SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 6
Honorable Evette D. Pennypacker, Presiding

David Criswell, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2160

October 17, 2024
9:00 A.M.

RECORDING COURT PROCEEDINGS IS PROHIBITED

ORAL ARGUMENT

Before 4:00 PM today you must notify the:

(1) Court by calling (408) 808-6856 and

(2) Other side by phone or email that you will appear at the hearing to contest the tentative

If you fail to so notify the court or opposing side, the Court will not hear argument, and the tentative ruling will be adopted.

(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

APPEARANCES

The Court strongly prefers in-person appearances.

If you must appear virtually, you must use video. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 6:
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

COURT REPORTERS

The Court does **not** provide official court reporters. If you want a court reporter to report your hearing, you must submit the appropriate form, which can be found here:
https://www.scscourt.org/general_info/court_reporters.shtml

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	17CV315253	SoFi Lending Corp. vs Hieu Le	The Court did not receive Defendant's papers in support of the claim of exemption from the Los Angeles County Sheriff's office. Thus, the Court is unable to rule on Defendant's claim of exemption. Both parties are accordingly ordered to appear at the hearing and provide the Court with copies of Defendant's claim. Remote appearance is acceptable, and Defendant's papers can be emailed to Department6@scscourt.org.
2	19CV348023	Phillip Erkenbrack vs Teresa Trinh	The parties reached an agreement during the September 12, 2024 hearing wherein judgment debtor would pay judgment creditor $18,000 within 30 days of that hearing date. The debtor's examination was continued to ensure that payment had been made. If it has, no party need appear, and the matter will come off calendar.
3	20CV367561	ZACHARY KOWITZ et al vs MICHAEL KOWITZ et al	The Court will enter the proposed order submitted on October 15, 2024 amends the August 29, 2024 order and strikes Bay Surplus Technology, Inc. from the Order of Sale of Dwelling. This shall resolve Defendants' motion for reconsideration.
4	22CV407913	A&E Electrical Company, Inc. vs Scott Nishiyama dba Ethel's Fancy et al	Alsterlind Construction Incorporated's motion to compel responses to form interrogatories and for monetary sanctions is DENIED. First, serving documents on the attorney of record is effective service. Asterlind cited no authority to the contrary. Thus, service of the original discovery responses was timely. Next, sending a dense letter two days before the motion discovery cut off is not "a reasonable and good faith attempt at an informal resolution of each issue presented in the motion" as required under Code of Civil Procedure section 2016.040. It is clear that once the parties picked up the phone and spoke to each other, a proposed resolution was reached. Finally, A&E Electrical has since served a supplemental response to form interrogatory No. 15.1. While Asterlind argues that response is still lacking, the quality of those responses is not before the Court on this motion. Moreover, the fact that A&E Electrical (a) agreed to a process to get Asterlind the requested information and (b) supplemented its response to form interrogatory No. 15.1 when the plan could not be completed before its opposition to this motion came due demonstrates that a Code compliant meet and confer would have obviated the need for this motion practice. Asterlind's motion to compel and for sanctions is accordingly denied. Court will prepare formal order.
5	22CV409123	Esmeralda Guzman et al vs Paula Arroyo et al	Wells Fargo Bank, N.A.'s demurrer is SUSTAINED WITHOUT LEAVE TO AMEND. Scroll to line 5 for complete ruling. Court to prepare formal order.
6	23CV409691	In re: Quality Loan Service Corp. vs 500 W Middlefield Unit 69, Mountain View, Ca. 94043	This motion was heard and addressed on September 26, 2024, and the signed the final order on October 2, 2024. The parties are ordered to appear on January 30, 2025 at 10:00 in department 6 and show cause why the case should not be dismissed.
7	23CV422621	MICHAEL HERTZ vs MARK A. OLIVEREZ et al	Off calendar.
8	23CV426978	Raul Ortega et al vs First American Title Company et al	First American Title Company and First American Title Insurance Company's demurrer to the second amended complaint is SUSTAINED WITHOUT LEAVE TO AMEND. Scroll to line 8 for complete ruling. Court to prepare formal order.
9	24CV445684	Natasha Doubson vs Hoover Krepelka, LLP	Plaintiff's motion to disqualify JULIA P. MCDOWELL as counsel for HK is GRANTED. Plaintiff's motion to strike HK's filings is DENIED. Scroll to line 9 for complete ruling. Court will prepare formal order.

