SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 6
Honorable Evette D. Pennypacker, Presiding

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

DATE: September 14, 2023 TIME: 9:00 A.M.

TO REQUEST ORAL ARGUMENT: Before 4:00 PM today you must notify the:

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

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

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

IN PERSON HEARINGS: The Court strongly prefers in person appearances for contested law and motion matters. We are open and look forward to seeing you in person again.

VIRTUAL HEARINGS: Whenever feasible, please use video when appearing for your hearing virtually through Microsoft Teams. To attend virtually, click or copy and paste this link into your internet browser, and scroll down to Department 6: https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

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

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	21CV391498	Hugo Amaya et al vs The Permanente Medical Group Inc. et al	Defendant Kaiser Foundation Hospitals' Motion to Compel is GRANTED. Please scroll down to Line 1 to review full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.
2	21CV391498	Hugo Amaya et al vs The Permanente Medical Group Inc. et al	The motion to strike was addressed at a prior hearing and an amended complaint has been filed.
3	22CV408665	QUOTE VELOCITY, LLC, a Delaware Limited Liability Company vs Hi.Q, Inc., a Delaware Corporation et al	The Entity Defendants' Demurrer is OVERRULED. Please scroll down to Line 3 to review full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.

4	22CV408665	QUOTE VELOCITY, LLC, a Delaware Limited Liability Company vs Hi.Q, Inc., a Delaware Corporation et al	Quote Velocity, LLC's Motion to Seal Portions of its *Ex Parte* Application for Additional Writ of Attachment is DENIED. Quote Velocity filed this motion to seal in an abundance of caution to permit Defendant Hi.Q, Inc. to submit evidence to support sealing. No evidentiary showing demonstrating the need to seal has been made. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.
5	22CV408665	QUOTE VELOCITY, LLC, a Delaware Limited Liability Company vs Hi.Q, Inc., a Delaware Corporation et al	Quote Velocity, LLC's Motion to Seal Portions of its First Amended Complaint and Exhibit 1 is DENIED. Quote Velocity filed this motion to seal in an abundance of caution to permit Defendant Hi.Q, Inc. to submit evidence to support sealing. No evidentiary showing demonstrating the need to seal has been made. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.
6	21CV390717	Fermin Marquez vs JUDGE HOSPITALITY CORPORATION et al	Defendant Judge Hospitality Corporation's Motion to Compel Responses for Form Interrogatories (Employment - Set One) and for Sanctions, Motion to Compel Form Interrogatories (General – Set One) and for Sanctions, Motion to Compel Requests for Production of Documents (Set One) and for Sanctions, Motion to Compel Special Interrogatories (Set One) are all set for October 10, 2023 at 9 a.m. in Department 6. Opposition and reply briefs shall be due based on the October 10, 2023 hearing date.
7	2013-1-CV-247406	P. Kleidman Vs N. Shah, Et Al	The Sherwood Witnesses' motion for protective order is GRANTED. Please scroll down to lines 7-9 for full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.
8	2013-1-CV-247406	P. Kleidman vs N. Shah, Et Al	Kleidman's Motion to Compel Robert Quist to Respond to Special Interrogatory No. 1 (Set One) is DENIED. Please scroll down to lines 7-9 for full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.
9	2013-1-CV-247406	P. Kleidman vs N. Shah, Et Al	Kleidman's Motion to Compel Bridge & Post, Inc. to provide responses to Requests for Production of Documents (Set One) is DENIED. Please scroll down to lines 7-9 for full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.
10	23CV417677	1153 SAN RAFAEL, LLC vs AMERICAN ZURICH INSURANCE COMPANY	1153 San Rafael, LLC's Petition Compel Arbitration is GRANTED. Please scroll down to Line 10 for full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.
11	21CV383612	Pedro Valdez vs Huy Dinh	Minor's Compromise is APPROVED. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to use order on file.

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Calendar Line 1
Case Name: *Karen Amaya v. Kaiser Permanente, et. al.*
Case No.: 21CV391498

Before the Court is Defendant Kaiser Foundation Hospitals' Motion to Compel Plaintiff Karen Amaya to Provide Further Responses to Request for Production Nos. 1, 2, 3, 7, 8, 13, 14, 17, 18, and 19 and Special Interrogatory Nos. 2, 5, 6, 10, 11, 12, 13, 15, 16, 20, and 22. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This action arises out of the medical treatment and passing of decedent Hugo Amaya ("Decedent"). Plaintiff Karen Amaya is Decedent's sister. (SAC, ¶ 1.) Around August 6, 2021, Decedent contracted COVID-19 and he was admitted to Kaiser-San Francisco and then transferred to Kaiser-Santa Clara. (SAC, ¶ 9, 11.) The same day, Decedent granted power-of-attorney to Amaya. (SAC, ¶ 61.)

From October 2021 to January 26, 2022, Defendants constantly threatened to "pull the plug" on the Decedent. (SAC, ¶ 17.) On January 26, 2022, Defendants affirmatively ended Decedent's life without written and verbal informed consent from Amaya. (SAC, ¶ 15.) The Decedent had vital statistics when Defendants "pulled the plug" on his life support, ventilator, and ECMO machine. (SAC, ¶ 18.)

Universal supplied the Security Guards to The Kaiser Group. (SAC, ¶ 39.) Horton and Laureta worked for Universal and Amaya alleges, upon information and belief, they worked as independent contractors for The Kaiser Group on January 26, 2022. (SAC, ¶¶ 41-42.) Between 10 a.m. to 4 p.m., the Security Guards assisted other Defendants when they threatened to call the police on Amaya, grabbed her and kicked her out of Decedent's bedside. (SAC, ¶¶ 43, 180-181, 196.)

Prior to Decedent's passing, Amaya filed for a temporary restraining order, temporary and permanent injunctive relief, and equitable relief for Decedent to be transferred to another medical facility to be treated, however, it was denied. (SAC, ¶ 45.)

Amaya filed the initial complaint on November 12, 2021, asserting: (1) temporary restraining order; (2) temporary and permanent injunctive relief; (3) intentional infliction of emotion distress; (4) negligent infliction of emotion distress; and (5) negligence. On January 25, 2022, Amaya filed her FAC, asserting: (1) medical malpractice-respondeat superior; (2) medical malpractice-negligence; (3) unconscionable injury; (4) negligence-lack of informed consent; (5) intentional infliction of emotional distress; (6) negligent infliction of emotional distress; (7) battery; (8) negligence; (9) temporary injunctive relief; and (10) permanent injunctive relief.

