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

**Department 18b**
**Honorable Shella Deen, Presiding**
Thomas Duarte, Courtroom Clerk
191 North First Street, San Jose, CA 95113

**DATE: August 1, 2024 TIME: 9:00 A.M.**

**To contest the ruling, call (408) 808-6856 before 4:00 P.M.**
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E

****Please specify the issue to be contested when calling the Court and Counsel****

## LAW AND MOTION TENTATIVE RULINGS

**FOR APPEARANCES:** Department 18 is fully open for in-person hearings. The Court strongly prefers **in-person** appearances for all contested law and motion matters. For all other hearings, the Court strongly prefers either **in-person or video** appearances. If you must appear virtually, you must use video. Audio-only appearances are permitted, but disfavored, as they cause significant disruptions and delays to the proceedings. Please use telephone-only appearances as a last resort. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 18:
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

**SCHEDULING MOTION HEARINGS**: Please go to https://reservations.scscourt.org or call 408-882-2430 between 8:30 a.m. and 12:30 p.m. (Mon.-Fri.) to reserve a hearing date for your motion before you file and serve it. You must then file your motion papers no more than five court days after reserving the hearing date, or else the date will be released to other cases.

**FOR COURT REPORTERS:** The Court is no longer able to provide official court reporters for civil proceedings (as of July 24, 2017). If you want to have a court reporter to report your hearing, you must submit the appropriate form, which can be found here:
https://www.scscourt.org/general_info/court_reporters.shtml

**RECORDING IS PROHIBITED**: As a reminder, most hearings are open to the public, but state and local court rules prohibit recording of court proceedings without a court order. This prohibition applies to both in-person and remote appearances.

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**LAW AND MOTION TENTATIVE RULINGS**

| LINE # | CASE # | CASE TITLE | RULING |
|---|---|---|---|
| LINE 1 | 24CV436461 | Shirley Getty vs Villa Verde et al | **Demurrer**. Scroll down to Lines 1 and 2 for Tentative Ruling. |
| LINE 2 | 24CV436461 | Shirley Getty vs Villa Verde et al | **Motion to Strike**. Scroll down to Lines 1 and 2 for Tentative Ruling. |
| LINE 3 | 20CV369408 | Anil Bhatnagar et al vs City of Milpitas et al | **Motion to Compel (Requests for Admission and Form Interrogatory 17.1).** Scroll down to Line 3 for Tentative Ruling. |

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**LAW AND MOTION TENTATIVE RULINGS**

| | | | |
|---|---|---|---|
| LINE 4 | 23CV415836 | Jin Zhang vs Zhichao Lu et al | **Motion to Compel (Discovery).** Before the Court is Plaintiff's motion to compel further responses and production from Defendant Lu to Plaintiff's request for production of documents (set one). The motion to stay for forum *non conveniens* that was heard on July 25, 2024 was denied. To allow the parties time to conduct meaningful meet and confer discussions, the motion to compel is CONTINUED to September 24, 2024 at 9 a.m. in Department 18b. The parties shall meet and confer by phone or video conference regarding the discovery in dispute in as many sessions as is necessary to address all the discovery in dispute. In the meet and confer(s), counsel shall address *all* the requests that are+ in dispute, any stipulated facts and the production of exit and entry and any other records. The parties shall file a joint statement by noon on September 10, 2024, as to the status of the further meet and confer efforts, and shall identify which discovery requests and issues remain in dispute and the reasons why.<br><br>Moving party to prepare a formal order. |
| LINE 5 | 23CV416108 | Travelers Property Casualty Company of America vs Liberty Insurance Corporation et al | **Motion to Compel (Discovery).** Scroll down to Lines 5-8 for Tentative Ruling. |

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**LAW AND MOTION TENTATIVE RULINGS**

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|---|---|---|---|
| LINE 6 | 23CV416108 | Travelers Property Casualty Company of America vs Liberty Insurance Corporation et al | **Motion to Compel (Discovery).** Scroll down to Lines 5-8 for Tentative Ruling. |
| LINE 7 | 23CV416108 | Travelers Property Casualty Company of America vs Liberty Insurance Corporation et al | **Motion to Compel (Discovery).** Scroll down to Lines 5-8 for Tentative Ruling. |
| LINE 8 | | Travelers Property Casualty Company of America vs Liberty Insurance Corporation et al | **Motion to Compel (Discovery).** Scroll down to Lines 5-8 for Tentative Ruling. |

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**LAW AND MOTION TENTATIVE RULINGS**

| | | | |
|---|---|---|---|
| LINE 9 | 23CV417246 | Keep America Safe and Beautiful vs Fitness Ventures International LLC | **Motion to Set Aside Dismissal**. Plaintiff Keep America Safe and Beautiful brings this motion pursuant to Code Civ. Proc., §473 (b). No opposition to this motion was filed by Defendant (which was served with this motion, but has not yet appeared in this action). A failure to oppose a motion may be deemed a consent to the granting of the motion. CRC Rule 8.54c. The failure to oppose a motion leads to the presumption that Defendant has no meritorious arguments. (*Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal. App. 3d 481, 489.) Good cause appearing, the Court finds a plausible showing of mistake, inadvertence, and excusable neglect and GRANTS the motion (calendaring mistake twice). The dismissal entered on February 1, 2024, is VACATED. This case is REINSTATED and set for a Review Re: Default hearing on November 7, 2024 at 10 a.m. in Department 18b.<br><br>Moving party to prepare a formal order |