10	24CV444998	City of San Jose, a charter city vs Kim Ho et al	The parties are ordered to appear at this hearing, which was advanced from October 31, 2024, on Jesse Fernandez's claim of right of possession. Jesse Fernandez filed a claim of right of possession to 991 Wainwright Drive San Jose 95128 ("the Property") on September 23, 2024. Fernandez asserts that he has occupied the Property since October 12, 2023 but claims to have no rental agreement with the landlord. Fernandez also swears: "I presented this claim form to the sheriff, marshal, or other levying officer, AND within two court days I shall deliver to the court (1) a copy of this completed claim form or a receipt, and (2) the court filing fee or form for proceeding in forma pauperis." Fernandez submitted a fee waiver request on September 19, 2024, which request was granted on that same date. The hearing date assigned to Fernandez's claim was October 31, 2024. The Court is unable to locate evidence that Fernandez submitted a completed claim form or receipt. On October 11, 2024 (first filed on October 1, 2024 but rejected by the clerk's office), the previously appointed Receiver, Gerard F. Keena III, moved ex parte to advance the hearing on Fernandez's claim because Fernandez failed to deposit 15 days rent, the October 31 hearing date is outside the statutorily required timeframe, and the Property is in a condition that is detrimental to public health and safety. The undersigned granted the Receiver's ex parte application and advanced the hearing to October 17, 2024. Fernandez brought his claim under Code of Civil Procedure section 1174.3(c)(2): A claim of right to possession is effected by. . . (2) Presenting a completed claim form in person with identification to the sheriff, marshal, or other levying officer as prescribed in this section, and delivering to the court within two court days after its presentation, the appropriate fee or form for proceeding in forma pauperis *without delivering the amount equivalent to 15 days' rent*. In this case, the court shall immediately set a hearing on the claim to be held on the fifth day after the filing is completed. *The court shall notify the claimant of the hearing date at the time the claimant completes the filing by delivering to the court the appropriate fee or form for proceeding in forma pauperis and shall notify the plaintiff of the hearing date by first-class mail*. Upon receipt of a claim of right to possession, the sheriff, marshal, or other levying officer shall indicate thereon the date and time of its receipt and forthwith deliver the original to the issuing court and a receipt or copy of the claim to the claimant and notify the plaintiff of that fact. (Emphasis added.) Thus, Fernandez was not necessarily required to deposit 15 days rent for the claim of possession to be effective, and the claim cannot be denied on that basis. However, the Court has no indication that Fernandez timely submitted the claim to the Sheriff as required. And, while the Court agrees with the Receiver that Fernandez's claim of possession is highly suspect given that there is not even an oral rental agreement with the Property owner, the Court has some concerns that Fernandez will not have received adequate notice of the advanced hearing date, since notice of the hearing was sent by regular mail on October 15, 2024, just two days before the hearing. This is not the Receiver's fault, of course. The court should have but did not set an expedited hearing at the time Fernandez submitted his claim because he did not include 15 days rent. However, Fernandez may believe he need only appear at the October 31 hearing date, which may impact what actions the Court is empowered to take during the hearing.

Calendar Line 5
Jose Roman Ochoa v. Excellence RE Real Estate Inc., Case No. 22CV409123

Before the Court is Cross-Defendant Wells Fargo Bank, N.A.'s, ("Wells Fargo") demurrer to Cross-complainants' Excellence RE Real Estate Inc. ("Excellence) and Paula Arroyo first amended cross-complaint ("FAXC"). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

Excellence is a brokerage firm that represented Plaintiffs in their transaction for purchase of a real property located at 14111 Buckner Drive in the City of San Jose ("Property"). On September 21, 2022, Plaintiffs executed a California Residential Purchase Agreement and Joint Escrow Instructions, including a seller Multiple Counteroffer No.1 executed on September 23, 2022, indicating a purchase price of $1,280,000 (collectively the "Purchase Agreement"). Ms. Arroyo was Plaintiffs' real estate agent under the Purchase Agreement. Ms. Sosa was assisting or otherwise working with and on behalf of Arroyo and Excellence as a Certified Transaction Coordinator. (First Amended Complaint ("FAC"), ¶¶ 9-12.)

On October 11, 2022, pursuant to the Purchase Agreement, Plaintiffs were to wire $1,245,818.05 to Fidelity National Title Company as escrow holder for the transaction. That morning, at 8:52 a.m., Plaintiffs received an email from Ms. Sosa containing wire transfer instructions. Minutes later, at 8:57 a.m., Plaintiffs received an email purporting to be from Ms. Arroyo requesting the transfer amount of $1,245,818.05 and attached a wire transfer instruction that was later discovered to be fraudulent. (FAC, ¶¶ 15, 16.) Ms. Arroyo's email address was manipulated to appear that an email originated from her when in fact it was sent from another source. (FAXC, ¶ 8.) Unaware of the fraud, Plaintiffs complied with the request and wired $1,245,818.05 from their Wells Fargo account to an account other than the intended recipient. (FAC, ¶ 17.)

Cross-complainants believe Wells Fargo knew or should have known the subsequent wire transfer instruction was different, even though the information about the escrow holder, the buyer and the property address were all the same as that in the first set of instructions. (FAXC, ¶

9.) Cross-complainants allege Wells Fargo was required to utilize commercially reasonable security procedures to verify the transaction and it failed to do so. (FAXC, ¶¶ 11-13.)

Plaintiffs initiated this action on December 23, 2022, and subsequently filed their FAC on August 22, 2023, against Excellence, Ms. Arroyo and Ms. Sosa alleging causes of action for (1) breach of contract, (2) breach of fiduciary duty, (3) negligence, (4) professional negligence, and (5) constructive fraud.

On February 22, 2024, Excellence and Arroyo filed their cross-complaint against Wells Fargo. The Court sustained Wells Fargo's demurrer to that cross-complaint with 20 days leave to amend by order dated July 9, 2024 ("Order"). Excellence and Arroyo filed an amended cross-complaint on July 17, 2024, alleging: (1) indemnification, (2) contribution, (3) declaratory relief, and (4) negligence.

II. Legal Standard

"The party against whom complaint or cross-complaint has been filed may object, by demurrer or answer as provided in [Code of Civil Procedure] section 430.30, to the pleading on any one or more of the following grounds: (e) The pleading does not state facts sufficient to 12 constitute cause of action, (f) The pleading is uncertain." (Code Civ. Proc., 430.10, subds. 13 (e) (f).) A demurrer may be utilized by "[t]he party against whom complaint has been filed" to object to the legal sufficiency of the pleading as whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 16 430.10, 430.50, subd. (a).)

The court treats demurrer "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 20 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 24 197, 213-214 (*Committee on Children's Television*).) In ruling on demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A*. (2013) 214 26 Cal.App.4th 743,

751.) Evidentiary facts found in exhibits attached to complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

III. Judicial Notice

Cross-complainants' request for judicial notice of Uniform Commercial Code §4A-205, including Office Comment 2 to the section is GRANTED.

