "You" as being the Buyer, in this instance Plaintiff and the "Seller-Creditor" as the Dealer. *See* RISC. It further states that any arbitration under the clause shall be governed by the FAA and not by any state law concerning arbitration. *Id*. Manufacturer is not a signatory to this arbitration agreement.

The Complaint avers that under the Act, Manufacturer was obligated to repair or repurchase the vehicle, and that Manufacturer violated the Act because the Vehicle was defective within the warranty period, and Manufacturer was "unable to conform the (Vehicle) to the applicable express warranty after a reasonable number of attempts". Complaint ¶¶ 26-28. These warranties are only contained in the Warranty and form the basis for the claims against Manufacturer. *See also* Complaint Exhibit 1.

The basis for the Motion is Manufacturer's contention that they may compel arbitration, even as non-signatories, because Plaintiff's claims against them are so intertwined to the condition of vehicle that they are covered under the RISC. Manufacturer relies on the doctrine of equitable estoppel to make this argument. Manufacturer also avers standing to assert the arbitration clause as a third party beneficiary. Manufacturer also argues that the FAA and California law require compliance with the agreement to arbitrate and they also request a stay pending arbitration.

II. Applicable Law Governing Arbitration

State law determines whether a non-signatory to a contract has a right to compel arbitration under the FAA. *Arthur Andersen LLP v. Carlisle* (2009) 556 U.S. 624, 631; *see also Ngo v. BMW of North America, LLC* (9th Cir. 2022) 23 F.4th 942, 946. When parties to an agreement have delegated the determination of arbitrability to the arbitrator, courts defer to the contractual delegation, but when a non-signatory seeks to compel arbitration, the court decides whether the non-signatory has the right to compel arbitration. *Kramer v. Toyota Motor Corp.* (9th Cir. 2013) 705 F.3d 1122, 1126-1128 ("*Kramer*"). Federal court cases are persuasive but not binding

authorities on matters of state law. *Michail v. Fluor Mining & Metals, Inc.* (1986) 180 Cal.App.3d 284, 286.

The Federal Arbitration Act ("FAA") supports a general policy favoring arbitration. *Granite Rock Co. v. International Broth. of Teamsters* (2010) 561 U.S. 287, 302. However, this policy only reflects the general deference given to the terms of contracts within courts and does not establish special "arbitration preferring procedural rules". *Morgan v. Sundance, Inc.* (May 23, 2022) 212 L.Ed.2d 753; citing *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24. Under California law, the policy favoring arbitration, "'does not extend to those who are not parties to an arbitration agreement, and a party cannot be compelled to arbitrate a dispute that he has not agreed to resolve by arbitration.'" *Molecular Analytical Systems v. Ciphergen Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 704, quoting *Westra v. Marcus & Millichap Real Estate Investment Brokerage Co., Inc.* (2005) 129 Cal.App.4th 759, 763.

III. Applicable Law Governing Enforcement of Arbitration Agreement by Third Parties

Under the equitable estoppel doctrine, a party to an arbitration agreement may be required to arbitrate with a nonparty. *See, e.g. JSM Tuscany, LLC v. Sup. Ct.* (2011) 193 Cal.App.4th 1222, 1237. "'The fundamental point' is that a party is 'not entitled to make use of [a contract containing an arbitration clause] as long as it worked to [his or] her advantage, then attempt to avoid its application in defining the forum in which [his or] her dispute ... should be resolved.'" *Jensen v. U-Haul Co. of California* (2017) 18 Cal.App.5th 295, 306 ("*Jensen*"), quoting *NORCAL Mutual Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 84. A non-signatory may enforce an arbitration clause on grounds of equitable estoppel only when the claims against the non-signatory are "dependent upon, or founded in and inextricably intertwined with" the obligations imposed by the agreement containing the arbitration clause. *Goldman v. KPMG LLP* (2009) 173 Cal.App.4th 209, 217-218 ("*Goldman*"); *Marenco v. DirecTV LLC* (2015) 233 Cal.App.4th 1409, 1419 ("*Marenco*") (equitable estoppel doctrine required employee who signed arbitration agreement with predecessor corporation to arbitrate claims against non-signatory successor corporation because employees who continued working after merger impliedly accepted successor corporation's decision to continue existing terms of employment, including arbitration agreement).

Thus, the equitable estoppel doctrine applies when: 1) the signatory must depend on the written agreement providing for arbitration in asserting claims against the non-signatory; or 2) when the signatory alleges "substantially interdependent and concerted misconduct" by the non-signatory and a signatory and the alleged misconduct is "founded in or intimately connected with the obligations of the underlying agreement." *Goldman*, 173 Cal.App.4th at 218-219 (holding there was no equitable basis to estop investors from asserting rights in court against non-signatory accountants and lawyers because investors did not use operating agreement with investment advisor, containing arbitration clause, to hold defendants liable). In California, warranties from manufacturers arise independently from the contract of sale. *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 60-61.

"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) 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 mere fact that a contract results in benefits to a third party does not render that party a 'third party beneficiary.'" *Jensen v. U-Haul Co. of California* (2017) 18 Cal.App.5th 295, 302. "(T)he parties to the contract must have *intended* the third party to benefit." *Ford Motor Warranty Cases* (2023) 89 Cal.App.5th 1324, 1337.

IV. Defendant is not Entitled to Compel Arbitration

A. Cases on Equitable Estoppel

Defendant asserts that they have standing to compel arbitration based upon equitable estoppel. Defendant relies on *Felisilda v. FCA US LLC* (2020) 53 Cal.App.5th 486 ("*Felisilda*"), which upheld a trial court order granting a signatory dealer defendant's motion to compel arbitration, which order also required the plaintiffs to arbitrate their claims against the non-signatory manufacturer defendant, who had filed a non-opposition to the dealer's motion. After the trial court ordered arbitration, the Felisildas dismissed their claims against signatory dealer. The arbitration then continued until the arbitrator rendered a decision, and the appeal was then taken.

On appeal, the Felisildas' argued the trial court erred in determining the manufacturer defendant was a third-party non-signatory beneficiary of the arbitration clause. *Id*. at 496. However, the court identified the doctrine of equitable estoppel, pertinent to our discussion here, and found in *Boucher v. Alliance Titles Co. Inc*., (2005) 127 Cal.App.4th 262, 271, that "a nonsignatory defendant may invoke an arbitration clause to compel the signatory plaintiff to arbitrate its claims when the cause of action against the nonsignatory are "intimately founded in and intertwined", with the underlying contract obligations'" *Id*. at 495. As it was in *Felisilda*, Defendant now argues Plaintiff's claims are directly related to the condition of the Vehicle. Plaintiff's complaint alleges "These causes of action arise out of the warranty obligations of in connection with a motor vehicle for which issued a written warranty." Complaint ¶ 10. Defendant further argues the sales contract is the source of the warranties at the heart of Plaintiff's case. As explained in Section III.A.3. below, the Court believes Defendant has not shown the warranties depend upon the RISC.