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**LAW AND MOTION TENTATIVE RULINGS**

| | | | |
|---|---|---|---|
| LINE 10 | 23CV421630 | Ashlin Mclaughlin vs Kevin Nguyen | **Motion for Leave to File Cross-Complaint**. Defendant Kevin Tuyen Ngoc Nuguyen aka Kevin Nguyen seeks leave to file a cross-complaint against Plaintiff Ashlin Mclaughlin, pursuant to Code of Civil Procedure section 428.10, subdivision (a). The motion was filed on June 6, 2024 and served on Plaintiff on June 5, 2024. No opposition was filed. A failure to oppose a motion may be deemed a consent to the granting of the motion. CRC Rule 8.54c. Failure to oppose a motion leads to the presumption that Plaintiff has no meritorious arguments. (*Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal.App.3d 481, 489.) Defendant has also provided good cause for the motion for leave to file a cross-complaint to be GRANTED. Defendant shall file his cross-complaint within 10 days of this order.<br><br>Moving party is instructed to prepare the formal order. |

**Calendar Lines 1 and 2**
**Case Name:** *Shirley Getty v. Villa Verde, et al.*
**Case No.:** 24CV436461

Before the court is (1) defendants Villa Verde's and Dominica Oliva's demurrer to plaintiff's complaint; and (2) defendants Villa Verde's and Dominica Oliva's motion to strike portions of plaintiff's complaint. Pursuant to California Rule of Court 3.1308, the court issues its tentative ruling as follows.

## I. Background.

According to the allegations of the complaint, on April 4, 2023, plaintiff Shirley Getty ("Plaintiff") fell while attempting to use the bathroom and was taken to Santa Clara Valley Medical Center where she was hospitalized for "recurrent falls and weakness." (See Complaint, ¶ 23.) On April 14, 2023, she was discharged to White Blossom Care Center, a skilled nursing facility, for short-term rehabilitation, and Plaintiff's condition improved within weeks. (*Id.*) Plaintiff's condition improved such that she was discharged from White Blossom Care Center to defendant Villa Verde on May 4, 2023. (See Complaint, ¶¶ 24-25.) However, at Villa Verde, Plaintiff received neither a documented assessment, nor a resident appraisal, nor a service plan, and received a lack of custodial care that resulted in her suffering a decreased lack of mobility and deconditioning, as well as lying in her own urine and feces for hours despite her family bringing in a bedside commode. (See Complaint, ¶¶ 25-26.)

On May 8, 2023, Plaintiff's insurer authorized defendant Sequoia Home Health & Hospice ("Sequoia") to provide home health services and Sequoia indicated that it was ready to staff. (See Complaint, ¶ 27.) However, Sequoia did not first see Plaintiff until May 11, 2023, and Plaintiff's condition further deteriorated as a result of Sequoia's failure to see Plaintiff immediately. (*Id.*) When Sequoia did first assess Plaintiff's functional status on May 11, 2023, it determined that Plaintiff was at risk for developing a pressure injury because her mobility was very limited, and thus identified its responsibility to teach and ensure Villa Verde staff knew what to do to prevent Plaintiff from developing a pressure injury. (See Complaint, ¶¶ 28-29.) However, Sequoia failed to provide any education regarding pressure injury prevention and failed to devise or implement any pressure injury prevention interventions for Plaintiff. (See Complaint, ¶ 29.) Villa Verde failed to mobilize Plaintiff or provide any activities for

Plaintiff, failed to reposition Plaintiff, and Sequoia did not see Plaintiff from May 12-15, 2023, thereby failing to supervise Villa Verde in its care to Plaintiff. (See Complaint, ¶30.)

On May 16, 2023, a Sequoia LVN assessed Plaintiff as alert, oriented, forgetful and verbally responsive with normal vital signs and no pain or shortness of breath. (See Complaint, ¶ 31.) Sequoia put Plaintiff on a low sodium diet and limited her intake of canned foods, processed foods, pickles, frozen foods and bacon, and had Plaintiff sit up when eating to prevent choking and aspiration. (*Id.*) Sequoia also educated Plaintiff on eating small portions, to eat many times a day to have enough nutrition and to sit for 30 minutes after eating for better digestion. (*Id.*) Sequoia was trying to prevent Plaintiff from experiencing acid reflux. (*Id.*) Sequoia also instructed Plaintiff to comply with her medications and taught her infection control. (*Id.*)

Plaintiff complained on May 16, 2023 that it was painful for her to sit and her family asked Villa Verde and Sequoia to check Plaintiff for injury; however, neither Villa Verde nor Sequoia checked for injury, investigated the cause of her pain nor documented its existence.(See Complaint, ¶ 32.) While Sequoia identified Plaintiff's skin integrity as its responsibility, care was delayed to the next visit and failed to provide any pressure injury prevention education to Villa Verde and failed to provide any pressure injury prevention care. (*Id.*) On May 17, 2023, a Sequoia therapist documented that Plaintiff had "increased complaints of pain" in her lower back area but neither Sequoia nor Villa Verde checked to see why Plaintiff was in pain in her lower back area, assessed the cause of her pain nor checked her lower back area for injury. (See Complaint, ¶ 33.)

On May 18, 2023, a Villa Verde caregiver noticed blood in Plaintiff's diaper at 5:30 a.m.; Plaintiff's family was notified of the wound at 9:18 a.m. and Plaintiff's family immediately called Sequoia and left a voice message. (See Complaint, ¶ 34.) Sequoia visited at 12:35 p.m. that day, sending a licensed vocational nurse who assessed Plaintiff's wound as a Stage 2 pressure injury and did not require a higher level of care or physician involvement and left a sample tube of TheraHoney and three bandages. (See Complaint, ¶ 35.) Sequoia also educated Plaintiff on urinary tract infections and adequate hydration as she was identified as being at risk for infection. (See complaint, ¶ 36.) Sequoia encouraged Plaintiff to call it if she

had any concerns and planned to address wound care, safety, nutrition, medication management, skin integrity and her condition for the next visit. (*Id.*)