IV. Judicial Notice

A. Uniform Commercial Code, Article 4A - Preemption of Common Law Claims.

Wells Fargo previously demurred to Cross-complainants' causes of action on the grounds that common law claims are displaced by Article 4A of the Uniform Commercial Code ("U.C.C.") Sustaining the demurrer, the Court explained that each of Cross-complainants' claims against Wells Fargo is based on the allegation that Wells Fargo made an improper funds transfer, which is unequivocally addressed by Article 4A and Division 11 of the California Uniform Commercial Code "Cal. U.C.C."). Consequently, Cross-complainants' common law claims and remedies were preempted in lieu of the statutory remedies. (Order.) The basis of Cross-complainants' causes of action in their FAXC against Wells Fargo remains the same, i.e., improper funds transfer.

Article 4A of the Uniform Commercial Code has been adopted as Division 11 of the Cal. U.C.C. governing funds transfers which include wire transfers. (*Chino Commercial Bank, N.A. v. Peters*, (2010) 190 Cal.App.4th 1163, 1173 (*Chino*); Cal. U.C.C. § 1103(b).) Division 11 provides that common law causes of action based on allegedly improper funds transfer are preempted or displaced in two specific areas: (1) where the common law claims would create rights, duties, or liabilities inconsistent with Division 11, and (2) where the circumstances giving rise to the common law claims are specifically covered by the provision of Division 11. (See, *Zengen v. Comerica Bank* (2007) 41 Cal.4th 239, 253.) Article 4A does not automatically displace all common law claims. Principles of law and equity apply unless displaced by particular code provisions. (See *Id.* at 252; *Chino, supra*, at 1174.)

Cross-complainants contend their causes of action are not preempted because common law claims are their only vehicle to recover any funds Wells Fargo was required to recover under

Cal. U.C.C. § 11205(a). Wells Fargo asserts Cross-complainants' reliance on § 11205(a) is misplaced since it does not apply to the facts of this case. The Court agrees.

Cal. U.C.C. §11205(a), as it is titled, pertains to certain errors in a payment order that was accepted and transmitted pursuant to a security procedure for the detection of error. "[S]ecurity procedure is defined by Section 4A-201 as a procedure established by agreement of a customer and a receiving bank for the purpose of … detecting error …. Section 4A-205 does not apply if the receiving bank and the customer did not agree to the establishment of a procedures for detecting error." (Cal. U.C.C. §11205, comment 1 (internal quotations omitted).) Furthermore, the type of erroneous payment orders this section applies to are (1) payment to a beneficiary not intended by the sender, (2) payment in an amount greater than the amount intended by the sender, or (3) duplicate of a payment order previously sent by the sender. (See Cal. U.C.C. § 11205(a).) Once the requisites of § 11205(a) are met, the receiving bank would be entitled to recover from the beneficiary to the extent allowed by the law governing mistake and restitution. (See, Cal. U.C.C. § 11205)(a)(2), (3).)

However, none of the enumerated mistakes apply to the Plaintiffs' payment order since, at the time of the transaction, they intended to send the wire to the account number provided, in the amount listed and to the intended and named beneficiary i.e., Fidelity. (Complaint, ¶¶ 13-16.) More importantly, neither Plaintiffs nor Cross-complainants allege the existence or terms of any security procedure agreement with Wells Fargo. Instead, Cross-complainants allege Wells Fargo failed to utilize "commercially reasonable security procedures" without identifying any procedures or violations that would have detected the fraud. (FAXC, ¶ 17.)

Cross-Complainants seek to impose liability on Wells Fargo for processing Plaintiff's authorized wire transfer (Complaint ¶¶ 13-17); conduct which is expressly governed by Cal. U.C.C. § 11202(a). Accordingly, Wells Fargo's demurrer to Cross-complainants' causes of action is SUSTAINED WITHOUT LEAVE TO AMEND.

B. Violation of Cal. U.C.C. § 11202(b)

While the FAXC does not specifically refer to Cal. U.C.C. § 11202(b), it alleges that prior to executing the wire transfer, "Wells Fargo was required to utilize commercially reasonable

security procedures to verify the transaction *in line with statutory requirements*" and it failed to do so. (FAXC, ¶¶ 11-13, emphasis added.)

Cal. U.C.C. 11202(b) provides:

> If bank and its customer have agreed that the authenticity of payment orders issued to the bank in the name of the customer as sender will be verified pursuant to security procedure, payment order received by the receiving bank is effective as the order of the customer, whether or not authorized, if (i) the security procedure is commercially reasonable method. of providing security against unauthorized payment orders, and (ii) the bank proves that it accepted the payment order in good faith and in compliance with the security procedure and any written agreement or instruction of the customer restricting acceptance of payment orders issued in the name of the customer. The bank is not required to follow an instruction that violates written agreement with the customer or notice of which is not received at time and in manner affording the bank reasonable opportunity to act on it before the payment order is accepted.

As noted above, "security procedure" is a procedure established by agreement of a customer and a receiving bank for the purpose of detecting error. (See, Section 4A-201.) Cal. U.C.C. § 11202(c) addresses the reasonableness of the security measures:

> Commercial reasonableness of a security procedure is a question of law to be determined by considering the wishes of the customer expressed to the bank, the circumstances of the customer known to the bank, including the size, type, and frequency of payment orders normally issued by the customer to the bank, alternative security procedures offered to the customer, and security procedures in general use by customers and receiving banks similarly situated. A security procedure is deemed to be commercially reasonable if (i) the security procedure was chosen by the customer after the bank offered, and the customer refused, a security procedure that was commercially reasonable for that customer, and (ii) the customer expressly agreed in a record to be bound by any payment order,

whether or not authorized, issued in its name and accepted by the bank in compliance with the bank's obligations under the security procedure chosen by the customer.

