TENTATIVE RULINGS
LAW & MOTION CALENDAR
Wednesday, September 16 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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PLEASE NOTE: The Court's Official Court Reporters are "not available" within the meaning of California Rules of Court, Rule 2.956, for court reporting of civil cases.

1. 24CV01352, Looney v. Eighty Five 75, LLC

Plaintiff Gary E. Looney dba Collectronics of California ("Plaintiff"), assignee of Young's Market Company, obtained a default judgment against defendants Eighty Five 75, LLC ("Defendant"), Errol Roussel ("Guarantor", together with Defendant, "Defendants"). Plaintiff requested Receiver Landon McPherson ("Receiver") be appointed to take control of Defendant's liquor license number 511764 and transfer it, which was granted. The Receiver has sold the liquor license and now seeks discharge. This matter is on calendar for the Receiver's motion to approve his final account and report and for discharge.

The Motion is accompanied by a proof of service showing that service was made on Plaintiff and Defendants and no oppositions were filed. The unopposed Motion is **DENIED WITHOUT PREJUDICE**.

I. Governing Law

Cal. R. Ct. ("CRC") 3.1184(a) provides that a receiver must present by noticed motion or stipulation of all parties: 1) a final account and report; 2) a request for discharge; and 3) a request for exoneration of the receiver's surety. No memorandum of points and authorities is required unless ordered by the court, notice must be given to "every person or entity known to the receiver to have a substantial, unsatisfied claim that will be affected by the order or stipulation, whether or not the person or entity is a party to the action or has appeared in it," and if any allowance of compensation for the receiver is claimed, "it must state in detail what services have been performed by the receiver or the attorney and whether previous allowances have been made to the receiver or attorney and the amounts." CRC 3.1184(b)-(d). "A receivership terminates upon completion of the duties for which the receiver was appointed; or at any other time upon court order." Ahart, Cal. Practice Guide: Enforcing Judgments and Debts (The Rutter Group 2020) ¶ 4:940. The Receiver is entitled to seek compensation for services rendered. CRC 3.1183, 3.1184. The amount of compensation awarded to a receiver is within the sound discretion of the trial court and will not be reversed on appeal in the absence of an abuse of discretion. *Melikian v. Aquila, Ltd*. (1998) 63 Cal.App.4th 1364, 1368.

II. Factual Application

The Court has reviewed the Receiver's motion and cannot locate an accounting of the Receiver's time or expenses. Accordingly, the Court lacks the necessary information to approve the Receiver's Final Report. The Court notes that Receiver's Ex Parte for Priority Payment (which is within the record) avers time expended of 28.75 hours but provides no billing statements thereon. The Receiver opines $1,832.47 in "hard costs", but the only costs articulated and supported by evidence are the bond costs ($100), payment for escrow ($500) and one attorney hour ($450), totaling $1,050. This falls short of what the Court would expect in final discharge of the Receiver.

The Motion for Final Approval is therefore DENIED without prejudice for failure to present an accounting.

The Receiver 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. 25CV00200, Baldinger v. Carrington Mortgage Services, LLC

Defendants Carrington Mortgage Service's and Compu-Link Corporation (together as "Defendants") demur to each of the 12 causes of action in Plaintiff Tarney Baldinger's, Trustee of the Tarney Baldinger 2000 Trust Created by Declaration of Trust, Dated August 15, 2000 ("Plaintiff") Second Amended Complaint ("SAC").

Defendants' Demurrer to Plaintiff's SAC is **SUSTAINED** in its entirety. Leave to amend is granted only as to the Second, Third, Fourth, Fifth, Sixth, Ninth, and Tenth Causes of Action. Leave to amend is denied as to the First, Seventh, Eighth, Eleventh, and Twelfth Causes of Action.

Defendants' request for judicial notice is **GRANTED**, subject to the limitations stated below.

I. Factual and Procedural Background

Plaintiff alleges claims arising from the nonjudicial foreclosure sale of real property located at 18044 Poplar Avenue, Sonoma, California (the "Property"). (SAC, ¶ 22.) Plaintiff alleges that she acquired the Property in 1996, has used it as her residence, and was 79 years old when she commenced this action. (SAC, ¶¶ 23—25.)

On July 25, 2017, Plaintiff executed an Adjustable Rate Deed of Trust securing a reverse mortgage loan with a maximum principal of $735,000.00. (SAC, ¶¶ 15, 28.) The Deed of Trust was recorded on August 1, 2017. (SAC, ¶ 25.) Plaintiff alleges financial hardship and cancellation of her homeowner's insurance caused her to default on property charges. (SAC, ¶ 29.) She was referred to foreclosure in December 2023 then sought a repayment plan. (SAC, ¶¶ 30—31.)

On January 29, 2024, an assignment to Defendant Carrington Mortgage Services, LLC ("Defendant Carrington"), a substitution of Defendant Clear Recon Corp. as trustee ("Defendant Clear Recon"), and a Notice of Default were recorded at the Sonoma County Recorder's Office. (SAC, ¶¶ 35—37.) The Notice of Default stated that $441,631.49 was due based on unpaid property taxes or insurance. (SAC, ¶¶ 29, 37; RJN, Exhibit 2.) Plaintiff alleges that Carrington sent her a Repayment Plan Review Request in January 2024, but never assigned a point of contact. (SAC, ¶ 32.) Between February and April 2024, she communicated with several representatives about insurance, financial documents, and repayment options. (SAC, ¶¶ 33, 39—42.) On April 22, 2024, Defendant Carrington allegedly told her that no sale date had been scheduled. (SAC, ¶ 42.)

Defendant Clear Recon recorded a Notice of Trustee's Sale on May 1, 2024, setting a June 12 sale and stating an unpaid balance of $456,186.53. (SAC, ¶ 43.) Defendant Carrington allegedly agreed on May 2 to review Plaintiff's financial information. (SAC, ¶ 45.) Plaintiff submitted completed materials on May 3. (SAC, ¶ 46.) Defendant Carrington confirmed receipt on May 6, and it approved a Repayment Plan Agreement ("RPA") on or about May 8, 2024. (SAC, ¶¶ 47,48.)

The RPA allegedly required an initial certified payment of $265.15 with the executed agreement and monthly payments of $265.15 over 46 months toward an advance balance of $12,196.56. (SAC, ¶ 178.) It further provided that prior acceleration would be revoked upon execution and foreclosure would be deferred while Plaintiff complied. (SAC, ¶ 178.) Plaintiff alleges that Defendant Carrington claimed to have mailed the RPA in early May, but she did not receive it despite repeated requests. (SAC, ¶ 49.) After Carrington directed her to use materials available online, she sent a $265.00 cashier's check on May 31. (SAC, ¶¶ 40, 52.) Defendant Carrington received but rejected the check because she used the wrong form, claimed to have returned it, but Plaintiff allegedly never received it. (SAC, ¶¶ 54—46.) On June 10, Plaintiff obtained the RPA by email and wired $528.30 on June 11 to cover the June and July installments. (SAC, ¶¶ 57—58.) Defendant Carrington allegedly confirmed that the wire covered both installments and that the next payment was due in August. (SAC, ¶¶ 59—60.)

Plaintiff's SAC materially differs from the Original Complaint. The Original Complaint alleged that Plaintiff received the RPA on May 8, 2024, incorrectly established automatic payments, missed two $265.00 payments during the summer, and “ultimately missed subsequent payments on the repayment agreement.” (*E.g.* Compl., ¶¶ 42, 64, 71, 89, 100, 135, 142, 147, 166, 178, 198, 227, 298, 310, 326, 353.) It quoted Plaintiff as stating: “Apparently, I had not [set up automatic payments] correctly,” “I was not aware that over the summer I had missed two payments of $265,” and “To lose one’s house over two missed payments of $265!” (Compl., ¶ 142.) The SAC instead alleges delayed receipt of the RPA, timely tender, acceptance, and application of the $528.00 wire, and a default created by Defendant Carrington’s payment handling. (*E.g.* SAC, ¶ 69, 77, 84, 86, 147, 149, 155, 164, 165, 180, 183, 195, 196.)

The June 12 sale was postponed to July 17. (SAC, ¶ 61.) Although Defendant Carrington’s June 26 letter stated that the next payment was due July 5, Defendant Carrington allegedly confirmed by telephone on July 2 that the wire covered June and July and that no further payment was due until August 5. (SAC, ¶¶ 62, 63.) Defendant Carrington nevertheless issued a First Default Notice on July 15 and the sale was postponed to September 18. (SAC, ¶¶ 64, 65.) Defendant Carrington later stated that it had not received the July or August payments. (SAC, ¶ 66.) The SAC contends that on August 15, however, a representative told Plaintiff not to worry about automated default notices and provided instructions for future payments. (SAC, ¶ 67.)

The SAC further contends that Defendant Carrington applied the $528.30 wire to reduce the advance balance from 412,196.56 to $11,668.26, but continued reporting Plaintiff in default. (SAC, ¶¶ 73.) On August 21, Defendant Carrington notified Plaintiff of an additional $3,512.76 in advance, increasing the claimed default balance to $15,181.02. (SAC, ¶ 74.) Plaintiff characterizes Defendant Carrington’s rejection of the cashier’s check, treatment of the wire, conflicting instructions, and additional advances as manufacturing a default, rather than responding to borrower nonperformance. (SAC, ¶¶ 69, 77.)

Both the Original Complaint and SAC aver Plaintiff traveled to Ukraine from August 26 through October 8, 2024. (Compl., ¶ 78; SAC, ¶ 88.) During her absence, Defendant Carrington sent a September 3 letter stating that the RPA was more than 60 days delinquent, was considered broken, and required immediate payment of $15,181.02. (SAC, ¶ 89.) The Property was sold to Defendant Carrington on September 18, 2024 for $476,935.62, and the Trustee’s Deed Upon Sale was recorded on November 12, 2024. (SAC, ¶ 92.) Plaintiff was served with a Notice to Quit on January 2, 2025. (SAC, ¶ 103.)

Plaintiff filed the Original Complaint on January 8, 2025. On October 27, 2025, the Court sustained Defendants’ demurrer with leave to amend, relying materially on Plaintiff’s allegations that she had incorrectly established automatic payments and missed two RPA payments. Plaintiff filed the operative SAC on April 7, 2026. The SAC pleads the same 12 causes of action previously asserted: 1) Violations of Civil Code section 2923.6; 2) Violations of CC section 2923.7; 3) Violations of CC section 2924.11; 4) Wrongful Foreclosure; 5) Breach of Contract; 6) Breach of the Implied Covenant of Good Faith and Fair Dealing; 7) Slander of Title; 8) Elder Abuse; 9) Violations of the Rosenthal Act; 10) Unfair Business Practices; 11) Fraud; and 12) Negligent Misrepresentation. Defendants’ demurrer to the SAC was filed on May 11, 2026.

II. Governing Law

A. Judicial Notice

On demurrer, the Court may consider matters judicially noticeable under Evidence Code sections 452 and 453. The court may take judicial notice of facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. (Evid. Code § 452(h).) Recorded instruments may be notices as to their existence, authenticity, recordation, contents, and clear legal effect, but not as proof of disputed factual recitals or contested interpretations. (*Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117.) "However, the fact that a court may take judicial notice of a recorded deed, or similar document, does not mean it may take judicial notice of factual matters stated therein." (*Poseidon Development, Inc.*, *supra*, 152 Cal.App.4th 1106 at 1117; *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079, 1102.)