Villa Verde expressed concerns about its ability to care for Plaintiff's wound and asked Sequoia when it would return to care for Plaintiff's wound; however, Sequoia "only told us that [they] will call first with no definite date for the next visit." (See Complaint, ¶ 37.) On May 20, 2023, Villa Verde was concerned about Plaintiff's wound because of Sequoia's failure to provide education, assistance, wound care and supervision; Villa Verde was also out of wound care supplies that Sequoia promised to provide and its administrator left a message for Sequoia to follow up, monitor and check the wound and follow up the supplies. (See Complaint, ¶ 38.) On May 21, 2023, Villa Verde asked Sequoia for a nurse to come and monitor Plaintiff, check on the wound, and for more medical attention and support for Plaintiff. (See Complaint, ¶ 39.) On May 22, 2023, Villa Verde asked Sequoia, if possible, to come to check and care for Plaintiff more than twice a week and was told that a nurse would come the following day to provide medical support and supplies. (See Complaint, ¶ 40.) Plaintiff's family also reached out to Sequoia who responded that Plaintiff's wound was a Stage 2 pressure injury and offered to send a wound care physician to see Plaintiff. (*Id.*)

On May 23, 2023, Sequoia's LVN visited Plaintiff and documented that Plaintiff's injury had progressed to a Stage 3 pressure injury with 100% slough but did not remove Plaintiff from Villa Verde as required by California Code of Regulations, Title 22, section 87615. (See Complaint, ¶¶ 41-43.) On May 24, 2023, a Sequoia physical therapist assistant documented that Plaintiff was suffering from a burning pain and reported to Plaintiff's family that Plaintiff's wound was larger and deeper. (See Complaint, ¶ 44.) Plaintiff's family visited and asked Sequoia when its wound care physician was coming to see Plaintiff; however Sequoia now indicated that Plaintiff needed a referral from her physician. (*Id.*) After Plaintiff's family contacted Plaintiff's physician, Sequoia then told Plaintiff's family that Sequoia's wound care physician would not see Plaintiff because the wound care physician was not an in-network provider. (*Id.*) On May 24, 2023, a Sequoia nurse filled out a physician order identifying Plaintiff's pressure injury as unstageable; the order was approved on May 25, 2023. (See Complaint, ¶ 45.) On May 25, 2023, Plaintiff's family asked Sequoia about the wound

care supplies and was told that it was difficult to order supplies. (See Complaint, ¶ 46.) Plaintiff's family also contacted Sequoia about its nurse that failed to show up as promised to treat Plaintiff's wound. (*Id.*) Plaintiff's family called Plaintiff's physician to see if he could look at Plaintiff's wound and an appointment was made for the following morning. (*Id.*)

On May 26, 2023, Plaintiff was seen by her physician who, after seeing the size and severity of the wound, had her immediately taken to O'Connor Hospital. (See Complaint, ¶ 47.) O'Connor Hospital identified a "wound infection" that was now a large, infected Stage 4 sacral pressure injury with a wound that measured 6 cm x 6 cm x 3 cm, and noted that Plaintiff had lost 13 pounds in a month. (*Id.*) Plaintiff had surgery with a skin substitute graft applied. (*Id.*) On June 6, 2023, Plaintiff was discharged to Almaden Health & Rehabilitation Center for wound care where she now remains with s severe, open Stage 4 wound. (See Complaint, ¶ 48.)

On April 22, 2024, Plaintiff filed a complaint against Villa Verde, Villa Verde owner Dominica Oliva ("Oliva"), Sequoia, Pennant Services, Inc. ("Pennant"), and Cornerstone Healthcare, Inc. ("Cornerstone"), asserting causes of action for:

(1) Elder neglect (against Villa Verde and Oliva (collectively, "Villa Verde defendants"));

(2) Elder neglect—enhanced remedies sought (against Villa Verde defendants);

(3) Negligence (against Villa Verde defendants);

(4) Elder neglect (against Sequoia, Pennant and Cornerstone (collectively, "Sequoia defendants"));

(5) Elder neglect—enhanced remedies sought (against Sequoia defendants);

(6) Negligence (against Sequoia defendants);

(7) Violation of Resident's Bill of Rights (Health & Safety Code § 1569.261, et seq.) (against Villa Verde defendants);

(8) Fraud (constructive) (against Villa Verde defendants);

(9) Fraud (constructive) (against Sequoia defendants);

(10) Negligent infliction of emotional distress (direct victim) (against Villa Verde defendants); and,

(11) Professional negligence (against Sequoia defendants).

On June 26, 2024, the Villa Verde defendants filed the motions now before the court: (1) a demurrer to the first, second, eighth, and tenth causes of action of Plaintiff's complaint; and (2) a motion to strike portions of the Plaintiff's complaint.

## II. Defendants Villa Verde's and Dominica Oliva's demurrer to plaintiff Getty's complaint is OVERRULED.

### A. The Villa Verde defendants' demurrer to the first cause of action [elder neglect] of Plaintiff's complaint is OVERRULED.

"The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 (*Delaney*).) "The elements of a cause of action under the Elder Abuse Act [Welfare and Institutions Code sections 15600, et seq.] are statutory, and reflect the Legislature's intent to provide enhanced remedies to encourage private, civil enforcement of laws against elder abuse and neglect." (*Intrieri v. Superior Court* (2004) 117 Cal.App.4th 72, 82.) Because we test for liability under the Elder Abuse Act, a statutory cause of action, we apply "the general rule that statutory causes of action must be pleaded with particularity." (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790 (*Covenant Care*).) "[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.)

Welfare and Institutions Code section 15610.07, subdivision (a)(1) states, "Abuse of an elder or a dependent adult" means … "[p]hysical abuse, ***neglect***, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering." (Emphasis added.)

Welfare and Institutions Code section 15610.57 goes on to state:

(a) "Neglect" means either of the following:

> (1) The negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise.

(2) The negligent failure of an elder or dependent adult to exercise that degree of self care that a reasonable person in a like position would exercise.

(b) Neglect includes, but is not limited to, all of the following:

(1) Failure to assist in personal hygiene, or in the provision of food, clothing, or shelter.

