SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 20, Honorable Socrates Peter Manoukian, Presiding

Courtroom Clerk: Hien-Trang Tran-Thien

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

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

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

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

By Standing Order of this Court, all parties appearing in this Court are expected to comply with the Code of Professionalism adopted by the Santa Clara County Bar Association: https://www.sccba.com/code-of-professional-conduct/

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DATE: Thursday, 08 February 2024
TIME: 9:00 A.M.

This Department uses Zoom for Law and Motion and for Case Management Calendars. Please use the Zoom link below.

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

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

Join Zoom Meeting
https://scu.zoom.us/j/96144427712?pwd=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. If the doors to the Old Courthouse are locked, please see the deputies at the metal detector next door at 191 North First Street.

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

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

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

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

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

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

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

Sign-ins will begin at about 8:30 AM. Court staff will assist you when you sign in. If you are using the Zoom virtual platform, it will 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	21CV391881	Amir Weiner; Ya'el Weiner; Julia Erwin-Weiner vs Board of Trustees of the Leland Stanford Jr. University; Matthew Ming Carpenter; William Corbitt Mitchell; Cole Weston Dill-De-Sa; Muhammad Yusuf Khattack; Theta Delta Chi Founders Corporation.	**Motion of Defendant Theta Delta Chi Founders Corporation for Summary Judgment.** SEE ATTACHED TENTATIVE RULING. SEE LINE 18.
LINE 2	21CV391881	Amir Weiner; Ya'el Weiner; Julia Erwin-Weiner vs Board of Trustees of the Leland Stanford Jr. University; Matthew Ming Carpenter; William Corbitt Mitchell; Cole Weston Dill-De-Sa; Muhammad Yusuf Khattack; Theta Delta Chi Founders Corporation.	**Demurrer of Defendant Cole Weston Dill-De-Sato Plaintiffs' First Amended Complaint.** SEE LINE #1. SEE LINE 18.
LINE 3	21CV391881	Amir Weiner; Ya'el Weiner; Julia Erwin-Weiner vs Board of Trustees of the Leland Stanford Jr. University; Matthew Ming Carpenter; William Corbitt Mitchell; Cole Weston Dill-De-Sa; Muhammad Yusuf Khattack; Theta Delta Chi Founders Corporation.	**Case Management Conference.** SEE LINE #1. SEE LINE 18.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 4	21CV391881	Amir Weiner; Ya'el Weiner; Julia Erwin-Weiner vs Board of Trustees of the Leland Stanford Jr. University; Matthew Ming Carpenter; William Corbitt Mitchell; Cole Weston Dill-De-Sa; Muhammad Yusuf Khattack; Theta Delta Chi Founders Corporation.	**Motion of Muhammad Yusuf Khattack To Strike the Prayer for Punitive Damages from Plaintiffs' First Amended Complaint.** SEE LINE #1. SEE LINE 18.
LINE 5	21CV391881	Amir Weiner; Ya'el Weiner; Julia Erwin-Weiner vs Board of Trustees of the Leland Stanford Jr. University; Matthew Ming Carpenter; William Corbitt Mitchell; Cole Weston Dill-De-Sa; Muhammad Yusuf Khattack; Theta Delta Chi Founders Corporation.	**Demurrer of Defendant Muhammad Yusuf Khattack To Plaintiffs' Third and Fourth Causes of Action in Their First Amended Complaint.** SEE LINE #1. SEE LINE 18.
LINE 6	21CV383107	Guiliani Construction and Restoration, Inc. vs Rancho Homeowners Association	**Trial Setting Conference.**
LINE 7	21CV383107	Guiliani Construction and Restoration, Inc. vs Rancho Homeowners Association	**Motion of Guiliani Construction and Restoration, Inc. for Summary Judgment/Summary Adjudication.** Cross-defendant GCR's motion for summary adjudication of the second cause of action [breach of HOA Contract] of cross-complainant Yeong's FAXC is GRANTED. Cross-defendant GCR's motion for summary adjudication of the third cause of action [negligence] of cross-complainant Yeong's FAXC is DENIED. Cross-defendant GCR's motion for summary adjudication of the fourth cause of action [violation of Business & Professions Code §17200 et seq.] of cross-complainant Yeong's FAXC is GRANTED. Cross-defendant GCR's motion for summary adjudication of cross-complainant Yeong's prayer for consequential damages is DENIED. SEE ATTACHED TENTATIVE RULING.
LINE 8	20CV373032	Bonnie J. Niesen; Travis Niesen v. Intuitive Surgical, Inc. et al.	**Motion of Plaintiffs to Compel Defendant Intuitive Surgical, Inc. To Provide Further Responses to Plaintiffs' Document Requests in the Deposition Notices of Scott Burd, Nick Pham, James Ragsdale, and Jaime Wong.** The motion is GRANTED.Plaintiffs' discovery requests at issue are sufficiently narrow so as to be manageable for Intuitive to address. These requests pertain directly to plaintiffs' theory of liability as to Intuitive's knowledge of problems with its robotic systems. Code-complaint responses will be due within 20 days of the filing and service of this Order. Plaintiffs are to provide notice of entry of the order. NO FORMAL TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 9	21CV389457	Hong Zhang v. Donliang Zhang; Fidelity National Title Company and related cross-complaint	**Motion Of Cross-Complainant Donliang Zhang To Compel Additional Responses And Documents From Plaintiff/Cross-Defendant Hong Zhang and Request for Monetary Sanctions.** NO TENTATIVE RULING.