Felisilda court distinguished the Ninth Circuit case *Kramer v. Toyota Motor Corp*. (9th Cir. 2013) 705 F.3d 1122—which denied the non-signatory manufacturer defendant's motion to compel arbitration—on the basis that the sales contract in *Kramer* "did not contain any language that could be construed as extending the scope of arbitration to third parties" (*Felisilda,* 53 Cal.App.5th at 497) whereas the agreement at issue (like the RISC here) required the plaintiff to arbitrate claims which arise out of or relate to the purchase or condition of the vehicle "or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract)." *Id.* The *Felisilda* court found that the arbitration provision language meant that it applied to third-party non-signatory manufacturers in the context of the complaint, and the dealership's motion to compel arbitration. *Id* at 496.

Contrasting *Felisilda* is the weight of recent cases from multiple appellate districts. Most persuasive is the published *Ford Motor Warranty Cases* (2023) 89 Cal.App.5th 1324 ("*Ochoa*"), 306 Cal.Rptr.3d 611, *review filed (May 12, 2023)*. Though review by the California Supreme Court

is pending, it remains more than persuasive authority. See *Ford Motor Warranty Cases* (2023) 310 Cal.Rptr.3d 440 (*Ochoa* "may be cited, not only for its persuasive value, but also for the limited purpose of establishing the existence of a conflict in authority that would in turn allow trial courts to exercise discretion under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456, 20 Cal.Rptr. 321, 369 P.2d 937, to choose between sides of any such conflict."); see also Cal. Rules of Court, Rule 8.1115(e)(1). In that decision, the court of appeal found the trial court properly denied the defendant's motion to compel arbitration based on several factors. First, the *Ochoa* court disagreed with the *Felisilda* court's reading of the arbitration agreement provisions extending expressly to third parties. *Ochoa, supra,* 306 Cal.Rptr.3d at 620 ("We do not read this italicized language as consent by the purchaser to arbitrate claims with third party nonsignatories. Rather, we read it as a further delineation of the *subject matter* of claims the purchasers and dealers agreed to arbitrate."). However, perhaps more salient to the analysis here, the *Ochoa* court points out several facts which distinguish that case from *Felisilda*. None of the cases decided under *Ochoa* named the dealers as parties to the case. *Ochoa, supra,* 306 Cal.Rptr.3d at 617. Equally relevant, the plaintiffs in *Ochoa* did not plead their causes of action in a manner that depended upon the terms of the RISC. *Id.* at 620. The *Ochoa* court elucidated the general rule of California law that manufacturer warranties **do not** arise from the underlying contracts of sale. *Id.* at 621; citing *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 60. These distinguishing facts resulted in the *Ochoa* court affirming the denial of arbitration.

Further authority comes from the Third District Court of Appeal, in *Kielar v. Superior Court* (2023) 94 Cal.App.5th 614, 620 ("*Kielar*"). In that case, the Third District explicitly found that the logic expressed by their court in *Felisilda* does not apply to third party manufacturers moving to compel based on a retail sales installment contract entered between the consumer and the dealership. *Id.* at 620. While the *Felisilda* court averred that the sales contract was the source of the warranty between consumer and manufacturer, the *Kielar* court was explicit that "(w)e join *Ford Motor* and *Montemayor* in disagreeing with this statement and concluding equitable estoppel does not apply in this situation." *Ibid.*

Based on the weight of the cases, and the distinguishing facts from *Felisilda*, this Court declines to follow *Felisilda*, and instead defers to *Ochoa*, *Kielar*, and *Montemayor v. Ford Motor Co.* (2023) 92 Cal.App.5th 958.

B. Application of Equitable Estoppel Here

Defendant has not shown equitable estoppel applies here. First, Defendant claims that its request for arbitration is entitled to favorable treatment is an inaccurate statement of law. Defendant's attacks on the applicability of *Morgan v. Sundance, Inc.* (May 23, 2022) 212 L.Ed.2d 753 are ill placed. Defendant's non-signatory status means its motion is controlled by state law. *Arthur Andersen LLP v. Carlisle* (2009) 556 U.S. 624, 631. California law reflects an even more strict principle than that expressed in *Morgan*, namely that motions to compel arbitration where one of the parties affected is a non-signatory are entitled to no favor at all. *Molecular Analytical Systems v. Ciphergen Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 704. As to the RISC, this facially appears to be very similar to the arbitration provision at issue in both *Felisilda* and *Ochoa*. The *Felisilda* court found that this language amounted to "an express extension of arbitration to claims involving third parties that relate to the vehicle's condition." *Felisilda,* 53 Cal.App.5th at 498.

While the *Felisilda* court found adequate basis to order the parties to arbitrate their claims, that case is substantially distinguishable in three major respects. First, in that case plaintiff made claims under the Act against both the manufacturer and the dealership, who was a signatory to the RISC. *Id*. at 498. Here, Dealer is named only as to the claims for negligent repair. Second, as the dealership was a party in *Felisilda,* the dealership was the party who moved to compel arbitration. *Id*. at 499. Dealer is not the moving party here. Third, in *Felisilda*, the claims within the complaint were intimately interwound with, and completely dependent on, the RISC. *Id*. at 496-497.

These distinguishing facts necessitate a different result. The RISC arbitration provision states, "Any claim or dispute. . . between your and us or our employees, agents, successors or assigns, which arises out of … the condition of this vehicle, this contract, or relationship (including any such relationship with third parties who do not sign this contract) shall, at your or our election, be resolved by neutral, binding arbitration, and not by a court action." The arbitration provision clearly indicates that the parties with standing to assert arbitration under the contract are Plaintiff (therein "you") and Dealer ("us"). Either party to the RISC has standing to assert the arbitration provision regarding "(a)ny claim or dispute. . . between your and us or our employees, agents, successors or assigns, which arises out of … the condition of this vehicle, this contract, or relationship (including any such relationship with third parties who do not sign this contract)".

The assertion that *Felisilda* militates against this result ignores substantial facts of the case. The plaintiffs in *Felisilda* did dismiss the dealer prior to arbitration. *Id*. at 489. However, this dismissal occurred **after** the dealer had moved to compel arbitration, and the court had granted that motion. *Ibid*. It was plaintiffs' attempt to "make use of [a contract containing an arbitration clause] as long as it worked to [their] advantage, then attempt to avoid its application in defining the forum in which [their] dispute should be resolved" that justified applying equitable estoppel. *Id*. at 496. As is explained further below, that is not the case here. Therefore, the language of the RISC does not support Defendant having standing to assert the right to arbitration under the contract. These distinguishing factors are supported by the findings in *Ochoa*. Dealer is not named as a party to the case, nor are they the moving party for arbitration here. The terms of the RISC do not give Defendant independent standing to move for arbitration, those rights are vested in either Dealer or Plaintiff under the RISC. As such, Defendant must depend on equitable estoppel.