(2) Failure to provide medical care for physical and mental health needs. No person shall be deemed neglected or abused for the sole reason that he or she voluntarily relies on treatment by spiritual means through prayer alone in lieu of medical treatment.

(3) Failure to protect from health and safety hazards.

(4) Failure to prevent malnutrition or dehydration.

(5) Substantial inability or failure of an elder or dependent adult to manage their own finances.

(6) Failure of an elder or dependent adult to satisfy the needs specified in paragraphs (1) to (5), inclusive, for themselves as a result of poor cognitive functioning, mental limitation, substance abuse, or chronic poor health.

(See also CACI, No. 3103.)

In short, neglect as a form of abuse under the Elder Abuse Act refers "to the failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults, regardless of their professional standing, to carry out their custodial obligations." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 34, 82 Cal.Rptr.2d 610, 971 P.2d 986 (*Delaney*).) Thus, when the medical care of an elder is at issue, "the statutory definition of 'neglect' speaks not of the *undertaking* of medical services, but of the failure to *provide* medical care." (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 783, 11 Cal.Rptr.3d 222, 86 P.3d 290 (*Covenant Care*); see also *id.* at p. 786, 11

Cal.Rptr.3d 222, 86 P.3d 290 ["statutory elder abuse may include the egregious withholding of medical care for physical and mental health needs"].)

(*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 404–405 (*Carter*); italics original.)

> …we distill several factors that must be present for conduct to constitute neglect within the meaning of the Elder Abuse Act and thereby trigger the enhanced remedies available under the Act. The plaintiff must allege (and ultimately prove by clear and convincing evidence) facts establishing that the defendant: (1) had responsibility for meeting the basic needs of the elder or dependent adult, such as nutrition, hydration, hygiene or medical care (Welf. & Inst.Code, §§ 15610.07, subd. (b), 15610.57, subd. (b); *Delaney*, *supra*, 20 Cal.4th at p. 34, 82 Cal.Rptr.2d 610, 971 P.2d 986); (2) knew of conditions that made the elder or dependent adult unable to provide for his or her own basic needs (*Sababin*, *supra*, 144 Cal.App.4th at pp. 85, 90, 50 Cal.Rptr.3d 266; *Benun*, *supra*, 123 Cal.App.4th at p. 116, 20 Cal.Rptr.3d 26; *Mack*, *supra*, 80 Cal.App.4th at pp. 972–973, 95 Cal.Rptr.2d 830); and (3) ***denied or withheld*** goods or ***services necessary to meet the elder or dependent adult's basic needs***, either with knowledge that injury was substantially certain to befall the elder or dependent adult (if the plaintiff alleges oppression, fraud or malice) or ***with conscious disregard of the high probability of such injury*** (if the plaintiff alleges recklessness) (Welf. & Inst.Code, §§ 15610.07, subd. (b); 15610.57, subd. (b), 15657; *Covenant Care*, *supra*, 32 Cal.4th at pp. 783, 786, 11 Cal.Rptr.3d 222, 86 P.3d 290; *Delaney*, at pp. 31–32, 82 Cal.Rptr.2d 610, 971 P.2d 986). The plaintiff must also allege (and ultimately prove by clear and convincing evidence) that the neglect caused the elder or dependent adult to suffer physical harm, pain or mental suffering. (Welf. & Inst.Code, §§ 15610.07, subds. (a), (b), 15657; *Perlin*, *supra*, 163 Cal.App.4th at p. 664, 77 Cal.Rptr.3d 743; *Berkley*, *supra*, 152 Cal.App.4th at p. 529, 61 Cal.Rptr.3d 304.) Finally, the facts constituting the neglect and establishing the causal link between the neglect and

> the injury "must be pleaded with particularity," in accordance with the pleading rules governing statutory claims. (*Covenant Care*, at p. 790, 11 Cal.Rptr.3d 222, 86 P.3d 290.)

(*Carter, supra*, 198 Cal.App.4th at pp. 406–407; emphasis added.)

Plaintiff's first cause of action alleges the Villa Verde defendants neglected her in "numerous respects," going on to identify at least seven. (See Complaint, ¶¶ 51 – 57.) In demurring, the Villa Verde defendants highlight two of the different ways in which Plaintiff alleges she was neglected and argue those allegations of neglect are contradicted by other allegations found within the Plaintiff's complaint.

Initially, the court finds the Villa Verde defendants' argument to be underdeveloped since it is well settled that a demurrer does not lie to only a portion of a cause of action. (See *Financial Corp. of America v. Wilburn* (1987) 189 Cal.App.3d 764, 778—"[A] defendant cannot demur generally to part of a cause of action;" see also *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682—"A demurrer does not lie to a portion of a cause of action.")

Furthermore, as this court recently held in ruling on co-defendants Sequoia's demurrer, the complaint alleges that due to the Villa Verde defendants' failure to supervise Plaintiff and carry out their caretaking and custodial obligations, "she was being left in urine soaked and/or feces-soiled briefs for long periods of time." (Complaint, ¶¶ 30 and 52.) The California Supreme Court in *Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148 (*Winn)* specifically noted that such an allegation would constitute "neglect" as defined in the Act in contrast with professional negligence. (See *Winn, supra*, 63 Cal.4th at pp.159-161 (stating that "[w]hat seems beyond doubt is that the Legislature enacted a scheme distinguishing between—and decidedly not lumping together—claims of professional negligence and neglect… *Delaney* concluded that 'neglect' as defined in former section 15610.57 and used in section 15657… [refers] to the failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults, regardless of their professional standing, to carry out their custodial obligations… [i]n both *Delaney* and in *Covenant Care*, the defendants had explicitly assumed responsibility for attending to the elders' most basic needs… [i]n *Delaney*, the elder

resided at a skilled nursing facility where she had been left lying in her own urine and feces for extended periods of time because the defendants, upon whom she had relied to provide basic care, had failed to carry out their caretaking and custodial obligations").) The complaint also alleges the abandonment of the Villa Verde defendants' caretaking and custodial responsibilities that allegedly led to the worsening of Plaintiff's injury, requiring hospitalization and a violation of staffing regulations. (See *Fenimore v. Regents of University of California* (2016) 245 Cal.App.4th 1339, 1348-1349 (stating that "a violation of staffing regulations here may provide a basis for finding neglect… [and] might constitute a failure to protect from health and safety hazards").)