The same limitation applies to court records. The Court may notice the existence, filing, contents, and procedural effects of pleadings and orders, but not the truth of hearsay allegations merely because they appear in a court file. (*Larson v. UHS of Rancho Springs, Inc.* (2014) 230 Cal.App.4th 336, [trial court properly judicially noticed complaints, demurrers, rulings on demurrers, and a dismissal from a prior action under Evidence Code section 452(d).].) Judicial notice therefore may not be used to resolve disputed facts on demurrer. (*Ibid*.)

These limitations do not prevent the Court from examining Plaintiff's prior pleadings under the sham pleading doctrine. The Court may consider whether the SAC omits or contradicts prior allegations without an adequate explanation. (*Larson, supra,* 230 Cal.App.4th 336 at 343.)

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. (Code Civ. Proc. § 430.30(a).) A party may demur to a pleading when there is another action pending between the same parties on the same cause of action. (Code Civ. Proc. § 430.10(c).) 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.) 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. (*The Swahn Group, Inc. v. Segal* (2010) 183 Cal.App.4th 831, 852.)

C. Sham Pleadings

Although generally after an amended pleading is filed, courts will disregard the original pleading, they will not do so “where an amended complaint attempts to avoid defects set forth in a prior complaint by ignoring them.” (*Kenworthy v. Brown* (1967) 248 Cal.App.2d 298, 302.) A plaintiff may not avoid demurrer by omitting harmful factual allegations, replacing them with contradictory allegations, or suppressing facts that defeat the amended theory without providing an adequate explanation. When a material inconsistency is unexplained, the Court may disregard the inconsistent allegation and read the operative pleading together with the prior admission. (*Ibid*.)

The doctrine applies equally to pleadings made on information and belief when a party attempts to retract or contradict a prior material admission without a factual basis for doing so. (*Womack v. Lovell* (2015) 237 Cal.App.4th 772, 786—787.) Its purpose is truthful pleading, not the mechanical preservation of every imprecise or immaterial statement. (*Larson*, *supra*, 230 Cal.App.4th 336, 344.) A plaintiff remains free to correct an allegation resulting from mistake or inadvertence, clarify an ambiguity, or allege facts learned through further investigation, provided the plaintiff supplies a plausible explanation for the change. (*Larson*, *supra*, 230 Cal.App.4th 336, 344.)

III. Analysis

A. Defendants’ Request for Judicial Notice

Defendants request judicial notice of several recorded instruments regarding the Property, the Court’s prior order, and Plaintiff’s Original Complaint. Plaintiff objects to these. Defendants request for judicial notice is **GRANTED** subject to the following limitations. (*See Poseidon Development, Inc.*, *supra*, 152 Cal.App.4th 1106 at 1117.)

The Court takes judicial notice of:

1. The existence, authenticity, contents, and clear legal effect, if any, of the Deed of Trust, Notice of Default, Notice of Trustee’s Sale, and Trustee’s Deed Upon Sale, but not the truth of disputed recitals concerning default, amounts due, mailing or receipt, payment application, or compliance with the RPA.
2. The existence, filing, contents, and procedural effect of the Original Complaint and the Court’s October 27, 2025 order. The Original Complaint may be considered under the sham pleading doctrine and the Court’s prior order may be considered for its rulings and procedural effect.

Plaintiff’s objection is **SUSTAINED** to the extent Defendants seek judicial notice of disputed factual assertions and otherwise **OVERRULED**.

B. Defendants’ Demurrer to Plaintiff’s Second Amended Complaint

i. Application of the Sham Pleading Doctrine

"A pleader may not attempt to breathe life into a complaint by omitting relevant facts which made his previous complaint defective." (*Hill Transp. Co. v. Southwest Forest Industries, Inc.* (1968) 266 Cal.App.2d 702, 713.) Here, the SAC omits the original Complaint's admissions that Plaintiff incorrectly established automatic payments, missed two RPA installments, and "ultimately missed those subsequent payments." (*Cf.* Compl., ¶¶ 42, 64, 71, 89, 100, 135, 142, 147, 166, 178, 198, 227, 298, 310, 326, 353.) It replaces those admissions with allegations of timely tender, performance, excuse, and a "manufactured" default. (*E.g.* SAC, ¶ 69, 77, 84, 86, 147, 149, 155, 164, 165, 180, 183, 195, 196.) Yet neither the SAC nor Plaintiff's opposition to the instant motion identifies which prior allegation was mistaken, explains why Plaintiff previously attributed the change, or accounts for the August and September 2024 installments. Plaintiff highlights the omission, stating that the SAC removed "the factual predicate underlying the Court's prior ruling" without further explanation. (Opp., pg. 6:18—20.)

The SAC also changes the alleged RPA receipt date from May 8 to June 10, 2024 without explaining whether the earlier date was erroneous or what facts support the later date. (*Cf.* SAC, ¶ 57; *cf*. Compl., ¶ 64.) Because these unexplained changes materially affect Plaintiff's statutory and reliance theories, the Court disregards the conflicting allegations of performance, manufactured default, and delayed receipt. (*See Kenworthy*, *supra*, 248 Cal.App.2d 298 at 302.) The new allegations concerning specific communications and payments are not disregarded merely because they are new. They do not, however, reconcile or supersede the prior admissions without a direct factual explanation. (*See Larson*, *supra*, 230 Cal.App.4th 336, 344.) Leave to amend is evaluated claim by claim. (*Ibid*.)

ii. First Cause of Action: Violation of Civil Code Section 2923.6

The demurrer to the First Cause of Action is **SUSTAINED without leave to amend**.

Civil Code section 2923.6(c) prohibits a mortgage servicer from recording a notice of sale or conducting a trustee's sale while a complete first-lien loan modification application is pending. The SAC alleges that the Notice of Trustee's Sale was recorded on May 1, 2024, but Plaintiff did not submit her completed application materials until May 3. (SAC, ¶¶ 46, 117.) Defendant Carrington confirmed receipt on May 6 and approved the RPA around May 8. (SAC, ¶¶ 81, 120.) Plaintiff's earlier communications and request for assistance do not establish that a complete application was pending on May 1. Nor does Defendant Carrington's later approval overcome the SAC's specific chronology.

By the September 18, 2024 sale, Defendant Carrington had reviewed the application and approved and executed the RPA. The later dispute over payments and termination of the RPA therefore does not establish an application remained pending.

iii. Second Cause of Action: Violation of Civil Code Section 2923.7

The demurrer to the Second Cause of Action is **SUSTAINED with leave to amend**.

Civil Code section 2923.7 requires a servicer to establish a single point of contact after a borrower requests a foreclosure prevention alternative. For purposes of this section, "single point of contact" means an individual or team of personnel each of whom has the ability and authority to perform the responsibilities described in subdivisions (b) to (d), inclusive. (Civ. Code § 2923(e).)

The SAC alleges that Plaintiff spoke with multiple Carrington representatives who gave inconsistent information about the RPA, payments, and account status. (SAC, ¶ 134.) The claim remains deficient because the alleged material harm depends on the SAC's unexplained reversal of Plaintiff's prior admissions that she incorrectly established automatic payments and missed two installments. Without an explanation, the Court disregards the conflicting allegation that the lack of a single point of contact caused Defendant Carrington to manufacture the default. (*See Kenworthy*, *supra*, 248 Cal.App.2d 298 at 302.)

The remaining allegations do not connect the asserted violation to material pre-sale harm. Plaintiff obtained the RPA, transmitted funds, and secured multiple sale postponements. She does not allege how the lack of a single point of contact caused her to miss a requirement, prevented proper crediting of a payment, deprived her of accurate information, or otherwise disrupted the foreclosure-prevention process.

iv. Third Cause of Action: Violation of Civil Code Section 2924.11

The demurrer to the Third Cause of Action is **SUSTAINED with leave to amend**.

Plaintiff alleges that Defendant Carrington violated Civil Code sections 2924.11(c) and 2924.11(d) by failing to provide a fully executed RPA and failing to rescind the Notice of Default or cancel the sale after execution of a permanent foreclosure prevention alternative. Both of these Civil Code sections outline procedures that must be followed depending on when a foreclosure prevention plan is approved, pre-or-post recordation of a notice of default.

Plaintiff's theory under subdivision (d) presently fails because the SAC's allegations of performance and excusal contradict her prior admission that she missed two RPA payments without explaining the inconsistency. The SAC also does not establish that the 46-month RPA permanently resolved the default rather than conditionally deferred foreclosure while Plaintiff complied.

Plaintiff's theory under subdivision (c) presently fails because Plaintiff alleges that she received, executed, returned, and acted under the RPA, but does not allege material harm from the absence of a countersigned copy.

v. Fourth Cause of Action: Wrongful Foreclosure

The demurrer to the Fourth Cause of Action is **SUSTAINED with leave to amend**.

Wrongful foreclosure requires an illegal, fraudulent, or willfully oppressive sale, resulting prejudice, and tender of the secured debt or a valid excuse. (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 112.) The SAC does not adequately plead these elements. Its theory that Plaintiff performed under the RPA and Defendant Carrington manufactured a default contradicts the Original Complaint's unexplained admission that Plaintiff missed payments. (*See Kenworthy*, *supra*, 248 Cal.App.2d 298 at 302.). These inconsistencies in the factual allegations made between the pleadings may prove fatal, nonetheless, the Court is providing one last opportunity in Plaintiff can alleged an adequate explanation.

The SAC likewise does not show that Defendants' conduct, rather than Plaintiff's admitted nonpayment, caused the sale. Nor does Plaintiff's allegation that she "could tender" the reinstatement amount constitute actual tender. (SAC, ¶ 169.) Her asserted excuse depends on the disregarded allegation that Defendant Carrington prevented performance.

vi. Fifth Cause of Action: Breach of Contract

The demurrer to the Fifth Cause of Action is **SUSTAINED with leave to amend**.

The SAC alleges the existence of the RPA and identifies specific provisions Defendant Carrington allegedly breached, including wrongful rejection of payments, failure to implement the RPA, issuance of contradictory default notices, and improper termination of the RPA. The claim fails, however, because Plaintiff has not adequately alleged her own performance or excuse for nonperformance. The SAC alleges that Plaintiff "fully performed all material obligations" under the RPA and that "any alleged nonperformance by Plaintiff was excused because Carrington's wrongful rejection of payments, failure to return funds, misapplication of payments, and contradictory servicing conduct prevented Plaintiff's performance." (SAC, ¶¶ 82, 84, 87, 151, 179, 181, 184.) These allegations directly contradict the Original Complaint's admission that Plaintiff had missed RPA payments. (*Cf*. Compl., ¶¶ 42, 64, 71, 89, 100, 135, 142, 147, 166, 178, 198, 227, 298, 310, 326, 353.) Without an adequate explanation for this material inconsistency, the Court disregards the consistent performance and excuse allegations under the sham pleading doctrine. (*See Kenworthy*, *supra*, 248 Cal.App.2d 298 at 302.)