Here, the FAXC fails to allege (1) the existence of a security procedure agreement between Wells Fargo and Plaintiffs, (2) the procedures Wells Fargo was reasonably required to take, and (3) how the security measures were violated.

Accordingly, Wells Fargo's demurrer to the first amended cross-complaint on this ground is SUSTAINED WITHOUT LEAVE TO AMEND.

C. Negligence

As stated above, negligence occurring within the four corners of wire transfer transaction is preempted or displaced by Article 4A and Division 11 of the Cal. U.C.C. applicable to wire transfers. (See also, *Zengen, supra*, at 250.) Even if the U.C.C. did not displace the negligence claim, Cross-complainants have not properly pleaded negligence.

"To state cause of action for negligence plaintiff must allege (1) the defendant owed the plaintiff duty of care, (2) the defendant breached that duty, and (3) the breach proximately caused the plaintiff's damages or injuries. Whether duty of care exists is question of law to be determined on case-by-case basis." (*Luceras v. BAC Home Loans Servicing, LP* (2013) 221 20 Cal.App.4th 49, 62.)

Civil Code § 1714(a), provides, "Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person … ." However, generally, there is no recovery in tort for negligently inflicted financial harm unaccompanied by physical or property damage. (See, *Sheen v. Wells Fargo Bank, N.A.* (2022) 12 Cal.5th 905, 922.) The primary exception to this rule of no recovery is where the plaintiff and the defendant have a special relationship and policy considerations support finding a duty. "What we mean by special relationship is that the plaintiff was an intended beneficiary of a particular transaction but was harmed by the defendant's negligence in carrying it out." (*Southern California Gas Leak Cases* (2019) 7 Cal.5th 391, 400 (*Gas Leak Cases*).) Additionally, "absent extraordinary and

specific facts, bank does not owe duty of care to noncustomer." (*Software Design Application, Ltd, v. Hoefer Arnett, Inc*. (1996) 49 Cal.App.4th 472, 479.)

Here, Cross-complainants, citing *Biakanja v. Irving* (1958) 49 Cal.2d 647 (*Biakanja*), and *The Law Firm of Fox & Fox v. Chase Bank, N.A.* (2023) 95 Cal. App. 5th 182, 195 (*Fox*), claim a special relationship with Wells Fargo stemming from their financial stake in the real estate transaction and the subject wire transfers. These cases are inapposite.

The Supreme Court in *Biakanja,* held a notary public, who negligently drafted a will for the decedent, owed a duty of care to an estate beneficiary who was not in contractual privity with the notary public but was the intended beneficiary of the transaction. (*Biakanja, supra,* at pp. 650–651.) The Court explained the defendant's liability to a third person not in privity is a matter of policy and involves the balancing of various factors: (1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury suffered; (5) the moral blame attached to the defendant's conduct; and (6) the policy of preventing future harm. (*Ibid*.) Later the Supreme Court explained, "[a] special relationship existed between the intended beneficiary and the notary in *Biakanja* … because 'the "end and aim" of the transaction' between the nonparty decedent and the notary was to ensure that the decedent's estate passed to the intended beneficiary." (*Gas Leak Cases, supra*, 7 Cal.5th at p. 400, quoting *Biakanja*, at p. 650.)

In *Fox* the appellate court concluded a bank owed a law firm a duty of care based on the special relationship it had with the firm as an intended beneficiary of the probate court's order directing that the estate funds be deposited into a blocked account from which withdrawals could only be made on court order and the bank's acceptance of that order by executing the "receipt and acknowledgment of order for the deposit of money into blocked account." (*Fox, supra*, at 182.)

In contrast to *Fox* and *Biakanja*, Cross-complainants were not the intended beneficiaries in the wire transaction. While Cross-complainants had a financial stake in the real estate transaction, Fidelity was the intended intermediary beneficiary, and the seller was the intended

final beneficiary of the wired funds. In other words, the "end and aim" of the transaction between Wells Fargo and Plaintiffs was to ensure that the wired funds passed to Fidelity in trust for the seller. Furthermore, neither the complaint nor the FAXC allege facts showing the degree, certainty, and foreseeability of financial loss to Cross-complainants when Fidelity was to be the recipient of the wired funds.

Cross-complainants have not pled a special relationship with Wells Fargo that gives rise to a duty of care. Wells Fargo demurrer to the negligence cause of action is therefore SUSTAINED WITHOUT LEAVE TO AMEND.

D. Indemnification, Contribution, and Declaratory Relief

Wells Fargo contends Cross-complainants' causes of action for indemnification, contribution, and declaratory relief fail because they are based on theory of comparative negligence that requires a viable negligence claim against Wells Fargo. The Court agrees.

Accordingly, the Court SUSTAINS Wells Fargo's demurrer to causes of action for indemnification, contribution, and declaratory relief WITH OUT LEAVE TO AMEND.

Calendar Line 8
Raul Ortega, et al. v. First American Title Company, et al. Case No. 23CV426978

Before the Court is defendants First American Title Company's ("FATC") and First American Title Insurance Company's ("FATIC") (collectively, "Defendants") demurrer to plaintiffs' Raul Ortega and Martina Ortega's (collectively, "Plaintiffs") second amended complaint ("SAC"). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This action arises from an alleged breach of an escrow instructions and the related title insurance policy. According to the SAC, in 2014, Plaintiffs sold some undeveloped land they owned in Gilroy (the "Property") to Delia Ruvalcaba, Isaias Ruvalcaba, Noe Perez, and Elizabeth Perez (collectively, "Buyers") for $350,000 and carried back a $125,000 promissory note secured by a deed of trust against the Property. (SAC, ¶¶ 1-3.) FATC was the escrow holder and FATIC was the title insurance company. (SAC, ¶¶ 4, 6.)