Accordingly, the Villa Verde defendants' demurrer to the first cause of action in Plaintiff's complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for elder neglect is OVERRULED.

**B. The Villa Verde defendants' demurrer to the second cause of action [elder neglect—enhanced remedies] of Plaintiff's complaint is OVERRULED.**

"In order to obtain the Act's heightened remedies, a plaintiff must allege conduct essentially equivalent to conduct that would support recovery of punitive damages. (Compare Welf. & Inst. Code, § 15657 [requiring "clear and convincing evidence that a defendant is liable for" elder abuse and "has been guilty of recklessness, oppression, fraud, or malice in the commission of the abuse"] with Civ. Code, § 3294, subd. (a) [requiring "clear and convincing evidence" that the defendant has been guilty of oppression, fraud, or malice].)" (*Covenant Care, supra*, 32 Cal.4th at p. 789.)

"Recklessness" refers to a subjective state of culpability greater than simple negligence, which has been described as a "deliberate disregard" of the "high degree of probability" that an injury will occur. (*Delaney, supra,* 20 Cal.4th at pp. 31 – 32; see also *Cochrum v. Costa Victoria Healthcare, LLC* (2018) 25 Cal.App.5th 1034, 1045 (*Cochrum*).) Recklessness, unlike negligence, involves more than "inadvertence, incompetence, unskillfulness, or a failure to take precautions" but rather rises to the level of a "conscious choice of a course of action . . . with knowledge of the serious danger to others involved in it." (*Id.*)

The court in *Fenimore v. Regents of University of California* (2016) 245 Cal.App.4th 1339 (*Fenimore*) considered whether the trial court properly sustained a demurrer to a cause of action for elder abuse. Ultimately, the *Fenimore* court determined the trial court should not have sustained the defendant hospital's demurrer. In *Fenimore*, the defendant hospital admitted on George Fenimore, Jr. (George) who suffered from dementia, Alzheimer's, among other diseases, and had "a history of wandering that led to numerous falls." (*Fenimore*, *supra*, 245 Cal.App.4th at p. 1343.) The hospital knew George was "an extreme fall risk." (*Id.*) Despite this knowledge, George was left unattended and fell only minutes after entering the hospital. (*Id.*) George "received no medical attention or further assessment" the four days following the fall. (*Id.* at p. 1344.) In relevant part, the operative pleading alleged:

> The Hospital also violated several sections of the California Code of Regulations applicable to acute psychiatric hospitals. By way of example, these regulations required it to properly train its staff, have a written patient care plan, and have a sufficient number of staff on hand for the safety of patients. [Footnote omitted.] These regulatory violations caused injury to George. The Hospital acted with reckless disregard for the health and safety of George and other residents.
>
> The Hospital had a pattern and practice of understaffing and undertraining its staff to cut costs, which foreseeably resulted in the abuse and neglect of its residents, including George. It consciously chose not to increase staff numbers or increase training. The Hospital knew that insufficient staff in number and competency would lead to it not meeting patients' needs, and injuries to patients would be not only likely but inevitable. Had there been sufficient staff at the Hospital, George would have received proper supervision and assistance and would not have suffered his injuries.

(*Fenimore*, *supra*, 245 Cal.App.4th at pp. 1344-1345.)

In reversing the trial court ruling sustaining defendant Hospital's demurrer to the elder abuse cause of action, the Fenimore court explained why the allegations regarding recklessness were sufficient:

> The FAC supplied allegations that may show recklessness. It alleged the Hospital had a pattern and knowing practice of improperly understaffing to cut costs, and had the Hospital been staffed sufficiently, George would have been properly supervised and would not have suffered injury. On a demurrer, we must accept the allegations as true and express no opinion on whether the Fenimores can ultimately prove these allegations. We must assume the Fenimores can prove by clear and convincing evidence that the Hospital was understaffed at the time George fell, that this understaffing caused George to fall or otherwise harmed him, and that this understaffing was part of a pattern and practice. If they do so, we cannot say as a matter of law that the Hospital should escape liability for reckless neglect. The trier of fact should decide whether a knowing pattern and practice of understaffing in violation of applicable regulations amounts to recklessness.

> *Sababin* is instructive. In that case, the court found a triable issue of fact on recklessness when the defendant rehabilitation center had established but failed to follow a care plan of monitoring a patient's skin daily and reporting changes to a physician for treatment orders. (*Sababin*, *supra*, 144 Cal.App.4th at pp. 89–90.) The rehabilitation center had cared for the patient continuously for approximately three years when she was admitted to an emergency room and severe skin conditions were discovered. (*Id.* at p. 85.) The pertinent neglected care plan had been in place for approximately three months when the severe conditions were discovered. (*Id.* at pp. 85, 89.) The rehabilitation center had no skin condition reports on the patient, and no one at the center had notified her physician of the need for a treatment order. The court held the trier of fact could infer reckless failure to provide medical care from this "significant pattern" of

> ignoring the care plan: "[I]f a care facility knows it must provide a certain type of care on a daily basis but provides that care sporadically, or is supposed to provide multiple types of care but only provides some of those types of care, withholding of care has occurred. In those cases, the trier of fact must determine whether there is a significant pattern of withholding portions or types of care. A significant pattern is one that involves repeated withholding of care and leads to the conclusion that the pattern was the result of choice or deliberate indifference." (*Id.* at p. 90.) Put otherwise, recklessness may be inferred when the neglect recurs in a significant pattern.
>
> By way of analogy, here, if a jury were to find the Hospital knew of the staffing regulations, violated them, and had a significant pattern of doing so, it could infer recklessness, i.e., a "'conscious choice of a course of action … with knowledge of the serious danger to others involved in it.'" (*Delaney*, *supra*, 20 Cal.4th at pp. 31–32.) We decline to hold as a matter of law that such conduct does not constitute recklessness.