On February 14, 2023, Amaya filed her SAC, asserting: (1) respondeat superior; (2) medical malpractice-negligence; (3) unconscionable injury; (4) negligence-lack of informed consent; (5) intentional infliction of emotional distress; (5) intentional infliction of emotional distress; (6) negligent infliction of emotional distress; (7) civil battery; (8) civil assault; (9) negligent hiring, retention,

training, and supervision; (10) wrongful death; and (11) violation of Title VI of the Civil Rights Act of 1964.

II. Legal Standard

Discovery is generally permitted "regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." (Cal. Code Civ. Pro. § 2017.010.) Everything that is relevant to the subject matter is presumed to be discoverable. (*Id.*) The Discovery Act further declares that "the court shall limit the scope of discovery" if it determines that the burden, expense, or intrusiveness of that discovery "clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." (Code Civ. Pro. § 2017.020(a); *Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 383-385.) The California Supreme Court teaches in *Greyhound* that the judge exercising discretion to limit discovery should construe disputed facts liberally in favor of discovery; reject objections such as hearsay that only apply at trial; permit fishing expeditions (within limits), avoid extending limitations on discovery, such as privileges; and, whenever possible, impose only partial limitations rather than denying discovery entirely. (*Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 383-385; *see also Tylo v. Superior Court* (1997) 55 Cal.App.4th 1379, 1386.)

The party to whom a request for production of documents has been directed can make one of three responses: (1) a statement that the party will comply with the demand, (2) a representation that the party lacks the ability to comply, or (3) an objection. (Code Civ. Pro. §2031.210(a).) A party may move for an order compelling a further response to a document demand on the ground that (1) an objection is without merit or too general, (2) a statement of compliance with the demand is incomplete, or (3) a representation of inability to comply is inadequate, incomplete, or evasive. (Code Civ. Pro. §2031.210(a).) A party seeking to compel is required to "set forth specific facts showing good cause justifying the discovery sought by the demand." (Code Civ. Pro. §2031.210(b)(1); *Kirkland v. Superior Court* (2002) 95 Cal.App.4th 92, 98.) This burden may be satisfied by a fact-specific showing of relevance. (*TBG Ins. Services Corp. v. Superior Court* (2002) 96 Cal.App.4th 443, 448.) Information is relevant to the subject matter of the action if it might reasonably assist a party in evaluating the case, preparing for trial, or facilitating settlement. (*Gonzalez v. Superior Court* (1995) 33 Cal.App.4th 1539, 1546.)

A party responding to interrogatories must respond in writing, under oath separately to each interrogatory with an answer that contains the information sought, an exercise of the party's option to produce writings from which the answer can be determined, or an objection to the interrogatory. (Code Civ. Pro. §2030.210(a).) The responding party must make a reasonable, good faith effort to obtain information to provide a response and generally may not respond to the interrogatory by simply stating it cannot respond. (*Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 406; Code Civ. Pro. §2030.210(c).)

III. Analysis

Defendant first argues the Court should disregard Plaintiff's opposition because it was a day late. Defendant suffered no prejudice from the late filing as evidenced by its ability to respond

substantively to the opposition. The Court also has discretion to consider late filed papers (see *Gonzalez v. Santa Clara County Dep't of Social Servs.* (2017) 9 Cal.App.5th 162, 168), and because Defendant responded substantively, it waived any irregularities in the filing and service of Plaintiff's opposition. (See *Moofly Prods., LLC v. Favila* (2020) 46 Cal.App.5th 1, 10.)

Next, Defendant did submit a separate statement with its motion to compel. Plaintiff, however, did not respond to that separate statement. Nor did Plaintiff otherwise respond to Defendant's arguments that Plaintiff's amended responses were insufficient. Instead, Plaintiff responds that amended responses were served on May 8, 2023. Defendant's motion acknowledges service of those amended responses and maintains that they are still insufficient, setting forth specific reasons for that view in the separate statement. The Court accordingly addresses each request below.

Form Interrogatory 17.1: GRANTED. Plaintiff must supplement her response to this interrogatory for each request for admission that is not an unqualified admission.

Special Interrogatory Nos. 2, 5, 6, 10, 12, 13, 15, 16, 20, 22: GRANTED. Plaintiff must supplement her answers to identify any additional documents and to address each interrogatory individually, rather than providing only blanket responses.

Requests for Production Nos. 1, 2, 3, 7, 8, 13, 14, 17, 18, and 19: GRANTED. Plaintiff indicates in each of her written responses that she does have additional documents, but she is having trouble accessing them after moving back to El Salvador. Plaintiff brought this lawsuit and should have collected her documents as part of her pre-filing investigation or, in any event, before she changed her circumstances to make those documents difficult to obtain. Moreover, it is incumbent upon Plaintiff to determine when she can locate and produce those documents. An open-ended representation that additional documents may be produced at some point is not sufficient. Plaintiff can contact the service providers where she believes documents are located and/or provide her attorney or another trusted party with the ability to access documents from the United States.

Plaintiff is ordered to produce these supplemental responses within 30 days of entry of this final order.

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Calendar Lines 3-5
Case Name: *Quote Velocity, LLC, v. HI.Q, Inc. et.al.*
Case No.: 22CV408665

Before the Court are Defendants', Hi.Q, Inc.,[1] Health IQ Insurance Services Inc., Health IQ Administrative Services Inc., Health IQ RE Inc., and HiQ SPV Insurance Services LLC (collectively, the "Entity Defendants") demurrers to Plaintiff's First Amended Complaint ("FAC"). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

HiQ is a Medicare broker that provides healthcare plans tailored to consumers' needs. HQ operated as part of a common enterprise with its four subsidiaries, Health IQ Insurance Services Inc., Health IQ Administrative Services Inc., Health IQ RE Inc., HIQ SPV Insurance Services. (FAC ¶ 11-26, 31.)

On April 6, 2022, Plaintiff and HiQ entered into a Lead Purchase Agreement ("Agreement") under which Plaintiff agreed to provide HiQ leads to potential customers. (*Id.* ¶ 32 & Ex. 1, Pg. 1.) Although HiQ was the sole counterparty to the agreement, Plaintiff contends that HiQ and the other Entity Defendants are all alter egos and agents of one another.

From May 2021 to September 2022, Plaintiff invoiced the Entity Defendants and was timely paid. (FAC ¶ 47.) Beginning in August 2022, the Entity Defendants began making increased requests for leads under the Agreement and agreed to pay Plaintiff higher rates for those leads. (FAC, ¶¶ 41, 50-61). In or around October 2022, Chris Treacy and Jacqueline Santos, employees of the Entity Defendants, assured Plaintiff it would be paid for these leads. (FAC, ¶ 62.) One month later, at a November 2022 meeting attended by mostly HiQ executives, Munjal Shah, HiQ's CEO, directed the attendees to request as many leads as possible because HiQ would "not be here" by the time the invoices for them would be due or that, by that time, HiQ would not be paying its vendors. (FAC, ¶ 64.)