FATC provided a preliminary report of the title search in early August 2014 and failed to list that the Property was subject to an easement that had been created and recorded in 1991, before Plaintiffs purchased the Property. (SAC, ¶¶ 27, 29, 35.) In December 2021, the Buyers filed a lawsuit against Plaintiffs and others based on the nondisclosure of the easement, which was settled on November 8, 2023. As part of the settlement, the Buyers assigned all of their claims relating to the sale to Plaintiffs, including claims against FATC and FATIC. (SAC, ¶¶ 11-12, 42-44.)

Plaintiffs filed the complaint on December 4, 2023 and a first amended complaint on February 8, 2024, asserting (1) breach of contract, (2) breach of the covenant of good faith and fair dealing, (3) breach of fiduciary duty, (4) negligence, (5) constructive fraud, and (6) declaratory relief. On June 21, 2024, the Court issued an order sustaining Defendants' demurrer to the first, second, third, and fifth causes of action with leave to amend and sustaining it to the fourth and sixth causes of action, without leave to amend (the "Order"). On July 5, 2024, Plaintiffs filed their SAC asserting (1) breach of contract, (2) breach of the covenant of good faith

and fair dealing, (3) breach of fiduciary duty, and (4) negligence. On August 1, 2024, Defendants filed the instant motion which Plaintiffs oppose.

II. Legal Standard for a Demurrer

"The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in [Code of Civil Procedure s]ection 430.30, to the pleading on any one or more of the following grounds: . . . (e) The pleading does not state facts sufficient to constitute a cause of action, (f) The pleading is uncertain." (Code Civ. Proc., § 430.10, subds. (e) & (f).) A demurrer may be utilized by "[t]he party against whom a complaint [ ] has been filed" to object to the legal sufficiency of the pleading as a whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).)

The court treats a demurrer "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214 (*Committee on Children's Television*).) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

Defendants demur to the first, second, and third causes of action on the ground that they fail to allege sufficient facts to state a claim. (See Code Civ. Proc., § 430.10, subd. (e).)

III. Analysis

A. First Cause of Action-Breach of Contract

To prevail on a of action for breach of contract, the plaintiff must allege and prove: (1) the contract, (2) the plaintiff's performance of the contract and excuse for nonperformance, (3) the

defendant's breach, and (4) the resulting damage to the plaintiff. (*Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1186.) "Where a complaint is based on a written contract which it sets out in full, a general demurrer to the complaint admits not only the contents of the instrument but also any pleaded meaning to which the instrument is reasonably susceptible." (*Aragon-Haas v. Family Security Ins. Services, Inc.* (1991) 231 Cal.App.3d 232, 239.)

"While the 'allegations [of a complaint] must be accepted as true for purposes of demurrer,' the 'facts appearing in exhibits attached to the complaint will also be accepted as true, and if contrary to the allegations in the pleading, will be given precedence.'" (*Bakke v. Economic Concepts, Inc.* (2013) 213 Cal.App.4th 761, 767 (*Bakke*); see also *SC Manufactured Homes, Inc. v. Liebert* (2008) 162 Cal.App.4th 68, 83 (*SC Manufactured Homes*) ["[i]f the allegations in the complaint conflict with the exhibits, we rely on and accept as true the contents of the exhibits"].)

1. **FATC**

Plaintiffs allege FATC breached the Vacant Land Purchase Agreement and Joint Escrow Instructions (the "Escrow Instructions") by failing to conduct a reasonable and diligent title search. (SAC, ¶¶ 53-58.) The Escrow Instructions provide:

> Within the time specified in Paragraph 19, Buyer shall be provided a current preliminary title report ("Preliminary Report"). The Preliminary Report is only an offer by the title insurer to issue a policy of title insurance and *may not contain every item affecting title.* Buyer's review of the Preliminary Report and any other matters which may affect title are a contingency of this Agreement as Specified in paragraph 19B. The company providing the preliminary report shall, prior to issuing a preliminary report, *conduct a search of the general index for all Sellers except banks or other institutional lenders selling properties they acquired through foreclosure (REOs), corporations, and government entities.*

(SAC, ¶ 54, Exh. B, ¶ 18(A) [emphasis added].)

It is undisputed that FATC conducted a title search and issued a preliminary report. Plaintiffs contend the title search was not reasonable or diligent because it failed to discover the

easement. (See SAC, ¶ 45.) The Escrow Instructions expressly state that the preliminary report may not contain every item affecting title. (See *Bakke, supra,* 213 Cal.App.4th at p. 767; see also *SC Manufactured Homes, supra,* 162 Cal.App.4th at p. 83.) Therefore, Plaintiffs fail to state facts that FATC's failure to discover the easement constitute a breach of Paragraph 18(A) of the Escrow Instructions or any other Escrow Instructions terms. Therefore, FATC and FATC's demurrer to the first cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

2. **FATIC**

Plaintiffs allege FATIC breached the terms of the CLTA/ALTA Homeowner's Policy of Title Insurance ("Title Insurance Policy") by failing to perform a title search on the Property, failing to disclose the easement, and failing to indemnify and defend Plaintiffs. (SAC, ¶ 73.)