The SAC does not allege that Plaintiff made or tendered the August 2024 or September 2024 RPA payments. Even if the Court accepts the allegations concerning the May 31 cashier's check and the June 11 wire payment, the SAC does not account for all installments due through the September 18, 2024 foreclosure sale. (SAC, ¶¶ 52, 71.)

The alleged breaches by Defendant Carrington also depend substantially on the performance theory. If Plaintiff did not perform under the RPA, as the Original Complaint admitted, then Defendant Carrington's decision to terminate the RPA and proceed with foreclosure would not constitute a breach.

vii. Sixth Cause of Action: Breach of the Implied Covenant of Good Faith and Fair Dealing

The demurrer to the Sixth Cause of Action is **SUSTAINED with leave to amend**.

The implied covenant of good faith and fair dealing is read into every contract and prevents a party from unfairly frustrating the other party's right to receive the contract's benefits. A breach of the implied covenant claim requires the same foundational showing of a plaintiff's own performance or excuse as a breach of contract claim. The pleading is deficient if it merely relabels the same failure to credit payments as both express breach and breach of the implied covenant, while seeking the same relief. (*Careau & Co. v. Security Pacific Business Credit, Inc*. (1990) 222 Cal.App.3d 1371, 1395.) It should allege the relevant contractual benefit, the discretion that Defendant Carrington possessed, how Defendant used that discretion unfairly, and how that conduct frustrated Plaintiff's reasonable expectations under the RPA.

Here, Plaintiff's implied covenant claim duplicates the breach of contract claim insofar as both allege that Defendant Carrington failed to apply payments as the RPA expressly required. Plaintiff does not identify any distinct exercise of contractual discretion that frustrated an RPA benefit without violating an express term.

Additionally, the allegations depend on the theory that Plaintiff performed or was excused from performing under the RPA, which materially contradicts the prior admission of missed payments in the Original Complaint. Once the inconsistent performance allegations are disregarded, the SAC does not establish that Defendant Carrington unfairly frustrated Plaintiff's contractual rights as opposed to enforcing them following Plaintiff's own default. (*See Kenworthy*, *supra*, 248 Cal.App.2d 298 at 302.)

viii. Seventh Cause of Action: Slander of Title

The demurrer to the Seventh Cause of Action is **SUSTAINED without leave to amend**.

Plaintiff's Seventh Cause of Action depends on allegations that Defendants engaged in violations asserted in the 1st through 3rd causes of action. The Court has now determined that the 1st cause of action is no longer viable. Plaintiff is presently allowed a final opportunity to amend the 2nd and 3rd causes of action. However, the Court cannot envision how Plaintiff could even amend the remaining causes of action to include any allegations that would then support a slander of title claim. The Court previously allowed Plaintiff leave to amend all causes of action including the present one. Despite this 3rd opportunity to amend to allege sufficient facts to establish wrongful disparagement of title in a specific manner, Plaintiff continues to resort to conclusory statements.

Plaintiff continues to allege that the RPA revoked acceleration, Plaintiff performed or was excused, and Defendants nevertheless foreclosed. These allegations conflict with the Original Complaints unexplained admission that Plaintiff missed RPA payments and are disregarded under the sham pleading doctrine. (*See Kenworthy*, *supra*, 248 Cal.App.2d 298 at 302.) The SAC therefore does not establish falsity or lack of justification. Furthermore, the SAC's conclusory allegation of malice does not show ill will, knowing falsity, or reckless disregard. (SAC, ¶ 205.) A dispute over payment application, default status, or the RPA's meaning is insufficient.

Finally, Plaintiff alleges loss of the Property and litigation expenses, not a separate pecuniary loss caused by impaired vendibility. (SAC, ¶ 207) The claim thus duplicates wrongful foreclosure. Because Plaintiff has twice amended without curing these facts or identifying additional facts that could do so, further amendment would be futile.

ix. Eighth Cause of Action: Elder Abuse

The demurrer to the Eighth Cause of Action is **SUSTAINED without leave to amend**.

Financial elder abuse requires the taking, secreting, or obtaining of an elder's property for wrongful use or with intent to defraud. (Welf. & Inst. Code § 15610.30.)

Plaintiff indirectly alleges that Defendants foreclosed she informed Defendant Celink, authorized agent for Defendant Carrington, that she was 'officially elderly'. (SAC, ¶219.) As a result Plaintiff now stands to lose her primary residence. (SAC, ¶220.) Those facts do not establish elder-directed exploitation, undue influence, fraud, or wrongful use. The claim also depends on the theory that Plaintiff performed under the RPA and Defendant Carrington manufactured the default. Those allegations conflict with the Original Complaint's unexplained admission that Plaintiff missed two payments and are disregarded under the sham pleading doctrine. (*See Kenworthy*, *supra*, 248 Cal.App.2d 298 at 302.) The remaining allegations show only enforcement of foreclosure rights following default.

Plaintiff has articulated no method by which they could remedy this defect, and accordingly leave to amend is denied.

x. <u>Ninth Cause of Action: Violation of the Rosenthal Act</u>

The demurrer to the Ninth Cause of Action is **SUSTAINED with leave to amend**.

Plaintiff alleges that Defendant Carrington gave conflicting information about payment receipt, application, account status, and the amount due. The claim fails because its falsity theory depends on allegations of performance and a manufactured default that conflict with the original Complaint's unexplained admission that Plaintiff missed two RPA payments. (*See Kenworthy*, *supra*, 248 Cal.App.2d 298 at 302.) The SAC also fails to identify each actionable communication, explain why it was false when made, and connect it to a specific injury.

xi. <u>Tenth Cause of Action: Unfair Business Practices</u>

The demurrer to the Tenth Cause of Action is **SUSTAINED with leave to amend**.

Plaintiff's Tenth Cause of Action is insufficient because it is entirely derivative of other insufficiently plead causes of action. The alleged unlawful practices depend on the same core factual theory: that Plaintiff performed under the RPA and Defendants manufactured the default through wrongful rejection and misapplication of payments. As discussed above, those allegations contract the prior admission of missed payments and are disregarded under the sham pleading doctrine. (*See Kenworthy*, *supra*, 248 Cal.App.2d 298 at 302.)

Leave to amend is granted, but only to the extent the UCL claim is based on causes of action for which leave to amend has been granted or independently plead unfair or fraudulent conduct supported by consistent factual allegations. The amended claim may not rely on causes of action for which leave to amend has been denied.

xii. <u>Eleventh Cause of Action: Fraud</u>

The demurrer to the Second Cause of Action is **SUSTAINED without leave to amend**.

Fraud requires a knowingly false representation of material fact, intent to deceive, justifiable reliance, and resulting damage. Fraud against a corporation must be plead with particularity, including the speaker, authority, date, statement, knowledge of falsity, intent, reliance, and damages.

Here, the SAC does not consistently identify the speaker, authority, precise statement, or any facts showing knowledge of falsity. Plaintiff's payment status theory also depends on disregarded allegations of performance and manufactured default that conflict with the Original Complaint's unexplained admission of missed payments. (*See Kenworthy*, *supra*, 248 Cal.App.2d 298 at 302.)

Reliance and causation are likewise conclusory. Plaintiff does not identify what specific action she could and would have taken before the sale in reliance on a particular knowingly false statement. The pleaded facts instead show that she knew foreclosure remained pending and continued communicating with Defendant Carrington.

Leave to amend is denied. Despite prior leave, Plaintiff still does not plead falsity, knowledge, intent, reliance, or causation with particularity. The claim merely repackages the contract and foreclosure disputes, and Plaintiff has not shown a reasonable possibility of curing these defects.

xiii. <u>Twelfth Cause of Action: Negligent Misrepresentation</u>

The demurrer to the Second Cause of Action is **SUSTAINED without leave to amend**.

Negligent misrepresentation requires: (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. (*Y.P. v. Wells Fargo Co*. (2026) 119 Cal.App.5th 1069, 1085.)

Here, the negligent misrepresentation claim relies on substantially the same communications as the fraud claim and fails for the same reasons. The SAC does not identify specific actionable misrepresentations of past or existing material fact made without reasonable grounds. Statements concerning what the RPA would accomplish, whether future foreclosure activity would be postponed, and how future payments should be made are principally statements about contractual interpretation, future conduct, or servicing instructions—not misrepresentations of existing fact.

To the extent Plaintiff relied on representations that the wire covered June or July or that the next payment was due in August, the SAC still does not allege payment or tender of every later installment due before the September 18 sale. To the extent she relies on representations that the RPA would prevent foreclosure while she complied, the claim depends on the unexplained reversal of the prior admission that she did not comply.

Plaintiff's Twelfth Cause of Action suffers from the same deficiencies as the fraud claim and does not state a cognizable negligent misrepresentation theory distinct from the contract and foreclosure claims for which limited leave to amend is separately granted. Plaintiff has articulated no method by which they could remedy this defect, and accordingly leave to amend is denied.

Conclusion

Defendants' request for judicial notice is **GRANTED**, subject to the limitations stated above.

Defendants' Demurrer to Plaintiff's SAC is **SUSTAINED** in its entirety. Leave to amend is GRANTED ONLY as to the Second, Third, Fourth, Fifth, Sixth, Ninth, and Tenth Causes of Action. Leave to amend is DENIED as to the First, Seventh, Eighth, Eleventh, and Twelfth Causes of Action.

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

3. 25CV01643, Marin v. City of Petaluma

Plaintiffs John Marin ("Plaintiff") and Therese Crutcher-Marin ("Consortium Plaintiff", together "Plaintiffs") filed the complaint ("Complaint") in this action against defendants the City of Petaluma (the "City" or "Defendant") and Does 1-100 for two causes of action for dangerous condition of public property, and loss of consortium.

This matter is on calendar for motions by Defendant for summary judgment or, in the alternative, adjudication pursuant to Cal. Code Civ. Proc. ("CCP") § 437c. Defendants' motion for summary judgment is **GRANTED**.

I. Evidentiary and Procedural Issues

A. Plaintiff's Issues

While the motion is targeted to Consortium Plaintiff, the parties have stipulated to her dismissal with prejudice of her claims at deposition, and Consortium Plaintiff accordingly does not dispute that the claim is dismissed. This matter is not in dispute as a result.

Plaintiff is admonished that briefs exceeding 10 pages are *required* to include a table of contents and a table of authorities. Rule of Court, Rule 3.1113(f). The Court nonetheless considers the Opposition on its merits. Plaintiff also presents various objections woven into the separate statement. These have not been presented separately, as required by Rule of Court, Rule 3.1354 (b). They are accordingly disregarded.

