SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 20, Honorable Socrates Peter Manoukian, Presiding

Courtroom Clerk: Hien-Trang Tran-Thien

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"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: Tuesday, 09 January 2024
TIME: 9:00 A.M.

Please note that for the indefinite future, all hearings will be conducted remotely as the Old Courthouse will be closed. This Department prefers that litigants use Zoom for Law and Motion and for Case Management Calendars. Please use the Zoom link below.

"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.

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=cW1JYmg5dTdsc3NKNFBpSjlEam5xUT09
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 bandwith. 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.

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.

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 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	17CV315735	Funding Circle USA, Inc. vs K&S Realty, Inc. et al	**Order of Examination.** There does not appear to be a proof of service for this OEX in the file. Unless the parties agree otherwise, both parties are to appear in Department 20 at 9:00 AM via the Zoom virtual platform. The appropriate oath will be administered by the Court and the parties may conduct the examination off-line and report back to the Court. The parties may meet and confer on how to conduct the examination remotely. NO FORMAL TENTATIVE RULING.
LINE 2	21CV384133	Miguel Vinces Bustamante vs Nicole Cizmar	**Further Case Management Conference.** SEE LINE #5.
LINE 3	23CV416458	Linda Thy, et al., v. S1 51; Greystar California, Inc.	**Motion of Defendant S1 51, LLC. to Strike Portions of Plaintiffs' Complaint.** Defendant S1 51, LLC.'s motion to strike [***Code of Civil Procedure***, § 436], as to the entirety of paragraphs 157 and 165 and the third sentence of paragraph 114 of the complaint, is GRANTED with 10 days leave to amend. The balance of the motion to strike is DENIED. SEE ATTACHED TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 4	23CV416458	Linda Thy, et al., v. S1 51, LLC; Greystar California, Inc.	**Demurrer of Defendant S1 51, LLC. to Plaintiff's Complaint.** Defendant SI 51, LLC.'s demurrer to the fifth cause of action [intentional infliction of emotional distress], seventh cause of action [unfair business practices], eighth cause of action [fraudulent concealment] for failure to state sufficient facts [***Code of Civil Procedure***, § 430.10, subd. (e)] is OVERRULED. Defendant shall answer the complaint within 20 days of the filing and service of this Order. SEE TENTATIVE RULING AT LINE #3.
LINE 5	21CV384133	Miguel Vinces Bustamante vs Nicole Cizmar	**Motion of Defendant Nicole Cizmar For Summary Judgment** Plaintiff has not filed opposition to this motion. Plaintiff has admitted that the accident occurred at his workplace, that he was on the job at the time of the incident, that the accident happened during his working hours, and that he made a claim for Workers Compensation. He admitted that he suffered no injury. He admitted that he was at fault. Since plaintiff was in the course and scope of his employment at the time of his injury, "[w]orkers [c]ompensation provides the exclusive remedy for an injury sustained by an employee in the course of employment and compensable under the Workers Compensation laws. (***Labor Code***, §§ 3600(a), 3602(a); ***Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund***) (2001) 24 Cal.4th 800, 812-813.)" (***Singh v. Southland Stone, U.S.A., Inc.*** (2010) 186 Cal.App.4th 338, 365. The motion of defendant for summary judgment. Is GRANTED. The Department via the e-filing queue for execution. The case will be placed on this Court's Dismissal Review Calendar for 28 March 2024 at 10:00 AM. NO FORMAL TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 6	22CV403877	Falguni Patel vs ESA Management, LLC; Manuel Torres.	**Motion Of Plaintiff To Compel Defendant ESA, LLC To Provide Further Responses To Plaintiff's Request For Production Of Documents, Set One.** On 22 November 2022, plaintiff dismissed defendant Extended Stay America, Inc. According to the Odyssey calendar, only the motion designated above is on calendar. This Court has perused the entire file in preparation for that motion. It seems that there are motions to compel further responses re: deposition of Greg Williams and Amal Derias which, according to the minutes of 28 November 2023, were ordered by this Court to be heard at the same time as the motion to compel ESA to produce further documents. Those motions were never officially calendared. In the interests of a full and thorough discussion of this matter, this Court believes that the volume of material in these motions would be too overwhelming to discuss in a one hour long law and motion calendar along with other cases. This Court would like the parties to appear on calendar to meet and confer and agree on a time on Friday, 26 January 2024 to hear these matters as a special setting. NO TENTATIVE RULING.
LINE 7	19CV340899	Lisamarie Chatham vs CSAA Insurance Services, Inc. et al	**Motion of Plaintiff for Relief from Order and for New Trial.** First: Why is this case on this Department's calendar? The original summary judgment motion was heard by Judge Chung. The motion of plaintiff to set aside the summary judgment orders was heard by Judge Kulkarni. Second: Does this Court have jurisdiction to hear this matter? NO FORMAL TENTATIVE RULING.
LINE 8	20CV375097	Donald Prange vs General Motors, LLC	**Dismissal after Settlement.** Continued from 12 October 2023. SEE LINE #9.
LINE 9	20CV375097	Donald Prange vs General Motors, LLC	**Motion of Plaintiff for Attorneys Fees and Costs.** NO TENTATIVE RULING. The parties should use the Tentative Ruling Protocol to advise the court if they wish to appear and argue on the merits or submitted on the papers presented.
LINE 10	22CV398223	Freidrik Ternian vs Ninos Ternian; Arseen Autobody, Inc.	**Motion of Defendant/Cross-Complainant Ninos Ternian To Deem Cases to Be Related**. The motion is GRANTED. SEE ATTACHED TENTATIVE RULING.
LINE 11	23CV411285	Katie Cane v. James J. Hoover; Hoover Krepelka LLP	**Motion of Defendants to Compel Arbitration.** The petition of the defendants to compel arbitration is GRANTED. SEE ATTACHED TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 12	23CV411789	Elizabeth "Betsy" Hoch vs Loretta Marks et al	**Application Of T. P. Skinner, Esq.to Withdraw As Counsel of Record for Plaintiff.** Counsel for plaintiff seeks to withdraw as counsel due to a breakdown of the attorney-client relationship. Communication between client and counsel has deteriorated due to an irreconcilable breakdown of the attorney-client relationship. Therefore, counsel is filing this motion to withdraw as counsel. The motion to be relieved as counsel is GRANTED. Mr. Skinner is to prepare the formal order. The Order will take effect upon the filing and service of the executed order of this Court and an order that is written on Form MC-053 and that otherwise complies with California ***Rules of Court***, rule 3.1362(e). Counsel should add the next court dates on ¶ 8 pf the proposed order (See Line #17) and submit it to this Department via the Clerk's efiling queue. NO FORMAL TENTATIVE RULING.
LINE 13	23CV420051	Christel Richey et al vs Humangood; Humangood Norcal d.b.a. The Terraces of Los Altos Health Facility; Deborah Gonzales.	**Motion of Plaintiff for Trial Preference.** This Court will CONTINUE the hearing on this motion to 07 March 2023 at 9:00 AM to allow the parties to meet and confer and agree upon an appropriate trial date and form honest assessments of the status of discovery. The Court is inclined to indicate that at that time it will grant a motion to set the trial within 120 days. SEE ATTACHED TENTATIVE RULING.
LINE 14	1998-7-CV-365367	Franklin Bank vs Lori T. Ngo	**Claim of Exemption.** Judgment Debtor objects to the writ of execution claiming that she was not served with the initial complaint. Judgment was entered on 10 June 1999 in favor of plaintiff. The judgment was renewed on 22 May 2007 and again on 16 May 2017. Judgment debtor has not filed a motion to vacate the judgment on any grounds. The claim of exemption is DENIED. NO FORMAL TENTATIVE RULING.
LINE 15	2009-1-CV-148391	Newport Capital Recovery Group II, LLC vs Kristine Facelo a.k.a. Kristine Abalos	**Claim of Exemption.** Judgment creditor intends to submit on the papers. The claim is not found in the Odyssey file. The Court would appreciate receiving a copy from either party to be sent to department20@scscourt.org NO TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 16	22CV402218	Dolores Mattson vs Adi De La Zerda et al	**Compromise of Claim of Disabled Person.** This Court discloses that it is familiar with the name of the Guardian as it has seen the Guardian's advertisements in the Los Altos Town Crier Newspaper. The Court does not otherwise have any familiarity with the Guardian. The petition is APPROVED. The Court requests that counsel and the Guardian be present via the Zoom virtual platform to answer a few questions from the Court. NO FORMAL TENTATIVE RULING.
LINE 17	23CV411789	Elizabeth "Betsy" Hoch vs Loretta Marks et al	**Case Management Conference.** This Court will set a further Case Management Conference on 12 March 2024 at 10:00 AM in this Department. NO FORMAL TENTATIVE RULING.
LINE 18			SEE ATTACHED TENTATIVE RULING.
LINE 19			SEE ATTACHED TENTATIVE RULING.
LINE 20			SEE ATTACHED TENTATIVE RULING.
LINE 21			SEE ATTACHED TENTATIVE RULING.
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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

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 20

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(For Clerk's Use Only)

CASE NO.: 23CV416458 **Linda Thy, et al., v. S1 51, LLC. et al.**
DATE: 09 January 2024 **TIME: 9:00 am** **LINE NUMBER: 03, 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 08 January 2024. Please specify the issue to be contested when calling the Court and Counsel.

