

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

Department 20, Honorable Socrates Peter Manoukian, Presiding

Courtroom Clerk: Hien-Trang Tran-Thien

191 North First Street, San Jose, CA 95113

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

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

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

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

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

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

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DATE: Tuesday, 12 September 2023

TIME: 9:00 A.M.

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

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

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

Join Zoom Meeting
<https://scu.zoom.us/j/96144427712?pwd=cW1JYmg5dTdsc3NKNFBpSjlEam5xUT09>
Meeting ID: 961 4442 7712
Password: 017350

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

One tap mobile
+16699006833,,961 4442 7712#

APPEARANCES.

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

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

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

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

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

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

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

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

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

CIVILITY.

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

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

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

COURT REPORTERS.

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

This Court no longer provides for Court Reporters in civil actions except in limited circumstances. If you wish to arrange for a court reporter, please use Local Form #CV-5100. All reporters are encouraged to work from a remote location. Please inform this Court if

any reporter wishes to work in the courtroom. This Court will approve all requests to bring a court reporter. Counsel should meet and confer on the use of a court reporter so that only one reporter appears and serves as the official reporter for that hearing.

PROTOCOLS DURING THE HEARINGS.

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

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

TROUBLESHOOTING TENTATIVE RULINGS.

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

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

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 1	21CV380684	Catherine Adams v. Menekshe Law Firm, APC, et al.	Motion to Strike, or in the Alternative, Demurrer to the First Amended Cross-Complaint by Plaintiff and Cross-Defendant Catherine Adams. The motion to strike paragraphs 45 and 51 is GRANTED WITH 10 DAYS’ LEAVE TO AMEND. The motion to strike paragraph 67 and the Prayer for Relief at No. 2 in the FACC is DENIED. The alternative motion for demurrer to the fourth cause of action is OVERRULED. The motion to strike paragraph 73 is GRANTED WITHOUT LEAVE TO AMEND. SEE ATTACHED TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 2	22CV403297	Sahel Helweh vs Nayef Alwardat	<p>Motion of Plaintiff to Compel Defendant to Provide Further Verified Responses To Form Interrogatories, Set One, and for Monetary Sanctions.</p> <p>Defendant has not opposed the motion.</p> <p>Although not required to do so, counsel for plaintiff met and conferred with defendant on two occasions about the lack of proper verified responses.</p> <p>The Civil Discovery Act requires that responses to discovery be signed under oath by the party to whom the discovery is directed. (See Code of Civil Procedure, §§ 2030.250(a); 2031.250(a); 2033.240(a).) Unverified responses to are tantamount to no responses at all. (See Appleton v. Superior Court (1988) 206 Cal.App.3d 632, 636.)</p> <p>Plaintiff makes a code-compliant request for monetary sanctions. The Court will GRANT the request in the amount of in the amount of \$2,100.00, payable within 20 days of the filing and service of this order.</p> <p>NO FORMAL TENTATIVE RULING.</p>
LINE 3	22CV401041	UHG I LLC vs Anthony Tran	<p>Motion of Defendant/Cross-Complainant to Compel Nonparty Deponent Citibank and Request for Monetary Sanctions.</p> <p>Plaintiff alleges that third party Citibank is the loan originator of the account upon which plaintiff is suing defendant. Citibank at one point viewed this as a possible issue of identity theft. Plaintiff here has asserted that Mr. Tran made multiple calls to the bank affirming that the debts in question was his.</p> <p>Mr. Tran seeks to depose third party Citibank as to the investigation that it made concerning Mr. Tran's claim of identity theft.</p> <p>Citibank failed to appear for deposition although it seems that one point the plaintiff and the bank were trying to reschedule. No objections were ever served.</p> <p>NO TENTATIVE RULING. The parties may submit on the papers presented or use the Tentative Ruling Protocol to advise this Court if they wish to appear.</p>
LINE 4	19CV357485	Natasha Doubson vs Elena Kozlova et al	<p>Motion of Plaintiff for Discovery Sanctions against Defendant Rosalie Toren.</p> <p>After Dr. Toren and her counsel mistakenly answered Special Interrogatory No. 1 by indicating that Dr. Toren had other psychological assistants other than Dr. Kozlova, per this Court's Order, Dr. Toren served an amended response indicating that she complied with her obligation to perform a reasonable and good faith investigation (including legal research) and based thereon, the only Psychological Assistant she ever had was Dr. Kozlova. Apparently the State Board of Psychology produced records corroborating this contention.</p> <p>The motion is DENIED.</p> <p>NO FORMAL TENTATIVE RULING.</p>

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 5	17CV317535	Jennifer La vs Santa Clara Valley Transportation Authority	<p>Motion of Defendant for Mandatory Dismissal for Failure to Bring Action to Trial within Five Years.</p> <p>Plaintiff has not filed opposition to this motion.</p> <p>Plaintiff filed this action on 17 October 2017, almost 6 years ago.</p> <p>Code of Civil Procedure, § 583.310 requires that all actions be brought to trial within five years after the action has commenced. No stipulation has been entered into to extend this deadline. Accordingly, pursuant to Code of Civil Procedure, §§ 583.310 and 583.360, this action must be dismissed with prejudice.</p> <p>The motion is GRANTED and the action is DISMISSED WITH PREJUDICE. The matter will be placed on the Dismissal Review calendar for 18 January 2024 at 10:00 AM in Department 20.</p> <p>NO FORMAL TENTATIVE RULING.</p>
LINE 6	21CV379734	Glendy Colop Colop vs Tanimura & Antle, Inc. et al	<p>Motion of Plaintiff to Quash/Modify Subpoena Served on Robert A. Rovner.</p> <p>There is no tentative ruling on the merits of the motion except that the request of plaintiff for monetary sanctions is DENIED. The parties should indicate whether they wish to submit on the papers presented or appear at the hearing and argue the matter on the merits.</p> <p>SEE ATTACHED TENTATIVE RULING.</p>
LINE 7	22CV402699	David Kissner vs Lisa Fraser et al	<p>Motion of Defendants for Reconsideration of Their Motion to Strike Pursuant to Code Of Civil Procedure, § 425.16.</p> <p>The motion of defendants for reconsideration is DENIED as there were no new facts or law raised in the moving papers.</p> <p>SEE ATTACHED TENTATIVE RULING.</p>
LINE 8	23CV417415	Hari Pillai as Trustees etc.; Yvonne Pillai as Trustees etc. vs Jason Davalos; Jacinto Aldo Davalos	<p>Petition of Petitioners to Confirm Contractual Arbitration Award.</p> <p>The petition was filed on 12 June 2023. No party has filed opposition to this petition within 10 days of the filing of the petition or at any time since then.</p> <p>The petition is GRANTED. Counsel for moving party should submit an appropriate order to this Department via the clerk's e-filing queue.</p> <p>NO FORMAL TENTATIVE RULING.</p>