LINE 10	22CV394887	Miguel Ramírez vs Anthony Hayes, Jr.	**Motion of Plaintiff for Sanctions against Defendant Anthony Alonso Fred Hayes Junior or, in the Alternative, Motion to Compel etc.** Odyssey does not reflect that a reply brief was filed. NO TENTATIVE RULING.
LINE 11	22CV398408	Capital Investment Co. vs Christopher Viray And Related Cross-Complaint.	**Motion of Plaintiff to Compel Defendant Christopher Viray to Produce Further Responses to Plaintiff's Special Interrogatories, Set 2.** Defendant filed a formal nonopposition to this motion as long as plaintiff acknowledges and agrees that the spreadsheet defendant intends to produce in lieu of identifying each patient whose name is requested in Special Interrogatories 15, 16, and 17 and in accordance with ***Code of Civil Procedure***, § 2030.230 is confidential and will be subject to the protective order entered into on 11 August 2023. Plaintiff did not file a reply brief. Is the matter MOOT? The parties are to use the Tentative Ruling Protocol to advise this Court if they wish to appear on the merits or deem the matter to be moot. NO FORMAL TENTATIVE RULING.
LINE 12	23CV410795	Stacey Belew vs Brinker International, Inc.; Luigi DiGrandy	**Motion Of Plaintiff To Compel Defendant Brinker International, Inc. To Provide Further Responses To Plaintiff's First Set Of Form And Special Interrogatories And Request For Monetary Sanctions.** The Court is inclined to GRANT the motion in its entirety. Defendant is to provide code-compliant responses within twenty days of the filing and service of this order. The request for monetary sanctions is code-compliant and GRANTED. The monetary sanctions are due and payable within 20 days of the filing and service of this Order. Plaintiff is to provide notice of entry of the order. NO FORMAL TENTATIVE RULING.
LINE 13	23CV417271	Yolanda Ruiz Esparza Vasquez vs Star Elevator, Inc.; Nicholas Gorder Haas	**Motion Of Plaintiff To Compel Defendants To Provide Further Responses To Form Interrogatories And Request For Production Of Documents.** CONTINUED to 14 March 2024 at 9:00 am in this Department.
LINE 14	21CV377923	Tonya O'Kray vs General Motors, LLC	Motion of Plaintiff for Attorneys Fees. NO TENTATIVE RULING. The parties should use the Tentative Ruling Protocol to advise this court if they wish to appear and argue the merits or submit on the papers presented.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 15	22CV38215	Helix Electric, Inc. vs FPC Builders, et al.	**Motion of Liodis C. Matthews, Esq. and Zhong Lun Law Firm to Withdraw as Attorney for Defendants FPC Builders, Inc., Full Power Properties, LLC, and FPP MB LLC.** Counsel for defendant seeks to withdraw as counsel due to a breakdown of the attorney-client relationship. Communication between client and counsel has deteriorated due to an irreconcilable breakdown of the attorney-client relationship (***Estate of Falco v. Decker*** (1987) 188 Cal.App.3d 1004, 1014.) Therefore, counsel is filing this motion to withdraw as counsel. Counsel alleges that his client will not be prejudiced by the withdrawal. No proposed order has been included. The motion to be relieved as counsel is GRANTED. The Order will take effect upon the filing and service of the executed order of this Court and an order that is written on Form MC-053 and that otherwise complies with California ***Rules of Court***, rule 3.1362(e). Counsel added the next court dates on ¶ 8 of the proposed order which this Court will execute. NO FORMAL TENTATIVE RULING.
LINE 16	22CV402699	David Kissner vs Lisa Fraser et al.	**Motion of Defendants for Attorneys Fees.** NO TENTATIVE RULING. The parties should use the Tentative Ruling Protocol to advise this court if they wish to appear and argue the merits or submit on the papers presented.
LINE 17	23CV417173	Dennis Johnson vs The Arister Group, Inc., d.b.a. DesignStyles; The TJX Companies, Inc.	The application of plaintiff Dennis Johnson to approve The Proposition 65 Settlement and Consent Judgment is GRANTED. Counsel for plaintiff is to prepare the formal order and submit it to this Department via the clerk's e-filing queue for execution. Counsel should then send notice of entry of judgment to all interested parties. The matter will be placed on these Departments dismissal review calendar on August 15 2024 at 10:00 AM in Department 20. NO FORMAL TENTATIVE RULING.
LINE 18	21CV391881	Amir Weiner; Ya'el Weiner; Julia Erwin-Weiner vs Board of Trustees of the Leland Stanford Jr. University; Matthew Ming Carpenter; William Corbitt Mitchell; Cole Weston Dill-De-Sa; Muhammad Yusuf Khattack; Theta Delta Chi Founders Corporation.	**Demurrer By Defendant William Corbitt Mitchell to the Third and Fourth Causes of Action to Plaintiffs' First Amended Complaint.** SEE LINE #1.
LINE 19			SEE ATTACHED TENTATIVE RULING.
LINE 20			SEE ATTACHED TENTATIVE RULING.
LINE 21			SEE ATTACHED TENTATIVE RULING.
LINE 22			SEE ATTACHED TENTATIVE RULING.