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Orders On Defendant S1 51, LLC's Demurrer and Motion To Strike.

I. Statement of Facts

This is a landlord-tenant matter. Plaintiffs Linda Thy and her minor child (collectively, "Plaintiffs") lived in a rental property located at 500 Race Street, San Jose, 95113 (the "Property"). (Complaint, ¶ 1.) Defendants S1 51, LLC ("Owner") and Greystar California, Inc. ("Greystar") (collectively, "Defendants") are the legal owners and/or companies managing the Property. (*Id.* at ¶¶ 17-18.)

In or around October 2022, plaintiff Thy entered into a rental agreement for an apartment at the Property. (Complaint, ¶¶ 14, 27, Ex. A.) Around the same time, Plaintiffs noticed bedbugs in the Property and immediately notified the on-site manager, "Rudy." (*Id.* at ¶ 28.) Defendants failed to remediate the bedbug issue for an extended period until Plaintiffs were forced to vacate the Property. (*Id.* at ¶¶ 28-29.) Despite Plaintiffs' requests, Defendants have not made an offer of reimbursement or relocation expenses. (*Id.* at ¶ 30.)

Defendants were aware of a bedbug infestation in the Property for an extended period before October 2022. (Complaint, ¶ 31.) Despite this, Defendants failed to abate the bedbug problem or provide Plaintiffs with notice of it. (*Ibid.*) Plaintiffs made monthly rental payments on time or made every reasonable effort to do so. (*Id.* at ¶ 32.)

On 17 May 2023,[1] Plaintiffs filed a complaint against Owner and Greystar, asserting causes of action for:

(1) Breach of Warranty of Habitability (Civil Code § 1941.1)

(2) Breach of Warranty of Habitability (Health & Safety Code § 17920.3)

(3) Negligence

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[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).

(4) Nuisance

(5) Intentional Infliction of Emotional Distress

(6) Breach of Contract

(7) Unfair Business Practices (Violation of Business & Professions Code § 17200, et seq.)

(8) Fraudulent Concealment.

On 20 September 2023, Owner filed a demurrer and motion to strike portions of the complaint.

II. Owner's Demurrer

Owner demurs to the fifth, seventh, and eighth causes of action on the grounds of uncertainty and failure to state facts sufficient to constitute a cause of action.

A. Legal Standard

"At the outset, it is well settled that a general demurrer admits the truth of all material factual allegations in the complaint; that the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court; and that plaintiff need only plead facts showing that he may be entitled to some relief." (*Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 496 (*Alcorn*) [internal citations omitted].)

B. Uncertainty

Uncertainty is a disfavored ground for demurrer and is typically sustained only where the pleading is so unintelligible and uncertain the responding party cannot reasonably respond or recognize the claims against it. (*Khoury v. Maly's of Cal., Inc*. (1993) 14 Cal.App.4th 612, 616 ["A demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures"].)

In this case, the complaint alleges the fifth, seventh, and eighth causes of action "against all defendants." (See Complaint, ¶¶ 123, 145, 152.) Owner, relying upon California Rules of Court, Rule 2.112,[2] contends it cannot determine which actions it is accused of taking. The court finds no violation of Rule 2.112, which provides that a cause of action must specify the "party *or parties* to whom it is directed." (Cal. Rules of Court, Rule 2.112, subd. (4), emphasis added.)

Owner's cited authority, *Grappo v. McMills* (2017) 11 Cal.App.5th 996 (*Grappo*), does not convince the court otherwise. There, the plaintiff filed a complaint with ten causes of action and served a person named in the caption but not identified in the complaint. (*Id.* at p. 999.) The complaint did not set forth the identity of the plaintiff or defendants, nor plaintiff's claimed relationship with any of the parties. (*Id.* at p. 1014.) The *Grappo* court said plaintiff's failure to identify whom the causes of action were against did not comply with Rule 2.112. (*Ibid.*) "As the leading practical treatise advises, failure to comply with Rule 2.112 presumably renders a complaint subject to a motion to strike (§ 436), or a special demurrer for uncertainty. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2016) ¶ 6:113, pp. 6-33 to 6-34.)" (*Ibid*.)

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[2] California Rules of Court, Rule 2.112: "Each separately stated cause of action, count, or defense must specifically state:

(1) Its number (e.g., "first cause of action");

(2) Its nature (e.g., "for fraud");

(3) The party asserting it if more than one party is represented on the pleading (e.g., "by plaintiff Jones"); and

(4) The party or parties to whom it is directed (e.g., "against defendant Smith").

Here, in contrast to *Grappo*, the complaint identifies the defendants and alleges the claims in question against all of them. As referenced above, a cause of action may be alleged against a "party or parties." (Cal. Rules of Court, Rule 2.112, subd. (4).) Indeed, the treatise relied upon by *Grappo* also states that a claim may be alleged against "all defendants." (*Weil & Brown*, *supra*, ¶ 6:112 ["Each cause of action … must identify … the defendant or defendants against whom the cause of action is being asserted (or 'all defendants')."].) Further, the fifth, seventh, and eighth causes of action are not so uncertain and unintelligible that Owner cannot reasonably recognize the claims against it and respond. In addition, the precise relationship between the named defendants and other related details are presumably within Owner's knowledge. (*Kennedy v. Bank of America* (1965) 237 Cal.App.2d 637, 654-655 [demurrer does not lie for uncertainty as to matters presumptively within defendant's knowledge].)

Accordingly, the demurrer to the fifth, seventh, and eighth causes of action on the ground of uncertainty is OVERRULED.

C. Sufficiency of Facts

1. Fifth Cause of Action [Intentional Infliction of Emotional Distress]

"A cause of action for intentional infliction of emotional distress exists when there is (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. A defendant's conduct is 'outrageous' when it is so extreme as to exceed all bounds of that usually tolerated in a civilized community. And the defendant's conduct must be intended to inflict injury or engaged in with the realization that injury will result." (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050-1051 (*Hughes*), internal punctuation and citations omitted.)

"Liability for intentional infliction of emotional distress does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities … [¶] With respect to the requirement that the plaintiff show emotional distress, this court has set a high bar. Severe emotional distress means emotional distress of such a substantial quality or enduring quality that no reasonable person in civilized society should be expected to endure it." (*Hughes*, *supra*, 46 Cal.4th at p. 1051.) "[T]he trial court initially determines … whether severe emotional distress can be found; the jury determines whether on the evidence it has, in fact, existed." (*Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1614.)

Here, Owner's position on demurrer is at odds with the standards set forth above. First, Owner contends the claim fails to allege that its conduct was intentionally directed at Plaintiffs. (Mot., pp. 7-8.) But the first element for the claim can be met either by allegations that the defendant intended to cause emotional distress *or* that the defendant acted with "reckless disregard about the probability of causing" emotional distress. (*Hughes*, *supra*, 46 Cal.4th at p. 1050.) Next, Owner says the complaint does not mention any pest report and argues Plaintiffs may have brought bedbugs with them upon moving in. (Mot., p. 8.) But on demurrer, the court may not consider extrinsic evidence or plaintiff's ability to prove the allegations stated. (*Ion Equip. Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 881 [error for court to consider facts asserted in memorandum supporting demurrer]; *Alcorn*, *supra*, 2 Cal.3d at p. 496 [possibility difficulty in proving allegations does not concern reviewing court].)

In sum, the complaint alleges facts sufficient to meet the elements of the claim. It alleges Owner knew about the Property's bedbug infestation but rented to Plaintiffs anyways, with reckless disregard as to whether renting a potentially-infested unit would cause emotional distress. (Complaint, ¶¶ 127-128.) The pleading further alleges Plaintiffs suffered and continue to suffer severe emotional distress caused by Owner's conduct. (*Id.* at ¶¶ 131-133.)

Thus, Owner's demurrer to the fifth cause of action for failure to state sufficient facts is OVERRULED.

2. Seventh Cause of Action [Unfair Business Practices]

"The UCL prohibits, and provides civil remedies for, unfair competition, which it defines as any unlawful, unfair or fraudulent business act or practice. Its purpose is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services." (*Kwikset Corp. v. Super. Court* (2011) 51 Cal.4th 310, 320, internal punctuation and citations omitted; Bus. & Prof. Code § 17200.)

"Section 17200 'borrows' violations from other laws by making them independently actionable as unfair competitive practices. In addition, under section 17200, a practice may be deemed unfair even if not specifically proscribed by some other law." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1143 (*Korea*).) "[T]here are three varieties of unfair competition: practices which are unlawful, or unfair, or fraudulent." (*Blakemore v. Superior Court* (2005) 129 Cal.App.4th 36, 48 (*Blakemore*).)

