

**SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA**

Department 20, Honorable Socrates Peter Manoukian, Presiding

Courtroom Clerk: Hien-Trang Tran-Thien

191 North First Street, San Jose, CA 95113

Telephone: 408.882.2320

Department20@scscourt.org

"Every case is important" "No case is more important than any other." –
United States District Judge Edward Weinfeld (<https://www.nytimes.com/1988/01/18/obituaries/judge-edward-weinfeld-86-dies-on-us-bench-nearly-4-decades.html>)

"The Opposing Counsel on the Second-Biggest Case of Your Life Will Be the Trial Judge on the
Biggest Case of Your Life." – Common Wisdom.

As Shakespeare observed, it is not uncommon for legal adversaries to "strive mightily, but eat and
drink as friends." (Shakespeare, *The Taming of the Shrew*, act I, scene ii.)" (*Gregori v. Bank of
America* (1989) 207 Cal.App.3d 291, 309.)

Counsel is duty-bound to know the rules of civil procedure. (See *Ten Eyck v. Industrial Forklifts Co.*
(1989) 216 Cal.App.3d 540, 545.) The rules of civil procedure must apply equally to parties represented
by counsel and those who forgo attorney representation. (*McClain v. Kissler* (2019) 39 Cal.App.5th 399.)

By Standing Order of this Court, all parties appearing in this Court are expected to comply with the
Code of Professionalism adopted by the Santa Clara County Bar Association:

<https://www.sccba.com/code-of-professional-conduct/>

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DATE: Thursday, 11 January 2024

TIME: 9:00 A.M.

**This Department prefers that litigants use Zoom for Law and Motion
in and for Case Management Calendars. Please use the Zoom link below.**

This Court expects all counsel and litigants to comply with the Tentative Rulings Procedures
that are outlined in Local Civil Rule 8(E) and **California Rules of Court**, rule 3.1308. If the Court
has not directed argument, oral argument must be permitted only if a party notifies all other parties
and the Court at (408) 808-6856 before 4:00 p.m. on the court day before the hearing of the party's
intention to appear. A party must notify all other parties by telephone or in person. A failure to
timely notify this Court and/or the opposing parties may result in the tentative ruling being the final
order in the matter.

You may use these links for Case Management Conferences and Trial Setting Conferences without Court permission. Informal
Discovery Conferences and appearances on Ex Parte applications will be set on Order by the Court.

Join Zoom Meeting
<https://scu.zoom.us/j/96144427712?pwd=cW1JYmg5dTdsc3NKNFBpSjJEam5xUT09>
Meeting ID: 961 4442 7712
Password: 017350

Join by phone:
+1 (669) 900-6833
Meeting ID: 961 4442 7712

One tap mobile
+16699006833,,961 4442 7712#

APPEARANCES.

Appearances are usually held on the Zoom virtual platform. However, we are currently allowing in court appearances as well. If you do intend to appear in person, please advise us when you call to contest the tentative ruling so we can give you current instructions as to how to enter the building.

Whether appearing in person or on a virtual platform, the usual custom and practices of decorum and attire apply. (See *Jensen v. Superior Court (San Diego)* (1984) 154 Cal.App.3d 533.). Counsel should use good quality equipment and with sufficient bandwidth. Cellphones are very low quality in using a virtual platform. Please use the video function when accessing the Zoom platform. The Court expects to see the faces of the parties appearing on a virtual platform as opposed to listening to a disembodied voice.

For new Rules of Court concerning remote hearings and appearances, please review California *Rules of Court*, rule 3.672.

"A person's name is to him or her the sweetest and most important sound in any language."—Dale Carnegie. All Courts of California celebrate the diversity of the attorneys and the litigants who appear in our Courts. Do not hesitate to correct the Court or Court Staff concerning the pronunciation of any name or how anyone prefers to be addressed. As this Court is fond of saying, "with a name like mine, I try to be careful how I pronounce the names of others." Please inform the Court how you, or if your client is with you, you and your client prefer to be introduced. The Court encourages the use of diacritical marks, multiple surnames and the like for the names of attorneys, litigants and in court papers. You might also try www.pronouncenames.com but that site mispronounces my name.

Please notify this Court immediately if the matter will not be heard on the scheduled date. *California Rules of Court*, rule 3.1304(b). If a party fails to appear at a law and motion hearing without having given notice, this Court may take the matter off calendar, to be reset only upon motion, or may rule on the matter. *California Rules of Court*, rule 3.1304(d). A party may give notice that he or she will not appear at a law and motion hearing and submit the matter without an appearance unless this Court orders otherwise. This Court will rule on the motion as if the party had appeared. *California Rules of Court*, rule 3.1304(c). Any uncontested matter or matters to which stipulations have been reached can be processed through the Clerk in the usual manner. Please include a proposed order.

All proposed orders and papers should be submitted to this Department's e-filing queue. Do not send documents to the Department email unless directed to do so.

While the Court will still allow physical appearances, all litigants are encouraged to use the Zoom platform for Law & Motion appearances and Case Management Conferences. Use of other virtual platform devices will make it difficult for all parties fully to participate in the hearings. Please note the requirement of entering a password (highlighted above.) As for personal appearances, protocols concerning social distancing and facial coverings in compliance with the directives of the Public Health Officer will be enforced. Currently, facemasks are not required in all courthouses. If you appear in person and do wear a mask, it will be helpful if you wear a disposable paper mask while using the courtroom microphones so that your voice will not be muffled.

Individuals who wish to access the Courthouse are advised to bring a plastic bag within which to place any personal items that are to go through the metal detector located at the doorway to the courthouse.