C. Defendant Has Not Shown the Claims Are Intertwined

Similarly, reliance on *Felisilda* based on the principle that the Complaint is dependent on the RISC is not supported in this case. The complaint in *Felisilda* averred that "express warranties accompanied the sale of the vehicle to (plaintiffs) by which FCA… undertook to preserve or maintain the utility or performance of (plaintiff's) vehicle or provide compensation if there was a failure in such utility or performance." *Id*. at 496. The Complaint here makes no such allegations. Plaintiff advances no claims based on the RISC, instead advancing claims based on the express warranties. In fact, on inspection of the RISC, the Court finds no evidence that warranties as to the vehicle were mentioned or promised in that contract. There is no evidence before the Court to show that the claims of warranties are intertwined with the RISC, other than the purchase occurred as part of the RISC.

It is inadequate for Defendant to show that the warranties would not be owed to Plaintiff were it not for the RISC, as warranties arise independent of the sale contract. *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 60; *see also Ochoa, supra,* 306 Cal.Rptr.3d at 621. Defendant have made no showing that the warranty is intertwined with the RISC. The Complaint simply states that, "These causes of action arise out of the warranty obligations of in connection with a motor vehicle for which issued a written warranty." Complaint ¶ 10. This is inadequate to show the Complaint is intertwined with the RISC. Nor does the rejection of the product intertwine the RISC, as this is a remedy available explicitly within the Act. *See* Cal. Civ. Code § 1794(b)(1). The RISC expressly disclaims responsibility for any warranties provided by Manufacturer. *See* RISC, pg. 4, ¶ 4 (the Dealer makes no warranties, express or implied, as to the Vehicle barring a written service contract, and this provision is separate and apart from any warranties provided by the Manufacturer). The Complaint not being interwoven with the terms of the RISC, there is no basis for Defendant to assert equitable estoppel as a non-signatory.

It is inarguable here that there would be no warranty from Manufacturer had Plaintiff not purchased the Vehicle. An express warranty is defined as: "(a) written statement arising out of a sale to the consumer of a consumer good pursuant to which the manufacturer, distributor, or retailer undertakes to preserve or maintain the utility or performance of the consumer good or provide compensation if there is a failure in utility or performance." Civ. Code, § 1791.2(a)(1). However, the cases cited by Defendant attempting to link the warranty to the RISC are inapposite, as each of these cases dealt with factually distinguishable issues, and do not link the **terms of the sale contract** with the warranty. *See, e.g., Cardinal Health 301, Inc. v. Tyco Electronics Corp.* (2008) 169 Cal.App.4th 116, 127 (warranties that formed cause of action were express terms of the contract); *A. A. Baxter Corp. v. Colt Industries, Inc.* (1970) 10 Cal.App.3d 144, 153 (warranty as to time of delivery was an express term of the sale contract, not a function of Song-Beverly claims, and even so time of delivery is not a function of warranty, which only applies to "title, character, quantity, quality, identity or condition of goods"); *C9 Ventures v. SVC-West, L.P.* (2012) 202 Cal.App.4th 1483, 1495 (warranties were an express term of the contract). In fact, this entire line of reasoning ignores the Act, and its provisions thereon, including Cal. Civ. Code §§ 1793.2 and 1794. Here, Defendant is not a party to the RISC. In fact, the RISC disclaims any responsibility for the Manufacturer's warranty. *See* RISC, pg. 4, ¶ 4. The lone applicable case cited by Defendant is *Felisilda*, and as has been discussed, *Ochoa* is the far more factually applicable decision. Defendant has not shown that the claims in the Complaint are related to or dependent upon the RISC.

Defendant is not a signatory to the RISC, and equitable estoppel does not apply. As such, Defendant has no basis to avail itself upon the arbitration provisions of the RISC. There is no arbitration agreement between Plaintiff and Defendant. Therefore, Defendant does not have a basis upon which to compel arbitration.

D. Third Party Beneficiary

Defendant also argues that they are entitled to invoke the arbitration provision as a third party beneficiary. Again, this position does not appear supported by the facts or recent cases on the subject. The language of the arbitration provision clearly does not contemplate that Defendant has standing to invoke the provision. While the arbitration provision covers "(a)ny claim or dispute"

which arises between Plaintiff and the Dealer, "or (Dealer's) employees, agents, successors or assigns", including relationships with third parties which arise out of the contract, the election for arbitration may be made "at your (Plaintiff) or our (Dealer) election". Therefore, the Court finds that the arbitration provision was not made in a manner where it was made expressly for the benefit of Defendant. Application of third party beneficiary standing is only proper where it is clear that the contract was made expressly for the benefit of the beneficiary. *Fuentes v. TMCSF, Inc.* (2018) 26 Cal.App.5th 541, 552. Looking at the same arbitration provision, the court in *Ochoa* came to the same conclusion. That Court found that allowing the manufacturer to assert third party beneficiary status would be inconsistent with the reasonable expectations of the contracting parties because they "specifically vested the right of enforcement in the purchaser and the dealer only." *Ochoa, supra,* 89 Cal.App.5th at 1340. The RISC "says nothing of binding the purchaser to arbitrate with the universe of unnamed third parties." *Id.* at 1335; see also *Montemayor v. Ford Motor Co.* (2023) 92 Cal.App.5th 958, 974.

Therefore, the motion to compel arbitration is **DENIED.**

IV. Conclusion

Based on the foregoing, the Motion is **DENIED**.

Plaintiff'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).

2. 23CV01646, Looney v. The Grape Nest, LLC

Plaintiff Gary E. Looney dba Collectronics of California ("Plaintiff"), assignee of Young's Market Company, obtained a default judgment against defendants The Grape Nest, LLC, ("Defendant"), Marlina Maria Miller ("Guarantor", together with Defendant, "Defendants"). This matter is on calendar for Plaintiff's motion to compel answers to special interrogatories ("SIs") against Defendant under Code of Civil Procedure ("CCP") §§ 708.020 & 2030.290, and to compel production of documents ("RPODs") from Defendants under CCP §§ 708.030 & 2031.300. The unopposed Motion is **GRANTED**. Defendant shall serve verified code-compliant responses free of objections within thirty (30) days of notice of entry of the order on this Motion. Defendants shall pay $60 in sanctions to Plaintiff within thirty (30) days of notice of entry of the order on this Motion.

I. Governing Law

A judgment creditor generally has the same rights to propound discovery to the judgment debtor in order to facilitate collection of the judgment. Particularly, a judgment debtor may propound interrogatories as allowed under CCP § 2030.010, et seq. See CCP § 708.020. Judgment creditors may also request production of documents under CCP § 2031.010. See CCP § 708.030.