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 9	2006-1-CV-067355	GCFS, Inc. vs Melissa Deleon	<p>Hearing on Judgment Debtor's Claim of Exemption.</p> <p>Defendant has failed to meet her burden that all of her income is necessary for her support.</p> <p>Good cause appearing, this Court will order that the sum of \$512.00 per pay period be withheld from her wages and paid to plaintiff. All payments will be reduced by \$12.00 per check before they are presented to judgment creditor.</p> <p>Counsel for judgment creditor is to prepare appropriate orders for execution by this Court and submit them through the clerk's e-filing queue.</p> <p>NO FORMAL TENTATIVE RULING.</p>
LINE 10	21CV392052	Kaylee Sabbatini vs Erik Schei; Kelsey Schei s.d.a. Chelsea Dunaway	<p>Petition to Approve Compromise of Minor's Claim.</p> <p>California Rules of Court, rule 7.952 requires attendance by the petitioner and claimant unless the court for good cause dispenses with their personal appearance. The Court finds that the appearance of the minor is not required due to her age.</p> <p>This Court wants to ask counsel some questions about the claimed fee. Counsel declares that per the fee agreement, she requesting attorney's fee in the sum of \$46,666.67 (33 1/3% of the gross settlement) plus costs of \$3,602.86 incurred for acquiring medical records, court fees and service of process fees.</p> <p>In general, the amount of attorney fees being requested is typically, but not required to be 25% (California Benchbook, Civil Proceedings Before Trial, § 5.54(a); see Vasquez v. S. Cal. Gas Co., 2023 Cal. Super. LEXIS 29131.)</p> <p>NO TENTATIVE RULING.</p>
LINE 11	21CV386407	Chipongolo Mulenga vs County of Santa Clara etc.; Evelyn Mendez.	<p>Motion Of Defendants To Compel Plaintiff To Submit To A Mental Examination.</p> <p>The motion is GRANTED and the parties are to select one of the dates specified by Dr. Greene as to his availability. Plaintiff is entitled to a copy of any report generated by Dr. Greene and submit to a deposition if so requested.</p> <p>SEE ATTACHED TENTATIVE RULING.</p>
LINE 12	20CV374920	Rodney Lee Curry vs Donald E. Curry	<p>Petition of Rodney Lee Curry To Confirm Sale, Distribute Proceeds, and for Order For Issuance of a Writ Of Possession.</p> <p>SEE ATTACHED TENTATIVE RULING.</p>
LINE 13			SEE ATTACHED TENTATIVE RULING.
LINE 14			SEE ATTACHED TENTATIVE RULING.
LINE 15			SEE ATTACHED TENTATIVE RULING.
LINE 16			SEE ATTACHED TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 17			SEE ATTACHED TENTATIVE RULING.
LINE 18			SEE ATTACHED TENTATIVE RULING.
LINE 19			SEE ATTACHED TENTATIVE RULING.
LINE 20			SEE ATTACHED TENTATIVE RULING.
LINE 21			SEE ATTACHED TENTATIVE RULING.
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LINE 26			SEE ATTACHED TENTATIVE RULING.
LINE 27			SEE ATTACHED TENTATIVE RULING.
LINE 28			SEE ATTACHED TENTATIVE RULING.
LINE 29			SEE ATTACHED TENTATIVE RULING.
LINE 30			SEE ATTACHED TENTATIVE RULING.

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Calendar Line 1

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

DEPARTMENT 20

161 North First Street, San Jose, CA 95113

408.882.2320 · 408.882.2296 (fax)

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(For Clerk's Use Only)

CASE NO.: 21CV380684

Catherine Adams v. Menekshe Law Firm, APC, et al.

DATE: 12 September 2023

TIME: 9:00 am

LINE NUMBER: 1

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 11 September 2023. Please specify the issue to be contested when calling the Court and Counsel.

**Motion to Strike, or in the Alternative,
Demurrer to the First Amended Cross-Complaint by
Plaintiff and Cross-Defendant Catherine Adams.**

I. Statement of Facts.

A. First Amended Complaint.

Plaintiff Catherine Adams ("Plaintiff" or "Adams") filed this complaint on 19 March 2021.¹

According to the first amended complaint ("FAC"), Plaintiff, an experienced litigator, began working for defendant Menekshe Law Firm ("MLF") in August 2009 as an Associate. (FAC at ¶¶ 1, 31-32.) Plaintiff's starting salary was \$96,000 plus medical benefits and the opportunity for discretionary bonuses—at the discretion of the firm's founder and her joint employer, defendant Ayhan M. Menekshe ("AMM"). (Id. at ¶ 32.) Plaintiff and defendant AMM also had an oral agreement allowing her to receive 10% of any fees generated from clients/cases she originated ("commission"). (Ibid.)

Defendants MLF and AMM (collectively, "Defendants" or "Cross-Complainants") jointly operated offices in Northern and Southern California. (FAC at ¶ 7.) Beginning in 2010, Plaintiff began regularly commuting to Southern California to build Defendants' business in that market. (Id. at ¶ 36.) Plaintiff handled at least ten files in the Southern California office and grew the office's business to approximately \$2 million in fees for Defendants. (Id. at ¶¶ 37, 65, 66.) Yet, despite all her efforts, Plaintiff received only nominal pay increases. (Id. at ¶ 41.)

In 2014 and 2015, defendant AMM hired two male associates (David Strong and Tony Stavjanik) to join the firm. (FAC at ¶¶ 43, 46.) Despite her work experience and contributions to growing Defendants' business,

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

Plaintiff learned she was paid far less than her male counterparts after reviewing their W-2s with her own. (Id. at ¶¶ 58-60.) None of the W-2 information or Plaintiff's analysis regarding wages and bonuses was attorney-client privileged or confidential. (Id. at ¶ 61.)

In January 2020, Plaintiff raised the gender-based pay discrepancy issue with defendant AMM, providing him with her legal research on California's Equal Pay Act ("EPA"). (FAC at ¶ 63.) Defendant AMM however justified the difference in pay as he had made "special deals" with the other two male attorneys claiming both had been partners at their former firms and agreed to take pay cuts to come to MLF. (Id. at ¶ 64.)

Due to the inequity in pay, Plaintiff reluctantly resigned from her position on 4 September 2020. (FAC at ¶ 68.) When it came time to settle Plaintiff's earned commissions from files she originated, Defendants refused to pay her what she was owed. (Id. at ¶ 69.)

On 18 March 2021, Plaintiff exhausted her administrative remedies by filing a charge of discrimination with the Department of Fair Employment and Housing for which a right to sue notice was issued on the same day. (FAC at ¶ 18.)

On 19 March 2021, Plaintiff filed a complaint against Defendants alleging causes of action for:

- (1) Violation of the EPA;
- (2) Sex/Gender Discrimination;
- (3) Failure to Take Steps to Prevent Discrimination and Harassment;
- (4) Failure to Reimburse Necessary Business Expenses;
- (5) Failure to Pay Wages Due to Discharged and Quitting Employees;
- (6) Breach of Contract;
- (7) Breach of the Covenant of Good Faith and Fair Dealing.

On 7 July 2021, Plaintiff filed the operative FAC alleging the same causes of action.

On 22 July 2021, Defendants filed a demurrer ~~to~~ and motion to strike ~~portions of~~ the FAC. The motions were set for hearing on 7 September 2021. Prior to the hearing, the court posted a tentative ruling overruling the demurrer and denying the motion to strike. Both sides appeared at the hearing as Defendants contested the court's tentative ruling. Following oral argument, the court took the matter under submission and ultimately adopted the tentative ruling as the final order of the court. Defendants were ordered to answer within 20 days of filing and service of the order.

On 6 December 2021, Defendants filed their answer alleging a general denial and various affirmative defenses.

B. First Amended Cross-Complaint.

According to the first amended cross-complaint ("FACC"), in April 2019, Cross-Complainants learned their office manager, along with other family co-conspirators, embezzled millions of dollars from the firm. (FACC at ¶ 11.) As a result, Cross-Complainants filed a civil action against the former employees in an attempt to recover the damages sustained by the embezzlement schemes. (Ibid.) In addition, a criminal action was initiated by the Santa Clara District Attorney and is pending. (Ibid.)