Sign-ins will begin at about 8:30 AM. Court staff will assist you when you sign in. If you are using the Zoom virtual platform, it will be helpful if you "rename" yourself as follows: in the upper right corner of the screen with your name you will see a blue box with three horizontal dots. Click on that and then click on the "rename" feature. You may type your name as: **Line #/name/party**. If you are a member of the public who wishes to view the Zoom session and remain anonymous, you may simply sign in as "Public."

CIVILITY.

In the 48 years that this Judge has been involved with the legal profession, the discussion of the decline in civility in the legal profession has always been one of the top topics of continuing education classes.

This Court is aware of a study being undertaken led by Justice Brian Currey and involving various lawyer groups to redefine rules of civility. This Judge has told Justice Currey that the lack of civility is due more to the inability or unwillingness of judicial officers to enforce the existing rules.

The parties are forewarned that this Court may consider the imposition of sanctions against the party or attorney who engages in disruptive and discourteous behavior during the pendency of this litigation.

COURT REPORTERS.

This session will not be recorded. No electronic recordings, video, still photography or audio capture of this live stream is allowed without the expressed, written permission of the Superior Court of California, County of Santa Clara. State and Local Court rules prohibit photographing or recording of court proceedings whether in the courtroom or while listening on the Public Access Line or other virtual platform, without a Court Order. See Local General Rule 2(A) and 2(B); *California Rules of Court*, rule 1.150.

This Court no longer provides for Court Reporters in civil actions except in limited circumstances. If you wish to arrange for a court reporter, please use Local Form #CV-5100. All reporters are encouraged to work from a remote location. Please inform this Court if any reporter wishes to work in the courtroom. This Court will approve all requests to bring a court reporter. Counsel should meet and confer on the use of a court reporter so that only one reporter appears and serves as the official reporter for that hearing.

PROTOCOLS DURING THE HEARINGS.

During the calling of any hearing, this Court has found that the Zoom video platform works very well. But whether using Zoom or any telephone, it is preferable to use a landline if possible. IT IS ABSOLUTELY NECESSARY FOR ALL INDIVIDUALS TO SPEAK SLOWLY. Plaintiff should speak first, followed by any other person. All persons should spell their names for the benefit of Court Staff. Please do not use any hands-free mode if at all possible. Headsets or earbuds of good quality will be of great assistance to minimize feedback and distortion.

The Court will prepare the Final Order unless stated otherwise below or at the hearing. Counsel are to comply with **California Rules of Court**, rule 3.1312.

TROUBLESHOOTING TENTATIVE RULINGS.

To access a tentative ruling, move your cursor over the line number, hold down the "Control" key and click. If you see last week's tentative rulings, you have checked prior to the posting of the current week's tentative rulings. You will need to either "REFRESH" or "QUIT" your browser and reopen it. Another suggestion is to "clean the cache" of your browser. Finally, you may have to switch browsers. If you fail to do any of these, your browser may pull up old information from old cookies even after the tentative rulings have been posted.

This Court's tentative ruling is just that—tentative. Trial courts are not bound by their tentative rulings, which are superseded by the final order. (See *Faulkinbury v. Boyd & Associates, Inc.* (2010) 185 Cal.App.4th 1363, 1374-1375.) The tentative ruling allows a party to focus his or her arguments at a subsequent hearing and to attempt to convince the Court the tentative should or should not become the Court's final order. (*Cowan v. Krayzman* (2011) 196 Cal.App.4th 907, 917.) If you wish to challenge a tentative ruling, please refer to a specific portion of the tentative ruling to which you disagree.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 1	17CV311946	YCS Investments Inc. vs. County of Santa Clara	<p>Motion of Plaintiff to Tax Costs/Strike etc.</p> <p>This Court believes that these motions should be heard by Judge Deen who was the trial judge. No hearings will be held in this Department. Judge Deen will contact counsel to set a date for the hearing of these motions.</p> <p>NO FORMAL TENTATIVE RULING.</p>
LINE 2	17CV311946	YCS Investments Inc. vs. County of Santa Clara	<p>Motion of Defendant County of Santa Clara for Attorney's Fees and Expenses.</p> <p>This Court believes that these motions should be heard by Judge Deen who was the trial judge. No hearings will be held in this Department. Judge Deen will contact counsel to set a date for the hearing of these motions.</p> <p>NO FORMAL TENTATIVE RULING.</p>
LINE 3	17CV311946	YCS Investments Inc. vs. County of Santa Clara	<p>Motion of Defendant County of Santa Clara to strike memo of costs filed by plaintiff YCS.</p> <p>This Court believes that these motions should be heard by Judge Deen who was the trial judge. No hearings will be held in this Department. Judge Deen will contact counsel to set a date for the hearing of these motions.</p> <p>NO FORMAL TENTATIVE RULING.</p>

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 4	23CV415803	Antonio Pina v. Covidien, Inc. et al.	<p>Demurrer to Plaintiff's First Amended Complaint by Defendants Covidien Holding Inc and Medtronic USA INC and Covidien L.P Covidien Inc, Covidien LLC, Medtronic PLC, U.S Surgical Corp and Sofradim Production SAS.</p> <p>The demurrer is OVERRULED in its entirety. The Court declines to sustain a demurrer to Plaintiff's request for punitive damages.</p> <p>SEE ATTACHED TENTATIVE RULING.</p>