By December 2, 2022, payment for services rendered in October 2022 was due. On that date, upon inquiry and insistence from Plaintiff, Christopher Shirley, HiQ CFO, directed his team to make partial payment of $500,000.00 for the October services and stated, "We anticipate being able to pay the remainder on or about 12/13 when we start to receive commissions for AEP [Annual Enrollment Period] sales." (FAC, ¶ 68.) On 12/5/22, Mr. Shirley confirmed this anticipated timing for payment. (FAC, ¶ 73.)

On December 7, 2022, the Entity Defendants began laying off hundreds of employees. (FAC, ¶ 75.) On December 9, 2022, Mr. Shah advised Plaintiff that, due to financial challenges, payment would not be forthcoming on December 13 as previously anticipated. (Id. ¶ 78.) To date, the Entity Defendants have not paid Plaintiff the balance remaining for the October services and have not paid any subsequent invoices. (FAC, ¶¶ 81-82, 85.) Plaintiff alleges that, since January 2023, the Entity Defendants have been receiving funds from third-party insurance carriers that were required to be used for marketing purposes, such as paying vendors like Plaintiff; but instead, the Entity Defendants have diverted and

[1] Hi.Q, Inc. filed a petition for bankruptcy. Thus, Plaintiffs case against that defendant is stayed, and this order does not apply to Hi.Q.

transferred the funds among themselves and to the individual defendants to shield the funds from creditors. (FAC ¶¶ 23-24, 86-88). Based on these allegations, Plaintiff asserts eight causes of action against the Entity Defendants, Munjal Shah, Vishal Parikh, and Gaurav Suri for breach of contract, withholding stolen property, negligent misrepresentation, intentional misrepresentation/fraudulent inducement, fraud, fraudulent transfer, civil conspiracy, and unjust enrichment. Plaintiff seeks to recover $6,988,428.00 in unpaid invoices.

Plaintiff filed its original complaint on December 22, 2022 and its FAC on May 1, 2023. Entity Defendants filed their demurrer to the FAC on June 2, 2023. Individual Defendants filed their demurrer to the FAC on August 20, 2023, for which a hearing date has yet to be set. Defendant Hi.Q Inc. filed a petition for bankruptcy protection and later a notice of stay of proceedings on September 6, 2023.

II. Legal Standard

A demurrer tests the sufficiency of a Complaint as a matter of law and raises only questions of law. (*Schmidt v. Foundation Health* (1995) 35 Cal.App.4th 1702, 1706) In testing the sufficiency of the Complaint, the Court must assume the truth of (1) the properly pleaded factual allegations; (2) facts that can be reasonably inferred from those expressly pleaded; and (3) judicially noticed matters. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The Court may not consider contentions, deductions, or conclusions of fact or law. (*Moore v. Conliffe* (1994) 7 Cal.App.4th 634, 638.) Because a demurrer tests the legal sufficiency of a complaint, the plaintiff must demonstrate the complaint alleges facts sufficient to establish every element of each cause of action. (*Rakestraw v. California Physicians Service* (2000) 81 Cal.App.4th 39, 43.) Where the complaint fails to state facts sufficient to constitute a cause of action, courts should sustain the demurrer. (Code of Civil Procedure §430.10(e); *Zelig v. County of Los Angeles* (2002) 27 Cal.App.4th 1112, 1126.)

Sufficient facts are the essential facts of the case "with reasonable precision and with particularity sufficiently specific to acquaint the defendant with the nature, source, and extent of his cause of action." (*Gressley v. Williams* (1961) 193 Cal.App.2d 636, 643-644.) Whether the plaintiff will be able to prove the pleaded facts is irrelevant. (*Stevens v. Superior Court* (1986) 180 Cal.App.3d 605, 609-610.)

A demurrer may also be sustained if a complaint is "uncertain." Uncertainty exists where the factual allegations are so confusing they do not sufficiently apprise a defendant of the issues it is being asked to meet. (*Williams v. Beechnut Nutrition Corp*. (1986) 185 Cal.App.3d 135, 139, fn. 2; Code of Civil Procedure §430.10(f).) A pleading is required to assert general allegations of ultimate fact. Evidentiary facts are not required. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 47; *Lim v. The.TV Corp. Internat.* (2002) 99 Cal. App. 4th 684, 690.)

III. Analysis

Entity Defendants' demurrer to FAC's second, third, fourth, fifth, sixth, and seventh causes of action on the ground that each fails to allege facts sufficient to state a claim against any of them.

A. Second Cause of Action: Withholding Stolen Goods in Violation of Penal Code § 496.

Penal Code §496 states: "every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a county jail for not more than one year." (Penal Code § 496.) An individual or entity may also be held civilly liable for receipt of stolen property under Penal Code § 496. (*Bell v. Feibush* (2013) 212 CalApp.4th 1041, 1049.) Money or property obtained through false representations or fraud can constitute "theft" within the meaning of Penal Code § 496. (See *Switzer v. Wood* (2019) 35 Cal.App.5th 116, at 126-130; *Bell,* 212 Cal.App.4th 1041 at 1048; Penal Code §484(a) ("Every person … who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, …, or personal property … is guilty of theft").) *Switzer* further explains:

> A violation of section 496(a) may, by its own terms, relate to property that has been "stolen" *or* "that has been obtained *in any manner constituting theft* or extortion." (§ 496(a), italics added.) As reflected in *Bell v. Feibush, supra*, 212 Cal.App.4th at page 1048, the issue of whether a wrongdoer's conduct in any manner constituted a "theft" is elucidated by other provisions of the Penal Code defining theft, such as section 484. In 1927, the Legislature consolidated the crimes of larceny, embezzlement, and theft by false pretense in Penal Code section 484, subdivision (a), under the single term "theft." (*Bell v. Feibush*, at p. 1048; see also *People v. Vidana* (2016) 1 Cal.5th 632, 640–641 [206 Cal. Rptr. 3d 556, 377 P.3d 805] [although the distinctive substantive elements of each offense remained the same, each constituted the crime of "theft"]; *People v. Gomez* (2008) 43 Cal.4th 249, 255, fn. 4 [74 Cal. Rptr. 3d 123, 179 P.3d 917].) Section 484, subdivision (a), states as follows: "Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, *is guilty of theft*."