B. Defendant's Issues

i. Omnibus Objections

Defendant is admonished to assert objections specifically, rather than in the omnibus manner in which they have been provided here. The objections on reply object to numerous declaration paragraphs on separate legal bases under one objection header. They overlap, are often redundant, and fail to follow any consistent methodology. Nonetheless, the analysis proceeds to the substance of the objections.

ii. Request for Judicial Notice

Plaintiff requests judicial notice of a prior decision on summary judgment related to a crash otherwise used as evidence. Citation to other judicial opinions not published is generally improper absent specific circumstances. Rule of Court, Rule 8.1115. Judicial notice of other judicial decisions *cannot* consider factual findings therein. *Kilroy v. State* (2004) 119 Cal.App.4th 140, 148. Accordingly, the requested judicial notice is only capable of consideration for irrelevant purposes, and so judicial notice is DENIED.

iii. Exclusion of Exhibits

The Court does not consider Defendant's Exhibit I (the video from Officer Harris's body worn camera). Defendant has submitted this evidence in the form of a hyperlink. There is no ability to maintain a record thereon for appeal, since the evidence itself (the video) is neither filed nor lodged. It is accordingly disregarded.

iv. Howard Declaration

As to the declaration of John Howard, Defendant's objections (Defendant's Objections ¶ 1 and 2) to ¶¶ 11-13 are SUSTAINED as being improper statements of fact that are not matters to which he was a witness, and therefore he lacks personal knowledge. Objections to the opening paragraph of ¶ 15, exempting subparagraphs, is SUSTAINED as a legal conclusion. Objections to ¶¶ 16 and 17 are sustained as outside Mr. Howard's expertise. The objections to the Howard Declaration ¶¶ 18 and 21 are SUSTAINED as expert hearsay under *People v. Sanchez* (2016) 63 Cal.4th 665, 686. Objections to The Howard Declaration, ¶¶ 14, 15 (a-f), 19 and 20 are OVERRULED

v. Wilde Declaration

The objection to the Declaration of Monty Wilde ("Wilde Declaration"), ¶ 12 is SUSTAINED based on Objections 3 and 6. Objections to Wilde Declaration ¶ 13 and 14 are OVERRULED. Objections to Wilde Declaration ¶ 15 are sustained as to the first sentence, and otherwise OVERRULED. Objections to ¶ 16 are SUSTAINED as to the first sentence of the second paragraph (starting with "The City of Petaluma…") as a legal conclusion, and because they are not supported by the underlying evidence.

In ¶ 17 of his declaration, Mr. Wilde also opines that the picture of the three cracks are estimated at "2" to 5" in width and the depressions are 1½" to 2" in depth." The Court acknowledges that evidence on this issue is complicated by the resurfacing of the area at issue around a month after the accident. Mr. Wilde did not perform direct measurements on the condition of the roadway before resurfacing work was performed in August of 2024. Accordingly, his conclusions related to the width and depth of the cracks in the road on the date of the accident are derived from Google Street View photos that are submitted to the Court in conjunction with the Wilde Declaration. Defendant objects to ¶ 17 on various bases. The evidence appears improper. Mr. Wilde's conclusion here both asks the Court to ignore its own perception of the same evidence (which would be an issue for finder of fact) and fails to express the method by which he has generated this conclusion (an issue of the propriety of the opinion). Mr. Wilde is no more a percipient witness than the Court. Mr. Wilde bases this conclusion on the "typical 4" width of a bike lane stripe" but provides no evidence that this is the width of the lane stripe at issue here. He provides no explanation for how he has calculated any of this estimate, to say nothing of depth and elevation changes based on a photograph. Nothing within Mr. Wilde's professed expertise would translate to interpretation of a photograph. The methodology is unarticulated, and therefore the Court need not allow "pure conclusion" to raise triable issue of fact. *Pagan v. City of San Rafael* (2026) 119 Cal.App.5th 853, 867. Defendant's objections to Wilde Declaration ¶ 17 are therefore SUSTAINED.

Defendant's objections to Wilde Declaration ¶ 18 are SUSTAINED based on objections 5 and 6. Objections to ¶ 19 are SUSTAINED based on objections 3 (based on the *Sanchez* objection), 5 and 6. Defendant's objections to Wilde Declaration ¶ 20 are SUSTAINED based on objections 4, 5 and 6. Objections to ¶ 21 are OVERRULED.

Defendant's objections to ¶ 3 of the Declaration of Plaintiff are SUSTAINED under *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21. Objections to Plaintiff's Declaration, ¶¶ 2 and 7 are OVERRULED.

Defendant's objections 8 and 11 are SUSTAINED. Plaintiff's Exhibits 1 and 8 are not considered. Objections 9-10, and 12-15 are OVERRULED.

II. <u>Underlying Facts</u>

Plaintiff had a bicycle accident on July 14, 2024, on Western Avenue in the City of Petaluma between Benjamin Lane and Hill Drive. Defendant's Separate Statement of Undisputed Facts, Undisputed Material Fact ("DUMF") ¶ 1-2. The weather was fair, clear and the ground was not wet. DUMF ¶ 11. Plaintiff cannot estimate what his speed was at the time of the accident. DUMF ¶ 12. In deposition, Plaintiff identified a specific crack in the bicycle lane that caused his crash. DUMF ¶ 14. Plaintiff could not identify the depth of the identified crack based on the picture provided in deposition. DUMF ¶ 15. Photographs taken in conjunction with the police report show a straight and unobstructed path of travel, with no visual obstructions limiting sightlines. DUMF ¶ 16. The photos were taken by Officer Rachel Harris and reflect the condition at or near the time of the accident. DUMF ¶ 17. The report prepared by Officer Harris at the time stated her opinion of the cause was that Plaintiff "caused this collision by violating 22350 CVC unsafe speed for prevailing conditions". Plaintiff's Ex. 4, page City_602. Defendant has no record of any claims related to Western Avenue near the accident site in the 5 years preceding the accident in this case. DUMF ¶ 22.

The cracks Plaintiff identifies in his evidence ("Cracks 1, 2, and 3") existed in 2011. Plaintiff's Opposing Undisputed Material Facts ("POUMF"), ¶ 3. Defendant patched over those cracks in

2012, but there is no evidence that the road was repaired or repaved between 2012 and Plaintiff's accident. POUMF ¶ 4. On August 20, 2011, Defendant prepared a traffic collision report related to the same nearby area due to a bicycle accident. POUMF ¶ 5. Defendant received Pavement Inspection Reports in 2011, 2013, 2016, 2018, 2019, 2022, and 2024, each of which catalogued that the subject road had exceeded its expected lifetime, and that it received a failing score. POUMF ¶ 6, 7, 9, 12, 13, 15, and 20. There was a second bicycle accident (for which Defendant prepared a collision report) nearby on Western Avenue on February 21, 2021. POUMF ¶ 14. A third accident occurred nearby on August 19, 2023, and had a traffic collision report prepared. POUMF ¶ 17. Defendant received complaints regarding the conditions on Western Avenue in 2014, 2017, and 2023, each expressing concern over conditions on the road. POUMF ¶ 8, 11, and 18.

III. The Burdens and Standards on Summary Judgment and Adjudication

A. Generally

Summary adjudication "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CCP § 437c(c). All evidence and inferences reasonably drawn therefrom must be viewed in the light most favorable to the party opposing summary adjudication. *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 ("*Aguilar*").

A moving defendant meets its initial burden to show that one or more elements of a cause of action "cannot be established" (CCP § 437c(p)(2)) by presenting evidence that, if uncontradicted, would constitute a preponderance of evidence that an essential element of the plaintiff's case cannot be established. *Aguilar, supra,* 25 Cal.4th at 851; *Kids Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 879. Alternatively, a defendant may show that there is a "complete defense" to a cause of action. CCP § 437c(p)(2). To show a complete defense, a defendant must present admissible evidence of each essential element of the defense upon which it bears the burden of proof at trial. *See, e.g. Anderson v. Metalclad Insulation Corp.* (1999) 72 Cal.App.4th 284, 289. A defendant cannot base its "showing" on the plaintiff's lack of evidence to disprove its claimed defense. *Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 472.

A moving party does not meet its initial burden if some "reasonable inference" can be drawn from the moving party's own evidence which creates a triable issue of material fact. *See, e.g. Conn v. National Can Corp*. (1981) 124 Cal.App.3d 630, 637; *Binder v. Aetna Life Ins. Co*. (1999) 75 Cal.App.4th 832, 840.

If a defendant meets its initial burden to show a "complete defense," the burden shifts to the plaintiff to provide sufficient evidence to raise a triable issue of fact as to the defense asserted. CCP § 437c(p)(2). *Consumer Cause, Inc.*, 91 Cal.App.4th at 468. An issue of fact exists if "the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." *Aguilar*, 25 Cal.4th at 845.
"[W]hen discovery has produced an admission or concession on the part of the party opposing summary judgment which demonstrates that there is no factual issue to be tried, certain of those

stern requirements applicable in a normal case are relaxed or altered in their operation." *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21. However, the *D'Amico* rule "does not apply where there is a reasonable explanation for the discrepancy or countenance ignoring other credible evidence that contradicts or explains that party's answers or otherwise demonstrates there are genuine issues of factual dispute." *Mackey v. Board of Trustees of California State University* (2019) 31 Cal.App.5th 640, 658 (internal quotations omitted).

B. Dangerous Condition of Public Property

"'Dangerous condition' means a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used." Gov. Code, § 830. Governmental entities can be held liable for the creation of dangerous conditions. Gov. Code § 835. Plaintiffs must establish "that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred," and that it was created by a public employee in the scope of employment or the public entity was aware of the dangerous condition. Gov. Code, § 835.

"The limited and statutory nature of governmental liability mandates that claims against public entities be specifically pleaded. (*Citation*.) Accordingly, a claim alleging a dangerous condition may not rely on generalized allegations (*Citation*) but must specify in what manner the condition constituted a dangerous condition. (*Citation*.)" *Brenner v. City of El Cajon* (2003) 113 Cal.App.4th 434, 439–440 (Internal citations omitted); see also *Mittenhuber v. City of Redondo Beach* (1983) 142 Cal.App.3d 1, 5 ("Because recovery is based on a statutory cause of action, the plaintiff must set forth facts in his complaint sufficiently detailed and specific to support an inference that each of the statutory elements of liability is satisfied. General allegations are regarded as inadequate."). "[W]hether a given set of facts and circumstances creates a dangerous condition is usually a question of fact and may only be resolved as a question of law if reasonable minds can come to but one conclusion." *Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, 810.

"To state a cause of action against a public entity under section 835, a plaintiff must plead: (1) a dangerous condition existed on the public property at the time of the injury; (2) the condition proximately caused the injury; (3) the condition created a reasonably foreseeable risk of the kind of injury sustained; and (4) the public entity had actual or constructive notice of the dangerous condition of the property in sufficient time to have taken measures to protect against it." *Brenner v. City of El Cajon* (2003) 113 Cal.App.4th 434, 439.

"The trivial defect doctrine is not an affirmative defense. It is an aspect of a landowner's duty which a plaintiff must plead and prove." *Stathoulis v. City of Montebello* (2008) 164 Cal.App.4th 559, 567. A differential of three-quarters of an inch or less in the sidewalk is "trivial and minor as a matter of law." *Fielder v. City of Glendale* (1977) 71 Cal.App.3d 719, 725. However, there may be exacerbating factors which make otherwise trivial defects more dangerous, and "where the defect goes beyond a mere depression between two adjoining slabs and consists of potholes, jagged breaks and cracks or also contains the presence of foreign substances such as grease and oil, then it can not be said that the defect is trivial and minor as a matter of law." *Ibid*.