Owner demurs to the seventh cause of action by arguing that the complaint does not allege any action by Owner that would require a refund of rents paid under the lease. (Mot., p. 10.[3]) In opposition, Plaintiffs contend they have adequately alleged a breach of the warranty of habitability under Civil Code section 1941.1. (Opp., p. 8.)

"A plaintiff alleging unfair business practices under [the UCL] must state with reasonable particularity the facts supporting the statutory elements of the violation." (*Kouhry v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 619.) "[Where] recovery is based on a statutory cause of action, the plaintiff must set forth facts in his [or her] complaint sufficiently detailed and specific to support an inference that each of the statutory elements of liability is satisfied. General allegations are regarded as inadequate. [Citations.]" (*Mittenhuber v. City of Redondo Beach* (1983) 142 Cal.App.3d 1, 5.)

The elements of a cause of action for breach of the warranty of habitability "are the existence of a material defective condition affecting the premises' habitability, notice to the landlord of the condition within a reasonable time after the tenant's discovery of the conditions, the landlord was given a reasonable time to correct the deficiency, and resulting damages. [Citations.]" (*Erlach v. Sierra Asset Servicing, LLC* (2014) 226 Cal.App.4th 1281, 1297 (*Erlach*).)

Here, the complaint alleges Owner had a duty to maintain the Property in a habitable condition. (Complaint, ¶¶ 26, 61.) It further alleges a materially defective condition in the form of a bedbug infestation in Plaintiffs' unit at the Property. (*Id.* at ¶¶ 28, 71.) The complaint alleges Plaintiffs noticed bedbugs in the Property soon after moving in and immediately notified the on-site manager, "Rudy." (*Id.* at ¶ 28.) Presumably the on-site manager is an employee or agent of Owner. The complaint further alleges Defendants failed to remediate the bedbug issue for an extended period. (*Id.* at ¶¶ 28-29.) From this the court may infer that Owner was given notice within a reasonable time after discovery of the condition and that Owner was given a reasonable time to correct the deficiency. Thus, Plaintiffs have stated sufficient facts to state a claim for breach of the warranty habitability, upon which their UCL claim is based.

Accordingly, Owner's demurrer to the seventh cause of action [unfair business practices] for failure to state sufficient facts [§ 430.10, subd. (e)] is OVERRULED.

3. Eighth Cause of Action [Fraudulent Concealment]

The elements of fraudulent concealment are: (1) concealment or suppression of material fact, (2) duty to disclose the fact, (3) intent to conceal or suppress with intent to defraud, (4) plaintiff must have been unaware of the fact and would not have acted in such a manner had the plaintiff known of the concealment or suppression, and (5) resulting damage. (*Jones v. ConocoPhillips* (2011) 198 Cal.App.4th 1187, 1198; *Marketing West, Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 612-613.)

"Fraud actions are subject to strict requirements of particularity in pleading. … Accordingly, the rule is everywhere followed that fraud must be specifically pleaded." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216; see also *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645 (*Lazar*) ["fraud must be pleaded specifically; general and conclusory allegations do not suffice"].) "The pleading should be sufficient to enable the court to determine whether, on the facts pleaded, there is any foundation, prima facie at least, for the charge of fraud." (*Commonwealth Mortgage Assurance Co. v. Superior Court* (1989) 211 Cal.App.3d 508, 518.) "This particularity requirement necessitates pleading facts which show how, when, where, to whom, and by what means the representations were tendered. A plaintiff's burden in asserting a fraud claim against a

[3] Owner also contends again that there are no facts corroborating that there were any bedbugs and that any bedbugs could have come from Plaintiffs. (Mot., p. 10.) For the reasons already addressed, these arguments are without merit on demurrer.

corporate employer is even greater. In such a case, the plaintiff must allege the names of the person who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." (*Lazar*, *supra*, 12 Cal.4th at p. 645 [internal punctuation and citations omitted].)

Here, Plaintiffs' claim is based on Owner's concealment of a bedbeg infestation prior to leasing the apartment to plaintiff Thy. (Complaint, ¶¶ 153, 154.) Owner contends the allegations as to its knowledge are conclusory. (Mot., p. 11.) But the allegation of Owner's knowledge is an averment of fact; the complaint need not prove such an averment to withstand demurrer. (See *Alcorn*, *supra*, 2 Cal.3d at p. 496 [demurrer admits the truth of all material factual allegations].) Further, as Plaintiffs note, the rule that fraud must be plead with specificity "is intended to apply to affirmative misrepresentations" rather than to nondisclosures because "[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 Improvement System & Planning Assn.* (2009) 171 Cal.App.4th 1356, 1384.) Where fraudulent concealment is involved, courts are more concerned with whether the allegations provide the defendants with sufficient notice of the claims alleged against them. (See *Jones v. ConocoPhillips Co.* (2011) 198 Cal.App.4th 1187, 1200.)

Thus, because this claim is based on nondisclosure, the fact that Plaintiffs do not plead how, when, where, to whom, and by what means the concealment occurred does not render it defective. Moreover, the averments in this cause of action are sufficient to place Owner on notice as to what is alleged against it.

Accordingly, Owner's demurrer to the eighth cause of action [fraudulent concealment] for failure to state sufficient facts [§ 430.10, subd. (e)] is OVERRULED.

IV. Owner's Motion to Strike

Owner moves to strike portions of the complaint that relate to exemplary or punitive damages.

A. Legal Standard

A court may strike out any irrelevant, false, or improper matter asserted in a pleading. (§ 436, subd. (a).) A court may also strike out all or any part of a pleading not filed in conformity with the laws of the State of California. (§ 436, subd. (b).) The grounds for a motion to strike shall appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice. (§ 437, subd. (a).)

Irrelevant matter includes "immaterial allegations." (§ 431.10, subd. (c).) "An immaterial allegation in a pleading is any of the following: (1) An allegation that is not essential to the statement of a claim or defense; (2) An allegation that is neither pertinent to nor supported by an otherwise sufficient claim or defense; (3) A demand for judgment requesting relief not supported by the allegations of the complaint or cross-complaint." (§ 431.10, subd. (b).)

In ruling on a motion to strike, a court reads the complaint as a whole, all parts in their context, and assumes the truth of all well-pleaded allegations. (*Clauson v. Superior Ct.* (1998) 67 Cal.App.4th 1253, 1255.) Motions to strike are disfavored and courts considering such motions must presume the allegations contained therein are true and must consider those allegations in context. (*Ibid*.)

B. Analysis

Owner moves to strike the complaint's prayer for punitive damages and certain allegations within the complaint. (Mot., p. 2.)

1. Punitive Damages

Owner moves to strike the paragraph of the complaint's prayer for relief that requests punitive damages. (See Complaint, ¶ 165 [seeking "Exemplary and punitive damages in an amount to be determined at trial"].)

Civil Code section 3294, subdivision (a) provides that punitive damages are recoverable where the defendant "has been guilty of oppression, fraud, or malice." To support punitive damages, a complaint "must allege ultimate facts of the defendant's oppression, fraud, or malice. (Civ. Code, § 3294.)" (*Cyrus v. Havenson* (1976) 65 Cal.App.3d 306, 316-317, internal citations omitted.) "Pleading in the language of the statute is acceptable

provided that sufficient facts are pleaded to support the allegations. [Citation.] The terms themselves are conclusory, however." (*Blegen v. Superior Court* (1981) 125 Cal.App.3d 959, 963.) Civil Code section 3294, subdivision (c), defines the terms:

> (1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.
>
> (2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.
>
> (3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

(Civ. Code, § 3294, subd. (c).)

As Owner points out, there is a heightened standard for alleging punitive damages against a corporation. "When the defendant is a corporation . . . the oppression, fraud, or malice must be perpetrated, authorized, or knowingly ratified by an officer, director, or managing agent of the corporation." (*Wilson v. Southern California Edison Co.* (2015) 234 Cal.App.4th 123, 164; Civ. Code, § 3294, subd. (b).) The purpose of this requirement is to "limit corporate punitive damage liability to those employees who exercise substantial independent authority and judgment over decisions that ultimately determine corporate policy." (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 573.)

Here, because Owner is a corporate defendant, Plaintiffs must allege that the oppression, fraud, or malice was perpetrated, authorized, or knowingly ratified by an officer, director, or managing agent of Owner. The complaint's allegations in this regard are insufficiently conclusory. While the complaint alleges that Defendants – collectively – acted knowingly and willfully in failing to abate the bed bug problem and provide notice thereof (see, e.g., Complaint, ¶ 130), it fails to allege facts attributing such conduct to an officer, director or managing agent *of Owner*.

Similarly, the complaint alleges Defendants had a company policy of "apathy and/or denial," (Complaint, ¶ 126), but this broad allegation lacks facts specific to Owner's management and control. And though Plaintiffs identify "Rudy" as being one of "Defendants' managing agents," (*id.* at ¶ 157), there is no specific allegation that Rudy works for Owner rather than Greystar, so this again falls short of alleging malfeasance on the part of employees who determine Owner's corporate policy. (See Civ. Code, § 3294, subd. (b) ["With respect to a corporate employer, the advance knowledge and conscious disregard must be on the part of an officer, director, or managing agent of the corporation"].)