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

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Calendar Line 1

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) *smanoukian@scscourt.org* *http://www.scscourt.org*	*(For Clerk's Use Only)*

CASE NO.: 21CV391881 Amir Weiner, et al. v. Leland Stanford Junior University, et al.

DATE: 8 February 2024 TIME: 9:00 am LINE NUMBER: 1 – 2 and 4 – 5

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 07 February 2024. Please specify the issue to be contested when calling the Court and Counsel.

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Orders On:
Order On (1) Defendant Cole Weston Dill-De Sa's Demurrer To Plaintiff's First Amended Complaint;
(2) Defendant Theta Delta Chi Founders' Corporation's Motion For Summary Judgment
or, In The Alternative, Summary Adjudication;
3) Defendant William Corbitt Mitchell's Demurrer
To The First Amended Complaint;
(4) Defendant Muhammad Yusuf Khattak's Demurrer
To The Third And Fourth Causes Of Action Of Plaintiffs' First Amended Complaint;
and (5) Defendant Muhammad Yusuf Khattak's Motion To Strike
Prayer For Punitive Damages From Plaintiffs' First Amended Complaint.

I. Statement of Facts.

In the early morning hours of 17 January 2020, Eitan Michael Weiner ("Decedent") died alone in a bathroom stall at the Theta Delta Chi ("TDX") fraternity house on the campus of defendant Leland Stanford Junior University ("University"). (First Amended Complaint ("FAC"), ¶1.)

On or about 15 January 2020, Decedent received a package addressed to him at the TDX fraternity house on defendant University's campus. (FAC, ¶38.) The package contained a bottle of counterfeit Percocet that Decedent and defendants Cole Dill-De Sa ("De Sa"), William Mitchell ("Mitchell"), and Muhammad Khattak ("Khattak")[1] purchased from defendant Matthew Ming Carpenter ("Carpenter"). (FAC, ¶¶17 – 20 and 38.) Defendant Carpenter was a lifelong friend of Decedent growing up in the same neighborhood and attending some of the same schools. (FAC, ¶17.) Defendant Carpenter held himself out to his customers, some of whom were his close personal friends, as an expert in using the dark web to (i) procure exactly what his customers and friends wanted; and (ii) obtain the requested substances or products from sources he called reputable. (*Id.*)

[1] Defendants De Sa, Mitchell, and Khattak are undergraduate students at defendant University and previously lived with Decedent at the TDX fraternity house on defendant University's campus. (FAC, ¶¶18 – 20.)

In the early evening hours of 15 January 2020, TDX's Resident Assistant ("RA"), Tim Michael ("Michael"), a student and member of the TDX fraternity who is employed by defendant University, learned that Decedent had lost both speaking and motor functions, symptoms of a Fentanyl overdose. (FAC, ¶39.) RA Michael contacted defendant University's Residence Dean ("RD") assigned to the TDX fraternity house to report the situation. (FAC, ¶40.) The RD directed RA Michael to dial 9-1-1, but did not take any immediate action, instead suggesting the RA contact the "on-call" RD, in violation of defendant University's Residential Education policies. (*Id.*)

When first responders arrived, Decedent declined further medical care. (FAC, ¶41.) Defendants De Sa, Mitchell, and Khattak actively concealed evidence and misled first responders and others regarding the presence of controlled substances within the TDX house, distribution of controlled substances from the TDX house, and their and Decedent's use of controlled substances. (*Id.*)

Defendant University took no further action even though the distribution, dispensation, possession, or use of a controlled substance violates campus policy. (FAC, ¶42.) Similarly, contrary to its own policies and procedures, TDX took no further action in response to Decedent's drug overdose on 15 January 2020. (FAC, ¶¶43 – 47.)

In the early morning hours of 17 January 2020, Decedent died of Fentanyl toxicity and blunt force trauma to his head. (FAC, ¶48.) In the bathroom where Decedent was found, on top of a paper towel dispenser, a responding officer observed an unknown blue powder. (FAC, ¶50.) One of the responding police officers discovered a pill bottle in Decedent's room containing several different types of pills, including a blue pill with an "M" outlined by a square on one side and a score mark with "30" above the line on the other side. (FAC, ¶51.) The color of the blue pill was similar to the powder observed on the paper towel dispenser in the bathroom where Decedent was found. (*Id.*) These pills match the description of pills that have been tied to several deaths involving Percocet laced with Fentanyl. (FAC, ¶52.)

Even after discovering a controlled substance inside the TDX fraternity house, neither defendant University nor TDX took any meaningful action. (FAC, ¶53.)

On 1 December 2020, defendant Carpenter provided law enforcement officers with a voluntary statement detailing his role in procuring controlled substances and facilitating their entry into and onto the defendant University campus. (FAC, ¶60.) Defendant Carpenter admitted to selling controlled substances such as Oxycontin and Percocet to various students, including Decedent and his TDX roommates, defendants De Sa, Mitchell, and Khattak. (Complaint, ¶62.) Defendant Carpenter obtained controlled substances through the "dark web," part of the internet not indexed by search engines and a hotbed of criminal activity. (FAC, ¶¶62 – 63.)