Regarding the SIs, a party responding to an interrogatory must provide a response that is "as complete and straightforward as the information reasonably available to the responding party permits" and "[i]f an interrogatory cannot be answered completely, it shall be answered to the

extent possible." Code Civ. Proc. ("CCP") §2030.220(a)-(b). "If the responding party does not have personal knowledge sufficient to respond fully to an interrogatory, that party shall so state, but shall make a reasonable and good faith effort to obtain the information by inquiry to other natural persons or organizations, except where the information is equally available to the propounding party." CCP §2030.220(c). If a party fails serve a timely 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 §2030.290(c). Code of Civil Procedure section 2030.290 provides that if a party to whom interrogatories were directed fails to serve timely responses, the responding party waives all objections, including those based on privilege and work product protection, and the propounding party may move for an order compelling responses. CCP §2030.290(a)-(b); see also, *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 404; CCP § 708.020(c). All that the moving party needs to show in its motion is that a set of interrogatories was properly served, that the time to respond has expired, and that no response has been provided. See, *Leach v. Superior Court* (1980) 111 Cal.App.3d 902, 905-906.

Similarly, Code of Civil Procedure section 2031.300 provides that if a party fails to serve timely responses to requests for production of documents, the responding party waives all objections, including those based on privilege and work product and "[t]he party making the demand may move for an order compelling [a] response to the demand." CCP §2031.300(a)-(b); CCP §708.030(c). When the motion to compel seeks a response to document requests, as opposed to further responses, no showing of "good cause" is required. CCP §2031.300.

When a party serves response after a motion to compel is filed, the court maintains jurisdiction within its discretion to determine the sufficiency of the response. *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 410-411.

CCP § 2030.290(c) (relating to interrogatories), and CCP § 2031.300(c) (relating to requests for production of documents), provide 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."

II. <u>Analysis</u>

Plaintiff served their SIs and RPODs on March 27, 2024. Defendants have served no responses.

There is no opposition to the motion, nor is there evidence that there have been responses to the underlying requests. The time to respond has expired. Compelling responses is appropriate. Plaintiff's motion to compel responses to SIs and RPODs GRANTED. Defendants will serve code complaint, objection-free responses within 30 days of notice of this order.

III. <u>Sanctions</u>

Sanctions are mandatory under the CCP for discovery abuses, absent substantial justification. Absent substantial justification, the Court must grant compensatory monetary sanctions which

represent reasonable and actual costs to Plaintiff. While Plaintiff appears to also ask for some form of discretionary sanctions, he provides no authority to support them.

Plaintiff requests sanctions of his actual costs of filing fees of $60. Filing fees of $60 is appropriate. The Court **GRANTS** Plaintiff's request for monetary sanctions in the amount of $60. Defendant shall pay $60 to Plaintiff within 30 days' notice of this order.

IV. Conclusion

Plaintiff's motion to compel responses to SIs and RPODs is GRANTED. Defendants will serve code complaint, objection-free responses within 30 days of notice of this order. The request for sanctions is granted and Defendants shall pay $60 to Plaintiff within 30 days' notice of this order.

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).

3. 23CV01698, Looney v. Enfuzio Bar & Lounge, LLC

Plaintiff Gary E. Looney dba Collectronics of California ("Plaintiff"), assignee of Young's Market Company, obtained a default judgment against defendants Enfuzion Bar & Lounge, LLC, ("Defendant"), Latfia Pacheco ("Guarantor", together with Defendant, "Defendants"). This matter is on calendar for Plaintiff's motion to compel answers to special interrogatories ("SIs") against Defendant under Code of Civil Procedure ("CCP") §§ 708.020 & 2030.290, and to compel production of documents ("RPODs") from Defendants under CCP §§ 708.030 & 2031.300. The unopposed Motion is **DENIED without prejudice.**

I. Governing Law

A judgment creditor generally has the same rights to propound discovery to the judgment debtor in order to facilitate collection of the judgment. Particularly, a judgment debtor may propound interrogatories as allowed under CCP § 2030.010, et seq. See CCP § 708.020. Judgment creditors may also request production of documents under CCP § 2031.010. See CCP § 708.030. Regarding the SIs, a party responding to an interrogatory must provide a response that is "as complete and straightforward as the information reasonably available to the responding party permits" and "[i]f an interrogatory cannot be answered completely, it shall be answered to the extent possible." Code Civ. Proc. ("CCP") §2030.220(a)-(b). "If the responding party does not have personal knowledge sufficient to respond fully to an interrogatory, that party shall so state, but shall make a reasonable and good faith effort to obtain the information by inquiry to other natural persons or organizations, except where the information is equally available to the propounding party." CCP §2030.220(c). If a party fails serve a timely 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 §2030.290(c). Code of Civil Procedure section 2030.290 provides that if a party to whom interrogatories were directed fails to serve timely responses, the responding party waives all objections, including those based on privilege and work product protection, and the propounding party may move for an order compelling responses. CCP §2030.290(a)-(b); see

also, *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 404; CCP § 708.020(c). All that the moving party needs to show in its motion is that a set of interrogatories was properly served, that the time to respond has expired, and that no response has been provided. See, *Leach v. Superior Court* (1980) 111 Cal.App.3d 902, 905-906.

Similarly, Code of Civil Procedure section 2031.300 provides that if a party fails to serve timely responses to requests for production of documents, the responding party waives all objections, including those based on privilege and work product and "[t]he party making the demand may move for an order compelling [a] response to the demand." CCP §2031.300(a)-(b); CCP §708.030(c). When the motion to compel seeks a response to document requests, as opposed to further responses, no showing of "good cause" is required. CCP §2031.300.

When a party serves response after a motion to compel is filed, the court maintains jurisdiction within its discretion to determine the sufficiency of the response. *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 410-411.

CCP § 2030.290(c) (relating to interrogatories), and CCP § 2031.300(c) (relating to requests for production of documents), provide 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."

II. Analysis

Plaintiff avers that it served its SIs and RPODs on March 27, 2024. However, the Proof of service to this effect was signed on March 13, 2024. The Court cannot find this proof of service sufficient. The proof of service avers that Plaintiff *would serve* the discovery at some point two weeks in the future from when the proof of service was signed. See CCP § 1013a. Therefore, there is not adequate evidence before the Court that the RPODs and SIs were served on March 27, 2024.

Therefore, because there is no evidence the original discovery requests were ever served, the motion to compel is DENIED without prejudice. 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).

4. MCV-261184, What's Good For Your Soul v. Marzo

Plaintiff What's Good for the Soul, LLC ("Plaintiff"), filed the complaint in this action against defendant James Marzo ("Defendant") and Does 1-21 with causes of action arising out of contractual disputes (the "Complaint"). This matter is on calendar for the motion by Defendant to compel Plaintiff to produce documents related to a business records subpoena issued May 16, 2024. The Motion is **DENIED**. Plaintiff's request for sanctions is GRANTED.

I. The Subpoena

Prior to Defendant's service of the subpoena at issue, Defendant had served multiple sets of requests for production of documents and special interrogatories, totaling 35 requests. Defendant served a subpoena to Plaintiff for business records under CCP § 2020.410 on May 16, 2024. Plaintiff refused to appear and objected on multiple grounds, including that the requested discovery is outside the bounds of the subpoena statute, and exceeds the discovery available in limited cases. This motion timely followed.