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 5	21CV376210	Weitao Ku and Pi-Lien Kuo (through George Ku, their attorney-in-fact George Ku) v. Harald Herchen	<p>Motion of Weitao Ku and Pi-Lien Kuo (through George Ku, their attorney-in-fact George Ku) for Summary Adjudication of Defendant Herchen's Ninth Affirmative Defense.</p> <p>On 26 September 2023, Judge Adams of this Court ruled that Alice Ku died on 29 November 2019 in Taiwan. Defendant was a party to that case, he presented evidence, and he argued that she is not dead. Defendant did not object to the order nor did he seek appellate review. Defendant is now estopped from arguing that she is alive.</p> <p>" 'Res judicata' describes the preclusive effect of a final judgment on the merits. Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them." (<i>Mycogen Corp. v. Monsanto Co.</i> (2002) 28 Cal.4th 888, 896 (<i>Mycogen</i>).)</p> <p>"Under the doctrine of res judicata, if a plaintiff prevails in an action, the cause is merged into the judgment and may not be asserted in a subsequent lawsuit; a judgment for the defendant serves as a bar to further litigation of the same cause of action." (<i>Id.</i> at pp. 896-897.)</p> <p>"A clear and predictable res judicata doctrine promotes judicial economy. Under this doctrine, all claims based on the same cause of action must be decided in a single suit; if not brought initially, they may not be raised at a later date." (<i>Mycogen, supra</i>, 28 Cal.4th at p. 897.) " 'Res judicata precludes piecemeal litigation by splitting a cause of action or relitigation of the same cause of action on a different legal theory or for different relief.' " (<i>Weikel v. TCW Realty Fund II Holding Co.</i> (1997) 55 Cal.App.4th 1234, 1245.)</p> <p>Three elements must exist for res judicata to apply: (1) the decision in the prior proceeding is final and on the merits; (2) the present proceeding is on the same cause of action as the prior proceeding; and (3) the parties in the present proceeding or parties in privity with them were parties to the prior proceeding. (<i>Association of Irrigated Residents v. Department of Conservation</i> (2017) 11 Cal.App.5th 1202, 1219.) Stated another way, res judicata or claim preclusion "arises if a second suit involves (1) the same cause of action (2) between the same parties [or their privies] (3) after a final judgment on the merits in the first suit." (<i>DKN Holdings, LLC v. Faerber</i> (2015) 61 Cal.4th 813, 824.)</p> <p>The motion of Weitao Ku and Pi-Lien Kuo (through George Ku, their attorney-in-fact George Ku) plaintiffs' motion for summary adjudication of defendant Herchen's ninth affirmative defense is GRANTED.</p> <p>NO FORMAL TENTATIVE RULING.</p>
LINE 6	23CV410103	Wells Fargo Bank, National Association vs Altin Sallaku et al	<p>Case Management Conference.</p> <p>SEE LINE #7.</p>

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 7	23CV410103	Wells Fargo Bank, National Association vs Altin A. Sallaku a.k.a. A. Altin Sallaku a.k.a. Sallaku A. Altin.	<p>Motion of Plaintiff for Summary Judgment.</p> <p>Defendant has not filed opposition to the motion and the failure to file the required separate statement is "sufficient grounds to grant the motion." (<i>Whitehead v. Habig</i> (2008) 163 Cal.App.4th 896, 902.) The motion of Wells Fargo Bank for summary judgment is GRANTED.</p> <p>Further, the motion is MOOT as Judge Kuhnle executed a default judgment in favor of plaintiff which was filed on 15 December 2023.</p> <p>The matter will be set for Dismissal Review on 14 March 2024 10:00 AM in Department 20.</p> <p>NO TENTATIVE RULING.</p>
LINE 8	23CV416519	Linda Lisner vs City of San José; et al.	<p>Motion Of Defendant Caltrans For Summary Judgment.</p> <p>On 22 December 2023, plaintiff dismissed Caltrans. The motion is OFF CALENDAR.</p>
LINE 9	20CV367863	Charles Thompson vs Bruce Williams et al	<p>Motion of Plaintiff to Compel Defendant to Provide Discovery etc.</p> <p>What is the status of the stipulation and order concerning defendant Williams' deposition and responses to form interrogatories that was filed in this Court on 10 October 2023?</p> <p>At a Case Management Conference heard on 07 November 2023, plaintiff was given leave to file his motion to compel defendant Bruce Williams to comply the foregoing. On its own motion, this Court consolidated this action with #23CV418537 (Bruce Williams vs Charles Thompson et al) and set the matter for a further case management conference to be heard today. It appears that the moving papers were never filed.</p> <p>NO TENTATIVE RULING.</p>
LINE 10	20CV367863	Charles Thompson vs Bruce Williams et al	<p>The Court's Own Motion To Deem Matters To Be Consolidated.</p> <p>The matter is MOOT as consolidation/relation was ordered on 07 November 2023.</p> <p>NO TENTATIVE RULING.</p>