Accordingly, the motion to strike paragraph 165 of the complaint is GRANTED.

2. Allegations

Owner also moves to strike seven paragraphs within the complaint's allegations. (Mot., p. 2.) The first six of those each allege that Defendants engaged in some manner of "intentional" and "willful" conduct. More specifically, Owner moves to strike the following language from the complaint:

1. Paragraph 33, lines 16-17: "By intentionally and willfully failing to eradicate this bed bug infestation, Defendants continue to violate Civil Code §§ 1941, 1941.1, 1942, and [Health and Safety Code (H.&S.C.) § 17920.3 – Infestation of insects and (c) nuisance]."
2. Paragraph 52, line 25: "[Plaintiffs' sustained injuries and illnesses directly] and proximately causes by the intentional, malicious, willful and reckless conduct, and breach of duty of the Defendants."
3. Paragraph 113, line 11: "As a direct and proximate result of Defendants' knowing, intentional and willful failure to [abate the nuisance (bed bug infestations), Plaintiffs have sustained injuries and incurred damages]."

4. Paragraph 114, in its entirety: "In maintaining the nuisance, Defendants acted with full knowledge and/or reckless disregard of the consequences thereof and of the ongoing damages being caused to Plaintiffs. Despite this knowledge, Defendants knowingly, intentionally, and willfully failed to disclose and failed to abate the nuisance by repairing the defective, dangerous, and uninhabitable conditions of the Subject Property or causing them to be repaired for an extended period. Defendants' failure to abate the bed bug infestation is both oppressive and malicious within the meaning of Civil Code § 3294 in that it has continuously subjected Plaintiffs to cruel and unjust hardship in willful and conscious disregard of Plaintiffs' rights and safety for an extended period of time, thereby entitling Plaintiffs to an award of punitive damages."
5. Paragraph 127 in its entirety: "While acting in these outrageous and egregious ways, Defendants knew, yet intentionally, willfully and recklessly disregarded their knowledge so that their conduct would result in Plaintiff's severe past and presently ongoing mental and emotional stress. Furthermore, Defendants acted with reckless disregard for the severe past and presently ongoing emotional consequences of their acts and omissions."
6. Paragraph 130, lines 25-27: "Furthermore, Defendants and/or their agents and employees abused their positions as landlords and/or managers and acted in an outrageous manner by, among other things, knowingly, intentionally, willfully and recklessly disregarding, ignoring and incessantly [failing to abate the nuisance and uninhabitable conditions]."

(Mot., p. 2; Complaint, ¶¶ 33, 52, 113, 114, 127, 130.)

Owner's motion states: "The Complaint includes many references to Defendant's 'intentional and willful' actions which resulted in the bedbugs not being eradicated, but there is not information provided to show whether the bugs were in the Property prior to the Plaintiffs' arrival or if Plaintiffs brought them in." (Mot., p. 4: 15-18.) Owner further asserts that "statements in a pleading which characterize a defendant's conduct in a conclusory manner … are properly stricken from a complaint." (Mot., p. 5: 24-26.) In support, Owner cites *Interior Systems, Inc. v. Del E. Webb Corp.* (1981) 121 Cal.App.3d 312, 316 (*Interior*) and *Brousseau v. Jarrett* (1977) 73 Cal.App.3d 864, 872 (*Brousseau*).

The terms "intentional" and "willful" are among those used by Civil Code section 3294 to define the standard for punitive damages. But that does not mean that "intentional" or "willful" conduct cannot be alleged in the absence of a valid claim for punitive damages. For example, such allegations can be relevant to stating a valid claim for intentional infliction of emotional distress, as discussed above. (See *Hughes*, *supra*, 46 Cal.4th at p. 1050-1051.) Further, the court notes that both *Interior* and *Brousseau* address demurrers rather than motions to strike. "[A] motion to strike is generally used to reach defects in a pleading which are not subject to demurrer. A motion to strike does not lie to attach a complaint for insufficiency of allegations to justify relief; that is a ground for demurrer." (*Pierson v. Sharp Memorial Hosp., Inc.* (1989) 216 Cal.App.3d 340, 342-343.)

Here, the last sentence of paragraph 114 of the complaint directly states a claim for "punitive damages" and cites to Civil Code § 3294.[4] This sentence cannot reasonably be understood to support anything other than a request for punitive damages. For the same reasons discussed in relation to the prayer for punitive damages itself, the motion to strike the last sentence of paragraph 114 of the complaint is GRANTED. However, for the reasons discussed above, the balance of the motion to strike as to paragraphs 33, 52, 113, 114, 127, and 130 is DENIED.

Finally, Owner moves to strike paragraph 157 of the complaint in its entirety (lines 9-11): "Defendants' managing agents, including the on-site manager "Rudy", authorized and/or ratified all offensive acts outlined in this cause of action, as well as all of the other causes of action included throughout the Complaint." For the reasons discussed above in relation to the prayer for punitive damages at paragraph 165, the language of paragraph 157 is

[4] "Defendants' failure to abate the bed bug infestation is both oppressive and malicious within the meaning of Civil Code § 3294 in that it has continuously subjected Plaintiffs to cruel and unjust hardship in willful and conscious disregard of Plaintiffs' rights and safety for an extended period of time, thereby entitling Plaintiffs to an award of punitive damages." (Complaint, ¶ 114: 21-25.)

insufficiently conclusory as to Owner's authorization for or ratification of each offensive act alleged in the complaint. Accordingly, the motion to strike paragraph 157 is GRANTED.

V. Tentative Ruling.

The tentative ruling was duly posted.

VI. Case Management.

The Case Management Conference currently set for 26 March 2024 at 10:00 AM in Department 20 shall REMAIN AS SET. The parties should continue with discovery and discussions about alternate dispute resolution.

VII. Conclusion

Defendant SI 51, LLC.'s demurrer to the fifth cause of action [intentional infliction of emotional distress], seventh cause of action [unfair business practices], eighth cause of action [fraudulent concealment] for failure to state sufficient facts [§ 430.10, subd. (e)] is OVERRULED.

Defendant S1 51, LLC.'s motion to strike [Code Civ. Proc., § 436], as to the entirety of paragraphs 157 and 165 and the third sentence of paragraph 114 of the complaint, is GRANTED with 10 days leave to amend. The balance of the motion to strike is DENIED.

_____ _____

DATED:

HON. SOCRATES PETER MANOUKIAN
Judge of the Superior Court
County of Santa Clara

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SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 20

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(For Clerk's Use Only)

CASE NO.: 22CV398223 **Freidrik Ternian vs Ninos Ternian; Arseen Autobody, Inc.**
DATE: 09 January 2024 **TIME: 9:00 am** **LINE NUMBER: 10**

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 08 January 2024. Please specify the issue to be contested when calling the Court and Counsel.

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Order Motion of Defendant/Cross-Complainant Ninos Ternian To Deem Cases to Be Related.

I. Statement of Facts.

These two brothers have been involved in similar litigation in four different lawsuits.

The third lawsuit is currently pending in Department 20 and bears Case Number 22CV398223, entitled Freidrik Ternian vs Ninos Ternian; Arseen Autobody, Inc. Freidrik (a.k.a. Fred) Ternian and his younger brother Ninos Ternian (Ninos"[5]) assert interests in Arseen Auto Body, Inc., a body shop that employs about 70 people. This case is well underway in proceedings under ***Corporations Code***, § 2000 regarding a dissolution of partnership action. The parties and the Court selected three appraisers to evaluate the business.

In Case Number 22CV398223, the Court has appointed three appraisers in connection with the Section 2000 process. Fred has argued that these appraisers must take derivative claims into account in their valuation. (See ***Cotton v. Expo Power Systems, Inc.*** (2009) 170 Cal.App.4th 1371, 1381.)

On 30 June 2023, Fred filed a fourth lawsuit against Ninos entitled Freidrik Ternian v. Ninos Ternian-Arseen Auto Body-Nominal Defendant, bearing case number 23CV418654. That case is in front of Judge Pennypacker in Department 6. The parties and the attorneys are the same as in Case Number 22CV398223. The complaint in that action alleges similar causes of action as well.

II. Motion To Deem Cases to Be Related.

Because these actions involve the same parties and are based on the same or similar claims, Ninos seeks an order to deem these two cases to be related.

Fred opposes the motion, claiming that the fraud action alleges nine different causes of action which are distinctly different matters. He points out that Judge Pennypacker has ordered the parties to provide her with argument as to why both cases should not be assigned to Department 6. Therefore, he claims that the motion is moot.