II. Governing Law

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). 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.

Limited civil actions are subject to a number of restrictions. In limited civil actions, parties may obtain 35 of any combination of interrogatories, demands to produce documents and requests for admission. CCP § 94 (a). Parties may also obtain one oral or written deposition. CCP, § 94 (b). However, "(t)he court may, on noticed motion and subject to such terms and conditions as are just, authorize a party to conduct additional discovery, but only upon a showing that the moving party will be unable to prosecute or defend the action effectively without the additional discovery. In making a determination under this section, the court shall take into account whether the moving party has used all applicable discovery in good faith, and whether the party has attempted to secure the additional discovery by stipulation or by means other than formal discovery." CCP, § 95. "Any party may serve on any person a deposition subpoena duces tecum requiring the person served to mail copies of documents, books, or records to the party's counsel at a specified address, along with an affidavit complying with Section 1561 of the Evidence Code." Code Civ. Proc., § 94 (c).

Subpoena duces tecum serve dual purposes, first to compel the production of particular documents **at trial** from both parties and non-parties, and second for parties to **compel depositions and production from nonparties**. *Terry v. SLICO* (2009) 175 Cal.App.4th 352, 358. To the degree that any provisions of CCP §§ 1985 and 1987.5 are inconsistent with third party depositions under CCP § 2020.010 et seq., they are superseded. *Ibid*. See also CCP § 2020.030. Depositions for production of business records and things (§ 2020.410 et seq.) "may

be used to obtain discovery within the state from a person who is not a party to the action" CCP § 2020.010 (a)(3).

III. Analysis

Defendant states that no responses were produced based on Plaintiff's objections. Defendant avers that it does not make sense to restrict a litigant to only 35 discovery requests, and that therefore the function of serving subpoenas must allow for additional discovery. Plaintiff avers that the subpoena was deficient because the time for discovery had passed at the time the subpoena was served, and that the discovery requests exceed the scope of the allowable discovery under CCP § 94.

The current matter is a limited civil case, subject to a number of restrictions on the bounds of discovery. This serves the purpose of limited civil cases in restricting the costs of the parties given the limited amounts at issue. See CCP § 85 (a) (limited civil cases must have an amount in controversy below $35,000). The Court maintains the power to expand discovery, even given the nature of the instant action as a limited civil case. CCP § 95. This is not the route chosen by Defendant. Rather, Defendant has instead utilized a discovery device designed only for discovery to non-parties. Defendant has not shown the applicability of the deposition subpoena for business records under CCP § 2020.410. It has none.

Defendant argues that the function of CCP § 94 (c) must allow for additional discovery. While subpoenas deuces tecum may be served on parties, the scope of that use is for production at trial, and not the opportunity to serve unlimited subpoenas on opposing parties. *Terry v. SLICO* (2009) 175 Cal.App.4th 352, 358. This is to say nothing of the discovery considerations and limitations affecting limited civil cases. The remedy of expanding discovery to exceed the 35 requests already tendered remained available to Defendant under CCP § 95. However, Defendant choose not to pursue this route. The Court cannot adopt Defendant's logic that all discovery devices apply without limitations, as to do so would obviate any purpose to the limitations imposed on discovery under CCP § 94. CCP § 94 does not provide the opportunity to conduct party discovery under CCP § 2020.410. Defendant's subpoena under CCP § 2020.410 was therefore incorrectly targeted to another party.

The Court therefore has no need to reach conclusions on the issue of whether discovery was timely, or the issue of good cause.

The subpoena notice being defective, compelling responses is inappropriate. The motion to compel is DENIED.

IV. Sanctions

Monetary sanctions are required where a party unsuccessfully makes a motion to compel. See CCP § 2025.480(j); CCP § 1987.2. As to Plaintiff's request for sanctions, Plaintiff requests an attorney rate of $300 per hour for 3.2 hours of work, and an additional $18.90 in costs. Plaintiff's rate is reasonable. Plaintiff's request for sanctions is **GRANTED** in the amount of $978.55.

Defendant's former counsel, Don A. Lesser of the Lesser Law Group, is to pay this amount within 30 days of this order.

V. Conclusion

The Motion to Compel is **DENIED**. Plaintiff is GRANTED sanctions in the amount of $978.55 as to Defendant's former counsel, Don A. Lesser of the Lesser Law Group.

Plaintiff'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).

5-7. SCV-272544, F&M Steel, Inc. v. Nordby Construction Co.

The Court requires clarity on a number of points. On August 15, 2024, Defendants averred that responses will be served "in advance of the hearing on the subject motions." Plaintiff in turn avers that as of August 21, 2024, no responses have been received. It is not clear whether responses were actually served prior to the Court's tentative ruling.

Assuming that Defendants comply with what they represented to the Court, the motions to compel are potentially moot. However, the Court maintains jurisdiction to determine the sufficiency of the responses. *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 410-411. The Court also maintains jurisdiction to determine whether sanctions are appropriate for the original responses, and the supplemental responses. *Ibid*. The Court has no briefing on the sufficiency of the supplemental responses, nor has Plaintiff had an opportunity to review them.

Therefore, the matter is continued to December 11, 2024, at 3:00 pm in Department 19.

If the supplementary responses resolve the issues of the sufficiency of the discovery responses, the Plaintiff is required to file a declaration with the Court at least 20 days in advance of hearing informing the Court of what issues have been resolved. The parties are encouraged to meet and confer on the issue of monetary sanctions. Should sanctions remain unresolved, they will be addressed on December 11, 2024.

If the supplemental responses fail to resolve the bases underlying the motions, the parties are required to meet and confer on the sufficiency of those responses. Should they remain at issue, Plaintiffs are required to serve and file an updated separate statement along with any supplemental briefing by November 13, 2024. Any opposition shall be served and filed by November 22, 2024. Replies are due December 3, 2024. If the Court does not receive supplemental briefing on the substantive nature of the discovery responses, it will rule on the substance of what is before it at that time.

8-9. SCV-273099, Gaye Martin v. Kaiser Foundation Hospitals, et al.

Plaintiffs Gaye Martin ("Plaintiff"), both individually and as successor-in-interest to decedent William Thomas Martin ("Decedent"), Tiffany Collver, the Estate of Jamie Freeman, Jaeger

Freeman and Dylan Martin, filed the currently operative first amended complaint ("FAC") in this action against defendants Kaiser Foundation Hospitals ("KFH"), Kaiser Foundation Health Plan ("Health Plan"), The Permanente Medical Group, Inc. ("Medical Group") Matthew N. Joseph, D.O ("Joseph")., Thuanthieu D. Ho, M.D., Allison Noesekabel, M.D., Colette McFadden, M.D., Quangminh D. Ly, M.D. ("Ly"), Tannia H. Joson, M.D. ("Joson"), Joe A. Saenz, M.D. ("Saenz"), Colin T. Iberti, M.D. ("Iberti"), Nanette L. Myers, M.D. ("Myers"), Claire E. White, M.D. ("White"), Elizabeth Au, M.D. ("Au"), (all together, "Defendants"), and Does 1-50, arising out of Defendants' care of Decedent. The FAC contains causes of action for: 1) wrongful death due to medical malpractice; and 2) Dependent Adult Abuse under the Elder Abuse and Dependent Adult Protection Act (the "Act"). This matter is on calendar for Defendants' demurrer to 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 well as Defendants' motion to strike pursuant to CCP § 435 et seq. The motion to strike is **GRANTED with leave to amend**. The Demurrer is **SUSTAINED with leave to amend in part and OVERRULED in part.**

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 of judicially noticeable matters, not extraneous facts. *See* CCP § 437. A motion to strike is also 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). And 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.