Cross-Complainants hired cross-defendant Adams to represent them in the lawsuit against the former employees and act as attorney for both MLF and AMM. (FACC at ¶ 12.) She agreed and subsequently, on 16 May 2019, filed a lawsuit in Santa Clara County entitled *Menekshe, et al. v. Alva, et al.* (case no. 19CV348059) ("Alva lawsuit") on behalf of Cross-Complainants. (Id. at ¶ 13.) From 16 May 2019, up to and including September 2020 (and continuing for several months thereafter), cross-defendant Adams was attorney of record for Cross-Complainants and was privy to confidential business records about firm operations and payroll of employees and attorneys in the office. (Id. at ¶ 14.)

Given her representations and conduct, Cross-Complainants reasonably believed they were consulting cross-defendant Adams in her professional capacity as an attorney, and they substantially relied on the legal work and legal advice she offered as their attorney of record in the Alva lawsuit. (FACC at ¶ 18.)

During the course of her representation, cross-defendant Adams was provided access to confidential information related to MLF's business operations, finances, including information about salaries and bonuses paid to its attorneys. (FACC at ¶ 19.) Cross-Complainants trusted Adams with very sensitive and confidential materials relative to their business and financial operations, thereby establishing attorney-client and work product privileges and protections. (Ibid.)

As legal counsel, cross-defendant Adams owed (and continues to owe) Cross-Complainants broad ethical and statutory duties of loyalty and confidentiality with respect to both her legal and non-legal functions. (FACC at ¶ 26.)

During their investigation of Adams' complaint, Cross-Complainants discovered she violated MLF's company policy as well as ethical duties and responsibilities as a licensed attorney. (FACC at ¶ 27.) Cross-defendant Adams was also secretly working for and being paid by at least one other law firm at the same time she was receiving a salary from MLF. (Id. at ¶ 28.) She was not only working for other law firms during the business day, ~~shebut she~~ was also utilizing Cross-Complainants' equipment, technology, and resources to do so. (Ibid.)

In January 2020, cross-defendant Adams informed AMM she was being unfairly paid less than two of her male colleagues. (FACC at ¶ 31.) Following an investigation, Cross-Complainants determined these allegations were meritless and discussed the results with Adams who accepted the results and expressed her desire to continue working in the law firm. (Ibid.) ~~Adams however~~Adams, however, concealed the fact that she intended to sue Cross-Complainants for the very pay dispute which she had represented was no longer an issue. (Id. at ¶ 32.) Adams also continued to represent Cross-Complainants in the Alva lawsuit for the purpose of gathering more evidence for her future complaint. (Ibid.)

On 6 December 2021, Defendants, also Cross-Complainants, filed a cross-complaint against Adams asserting causes of action for:

- (1) Breach of Fiduciary Duty of Loyalty;
- (2) Breach of Fiduciary Duty of Confidentiality;
- (3) Breach of Contract;
- (4) Breach of the Covenant of Good Faith and Fair Dealing;
- (5) Intentional Concealment;
- (6) Negligent Concealment.

Thereafter, cross-defendant Adams filed a special motion to strike and demurrer to the cross-complaint. The motions were heard and submitted on 5 May 2022. The special motion to strike was granted in part and denied in part.² As to the demurrer, the court issued the following rulings:

- The demurrer to the cross-complaint on the ground that it is barred by the litigation privilege is OVERRULED;
- The demurrer to the first, third, fourth, fifth, and sixth causes of action is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND for failure to state a claim;
- The demurrer to the third, fourth, fifth, and sixth causes of action on the ground of uncertainty is OVERRULED.

² On 5 July 2022, cross-defendant Adams filed a Notice of Appeal challenging the court's ruling on the special motion to strike. The Sixth Appellate District later granted Adams' request to dismiss the appeal and the remittitur issued on 6 February 2023.

On 25 May 2022, Cross-Complainants filed the operative FACC against Adams setting forth causes of action for:

- (1) Breach of the Duty of Loyalty;
- (2) Breach of Fiduciary Duty of Confidentiality;
- (3) Breach of Contract;
- (4) Intentional Concealment;
- (5) Negligent Concealment.

C. Motions Before the Court.

Currently before the court is a motion to strike punitive damages allegations in the FACC, or in the alternative, a demurrer to each cause of action by cross-defendant Adams. Cross-Complainants filed written opposition. Adams filed reply papers.

A trial setting conference is set for 5 December 2023.

II. Motions to Strike in General.

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

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

“As with demurrers, the grounds for a motion to strike must appear on the face of the pleading under attack, or from matter which the court may judicially notice.” (Weil & Brown, et al., California Practice Guide: **Civil Procedure Before Trial** (The Rutter Group 2022) ¶ 7:168, p. 7(l)-76 citing **Code of Civil Procedure**, § 437.) “Thus, for example, defendant cannot base a motion to strike the complaint on affidavits or declarations containing extrinsic evidence showing that the allegations are ‘false’ or ‘sham.’ Such challenges lie only if these defects appear on the face of the complaint, or from matters judicially noticeable.” (*Id.* at ¶ 7:169, pp. 7(l)-75 to 7(l)-76.)

Superior Court “In passing on the correctness of a ruling on a motion to strike, judges read allegations of a pleading subject to the motion to strike as a whole, all parts in their context, and assume their truth.” (**Clauson v. Super. Ct.** (1998) 67 Cal.App.4th 1253, 1255.) “In ruling on a motion to strike, courts do not read allegations in isolation.” (*Ibid.*)

III. Demurrers in General.

A complaint must contain substantive factual allegations sufficiently apprising the defendant of the issues to be addressed. (See **Williams v. Beechnut Nutrition Corp.** (1986) 185 Cal.App.3d 135, 139, fn. 2.)

A demurrer tests the legal sufficiency of a complaint. It is properly sustained where the complaint or an individual cause of action fails to “state facts sufficient to constitute a cause of action.” (**Code of Civil Procedure**, § 430.10, subdivision (e).) “[C]onclusionary allegations . . . without facts to support them” are insufficient on demurrer. (**Ankeny v. Lockheed Missiles and Space Co.** (1979) 88 Cal.App.3d 531, 537.) “It is fundamental that a demurrer is an attack against the complaint on its face, it should not be sustained unless the complaint

shows that the action may not be pursued.” (*Yolo County Dept. of Social Services v. Municipal Court* (1980) 107 Cal.App.3d 842, 846-847.)

“It is not the ordinary function of a demurrer to test the truth of the plaintiff’s allegations or the accuracy with which he describes the defendant’s conduct. A demurrer tests only the legal sufficiency of the pleading.” (*Committee on Children’s Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213.) “It ‘admits the truth of all material factual allegations in the complaint . . . ; the question of plaintiff’s ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court.’ [Citation.]” (*Id.* at pp. 213-214; see *Cook v. De La Guerra* (1864) 24 Cal. 237, 239 “[I]t is not the office of a demurrer to state facts, but to raise an issue of law upon the facts stated in the pleading demurred to.”).)

IV. Analysis.

Cross-defendant Adams moves to strike paragraphs 45, 51, 67, 73, and the Prayer for Relief at No. 2 in the FACC as Cross-Complainants fail to allege sufficient facts to support a request for punitive damages. In the alternative, Adams demurs to each cause of action for failure to state a valid claim for punitive damages.