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[5] "For the sake of clarity, we refer to the [parties] by their first names. We mean no disrespect in doing so." (***In re Marriage of Leonard*** (2004) 119 Cal.App.4th 546, 551, fn. 2; see ***Rubenstein v. Rubenstein*** (2000) 81 Cal.App.4th 1131, 1136, fn. 1; ***Estate of O'Connor*** (2018) 26 Cal.App.5th 871, 875, fn. 2.)

This Court has had a very long policy of combining cases and assigning them to the Department with the lowest case number. That policy would therefore mandate that the matters should be assigned to this Department, assuming that the motion to deem related is appropriate.

III. Analysis.

California Rule of Court 3.300(a) set forth the circumstances under which one pending civil case is related to another pending civil case:

1. Cases are related if they involve the same parties and are based on the same or similar claims;
2. Arise from the same or substantially identical transactions, incidents, or events requiring the determination of the same or substantially identical questions of law or fact;
3. Involve claims against, title to, possession of, or damages to the same property; or
4. Are likely for other reasons to require substantial duplication of judicial resources if heard by different judges.

"Whenever a party in a civil action knows action or proceeding is related to another action or proceeding pending, dismissed, or disposed of by judgment in any state or federal court in California, the party must serve and file a Notice of Related Case. (***Rules of Court***, rule 3.300(b).)

If all the related cases have been filed in one superior court, the court, on notice to all parties, may order that the cases, including probate and family law cases, be related and may assign them to a single judge or department. In a superior court where there is a master calendar, the presiding judge may order the cases related. In a court in which cases are assigned to a single judge or department, cases may be ordered related according to criteria stated in that rule. (***Rules of Court***, rule 3.300(h)(1).)

A. Mootness.

The motion is not moot because Judge Pennypacker has not issued a final ruling on the issue. This Court intends to follow the long-standing policy of assigning matters according to the lowest case number.

B. Timeliness and Waiver.

As to the timeliness of the motion because of the failure to comply with California ***Rules of Court***, rule 3.300(e), that rule is directory and not mandatory. In this case, Fred has failed to assert how 48 days versus 15 days has prejudiced his rights.

As pointed out in the reply papers, Fred failed to file a timely objection to the "related case notice" filed by Ninos.

C. Whether The Cases Are Based on Same or Similar Claims.

Fred asserts that a ***Corporations Code***, § 2000 proceeding does not resolve cases on the merits. He asserts that the special proceeding involves none of the attributes of the trial because there is no resolution of the dispute on the merits, citing ***Ontiveros v. Constable*** (2018) 27 Cal.App.5th 259, 279.

Where questions of law or fact predominate over any individual issues and the risk of confusion or prejudice does not outweigh the benefits of a joint trial, the actions can be consolidated. (Code of Civil Procedure, § 048(a); ***Todd-Stenberg v. Dalkon Shield Claimants Trust*** (1996) 48 Ca1.App.4th 976, 978-79.)

This Court has reviewed ***Schrage v. Schrage*** (2021) 69 Cal.App.5th 126, 137 and concludes that Fred second cause of action in the fourth complaint is derivative and not direct and will be valued through the section 2000 buyout process. Fred has not address the merits of this claim in his opposition papers.

D. Whether Relation Is Mandatory.

Fred asserts that relation is not mandatory in a case like this. Fred is entirely correct. However, this Court believes that moving cases through the court expeditiously is best accomplished by moving cases with similar issues together. Resolution in some of the issues will help decide issues in subsequent cases.

Additionally, this Court believes that deeming the matters to be related will keep litigation costs down. (See ***Go v. Pacific Health Serv., Inc.*** (2009) 179 Cal.App.4th 522, 531.)

E. Judge Shopping.

As noted above, the policy of this Court has been to assign cases to the lowest case number. The benefit of this policy is the partial preclusion of judge shopping.

F. Conclusion.

The motion of Ninos to deem the two cases related is GRANTED.

IV. Tentative Ruling.

The tentative ruling was duly posted.

V. Case Management.

This Court will STAY all proceedings—discovery, Law and Motion, and other proceedings—in Case Number 22CV398223 until further notice.

This Court will ask the parties to meet and confer and agree on a date during an afternoon on January 30, 31, February 1 or 2 at 2:00pm via Zoom. The parties may inform this Court via stipulation and order through the e-filing queue.

The Court will set a Trial Setting Conference on 26 March 2024 at 11:00 AM in this Department.

VI. Order.

The motion of Ninos to deem the two cases related is GRANTED. Both cases will proceed in Department 20. This Court will STAY all proceedings—discovery, Law and Motion, and other proceedings—in Case Number 22CV398223 until further notice.

_____ _____

DATED:

HON. SOCRATES PETER MANOUKIAN
Judge of the Superior Court
County of Santa Clara

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Calendar Line 11

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
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(For Clerk's Use Only)

CASE NO.: 23CV411285 **Katie Cane v. James J. Hoover; Hoover Krepelka LLP**

DATE: 09 January 2024 **TIME: 9:00 am** **LINE NUMBER: 11**

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 08 January 2024. Please specify the issue to be contested when calling the Court and Counsel.

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Order On Motion of Defendants to Compel Arbitration.

I. Statement of Facts.

This action was filed on 21 February 2023.[6]

The 33-page complaint alleges causes of action for:

1. Breach of Contract, the "Agreement to Provide Legal Services's;"
2. Legal Malpractice; and
3. Breach of Fiduciary Duty.[7]

Plaintiff alleges that the defendants are part of a law firm with more than 10 attorneys in the office. Mr. Hoover is the "managing partner," the namesake and chief of the law firm who represented plaintiff in a Family Law case entitled Cane v. Cane, Case Number 20FL003850. Attorney Karlina Paredes also worked on the case.

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[6] 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).

[7] In the opposition papers to defendants' motion to compel arbitration, plaintiff states that she is going to amend the complaint to alert you a cause of action for fraud. "I have concluded that there is sufficient evidence for probable cause to believe that Defendants perpetrated a fraud on Plaintiff. The first amended complaint ("FAC") will be amended to add a fraud cause of action." (Declaration of Mr. Evans, ¶ 4.)

To save time and effort, should this matter proceed to a hearing this Court will ask defendants if they oppose the motion to amend subject to their right to file a response of any kind.

Plaintiff was the respondent in the case. She is no longer married to petitioner, John P. Cane, who is not a party to the case. Mr. Cane was represented by attorney Michael Bonetto of the Hoge, Fenton et al. firm and by Chelsea Pagán of Kepner & Pagán.

The matter was overseen in a settlement conference by Irwin Joseph who is a retired bench officer from this Court.

Plaintiff attaches the Retainer Agreement as an exhibit to the complaint. She states that she has paid the defendants approximately $350,000 as legal fees.

Plaintiff alleges that "[a]s part of overall failure to act competently and orbiting advice and duties, after advising and causing Plaintiff to hire the private judge at significant expense, Hoover did not prepare for the private judge settlement session, failing [sic] to obtain John's financial information for the settlement meeting, with the result that Plaintiff could not evaluate settlement with the private judge for lack of information about her ex-husband's financial situation." [Complaint, ¶ 31.]

Plaintiff also alleges that defendants failed to secure evidence of Mr. Cane's physical abuse of the children; fails to obtain his financial information; failed to properly respond to settlement offers by Mr. Bonetto; failed to properly prepare for a Domestic Violence Restraining Order trial; failed to conduct meaningful discovery to prepare for trial; did little legal work, none of which was of any utility; lost video evidence of reported child abuse; failed to follow up on reports by plaintiff concerning her ex-husband's financial improprieties; and threatened to quit the case when plaintiff complained.

II. Motion To Compel Arbitration.

The current motion was filed on 27 September 2023 and was calendared for 05 December 2023 in this Department. Plaintiff filed opposition on 17 November 2023.

Due to the absence of this Judge, the matter was to be heard by Judge Kulkarni. On the day prior to the hearing, plaintiff filed a peremptory challenge to Judge Kulkarni which the Judge accepted.

III. Analysis.

A. Arbitration in General.

Code of Civil Procedure, § 1281.2 states:

> "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:
>
> (a) The right to compel arbitration has been waived by the petitioner; or
>
> (b) Grounds exist for the revocation of the agreement.
>
> (c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact. For purposes of this section, a pending court action or special proceeding includes an action or proceeding initiated by the party refusing to arbitrate after the petition to compel arbitration has been filed, but on or before the date of the hearing on the petition. This subdivision shall not be applicable to an agreement to arbitrate disputes as to the professional negligence of a health care provider made pursuant to Section 1295.
>
> If the court determines that a written agreement to arbitrate a controversy exists, an order to arbitrate such controversy may not be refused on the ground that the petitioner's contentions lack substantive merit.

If the court determines that there are other issues between the petitioner and the respondent which are not subject to arbitration and which are the subject of a pending action or special proceeding between the petitioner and the respondent and that a determination of such issues may make the arbitration unnecessary, the court may delay its order to arbitrate until the determination of such other issues or until such earlier time as the court specifies.

If the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party as set forth under subdivision (c) herein, the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding."