(*Switzer v. Wood*, 35 Cal. App. 5th 116, 126-127.)

Plaintiff alleges Entity Defendants violated section 496 by (1) receiving funds or payments from third parties then failing to turn the funds over to Plaintiff for rendered services and (2) receiving leads under the Agreement while knowing they lacked the ability to pay. Entity Defendants assert Plaintiff fails to allege felonious receipt or retention of the funds, that Entity Defendants tricked any third parties to pay them, or that the money Entity Defendants received was earmarked for the Plaintiff; at best, the Entity Defendants received funds that they could have used to pay Plaintiff but did not, which does not constitute theft of property.

Citing to *People v. Ashley*, (1954) 42 Cal.2d 246 (*Ashley*), Entity Defendants further argue Plaintiff's claim is nothing more than a classic breach of contract where one party fails to pay for good/services received which is evident from the fact that the FAC fails to allege Entity Defendants had an intent to steal from or deceive Plaintiff.

The Court finds *Ashley* distinguishable. *Ashley* addressed a grand theft conviction under Penal Code § 484, where the defendant obtained property by false pretense. The court explained that to support a *conviction of theft* for obtaining property by false pretenses, the government must prove beyond a reasonable doubt that the defendant made a false pretense or representation with intent to defraud the owner of his property, and that the owner was in fact defrauded. (*Ashley*, supra at 259.) This required intent, as argued by Entity Defendants is necessary to prove theft. However, on demurrer, the Court does not address whether Plaintiff can prove theft; only whether it is adequately alleged.

Plaintiff alleges:

- Defendants took, …obtained property belonging to Plaintiff.
- Defendants obtained possession in a manner constituting theft.
- Stolen property includes Leads, Applications, Billable calls, and funds from third party carriers that were received as a result of Plaintiff's services / products.
- Defendants knowingly received, concealed, and/or withheld (or aided in concealing or withholding) property belonging to Plaintiff.
- Defendants induced Plaintiff to provide increased Leads, Applications, and billable Calls while knowing all along that it lacked funds to pay for such property.

(FAC, ¶¶ 104-105.)

The Court finds that Entity Defendants' conduct falls within the ambit of section 496(a). Accordingly, Entity Defendants' demurrer to the second cause of action is OVERRULED.

B. Third Cause of Action: Negligent Misrepresentation

Entity Defendants assert the FAC fails to identify a single statement Suri, Shah, Shirly and "others" actually made because there were no such statements. They add that Mr. Shirley, CFO, was the person who made statements on December 2, 2022 and December 5, 2022 about paying the remainder balance, however, he believed it to be true and was unaware of the companies' financial difficulties. Hence there was no falsity or intent to defraud when Mr. Shirley made representations. Plaintiff argues the Entity Defendants' demurrer imposes a heightened evidentiary standard at this pleading stage; with which this Court agrees.

To state a claim for negligent misrepresentation, a plaintiff must plead: (1) misrepresentation of a material fact, while ignorant of the truth, but without reasonable ground for believing it to be true; (2) made with the intent to induce reliance on the fact misrepresented; (3) justifiable reliance on the misrepresentation; and (4) resulting damage. (*Hasso v. Hapke* (2014) 227 Cal.App.4th 107, 127.)

Plaintiff alleges:

- Defendants failed to pay an invoice by its December 2, 2022 due date.

- In a conversation on December 2, 2022, Mr. Shirley (CFO) directed his team to pay $500,000.00 toward the invoice stating that the company would pay the remainder on or about December 13, 2022, once they receive anticipated commissions.
- On December 5, 2022, Mr. Shirley again confirmed their anticipated payment date and the company's ability to pay its invoice via an email to Plaintiff to encourage Plaintiff's continued performance.
- On information and belief, Plaintiff alleges Defendants began laying off hundreds of employees on December 7, 2022.
- On information and belief, Plaintiff alleges Defendants' executives met in November 2022 and discussed the company's insolvency and their plan to obtain maximum benefit from Plaintiff and other vendors in the meantime.
- Plaintiffs justifiably relied on Mr. Shirley's statements/assurances and continued to provide services.
- As a result, Plaintiff has suffered approximately $7 million in monetary losses.

(FAC, ¶¶11-13)

The Court finds these allegations sufficient. Accordingly, the Entity Defendants' demurrer to the third cause of action is OVERRULED.

C. Fourth Cause of Action: Intentional Misrepresentation/Fraudulent Inducement
Fifth Cause of Action: Fraud

Entity Defendants assert the FAC fails to show: (1) Mr. Shirley knew on December 2 or 5, 2022 that payment would not be forthcoming, (2) Mr. Shirley attended the November executive meeting where M. Shah allegedly informed all attendees of the company's financial difficulties, and/or (3) Mr. Shirley knew of the upcoming layoffs. Entity Defendants also argue the fourth and fifth causes of action are duplicative, fail to add anything to the FAC, and thus are subject to demurrer.

The elements for a fraud are: (1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (scienter); (3) intent to defraud or induce reliance; (4) justifiable reliance; and (5) damages. (Civil Code § 1709.) Fraud must be plead with particularity. (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal. 3d 197, 216.) A plaintiff must allege what was said, by whom, in what manner (i.e., oral or in writing), when, and, in the case of a corporate defendant, under what authority to bind the corporation. (*Goldrich v. Natural Y Surgical Specialties*, Inc. (1994) 25 Cal.App.4th 772, 782.)

The difference between fraud and negligent misrepresentations is the defendants' knowledge of falsity. To satisfy the scienter element, Plaintiff alleges:

- Defendants and their employees/agents made aggressive demands for an unprecedented increase in volume of services even up to the date of layoffs.
- Defendants' employees including Mr. Treacy and Ms. Santos, promised to pay higher rates just weeks before the start of layoffs and the company's claim that it could not pay Plaintiff.

- Mr. Shah's November 2022 directive to buy as many leads and Applications as possible because the company would not be here to pay by the time invoices arrive.
- Mr. Shirley's continued assurances that Plaintiff's outstanding balance would be paid "in days" and the company had the ability to pay its invoices in full once anticipated commissions were received.
- Entity Defendants did not disclose their financial difficulties to Plaintiff.

(FAC ¶¶ 50-51, 53-62, 68, 72-80.)

Although fraud must be specifically pled, less specificity is required when "it appears from the nature of the allegations that the defendant must necessarily possess full information concerning the facts of the controversy." (*Committee on Children's Television, Inc.,* 35 Cal.3d 197, 216-217.) Accordingly, the Court finds that the foregoing allegations are sufficient to satisfy the scienter element of a fraud claim.