"The mere fact that a road slopes downhill does not mean that it is dangerous. To hold the defendant liable for the natural topography of the land would be to impose strict liability on the defendant as an insurer of the safety of its streets. The city would be required to either grade all of its streets level in hilly areas or to forego development in such areas. An ordinary, natural topographical condition is not a dangerous condition of property within the meaning of the Governmental Tort Liability Law." *Mittenhuber v. City of Redondo Beach* (1983) 142 Cal.App.3d 1, 7. "Even though it is foreseeable that persons may use public property without due care, a public entity may not be held liable for failing to take precautions to protect such persons." *Biscotti v. Yuba City Unified School Dist.* (2007) 158 Cal.App.4th 554, 561. "So long as a plaintiff-user can establish that a condition of the property creates a substantial risk to *any* foreseeable user of the public property who uses it with due care, he has successfully alleged the existence of a dangerous condition regardless of his personal lack of due care." *Fredette v. City of Long Beach* (1986) 187 Cal.App.3d 122, 131.

C. Open and Obvious Condition

"Generally, if a danger is so obvious that a person could reasonably be expected to see it, the condition itself serves as a warning, and the landowner is under no further duty to remedy or warn of the condition." *Jacobs v. Coldwell Banker Residential Brokerage Co.* (2017) 14 Cal.App.5th 438, 446-447 ("*Jacobs*"), quoting *Krongos v. Pacific Gas & Electric Co.* (1992) 7 Cal.App.4th 387, 393. "In that situation, owners and possessors of land are entitled to assume others will 'perceive the obvious" and take action to avoid the dangerous condition.'" *Ibid*, quoting *Haberlin v. Peninsula Celebration Assn.* (1957) 156 Cal.App.2d 404, 408. However, "[a]n exception to this general rule exists when 'it is foreseeable that the danger may cause injury despite the fact that it is obvious (*e.g.*, when necessity requires persons to encounter it).'" *Ibid*, quoting *Osborn v. Mission Ready Mix* (1990) 224 Cal.App.3d 104, 122. "In other words, while the obviousness of the condition and its dangerousness may obviate the landowner's duty to remedy or warn of the condition in some situations, such obviousness will not negate a duty of care when it is foreseeable that, because of necessity or other circumstances, a person may choose to encounter the condition." *Id*. at 447. Whether or not a condition is open and obvious is an issue of fact for a jury, and not properly an issue for summary judgment unless reasonable minds could not differ on the matter. *Kasparian v. AvalonBay Communities, Inc.* (2007) 156 Cal.App.4th 11, 24-26. Similarly, issues of comparative fault are issues of fact inappropriate for summary judgment. *Wright v. Stang Manufacturing Co.* (1997) 54 Cal.App.4th 1218, 1233.

IV. Analysis

Defendant argues that Plaintiff cannot prevail on the action for negligence because: 1) the condition of the road was not a dangerous condition as a matter of law; 2) Defendant had no actual or constructive notice of a dangerous condition; and 3) the condition was open and obvious. Plaintiff provides evidence in response, averring that there are triable issues of material fact as to Defendant's motion.

A. Defendant Shifts Their Burden

1. Existence of a Dangerous Condition

First, while Defendant and Plaintiff argue the propriety of whether Plaintiff exercised due care, whether or not due care was exercised is relevant, but not for reasons adequately addressed by the parties. It is not that summary judgment may be granted where Plaintiff has some apportionment of fault due to lack of care. Instead, the question is whether *anyone* using due care would otherwise be injured due to the condition. *Fredette v. City of Long Beach* (1986) 187 Cal.App.3d 122, 131. Whether Plaintiff was exercising due care only appears relevant to show someone doing so would nonetheless be injured, and Defendant's showing in contrast is only effective to show that Plaintiff did not exercise it. Given that we are at summary judgment, and there is no clear evidence that Plaintiff *was* exercising due care, this appears largely irrelevant for determination of the existence of a dangerous condition.

Defendant provides evidence that Plaintiff identified a specific crack in the roadway as the cause of his fall but only after providing vague discovery responses on location. While Plaintiff opines that the photograph is not sufficiently clear, the Court notes both the redundancy of the police report photos of the same area, and that Plaintiff relies on substantially the same image in arguing that the roadway was in a dangerous condition. The photo is adequately clear that it holds evidentiary value.

Plaintiff also argues that Defendant cannot shift their burden at summary judgment because there is no direct measurement of the size of the crack, and therefore, whether it meets the standards opined in caselaw. Most of the cases related to the size of defects, and determination that they are trivial, relate to sidewalk, and not streets or bike lanes. See, e.g., *Fielder v. City of Glendale* (1977) 71 Cal.App.3d 719, 725. Instead, we must review the situation holistically, considering not just the size of the defect, but "the nature and quality of the defect (including whether it has jagged breaks or cracks); whether anything was obstructing or concealing the defect (for instance, an object, debris, or other substance); the lighting and weather conditions at the time of the incident; [and] whether the defect has caused other accidents…" *Stack v. City of Lemoore* (2023) 91 Cal.App.5th 102, 115 (Holding that the other factor previously considered by courts, plaintiff's familiarity with the area, is not appropriate for consideration). As Plaintiff argues, his individual familiarity is irrelevant for this analysis. *Id*. at 123.

Size of the condition remains the *most* weighty factor. The evidence thereon is limited (for both parties) because the relevant section of road was resurfaced shortly after the accident. Nonetheless, there is significant photographic evidence of the purported defect. Plaintiff identified a section of road in the deposition showing the crack that caused is eventual fall. See Defendant's Exhibit P. While Defendant offers no measurements, Plaintiff's argument that the Court cannot draw any conclusions from the provided photograph does not appear to be grounded in any proposition of law. Plaintiff's underestimates the judicial process, in essence restricting the Court to only the words of the parties, and not its own observation of the evidence. This does not appear to be supported by any authority. The Court can, should, and does consider what is depicted in *all* the admissible photographic evidence. In assessing the nature of the identified crack, visually the size appears minimal as an asphalt defect. The capacity of everyone involved (Plaintiff, Defendant, and the Court) to determine depth is limited by the two dimensional nature of the evidence provided. However, based on the depiction of the crack in

Plaintiff's Exhibit P, the difference in elevation appears to be fractions of an inch. The size of the defect appears significantly smaller than what the Court would consider a defect which is nontrivial as a matter of law. *Stack v. City of Lemoore* (2023) 91 Cal.App.5th 102, 113. The size of the defect militates toward finding it trivial.

Looking to the nature and quality of the defect, the cracks at issue are long, but appear both narrow and shallow. It is not clear the degree to which the Court may rely on the topography in determining the existence of a dangerous condition. Natural slope is not typically a basis for establishing a dangerous condition, as the public entity is not an insurer of safety from natural landscape. *Mittenhuber v. City of Redondo Beach* (1983) 142 Cal.App.3d 1, 7. There is no apparent signage or street design that causes the downhill to be itself a dangerous condition. Plaintiff's deposition testimony states that there was gravel present which were part of the road condition. See Defendant's Ex. O, pg. 10:11-17. Gravel does exacerbate the condition, but given that the evidence shows that the quality of the defect was otherwise relatively benign, overall the quality of the defect trends toward trivial.

There is no apparent visual obstruction preventing Plaintiff from seeing the alleged defect as he approached it. As is covered further below, Defendant presents evidence that there are no other accidents attributable to the condition.

Between the pictures of the roadway, the image on which Plaintiff identified the averred crack on which he fell during his deposition, the clear skies and dry conditions, lack of prior accidents, Therefore, on the issue of the trivial nature of the alleged defect, Defendant has shifted their burden.

2. Notice of the Dangerous Condition

For Plaintiff to prove liability for a dangerous condition, it is not enough that Plaintiff shows that there is a dangerous condition, he must also plead and prove that that the city had actual or constructive notice of the dangerous condition. *Brenner v. City of El Cajon* (2003) 113 Cal.App.4th 434, 439. Defendant may shift their burden at summary judgment by providing evidence that they had no notice of the condition, and that therefore Plaintiff cannot meet this burden. Defendant provides evidence that they have had no reports of formal claims in the last five years for the area where the accident occurred. This is sufficient to shift the burden at summary judgment.

3. Open and Obvious

As is already addressed above, the condition was not apparently hidden by any secondary factors beyond the speed at which it may be encountered. However, the Court gives no *independent* significance to the open and obvious nature of the alleged defect. The open and obvious doctrine only applies where a condition does not need to be encountered by necessity. *Haberlin v. Peninsula Celebration Assn.* (1957) 156 Cal.App.2d 404, 408. The alleged defect sits in a bike lane and is quite clearly going to be encountered by bicyclists traveling at speed. The nature of the condition is not so obvious that a bicyclist traveling at modest speed would clearly have sufficient advance notice to avoid the alleged hazard. *Kasparian v. AvalonBay Communities, Inc.* (2007) 156 Cal.App.4th 11, 24-26. Defendant fails to shift their burden on this issue.

Analysis turns to Plaintiff's opposition, and whether they meet the shifted burdens. The scope of the issue is constrained to whether there is a triable issue of fact as to if the condition was trivial, and whether the Defendant had notice of the condition.

B. <u>Plaintiff Fails to Meet the Shifted Burden as to Notice and the Dangerous Condition</u>

1. Dangerous Condition

The Court again examines the factors related to a dangerous condition. Plaintiff now opines that while his fall was ultimately caused by the crack identified in his deposition (now labelled by Plaintiff as "Crack 3"). He contends that two preceding cracks, "Crack 1" and "Crack 2", shunted him into Crack 3 having already lost control of the bicycle. Cracks 1 and 2 are clearly depicted in the images submitted by Plaintiff. Crack 1 appears the most significant, significantly larger and deeper than either Crack 2 or the previously identified Crack 3. Even so, the image doesn't depict significant change in elevation, still significantly below an inch. The width of the center of the crack appears of moderate width but abrogated by the lack of significant elevation change. Cracks 2 and 3 remain significantly smaller in nature, more resembling cracks at a seam in the layers of asphalt. Their width and depth appear significantly below an inch in every respect, and trend toward trivial as a result. The size of these three defects taken together is significantly closer to "nontrivial" but still does not reach sufficient nontriviality to remove the matter from consideration at summary judgment.

The Declaration of Monty Wilde ("Wilde Declaration") fails to present evidence that raises a triable issue of fact. While Mr. Wilde appears qualified to opine on the life and condition of asphalt, nothing within his expertise appears to reach to issues of whether the condition at the time violates a generalized tortious standard of care.

The contentions regarding the content of the police report from Officer Harris for this accident is equally unprevailing. Plaintiff avers that the police reports affirm that the crash was caused by "uneven pavement", but that statement does not appear admissible for such a purpose. Plaintiff asks to attribute truth to the hearsay statement in the document, and that statement is not made under penalty of perjury. Accordingly, it cannot be considered for that purpose.