"California has a strong public policy in favor of arbitration and any doubts regarding the arbitrability of a dispute are resolved in favor of arbitration. (***Armendariz v. Foundation Health Psychcare Services, Inc.*** (2000) 24 Cal.4th 83, 97, 99; see ***California Correctional Peace Officers Association*** (2006) 142 Cal.App.4th 198, 204-205; ***Christensen v. Dewor Developments*** (1983) 33 Cal.3d 778, 782.)" (***Coast Plaza Doctors Hospital v. Blue Cross of California*** (2000) 83 Cal.App.4th 677, 686.)

"[***Code of Civil Procedure***,] sections 1281.2 and 1290.2 create a summary proceeding for resolving these petitions. [citation omitted.] . . . In these summary proceedings, the trial court sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court's discretion, to reach a final determination. [citation omitted.] No jury trial is available for a petition to compel arbitration. [citation omitted.]" (***Engalla v. Permanente Medical Group, Inc.*** (1997) 15 Cal.4th 951, 972.)

"A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract." (***Code of Civil Procedure***, § 1281.)

The petitioner bears the burden of proving the existence of a valid arbitration agreement by a preponderance of the evidence; the party opposing the petition bears the burden of proving by preponderance of the evidence any fact that is necessary to its defense. (***Engalla v. Permanente Medical Group, Inc.*** (1997)15 Cal.4th 951, 972.) "[T]o bring a motion to compel arbitration, a party must plead and prove: '(1) the parties' written agreement to arbitrate a controversy ...; (2) a request or demand by one party to the other party or parties for arbitration of such controversy pursuant to and under the terms of their written arbitration agreement; and (3) the refusal of the other party or parties to arbitrate such controversy pursuant to and under the terms of their written rbitration agreement.'" (***Betancourt v. Prudential Overall Supply*** (2017) 9 Cal.App.5th 439, 444-445.)

This Court takes judicial notice of the arbitration agreement inasmuch as plaintiff has attached a copy to her complaint of the retainer agreement containing the arbitration provision. The provision provides:

19 "DISPUTE RESOLUTION; Arbitration of All Disputes Including Fees and Claims of Malpractice:

Any controversy between the parties regarding the construction, application or performance of any services under this Agreement, and any claim arising out of or relating to this Agreement or its breach, shall be submitted to binding arbitration upon the written request of one party after the service of that request on the other party. The parties shall agree upon a three-person panel to hear and determine the dispute. If the parties cannot agree, then the Superior Court of Santa Clara County, California, shall choose an impartial arbitrator or panel of arbitrators whose decision shall be final and conclusive on all parties. Hoover Krepelka and Client shall each have the right of discovery in connection with any arbitration proceeding in accordance with California Code of Civil Procedure § 1283.05. The cost of arbitration, excluding legal fees and costs, shall be borne by the losing party. The responsibility for attorney's fees and costs incurred in

connection with the arbitration shall be determined by the arbitrator(s). The sole and exclusive venue for the arbitration and/or any legal dispute shall be Santa Clara County, California."

This Court finds that the parties had a written agreement to arbitrate a controversy, defendants demanded arbitration under the agreement, and plaintiff has refused to arbitrate pursuant to the terms of the written agreement.

B. Plaintiff's Opposition to Arbitration.

Plaintiff opposes the arbitration.[8] She claims that womens support groups[9] were fronts for the defendants and that illegal "runners and campers" referred women to defendants who were desperate to report spousal abuse. (See declaration of Mr. Evans, ¶ 5.) She claims she signed under the pressure of fraudulent conduct. Language in the arbitration agreement was equivocal as to whether the arbitrators would be impartial or partial. She contends that defendants committed legal malpractice in many aspects as alleged in the complaint.

Additional contentions of plaintiff in opposition to the motion to compel arbitration include:

"[The arbitration agreement] juxtaposed non-public secret arbitration with State Bar mandatory legal fee arbitration." (Opposition papers, page 1, line 23.) The Court finds this argument is a nonstarter because plaintiff is not suing over the amount of fees billed and she has not even agreed to State Bar Fee Arbitration.

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[8] In connection with the opposition, plaintiff filed evidentiary objections to the declaration of defendant James J. Hoover in support of or opposition to this motion. There is no legal basis requiring a court to rule on an evidentiary objection made in connection with a motion other than one for summary judgment or an anti-SLAPP motion. This Court believes there is none, and therefore this Court will decline to do so.

To the extent that plaintiff seeks to exclude portions of the transcript from evidence, the Court will not make such an evidentiary ruling in connection with a discovery motion or other routine law and motion matter. (See ***People v. Morris*** (1991) 53 Cal.3d 152, 188 (holding that a motion in limine is a motion brought before the trial court for the purpose of excluding evidence).)

In ***Reid v. Google, Inc.*** (2010) 50 Cal.4th 512, the California Supreme Court recognized that rulings must be made on evidentiary objections in summary judgment motions and on anti-SLAPP motions. That court also recognized that it has become a common practice for litigants to flood trial courts with inconsequential written evidentiary objections, without focusing on those that are critical.[8]

Motions must be supported by evidence, if the motion cannot stand solely on judicially noticed facts. *See* ***Olson Prtshp v. Gaylord Plating Lab*** (2d Dist. 1990) 226 Cal.App.3d 235, 242 n. 7. This evidence, including declarations must be attached to the notice of motion, if possible, and served with the motion papers. (***Code of Civil Procedure***, §§1005(b), 1010; Cal. ***Rules of Court***, rule 3.1113(j).)

[9] These groups include Tina Swithin and her nonprofit organization for women spousal abuse victims called "One Mom's Battle"; WomenSV, Ms. Swithin declares that between 2017 and last year, she estimates that dozens of women were likely referred to Mr. Hoover through her website. She provided two presentations to her firm in March of 2021 including a zoom presentation about high conflict individuals in divorce. After she heard negative reviews, she removed Mr. Hoover and his firm from her website. (Declaration of Tina Swithin, ¶¶ 13-15.) Patricia Jean Boone declares that Mr. Hoover was on the WomensSV Board and a guest speaker at many events and fundraisers. She states that she retained defendants for an issue concerning her son and twin daughters. She scraped together a $10,000 retainer but was not informed that the County was obligated to pay the fee. The firm withdrew from the case because she could not pay them and the firm did nothing on her behalf. Other attorneys besides Mr. Hoover were assigned to the case.

Nancy LaScola also filed a declaration and refers to the civil case with her ex-husband entitled Nancy LaScola v. Theodore LaScola (case number 18CV323463.) Defendants represented her ex-husband in the case. She discusses how one side or another divorce case would have Mr. Hoover as their attorney. Whenever a WomenSV client made negative statements about her experience with Mr. Hoover's firm, she would be excluded and ostracized from future events and women's groups. (¶ 12-16.) She attached the transcript of the recording she made during a 90-minute presentation made by Mr. Hoover.

This Court wishes to make two points. First, this Judge was assigned the civil case to which Ms. LaScola refers. Second, this Court did not review the transcript as there is no representation that it was not made in violation of the Penal Code statutes concerning unauthorized recordings.

Plaintiff further claims that defendants did not pursue the best interests of plaintiff because Mr. Hoover acted to favor her ex-husband, a real estate broker. This relationship serves Mr. Hoover's interest of having good relations with the real estate broker community but was a total disservice to plaintiff and her interests as it was a conflict of interest.[10]

Finally, plaintiff claims that "[D]efendants waived arbitration by not asserting it earlier, and by making a motion instead of filing a petition to compel [arbitration]." (Opposition papers, page 2, lines 2-3.)

1. Waiver.

A written arbitration agreement, like any other contractual right, is subject to waiver, which can be express or implied by the party's conduct. (***Code of Civil Procedure***, § 1281.2.) Questions of waiver are determined by the court. (***Id.***)

The party claiming the other waived the right to arbitrate bears a "heavy burden; and a waiver will not be lightly inferred." (***Thorup v. Dean Witter Reynolds, Inc.***) (1986) 180 Cal.App.3d 228, 234. Furthermore, "the party who seeks to establish waiver must show that some prejudice has resulted from the other party's delay in seeking arbitration." (***Davis*** at 212.) Mere participation in litigation is not enough to show waiver. (***Id.***)

Whether there has been a waiver normally deals with a question of fact. (***Davis v. Continental Airlines, Inc.*** (1997) 59 Cal.App.4th 205, 211.) In order to show waiver, "[a] party seeking to prove waiver of a right to arbitration must demonstrate (1) knowledge of an existing right to compel arbitration, (2) acts inconsistent with that existing right and (3) prejudice to the party opposing arbitration." (The Rutter Group, ***Alternate Dispute Resolution*** (2002), §5:168, citing to ***Britton v. Co-op Banking Group*** (9th Cir. 1990) 916 F.2d 1405, 1412.)

The court in ***Davis*** also describes other types of waiver, such as unreasonable delay in seeking arbitration or acts in bad faith or with willful misconduct. (***Davis*** at 212.)