Defendant Carpenter routinely made transactions on the dark web on behalf of his customers and friends, priding himself on being an expert experienced in dealing with vendors on the dark web which allowed him to ensure he dealt with reputable sellers and obtained what was ordered and not something different. (FAC, ¶66.) Decedent and defendant Carpenter grew up together and were lifelong friends. (FAC, ¶67.) Decedent trusted and confided in defendant Carpenter. (*Id.*) Based on defendant Carpenter's professed expertise, Decedent reasonably believed defendant Carpenter would go the extra mile to make sure they purchased from a safe, trustworthy vendor on the dark web who would sell them substances that were in fact what they purported to be. (*Id.*) In early January 2020, Decedent and his TDX roommates, defendants De Sa, Mitchell, and Khattak, sought out defendant Carpenter's expertise and assistance in obtaining Percocet. (FAC, ¶68.) Defendant Carpenter agreed to obtain the specific substances sought on behalf of Decedent and his TDX roommates. (*Id.*)

Defendant Carpenter admitted he was concerned about counterfeit or fake Percocet coming into "other schools all over the place;" and about the trustworthiness of sources on the dark web. (FAC, ¶70.) Despite such knowledge and concerns, defendant Carpenter purchased the Percocet after purporting to research various vendors to make sure the purchase came from a safe and trusted source. (*Id.*) At no point did defendant Carpenter warn Decedent of his concerns regarding the spread of fake Percocet on university campuses, share his personal concerns regarding the dark web, or take any action to confirm the Percocet he acquired for Decedent was unadulterated. (FAC, ¶71.)

Defendant Carpenter arranged to have the pills mailed to Decedent and his TDX roommates at their fraternity house on defendant University campus. (FAC, ¶72.) In reliance on defendant Carpenter's experience and expertise in obtaining substance through the dark web, Decedent reasonably believed the substances received in the

mail were as represented, just Percocet. (FAC, ¶73.) Believing the Percocet obtained from defendant Carpenter was safe, Decedent ingested the substance, suffered an overdose and died. (FAC, ¶¶74 – 75.)

Defendant Carpenter agreed the pills he sold likely caused Decedent's death. (FAC, ¶¶17 and 77.) After Decedent's death, defendant Carpenter initially destroyed evidence linking him to Decedent's death, but ultimately admitted his guilt. (Complaint, ¶¶17 and 79 - 80.)

On 1 December 2021[2], plaintiffs Amir Weiner (Decedent's father), Julia Erwin-Weiner (Decedent's mother), and Ya'el Weiner (Decedent's sister) filed a complaint against defendants University, Theta Delta Chi Founders' Corporation ("TDX Corp"), Carpenter, De Sa, Khattak, and Mitchell asserting causes of action for:

(1) Wrongful Death (Plaintiffs Amir Weiner and Julia Erwin-Weiner against defendant University)

(2) Wrongful Death (Plaintiffs Amir Weiner and Julia Erwin-Weiner against defendant TDX Corp)

(3) Wrongful Death (Plaintiffs Amir Weiner and Julia Erwin-Weiner against defendants Carpenter, De Sa, Khattak, and Mitchell)

(4) California Drug Dealer Liability Act (All plaintiffs against defendants Carpenter, De Sa, Khattak, and Mitchell)

On 20 April 2022, defendant TDX Corp filed an answer to the plaintiffs' complaint and also filed a cross-complaint against Doe cross-defendants for (1) declaratory relief; (2) comparative indemnity and apportionment of fault; (3) total equitable indemnity; and (4) contribution.

On 3 June 2022, defendant Carpenter filed a demurrer to plaintiffs' complaint.

On 3 June 2022, defendant University filed an answer to the plaintiffs' complaint.

On 23 November 2022, the court issued an order sustaining defendant Carpenter's demurrer to the third cause of action, but overruling defendant Carpenter's demurrer to the fourth cause of action

On 10 January 2023, defendant TDX Corp filed its answer to the plaintiff's FAC.

On 17 January 2023, defendant Carpenter filed the motion now before the court, a demurrer to the plaintiffs' FAC.

On 8 February 2023[3], plaintiffs filled the operative FAC which continues to assert the same four causes of action found in the original complaint.

On 15 May 2023, the court issued an order (after hearing on 27 April 2023) sustaining, without leave to amend, defendant Carpenter's demurrer to the third cause of action of the plaintiffs' FAC.

On 8 May 2023, defendant Carpenter filed an answer to the plaintiff's FAC.

On 29 September 2023, defendant De Sa filed the first of five motions now before the court, a demurrer to the fourth cause of action of the plaintiffs' FAC.

On 2 October 2023, defendant TDX Corp. filed the second motion now before the court, a motion for summary judgment/ adjudication of the plaintiffs' FAC.

On 3 October 2023, defendant Mitchell filed the third motion now before the court, a demurrer to the plaintiffs' FAC.

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[2] 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).)

[3] The answer to FAC by defendant TDX Corp. and demurrer to FAC by defendant Carpenter both predate the filing of the FAC. It appears from the record that the court clerk rejected plaintiffs' attempt to file the FAC on 8 December 2022.