As to the duplicative argument, while some cases have sustained a demurrer to a cause of action that merely duplicates another cause of action and adds nothing to the complaint by way of fact or theory (e.g., *Award Metals v. Superior Court* (1991) 228 Cal.App.3d 1128, 1135), the better view is that the objection that a cause of action is duplicative of another in the complaint "is not a ground on which a demurrer may be sustained." (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 890 ("it is a waste of time and judicial resources to entertain a motion challenging part of a pleading on the sole ground of repetitiveness"); Code Civ. Proc. § 3537 ("superfluity does not vitiate").) "This is the sort of defect that, if it justifies any judicial intervention at all, is ordinarily dealt with most economically at trial, or on a dispositive motion such as summary judgment." (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 890.)

Accordingly, Entity Defendants' demurrer to the fourth and fifth causes of action is OVERRULED.

D. Sixth Cause of Action: Fraudulent Transfer

"Claims for fraudulent transfer are governed by the UVTA. The purpose of the UVTA is to prevent debtors from placing, beyond the reach of creditors, property that should be made available to satisfy a debt." (*Chen v. Berenjian* (2019) 33 Cal.App.5th 811, 817.) "A creditor may set aside a transfer as fraudulent under Civil Code section 3439.04 by showing actual fraud as defined in subdivision (a)(1) or by showing constructive fraud as defined in subdivision (a)(2)." (*Id.* at 817.) Actual fraud under the UVTA means that the transfer was made "[w]ith actual intent to hinder, delay, or defraud any creditor of the debtor." (Civ. Code § 3439.04, subd. (a)(1).) Constructive fraud means the debtor made the transfer: "Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor either: (a) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction or (b) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due." (Civ. Code § 3439.04, subd. (a)(2).)

Whether a debtor had the actual intent to hinder, delay, or defraud a creditor is a question of fact. (*Nautilus, Inc. v. Yang* (2017) 11 Cal.App.5th 33, 40; *Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1294.) The fact finder may consider whether: (1) the debtor made the transfer to an "insider"; (2) the debtor retained possession or control of the property after the transfer; (3) the debtor had been sued before making the transfer; (4) the debtor removed or concealed assets; (5) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred; and (6) the transfer occurred shortly before or shortly after a substantial debt was incurred (§ 3439.04, subd. (b)). None of these factors is determinative, and no minimum or maximum number of factors is required. (*Filip v. Bucurenciu* (2005) 129 Cal.App.4th 825, 834; *In re Ezra* (Bankr. 9th Cir. 2015) 537 B.R. 924, 931.)

Plaintiffs plead facts sufficient to constitute a cause of action under section 3439.04, subdivision (a)(1):

- Entity Defendants owe Plaintiff approximately $7 million in outstanding invoices.
- Entity Defendants diverted or caused diversion revenues and assets among themselves.
- Entity Defendants transferred or caused the transfer of revenues and assets to Suri, Shah, and/or Parikh.
- The transferred assets include, but are not limited to, resulted revenues from the Applications, Leads and/or billable Calls that were provided by Plaintiff.
- The revenues were transferred to insiders.
- Entity Defendants retained control of the transferred revenues and assets.
- Certain Defendants were insolvent or became insolvent shortly after the transfer was made.
- Transfers were done with the intent to hinder or defraud Plaintiff.
- Plaintiff's right to payment from Entity Defendants arose before they transferred their revenue and assets.

(FAC, ¶¶ 148-153)

Accordingly, the Entity Defendants' demurrer to the sixth cause of action is OVERRULED.

E. Seventh Cause of Action: Civil Conspiracy

Entity Defendants demurrer to this cause of action solely on the ground that California does not recognize a separate and distinct tort for civil conspiracy.

The Court agrees with Entity Defendants that conspiracy is not a separate tort, but a form of vicarious liability by which one defendant can be held liable for the acts of another. Thus, conspiracy provides a remedial measure for affixing liability to all who have agreed to a common design to commit a wrong when damage to the plaintiff results.

The elements of civil conspiracy are: (1) the formation of a group of two or more persons who agreed to a common plan or design to commit a tortious act; (2) a wrongful act committed pursuant to the agreement; and (3) resulting damages. (*City of Industry v. City of Fillmore* (2011) 198 Cal.App.4th 191, 212.) The defendant in a conspiracy claim must also be capable of committing the target tort. (*IIG Wireless, Inc. v. Yi* (2018) 22 Cal.App.5th 630, 652; CACI 3600.)

Plaintiff's conspiracy claim is sufficiently pled and survives demurrer because each of the other causes of action alleged in the FAC, to which the conspiracy allegations can attach, are suitably pled.

F. Breach of Contract as a Tortious Act

Entity Defendants argue generally that Plaintiff's claim is contractual in nature and cannot support its tort claims. Plaintiff counters that it asserts independent tort claims based on the Entity Defendants' tortious conduct in knowingly demanding nearly $7 million in services with no intention paying for them.

In *Erlich v. Menezes* (1999) 21 Cal.4th 543, 551, the court held that a party's contractual obligation may create a legal duty and that a breach of that duty may support a tort action. "[C]onduct amounting to a breach of contract becomes tortious only when it also violates a duty independent of the contract arising from principles of tort law.". . the duty that gives rise to tort liability is either completely independent of the contract or arises from conduct which is both intentional and intended to harm." (*Id.* at p. 552; see also *Harris v. Atlantic Richfield Co.* (1993) 14 Cal.App.4th 70, 78 ("when one party commits a fraud during the contract formation or performance, the injured party may recover in contract and tort").) Generally, "a tortious breach of contract … may be found when (1) the breach is accompanied by a traditional common law tort, such as fraud or conversion; (2) the means used to breach the contract are tortious, involving deceit or undue coercion; or, (3) one party intentionally breaches the contract intending or knowing that such a breach will cause severe, unmitigable harm in the form of mental anguish, personal hardship, or substantial consequential damages." (*Erlich v. Menezes*, supra, 21 Cal.4th at pp. 553–554.)

Here, Plaintiff alleges the Entity Defendants' intentional breach and deceit to defraud Plaintiff into providing nearly $7 million in valuable services for which Entity Defendants knew they would not pay. Plaintiff's allegations, as referenced above for each challenged claim, establish its claims that Entity Defendants engaged in a plan to intentionally deceive Plaintiff into providing continued service well into December of 2022 when they knew in November of 2022 that the company was at the brink of bankruptcy. Plaintiff further alleges the Entity Defendants continue to benefit from its alleged tortious conduct by receiving insurance contract revenues that were generated from Plaintiff's Leads and diverted among themselves to avoid payment to the Plaintiff.