The burden must fall upon the party opposing arbitration to demonstrate that an arbitration clause cannot be interpreted to require arbitration of the dispute. (***Baxter v. Genworth North America Corp.*** (2017) 16 Cal.App.5th 713, 721.) "It seems clear that the burden must fall upon the party opposing arbitration to demonstrate that an arbitration clause cannot be interpreted to require arbitration of the dispute. Thus, if there is any reasonable doubt as to whether Coast Plaza's claims come within the Service Agreement's arbitration clause, that doubt must be resolved in favor of arbitration, not against it." (***Coast Plaza Doctors Hospital v. Blue Cross of California*** supra at 686-687.)

The law surrounding waiver of arbitration is well defined and waiver exists only when "(1) the waiving party had knowledge of an existing right to compel arbitration; (2) acted inconsistently with that existing right; and (3) there is prejudice to the party opposing arbitration." (***St. Agnes Medical Center v. PacifiCare of California*** (2003) 31 Cal.4th 1187, 1196) (emphasis added.) "Prejudice is typically found only where the petitioning party's conduct has substantially undermined ... important public policy or substantially impaired the other side's ability to take advantage of the benefits and efficiencies of arbitration. (Id., at 1204.)

This Court finds that defendants did not waive the right to compel arbitration. In ***Hoover v. American Income Life Ins. Co.*** (2012) 206 Cal.App.4th 1193 and ***Adolf v. Coastal Auto Sales, Inc.*** (2010) 184 Cal.App.4th 1443, the party seeking arbitration there engaged in aggressive discovery and motion practice prior to filing the petition for arbitration. That is not the situation here in this case as the conduct of the defendants did not undermine important public policy or substantially impair plaintiff's ability to take advantage of the benefits and deficiencies of arbitration.

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[10] Nancy LaScola declares that she was present at the Silicon Valley Association of Realtors meeting on 26 May 2021 when Mr. Hoover gave a presentation of about 80 real estate professionals. Ms. LaScola perceived that Mr. Hoover was at the meeting for business generation between his firm and the realtors even though he said he was not trying to "drum up business." In her knowledge and experience, the family home is often sold to pay the divorce attorneys legal fees. (¶¶ 34-36.) She points out several discrepancies in articles with conflicting numbers of attorneys in the defense firm but she cannot find any indication that Mr. Hoover retracted or corrected any of those discrepancies about the firm size. (¶¶ 37-40.)

Whether the instant proceeding is considered to be a “motion” or “petition” is inconsequential. "The term "petition," ... has been construed, in practice, to include the term "motion" when, as here, an action is already pending." (***Mercury Insurance Group v. Superior Court*** (1998) 19 Cal.4th 332, 349.) Both terms have the same meaning and affect under ***Code of Civil Procedure***, § 1281.2.

2. Runner and Capper Allegations.

The allegations of the use of runners and cappers must include an element of agency to constitute "running" and "capping." (***People v. Levy*** (1935) 8 Cal.App.2d Supp. 763, 770.) Mere recommendations, or a willingness to recommend and attorney, if inquired upon by a third party, does not establish the necessary agency." (Id., at 769.) Further, a person, firm, association or corporation must be acting for consideration. (***Business & Professions Code***, § 6151.)

At best, the conduct about which plaintiff complains is nothing more than what is accepted as good business recruitment practices among the legal professionals.

3. Conflicts of Interest.

Plaintiff alleges nothing more than Mr. Hoover gave a speech to an organization in the real estate community. Anyone that has any familiarity at all with family law matters understands that in the divorce, it is quite likely that the family home will be sold and that the proceeds will be divided between the spouses.

4. Minimum Hours Of Billing.

Plaintiff cites no authority for the proposition that setting minimum billable hour requirements is afoul of any professional Canon or ethical rule. Indeed, this Court is aware that just about every law firm, even solo practitioners, calculate how much money they need to bring in by way of fees in order to sustain and continue the practice.

5. Conclusion.

Plaintiff has insufficient evidence to lead this Court to a conclusion that she signed this contract under duress, deception or lack of understanding on her part. Plaintiff can raise her claims of unenforceability with the arbitrator in this matter as this Court considers only issues relating to the making and performance of the agreement to arbitrate. (***Rosenthal v. Great Western Financial Securities Corp.*** (1996) 14 Cal.4th 394, 415.) To clarify, "claims that the contract as a whole was obtained through fraud in inducement are, in the absence of evidence of the parties' contrary intent, arbitrable." (Id., at 419.)

Good cause appearing, this Court finds that the petition to compel arbitration filed by the defendants is GRANTED.

IV. Tentative Ruling.

The tentative ruling was duly posted.

V. Case Management.

The Court will set a further Case Management Conference to be specially set at 9:00 AM on Tuesday, 12 March 2024. The parties are expected to have met and conferred and agree upon an arbitration procedure pursuant to the retainer agreement attached as an exhibit to the complaint.

In the event that the parties are unable to agree, the Court will ask each party to select one arbitrator who is RW&A to serve as an arbitrator in this matter. The Court will select the third arbitrator.

VI. Order.

The petition of the defendants to compel arbitration is GRANTED.

Pursuant to the arbitration agreement, the parties are to agree upon a three-person panel to hear and determine the dispute. If the parties cannot agree, then the Superior court of Santa Clara County, California, shall choose an impartial arbitrator or panel of arbitrators whose decision shall be final and conclusive on all parties.

DATED:	**HON. SOCRATES PETER MANOUKIAN** ***Judge of the Superior Court*** ***County of Santa Clara***

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SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

DEPARTMENT 20

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(For Clerk's Use Only)

CASE NO.: 23CV420051 **Christel Richey et al vs Deborah Gonzales et al**
DATE: 09 January 2024 **TIME: 9:00 am** **LINE NUMBER: 13**

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 08 January 2024. Please specify the issue to be contested when calling the Court and Counsel.

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Order on Motion of Plaintiff
For Preferential Trial Setting.

I. Statement of Facts.

Plaintiff filed this complaint for damages and equitable relief on 28 July 2023.[11]

The complaint generally alleges that plaintiff is currently 88 years old and is suffering declining health do to her advanced age and medical conditions. Counsel for plaintiff is informed and believes that plaintiff has a medical diagnosis of advanced fibrosis/cirrhosis of the liver.

Counsel for plaintiff further believes that plaintiff's husband who was admitted to the facility on 23 December 2022 for rehabilitation after a short hospitalization for abdominal pain and liver issues. The decedent's family spoke to the staff on his admission and insisted that someone had to be with him at all times when he was up because of limited strength in his arms and legs and was at risk for falling. On 01 January 2023, the gentleman was escorted to the bathroom by a caregiver who left the decedent alone inside the bathroom. He fell hard onto the floor, landing on his right leg and hitting his head. He began yelling for help and was found with the said partially in the shower and his body on the floor. He had a right comminuted hip fracture and closed fractures of his right femur in eight places.

Decedent underwent surgery on 03 January 2023. He eventually died at El Camino Hospital on 29 March 2023 allegedly a result of neglect at the defendants' facility. Plaintiffs alleged that there was chronic shortage of staff at the hospital, especially for the short term acute care patients following a surgery or hospitalization. The short staffing was the cause of the decedent being left alone in the bathroom.

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[11] 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).

Plaintiff's overall condition and prognosis continues to steadily decline, compounded by the fact that she has been experiencing depression due to her husband's untimely death.

Plaintiff filed the current motion on 03 October 2023. The Humangood defendants answered the complaint on 11 October 2023.

II. Motion For Preferential Trial Setting.

Plaintiff now moves for an order granting him preferential trial setting pursuant to ***Code of Civil Procedure***, §§ 36(a). Defendants oppose the motion on the grounds that the claims of plaintiff are unsupported by competent medical evidence.[12]

III. Analysis.

A full resolution of this motion requires this Court to consider the intended and unintended consequences of a motion for trial preference.

A. The Right of a Plaintiff to Preference.

The plaintiffs who bring preference motions generally argue that "***Code of Civil Procedure***, § 36 is a legislative recognition of the maximum that "justice delayed is justice denied." (***Warren v. Schecter*** (1997) 57 Cal.App.4th 1189, 1199.)

Code of Civil Procedure, § 36(a)(1, 2) state: "A party to a civil action who is over 70 years of age may petition the court for a preference, which the court shall grant if the court makes both of the following findings: (1) The party has a substantial interest in the action as a whole. (2) The health of the party[13] is such that a preference is necessary to prevent prejudicing the party's interest in the litigation."

The intent of the legislature behind ***Code of Civil Procedure***, § 36(a) is to safeguard litigants who qualify against the acknowledged risk that death or incapacity might deprive them of the opportunity to have their case effectively tried and to obtain the appropriate recovery. (See ***Switcher v. Superior Court*** (1989) 212 Cal.App.3d 1082, 1085; see also ***Miller v. Superior Court*** (1990) 221 Cal.App.3d 1200, 1203.) An elderly plaintiff does not need to be terminally ill in order to qualify for preference under Section 36(a). (Id.)