On 15 December 2023, defendant Khattak filed the fourth and fifth motions now before the court, a demurrer and motion to strike portions of the plaintiffs' FAC.

On or about 16 January 2024, plaintiffs filed an ex-parte application for an order continuing the hearing on defendant TDX Corp.'s motion for summary judgment/ adjudication pursuant to Code of Civil Procedure section 437c, subdivision (h).[4] Defendant TDX Corp. opposed plaintiffs' request for a continuance. On 24 January 2024, the court issued an order denying plaintiffs' application for a continuance.

II. Analysis.

A. Defendant TDX Corp.'s motion for summary judgment/ adjudication of the second cause of action [wrongful death] in plaintiffs' FAC by plaintiffs Amir Weiner and Julia Erwin-Weiner is DENIED.

"Wrongful death is a statutorily created cause of action for pecuniary loss brought by heirs against a person who causes the death of another by a wrongful act or neglect. It is original in nature and does not represent a right of action that the deceased would have had if the deceased had survived the injury. [Citations.] It is a cause of action for the heir who recovers for the pecuniary loss suffered on account of the death of the relative. [Citation.] In any action for wrongful death resulting from negligence, the complaint must contain allegations as to all the elements of actionable negligence. [Citation.] Negligence involves the violation of a legal duty imposed by statute, contract or otherwise, by the defendant to the person injured, e.g., the deceased in a wrongful death action." (*Jacoves v. United Merchandising Corp.* (1992) 9 Cal.App.4th 88, 105.)

Defendant TDX Corp. moves for summary judgment/ adjudication on the basis that it did not owe a duty of care to Decedent. "Recovery for negligence depends as a threshold matter on the existence of a legal duty of care." (*Brown v. USA Taekwondo* (2021) 11 Cal.5th 204, 213.) "[T]he existence of a duty is a question of law for the court." (*Kentucky Fried Chicken of California, Inc. v. Superior Court* (1997) 14 Cal.4th 814, 819.) "The question of whether a duty exists is a question of law and must be decided by the court on a case-by-case basis." (*Dutton v. City of Pacifica* (1995) 35 Cal.App.4th 1171, 1175.) "Whether a legal duty of care exists in a given factual situation is a question of law to be determined by the court, not the jury." (*Carleton v. Tortosa* (1993) 14 Cal.App.4th 745, 754.) "The existence and scope of duty are legal questions for the court." (*Coldwell Banker Residential Brokerage Co. v. Superior Court* (2004) 117 Cal.App.4th 158, 163."

In relevant part, the second cause of action of plaintiffs' FAC (the only cause of action directed against defendant TDX Corp.) alleges "[d]efendant TDX owed a duty of care to all reasonably foreseeable people, including Decedent … to provide a safe and healthy environment for students, members, pledges, charges, and employees, among others." (FAC, ¶107.)

The court will note that plaintiffs' FAC seemingly recognizes a distinction between TDX which is alleged to be a "fraternity house on the Stanford University campus" and TDX Corp. which is alleged to be a "Massachusetts corporation that operates the Eta Deuteron Chapter formerly located on the campus of Stanford University. TDX Corp. supervises, manages, and directs its individual chapters or charges by promulgating rules, regulations, and requirements with respect to alcohol and drugs, hazing, sexual assault and violence, and academic standards, among other things. TDX Corp. also collects initiation fees for all new members as well as service fees payable by each chapter or charge on a yearly basis. As of the filing of this Complaint, the Stanford Chapter appears under TDX's list of 'active charges' on its website with the notation that it has been 'suspended.'" (FAC, ¶¶1 and 16.) Read together, paragraphs 1 and 16 amount to an apparent recognition by plaintiffs that TDX refers to the local chapter at defendant University whereas TDX Corp. refers to a separate and distinct national organization.

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[4] Code of Civil Procedure section 437c, subdivision (h) states, in pertinent part, that, "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just."

Despite this apparent recognition, plaintiffs' FAC refers to TDX and TDX Corp. interchangeably as is apparent from the charging allegation, above, of the second cause of action. While the caption identifies defendant TDX ***Corp.*** as the target of the second cause of action, plaintiffs allege it is "defendant TDX" which owed a duty of care. In moving for summary judgment/ adjudication of the second cause of action, defendant TDX Corp. emphasizes the distinction to argue that it, as a national fraternal organization, owed no duty to Decedent.

Defendant TDX Corp. relies principally upon *Barenborg v. Sigma Alpha Epsilon Fraternity* (2019) 33 Cal.App.5th 70, 77 (*Barenborg*) which upheld the granting of summary judgment and finding that a national fraternity did not owe a duty to plaintiff who was injured at a party hosted by a local chapter of the defendant national fraternity. The local chapter was a separate legal entity, distinct from the defendant national fraternity, and there was no factual basis for the *Barenborg* court to deviate from the general rule that that national fraternity had no duty to act to protect others (plaintiff) from the conduct of third parties (the local chapter). Although a duty may arise based on the existence of a special relationship between the defendant and the third party, the *Barenborg* court concluded no such special relationship existed between a national fraternity and its local chapter.