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 11	19CV346678	Premise Data Corporation, a Delaware Corporation vs Moorea Brega; David Mendelson; Alex Pompe.	<p>Motion of Plaintiff for Protective Order etc.</p> <p>The motion is DENIED.</p> <p>Plaintiff filed this lawsuit against defendants alleging that they adversely impacted plaintiff's business. It seems to this Court that it would be unfair to preclude the defendants having access to relevant evidence.</p> <p>The documents are electronic messages from 2018 from Premise CEO Blackman discussing his plan to terminate Mendelson and why employees are leaving the company. There is no justification for sealing these documents from the public and preventing defendants from defending themselves from Premise's public accusations.</p> <p>Premise also seeks an overbroad order endorsing Premise's approach that it may designate any document attorneys-eyes only if the document contains a client or customer name. The Court should deny the request. Premise chose to file suit and allege that defendants made false statements about its contracts. The defendants therefore must review the documents to assist in preparing their defense.</p> <p>NO FORMAL TENTATIVE RULING</p>
LINE 12	19CV346678	Premise Data Corporation, a Delaware Corporation vs Moorea Brega; David Mendelson; Alex Pompe.	<p>Motion Of Plaintiff Motion Of Plaintiff To Seal Unredacted Records etc.</p> <p>The motion is DENIED. See Line #11.</p> <p>NO FORMAL TENTATIVE RULING.</p>
LINE 13	19CV346678	Premise Data Corporation, a Delaware Corporation vs Moorea Brega; David Mendelson; Alex Pompe.	<p>Motion of Plaintiff for Protective Order Limiting PMQ Deposition to Topic #11.</p> <p>The motion is DENIED. See Line #11.</p> <p>NO FORMAL TENTATIVE RULING.</p>
LINE 14	19CV346678	Premise Data Corporation, a Delaware Corporation vs Moorea Brega; David Mendelson; Alex Pompe.	<p>Motion to Seal Confidential Information Submitted in Support of Motion to Maintain That Confidential Designation by Plaintiff hello not a problem not etc.</p> <p>The motion is DENIED. See Line #11.</p> <p>NO FORMAL TENTATIVE RULING.</p>
LINE 15	19CV346678	Premise Data Corporation, a Delaware Corporation vs Moorea Brega; David Mendelson; Alex Pompe.	<p>Motion for Order Preserving Confidentiality Designation of Discovery Document Not Submitted to Court.</p> <p>The motion is DENIED. See Line #11.</p> <p>NO FORMAL TENTATIVE RULING.</p>
LINE 16	19CV346678	Premise Data Corporation, a Delaware Corporation vs Moorea Brega; David Mendelson; Alex Pompe.	<p>Motion to Seal Records.</p> <p>The motion is DENIED. See Line #11.</p> <p>NO FORMAL TENTATIVE RULING.</p>

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 17	21CV385011	Capital One Bank (USA), USA vs. John Davis	<p>Motion of Plaintiff to Set Aside <i>Code of Civil Procedure</i>, § 664.7 stipulation and Enter Judgment.</p> <p>Defendant has defaulted on the terms of the Agreement. Defendant ceased making payments towards the settlement and has not made any payments since 13 March 2023.</p> <p>In response, Plaintiff now files this motion to set aside and vacate the dismissal, and enter Judgment pursuant to the Conditional Stipulated Settlement Agreement.</p> <p>The motion is GRANTED. Plaintiff is entitled to Judgment as follows: prejudgment amount of \$13,176.21 plus court costs of \$488.00, minus credits of \$300.00 totaling \$13,364.21.</p> <p>Plaintiff is to prepare an appropriate judgment and submit it to this Court via the e-filing queue for execution.</p> <p>NO FORMAL TENTATIVE RULING.</p>
LINE 18	23CV414019	Sergio Huaman; Elvis Huaman vs Hathur Trucking Inc.; Jatinder Pal Singh	<p>Motion of Defendants for Leave to File a Cross-Complaint.</p> <p>No party has filed opposition to this motion.</p> <p>Defendants seek to file a cross-complaint (there is no such thing as a “cross-claim” in the <i>Code of Civil Procedure</i>) against Sergio Huaman for equitable indemnity and contribution.</p> <p>The motion is GRANTED. Defendants should present a copy of the proposed cross-complaint to the clerk via the e-filing queue and serve a file endorsed copy upon counsel for the cross-defendant. Sergio Huaman will have 20 days from the filing and the service of the cross-complaint within which to RESPOND.</p> <p>NO TENTATIVE RULING.</p>
LINE 19	2012-1-CV-230979	Main Street Acquisition Corp vs T Tran	<p>Claim of Exemption.</p> <p>Judgment creditor submits on the papers presented.</p> <p>The claim here was provided by the financial institution pursuant to <i>Code of Civil Procedure</i>, § 708.080 because the levied property is a direct deposit public benefits and/or so security deposit account and are in excess of the automatically exempt amount.</p> <p>Judgment creditor claims that the amount of the deposit in excess of the statutory exempt amount is not exempt in whole or in part. Judgment debtor has the burden of proving that the excess amount is exempt pursuant to <i>Code of Civil Procedure</i>, § 704.080(e)(4). Judgment creditor has not done so.</p> <p>The claim of exemption is DENIED.</p> <p>NO FORMAL TENTATIVE RULING.</p>
LINE 20			SEE ATTACHED TENTATIVE RULING.
LINE 21			SEE ATTACHED TENTATIVE RULING.
LINE 22			SEE ATTACHED TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 23			SEE ATTACHED TENTATIVE RULING.
LINE 24			SEE ATTACHED TENTATIVE RULING.
LINE 25			SEE ATTACHED TENTATIVE RULING.
LINE 26			SEE ATTACHED TENTATIVE RULING.
LINE 27			SEE ATTACHED TENTATIVE RULING.
LINE 28			SEE ATTACHED TENTATIVE RULING.
LINE 29			SEE ATTACHED TENTATIVE RULING.
LINE 30			SEE ATTACHED TENTATIVE RULING.

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Calendar Line 1

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Calendar Line 2

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Calendar Line 3

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Calendar Line 4

**SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA**

DEPARTMENT 20

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(For Clerk's Use Only)

CASE NO.: 23CV415803

Antonio Pina v. Covidien, Inc. et al.

DATE: 11 January 2024

TIME: 9:00 AM

LINE NUMBER: 04

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 10 January 2024. Please specify the issue to be contested when calling the Court and Counsel.

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**Order On Demurrer to Plaintiff's First Amended Complaint
by Defendants Covidien Holding Inc and Medtronic USA INC
and Covidien L.P Covidien Inc, Covidien LLC, Medtronic PLC,
U.S Surgical Corp and Sofradim Production SAS.**

I. Statement of Facts.

A. The Parties.

Plaintiff Antonia Pina ("Plaintiff") is an individual who underwent hernia repair surgery and received the placement of a Covidien Parietex Composite Open Skirt Mesh ("Parietex" or "implanted medical device").