The caselaw makes clear that not every crack, undulation and imperfection in city streets is a dangerous condition. They can often be determined to be trivial when examining the entirety of the circumstances, "where reasonable minds could reach only one conclusion". Plaintiff presents evidence only related to the size of the alleged condition and otherwise does not present admissible evidence related to the other factors when assessing a dangerous condition. Plaintiff's evidence regarding the multiple cracks that led to his crash are not sufficient to raise triable issue of fact that condition was not trivial as a matter of law.

2. Notice of a Dangerous Condition

Second, Plaintiff must rebut Defendant's showing that they had no notice of the dangerous condition.

Plaintiff relies heavily on multiple reports opining the general condition of Western Avenue. As Defendant accurately argues both in their motion and on Reply, "general" awareness of road wear does not itself establish knowledge of a specific dangerous condition. *Restivo v. City of Petaluma* (2025) 111 Cal.App.5th 267, 275.

Plaintiff also presents evidence of other bicycle crashes in the same general area, arguing that this is sufficient to show foreseeability. Plaintiff presents evidence of crashes that occurred in 2011, 2021, and 2023. Plaintiff submits the police reports for these crashes, for which the Court considers the nature of the notice to the City regarding the defect, and not the truth or veracity of the factual assertions therein. The crash in 2023 occurred further up the road, significantly before the curvature that Plaintiff avers contributed to his fall. See Plaintiff's Exhibit 14. Nothing in the evidence presented would indicate that the accident occurred because of the roadway condition, and therefore it does not contribute to whether or not there was notice of the allegedly dangerous condition. *Ibid*. The crash in 2021 is even less relevant. That crash occurred over 150 feet further up the road. Plaintiff's Exhibit 13. There is no indication in the police report that road conditions contributed to the crash. *Ibid*. It is therefore not relevant for establishing notice.

The closest of the collisions geographically (according to the reports) to the site of Plaintiff's accident was the crash that occurred in 2011. It nonetheless occurred nearly 30 feet before Plaintiff's crash. Additionally, Plaintiff has submitted evidence that that City *had* repaired the condition after the 2011 crash with hot mixed asphalt. See Wilde Declaration ¶ 15, Ex. 2. That Defendant may have been aware of general road condition, and that bicyclists had crashed on a long down-hill road is not sufficient to show that they were aware of the *specific* road condition that allegedly caused Plaintiff's accident. *Restivo v. City of Petaluma* (2025) 111 Cal.App.5th 267, 275. That Defendant previously *had* performed temporary repairs is not sufficient to show notice of the current condition of the roadway. *Id*. at 276.

In looking at the other complaints provided regarding Western Avenue, (Plaintiff's Exhibits 7, 9, and 11), none appear to raise a triable issue of fact related to actual or constructive notice. In coming to this determination, the Court notes that . Exhibits 7 (from 2014) and 11 (from 2023) both state that the condition of the road is poor. However, both describe a significant stretch of road which happens to include the area where Plaintiff fell. Defendant's general knowledge of cracks in asphalt and poor road condition are not sufficient to raise a triable issue of fact regarding notice of a dangerous condition. *Restivo v. City of Petaluma* (2025) 111 Cal.App.5th 267, 275. Exhibit 9 (from 2017) attributes the defect to Western Avenue near Hill Drive, the closest cross street to where the accident in this case occurred. However, that complaint merely recounts excess gravel on the road, not any other complaint about road conditions. There is no other evidence that the gravel condition was in place from 2017 consistently until 2024. There is no evidence that the Defendant had notice of a particular cause for the accumulation of gravel, or that there were steps that could be taken to ameliorate it. This complaint does not complain about what Plaintiff posits is the cause of his crash, the cracked roadway. It therefore does not establish notice of a dangerous condition sufficient to create triable issues of fact for Plaintiff's claim.

Plaintiff fails to meet the shifted burden on the issue of notice of the dangerous condition.

3. Open and Obvious

Defendant did not shift their burden as to this argument, and accordingly, Plaintiff has no burden to meet it.

V. Conclusion

Plaintiff has failed to meet the burden Defendant shifted. Defendant's motion for summary judgment and adjudication is **GRANTED**.

Defendant 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. 25CV03803, Molland v. Braswell

Plaintiff Barbara Molland ("Plaintiff"), both individually and as the personal representative of the estate of Michael Molland ("Decedent"), filed the currently operative first amended complaint (the "FAC") in this action against the County of Sonoma (sued both as the County of Sonoma and the Sonoma County Sheriff's Department, hereinafter the "County"), Eddie Engram ("Engram"), Darin Braswell ("Braswell"), Miguel Garcia ("Garcia"), Micah Hope ("Hope" together with the County, Engram, Braswell, and Garcia, "Defendants"), and Does 1-50 with causes arising out of a criminal incident at Plaintiff and Decedent's home which resulted in Decedent's death.

This matter is on calendar for the motion by Plaintiff to compel further production directed at the document requests set forth in Plaintiff's request for production of documents, set one, served to the County (the "RPODs") under CCP § 2031.310. The Motion is **GRANTED in part and DENIED in part**.

I. Governing Law

Regarding RPODs, a party to whom a document demand is directed must respond to each item in the demand with an agreement to comply, a representation of inability to comply, or an objection. CCP § 2031.210(a). If only part of an item or category demanded is objectionable, the response must contain an agreement to comply with the remainder, or a representation of the inability to comply. CCP § 2031.240(c)(1). If a responding party is not able to comply with a particular request, that party "shall affirm that a diligent search and a reasonable inquiry has been made in an effort to comply with that demand." CCP § 2031.230. "This statement shall also specify whether the inability to comply is because the particular item or category has never existed, has been destroyed, has been lost, misplaced, or stolen, or has never been, or is no longer, in the possession, custody, or control of the responding party" and "[t]he statement shall set forth the name and address of any natural person or organization known or believed by that party to have possession, custody, or control of that item or category of item." *Id.*

Upon receipt of a response to a request for production, the propounding party may move for an order compelling further response if the propounding party deems that a statement of compliance with the demand is incomplete; a representation of inability to comply is inadequate, incomplete, or evasive; or an objection in the response is without merit or too general. CCP § 2031.310(a). A motion to compel further responses to a request for production of documents must "set forth specific facts showing 'good cause' justifying the discovery sought by the demand." CCP §2031.310(b)(1). Absent a claim of privilege or attorney work product, the party who seeks to compel production has met his burden of showing 'good cause' simply by showing that the requested documents are relevant to the case, *i.e.*, that it is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence under CCP § 2017.010. *See also Kirkland v. Sup. Ct.* (2002) 95 Cal.App.4th 92, 98. Once good cause is shown, the burden shifts to the responding party to justify its objections. *See Coy v. Superior Court of Contra Costa County* (1962) 58 Cal.2d 210, 220-221.

"If an objection is based on a claim of privilege or a claim that the information sought is protected work product, the response shall provide sufficient factual information for other parties to evaluate the merits of that claim, including, if necessary, a privilege log." CCP, § 2031.240 (c)(1). However, failure to provide a privilege log does not, in and of itself, waive attorney client privilege. *Catalina Island Yacht Club v. Superior Court* (2015) 242 Cal.App.4th 1116, 1131. The right to discovery is generally liberally construed. *Williams v. Superior Court* (2017) 3 Cal.5th 531, 540. 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.

Motions to compel must be brought within 45 days of a verified response to a discovery request. See CCP §§ 2030.300(c), 2031.310(c), and 2033.290(c). The 45-day time limit for discovery motions is jurisdictional, and if a motion to compel further responses is filed after this period, the court cannot compel further answers. *Vidal Sassoon, Inc. v. Superior Court* (1983) 147 Cal.App.3d 681, 685; *Sexton v. Superior Court* (1997) 58 Cal.App.4th 1403, 1410.

II. <u>Analysis</u>

Plaintiff served RPODs, Set one to the County requesting inspection of 28 categories of documents. The County tendered objections to various categories, along with some unverified responses. Plaintiff requests the Court compel further responses to RPOD ¶¶ 14-17, 19-20, 23, and 28. The County served the missing verifications on August 31, 2026. The initial burden is on Plaintiff as the moving party to show good cause for the production. Thereafter, the burden shifts to the County to justify their objections.

Many of the County's objections go to relevance, which is part of the good cause analysis, not an objection in and of itself. The County also raises some particular arguments in response to categories of information which merit addressing.

1. RPOD ¶ 14, 15, and 16

First, it is confounding to the Court that RPOD ¶ 14, 15, and 16, which particularly asks for documents which are directly relevant to this case remained at issue even after the 'meet and confer' process terminated. The policies and procedures on which the deputies relied, or should have relied, appear central to the Plaintiff's theory of liability. The RPODs only request those in relation to the date of incident and are not unbounded in time like many of the other RPODs at issue. The County's primary contention is that they *have* produced all responsive documents. Plaintiff argues, and is persuasive, that the County's (now verified) response is far from clear on this point. The County avers that it has produced all documents "responsive to this request to which no objection is being made." RPOD ¶ 14. They *then* state that they are "unaware of any additional responsive documents in [their] possession, custody, or control as of the date of this response." Whether there are documents withheld subject to objection is left entirely unclear. The County is both entitled to make objections and withhold those documents subject to objection while producing all unobjectionable relevant documents. See CCP § 2031.220. However, that does not mean that Plaintiff cannot move to have objections overruled and compel production of documents which were responsive and previously withheld. CCP § 2031.310 (a)(3). Moreover, none of Defendant's response assert any objection such as attorney-client, privacy, or work-product for which withholding is typically done. The County's assertion in opposition that there was nothing left to produce must be conclusively made as part of a verified response. Otherwise, Defendant is to produce a privilege log to at minimum identify documents that may be protected by valid objection.

Turning to objections, the County's objection of vagueness is otherwise overruled, and further responses must be provided affirming there are no further responsive documents. Further responses as to RPODs 14, 15, and 16 are GRANTED.

In contrast, RPOD ¶ 17 is restricted as to time, and good cause appears sufficient. The County provided substantive response but also objects because the RPOD utilizes two nebulous and vague terms ("contact information" and "mental health professionals") which renders the request incapable of further response. The County is persuasive that this request is asserted in a manner that renders the RPOD unclear. Plaintiff's assertion that every email discussing the Mobile Support Team needs to be produced (which the County did not produce but points out as an example of the burden involved) is meritless. There are untold permutations of possible emails discussing the MST which are not responsive to these requests, and the County's argument makes clear that finding the documents with a search is the *least* burdensome part of the production process. As the County points out, these need to be assessed for actual responsiveness, third party privacy, and privilege. The County's point does not concede what Plaintiff argues. That Plaintiff believes these documents are responsive while the Court does not is illustrative of the vagueness of the request. The objection is sustained. No further responses to RPOD ¶ 17 are proper.

B. Materials Available

In RPOD ¶¶ 19 and 20, Plaintiff asks for all documents related to training for sheriff's department officers on mental health crises and 5150 evaluations. The County provided responses with objections as to RPOD ¶ 19. They also provided an objection only response as to RPOD ¶ 20.

Plaintiff bears the initial burden of good cause. These requests are unbounded as to time, and resultingly are wildly overbroad. There is nothing apparent from the papers showing Plaintiff was willing to narrow the scope of the request. There is no showing of good cause for such broad requests, and the Court will not rewrite Plaintiff's discovery to bring it in the realm of reasonableness. Further responses are inappropriate as a result.