B. Pleading Punitive Damages and Other Damages

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 willfully 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).

For an employer to be liable for punitive damages for the actions of an employee, it must be shown that "the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice." Civ. Code § 3294(b). "With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation." *Ibid*. An employer's failure to discipline an employee after the employee commits an intentional tort, can be found to be ratification of that tortious conduct. *Iverson v. Atlas Pacific Engineering* (1983) 143 Cal.App.3d 219, 228. Where punitive damages are alleged against an employer under Civ. Code § 3294 (b), the knowledge on the part of the employer stands as their equivalent of oppression, fraud or malice otherwise required under Civ. Code § 3294 (a); no oppression, fraud or malice on the part of the employer need be shown. *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1154.

C. Elder Abuse

Elder abuse is defined under the Welfare and Institutions Code to include "(p)hysical abuse, neglect, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering" and "(t)he deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering." Welfare and Institutions Code ("WIC") § 15610.07 (a)(1-2). Neglect is "(t)he negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise." WIC § 15610.57 (a)(1). "Neglect includes, but is not limited to, all of the following: (1) Failure to assist in personal hygiene, or in the provision of food, clothing, or shelter. (2) Failure to provide medical care for physical and mental health needs. . . . (4) Failure to prevent malnutrition or dehydration. *Id*. at (b).

Courts have consistently held that neglect is more than simple or even gross negligence. *Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 405 ("*Carter*"). "'(N)eglect' . . . does not refer to the performance of medical services in a manner inferior to 'the knowledge, skill and care ordinarily possessed and employed by members of the profession in good standing' (*Citation*), but rather to the failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults, regardless of their professional standing, to carry out their custodial obligations." *Delaney v. Baker* (1999) 20 Cal.4th 23, 34 ("*Delaney*").

> The difficulty in distinguishing between “neglect” and “professional negligence” lies in the fact that some health care institutions, such as nursing homes, perform custodial functions *and* provide professional medical care. When, for example, a nursing home allows a patient to suffer malnutrition, defendants appear to argue that this was “professional negligence,” the inability of nursing staff to prescribe or execute a plan of furnishing sufficient nutrition to someone too infirm to attend to that need herself. But such omission is also unquestionably “neglect,” as that term is defined in former section 15610.57.

Delaney, supra, 20 Cal.4th at 34–35.

“(I)f the neglect is ‘reckless,’ or done with ‘oppression, fraud or malice,’ then the action falls within the scope of section 15657 and as such cannot be considered simply ‘based on ... professional negligence’ within the meaning of section 15657.2.” *Id.* at 35.

To adequately plead neglect under a cause of action for elder abuse plaintiff must plead that “defendant: (1) had responsibility for meeting the basic needs of the elder or dependent adult, such as nutrition, hydration, hygiene or medical care (Citation); (2) knew of conditions that made the elder or dependent adult unable to provide for his or her own basic needs (Citation); and (3) denied or withheld goods or services necessary to meet the elder or dependent adult's basic needs, either with knowledge that injury was substantially certain to befall the elder or dependent adult (if the plaintiff alleges oppression, fraud or malice) or with conscious disregard of the high probability of such injury (if the plaintiff alleges recklessness).” *Carter, supra,* 198 Cal.App.4th at 406. The plaintiff must also allege causation, the facts constituting neglect, and “the causal link between the neglect and the injury ‘must be pleaded with particularity,’ in accordance with the pleading rules governing statutory claims.” *Id.* at 406–407. “In order to obtain the Act's heightened remedies, a plaintiff must allege conduct essentially equivalent to conduct that would support recovery of punitive damages.” *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 789.

In elder abuse causes of action, attorney’s fees and costs are recoverable where the plaintiff is able to prove “neglect as defined in Section 15610.57 . . . and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse”. WIC § 15657. To permit recovery against a corporation under WIC § 15657, the standards under Civ. Code § 3294 (b) must be satisfied. WIC § 15657(c). “Notwithstanding (the Elder Abuse and Dependent Adult Civil Protection Act [the “Elder Abuse Act”]), any cause of action for injury or damage against a health care provider, as defined in Section 340.5 of the Code of Civil Procedure, based on the health care provider's alleged professional negligence, shall be governed by those laws which specifically apply to those professional negligence causes of action.” WIC § 15657.2.

D. 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). 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 for uncertainty pursuant to CCP § 430.10(f) will be sustained only where a defendant cannot reasonably respond, i.e. cannot reasonably determine what issues must be admitted or denied, or what counts or claims are directed against him or her. *Khoury v. Maly's of Calif., Inc.* (1993) 14 Cal.App.4th 612, 616; *see also A.J. Fistes Corp. v. GDL Best Contractors, Inc.* (2019) 38 Cal.App.5th 677, 695 ("A demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures.") (internal citation omitted). 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. *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.

E. 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 demurrer based on statute of limitations is argued from judicially noticed documents, the truth of dates within those documents is inadmissible hearsay and is not appropriate for judicial notice. *Richtek USA, Inc. v. uPI Semiconductor Corp.* (2015) 242 Cal.App.4th 651, 660-661. To sustain demurrer on such judicially noticed material is error. *Id*.

"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.

F. Wrongful Death

> To prevail against (defendant) on (a) claim of wrongful death, plaintiffs must prove "(1) a 'wrongful act or neglect' on the part of one or more persons [(that is, negligence)] that (2) 'cause[s]' (3) the 'death of [another] person.'" (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 390, 87 Cal.Rptr.2d 453, 981 P.2d 79.) A person may be liable either for (1) *his own* negligence, in which case he is *directly* liable for the resulting death, or (2) *someone else's* negligence, in which case he is *vicariously* liable because—in the eyes of the law—the other person's negligence is deemed to be his own. (E.g., *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 210, 115 Cal.Rptr.2d 853, 38 P.3d 1081; *de Villers v. County of San Diego* (2007) 156 Cal.App.4th 238, 247, 67 Cal.Rptr.3d 253.) A person acts negligently only if he "'had a duty to use due care'" and "'breached that duty.' " (*Brown, supra*, 11 Cal.5th at p. 213, 276 Cal.Rptr.3d 434, 483 P.3d 159.)