Plaintiff brings this action against the following defendants:

- (1) Covidien, Inc.;
- (2) Covidien, Ltd.;
- (3) Covidien PLC;
- (4) Covidien Holding Inc.;
- (5) Covidien, LLC;
- (6) Tyco International Ltd. (dba Covidien, Inc.);
- (7) Tyco International Group S.A. (dba Covidien, Inc.);
- (8) Surgical Solutions Group (subsidiary of Covidien Ltd.);
- (9) United States Surgical Corp.;
- (10) Sofradim Production SAS;
- (11) Sofradim Corp.;
- (12) Medtronic USA Inc. (corporate parent/stockholder of Covidien and all of its subsidiaries);
- (13) Medtronic PLC;
- (14) James Nathan Lau, M.D. ("Dr. Lau"); and

(15) Stanford Health Care (“Stanford”).

Defendants Nos. 1-13 are referred to by Plaintiff as the Manufacturing Defendants. Defendants Dr. Lau and Stanford are referred to as the Medical Defendants.

B. The Parietex.

The Manufacturing Defendants designed, manufactured, sold, and/or distributed Mesh Devices for use in the treatment and repair of hernias, including the subject Parietex. (First Amended Complaint (“FAC”), ¶ 31.) The Parietex was cleared for marketing pursuant to the FDA’s premarket notification process but was not approved by the FDA or formally reviewed for safety or efficacy by the FDA. (*Id.* at ¶ 35.) The polyester polymer used in the design of Parietex mesh is more brittle and significantly more susceptible to fatigue fracture, breakage, fragmentation, and other mechanical failures than alternative polymers. (*Id.* at ¶ 36.) The addition of a collagen coating to the Parietex increased its density and the foreign body and inflammatory reaction to the device. (*Id.* at ¶ 49.)

On 9 July 2018, Plaintiff underwent surgery to repair an incisional ventral hernia at Stanford. (FAC, ¶ 54.) Dr. Lau performed the operation using the Parietex. (*Ibid.*) Thereafter, a portion of Plaintiff’s Parietex adhered to his bowel, perforated through his bowel, caused a bowel to mesh fistula, and became chronically infected. (*Id.* at ¶ 55.)

On 4 March 2022, Plaintiff required surgery to lyse adhesions and to remove the mesh and a portion of Plaintiff’s perforated bowel. (FAC, ¶ 56.)

On 21 November 2022, due to complications associated with the mesh placement and/or its removal, Plaintiff required an additional surgery. (FAC, ¶ 56.) This surgery included 180 minutes of lysis of adhesions, another small bowel resection, enterocutaneous fistula tract resection, and complex abdominal wall closure. (*Ibid.*) As a result, Plaintiff has suffered and continues to suffer pain. (*Id.* at ¶ 57.)

On 20 July 2023,¹ Plaintiff filed his FAC, asserting the following causes of action:

- (1) Strict Products Liability [against Manufacturing Defendants];
- (2) Negligence [against Manufacturing Defendants];
- (3) Fraudulent Concealment [against Manufacturing Defendants];
- (4) Express Warranty [against Manufacturing Defendants]; and
- (5) Medical Negligence [against Medical Defendants].

On 11 September 2023, defendants Covidien Holding Inc. and Medtronic USA Inc., and specially appearing entities Covidien LP, Covidien, Inc., Covidien, LLC, Medtronic PLC, United States Surgical Corp., Tyco Healthcare Group LP, and Sofradim Production SAS (collectively, “Covidien Defendants”),² filed a demurrer to the FAC. Plaintiff opposes the motion.

II. Demurrers In General.

In ruling on a demurrer, the Court treats it “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.) The only issue involved in a

¹ This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (**Government Code**, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (Ca. St. Civil **Rules of Court**, Rule 3.714(b)(1)(C) and (b)(2)(C).)

² Specially Appearing entities have been named in the FAC but have not been served and therefore make a special appearance for purposes of the demurrer only. (See Demurrer, p. 1, fn. 1.)

demurrer is whether the complaint, as it stands, unconnected with extraneous matters, states a cause of action. (*Griffith v. Department of Public Works* (1956) 141 Cal.App.2d 376, 381.)

The Court will not consider extrinsic evidence in ruling on a demurrer. (*SKF Farms v. Superior Court* (1984) 153 Cal.App.3d 902, 905 [“A demurrer tests the pleadings alone and not the evidence or other extrinsic matters”].) Accordingly, the Court has not considered the exhibit attached to Plaintiff’s opposition as it was not attached to Plaintiff’s pleading and Plaintiff did not properly request the Court take judicial notice of the exhibit. (*Tenet Healthsystem Desert, Inc. v. Blue Cross of California* (2016) 245 Cal.App.4th 821, 834 [“Because a demurrer challenges defects on the face of the complaint, it can refer to matters outside the pleading only if those matters are subject to judicial notice”].)

III. Covidien Defendants’ Request for Judicial Notice.

In support of their demurrer, Covidien Defendants request the Court take judicial notice of the following:

- (1) FDA’s webpage on Hernia Surgical Mesh Implants (Ex. A); and
- (2) The Instructions for Use (“IFU”) for the implanted medical device at issue (Ex. B).

The request for judicial notice of Ex. A is DENIED. (See *Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 889 [contents of government agency’s website may still be reasonably subject to dispute].)

The request for judicial notice of Ex. B is unopposed and moreover, Plaintiff relies on portions of the document within his opposition. Therefore, the request is GRANTED. (*Evid. Code*, § 452, subd. (h).)

IV. Analysis.

Covidien Defendants demur to the first through fourth causes of action on the ground they fail to state facts sufficient to constitute a cause of action.