The Entity Defendant's alleged conduct is the type of tortious conduct California law recognizes as independently giving rise to tort liability.

Accordingly, Entity Defendants' demurrer to the second, third, fourth, fifth, sixth, and seventh causes of action is OVERRULED.

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Calendar Lines 7-9
Case Name: *P. Kleidman vs N. Shah, Et Al*
Case No.: 2013-1-CV-247406

Before the Court is (1) The Sherwood Witness's Motion for Protective Order, (2) Kleidman's Motion to Compel Robert Quist to Respond to Special Interrogatory No. 1 (Set One), and (3) Kleidman's Motion to Compel Bridge & Post, Inc. to provide responses to Requests for Production of Documents (Set One). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This is an action for breach of a settlement agreement allegedly entered to resolve a lawsuit Cross-Defendant Kleidman filed in 2013. According to the Cross-Complaint brought by Nitin Shah, Don Cook, E.J. Von Schaumburg, Feeva Technology ("Feeva"), Michael Maidy, Timothy Cox, Martin Pichinson, Bernie Murphy, Sherwood Management, LLC, Sherwood Partners, LLC ("Sherwood"), FeevT (Assignment for the Benefit of Creditors), LLC ("FeevT"), Estate of Robert Quist, David Becker, Becker Legal Group, LLC, and Bridge and Post, Inc., in November 2010, technology startup Feeva ran out of funds and went out of business. (Cross-Complaint, ¶1.) Feeva wound down via an assignment for the benefit of creditors and ownership of all of its assets and liabilities was transferred to FeevT, overseen by Sherwood, and sold to the highest bidder, Bridge.

Kliedman, a minority investor in Feeva, filed the underlying complaint in June 2013, alleging that when FeevT sold Feeva's assets, it did not obtain reasonably equivalent value for them and thus Kleidman had been harmed. (Cross-Complaint, ¶2.) After nearly two years of litigation, and prior to the adjudication of motions to dismiss the then-pending fourth amended complaint, the parties settled the action by signing a comprehensive formal settlement agreement on March 25, 2015 (the "Settlement Agreement.") (*Id.*) Instead of honoring his obligations under the Settlement Agreement, Kleidman tried to revoke the Settlement Agreement on March 30, 2015, stating that he had "changed his mind." (Cross-Complaint, ¶3.)

In April 2015, the Cross-Complainants, believing Kleidman was bound by the Settlement Agreement, filed a joint motion to enforce it under Code of Civil Procedure section 664.6. (Cross-Complaint, ¶4.) Kleidman opposed the motion, arguing Section 664.6 was inapplicable because "not all the parties themselves signed the purported [settlement] agreement." In May 2015, the Court granted Cross-Complaints' motion to enforce, ordered Kleidman to comply with the Settlement Agreement, and entered a judgment of dismissal of the fourth amended complaint with prejudice. Kleidman appealed that judgment, and, on June 29, 2020, the Court of Appeal reversed the judgment, agreeing with Kleidman that because not all of the parties to the Settlement Agreement signed it, the trial court erred in granting the motion to enforce it under Section 664.6. (*Id.*)

The action was remanded to this Court, where Cross-Complainants filed their Cross-Complaint on September 14, 2021, asserting (1) breach of the Settlement Agreement and (2) declaratory relief. Kleidman's demurrer to the Cross-Complaint was overruled by order dated March 7, 2022. Kleidman now seeks discovery related to the Cross-Complaint.

On May 31, 2023, Kleidman served deposition subpoenas on Bernie Murphy, Martin Pichinson, FeevT, and Sherwood Management, LLC, setting each deposition for June 12, 2023. Kleidman and counsel for the Sherwood Witnesses met and conferred and concluded the scope of these depositions would be (i) the agency relationship between Bernie Murphy and the other Sherwood Defendants, (ii) whether the Sherwood Defendants authorized Bernie Murphy to enter into the Settlement Agreement on their behalf and (iii) whether the Sherwood Defendants ratified Bernie Murphy's execution of the Settlement Agreement on their behalf. Based on his opposition, Kleidman does not dispute that he noticed these depositions for the sole purpose of challenging the agency relationship. The Sherwood Witnesses seek a protective order to prevent these depositions from going forward as noticed.

On March 7, 2022, Kleidman served the following single special interrogatory on Robert Quist: "Identify the executors of the estate of Robert Quist. Please provide their names, addresses, telephone numbers and email addresses." Kleidman states that Quist provided no response. Kleidman seeks an order compelling a response to this interrogatory without objections.

On May 3, 2022, Kleidman served two requests for production on Bridge & Post seeking (1) all documents which show that Bridge & Post authorized Don Lloyd Cook to sign and execute the 3/25/2015 document on Bridge & Post's behalf and (2) all documents showing whether Bridge & Post is in good standing at the Arkansas Secretary of State and in good standing in the state of Arkansas. Kleidman sates that Bridge & Post provided no response. Bridge & Post eventually did serve substantive responses to these document requests, despite the fact that Kleidman moved to compel more than a year after Bridge & Post's responses were due.

II. Legal Standard

Discovery is generally permitted "regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. (Code Civ. Pro. § 2017.010.) Everything that is ***relevant*** to the subject matter is presumed to be discoverable. (*Id.* (emphasis added).) The Discovery Act further declares that "the court shall limit the scope of discovery" if it determines that the burden, expense, or intrusiveness of that discovery "clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." (Code Civ. Pro. § 2017.020(a); *Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 383-385.) The California Supreme Court teaches in *Greyhound* that the judge exercising discretion to limit discovery should construe disputed facts liberally in favor of discovery; reject objections such as hearsay that only apply at trial; permit fishing expeditions (within limits), avoid extending limitations on discovery, such as privileges; and, whenever possible, impose only partial limitations rather than denying discovery entirely. (*Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 383-385; *see also Tylo v. Superior Court* (1997) 55 Cal.App.4th 1379, 1386.)

III. Sherwood Witness's Motion for Protective Order

A party may move for a protective order regarding a deposition. (Code of Civ. Pro. §2025(a) ("Before, during, or after a deposition, any party, any deponent, or any other affected natural person or organization may promptly move for a protective order.").) The party seeking the protective order

must demonstrate good cause that a protective order is required "to protect any party, deponent, or other natural person or organization from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense. (Code Civ Proc § 2025.420 (b).) Once good cause is shown, the court may enter a variety of orders of protection, including but not limited to:

> (1) That the deposition not be taken at all.
> (2) That the deposition be taken at a different time.
> . . .
> (6) That the deponent's testimony be taken by written, instead of oral, examination.
> (7) That the method of discovery be interrogatories to a party instead of an oral deposition.
> . . .
> (9) That certain matters not be inquired into.
> (10) That the scope of the examination be limited to certain matters.