If a party opposes preferential setting, that party must present competent evidence. (See Well & Brown, Cal. Practice Guide: ***Civil Procedure Before Trial*** (The Rutter Group 2022) ¶ 9:102.10.) But even if the Court finds that Defendants did present admissible evidence, that evidence does not support denying Diego's motion in light of the plain nature of his age and apparently declining health condition.

"An affidavit submitted in support of a motion for preference under subdivision (a) of Section 36 may be signed by the attorney for the party seeking preference based upon information and belief as to the medical diagnosis and prognosis of any party. The affidavit is not admissible for any purpose other than a motion for preference under subdivision (a) of Section 36."

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[12] "There is absolutely no concrete showing that an accelerated trial date is necessary to prevent prejudice to Plaintiff and that her ability to participate in trial will differ if the trial was held later rather than sooner. There is no evidence indicating that Plaintiff is near death or incapacity. Although Plaintiff may be over 70 years old and have health issues (controllable through monitoring), it does not automatically entitle her to an accelerated trial date above all other litigants. It is also important to note that there is no evidence that her physical condition is deteriorating." (Opposition papers, page 3, lines 15-21.)

[13] "An affidavit submitted in support of a motion for preference under subdivision (a) of Section 36 may be signed by the attorney for the party seeking preference based upon information and belief as to the medical diagnosis and prognosis of any party. The affidavit is not admissible for any purpose other than a motion for preference under subdivision (a) of Section 36."

"A civil action shall be entitled to preference, if the action is one in which the plaintiff is seeking damages which were alleged to have been caused by the defendant during the commission of a felony offense for which the defendant has been criminally convicted." (***Code of Civil Procedure***, § 37(a).) "The court shall endeavor to try the action within 120 days of the grant of preference." (***Code of Civil Procedure***, § 37(b).)

"Upon the granting of such a motion for preference, the court shall set the matter for trial not more than 120 days from that date and there shall be no continuance beyond 120 days from the granting of the motion for preference except for physical disability of a party or a party's attorney, or upon a showing of good cause stated in the record. Any continuance shall be for no more than 15 days and no more than one continuance for physical disability may be granted to any party." (***Code of Civil Procedure***, § 36(f).)

"'The Legislature intended [section 36(a)] to be mandatory. [Citation.]" (***Miller v. Superior Court*** (1990) 221 Cal.App.3d 1200, 1204 [holding that trial setting preference under ***Code of Civil Procedure***, § 36 prevails over the Trial Court Delay Reduction Act of 1986.].

"The trial court has no power to balance the differing interests of opposing litigants in applying the provision. The express legislative mandate for trial preference is a substantive public policy concern which supersedes such considerations. [Citation] Accordingly, subdivision (a) of section 36 is mandatory and absolute in its application in civil cases " [Citation]. (***Miller v. Superior Court*** (1990) 221 Cal.App.3d 1200, 1205.)

"The Legislature intended section 36 to be mandatory in circumstances that appear to be present here. (§ 36, subds. (a) & (f) [court "shall set the matter for trial" (italics added) where party to civil action is over 70, has substantial interest in action, and preference is necessary because of party's health]; ***Fox v. Superior Court*** (2018) 21 Cal.App.5th 529, 535 ["preference must be granted" where party meets standard and "[n]o weighing of interests is involved"]; ***Miller v. Superior Court*** (1990) 221 Cal.App.3d 1200, 1204 [statute "grants a mandatory and absolute right to trial preference"]; ***Swaithes v. Superior Court*** (1989) 212 Cal.App.3d 1082, 1085[14] [trial court "has no power to balance the differing interests of opposing litigants in applying the provision"]; ***Koch-Ash v. Superior Court*** (1986) 180 Cal.App.3d 689, 694 [§ 36 "must be deemed to be mandatory and absolute" and "no discretion is left to trial courts"]; ***Rice v. Superior Court*** (1982) 136 Cal.App.3d 81, 86–87.)" (***Isaak v. Superior Court*** (2022) 73 Cal.App.5th 792, 798.[15])

B. Due Process Concerns of a Defendant.

"The term 'due process of law' asserts a fundamental principle of justice which is not subject to any precise definition but deals essentially with the denial of fundamental fairness, shocking to the universal sense of justice." (***Gray v. Whitmore*** (1971) 17 Cal.App.3d 1, 20.) "Substantive due process. . . . . deals with protection from arbitrary legislative action, even though the person whom it is sought to deprive of his right to life, liberty or property is afforded the fairest of procedural safeguards. (*Id.* at 21.)

Defendants in addition to the insufficiency of the showing that plaintiff has a dire medical condition that justifies trial preferential setting, defendants claimed that scheduling the trial date within 120 days does not allow the parties sufficient time to complete the meaningful and legitimate discovery required for the defense of such a lawsuit.

> "We are aware that the provisions of ***Code of Civil Procedure*** section 36 are mandatory. (***Swaithes v. Superior Court*** (1989) 212 Cal.App.3d 1082.) We are also aware that

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[14] "The application of section 36, subdivision (a), does not violate the power of trial courts to regulate the order of their business. Mere inconvenience to the court or to other litigants is irrelevant. (citation omitted.) Failure to complete discovery or other pretrial matters does not affect the absolute substantive right to trial preference for those litigants who qualify for preference under subdivision (a) of section 36. The trial court has no power to balance the differing interests of opposing litigants in applying the provision. The express legislative mandate for trial preference is a substantive public policy concern which supersedes such considerations. (citation omitted.) Accordingly, subdivision (a) of section 36 is mandatory and absolute in its application in civil cases whenever the litigants are 70 years old. (citation omitted.) (***Swaithes v. Superior Court*** (1989) 212 Cal.App.3d 1082, 1085-1086.)

[15] ***Izaak*** discussed the ability of the trial courts to deny the preference statutes in the context of coordinated cases pursuant to California Rules of Court, rule 3.504.

Swaithes briefly indicates that this preference can operate to truncate the discovery rights of other parties. (Id., at p. 1085.) However, we are also aware that the due process implications of this approach have not yet been decided. (See ***Peters v. Superior Court*** (1989) 212 Cal.App.3d 218, 227.) In this case, we recognize that it may not be possible to bring the matter to trial within the technical limits of ***Code of Civil Procedure*** section 36, subdivision (f). However, defendant Esepenth has not appeared before this court to argue the matter." (***Roe v. Superior Court*** (1990) 224 Cal.App.3d 642, 643, fn. 2.)

This Court recognizes the argument that the causes of action alleged here (elder abuse, negligence, violation of resident rights, wrongful death, survivorship) are complex and multifaceted. The due process arguments raised by the defendants are well taken by this Court.

C. The Right of the Defense to Bring a Motion for Summary Judgment.

The defense also argues that setting the matter within 120 days does not allow sufficient time for the filing and hearing on a motion for summary judgment. This Court finds it interesting that the defense believes it has a good motion for summary judgment while apparently not having completed discovery. This Court is further aware that by far and away, most summary judgment motions are denied.

Nevertheless, case law holds that the court is required to hear a timely motion for summary judgment notwithstanding the Court's motion reservation system. (***Wells Fargo Bank v. Superior Court*** (1989) 206 Cal.App.3d 918 (trial court may not "refuse to hear a summary judgment motion filed within the time limits of ***Code of Civil Procedure***, §437c); ***Sentry Insurance Co. v. Superior Court*** (1989) 207 Cal.App.3d 526, 529: trial court's refusal to hear timely motion for summary judgment overturned.)

If the defense were to file a motion for summary judgment today, the setting of a trial date could adversely affect the rights of the defendants to file a motion, whether meritorious or not.

D. Other Concerns.

The parties have not informed the Court about the status of discovery, what depositions have been taken, what depositions remain, whether there is going to be a request for a physical examination of anyone,[16] and the readiness of experts to complete work and be properly deposed.

All too often, this Court has granted a motion for preference and set a trial date, only to have the moving party and the defense to agree that more time is needed to conduct discovery.

E. Conclusion.

Good cause appearing, this Court will CONTINUE the hearing on this motion to 07 March 2023 at 9:00 AM to allow the parties to meet and confer and agree upon an appropriate trial date and form honest assessments of the status of discovery. The Court is inclined to indicate that at that time it will grant a motion to set the trial within 120 days.

IV. Tentative Ruling and Hearing.

The Tentative Ruling was duly posted.

V. Case Management.

The next hearing date will be 07 March 2023 at 9:00 AM in this Department for further hearing on the motion.

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[16] This Court raises this point only because it has seen motions filed by defendants to examine a plaintiff in other preference motions.

VI. Conclusion and Order.

This Court will CONTINUE the hearing on this motion to 07 March 2023 at 9:00 AM to allow the parties to meet and confer and agree upon an appropriate trial date and form honest assessments of the status of discovery. The Court is inclined to indicate that at that time it will grant a motion to set the trial within 120 days.

DATED:

HON. SOCRATES PETER MANOUKIAN
Judge of the Superior Court
County of Santa Clara

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