C. Public Statements

Plaintiff requests further responses for documents related to public statements made regarding the incident. The County provided objection-only responses. Plaintiff adequately shows good cause, persuasively arguing that "false exculpatory statements" are relevant evidence. *Donchin v. Guerrero* (1995) 34 Cal.App.4th 1832, 1842 (False exculpatory statements are relevant in the civil context). The County argues that the request is vague, but this is not sufficiently persuasive to show that the County could not reasonably respond to the request. The County also argues that these are equally available to Plaintiff, but that both ignores documents created in preparation of the statement and is not persuasive that these are "equally" available to Plaintiff. The scope of what the County "said" and when is not necessarily apparent externally. Internally, significantly more information is available.

The request for further responses to RPOD ¶ 23 is GRANTED.

D. District Attorney File

Plaintiff has also requested all documents produced by the office of the District Attorney to Yanez. The County sent a subpoena to the district attorney, and their response opines that they have produced the results of the subpoena, and that there is nothing further to produce because the District Attorney is an independent entity. Plaintiff argues that the County's answer is evasive, because the District Attorney is a county office, and therefore they fall under the County's "control".

Plaintiff's position fails to appreciate the complicated nature of the interplay between the district attorney's office, and their local county government. See Gov. Code § 25303. It is true that *sometimes* a district attorney acts as a county official, particularly when implementing localized policies and procedures for local administration of justice. See *Goldstein v. City of Long Beach* (9th Cir. 2013) 715 F.3d 750, 760. However, when performing their investigative and prosecutorial function, they are state actors, not officials of the local government. *Pitts v. County of Kern* (1998) 17 Cal.4th 340, 359; *Weiner v. San Diego County* (9th Cir. 2000) 210 F.3d 1025, 1027. The County's argument that this is a matter which would treat the District Attorney as separate from the County is persuasive. The County has produced those documents which were given to them under a subpoena. Those are the documents within their possession or control. No further responses to RPOD ¶ 28 are appropriate as a response.

III. Conclusion

Based on the foregoing, Plaintiff's motion to compel further responses to RPOD, Set One, is **GRANTED as to RPOD ¶¶ 14-16 and 23.** The motion is **DENIED as to RPOD ¶¶ 17, 19, 20, and 28**. The County is to produce objection free code-compliant responses and any documents previously withheld within **30 days** of notice of the court's order.

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).

5-6. 25CV06504, Vistajet US Inc. v. Malvesta

Plaintiff Vistajet US, Inc. ("Plaintiff") filed the currently operative first amended complaint against defendant Stephen Malvesta ("Defendant") and Does 1-50 for causes of action arising out of alleged contractual breach (the "FAC").

This matter is on calendar for demurrer to the FAC filed by Defendant for failure to state a cause of action, and the motion to strike punitive damages and attorney's fees from the FAC. The Demurrer is **SUSTAINED with leave to amend** as to the Second cause of action, **OVERRULED** as to the First and Third causes of action. The Motion to strike is **GRANTED** with leave to amend as to punitive damages, and **GRANTED** without leave to amend to FAC ¶¶ 28-30.

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.

B. Punitive 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. "In addition to the requirement that the operative complaint set forth the elements as stated in section 3294, it must include specific factual allegations showing that defendant's conduct was oppressive, fraudulent, or malicious to support a claim for punitive damages." *Today's IV, Inc. v. Los Angeles County Metropolitan Transportation Authority* (2022) 83 Cal.App.5th 1137, 1193. 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).

C. 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.

D. Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing

The elements of a cause of action for breach of contract are: "'(1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff.'" *See Coles v. Glaser* (2016) 2 Cal.App.5th 384, 391; quoting *Hamilton v.*

Greenwich Investors XXVI, LLC (2011) 195 Cal.App.4th 1602, 1614, 126 Cal.Rptr.3d 174. "It is the general rule that if an instrument is ambiguous the party pleading is required to set forth the meaning of the writing. The meaning attributed to the writing must be one to which it is reasonably acceptable, and where 'a pleaded instrument is, because of the uncertainty of the language in which it is expressed, susceptible of more than one construction As to its nature or as to the purpose intended by the parties to be attained by it, … the construction of the party pleading it should be accepted, if such construction be reasonable' in considering a pleading attacked by general demurrer." *Connell v. Zaid* (1969) 268 Cal.App.2d 788, 794–795 (internal citations omitted). "Facts alleging a breach, like all essential elements of a breach of contract cause of action, must be pleaded with specificity." *Levy v. State Farm Mutual Automobile Ins. Co.* (2007) 150 Cal.App.4th 1, 5.

"The implied covenant of good faith and fair dealing is implied by law in every contract to prevent a contracting party from depriving the other party of the benefits of the contract." *See, e.g., Moore v. Wells Fargo Bank, N.A.*, 2019 WL 4051754, at *5; *see also*, *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 371; *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 683–684; *Thrifty Payless, Inc. v. The Americana at Brand, LLC* (2013) 218 Cal.App.4th 1230, 1244. The covenant requires each contracting party to refrain from doing "anything which will injure the right of the other to receive the benefits of the agreement." *Kransco v. American Empire Surplus Lines Ins.* Co. (2000) 23 Cal.4th 390, 400; *see also*, *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 818. The implied covenant rests upon the existence of a specific contractual obligation and "cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." *Agosta v. Astor* (2004) 120 Cal.App.4th 596, 607; *see also*, *Racine & Laramie, Ltd. v. California Dept. of Parks & Rec.* (1992) 11 Cal.App.4th 1026, 1031-32. Where a complaint alleges actionable breach of a contract term, "a claim [for breach of the covenant of good faith and fair dealing] that merely realleges that breach as a violation of the covenant is superfluous." *Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 352.

E. Breach of Fiduciary Duty

"Technically, a fiduciary relationship is a recognized legal relationship such as guardian and ward, trustee and beneficiary, principal and agent, or attorney and client [citation], whereas a 'confidential relationship' may be founded on a moral, social, domestic, or merely personal relationship as well as on a legal relationship. [Citations.] The essence of a fiduciary or confidential relationship is that the parties do not deal on equal terms, because the person in whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependent party." *Hudson v. Foster* (2021) 68 Cal.App.5th 640, 663 (internal quotations omitted). "The elements of a claim for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) its breach, and (3) damage proximately caused by that breach." *Mendoza v. Cont'l Sales Co.* (2006) 140 Cal.App.4th 1395, 1405; *Gutierrez v. Girargi* (2011) 194 Cal.App.4th 925, 932.

"An employee who has any business to transact on his own account, similar to that intrusted to him by his employer, shall always give the preference to the business of the employer." Lab. Code, § 2863. As restated by the courts, "it is the law in this state that an employee, while employed, owes undivided loyalty to his employer." *Guild Mortgage Co. LLC v. CrossCountry Mortgage LLC* (2026) 120 Cal.App.5th 885, 892 (internal quotations omitted). "While California law does permit an employee to seek other employment and even to make some 'preparations to compete' before resigning (*Citation*), California law does not authorize an employee to transfer his loyalty to a competitor." *Fowler v. Varian Associates, Inc.* (1987) 196 Cal.App.3d 34, 41. "The duty of loyalty is breached, and the breach may give rise to a cause of action in the employer, when the employee takes action which is inimical to the best interests of the employer." *Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 414 (internal quotations omitted).

> "We conclude an officer who participates in management of the corporation, exercising some discretionary authority, is a fiduciary of the corporation as a matter of law. Conversely, a 'nominal' officer with no management authority is not a fiduciary. Whether a particular officer participates in management is a question of fact. We expect that in most cases this test will be easily met. And, as in all legally recognized fiduciary relationships, once this factual prerequisite is established, the law imposes a fiduciary duty."

GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc. (2000) 83 Cal.App.4th 409, 420–421, *as modified (Sept. 14, 2000),* <u>disapproved of on other grounds by</u> *Reeves v. Hanlon* (2004) 33 Cal.4th 1140.

II. <u>Demurrer</u>

A. <u>Breach of Contract and the Covenant of Good Faith and Fair Dealing</u>

Plaintiff alleges that Defendant breached his employment contract, provided in the form of an offer letter attached as Exhibit A to the FAC (the "Contract"). Defendant argues that breach of contract actions must be sufficiently specific with what conduct breached the contract. Plaintiff in turn argues that the FAC contains adequate specificity to plead breach of contract.

Plaintiff is persuasive in its argument that the pleading standard for breach of contract is not of the same specificity required for fraud pleadings. Nothing within *Baldwin v. AAA Northern California, Nevada & Utah Ins. Exchange* (2016) 1 Cal.App.5th 545, opines the specificity with the same elements described when alleging fraud. 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' "]. In contrast, "[f]acts alleging a breach… must be pleaded with specificity." Nothing cited by Defendant nor found by the Court seems to outline the matters on which to be specific. Nonetheless, the facts of *Baldwin* remain instructive as to the standard.

In *Baldwin*, the court of appeal affirmed the trial court's sustaining of a demurrer without leave to amend. *Id*. at 548. Plaintiff in that case had sued their insurer for breach of contract and bad faith because the vehicle was not returned to its pre-accident condition by the repairs which the insurer agreed to cover. *Id*. at 551. Insurer demurred to the complaint and the trial court sustained that demurrer without leave to amend. *Id*. at 549. Insured plaintiff appealed, averring that the facts alleged had been sufficient to show breach of the insurance contract by opining that the decline in post-repair value and the insurer's failure to repair the vehicle to a pre-accident condition were breaches of the contract, or the covenant of good faith and fair dealing. *Id*. at 551. The court of appeal affirmed, noting that no contract provision stated that repairs *would* return the vehicle to pre-accident condition, and that plaintiff had not pled facts with sufficient specificity to state breach of a material term. *Ibid*. "Appellant's general allegation that his repaired pickup was not restored to its preaccident condition 'with respect to safety, reliability, mechanics, cosmetics and performance' is a mere conclusion unsupported by any specific factual allegations." *Ibid.*

The standard apparent from *Baldwin* is that the facts alleged must clearly identify breach of specific terms of the contract. It must do so in a factual manner, not with mere conclusions. The facts must establish the breach itself when compared to the contract terms, and not the mere conclusion that the fact does constitute a breach. Specific facts are not helpful if they do not display breach, and the conclusion of breach is not sufficient to plead the cause of action. *Levy v. State Farm Mutual Automobile Ins. Co.* (2007) 150 Cal.App.4th 1, 6. The facts alleged must also clearly violate the terms of the contract, or they are insufficient to state the cause of action. "In other words, an allegation that a defendant *might have* breached a contract does not state a valid cause of action." *Melican v. Regents of University of California* (2007) 151 Cal.App.4th 168, 174.

Plaintiff alleges various theories of breach of contract based on multiple terms of the Contract. However, Plaintiff is not persuasive that the analysis should avoid assessment of B&P §16600 against the provisions of the Contract. The Court will review the Contract with a lens towards compliance with B&P §16600. It is clear that the Contract precludes Plaintiff's subsequent conduct after leaving, therefore, Sections 7 and 9 are void and unenforceable in part. They impinge by their terms on Defendant's ability to perform his trade and practice. That is clearly violative of California law, and to the degree that it is void it cannot form the predicate for Plaintiff's claims. To the degree that the contract terms are undisputed, their interpretation is a question of law. *Hervey v. Mercury Casualty Co.* (2010) 185 Cal.App.4th 954, 963.