"A written contract may be pleaded either by its terms—set out verbatim in the complaint or a copy of the contract attached to the complaint and incorporated therein by referenced, or by its legal effect. [Citation.] In order to plead a contract by its legal effect, plaintiff must allege the substance of its relevant terms. This is more difficult, for it requires a careful analysis of the instrument, comprehensiveness in statement, and avoidance of legal conclusions." (*Heritage Pacific Financial, LLC v. Monroy* (2013) 215 Cal.App.4th 972, 993 (*Heritage*).) Plaintiffs purport to attach the Title Insurance Policy as Exhibit C, however, the exhibit is missing the first page and states:

> Dated as of August 04, 2014, at 7:30 A.M.
>
> The form of policy of title insurance contemplated by this report is:
>
> To Be Determined
>
> A specific request should be made if another form or additional coverage is desired.

(SAC, Exh. C, p. 1.)

The SAC adds the following allegations to this claim against FATIC:

- "The Title Insurance Policy outlines the risk covered, the limitations on coverage, the exclusions, and exceptions," (SAC, ¶ 65);

- "The Title Insurance Policy covers Plaintiffs' claim because the *Easement* is shown by public records, i.e., in the Santa Clara County—Clerk-Recorder's office, and it could be ascertained by an inspection of the land," (SAC, ¶ 66);
- "Plaintiffs (in their position as Assignees of the former Buyers) duly performed all of the conditions, covenants, and promises to be performed on their part under the terms of the title insurance policy. As stated above, a TIMELY claim was made against the Policy per the terms of it and it was confirmed/acknowledged by the Defendant," (SAC, ¶ 72); and
- "The Title Insurance Policy covers Plaintiffs' claim because the *Easement* is shown by public records, i.e., in the Santa Clara County—Clerk-Recorder's office. The *Easement* was recorded in the Santa Clara County—Clerk-Recorder's on or about April 25, 1991." (SAC, ¶ 74.)

The Court previously found Plaintiffs failed to sufficiently allege the contract or its legal effects. (Order, p.4:18-22.) The new allegations fail address this deficiency. (See *Gilmore v. Lycoming Fire Ins. Co.* (1880) 55 Cal.123, 124 [a complaint is insufficient if it omits allegations to show the legal effect of the contract's material/essential terms].)

Defendants also argue that Buyers did not assign their title policy or claims against FATIC to Plaintiffs. In support, they rely on the Settlement Agreement, which provides, in relevant part, "Plaintiffs also hereby convey, transfer, and assign to Defendants all the rights, title, and interest to any claims related to or arising from the Purchase Agreement and/or the Easement Claims that Plaintiffs have *against First American Title Company* ("Claim Assignment")." (SAC, Exh. D, ¶ 2 [emphasis added].) Plaintiffs contend that FATIC is not excluded from this claim even though the Settlement Agreement only specified claims against FATC. But Plaintiffs assert this claim against FATIC "*as assignees of the Buyer's policy*." (See SAC, p. 8:22-23 [emphasis added].) Thus, FATIC's demurrer to the first cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

B. Second Cause of Action- Breach of the Implied Covenant of Good Faith and Fair Dealing

"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." (*Hicks v. E.T. Legg & Assoc.* (2001) 89 Cal.App.4th 496, 508.)

"[T]he scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract." (*Id*. at p. 509.) "The covenant of good faith and fair dealing… exists… to prevent on contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made." (*Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 349.) "If the allegations for [breach of covenant of good faith and fair dealing] do not go beyond the statement of a mere contract breach and… simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated." (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1394.) A breach of implied covenant good faith and fair dealing involves something beyond breach of the contractual duty itself. (See *Howard v. American National Fire Insurance Company* (2010) 187 Cal.App.4th 498, 528; see also *California Shoppers, Inc. v. Royal Globe Insurance Company* (1985) 175 Cal.App.3d 1, 54.)

Similarly, a covenant of good faith and fair dealing is implied in every insurance contract, including title insurance contracts. (See *White v. Western Title Ins. Co.* (1985) 40 Cal.3d 870, 885.) "[T]here are at least two separate requirements to establish breach of the implied covenant: (1) benefits due under the policy must have been withheld; and (2) the reason for withholding benefits must have been unreasonable or without proper cause." (*Grebow v. Mercury Ins. Co.* (2015) 241 Cal.App.4th 564, 581.)

Plaintiffs' claim against FATC is based on its alleged breach of the Escrow Instructions and their claim against FATIC is based on its alleged breach of the Title Insurance Policy, but they fail to allege any facts beyond those alleged in the breach of contract claim. (See SAC, ¶¶83-87, 90-94.) Plaintiff fails to address the deficiencies identified in the Order or present any new argument. The Court is not persuaded to depart from its prior ruling. As a result, Plaintiffs fail to allege facts sufficient to state this claim against Defendants. (See *Howard, supra*, 187 Cal.App.4th at p. 528 [a breach of implied covenant of good faith and fair dealing involves something beyond the breach of the contractual duty].) Thus, Defendants' demurrer to the second cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

C. Third Cause of Action-Breach of Fiduciary Duty

"'The elements of a cause of action for breach of fiduciary duty are: (1) the existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damage proximately caused by the breach.'" (*Gutierrez v. Girardi* (2011) 194 Cal.App.4th 925, 932.) The breach of fiduciary duty can be based on either negligence or fraud, depending on the circumstances. (*Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 563.)