(Code Civ Proc § 2025.420(b); *Nativi v. Deutsche Bank Nat. Trust Co.* (2014) 223 Cal.App. 4th 261, 316.) The scope of such a protective order is discretionary. (*Id.* at 316.)

The Court finds good cause here to issue a protective order. The law is clear that a third party in Kleidman's position cannot challenge the agency relationship. (*Boteler v. Conway* (1936) 13 Cal.App.2d 79, 83.) Kleidman's argument that *Boteler* is factually distinguishable is unpersuasive. *Boteler* states: "One who contracts with an agent or officer of, and acting for, a corporation generally cannot question his authority to bind the corporation. (14A Cor. Jur. 120.) This is a general rule of agency. (2 Cor. Jur. 467.) *If an agent exceeds his authority his principal may complain but* ***a third person may not.*** Monarch had the right to affirm or repudiate the acts of its secretary. It did not disaffirm them and plaintiff may not take unto himself the right to do so." (*Id.* (emphasis added).)

Kleidman argues that because he disputes whether there really was agency, he should be permitted to question the witnesses about their representations regarding agency; it would be unfair to rely on the declarations or the face of the Settlement Agreement as admissions. Even if this were true, Cross-Complainants have made judicial admissions ratifying the actions of their agents in the Cross-Complaint. "A judicial admission is a party's unequivocal concession of the truth of a matter, and removes the matter as an issue in the case. (*Parker v. Manchester Hotel Co.* (1938) 29 Cal. App. 2d 446, 458 [85 P.2d 152]; *Smith v. Walter E. Heller & Co.* (1978) 82 Cal. App. 3d 259, 269 [147 Cal. Rptr.1].)" (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal. App. 4th 34, 48.) "The allegations in a plaintiff's complaint constitute judicial admissions, and are 'conclusive concessions of the truth of a matter and have the effect of removing it from the issues' (*Castillo v. Barrera* (2007) 146 Cal.App.4th 1317, 1324 [53 Cal. Rptr. 3d 494]), so that 'a pleader cannot blow hot and cold as to the facts positively stated.'" (*CytoDyn of New Mexico, Inc. v. Amerimmune Pharmaceuticals, Inc.* (2008) 160 Cal. App. 4th 288, 299 (internal citations and quotations omitted).)

Paragraph 29 of the Cross-Complaint states:

> On March 25, 2015, an out-of-court in-person mediation occurred, which resulted in a settlement of the Action. The settlement was memorialized in a Settlement Agreement that was fully executed that day ***by each of the parties or their authorized representatives***. Defendants and Cross-

> Complainants signed the Settlement Agreement first and then it was provided to Plaintiff and Cross-Defendant Kleidman who, after a full and complete opportunity to examine the document and object to the validity or efficacy of any of the signatures thereto, did not make any such objection and instead executed the Settlement Agreement on a signature line directly above that of Jonahtan Gaskin signing for Feeva. A true and correct copy of this Settlement Agreement is attached hereto as Exhibit A. (Cross-Complaint, ¶29 (emphasis added.)

At paragraph 38 of the Cross-Complaint, Cross-Complainants further state: "The Settlement Agreement is a valid settlement agreement, requiring the dismissal of this case – whether or not the Settlement Agreement can be enforced through the expedited procedures of CCP §664.6." (Cross-Complaint, ¶38.)

Cross-Complainants are bound by these representations in the Cross-Complaint. Put another way, even they wanted to, having made these and other similar representations in their Cross-Complaint, Cross-Complainants could not now claim that the individuals who signed the Settlement Agreement for them did not have authority to do so. These statements comprise an "unequivocal concession of the truth of a matter, and remove[] the matter as an issue in the case."

Accordingly, these depositions are irrelevant, burdensome and harassing, and the Sherwood Witnesses's motion for protective order is GRANTED.

IV. Kleidman's Motion to Compel Robert Quist to Respond to Special Interrogatory No. 1

A party responding to interrogatories must respond in writing, under oath separately to each interrogatory with an answer that contains the information sought, an exercise of the party's option to produce writings from which the answer can be determined, or an objection to the interrogatory. (Code Civ. Pro. §2030.210(a).) The responding party must make a reasonable, good faith effort to obtain information to provide a response and generally may not respond to the interrogatory by simply stating it cannot respond. (*Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 406; Code Civ. Pro. §2030.210(c).)

Quist's response to Kleidman's special interrogatory was due on or around April 7, 2022. Kleidman claims he received no response. Kleidman filed this motion on May 16, 2023—over a year after Quist's response was due. While there is no 45-day time limit for filing a motion to compel when a party fails to respond to an interrogatory, the Court finds that waiting more than a year to enforce this right is unreasonable. More importantly, the information sought by this special interrogatory is not relevant to any issue in the case. To the extent Kleidman seeks this information to challenge the agency relationship between the party signing the Settlement Agreement and the Quist estate, for the reasons set forth above, he may not do so. Quist ratified the agency relationship in a judicial admission in the Cross-Complaint. (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal. App. 4th 34, 48; *CytoDyn of New Mexico, Inc. v. Amerimmune Pharmaceuticals, Inc.* (2008) 160 Cal. App. 4th 288, 299.) As a third party to that relationship, Kleidman may not challenge it. (*Boteler v. Conway* (1936) 13 Cal.App.2d 79, 83.)

Accordingly, Kleidman's motion to compel is DENIED.

V. Kleidman's Motion to Compel Bridge & Post, Inc. to provide responses to Requests for Production of Documents

The party to whom a request for production of documents has been directed can make one of three responses: (1) a statement that the party will comply with the demand, (2) a representation that the party lacks the ability to comply, or (3) an objection. (Code Civ. Pro. §2031.210(a).) No response at all is not one of the options under the code. In the absence of a motion to set a different deadline, the deadline for serving a written response is 30 days after service of the demand. (Code Civ. Pro. §2031.260.) Failure to serve a response waives all objections to the inspection demands, unless the judge grants a motion relieving the responding party from that waiver, and entitles the demanding party to obtain an order compelling responses. (Code Civ. Pro. §2031.300(a), (b).) A motion to compel a response to inspection demands does not require a declaration that the parties have met and conferred in advance of the motion. (Code Civ. Pro. §2031.300(b); *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390.)