> Two themes emerge from the decisions finding no special relationship between national fraternities and local chapters. First, courts have concluded that the existence of general policies governing the operation of local chapters and the authority to discipline them for violations does not justify imposition of a duty on national fraternities.
>
> …
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> Second, courts have recognized that national fraternities cannot monitor the day-to-day activities of local chapters contemporaneously, and have concluded that absent an ability to do so, there can be no duty to control.
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> …
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> Absent an ability to monitor the day-to-day operations of local chapters, the authority to discipline generally will not afford a national fraternity sufficient ability to prevent the harm and thus will not place it in a unique position to protect against the risk of harm.

(*Barenborg*, *supra*, 33 Cal.App.5th at pp. 79 – 80.)

Defendant TDX Corp. proffers the following facts in support of its assertion that it did not owe a duty to protect Decedent against any negligence by the local chapter (TDX/ Eta Deuteron Charge) in this instance: TDX Corp. is a 501(c)(2) nonprofit organization [and since March 2006] organized under the laws of Massachusetts.[5] TDX Corp.'s function is to make investments in bonds, securities, mutual funds and other investments, which it turns over to the Grand Lodge of Theta Delta Chi to assist in its annual operating budget.[6] The alleged fraternity house where Plaintiffs allege Decedent suffered his fatal overdose, located on defendant University's campus, has never been owned, operated, rented, managed, leased, or possessed by defendant TDX Corp.[7] TDX Corp. does not issue charters to any of the Charges, including the former Charge at defendant University – Eta Deuteron Charge – and has never been involved in that process.[8] TDX Corp. does not issue and has never issued any rules, regulations, or policies which apply to any Charges or their members, including the Eta Deuteron.[9] TDX Corp. did not devise the Crisis Management Plan which applied to any Charges or their members, including Eta Deuteron.[10] TDX Corp. does not receive and has not received any annual fees or dues from any Charges or their members, including Eta

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[5] See Defendant TDX Corp.'s Separate Statement of Undisputed Material Facts in Support of its Motion for Summary Judgment or, in the Alternative, for Summary Adjudication ("TDX Corp. UMF"), Issue No. 1, Fact No. 1.

[6] See TDX Corp. UMF, Issue No. 1, Fact Nos. 2 – 3.

[7] See TDX Corp. UMF, Issue No. 1, Fact No. 4.

[8] See TDX Corp. UMF, Issue No. 1, Fact No. 5.

[9] See TDX Corp. UMF, Issue No. 1, Fact No. 6.

[10] See TDX Corp. UMF, Issue No. 1, Fact No. 7.

Deuteron.[11] TDX Corp. does not engage in, and has never engaged in, day-to-day communications with any Charges, including Eta Deuteron.[12] TDX Corp. does not and has never managed, supervised, or overseen the daily activities of any Charges or their members, including Eta Deuteron.[13] TDX Corp. has never had any disciplinary power over any Charges, including Eta Deuteron, or any members or officers of any Charge.[14] No Charge, including Eta Deuteron, has the authority to act as an agent of TDX Corp.[15]

In opposition, plaintiffs argue preliminarily that the court should, on its own motion[16], reconsider its decision to deny plaintiffs' earlier ex-parte application for a continuance. This court has already rendered a decision on plaintiffs' application for continuance and declines to reconsider that ruling on its own motion.

Plaintiffs argue next that defendant TDX Corp. has not met its initial burden because the evidence cited by defendant TDX Corp. is based exclusively upon the declaration of Brian Bertges ("Bertges"). Plaintiffs object to Bertges's declaration on the ground that his statements lack the requisite foundation to establish that Bertges has personal knowledge.[17] In Bertges's declaration, the only statement Bertges provides to support his personal knowledge is the statement by Bertges that he is "the Resident Agent for the Defendant Theta Delta Chi Founders' Corporation … and [has] held this role since August 24, 2017." Plaintiffs contend such a statement is insufficient since it offers no explanation as to what the role of Resident Agent entails.

By defendant TDX Corp.'s own assertion that it is organized under the laws of Massachusetts, a search for the term "Resident Agent" reveals the following explanation found at Mass. Ann. Laws ch. 156B, § 49 which states, in relevant part:

> Any corporation may by vote of its directors appoint a resident agent as its true and lawful attorney upon whom all lawful processes in any action or proceeding against such corporation may be served. Such resident agent shall be either an individual who is a resident of and has a business address in the commonwealth, a corporation organized under the laws of the commonwealth or a corporation organized under the laws of any other state of the United States which has complied with section 15.03 of subdivision A of Part 15 of chapter 156D and which has an office in the commonwealth.

Even so, the court would agree with plaintiffs that Bertges has not adequately shown that he has personal knowledge of the operations of defendant TDX Corp. based simply on an assertion that Bertges is (and has since 24

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[11] See TDX Corp. UMF, Issue No. 1, Fact No. 8.

[12] See TDX Corp. UMF, Issue No. 1, Fact No. 9.

[13] See TDX Corp. UMF, Issue No. 1, Fact No. 10.

[14] See TDX Corp. UMF, Issue No. 1, Fact No. 11.

[15] See TDX Corp. UMF, Issue No. 1, Fact No. 12.

[16] In *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1108, the California Supreme Court concluded that Code of Civil Procedure section 1008 does not limit a court's ability to reconsider a previous interim order ***on its own motion***, if it gives notice to the parties that it may do so and provides a reasonable opportunity to litigate the question.