(*Fenimore*, *supra*, 245 Cal.App.4th at pp. 1349-1350.)

The allegations of understaffing in Plaintiff's complaint are at least as specifically stated as those in *Fenimore*. Here, the complaint alleges the Villa Verde defendants "were required to comply with state regulations governing such facilities, including California Code of Regulations, Title 22, section 87411(a), which requires that '[f]acility personnel shall at all times be sufficient in numbers, and competent to provide the services necessary to meet resident needs.' The Villa Verde Defendants were also required to comply with California Code of Regulations, Title 22, section 87705, which requires the Villa Verde Defendants to ensure that '[t]here is an adequate number of direct care staff to support each resident's physical, social, emotional, safety and health care needs as identified in his/her current appraisal.' The Villa Verde Defendants' deliberate understaffing of Villa Verde caused [Plaintiff] to suffer the injuries set forth above." (Complaint, ¶ 57.) "The Villa Verde Defendants … knew that there were insufficient numbers of trained and supervised direct

caregiving staff to provide basis care to prevent resident neglect. They knew Villa Verde had so few staff that they could not possibly supervise residents who were at significant risk for pressure injuries … They knew Villa Verde had received resident and family complaints of poor care and regulatory deficiency notices for neglect and/or substandard resident care caused by poorly trained and/or inadequate staffing. They were aware of this from internal reports yet did not increase staffing. Despite this knowledge, the Villa Verde Defendants … failed to hire additional staff … and continued to admit new residents to maximize profits, knowing Villa Verde did not have sufficient staff to care for them." (Complaint, ¶¶ 63; see also ¶¶ 4 – 9 and 60 – 62.)

The Villa Verde defendants contend the allegations here are no different than those in *Worsham v. O'Connor Hospital* (2014) 226 Cal.App.4th 331 (*Worsham*). However, the *Fenimore* court also distinguished *Worsham*:

> *Worsham*'s determination that understaffing constitutes no more than negligence may be true, *absent* further allegations showing recklessness. But the Fenimores have alleged more than a simple understaffing here. The FAC identified the staffing regulation the Hospital allegedly violated and suggested a knowing pattern of violating it constituted recklessness. A jury may see knowingly flouting staffing regulations as part of a pattern and practice to cut costs, thereby endangering the facility's elderly and dependent patients, as qualitatively different than simple negligence.

(*Fenimore*, *supra*, 245 Cal.App.4th at p. 1350.)

Here, as noted above, Plaintiff also alleges the Villa Verde defendants engaged in repeated conduct by continuing to admit new patients in spite of receiving complaints and regulatory deficiency notices concerning understaffing. A jury can infer recklessness from a pattern of conduct combined with knowledge of the serious dangerousness. Consequently, just as in *Fenimore*, Plaintiff here has stated at least a viable theory of elder/ dependent adult abuse based on recklessness.

Accordingly, the Villa Verde defendants' demurrer to the second cause of action in Plaintiff's complaint on the ground that the pleading does not state facts sufficient to constitute

a cause of action [Code Civ. Proc., §430.10, subd. (e)] for elder neglect—enhanced remedies is OVERRULED.

**C. The Villa Verde defendants' demurrer to the eighth cause of action [constructive fraud] of Plaintiff's complaint is OVERRULED.**

The Villa Verde defendants cite to *Younan v. Equifax Inc.* (1980) 111 Cal.App.3d 498, which states that "[t]he elements of the cause of action for constructive fraud are: (1) fiduciary relationship; (2) nondisclosure (breach of fiduciary duty); (3) intent to deceive, and (4) reliance and resulting injury (causation)." (*Id.* at pp.516-517, fn. 14 (also stating that "the elements of a representation and falsity, are absent from constructive fraud… [t]he fraud consists of the breach of the fiduciary duty of disclosure of relevant matters arising from the relationship").)

The Villa Verde defendants' argue fraud must be pleaded with particularity and the allegations of Plaintiff's constructive fraud cause of action lack the requisite specificity. It is true that "[i]n California, fraud must be pled specifically; general and conclusory allegations do not suffice." (*Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 993.) "This particularity requirement necessitates pleading facts which 'show how, when, where, to whom, and by what means the representations were tendered.'" (*Id.*) "This statement of the rule reveals that it is intended to apply to affirmative misrepresentations." (*Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009) 171 Cal.App.4th 1356, 1384 (*Alfaro*).) "[I]t is harder to apply this rule to a case of simple nondisclosure." (*Id.*) "[L]ess specificity is required of a complaint when " 'it appears from the nature of the allegations that the defendant must necessarily possess full information concerning the facts of the controversy…." (*Tenet Healthsystem Desert, supra*, 245 Cal.App.4th at p. 838.) If discovery would clear any confusion as to who made the representations and by what means, if the allegations of fraud are otherwise sufficiently detailed, defendant cannot persuasively complain that it misunderstands the fraud claim. (*Charpentier v. Los Angeles Rams Football Co.* (1999) 75 Cal.App.4th 301, 312.)

The basis of the eighth cause of action is the Villa Verde defendants' failure to disclose that their management of Villa Verde was focused on fully maximizing profits to the detriment of the care provided and failure to disclose that the facility was not capable of properly caring

for Plaintiff because of inadequate staffing, training, and/or supervision. The particularity requirement is not applicable to a cause of action for an alleged nondisclosure. Though the particularity requirement generally mandates that a plaintiff plead facts establishing how, when, where, to whom, and by what means the representations were tendered, it is much more difficult to apply this rule in a case of non-disclosure because, as one court explained, "[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, supra*, 171 Cal.App.4th at p. 1384.)