A. Learned Intermediary Doctrine.

Covidien Defendants argue that Plaintiff’s first and second causes of action fail because an implantable medical device is subject to the learned intermediary doctrine, which states that a manufacturer’s duty to warn runs to the physician, not the patient. (Demurrer, p. 9:6-7.)

“[I]t has long been the law in California that the learned intermediary doctrine defines the scope of a manufacturer’s duty to warn[.] . . . As our Supreme Court put it, ‘It is well established that a manufacturer fulfills its duty to warn if it provides adequate warning to the physician.’” (*Amiodarone Cases* (2022) 84 Cal.App.5th 1091, 1104 (*Amiodarone*),³ citing *Brown v. Superior Court* (1988) 44 Cal.3d 1049, 1062, fn. 9.) “[A] patient’s expectations regarding the effects of a [medical device] are those related to him by his physician, to whom the manufacturer directs the warnings regarding the [device’s] properties.” (*Ibid.*) “In the case of . . . implants, the physician stands in the shoes of the ‘ordinary user’ because it is through the physician that a patient learns of the properties and proper use of the . . . implant. Thus, the duty to warn in these cases runs to the physician, not the patient.” (*Ibid.* [internal emphasis, citations, and quotations omitted].)

“Because the duty to warn is an essential element of plaintiffs’ claims, and the learned intermediary doctrine sets the scope of the duty with respect to the [implantable medical device], it is plaintiffs’ burden to plead and prove that defendants failed to adequately warn the prescribing physician of the potential risks. Under the learned intermediary doctrine, [] manufacturers satisfy their duty to warn if they provide adequate warnings to

³ *Amiodarone* focuses on prescription drugs but acknowledges that the learned intermediary doctrine has been extended in California to implantable medical devices. (See *Amiodarone*, *supra*, 84 Cal.App.5th at p. 1106, citing *Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 319.)

prescribing physicians. Warnings directly to patients do not enter the picture.” (*Amiodarone*, *supra*, 84 Cal.App.5th at pp. 1104-1105 [internal citations omitted].)

In opposition, Plaintiff contends he alleges specific facts that Defendants failed to adequately warn Plaintiff’s physician of the true risks associated with the medical device. (Opposition, p. 6:3-5.) Plaintiff further argues that the IFU’s disclosures were not adequate because they “[do] not warn of the severity and likelihood of potential complications that were known or knowable to Defendants” and further, whether the IFU adequately warned Plaintiff’s doctor is a question of fact to be resolved by a jury. (*Id.* at p. 7:1-4, 19-20.)

“Whether a warning is adequate depends on several factors, among them ‘the normal expectations of the consumer as to how a product will perform, degrees of simplicity or complication in its operation or use, the nature and magnitude of the danger to which the user is exposed, the likelihood of injury, and the feasibility and beneficial effect of including a warning.’ Whether a warning is adequate is usually a question of fact.” (*Schwoerer v. Union Oil Co.* (1993) 14 Cal.App.4th 103, 111 (*Schwoerer*)⁴; see also *Torres v. Xomox Corp.* (1996) 49 Cal.App.4th 1, 21 [adequacy of warning usually a question of fact].)

Plaintiff does not appear to dispute that RJN, Ex. B is the relevant IFU at issue. (See Opposition, p. 7:1, citing RJN, Ex. B.) However, Plaintiff contends the IFU is not an adequate warning. The FAC alleges Defendants failed to adequately warn and instruct both the Plaintiff and his health care providers and physician about the risks of the medical implant and the IFU understates and misstates the risks known to be associated with the medical implant. (FAC, ¶¶ 60-68.) Defendants assert that the IFU explicitly warned of the specific risks alleged by Plaintiff and its warning was adequate as a matter of law. (*Id.* at p. 10:14-15, citing RJN, Ex. B.) In opposition, Plaintiff argues the IFU does not mention that the mesh is susceptible to adhesions, more likely to perforate the bowel, or that is more likely to cause fistula formation.

Both parties refer to the following paragraph within the IFU:

The possible complications associated with the use of Parietex optimized composite mesh are those typically associated with surgically implantable materials: seroma/ hematoma/ recurrence/ adhesions/ chronic pains/ infection/ fistula formation/ inflammation/ allergic reactions to the components of the product.

(RJN, Ex. B, “Possible Complications”).

The IFU refers to several of the risks alleged in the FAC. However, as noted above, whether the warning is adequate under the circumstances is a question of fact not properly decided on demurrer. Accordingly, the Court declines to sustain the demurrer to the first and second causes of action on the ground Plaintiff’s physician was adequately warned.

B. Causation.

“‘Causation’ is an essential element of a tort action. Defendants are not liable unless their conduct . . . was a ‘legal cause’ of plaintiff’s injury.” (*Whiteley v. Philip Morris, Inc.* (2004) 117 Cal.App.4th 635, 696.)

Covidien Defendants argue that Plaintiff’s first four causes of action fail because he fails to allege their actions were the cause of his injury. (Demurrer, p. 7:4-5.) They assert that all the injuries suffered by Plaintiff are well-known complications of hernia repair surgery with or without the use of the implanted medical device and there are no specific factual allegations connecting the injuries to any defect in the Parietex. (*Id.* at p. 7:14-16, 23-24 [stating the “mere presence of the mesh at the site of the infection does not demonstrate that it caused the injury”].) In addition to these arguments, Covidien Defendants assert a sham pleading argument, contending that Plaintiff’s initial complaint attributes his injuries to causes other than the Parietex. (*Id.* at p. 8:3-5.)

In opposition, Plaintiff argues that he alleges specific facts creating a reasonable inference that Covidien Defendants owed him a duty of care, breached that duty, and that breach was the cause of his injuries. (Opposition, p. 8:25-28.)