Defendant attempts to opine that any determination of voidness is fatal as to the entire Contract. However, that is not persuasive. The contract is *facially* void as to these terms. If there are facts which fall within terms that are *not* void, the FAC may still express actionable breach. In this manner, Plaintiff's allegations that Defendant misappropriated information and clients must be specific in what was taken. (FAC ¶34, ¶35.) The current form of the allegations amounts to little more than alleging that Defendant took *something*, though Plaintiff does not (or cannot) opine *what*. The void terms of the contract cannot form the basis for the breach claim, and accordingly Plaintiff must be able to articulate what provision Defendant violated, and how he violated it.

In this manner, Plaintiff's contractual claims largely fail to express actionable breach. Plaintiff repeatedly avers that Defendant breached portions of the Contract related to Confidential Information, Intellectual Property, and Protection of the Company's Business Interests. (See Contract §§ 7-9, FAC ¶34, ¶35, ¶43). These are broadly defined terms expressing control over various things which might or might not be valid under B&P § 16600 and might or might not be "owned" by Plaintiff. To opine breach, it must be sufficiently clear that the term was valid or its validity is a question of fact, and that it was breached by Defendant. As such, these claims are not adequately expressed.

However, Plaintiff need only express one actionable breach for the cause of action to be viable. Plaintiff also alleges that Defendant breached the Contract by violating § 6.1. Section 6.1, as Plaintiff argues, specifically prohibits Defendant from working for another employer during his employment with Plaintiff, unless he provides notice and receives permission. This does not appear to violate B&P § 16600, as it only restrains Defendant's conduct during employment. The issue of nuanced voidness does not need to be pled around. Violations of § 6.1 appear clearly capable of being pled with minimal detail. Stating that Defendant engaged in outside business during employment and identifying the outside employer with some manner of factual allegations, appears sufficient. Therefore, the breach of contract claim is adequately pled as to this particular contention and the demurrer may not be sustained to that cause of action as a whole.

To the degree that Plaintiff's allegations of breach of the covenant of good faith and fair dealing are examined, they are entirely redundant of allegations of express breach of contract. Plaintiff's theory of breach of the covenant of good faith and fair dealing is rooted in not receiving the "full benefit" of Defendant's efforts despite him receiving his full compensation. The issue here is not merely that the *theory* is redundant, but that the implied covenant does not address express breaches of the contract. Plaintiff's allegations to breach of contract are only sufficiently specific to state violations of Contract § 6.1. The breach of the covenant of good faith and fair dealing claim is merely a restatement of the breach of § 6.1. Breach of express provisions of the contract are *not* a basis for breach of the covenant of good faith and fair dealing, because it merely reiterates the breach of contract claim. *Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 352. While Plaintiff cites to *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 890, that is unpersuasive. That case dealt with negligent and intentional misrepresentation, which the court of appeal did not find capable of being struck on the "sole ground" of repetitiveness. *Ibid*. Here, the breach is not of the implied covenant, it is an express term. There is no breach of the implied covenant of good faith and fair dealing pled.

Between these deficiencies, the demurrer is SUSTAINED with leave to amend as to the Second cause of action. The demurrer is OVERRULED as to the First cause of action.

B. <u>Breach of Fiduciary Duty</u>

Plaintiff also contends that Defendant had breached his duty of loyalty under Labor Code § 2863. Plaintiff asserts this in the form of a claim for breach of fiduciary duty. Defendant avers that the allegations here do not constitute sufficient cause to find either a fiduciary duty, or breach thereon. Defendant also argues that there are no alleged damages caused by any breach.

Defendant's argument that there is no fiduciary duty pled is unpersuasive. "(A)n officer who participates in management of the corporation, exercising some discretionary authority, is a fiduciary of the corporation as a matter of law. Conversely, a "nominal" officer with no management authority is not a fiduciary." *GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.* (2000) 83 Cal.App.4th 409, 421, <u>disapproved of on other grounds by</u> *Reeves* *v. Hanlon* (2004) 33 Cal.4th 1140. While he argues that he merely "led the sales team", that appears to understate the scope of his alleged responsibilities (incorporated into the Contract), and his compensation being tied to the success of the entire company. The title is for "Executive Vice President, Sales". Defendant was expected to make reports directly to Plaintiff's President. See Contract, Appendix 1. Defendant was expected to spearhead campaigns, provide direction to subordinate Vice Presidents, and establish best practices for sales. "Whether a particular officer participates in management is a question of fact." *Ibid*. This appears to be of sufficient scope that the existence of a fiduciary duty is clearly an issue of fact not capable of resolution at demurrer.

Second, Defendant again asserts that the breach of fiduciary duty is not alleged with sufficient detail to constitute the cause of action. Defendant avers that "mere preparation" is insufficient to state a cause of action for breach of fiduciary duty. This understates the allegations in the FAC, and does not accurately state the level of specificity required for breach of fiduciary duty. First, the FAC alleges significantly more than just preparation. Per the allegations, Defendant did not merely "prepare" to compete, he actively competed. It is alleged Defendant assisted with acquisition of funding for his new business during his employment with Plaintiff. FAC ¶¶ 22, 24. He assisted with a significant order of jets from a vendor. FAC ¶ 23. This is not "mere preparation". It alleges active competition.

Nor does the purported lack of specificity suffice when dealing with breach of fiduciary duty. Defendant offers no authority showing fiduciary duty is not subject to a special pleading standard. The pleading standard for breach of fiduciary duty is below the requirements for fraud. See, e.g., *Knox v. Dean* (2012) 205 Cal.App.4th 417, 432 (breach of fiduciary duty was adequately pled, but both fraud and constructive fraud were not). The statement that Defendant actively competed, in the general terms averred, is sufficient to state the cause of action. Defendant's contention that information and belief allegations are insufficient is also unpersuasive. Allegations on information and belief are common and allowable.

Finally, Defendant argues that there is no articulable harm from the breach. This is unpersuasive. Plaintiff avers that the competitor business is and will take market share from Plaintiff, resulting in reduced business and lost profits. This appears sufficient to state damages caused by Defendant's simultaneous competition with his employer.

The demurrer to the third cause of action is OVERRULED.

III. Motion to Strike

A. Punitive Damages

The breach of fiduciary duty claims are found adequately pled above, it nonetheless appears insufficient to meet the elevated pleading standards attributable to punitive damage claims. The allegations related to Defendant's conduct are already widely addressed. Defendant also allegedly used this information with the intent to harm and destroy Plaintiff's business.

Issues of intent are typically easily resolved at the pleadings in favor of the plaintiff, as conclusory allegations will typically suffice. *Unruh v. Truck Insurance Exchange* (1972) 7 Cal.3d 616, 632 (superseded by statute on other grounds). However, Plaintiff's averments regarding the generalized ability to plead punitive damages in other respects is not a reflection of applicable jurisprudence. “Punitive damages may not be pleaded generally.” *Today's IV, Inc. v. Los Angeles County Metropolitan Transportation Authority* (2022) 83 Cal.App.5th 1137, 1193. They require “specific factual allegations showing that defendant's conduct was oppressive, fraudulent, or malicious to support a claim for punitive damages.” *Ibid*.

Defendant’s contention that the contractual claims cannot support punitive damages is correct as a matter of law, but Plaintiff makes no contention to this effect. Punitive damages here must rely on the breach of fiduciary duty claim. Defendant also argues that the FAC fails to state facts that could be found to meet the standard of “oppressive, fraudulent, or malicious”. This opines a restrictive view of malicious conduct that fails to address the full statutory language. Malicious conduct includes tortious conduct “intended by the defendant to cause injury to the plaintiff…” Civ. Code, § 3294 (c)(1). Intentional torts presumably meet the standard of the statute, so long as they have facts sufficient to support the finding of malice.

The question remains whether Plaintiff has alleged facts sufficient to meet the standard of malice, oppression, or fraud. Malice requires that Defendant “intended [] 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.” Civ. Code § 3294(c)(1). Given that despicable conduct is not described or argued, unintentional conduct cannot form the basis for punitive damages here. However, Plaintiff alleges an intentional tort in the form of breach of fiduciary duty. It is not clear whether this meets the burden of intent “to cause injury”. Were this the case, plaintiffs would allege the mere conclusion of intent and punitive damages would be adequately pled. Cases show us that is not the case. See *Turman v. Turning Point of Central California, Inc.* (2010) 191 Cal.App.4th 53, 63 (plaintiff alleged intentional gender discrimination, and motion to strike was properly granted, as the complaint failed to allege facts sufficient to meet the standard for malice). Therefore, something more than a conclusory expression of intent appears to be necessary.

Defendant argues that the FAC falls short of the requirements because it fails to allege malicious conduct with sufficient specificity. The FAC is not particularly specific as to the particular, evidentiary facts of what occurred. No allegations of when or how Defendant misappropriated information is included. While there are vague references to Defendant’s participation in obtaining funding and purchases, notable details are omitted, despite the appearance that Plaintiff knows other details with great specificity. Scant specific information is pled. These are generalized pleadings that absent a requirement of specificity, would meet the requirement to plead “ultimate facts”. However, that is not the requirement for punitive damages. Instead, due to the intent of the remedy being to punish rather than compensate, the notice required is more stringent. “[S]pecific” factual allegations must be made. *Today's IV, Inc. v. Los Angeles County Metropolitan Transportation Authority* (2022) 83 Cal.App.5th 1137, 1193. Here, the lack of detail leaves to Defendant’s speculation what was misappropriated. Given the drastic nature of the remedy, Cross-Complainant must plead with greater specificity to support the prayer.

The motion to strike is GRANTED with leave to amend.

B. <u>Litigation Conduct</u>

Plaintiff does not oppose the motion to strike to the degree it asks to strike FAC ¶¶ 28-30. These are clearly and obviously inappropriate, both as acts falling under the litigation privilege, and conduct which postdates the filing of the complaint in this matter.

The motion to strike is GRANTED WITHOUT LEAVE TO AMEND.

IV. Conclusion

Based on the foregoing, the Demurrer is **SUSTAINED** with leave to amend as to the Second, cause of action**, OVERRULED** as to the First and Third causes of action.

The motion to strike is **GRANTED WITH LEAVE TO** AMEND as to punitive damages**,** and **GRANTED without leave to amend** as to FAC ¶¶ 28-30.

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).

7. MCV-178973, DeMeo v. Denbeste

This matter was previously reassigned to the Superior Court of California, County of Marin in 2019. It was renumbered as case number JC 1404237. Defendant was also designated a vexatious litigant in 2007. Defendant filed the motion in this court, but this court has no jurisdiction to issue orders in the matter due to the reassignment. On September 10, 2026, in JC 1404237, the presiding judge issued an order incorporating the instant filings into that case and striking them. The appropriate court having adjudicated the issue, this Court removes the matter from calendar.

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