"'An escrow involves the deposit of document and/or money with a third party to be delivered on the occurrence of some conditions.' An escrow holder is an agent and fiduciary of the parties to the escrow. The agency created by the escrow is limited—limited to the obligation of the escrow holder to carry out the instructions of each of the parties to the escrow that '[a]n escrow holder must comply strictly with the instructions of the parties'." (*Summit Financial Holdings, Ltd. V. Continental Lawyers Title Co.* (2002) 27 Cal.4th 705, 711 (*Summit*).) As such, an escrow holder has a fiduciary duty to communicate to its principals, knowledge acquired in the course of the agency with respect to material facts that might affect the principals' decisions regarding the pending transaction. (*Siegel v. Fidelity National Title Ins. Co*. (1996) 46 Cal.App.4th 1181, 1194 (*Siegel*).) As an agent, an escrow holder owes a duty "to exercise ordinary skill and diligence in his employment and if he acts negligently, he is responsible for any loss occasioned thereby, subject to the rules ordinarily applicable to the premises." (*Spaziani v. Millar* (1963) 215 Cal.App.2d 667, 683.) An escrow holder "'has no general duty to police the affairs of its depositors'; rather, an escrow holder's obligations are 'limited to faithful compliance with [the depositors'] instructions.' [Citations.] Absent clear evidence of fraud, an escrow holder's obligations are limited to compliance with the parties' instructions." (*Summit, supra,* 27 Cal.4th at p. 711.)

1. **FATC**

Plaintiffs allege that as their escrow holder, FATC owed a fiduciary duty to Plaintiff ensure that it strictly complied with the terms of the escrow agreement and Escrow Instructions. (FAC, ¶¶ 100-102.) They further allege FATC breached that duty when it closed escrow without conducting a reasonable review of the disclosure documents and title search, which would have

revealed potential issues of several easements on the Property and prevented escrow closure until the issues were resolved. (SAC, ¶¶ 107-108.)

In *Summit*, the California Supreme Court recognized that "the general rule that an escrow holder incurs no liability for failing to do something not required by the terms of the escrow or for a loss caused by following the escrow instructions." (*Id*. at p. 715.) Plaintiffs' contention that FATC was required to conduct a title search which discloses all liens, title, and easements that would adversely affect Plaintiffs' interests is belied by the Escrow Instructions, which explicitly stated, "[t]he Preliminary Report is only an offer by the title insurer to issue a policy of title insurance and *may not contain every item affecting title.*" (See SAC, ¶ 54, Exh. B, ¶ 18(A).) Plaintiffs fail to allege FATC breached any other portions of the Escrow Instructions or facts to support fraud that would expand FATC's obligations. (See *Summit, supra,* 27 Cal.4th at p. 711.) Thus, FATC's demurrer to the third cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

2. **FATIC**

A fiduciary relationship is "any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where a confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interests of the other party without the latter's knowledge or consent…" (*Wolf v. Sup. Ct.* (2003) 107 Cal.App.4th 25, 29.)

Plaintiffs allege a fiduciary duty was created with FATIC by virtue of its status as Plaintiffs' title company and it breached the duty when it failed to (1) diligently and competently conduct a title search, (2) prepare a complete preliminary report, (3) disclose the easement on the Property, and (4) comply with the terms of the Title Insurance Policy. (SAC, ¶ 117.)

The Court sustained the previous demurrer because the FAC failed to allege facts to establish a fiduciary duty with FATIC. (See Order, p.7:3-4.) Plaintiffs fail to address that deficiency in their SAC, nor do they offer any new arguments on this point. As a result, Plaintiffs

fail to allege sufficient facts to state this claim. Thus, FATIC's demurrer to the third cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

Calendar Line 9
Natasha Doubson vs Hoover Krepelka, LLP, Case No. 24CV445684

Before the Court is Plaintiff's motion to disqualify attorney Julia McDowell from representing Defendant Hoover Krepelka, LLP ("HK") and to strike all papers submitted by McDowell. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

This is a professional negligence action. Plaintiff alleges Defendant HK was negligent when it drafted an attorney fee provision in a settlement agreement with Plaintiff's former spouse while representing Plaintiff in a family law matter. Attorney Julia P. McDowell, a partner at Defendant HK, represented Plaintiff in the family law matter.

McDowell is now representing HK in this malpractice lawsuit. Plaintiff moves to disqualify McDowell from this representation pursuant to California Rules of Professional Conduct, Rule 3.7, which provides:

> (a) A lawyer shall not act as an advocate in a trial in which the lawyer is likely to be a witness unless:
>
> (1) the lawyer's testimony relates to an uncontested issue or matter;
>
> (2) the lawyer's testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) the lawyer has obtained informed written consent (*) from the client. If the lawyer represents the People or a governmental entity, the consent shall be obtained from the head of the office or a designee of the head of the office by which the lawyer is employed.
>
> (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm* is likely to be called as a witness unless precluded from doing so by rule 1.7 or rule 1.9.

(Cal. Rules of Prof'l Conduct, Rule 3.7.) "Notwithstanding a client's informed written consent, courts retain discretion to take action, up to and including disqualification of a lawyer who seeks

to both testify and serve as an advocate, to protect the trier of fact from being misled or the opposing party from being prejudiced." (*Id.*, Comment 3, citing *Lyle v. Superior Court* (1981) 122 Cal.App.3d 470].)

There can be no dispute here that McDowell will be a central witness in this lawsuit. McDowell was the attorney representing Plaintiff during the alleged malpractice; no other attorney is alleged to have even worked on the agreement that gives rise to this lawsuit. Plaintiff does not seek to disqualify HK from representing itself in this litigation, Plaintiff seeks to disqualify McDowell from being the lawyer from HK that takes on that representation. Plaintiff's notice of motion states:

> PLEASE TAKE NOTICE that on October 17, 2024 at 9am in Department 6 of Santa Clara County Superior Court Plaintiff NATASHA DOUBSON will, and hereby does, move the Court (i) to disqualify attorney JULIA MCDOWELL ("Ms. McDowell") from representing Defendant HOOVER KREPELKA, LLP ("Defendant") in this action; and (ii) to strike all papers submitted by Ms. McDowell for filing.