⁴ *Schwoerer* was decided on a motion for summary judgment and did not involve medical device implantation.

1. Sham Pleading.

“Generally, after an amended pleading has been filed, courts will disregard the original pleading. However, an exception to this rule is found where an amended complaint attempts to avoid defects set forth in a prior complaint by ignoring them. The court may examine the prior complaint to ascertain whether the amended complaint is merely a sham. Moreover, any inconsistencies with prior pleadings must be explained; if the pleader fails to do so, the court may disregard the inconsistent allegations.” (*Larson v. UHS of Rancho Springs, Inc.* (2014) 230 Cal.App.4th 336, 343.) “A plaintiff may not avoid a demurrer by pleading facts or positions in an amended complaint that contradict the facts pleaded in the original complaint or by suppressing facts which prove the pleaded facts false.” (*Id.* at p. 344.)

Plaintiff’s initial complaint alleges Dr. Lau failed to properly secure the Parietex and failed to provide Plaintiff with adequate post-operation care instructions (Compl., ¶ 54); the Parietex developed fluid collections resulting in an infection which required removal (*id.* at ¶ 55); and surgery revealed the Parietex was infected and there was a defect just below the Parietex and it was removed (*id.* at ¶ 56). The initial complaint indicates that Plaintiff’s 21 November 2022 surgery was an exploratory laparotomy and resulted in the discovery of a fistula caused by a previously placed tack used to secure the Parietex when it was first implanted. (*Id.* at ¶ 57.) The FAC’s general allegations omit the above facts and alleges the Parietex “caused a bowel to mesh fistula” resulting in a required surgery to remove the Parietex. (FAC, ¶ 55.) Moreover, Plaintiff now alleges the November 21st surgery was required due to complications associated with the Parietex placement and/or its removal. (FAC, ¶ 56.)

The Court finds that some of these allegations are inconsistent and Plaintiff fails to explain these inconsistencies in his opposition or address Covidien Defendants’ sham pleading argument. Nevertheless, in both the initial complaint and the FAC, Plaintiff alleges that the Parietex caused his injuries. First, the FAC, like the complaint, alleges the Parietex swells between 200 and 500% which can lead to inflammation and cause tacks to be pulled and lead to deformation of the mesh. (FAC, ¶ 51). Both pleadings further allege numerous reasons the Covidien Defendants’ Parietex caused Plaintiff’s injuries. (See e.g., *Id.* at ¶ 81, subd. (a)-(p).) Accordingly, the Court does not find that the amended allegations render the FAC a sham pleading.

The demurrer to the first through fourth causes of action based on sham pleading doctrine is OVERRULED.

2. Strict Products Liability – Failure to Warn.

“The elements of a strict products liability cause of action are a defect in the manufacture or design of the product or a failure to warn, causation, and injury.” (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 318 (*Atlantic Richfield*).)

Here, the FAC alleges that as a result of Covidien Defendants’ inadequate warnings regarding the implanted medical device, Plaintiff sustained severe economic loss and permanent past and future pain and suffering. (FAC, ¶ 74.) Thus, for pleading purposes, Plaintiff sufficiently alleges that inadequate warnings regarding frequency, severity, or duration of complications with the Parietex caused his injuries. (See *Bader v. Anderson* (2009) 179 Cal.App.4th 775, 787 [in considering merits of a demurrer, the facts alleged are deemed true, however improbable they may be]; see also *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 496 [court reviewing propriety of ruling on demurrer is not concerned with the “plaintiff’s ability to prove . . . allegations, or the possible difficulty in making such proof”].)

3. Negligence.

“The elements of a negligence cause of action are duty, breach, causation and damages.” (*Atlantic Richfield, supra*, 137 Cal.App.4th at p. 318.) Where “the complaint’s factual recitations show plainly the connection between cause and effect, it suffices to plead causation succinctly and generally.” (*Bockrath v. Aldrich Chemical Co.* (1999) 21 Cal.4th 71, 78.)

Here, the FAC alleges the Covidien Defendants’ negligence was a proximate cause of the damages and injuries to Plaintiff. (FAC, ¶ 84.) The FAC further alleges the reasons their negligence caused the Parietex to be unreasonably dangerous and defective as well as how they breached their duty of care by failing to adequately warn Plaintiff or his physician. (FAC, ¶¶ 79, 80.) These allegations are sufficient for pleading purposes.

4. Fraudulent Concealment.

“Every element of a fraud cause of action must be specifically pleaded. This pleading requirement of specificity applies not only to the alleged [fraudulent concealment], but also to the elements of causation and damage.” (*Moncada v. West Coast Quartz Corp.* (2013) 221 Cal.App.4th 768, 776 [internal citations omitted].) As will be explained in further detail below, courts typically apply a more relaxed pleading requirement for fraudulent concealment.

Here, the FAC alleges that Manufacturing Defendants’ concealment of material facts from Plaintiff and his health care providers was a substantial factor in his health care team’s decision to use the Parietex and a substantial factor in causing Plaintiff’s injuries and damages. (FAC, ¶ 94.) Accordingly, Plaintiff has sufficiently alleged causation.

5. Breach of Express Warranty.

Similar to the above causes of action, causation is likewise an essential element of breach of express warranty. (See *Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 142 (*Williams*).)

In this case, the fourth cause of action alleges Manufacturing Defendants’ breach of express warranty was a substantial factor in causing Plaintiff’s injuries and damages. (FAC, ¶ 101.) This is sufficient to allege causation. (See *Bockrath v. Aldrich Chemical Co.* (1999) 21 Cal.4th 71, 78 [causation may be pled generally].)

Based on the foregoing, the demurrer to the first through fourth causes of action on the ground Plaintiff failed to allege causation is OVERRULED.