Musgrove v. Silver (2022) 82 Cal.App.5th 694, 705.

Put another way, "(t)he elements of the cause of action for wrongful death are the tort (negligence or other wrongful act), the resulting death, and the damages, consisting of the *pecuniary loss* suffered by the *heirs. Lattimore v. Dickey* (2015) 239 Cal.App.4th 959, 968 (emphasis original, internal quotations omitted).

To prevail on a claim for medical malpractice, a plaintiff must establish: 1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; 2) a breach of that duty; 3) a proximate causal connection between the negligent conduct and the resulting injury; and 4) loss or damages caused by the professional's negligence. *Gami v. Mullikin Medical Center* (1993) 18 Cal.App.4th 870, 877. "Mere error of judgment, in the absence of a want of reasonable care and skill in the application

of his medical learning to the case presented, will not render a doctor responsible for untoward consequences in the treatment of his patient [citations], for a doctor is not a 'warrantor of cures' [citation] or 'required to guarantee results' [citations]." *Custodio v. Bauer* (1967) 251 Cal.App.2d 303, 311-12 (internal citation omitted).

II. Request for Judicial Notice

Defendants have filed an unopposed request for judicial notice as to Plaintiffs complaint and FAC. It is GRANTED.

III. Analysis

A. Motion to Strike

Defendants seek to strike all references to recklessness, elder abuse and punitive damages from the Complaint, as Plaintiffs have failed to plead sufficient facts to support these contentions.

Defendants' first argument is that Plaintiffs have failed to meet the requirements under CCP § 425.13 for punitive damage claims in cases of medical malpractice. The Court notes that the FAC has a cause of action for dependent adult abuse. Therefore, Defendants; argument is entirely misplaced, as the requirements of CCP § 425.13 have no application to claims under the Act, even when asserted against healthcare providers. *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 783.

Defendants then argue that the FAC does not meet any of the requirements under Civ. Code § 3294. Plaintiffs argue in turn that Civ. Code § 3294 has no application, because Plaintiffs are seeking recovery of punitive damages under WIC § 15657. Plaintiffs' argument ignores the language of WIC § 15657, and the case law thereon. Plaintiffs simply do not meet the pleading requirements delineated by CCP § 3294 to plead punitive damages, and as a result, they fail to adequately plead the requirements under WIC § 15657.

First, as to Civ. Code § 3294 (a), drawn into application by *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, Plaintiffs must plead facts "essentially equivalent to conduct that would support recovery of punitive damages." *Id.* at 789. Plaintiffs must plead facts that support a finding of "recklessness, oppression, fraud, or malice". WIC § 15657. Additionally, Plaintiffs must adequately allege facts which constitute abuse under WIC § 15610.07. "'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur." *Delaney, supra,* 20 Cal.4th at 31. Not only this, the conduct alleged must not be medical in nature, instead relating to "attending to the basic needs and comforts of elderly or dependent adults". *Delaney, supra,* 20 Cal.4th at 34. Plaintiffs make many allegations regarding the intent of the Defendants, particularly that they failed to provide medical care as a matter of financial incentive. At demurrer, however dubious Plaintiffs' allegations of intent may be, we treat them as true. While this may be sufficient to meet the disregard intended to indicate recklessness, it does not itself indicate neglect. Plaintiffs must plead sufficient facts to indicate that the actions alleged are both neglect and that the neglect is reckless, or done with oppression, fraud or malice,

otherwise it is just garden variety malpractice. *Delaney, supra,* 20 Cal.4th at 34–35. Even allegations which rise to gross negligence are insufficient. *Carter, supra,* 198 Cal.App.4th at 405. The Court explores this issue further in section III (B) (3) below. Plaintiffs have failed to plead the elements of dependent adult abuse. As a result, the punitive damages are inadequately supported, because the underlying causes of action are infirm.

Furthermore, Plaintiffs must plead that Kaiser either “had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice” by an officer director or managing agent. Civ. Code, § 3294(b). Plaintiffs have not provided any pleading that the managing agents of Kaiser had any knowledge, involvement, or ratification in the events that lead to Decedent’s death. Without factual pleading of these elements, Plaintiffs have not pled punitive damages sufficiently under WIC 15657(c). The FAC makes no allegations to this effect. The punitive damages prayer is per se deficient in this regard.

As a result, the Court finds that the requests for recovery of punitive damages and attorneys’ fees under WIC § 15657 are inadequately supported by the facts. They are properly struck. The Motion to Strike is GRANTED with leave to amend.

B. Demurrer

1. Missing Defendants

As an initial matter, Plaintiffs has made no allegations against Ly, White, and Myers. Plaintiffs do allege agency in general terms between Defendants (See FAC Attachment 1.b.). However, such allegations are “egregious examples of generic boilerplate”, and properly disregarded as conclusory pleading. *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 134, fn. 12. As such, there are not alleged sufficient facts to constitute a cause of action against these defendants. Therefore, as to Ly, White, and Myers, the demurrer is SUSTAINED WITH LEAVE TO AMNED as to both causes of action on this basis.

2. Wrongful Death

As to the statute of limitations issues, Plaintiffs make two arguments. First, Plaintiffs request that the Court continue this hearing for Plaintiffs to conduct discovery previously compelled by court order. This is unpersuasive. The issue of this discovery has been obvious since the first demurrer was filed to the original complaint in October 2023. Plaintiffs have had an order from this Court to compel attendance at the depositions since May 15, 2024, over three months ago. Given that, continuing these motions again without ruling on the otherwise applicable merits appears to be both unjust and an inefficient use of Court resources. The Court does weigh the timing of the depositions when setting the time to amend below.

Plaintiffs’ other argument is that Plaintiffs did not have cause to suspect that they had a cause of action against Defendants, and they only came to that conclusion after discovering facts obscured by Defendants. See FAC Attachment 1.b. However, Plaintiffs only make these assertions in

vague and conclusory terms. Plaintiffs incorrectly assert that the burden is on Defendants to show the claims are time barred. The FAC clearly alleges that Decedent passed away due to the alleged negligence and abuse by Defendants on January 18, 2022. The original complaint was filed April 18, 2023. This factually exceeds the one-year statute of limitations for the first cause of action unless Plaintiffs meet the requirements for delayed discovery. The burden here is actually on Plaintiffs to plead facts sufficient to show diligence, not vague and conclusory allegations. *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806–808. (Plaintiffs taking advantage of the delayed discovery rule must plead "the time and manner of discovery *and* . . . the inability to have made earlier discovery despite reasonable diligence."). Plaintiffs have made no pleading as to the time and manner of discovery. Therefore, they have failed to adequately plead delayed discovery.

As to Plaintiff Jaeger Freeman, he is a minor and therefore subject to the three-year statute of limitations under CCP § 340.5. As to Jaeger Freeman, the statute of limitations is adequately pled, and therefore the demurrer is not sustained on statute of limitations grounds as to only the Plaintiff Jaeger Freeman.