A. Punitive Damages.

“In order to state a prima facie claim for punitive damages, a complaint must set forth the elements as stated in the general punitive damage statute, Civil Code section 3294. These statutory elements include allegations that the defendant has been guilty of oppression, fraud, or malice. ‘Malice’ is defined in the statute as conduct ‘intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.’ ‘Oppression’ means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person’s rights. ‘Fraud’ is ‘an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.’” (*Turman v. Turning Point of Central California, Inc.* (2010) 191 Cal.App.4th 53, 63, internal citations omitted.)

“In determining whether a complaint states facts sufficient to sustain punitive damages, the challenged allegations must be read in context with the other facts alleged in the complaint. Further, even though certain language pleads ultimate facts or conclusions of law, such language when read in context with the facts alleged as to defendants’ conduct may adequately plead the evil motive requisite to recovery of punitive damages.” (*Monge v. Superior Court* (1986) 176 Cal.App.3d 503, 510.)

B. Paragraphs 45 and 51.

Paragraph 45 of the FACC sets forth the following allegations:

Cross-Complainants are informed and believe that Cross-Defendant ADAMS pursued the course of conduct alleged herein intentionally, maliciously, and oppressively, and in conscious disregard of Cross-Complainants’ rights and their own fiduciary obligations, with knowledge that her conduct was likely to harm Cross-Complainant’s interests, and at all times to further her own self-interests. As a result, Cross-Complainants are entitled to punitive damages.

Similarly, paragraph 51 alleges:

Cross-Complainants are informed and believe that Cross-Defendant ADAMS pursued the course of conduct alleged herein intentionally, maliciously, and oppressively, and in conscious disregard of Cross-Complainants’ rights and their own fiduciary obligations, with knowledge that her conduct was likely to harm Cross-Complainant’s interests. As a result, Cross-Complainants are entitled to punitive damages.

The aforementioned paragraphs are incorporated as part of the first cause of action for breach of the duty of loyalty and second cause of action for breach of fiduciary duty. These ~~allegations however~~ allegations, however, are merely conclusions without the necessary factual support for punitive damages. (See *Today’s IV, Inc. v. Los Angeles County Metropolitan Transportation Authority* (2022) 83 Cal.App.5th 1137, 1193 [a complaint must include specific factual allegations showing the defendant’s conduct was oppressive, fraudulent, or malicious to

support a claim for punitive damages; punitive damages may not be pleaded generally].) For example, in the first cause of action, Cross-Complainants allege cross-defendant Adams breached her fiduciary duty by:

- (a) Failing to advise Cross-Complainants of an irreconcilable conflict between their interests and her own;
- (b) Failing to withdraw from representing Cross-Complainants after she began to contemplate litigation against them;
- (c) Interfering with Cross-Complainants' rights to be represented free of conflicts of interest by failing to disclose her outside work for other law firms and clients;
- (d) Failing to avoid the representation of interests adverse to Cross-Complainants, in violation of **California Rule of Professional Conduct 3-310**;
- (e) Failing to seek informed written consent from Cross-Complainants prior to representing interests adverse to Cross-Complainants, in violation of **California Rule of Professional Conduct 3-310**.

(FACC at ¶ 43.)

As to the second cause of action, Cross-Complainants allege cross-defendant Adams made unprivileged disclosures of their confidential information that she obtained during the course of her representation of them in the Alva lawsuit, including, without limitation, disclosing confidential personnel information to other employees. (FACC at ¶ 49.) In reviewing the FACC, the court finds none of these allegations include facts establishing malice, oppression, or fraud to support an award for punitive damages.

Therefore, the motion to strike paragraphs 45 and 51 is GRANTED WITH 10 DAYS' LEAVE TO AMEND. (See **Price v. Dames & Moore** (2001) 92 Cal.App.4th 355, 360 [regarding demurrers and motions to strike, leave to amend is routinely and liberally granted to give the plaintiff a chance to cure the defect in question].)

C. Paragraph 67 and FACC at Prayer for Relief No. 2.

Paragraph 67 of the FACC alleges:

ADAMS' concealment of her plan was done with the intent to deceive Cross-Complainants and deprive them of property and trust causing injury. ADAMS' conduct was despicable and subjected Cross-Complainants to unjust hardship in conscious disregard of Cross-Complainants' rights. As such, Cross-Complainants is entitled to an award of exemplary damages.

The Prayer for Relief at No. 2 requests punitive and exemplary damages. (FACC at p. 14:15.)

Cross-defendant Adams argues there are insufficient facts of malice, oppression, or fraud to support any request for punitive damages. ~~But~~But paragraph 67 is incorporated as part of the fourth cause of action for intentional concealment which is a species of fraud. (See **Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC** (2008) 162 Cal.App.4th 858, 868 ["Concealment is a species of fraud or deceit."]; see also **Marketing West, Inc. v. Sanyo Fisher (USA) Corp.** (1992) 6 Cal.App.4th 603, 612-613 [elements for fraud and deceit based on concealment].) Nor does Adams challenge the adequacy of the concealment claim by demurrer or motion to strike.³ And, as pointed out in opposition, a well-pleaded fraud claim is sufficient to support an award for punitive

³ To the extent Adams challenges the fourth cause of action for failure to support a claim for punitive damages on demurrer, such a procedural vehicle is improper. (See **Caliber Bodyworks, Inc. v. Superior Court** (2005) 134 Cal.App.4th 365, 384 ["A demurrer is not the appropriate vehicle to challenge a portion of a cause of action demanding an improper remedy."]; **Kong v. City of Hawaiian Gardens Redevelopment Agency** (2002) 108 Cal.App.4th 1028, 1047 ["a demurrer cannot rightfully be sustained to part of a cause of action or to a particular type of damage or remedy"]; see also **Venice Town Council v. City of L.A.** (1996) 47 Cal.App.4th 1547, 1562 ["[A] demurrer tests the sufficiency of the factual allegations of the complaint rather than the relief suggested in the prayer of the complaint."].) In reply, Adams contends the adequacy of punitive damages allegations can be determined on demurrer. (See Reply at pp. 4:15-5:2.) But, none of the cases cited by Adams in support of this contention are persuasive as they did not consider the pleading of a fraud claim to support punitive damages. (See **Connell v. Superior Court** (1997) 56 Cal.App.4th 601, 611 ["Cases are not propositions for matters not expressly considered."].)

damages. (See OPP at p. 5:12-16; see also **Stevens v. Super. Ct.** (1986) 180 Cal.App.3d 605, 610 [“A fraud cause seeking punitive damages need not include an allegation that the fraud was motivated by the malicious desire to inflict injury upon the victim. The pleading of fraud is sufficient.”].)

Consequently, the motion to strike paragraph 67 and the Prayer for Relief at No. 2 in the FACC is DENIED. The alternative motion for demurrer to the fourth cause of action is OVERRULED.

D. Paragraph 73.

Paragraph 73 of the FACC sets forth the following allegations:

ADAMS’ concealment of her plan was done with the intent to deceive Cross-Complainants and deprive them of property and trust causing injury. ADAMS’ conduct was despicable and subjected Cross-Complainants to unjust hardship in conscious disregard of Cross-Complainants’ rights. As such, Cross-Complainants are entitled to an award of exemplary damages.