Accordingly, the Villa Verde defendants' demurrer to the eighth cause of action in Plaintiff's complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for constructive fraud is OVERRULED.

**D. The Villa Verde defendants' demurrer to the tenth cause of action [negligent infliction of emotional distress] of Plaintiff's complaint is OVERRULED.**

"Negligent infliction of emotional distress [NIED] is not an independent tort in California, but is regarded simply as the tort of negligence. [Citations.] Whether plaintiffs can recover damages for NIED is dependent upon traditional tort analysis, and the elements of duty, breach of duty, causation and damages must exist to support the cause of action." (*Klein v. Children's Hosp. Medical Ctr.* (1996) 46 Cal.App.4th 889, 894.)

In demurring, the Villa Verde defendants cite *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 928 (*Molien*) where it is written: " 'serious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.' [Citation omitted.]" The *Molien* court was quoting the Hawaii Supreme Court's standard for defining what constituted "serious mental distress." The Villa Verde defendants argue simply that Plaintiff's allegation that she suffered serious emotional distress, in light of the aforementioned language in *Molien* is insufficient to state a prima facie claim. The court in *Molien*, however, held:

> the jurors are best situated to determine whether and to what extent the defendant's conduct caused emotional distress, by referring to their own experience. In addition, there will doubtless be circumstances in which the

> alleged emotional injury is susceptible of objective ascertainment by expert medical testimony. (See Comment, Negligently Inflicted Mental Distress: The Case for an Independent Tort (1971) 59 Geo. L.J. 1237, 1248 et seq.) ***To repeat: this is a matter of proof to be presented to the trier of fact. The screening of claims on this basis at the pleading stage is a usurpation of the jury's function.***

(*Molien, supra*, 27 Cal.3d 916, 930; emphasis added.)

Thus, the court here declines to reach any conclusion, as a matter of law, whether Plaintiff's allegation of severe emotional distress is sufficient; as *Molien* instructs, "this is a matter of proof to be presented to the trier of fact."

Accordingly, the Villa Verde defendants' demurrer to the tenth cause of action in Plaintiff's complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for negligent infliction of emotional distress is OVERRULED.

**III. Defendants Villa Verde's and Dominica Oliva's motion to strike portions of plaintiff's complaint is DENIED.**

The Villa Verde defendants move to strike Plaintiff's allegations and prayer for punitive damages. Essentially, the Villa Verde defendants repeat their earlier argument that Plaintiff has not sufficiently alleged recklessness to support her claim for enhanced remedies under the Elder Abuse Act. For the same reasons discussed above, the Villa Verde defendants' motion to strike portions of Plaintiff's complaint is DENIED.

The Court will prepare the formal order.

**- oo0oo –**

**Calendar Line 3**
**Case Name:** *Anil Bhatnagar et al vs City of Milpitas et al*
**Case No.:** 20CV369408

Plaintiff brought motions to compel against Defendant on several sets of discovery. By this Court's July 3, 2024 *ex parte* order, the parties were ordered to meet and confer to try to resolve the discovery dispute between them. In their court-ordered joint statement filed July 18, 2024, the parties identified Requests for Admission numbers 159, 160, 161 and 164 (and Form Interrogatory 17.1 if the motion to compel was granted) as the remaining discovery in despite. The Court appreciates that the parties have met and conferred in good faith and, as a result, have reduced the number of items in dispute for this motion to compel.

Defendant argues that each of the four requests for admission in dispute are vague, ambiguous and violate Code of Civil Procedure section 2033.060.

**Request for Admission No. 159**

This request for admission asks Defendant to "Admit that PLAINTIFF seeking treatment at Allied Pain Institute following the SUBJECT INCIDENT for bodily injuries was reasonable." Defendant objected, *inter alia,* on the grounds that the records are not attached, the request is vague, ambiguous and unclear as to specific treatment(s) referring and that the request violates Code of Civil Procedure Section 2033.060(d) & (f) and seeks expert opinion prematurely. Defendant also argues that the records previously produced were incomplete, the request is compound, and the issue is similar to that in *Catanese v. Superior Court* (1996) 46 Cal.App.4th 1159,1164.

**Request for Admission No. 160**

This request is identical, but for another entity. Plaintiff asks Defendant to "Admit that PLAINTIFF seeking treatment at Mind and Body Pain Clinic following the SUBJECT INCIDENT for bodily injuries was reasonable." Defendant raises the same objections as for Request for Admission No. 159.

**Requests for Admission Nos. 161 and 164**

Request for Admission No. 161 asks defendant to "Admit that PLAINTIFF seeking treatment at MORE Physical Therapy following the SUBJECT INCIDENT for bodily injuries was reasonable."

Request for Admission No. 164 asks defendant to "Admit that PLAINTIFF seeking treatment at M.O.M. & Acupuncture following the SUBJECT INCIDENT for bodily injuries was reasonable."

Defendant raised the same objections to these requests.

Plaintiff argues, *inter alia,* that the requests for admission do not directly refer to medical records and the medical records would only need to be attached when seeking an admission as to the genuineness of those records (Code Civ. Proc., §2033.060 (g)). Plaintiff also declares that he provided medical records to Defendant, Defendant has subpoenaed the

entities for Plaintiff's medical records 6 months ago, Plaintiff sent an email identifying pages that records could be found in the document production and a good faith effort to respond should be made in that Defendant may admit or deny that treatment up to a certain date is reasonable and state that it has no knowledge regarding treatment after that date. The Court agrees. The requests are not seeking Defendant to admit of deny the genuineness of the documents, so they do not need to be attached to the request. The *Catanese* case relates to interrogatories and is not persuasive here. Given that Plaintiff has identified the records from each entity that these requests for admission relate (if there was any ambiguity), the Court GRANTS the motion to compel responses to Requests for Admission numbers 159, 160, 161 and 164 and Form Interrogatory 17.1. Given that this matter is set for trial on August 19, Defendant shall serve verified code-compliant responses to these requests by August 8, 2024, by both mail and electronic service.