3. Elder Abuse

Defendants' averment that the one-year statute of limitations under CCP § 340.5 applies to the elder abuse cause of action by nature of its "gravamen" is unavailing. Defendants provide no authority showing that the Court may shoehorn Plaintiffs' pled cause of action under a label which would result in it being time barred. If Plaintiffs can plead the elements of dependent adult abuse, they may avail themselves of the cause of action, regardless of Defendants' status as health care providers. See, e.g., *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 783.

As is covered above, to adequately plead neglect, the requirement is not to plead the provision of poor or inferior care, but the failure to provide basic needs and comforts to elder or dependent adults. *Delaney, supra,* 20 Cal.4th at 34. This failure to provide care must ring in terms that are "essentially equivalent to conduct that would support recovery of punitive damages." *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 789. The allegations here allege the final result of alleged neglect without alleging a course of conduct that supports any finding of recklessness as required to meet dependent adult abuse claims. Plaintiffs allege that antibiotics were "finally started" for Decedent on January 16, 2022. Plaintiffs also allege that Decedent was administered morphine on January 17, 2022, "despite its well known propensity to aggravate respiratory depression". Plaintiffs allege that the hospitalist assigned to Decedent was "inexperienced". FAC Attachment 1.a. This is clearly an allegation of **improper or untimely care**, as opposed to **failure to provide care**. The facts alleged here do not rise to conduct which amounts to a failure to provide care.

The Fourth District Court of Appeal provided the following summation of cases showing allegations sufficient to constitute neglect, rather than substandard medical care.

> Examples of cases involving conduct sufficiently egregious to warrant the award of enhanced remedies under the Elder Abuse Act include the following:
> • A skilled nursing facility: (1) failed to provide an elderly man suffering from Parkinson's disease with sufficient food and water and necessary medication; (2) left him unattended and unassisted for long periods of time; (3) left him in his own excrement so that ulcers exposing muscle and bone became infected; and (4) misrepresented and failed to inform his children of his true condition. (*Covenant Care, supra,* 32 Cal.4th at p. 778 [11 Cal.Rptr.3d 222, 86 P.3d 290].)
> • An 88–year–old woman with a broken ankle "was frequently left lying in her own urine and feces for extended periods of time"; and she developed pressure ulcers on her ankles, feet and buttocks that exposed bone, "despite plaintiff's persistent complaints to nursing staff, administration, and finally, to a nursing home ombudsman." (*Delaney, supra,* 20 Cal.4th at pp. 27, 41 [82 Cal.Rptr.2d 610, 971 P.2d 986].)
> • A facility caring for a dependent adult with a known condition causing progressive dementia, requiring nutrition and hydration through a gastrostomy tube, and subjecting her to skin deterioration, ignored a medical care plan requiring the facility to check the dependent adult's skin on a daily basis and failed to notify a physician when pressure ulcers and other skin lesions developed. (*Sababin, supra,* 144 Cal.App.4th at pp. 83–87, 90 [50 Cal.Rptr.3d 266].)
> • A 78–year–old man admitted to a skilled nursing facility "was abused, beaten, unlawfully restrained, and denied medical treatment." (*Smith, supra,* 133 Cal.App.4th at p. 1512 [35 Cal.Rptr.3d 612].)
> • The staff of a nursing home: (1) failed to assist a 90–year–old, blind and demented woman with eating; (2) used physical and chemical restraints to punish the elder and prevent her from obtaining help; and (3) physically and emotionally abused the elder by bruising her, "withholding food and water, screaming at her, and threatening her." (*Benun v. Superior Court* (2004) 123 Cal.App.4th 113, 116–117 [20 Cal.Rptr.3d 26] (*Benun*).)
> • A skilled nursing facility: (1) failed to provide adequate pressure relief to a 76–year–old woman with severe pain in her left leg and identified as at high risk for developing pressure ulcers; (2) dropped the patient; (3) left "her in filthy and unsanitary conditions"; and (4) failed to provide her the proper diet, monitor food intake and assist with eating. (*Country Villa Claremont Healthcare Center, Inc. v. Superior Court* (2004) 120 Cal.App.4th 426, 430, 434–435 [15 Cal.Rptr.3d 315].)
> • A physician "conceal[ed] the existence of a serious bedsore on a nursing home patient under his care, oppose[d] her hospitalization where circumstances indicate[d] it [was] medically necessary, and then abandon[ed] the patient in her dying hour of need." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 973 [95 Cal.Rptr.2d 830] (*Mack*).)

Carter v. Prime Healthcare Paradise Valley LLC (2011) 198 Cal.App.4th 396, 405–406.

Plaintiffs aver that "negligence and neglect are similar concepts." Plaintiffs' Opposition to Demurrer, pg. 5:26-27. This is not persuasive based on the applicable caselaw. Neglect falls within a particular category of refusal to provide basic necessities to an elder or dependent adult. Not every negligent act may meet the standard for neglect simply because the act was undertaken recklessly. Plaintiffs accuse Defendants of providing some care to Decedent, but failing to take cultures, not prescribing Remdesivir and Tocilizumab, delaying transfer to the ICU, administering antibiotics, and negligent administration of morphine for pain management despite potential side effects. The Court cannot read this as being the type of allegations which constitute neglect. As outlined above, neglect typically applies to the provision of basic necessities, and where it is applied to medical care, the facts must meet a level of egregiousness that is not present in the instant case. It is clear based on the allegations that Defendants provided various types of care to Decedent, but that care was unnecessarily delayed or restricted in scope. This does not appear to be a failure to provide care. The facts not rising to neglect, Plaintiffs have failed to allege a cause of action.

Therefore, Defendants' demurrer to the second cause of action is SUSTAINED with leave to amend.

IV. Leave to Amend

This is the first demurrer ruled upon by the Court. Based on the deficiencies identified, the Court cannot presume at this juncture that Plaintiffs cannot amend sufficiently to cure the defects. Leave to amend is properly granted. As to the time to amend, the Court weighs Plaintiffs' pending discovery, and believes that longer than typical time to amend is proper to allow Plaintiffs to obtain compliance with the Court's prior discovery order. Therefore, Plaintiffs have 40 days from notice of entry of this order to file their amended complaint.

V. Conclusion

Based on the foregoing, the Motion to Strike is **GRANTED WITH LEAVE TO AMEND**.

As to Ly, White, and Myers, the demurrer is SUSTAINED WITH LEAVE TO AMEND as to both causes of action. As to Plaintiffs with the exception of Jaeger Freeman, the demurrer to the first cause of action is SUSTAINED WITH LEAVE TO AMEND. As to Jaeger Freeman, the Demurrer is OVERRULED as to the first cause of action, except as to Ly, White, and Myers. As to the second cause of action, the demurrer is SUSTAINED WITH LEAVE TO AMEND.

Plaintiffs shall file their amended complaint within forty (40) days of notice of entry of the order.

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).

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