This paragraph is incorporated as part of the fifth cause of action for negligent concealment. As a preliminary matter, the court is unaware of any California statutes or judicial decisions specifically recognizing negligent concealment as a legitimate cause of action. In opposition, Cross-Complainants urge the court to construe the fifth cause of action as a fraud claim to support an award of punitive damages. (See OPP at p. 5:7-10.) But, Cross-Complainants do not cite any legal authority which allows a court to treat a claim for negligent concealment as a fraud cause of action. (See **Michael P. v. Superior Court** (2001) 92 Cal.App.4th 1036, 1042 [“We need not address arguments for which a party provides no supporting authority.”].)

Furthermore, “[p]unitive damages are recoverable in those fraud actions involving intentional, but not negligent misrepresentations.” (**Alliance Mortgage Co. v. Rothwell** (1995) 10 Cal.4th 1226, 1241; see **Branch v. HomeFed Bank** (1992) 6 Cal.App.4th 793, 799 [no punitive damages recoverable for negligent misrepresentation].) As this is an alleged claim for “negligent concealment,” there appears to be no legal basis for an award of punitive damages.

Accordingly, the motion to strike paragraph 73 is GRANTED WITHOUT LEAVE TO AMEND. (See **Berkeley Police Assn. v. City of Berkeley** (1977) 76 Cal.App.3d 931, 942 [“[W]here the nature of plaintiff’s claim is clear, but under substantive law no liability exists, leave to amend should be denied, for no amendment could change the result.”].)

V. Case Management.

The next appearance is a Trial Setting Conference currently set for 05 December 2023 at 11:00 AM in Department 20.

The parties will recall that the matter was set for a hearing on the motion of cross-defendant’s motion for attorney’s fees and costs from defendants/cross-complainants and their counsel of record as a “prevailing defendant” on her Anti-SLAPP Motion against Defendants’ Cross-Complaint. that motion was originally set for 29 June 2023 and continued to 25 July 2023. However, on that date this Department was unavailable. Should this matter proceed to hearing, this Court would like to hear whether plaintiff/cross-defendant wishes to proceed with the motion.

VI. Conclusion and Order.

The motion to strike paragraphs 45 and 51 is GRANTED WITH 10 DAYS’ LEAVE TO AMEND.

The motion to strike paragraph 67 and the Prayer for Relief at No. 2 in the FACC is DENIED.

The alternative motion for demurrer to the fourth cause of action is OVERRULED.

The motion to strike paragraph 73 is GRANTED WITHOUT LEAVE TO AMEND.

DATED:

HON. SOCRATES PETER MANOUKIAN

*Judge of the Superior Court
County of Santa Clara*

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

161 North First Street, San Jose, CA 95113
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(For Clerk's Use Only)

CASE NO.: 21CV379734

Glendy Colop Colop vs Tanimura & Antle, Inc. et al

DATE: 12 September 2023

TIME: 9:00 am

LINE NUMBER: 06

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 11 September 2023. Please specify the issue to be contested when calling the Court and Counsel.

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**Order on Motion of Plaintiff to Quash/Modify Deposition Subpoena
Served on Robert A. Rovner, M.D.**

I. Statement of Facts.

On 18 April 2023, Dr. Rovner examined plaintiff and concluded that plaintiff did not require surgery. On 02 May 2023, defendant served an offer to compromise along with Dr. Rovner's medical report pursuant to Code of Civil Procedure, § 2032.610.

II. Motion To Depose Dr. Rovner.

Plaintiff now wants to depose Dr. Rovner. Defendants object on the ground that there has been no demand for the exchange of expert witness information pursuant to Code of Civil Procedure, § 2034.210(a) and premature pursuant to **Code of Civil Procedure**, §§ 2034.210 and 2034.220.

III. Analysis.

A. "Meet & Confer."

To this Court, the "Meet And Confer" prior to the filing of this motion was more akin to a series of drive-by shootings rather than an attempt to work out the otherwise-simple discovery requests in a reasonable manner.

The purpose of the "Meet & Confer" requirement is to force lawyers to reexamine their positions, and to narrow their discovery disputes to the irreducible minimum, before calling upon the court to resolve the matter. It also enables parties and counsel to avoid sanctions that are likely to be imposed if the matter comes before the court. (*Stewart v. Colonial Western Agency, Inc.* (2001) 87 Cal.App.4th 1006, 1016-1017.)

Failing to engage in a proper "Meet & Confer" session is a misuse of the discovery process. (**Code of Civil Procedure**, § 2023.010(i).)

Failing to make a "reasonable and good faith attempt" to resolve the issues informally before a motion to compel is filed constitutes a "misuse of the discovery process." Monetary sanctions can be imposed against whichever party is guilty of such conduct even if that party wins the discovery motion in question. (**Code of Civil Procedure**, § 2023.020; *Obregón v. Superior Court (Cimm's, Inc.)* (1998) 67 Cal.App.4th 424, 434-435.)

In some cases, monetary sanctions may be imposed against both counsel at the same time. (See **Volkswagenwerk Aktiengesellschaft v Superior Court (Golsch)** (1981) 122 Cal.App.3d 326, 331-334⁴.)

Plaintiff contends there is a right to depose Dr. Rovner pursuant to **Kennedy v. Superior Court** (1998) 64 Cal.App.4th 674 and **Code of Civil Procedure**, §2032.610(c).

In **Kennedy**, the plaintiff was injured in a slip and fall. A certain doctor examined the plaintiff who then requested a copy of the report. The parties had a trial date and already exchanged expert witness lists prior to a doctor deposition being requested, unlike the matter at hand. The trial court denied her motion to compel production after the defendant designated the doctor as a "consultant" and not a declared expert.

Kennedy concerned the failure of the opposing counsel to produce a written report of an expert witness and their attempts to shield their expert from being produced for deposition by withdrawing the doctor as an expert. "A party may "hide" an expert from deposition by withdrawing him and dubbing him a "consultant," thereby reinstating work product protection-but when the expert is also the examining physician per section 2032, the specific terms of the statute must control. Despite the withdrawal, petitioner is entitled to depose Dr. Weil with regard to the physical examination." (**Kennedy v. Superior Court** at 679.) The case does not involve the timing of depositions in relation to the formal exchange of expert witness lists or trial dates.

Now, discussing the matter in a rhetorical sense: there is nothing to prevent the defense from deposing any of the treating doctors. Why couldn't Dr. Rovner be deposed in the same manner? According to the defense papers, it was hoped that counsel for plaintiff would discuss the report with plaintiff including Dr. Rovner's opinion that the plaintiff would not benefit from surgery.

NO TENTATIVE RULING except that the request of plaintiff for monetary sanctions is DENIED.

IV. Tentative Ruling.

The tentative ruling was duly posted.

V. Case Management.

The trial setting conference will REMAIN AS SET for 21 November 2023 at 11:00 AM. The parties should meet and confer and agree on a trial date 6 to 7 months after the Trial Setting Conference.

VI. Order.

There is no tentative ruling on the merits of the motion except that the request of plaintiff for monetary sanctions is DENIED. The parties should indicate whether they wish to submit on the papers presented or appear at the hearing and argue the matter on the merits.

DATED:

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

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⁴ Because of personal dislike for each other, counsel failed to make any real effort to negotiate the disputed issues. The Court could have refused to rule on the motion to compel because of moving party's counsel's failure to "meet and confer." But in order to resolve the matter, it heard the motion, found both lawyers to have violated the requirement, and ordered each to pay \$150.00 out of his own pocket to the other lawyer's client.