No sanctions are awarded.

Moving party to prepare the formal order.

**- oo0oo –**

**Calendar Lines 5-8**
**Case Name:** *Travelers Property Casualty Company of America vs Liberty Insurance Corporation et al*
**Case No.:** 23CV416108

Before the Court are four discovery motions:

(1) Liberty's Motion to Compel against Travelers filed on March 25, 2024, related to Liberty's first set of Requests for Production of Documents and Requests for Admissions;

(2) Travelers' Motion to Compel against Liberty filed on April 3, 2024, related to Travelers' first set and second set of Requests for Production of Documents;

(3) DPR's Motion to Compel against Travelers filed on April 18, 2024, related to DPR's first set of Requests for Production of Documents, Requests for Admissions, and Special Interrogatories; and

(4) Liberty's Motion to Compel against Travelers filed on July 1, 2024, related to Liberty's second set of Requests for Production of Documents and Travelers' privilege log produced on April 26, 2024.

On June 11, 2024, the Court ordered counsel to meet and confer regarding the voluminous discovery items in dispute and file a joint statement with the court by July 18, 2024 listing the disputes that remain outstanding and why the disputed item(s) should be compelled or not compelled.

The Joint Statement was duly filed, and whilst it is voluminous, it is largely repetitive. The Court questions whether any good faith attempt was actually made for the meet and confer that it ordered. Not including Traveler's motion to compel, there were some 42 requests in dispute over 8 sets of discovery. If there any further similar disputes occur, the Court will appoint a discovery referee, as such appointment is clearly warranted.

As to the current discovery requests in dispute, the Court rules as follows:

1. **Liberty's Motion to Compel against Travelers (Liberty's first and second sets of Requests for Production of Documents and first set of Requests for Admissions)**:

As an initial matter, Travelers appears to have asserted the exact same objection to each request; the objections are not tailored to the request propounded. Likewise, Liberty's arguments as to why the motion to compel should be granted are also largely repeated.

**Request for Production of Documents, Set No.1**

**Request Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12**: Good cause appearing, the motion to compel is GRANTED. The response for each of these requests is not code-compliant, there is no statement of a diligent search and reasonable inquiry or that the documents are all the documents in responding party's possession, custody or control, and it appears that only the claim file has been produced and not any other documents outside of the claim file, such as the

Rosendin claim file. (Code Civ. Proc., §§2031.220, 2031.310 (a) (1) and (2), 2031.230 *et seq*.). ESI does not appear to have been discussed but is addressed in Set No. 2 below.

**Request for Production of Documents, Set No. 2**

This set of discovery is duplicative of Request for Production Set No.1 but seeks ESI.

**Request Nos. 13, 14, 15, 16, 17, 18, 19 and 20**: Good cause appearing, the motion to compel is GRANTED, for the same reasons stated for the disputed items in Set No. 1 above. ESI shall be produced. Travelers is ordered to update and serve its privilege log, if, based on this order, additional items need to be identified on that log.

**Requests for Admission, Set No.1**

**Request Nos. 4, 13, 14 and 15:** The motion to compel is DENIED. These responses are compliant. The arguments made by Liberty are trial arguments, Travelers has answered the requests appropriately.

**Request Nos. 5, 6, duplicate 6, 7 and 8**: The motion to compel is GRANTED. The responses to each of these requests are not code-compliant and somewhat evasive in that they do not fully and completely answer the request posed.

**Special Interrogatory 11**: The Court does not know why this request was included and believes it was included in error.

2. **DPR's Motion to Compel against Travelers (DPR's first set of Requests for Production of Documents, Requests for Admissions, and Special Interrogatories)**.

**Request for Production of Documents, Set No. 1**

**Request Nos. 1, 2, 3, 4 and 5:** Good cause appearing, the motion to compel is GRANTED. The response to each of these requests is not code-compliant, the responses do not answer the requests posed in that they reword what has been requested, there is no statement of a diligent search and reasonable inquiry or that the documents are all the documents in responding party's possession, custody or control, and it appears that only the claim file has been produced and not any other documents outside of the claim file, such as the Rosendin and DPR claim files. (Code Civ. Proc., §§2031.220, 2031.310 (a) (1) and (2), 2031.230 *et seq*.).

**Request for Admissions, Set No.1**

**Request Nos. 1:** Good cause appearing, the motion to compel is GRANTED, the request seeks information communicated to a third party and thus there is no attorney/client privilege.

**Request Nos. 2, 3, 4, 5 and 9:** The motion to compel is DENIED, for the reasons stated in opposition to the motion.

**Special Interrogatories, Set No. 1**

**Interrogatory No. 4:** The motion to compel is GRANTED to the extent that the entire claim file has not been produced. As its response, Travelers relies on the claim file, however, the entire claim file has not been produced, so this response is incomplete.

**Interrogatories 6 and 7:** The motion to compel is DENIED. The responses are code-complaint, responsive and complete.

3. **Travelers' Motion to Compel against Liberty (Travelers' first set and second set of Requests for Production of Documents)**.

The motion relates to the first and second set of document requests to Liberty. The motion was filed beyond the 45-day time period (plus service) within which any motion to compel must be filed and there is no mention of Liberty granting any extension for the time to file the motion to compel. Further, the required separate statement was not filed to ascertain the nature and extent of the discovery requests being compelled. As such, the motion to compel is DENIED. (Code Civ. Proc., §2031.310 (c), Cal Rules of Ct 3.1345 (a) (3), (c)).

All requests for sanctions are DENIED.

For those requests where the motion to compel is granted, code-compliant, verified responses and responsive documents are to be served by August 30, 2024. If updated, a privilege log must also be served by August 30, 2024.

Liberty to prepare a formal order.

**- oo0oo –**