McDowell submits the declaration of Travis I. Krepelka, a named partner at HK, who swears:

> I have been fully advised regarding possible consequences of JAMES J. HOOVER (hereinafter "Mr. Hoover") and/or JULIA P. MCDOWELL (hereinafter "Ms. McDowell") serving both as an advocate in trial and as a potential witness, and that this may affect the outcome of my case. [¶] I have had a reasonable opportunity to seek the advice of independent counsel on this matter. [¶] I consent to and want Mr. Hoover and/or Ms. McDowell of Hoover Krepelka, LLP to represent me in this lawsuit. Since Mr. Hoover's and/or Ms. McDowell's representation of our firm in this case comes at no cost to our firm and has thus far been Defendant's sole representation, Defendant will be prejudiced by being forced to seek

other counsel who will incur greater costs and delay Defendant's ability to have well informed representation.

The fact that McDowell obtained informed consent does not end the inquiry. The Court must now examine whether there is "a convincing demonstration of detriment to the opponent or injury to the integrity of the judicial process." (*Smith, Smith & Kring v. Superior Court* (1997) 60 Cal. App. 4th 573, 579, citing *Lyle v. Superior Court* (1981) 122 Cal. App. 3d 470, 482.) Case law teaches that to make this determination, the Court must carefully weigh competing interests and make thorough factual findings:

> First, the court must consider the combined effects of the strong interest parties have in representation by counsel of their choice, and in avoiding the duplicate expense and time-consuming effort involved in replacing counsel already familiar with the case. (*Lyle v. Superior Court*, *supra*, 122 Cal. App. 3d at p. 481; *People* ex rel. *Younger v. Superior Court* (1978) 86 Cal. App. 3d 180, 201 [150 Cal. Rptr. 156].) "[I]t must be kept in mind that disqualification usually imposes a substantial hardship on the disqualified attorney's innocent client, who must bear the monetary and other costs of finding a replacement." (Gregori *v. Bank of America* (1989) 207 Cal. App. 3d 291, 300 [254 Cal. Rptr. 853].)
>
> Second, the court must consider the possibility counsel is using the motion to disqualify for purely tactical reasons. (*Comden v. Superior Court*, *supra*, 20 Cal. 3d at p. 915.) Should counsel freely be able to disqualify opposing counsel simply by calling them as witnesses, it would "pose the very threat to the integrity of the judicial process that [motions to disqualify] purport to prevent." (*Gregori v. Bank of America, supra*, 207 Cal. App. 3d at pp. 300-301.) " 'After all, in cases that do not involve past representation [conflict cases] the attempt by an opposing party to disqualify the other side's lawyer must be viewed as part of the tactics of an adversary proceeding.' "

> (Graphic *Process Co. v. Superior Court* (1979) 95 Cal. App. 3d 43, 52, fn. 5 [156 Cal. Rptr. 841], quoting *J. P. Foley & Co., Inc. v. Vanderbilt* (2d Cir. 1975) 523 F.2d 1357, 1360.)
>
> Finally, " '[W]henever an adversary declares his intent to call opposing counsel as a witness, prior to ordering disqualification of counsel, the court should determine whether counsel's testimony is, in fact, genuinely needed.' " (*Reynolds v. Superior Court, supra*, [**512] 177 Cal. App. 3d at p. 1027, quoting *Connell v. Clairol, Inc*. (N.D.Ga. 1977) 440 F. Supp. 17, 18, fn. 1.) In determining the necessity of counsel's testimony, the court should consider "the significance of the matters to which he might testify, the weight his testimony might have in resolving such matters, and the availability of other witnesses or documentary evidence by which these matters may be independently established." (*Comden v. Superior Court*, *supra*, 20 Cal. 3d at p. 913; *Graphic Process Co. v. Superior Court, supra*, 95 Cal. App. 3d at p. 50.) The court should also consider whether it is the trial attorney or another member of his or her firm who will be the witness.

(*Smith, Smith & Kring v. Superior Court* (1997) 60 Cal. App. 4th 573, 580-581.)

Here, McDowell will be a central witness in this malpractice action; that Plaintiff will call her to testify at trial and may take her deposition is not tactical, it is expected. Given the centrality of McDowell's testimony, it certainly would be confusing to the fact finder to have McDowell act as both advocate and central witness. Permitting McDowell to do so would also be prejudicial to Plaintiff, who will have to find a way to cross examine the opposing attorney in the presence of the fact finder.

The Court also finds McDowell's assertions of prejudice unpersuasive. This case is in its early stages, and it presents a very straightforward issue. The complaint thoroughly outlines the alleged malpractice, and it would not take long for counsel to come up to speed on the issues

presented there. However, the Court is at a loss as to why new counsel would even be necessary. Plaintiff did not move to disqualify HK; Plaintiff moved to disqualify McDowell. The professional rules plainly contemplate another lawyer in the same firm representing a law firm when a lawyer from the firm will need to be a witness. And Krepelka submits that he would be fine with McDowell ***or*** Hoover representing him in this matter. Thus, even if this motion is granted, HK can have Hoover as its counsel of record.

Accordingly, Plaintiff's motion to disqualify JULIA P. MCDOWELL as counsel for HK is GRANTED.

Plaintiff's motion to strike HK's filings is DENIED. Plaintiff cites no authority or basis for striking filings already made in the case, and the Court finds no grounds to do so.