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

DEPARTMENT 20

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(For Clerk's Use Only)

CASE NO.: 21CV386407

Chipongolo Mulenga vs Evelyn Mendez et al

DATE: 12 September 2023

TIME: 9:00 am

LINE NUMBER: 11

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 11 September 2023. Please specify the issue to be contested when calling the Court and Counsel.

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**Order on Motion of Defendants To Compel Plaintiff
To Submit To A Mental Examination.**

I. Statement of Facts.

The facts of this important matter are well known to this Court and counsel.

II. Motion to Compel Mental Examination.

Defendants seek to conduct a mental examination of plaintiff

Plaintiff opposes the motion claiming that her mental condition is not currently in controversy because she does not allege a current medical condition exceeding garden-variety emotional distress, that defendants have not made a showing of specific facts justifying a mental examination, and finally because defendants have expressed to test plaintiff's past mental condition, as well as to engage in a substantially unrestricted mental examination generally.

III. Analysis.

The pertinent sections of **Code of Civil Procedure**, § 2032.320(a, b, c,) are as follows:

“(a) The court shall grant a motion for a physical or mental examination under Section 2032.310 only for good cause shown.

(b) If a party stipulates as provided in subdivision (c), the court shall not order a mental examination of a person for whose personal injuries a recovery is being sought except on a showing of exceptional circumstances.

- (c) A stipulation by a party under this subdivision shall include both of the following:
- (1) A stipulation that no claim is being made for mental and emotional distress over and above that usually associated with the physical injuries claimed.
 - (2) A stipulation that no expert testimony regarding this usual mental and emotional distress will be presented at trial in support of the claim for damages.

“For discovery purposes, information is relevant if it “might reasonably assist a party in evaluating the case, preparing for trial, or facilitating settlement” (citation omitted.) Admissibility is not the test and information, unless privileged, is discoverable if it might reasonably lead to admissible evidence. (citation omitted.) These rules are applied liberally in favor of discovery (citation omitted) and (contrary to popular belief), fishing expeditions are permissible in some cases. (citation omitted.)⁵ Although fishing may be improper or abused in some cases, that is not of itself an indictment of the fishing expedition per se. More specifically, the identity of witnesses must be disclosed if the witness has ‘knowledge of any discoverable matter,’ including fact, opinion and any information regarding the credibility of a witness (including bias and other grounds for impeachment). (citations omitted.) (**Gonzalez v. Superior Court**, 33 Cal.App.4th at 1546.)

A. Right to Privacy

Both physical and mental medical records are protected by a right to privacy. (**Board of Med. Quality Assurance v. Gherardini** (1979) 93 Cal.App.3d 669, 679; see also **Civil Code**, § 56.10 (health care providers may not disclose confidential medical information without either a court order or the permission of the patient.)) Discovery of medical records requires a two-part test. Discovery must be directly relevant to a cause of action or defense. (**Britt v. Superior Court (San Diego Unified Port Dist.)** (1978) 20 Cal.3d 844, 859-862.) Discovery is allowable only where the party seeking discovery has no other means of attaining the information. (**Palay v. Superior Court (County of Los Angeles)** (1993) 18 Cal.App.4th 919, 933-934.⁶)

Medical records are not discoverable for the lifetime of the patient, but only for periods of time where the records may relate to physical or mental injuries alleged in the lawsuit. (**Britt v. Superior Court**, *supra*, (1978) 20 Cal.3d 844, 864.) If the request passes the two-part test, the court must ‘carefully balance’ the claimed right of privacy versus the public interest in obtaining just results in litigation. (**Valley Bank of Nevada v. Superior Court (Barkett)** (1975) 15 Cal.3d 652, 657.)

B. Relevancy to Causes of Action.

Direct relevance is required in a case involving privacy issues. (see **Boler v. Superior Court** (1987) 201 Cal.App.3d 467, 472; see also **Tylo v. Superior Court (Tylo)** (1997) 55 Cal.App.4th 1379, 1387.)

Medical records are relevant to the issue of damages. Information concerning extrinsic causes of emotional distress is directly relevant because they bear directly on the nexus between Plaintiff’s claims and the conduct of the Defendants. (see **Tylo**, at 1388.)

In general, discovery requests for all physical and mental medical information about a plaintiff in a personal injury action may be impermissibly overbroad. (**Hallendorf v. Superior Court** (1978) 85 Cal.App.3d 553,

⁵ “[T]he claims that a party is engaged upon a fishing expedition is not, and under no circumstances can be, a valid objection to an otherwise proper attempt to utilize the provisions of the discovery statutes. Should the so-called fishing expedition be subject to other objections, it can be controlled.” (**Greyhound Corp. v. Superior Court of Merced County** (1961) 56 Cal.2d 355, 386). “[T]he court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression. In granting or refusing such order the court may impose upon either party or upon the witness the requirement to pay such costs and expenses, including attorney’s fees, as the court may deem reasonable.” (**Greyhound Corp. v. Superior Court of Merced County**, *supra* at 370-371.)

⁶ “[**Palay** and other cited cases] are disapproved only to the extent they assume, without conducting the inquiry **Hill v. National Collegiate Athletic Assn.** requires, that a compelling interest or compelling need automatically is required when a party seeks discovery of private information. (**Williams v. Superior Court** (2017) 3 Cal.5th 531, 531.)”

555.) Some of the information requested might not be directly relevant to Plaintiff's claims.

C. Plaintiff's Allegations.

Defendants assert that in this particular case, plaintiff has made her mental health and issue in this case. Her first amended complaint filed on 22 March 2022 includes the allegations and prayer for relief noted above. (FAC ¶¶ 51, 73, 75 and Prayer for Relief ¶ 2.7)

Plaintiff's June 3, 2022 written discovery responses include her assertions that she suffered "anxiety" and "severe depression, with symptoms including extreme loss of sleep, loss of appetite, frequent crying, withdrawal from family and friends and other social activities, and other similar symptoms." (Cormier Decl. ¶ 3 and Ex. A (Amended Response to Interrogatory 212.2).) She further stated that, while her condition had "improved over time, she still suffers from mild anxiety and bouts of depression" relating to her former County employment. (Ibid.) At her deposition on 20 December 2022, Plaintiff testified that her alleged treatment "continues to affect every aspect of [her] life emotionally." (Cormier Decl. ¶ 4 and Ex. B (Mulenga Depo. at 678:9-24).)

Defendants have the right to evaluate the veracity of Plaintiff's claims. (*Vinson v. Superior Court* (1987) 43 Cal.3d 833, 842.) Some of the documents requested albeit not all might be directly relevant. Defendant has a right to accumulate records that are relevant, and which might give reason to determine that a mental health examination is in order.

Accordingly, the Court finds that medical documents at least after the date of the accident would have direct relevance to Plaintiff's claims.

C. No Less Intrusive Means to Discover Relevant Information.

Defendants are entitled to seek medical information to ascertain whether there are extrinsic causes of emotional distress. (see *Davis v. Superior Court* (1992) 7 Cal.App.4th 1008, 1017-1018.⁸) Medical records are the only feasible way to probe the Plaintiff's physical and mental state over a period of time. (*Palay v. Superior Court* (1993) 18 Cal.App.4th 919, 933-934.) There are no other less intrusive means of discovering extrinsic causes of emotional distress.