[17] "Supporting and opposing affidavits or declarations shall be made by a person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations." (Code Civ. Proc., §437c, subd. (d).)

"[T]he testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter." (Evid. Code, § 702.)

"Except to the extent that an expert may give testimony not based on personal knowledge, under Evidence Code section 702, subdivision (a), which codifies a long-existing rule of evidence, the testimony of every witness, whether expert or lay, concerning facts to which he testifies is inadmissible unless he has personal knowledge of those facts." (*People v. Southern Cal. Edison Co.* (1976) 56 Cal.App.3d 593, 606.)

August 2017 been) a "resident agent" for the corporation.[18] While Bertges may have established personal knowledge to testify concerning issues related to service of process against defendant TDX Corp., Bertges has not established personal knowledge to testify concerning defendant TDX Corp.'s ability to monitor the day-to-day operations of local chapters which is the relevant issue in this motion for summary judgment/ adjudication. Consequently, defendant TDX Corp. has not met its initial burden of showing that it did not owe a duty of care to Decedent.

The court declines to address defendant TDX Corp.'s additional arguments regarding vicarious liability and premises liability. As defendant TDX Corp. itself recognizes, vicarious liability and premises liability are alternative theories of liability. As against defendant TDX Corp., summary judgment or summary adjudication of the second cause of action "shall be granted only if it completely disposes of a cause of action." (Code Civ. Proc., §437c, subd. (f).) Since defendant TDX Corp. has not eliminated the primary theory of liability, summary judgment/ adjudication of the second cause of action is not available even if defendant TDX Corp. eliminated vicarious liability and premises liability.

For the reasons discussed above, defendant TDX Corp.' motion for summary judgment or, in the alternative, summary adjudication of the second cause of action in plaintiffs' FAC by plaintiffs Amir Weiner and Julia Erwin-Weiner is DENIED.

B. Defendant De Sa's demurrer to the fourth cause of action [California Drug Dealer Liability Act] in plaintiffs' FAC is OVERRULED.

Plaintiffs' fourth cause of action asserts a claim under the Drug Dealer Liability Act ("DDLA") found at Health & Safety Code sections 11700, et seq.

> The purpose of this division is to provide a civil remedy for damages to persons in a community injured as a result of the use of an illegal controlled substance. These persons include parents, employers, insurers, governmental entities, and others who pay for drug treatment or employee assistance programs, as well as infants injured as a result of exposure to controlled substances in utero ("drug babies"). This division will enable them to recover damages from those persons in the community who have joined the marketing of illegal controlled substances. A further purpose of this division is to shift, to the extent possible, the cost of the damage caused by the existence of the market for illegal controlled substances in a community to those who illegally profit from that market. The further purpose of this division is to establish the prospect of substantial monetary loss as a deterrent to those who have not yet entered into the distribution market for illegal controlled substances. The further purpose is to establish an incentive for users of illegal controlled substances to identify and seek payment for their own treatment from those dealers who have sold illegal controlled substances to the user in the past.

(Health & Saf. Code, §11701.)

> The Legislature finds and declares all of the following:
>
> (a) Although the criminal justice system is an important weapon against the marketing of illegal controlled substances, the civil justice system can and must also be used. The civil justice system can provide an avenue of compensation for those who have suffered harm as a result of the marketing and distribution of illegal controlled substances. The persons who have joined the marketing of illegal controlled substances should bear the cost of the harm caused by that market in the community.

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[18] Accordingly, Plaintiffs' Objections to Evidence Submitted by Defendant TDX Corp. in Support of its Motion for Summary Judgment or in the Alternative, Summary Adjudication, nos. 2 and 4 – 12, based upon lack of personal knowledge are SUSTAINED. The court declines to rule on objection numbers 1, 3, and 13 – 19 as the court did not deem the evidence material to its disposition. "In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review." (Code Civ. Proc., §437c, subd. (q).)

(b) The threat of liability under this division serves as an additional deterrent to a recognizable segment of the network for illegal controlled substances. A person who has assets unrelated to the sale of illegal controlled substances, who markets illegal controlled substances at the workplace, who encourages friends to become users, among others, is likely to decide that the added cost of entering the market is not worth the benefit. This is particularly true for a first–time, casual dealer who has not yet made substantial profits. This division provides a mechanism for the cost of the injury caused by illegal drug use to be borne by those who benefit from illegal drug dealing.

(c) This division imposes liability against all participants in the marketing of illegal controlled substances, including small dealers, particularly those in the workplace, who are not usually the focus of criminal investigations. The small dealers increase the number of users and are the people who become large dealers. These small dealers are most likely to be deterred by the threat of liability.

(Health & Saf. Code, §11702.)

"A person who knowingly participates in the marketing of illegal controlled substances within this state is liable for civil damages as provided in this division. A person may recover damages under this division for injury resulting from an individual's use of an illegal controlled substance." (Health & Saf. Code, §11704, subd. (a).)

"A person entitled to bring an action under this section may seek damages from one or more of the following: (1) A person who sold, administered, or furnished an illegal controlled substance to the individual user of the illegal controlled substance." (Health & Saf. Code, §11705, subd. (b)(1).)