6. Manufacturing Defect.

Covidien Defendants’ assert arguments regarding a manufacturing defect claim. (Demurrer, p. 11, subd. (C).) In opposition, Plaintiff states he has not made a manufacturing defect claim. (Opposition, p. 9, subd. (C).) Accordingly, the Court need not address this argument.

7. Fraudulent Concealment.

Covidien Defendants next contend Plaintiff’s fraud allegations are not specifically pled because he does not allege how the concealed information was conveyed or withheld, when, where, to whom, and by what means. (Demurrer, p. 13:19-20.)

In opposition, Plaintiff asserts the FAC alleges Covidien Defendants concealed that the Parietex posed dangerous health risks more than other similar devices, that the warnings provided were misleading, that adequate testing was not performed on the device, and this information was not disclosed in the IFU. (Opposition, p. 10:14-22.) Plaintiff further argues that he alleges Defendants knew about the material risk information prior to the device being implanted in Plaintiff and concealed this information to induce health care providers to continue to purchase and use the device. (*Id.* at p. 10:23-25, citing FAC, ¶¶ 83-90.)

The essential elements of a fraud cause of action based on concealment, nondisclosure, or omission are: (1) defendant had a duty to disclose the concealed or suppressed fact to the plaintiff; (2) defendant intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, and (3) plaintiff was damaged as a result. (*Jones v. ConocoPhillips* (2011) 198 Cal.App.4th 1187, 1198.)

As explained above, fraud must be pled with specificity. However, the specific pleading requirement is relaxed in the case of fraudulent concealment because, as one court noted, “[h]ow does one show ‘how’ and ‘by what means’ something didn’t happen, or ‘when’ it never happened, or ‘where’ it never happened?” (*Alfaro v. Community Housing Imp. System & Planning Ass’n, Inc.* (2009) 171 Cal.App.4th 1356, 1384.) Additionally, one of the purposes of the specificity requirement is to provide “notice to the defendant, to furnish the defendant with certain definite charges which can be intelligently met.” (*Committee on Children’s Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216 [internal quotations omitted].) Thus, when “it appears from the nature of the allegations that the defendant must necessarily possess full information concerning the facts of the controversy, even under strict rules of common law pleading, one of the canons was that less particularity is required when the facts lie more in the knowledge of the opposite party[.]” (*Id.* at p. 217; see also *Bushell v. JPMorgan Chase Bank, N.A.* (2013) 220 Cal.App.4th 915, 931.)

In this case, the FAC alleges the Manufacturing Defendants' concealed material facts regarding the Parietex and its safety and side effects not adequately reflected in the warning associated with the device (FAC, ¶ 88, subd. (a)-(d)); the concealed information was withheld within the IFU (*id.* at ¶ 92); the Manufacturing Defendants had a duty to disclose the true character, quality, and nature of implanted device (*id.* at ¶ 90); Manufacturing Defendants intended to deceive Plaintiff and his health care providers as to the true facts regarding the safety and efficacy of the Parietex so they would continue to purchase the device (*id.* at ¶ 91); and that this concealment was a substantial factor in causing Plaintiff's health care providers to use the device and resulted in his injuries and damages (*id.* at ¶ 94). The Court finds these allegations, taken together with the FAC's general allegations incorporated into the fraud cause of action, to be sufficient for pleading purposes.

Based on the foregoing, the demurrer to the third cause of action is OVERRULED.

8. Breach of Express Warranty.

Covidien Defendants argue Plaintiff's express warranty claim fails because he has not alleged the contents of any specific warranty made to him or his physician. (Demurrer, p. 14:7-9.)

"In order to plead a cause of action for breach of express warranty, one must allege the exact terms of the warranty, plaintiff's reliance thereon, and a breach of that warranty which proximately causes plaintiff injury." (*Williams, supra*, 185 Cal.App.3d at p. 142 [determining complaint was sufficient where plaintiff alleged advertisement was used to warrant that the product was effective, proper, and safe for its intended use].)

Similar to *Williams*, the FAC alleges Manufacturing Defendants used packaging inserts and advertisements to warrant to the medical community and consumers that the Parietex was safe for its intended use; did not pose serious health hazards when used appropriately; was safer and more effective than alternative mesh devices; had been adequately tested for its intended use; and would not cause injury after implantation. (FAC, ¶ 98.) These allegations are sufficient to allege breach of express warranty.

Accordingly, the demurrer to the fourth cause of action is OVERRULED.

9. Punitive Damages.

Covidien Defendants request the Court sustain a demurrer to Plaintiff's request for punitive damages on the ground his allegations of malice, fraud, and oppression are conclusory. (See Demurrer, p. 15:10-11, 21-22.)

The proper procedural vehicle for challenging an improper remedy is a motion to strike, not a demurrer. (See *Brown v. Ralphs Grocery Co.* (2018) 28 Cal.App.5th 824, 844, citing *Caliber Bodyworks, Inc. v. Superior Ct.* (2005) 134 Cal.App.4th 365, 385 ["The appropriate procedural device for challenging a portion a cause of action seeking an improper remedy is a motion to strike."].) Thus, the Court declines to sustain a demurrer to Plaintiff's request for punitive damages.

V. Tentative Ruling.

The tentative was duly posted.

VI. Case Management.

The parties should commence discovery and discussions concerning alternate dispute resolution.

This Court will set a further Case Management Conference on 09 July 2024 at 10:00 AM in Department 20. The Court will also entertain a request to set a trial date at that time.

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VII. Conclusion and Order.

The demurrer is OVERRULED in its entirety. The Court declines to sustain a demurrer to Plaintiff's request for punitive damages.

DATED:

HON. SOCRATES PETER MANOUKIAN

*Judge of the Superior Court
County of Santa Clara*

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