D. "Garden Variety" and "Severe" Mental Distress.

The difference between "garden-variety emotional distress" and emotional distress which may justify allowing the defendants to obtain a mental health examination has not been very clearly explained in the cases. This Court has obtained some guidance from *Pringle v. Wheeler* (2021) U.S.Dist.LEXIS 92441 which has attempted to quantify what the statute might mean:

"Garden variety emotional distress has been described as "ordinary or commonplace emotional distress, that which is simple or usual." *Fitzgerald v. Cassil*, 216 F.R.D. 632, 637 (N.D. Cal. 2003) (internal quotation marks and citation omitted). "In contrast, emotional distress that is not garden variety 'may be complex, such as that resulting in a specific psychiatric disorder.'" Id. (citation omitted). Courts have found the following allegations go beyond "garden variety" emotional distresses and are specific enough to place a plaintiff's mental state in

⁷ She alleges that she "continues to suffer emotional distress, humiliation, shame, anxiety, depression, and embarrassment" (First Amended Complaint (FAC) ¶ 51) and that she "suffered and continues to suffer severe and continuous humiliation, emotional distress, and physical and mental pain and anguish." (FAC ¶ 73.) Plaintiff seeks punitive damages against Defendant Mendez. (FAC ¶ 75 and Prayer for

⁸ "Petitioner here has clearly limited her claim to pain and suffering associated with the injuries to her body. Nothing prevents real party from seeking records directly relevant to such claim by a narrowly drawn discovery request. If such a request were made, the trial court could then evaluate the respective interests of the parties and the necessity and appropriate extent of disclosure according to the standards set forth hereinabove."

In *Davis*, the court held that "that the mere act of filing a personal injury action asking for general damages for pain and suffering does not tender the plaintiff's mental condition so as to make discoverable postinjury psychotherapeutic records." (*Davis v. Superior Court*, supra at 1011.)

controversy. See, e.g., **Mandujano v. Geithner**, No. C 10-01226 LB, 2011 WL 825728, at *2 (N.D. Cal. Mar. 7, 2011) ("loss of sleep, migraines, weight loss, fear, growing a beard to hide, and other severe anxiety"); **Greenhorn v. Marriott Int'l, Inc.**, 216 F.R.D. 649, 651 (D. Kan. 2003) ("emotional trauma causing insomnia, severe depression, avoidance, withdrawal, suicidal [*9] ideation, suspiciousness, social discomfort, low self-esteem, [and] resentfulness") (internal quotation marks omitted); **Dornell v. City of San Mateo**, No. 12-cv-06065 CRB (KAW), 2013 WL 5443036, at *4 al. Sept. 30, 2013) (anxiety, high blood pressure, chest pain, sleeplessness, weight gain, inability to focus and loss of interest in daily life activities and hobbies); **K. Oliver v. Microsoft Corp.**, No. 12-cv-00943 RS (LB), 2013 WL 3855651, at *2 (N.D. Cal. July 24, 2013) (extreme anguish, humiliation, emotional distress, physical distress, increased risk of reoccurrence in breast cancer, and physical injuries resulting from stress); **Tamburri v. SunTrust Mortgage Inc.**, No. 11-cv-02899 JST (DMR), 2013 WL 942499, at *3-4 (N.D. Cal. Mar. 11, 2013) (suicidal ideation, paranoia, chest pains, blinding and debilitating headaches that are "frightening in their intensity," multiple cracked teeth from jaw grinding, and loss of mental clarity); **Varfolomeeva v. United States**, 2017 U.S. Dist. LEXIS 201100 (E.D. Cal. 2017) ("depression, post-traumatic stress disorder," "suicidal ideation, and a phobia of walking on the street"); **Ayat v. Societe Air France**, No. C 06-1574 JSW JL, 2007 WL 1120358, at *4 (N.D. Cal. Apr. 16, 2007) ("Both depression and post-traumatic stress disorder constitute a specific mental or psychiatric injury or disorder.").

On the other hand, courts have found "humiliation, mental anguish, and emotional distress" are "garden variety" emotional distresses do not put a plaintiff's mental state in controversy. See **Turner**, 161 F.R.D. at 97. For example, in **Montez v. Stericycle, Inc.**, No. 1:12-CV-0502-AWI-BAM, 2013 WL 2150025, at *4 (E.D. Cal. May 16, 2013), the court found that "Plaintiff ha[d] not placed his mental injury in controversy as Plaintiff's mental anguish claims [were] those [*10] garden-variety emotional distress claims naturally flowing from an unlawful termination." The court further noted that "Plaintiff ha[d] not undergone mental health treatment for emotional or psychological reasons," "[did] not claim an ongoing mental injury," and there was "no indication that he will attempt to offer medical evidence to support his emotional distress damages." *Id.*; see also **Rund v. Charter Commc'ns, Inc.**, No. CIV. S-05-0502 FCDGG, 2007 WL 312037, at *2 (E.D. Cal. Jan. 30, 2007) (finding an independent mental examination not appropriate given "plaintiff's abandonment of any claim for serious psychological/psychiatric injury," where "[s]uch a claim [was] not realistically possible in the absence of medical proof, i.e., records testified to by the appropriate medical personnel," and "[p]laintiff made it crystal clear that he has not sought medical treatment, and would not be presenting any medical evidence concerning emotional injury"); **Ford v. Contra Costa Cty.**, 179 F.R.D. 579, 580 (N.D. Cal. 1998) ("Because defendants have presented little more than Ford's prayer for emotional and mental distress damages, they have not met their burden under FRCP 35(a).").

Pringle's claim for general "mental and emotional distress," "pain and suffering," and "stress, internal turmoil, trauma, and anxiety" are akin to "garden variety" emotional distresses. Cases where mental condition was in controversy involved, in addition to general claims like anxiety, more specific mental injuries such as post-traumatic stress disorder, depression, insomnia, and suicidal ideation. As Regan acknowledges, Pringle "never sought mental health treatment or medication." (**Pringle v. Wheeler** (N.D. Cal. Apr. 16, 2021, No. 19-cv-07432-WHO) 2021 U.S. Dist. LEXIS 92441, at *11.⁹)

⁹ Absent contrary precedent under state law, California courts have found federal decisions "persuasive" in interpreting similar provisions of the California Act. (See **Greyhound Corp. v. Superior Court of Merced County** (1961) 56 Cal.2d 355, 401; **Nagle v. Superior Court** (1994) 28 Cal.App.4th 1465, 1468; **Vasquez v. California School of Culinary Arts, Inc.** (2014) 230 Cal.App.4th 35, 42-43; Weil & Brown, **Civil Procedure Before Trial** (The Rutter Group 2019) § 8:19, p. 8A-10.)

Where California discovery rules and cases do not expressly address a particular issue which has been addressed by federal courts, California courts may look to federal cases for guidance. Federal decisions have historically been considered

Both sides make very reasonable arguments in this interesting matter. It is this Court's responsibility to adequately protect the privacy rights of the Plaintiff while, at the same time, not to deprive the Defendants of an opportunity to contest Plaintiff's claims of damages. (See **Gonzalez v. Superior Court** (1995) 33 Cal.App.4th 1539, 1542.

In support of this motion, defendants have provided the Declaration of John M. Greene, MD, board certified in general and forensic psychiatry. Dr. Greene has summarized the parameters of his proposed evaluation consisting of an examination and administration of psychological testing. He opines that plaintiff's current presentation of emotional distress, even though alleged to be "garden-variety," is by her own report related to a prior level of "severe," and encompasses an alleged condition is characterized by periods of exacerbation and remission and that this should therefore be objectively assessed. (§ 5.) He believes it is necessary to conduct the clinical examination 3 to 3 ½ hours. (§ 7.) The psychological testing will take 2 to 3 hours (§ 8.)