Responses were due here in June 2023. Kleidman filed his motion to compel nearly a year later. Bridge & Post asks the Court to permit its objections to stand because Kleidman's long delay lead it to believe he had abandoned his agency argument to challenging the Settlement Agreement. Given that this case has been pending for 10 years, Kleidman's very lengthy delay in bringing this motion, and Bridge & Port's service of complete responses, the Court finds good cause to set aside Bridge & Port's waiver and to permit its objections to stand.

Accordingly, Kleidman's motion to compel is DENIED. Bridge & Port has already served Code compliant responses.

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Calendar Line 10
Case Name: *1153 SAN RAFAEL, LLC vs AMERICAN ZURICH INSURANCE COMPANY*
Case No.: 23CV417677

Before the Court is 1153 San Rafael LLC's ("Petitioner") Petition to Compel Arbitration of Insurance Claim. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

According to the Petition, Petitioner was the owner, developer and builder of a four-unit commercial condominium property ("Property"). (Petition, ¶3.) The Property was insured for risk of direct physical damage or loss under two builders risk insurance policies issued by Respondent American Zurich Insurance Company. (Petition, ¶¶2-3, Ex A.) The policy provided replacement cost coverage up to a stated limit of $900,000 for all risks of direct physical loss to the Property not specifically excluded or excepted, including physical loss or damage caused by water escaping from a plumbing system and for additional coverage for other types of stated losses above the $900,000 limit including debris removal and code upgrade. (Petition, ¶4.)

On or around December 15, 2021, during the policy term and before a certificate of completion was issued for the Property, Petitioner discovered direct physical damage to the Property caused by water accidentally escaping from the building's fire system. (Petition, ¶5.) Petitioner notified Respondent and cooperated with Respondent's adjuster's investigation. (Petition, ¶6.)

Respondent initially paid emergency remediation costs ($52,479.68) but denied Petitioner's claim to repair damage to the building. (Petition, ¶7.) Respondent paid Petitioner an additional $127,452.72 after Petitioner hired an attorney. (Petition, ¶7.) Petitioner submitted a supplemental repair estimate for $637,493.49 with two supporting engineering reports, which amount Respondent contests. (Petition, ¶8, Ex. B.)

Petitioner demanded an appraisal of the amount of the loss pursuant to the policy terms and Insurance Code section 2071, identifying Robert Bresee as its appraiser. (Petition, ¶9, Ex. C.) Respondent failed to name its appraiser within the required twenty-day period, and indicated that it was refusing to participate in the appraisal process at this time. (Petition, ¶¶9-10, Ex. D.)

Petitioner, who has not waived its right to appraisal under the policy or Insurance Codes section 2071, seeks an order compelling Respondent to participate in the appraisal process based on this language in the policy:

> If we and you disagree on the value of the property or the amount of loss ("loss"), either may make written request for an appraisal of the loss ("loss"). If the request is accepted, each party will select a competent and impartial appraiser. Each party shall notify the other of the appraiser selected within 20 days of the request. The two appraisers will select an umpire. If they cannot agree within 15 days, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and amount of

> loss ("loss"). If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will: 1. Pay its chosen appraiser; and 2. Bear the other expenses of the appraisal and umpire equally. If there is an appraisal, we will still retain our right to deny the claim.

Respondent opposes the Petition.

II. Legal Standard

"All fire policies issued in California must be on a standard form that includes an appraisal provision as set forth in Insurance Code section 2071. (Ins. Code, §§ 2070, 2071.) Under the statutorily mandated appraisal provision, the parties are required to participate in an informal appraisal proceeding in the event there is a disagreement about the actual cash value or the amount of the loss and the insurer or insured makes a written request for an appraisal. (*Lee v. California Capital Ins. Co.* (2015) 237 Cal. App. 4th 1154, 1165-1166.)

"[A]lthough an appraisal is a specific form of limited arbitration, there are significant differences between the powers of an arbitrator and those of an appraiser. An arbitrator typically exercises "'essentially judicial functions,'" including deciding issues of law, and often resolves the entire dispute between the parties. By contrast, "an appraiser has authority to determine only a question of fact, namely the actual cash value or amount of loss of a given item. The function of appraisers is to determine the amount of damage resulting to various items submitted for their consideration. It is certainly not their function to resolve questions of coverage and interpret provisions of the policy." (*Lee v. California Capital Ins. Co.* (2015) 237 Cal. App. 4th 1154, 1165-1166 (internal citations and quotations omitted.)

The existence of disputed issues regarding coverage does not necessarily preclude an appraisal. (*Devonwood Condominium Owners Assn. v. Farmers Ins. Exchange* (2008) 162 Cal.App.4th 1498 ("a judgment after confirmation of an appraisal award fixing the cash value of loss does not preclude further litigation on other issues between parties to an insurance policy.") "[A]n appraisal panel may assign a value to items as to which coverage is disputed with the disclaimer that the award does not establish coverage or the insurer's liability to pay. The issue of whether the loss is covered under the policy is a separate legal issue that must be resolved outside the appraisal process." (*Lee v. California Capital Ins. Co.* (2015) 237 Cal. App. 4th 1154, 1170.)

If a party believes it would be wasteful to go through the appraisal before resolving disputed legal issues, it may seek to "stay the appraisal pending resolution of those issues in a declaratory relief action." ((*Kirkwood v. California State Automobile Assn. Inter-Ins. Bureau* (2011) 193 Cal.App.4th 49, 58 (appraisal properly deferred until resolution of legal issues in declaratory relief action); *Alexander v. Farmers Ins. Co., Inc.* (2013) 219 Cal. App. 4th 11831194–1196 (court has discretion to defer appraisal pending resolution of legal issues in declaratory relief action).)

III. Analysis

The parties do not appear to dispute the enforceability of the appraisal provision here. Respondent disputes, however, that Petitioner's request for the appraisal is ripe, because Respondent contends it has not disputed the repair costs yet. Respondent requests a continuance of the hearing on this Petition for 90 days to allow the parties to determine whether there is a disagreement or not.

Petitioner argues that because appraisal is an arbitration, the Court has no ability to delay or stay the appraisal unless there is pending litigation between the parties. That assertion is belied by its own cited authority, which explains that a court has discretion to stay an appraisal where declaratory relief is sought.

More troubling to the Court, however, is that Respondent has already had nine months to evaluate Petitioner's claim and still has reached no conclusion. The Court agrees with Petitioner that ordering the appraisal does not preclude Respondent from continuing its analysis or the parties from attempting to resolve their issues.

There is a valid, binding and enforceable appraisal provision here. Respondent has not paid Petitioner's claim after nine months. This constitutes a disagreement over Petitioner's claim. The Court accordingly GRANTS the Petition to Compel and orders that the appraisal commence.

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