Plaintiff has not provided any medical support in opposition to the motion.

E. Balancing Test.

"The mere initiation of a sexual harassment suit, even with the rather extreme mental and emotional damage plaintiff claims to have suffered, does not function to waive all of plaintiff's privacy interests, exposing her persona to the unfettered mental probing of defendants' expert. Plaintiff is not compelled, as a condition to entering the courtroom, to discard entirely her mantle of privacy. At the same time, plaintiff cannot be allowed to make her very serious allegations without affording defendants an opportunity to put their truth to the test. (**Vinson v. Superior Court** (1987) 43 Cal.3d 833, 841-42.)" (**Zuckowich v. JP Morgan Chase Bank Imaged**, 2017 Cal.Super.LEXIS 35233, *1-2) (internal punctuation modified.)

"**Schlagenhauf v. Holder** (1964) 379 U.S. 104 [13 L. Ed. 2d 152, 85 S. Ct. 234] thus stands for the proposition that one party's unsubstantiated allegation cannot put the mental state of another in controversy. [¶] It is another matter entirely, however, when a party places his own mental state in controversy by alleging mental and emotional distress. Unlike the bus driver in **Schlagenhauf**, who had a controversy thrust upon him, a party who chooses to allege that he has mental and emotional difficulties can hardly deny his mental state is in controversy. To the extent the decision in **Cody v. Marriott Corp.**, 103 F.R.D. 421, is inconsistent with this conclusion, we decline to follow it. (See also **Reuter v. Superior Court** [1970] 93 Cal.App.3d 332, 340.)" (**Vinson v. Superior Court** (1987) 43 Cal.3d 833, 839.)

IV. Tentative Ruling.

The tentative ruling was duly posted.

V. Case Management.

The trial date and settlement conference date will REMAIN AS SET.

VI. Conclusion.

persuasive because of the similarity of California and federal discovery law. (**Nagle v. Superior Court** (1994) 28 Cal. App. 4th 1465, 1468; **Liberty Mut. Ins. Co. v. Superior Court** (1992) 10 Cal. App. 4th 1282, 1288; see also 2-50 California Deposition and Discovery Practice § 50.04; Weil & Brown, **Civil Procedure Before Trial** (The Rutter Group 2007) P 8:19, p. 8A-15.)

Although the California and federal codes developed in different directions during the latter part of the 20th century, the 1986 Discovery Act brought California into closer alignment with the Federal Rules, indicating that "federal cases are likely to play an even more prominent role in the future." (**Liberty**, 10 Cal. App. 4th at 1288.) These federal cases are to be deemed "persuasive" authority, "and their reasoning is accepted where applicable in California." (**Greyhound Corp. v. Superior Court of Merced County** (1961) 56 Cal. 2d 355, 401.)

The motion is GRANTED and the parties are to select one of the dates specified by Dr. Greene as to his availability. Plaintiff is entitled to a copy of any report generated by Dr. Greene and submit to a deposition if so requested.

DATED:

HON. SOCRATES PETER MANOUKIAN

*Judge of the Superior Court
County of Santa Clara*

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Calendar Line 12

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

DEPARTMENT 20

161 North First Street, San Jose, CA 95113
408.882.2320 · 408.882.2296 (fax)
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(For Clerk's Use Only)

CASE NO.: 20CV374920
DATE: 12 September 2023

TIME: 9:00 am

Rodney Lee Curry vs Donald E. Curry
LINE NUMBER: 12

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 11 September 2023. Please specify the issue to be contested when calling the Court and Counsel.

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Order on Petition of Rodney Lee Curry To Confirm Sale,
Distribute Proceeds, and for Order For Issuance
of a Writ Of Possession.

I. Statement of Facts.

In this partition action, plaintiff seeks sale pursuant to the referee's report of sale and **Code of Civil Procedure**, § 873.710.

The Court issued an Interlocutory Default Judgment appointing a referee to sell real property co-owned by plaintiff Rodney Lee Curry and defendant Donald E. Curry and in which the defendant currently resides.

A purchase agreement with a third party was entered into on 18 August 2023 which has a closing date of 17 September 2023. The purchaser intends to reside there upon completing the purchase. Therefore, plaintiff seeks an order directing the Court Clerk to issue a Writ of Possession removing defendant and any other occupants from the real property.

The hearing today was set by Plaintiff's Ex Parte Application for a Special Settings based on the motion needing to be the close of escrow, or 17 September 2023, in order to prevent the purchase agreement from being cancelled. The **Code of Civil Procedure** requires at least ten days' notice, so the motion needed to be heard sometime after 04 September 2023, but before September 17, 2023.

While the moving papers have been served upon respondent prior to the setting of this hearing, he has not filed opposition. However, this motion was set on an expedited basis and this Court will see if he appears for the hearing.

On 22 August 2023, defendant was served with a letter from plaintiff's attorney giving him the ten days' notice required by the Interlocutory Default Judgment. The letter states that defendant and all other occupants must vacate the real property no later than 01 September 2023 and asks him to contact counsel for plaintiff no later than 01 September 2023 and confirm that he will do so.

A conference call took place between plaintiff, his counsel, and defendant and 24 August 2023. Defendant maintained during this conversation that he does not have the money needed to move. Defendant and his family have been living in the Real Property for many years without having to pay any rent or make any mortgage payments. They knew that the Real Property was going to be sold and should have been prepared to move. Respondent has now said that he would need \$6,000.00 to vacate this property and seek another home for his family.

Plaintiff is requesting an order confirming the sale.

II. Analysis.

In addition to confirming the sale, and in order to effectuate it, the Court "shall order the referee to execute a conveyance or other instrument of transfer to collect the proceeds, take security, and perform other acts required to consummate the sale.: (**Code of Civil Procedure**, § 873.750(a). It may also "direct the referee concerning the distribution, deposit, or securing of sale deposits and sale proceeds. (**Code of Civil Procedure**, § 873.750(b).)

III. Order.

Good cause appearing, and pursuant to **Code of Civil Procedure**, §§ 873.810, 873.820, 874.010, and 873.750(b), IT IS ORDERED that plaintiff is entitled to relief as follows:

1. An order confirming the sale of the real property located a 1128 Ribisi Circle, San Jose, California to Shuyan Fu for \$ 800,000;
2. An order directing the referee appointed by the Court to distribute the net sale proceeds as follows:
 - a. The payment of \$40,000.00 for real estate commissions;
 - b. The payment of a sum to be determined by the referee for closing costs;
 - c. Plaintiff s attorney's fees and costs in the amount of \$59,153.40;
 - d. Disbursement of the remaining funds evenly between plaintiff Rodney Lee Curry and defendant Donald E. Curry with the following amounts charged against the share of defendant Donald E. Curry and paid to plaintiff Rodney Lee Curry:
 - i. The \$54,046.90 judgment, plus \$ 8,557.41 for accrued interest;
 - ii. \$ 185,600.00 for plaintiff s one-half share of the total rental value of the real property since April of 2013; and
 - iii. An additional \$52.60 for each day that defendant Donald E. Curry fails to vacate the real property;
3. An Order directing the Court Clerk to issue a Writ of Possession directing the Santa Clara County Sheriff to remove defendant Donald E. Curry and all other occupants of the real property and placing plaintiff Rodney Lee Curry in possession.
4. Plaintiff is to prepare an appropriate judgment and eFile it to this Department.

DATED:

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

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