In demurring, defendant De Sa acknowledges the FAC includes allegations that he (along with defendants Mitchell and Khattak) "furnished" and "administered" controlled substances to Decedent (FAC, ¶141), but contend such allegations should be ignored presumably as they are in conflict or inconsistent[19] with other allegations that Decedent, De Sa, Mitchell, and Khattak purchased the illegal controlled substance from defendant Carpenter (FAC, ¶38; see also ¶115 – 116—"In the early weeks of January 2020, Defendants Cole Dill-De Sa, William Mitchell, and Muhammad Khattak, along with Decedent Eitan Weiner, agreed to purchase a number of controlled substances, including Percocet. This group purchase was arranged through Defendant Matthew Ming Carpenter…;" see also ¶138—"Decedent[,] De Sa, Mitchell, and Khattak received the package containing the controlled substances procured and sold by Defendant Carpenter…;" see also ¶140—"De Sa, Khattak and Mitchell obstructed, obfuscated, and otherwise misled first responders and others regarding their ***collective purchase*** of controlled substances….").

In opposition, plaintiffs apparently maintain that despite the allegations that Decedent, De Sa, Mitchell, and Khattak collectively purchased the illegal controlled substance from defendant Carpenter, it remains factually possible for De Sa to be liable because Health and Safety Code section 11705, subdivision (b)(1) provides liability not only against the person who sold the illegal controlled substance, but against the person who "administered" or "furnished" the illegal controlled substance to, in this case, Decedent. Plaintiffs offer dictionary definitions of the terms "administer" and "furnish" as meaning "to provide."[20] It is within the realm of factual possibility that collective

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[19] "While inconsistent theories of recovery are permitted [citation], a pleader cannot blow hot and cold as to the facts positively stated. [Citations.]" (*Manti v. Gunari* (1970) 5 Cal.App.3d 442, 449.)

[20] "The cardinal rule governing statutory interpretation is to 'ascertain the legislative intent so as to effectuate the purpose of the law. [Citations.]' [Citations.] 'If the statutory language is unambiguous, legislative intent is determined from the plain meaning of the language itself. [Citations.]' [Citation.] " (*Campbell v. Arco Marine, Inc.* (1996) 42 Cal.App.4th 1850, 1856.)

> [Under] well-settled principles of statutory interpretation … "we first look to the plain meaning of the statutory language, then to its legislative history and finally to the reasonableness of a proposed construction." [Citation.]
>
> Under the first step, we look to the chosen words in the statute as they are the most reliable indicator of the Legislature's intent. "We give the words of the statute 'a plain and commonsense meaning' unless the statute specifically defines the words to give them a special meaning. [Citations.] If the statutory language is clear and unambiguous, our task is at an end, for there is no need for judicial construction." [Citation.]

purchasers of an illegal drug divide it amongst themselves. Thereafter, it is possible that one of the original purchasers "furnishes" the illegal drug to a friend. As plaintiffs point out, the statutory scheme recognizes that a threat of liability would deter someone "who encourages friends to become users" even if they are not a seller. It is also possible that when one person in a collective group purchase of an illegal drug uses up his/her entire share, another purchaser may "furnish" or "administer" some of his share to the other. Such an event may have occurred here. Since this is a demurrer, the court must accept the truth of plaintiffs' allegations. That defendant De Sa is alleged to have been part of a group of individuals who purchased the illegal controlled substance from defendant Carpenter does not preclude plaintiffs from seeking liability against defendant De Sa for thereafter furnishing or administering the illegal controlled substance.

Accordingly, defendant De Sa's demurrer to the fourth cause of action in plaintiffs' FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for a violation of the Drug Dealer Liability Act or on the ground that the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is OVERRULED.

C. Defendant Mitchell's demurrer to plaintiffs' FAC.

1. Defendant Mitchell's demurrer to the third cause of action [wrongful death] in plaintiffs' FAC is OVERRULED.

According to the plaintiffs' FAC, defendant Mitchell "owed a duty of care to all reasonably foreseeable people, including Decedent Eitan Weiner, to warn against, prevent, and report the use and consumption of controlled substances while residing in the TDX house on Stanford's campus." (FAC, ¶127.) Similar to defendant TDX Corp., defendant Mitchell demurs to the third cause of action for wrongful death on the ground that he did not owe such a duty to Decedent.

> Duty is not universal; not every defendant owes every plaintiff a duty of care. A duty exists only if "'the plaintiff's interests are entitled to legal protection against the defendant's conduct.'" (*Dillon v. Legg* (1968) 68 Cal.2d 728, 734 [69 Cal. Rptr. 72, 441 P.2d 912], quoting Prosser, Torts (3d ed. 1964) § 53, p. 332.) Whether a duty exists is a question of law to be resolved by the court. (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 397 [11 Cal. Rptr. 2d 51, 834 P.2d 745].)
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> The "general rule" governing duty is set forth in Civil Code section 1714 (section 1714). (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 771 [122 Cal. Rptr. 3d 313, 248 P.3d 1170] (*Cabral*).) First enacted in 1872, section 1714 provides: "Everyone is responsible … for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person … ." (*Id.*, subd. (a).) This statute establishes the default rule that each person has a duty "to exercise, in his or her activities, reasonable care for the safety of others." (*Cabral*, at p. 768.)
>
> Section 1714 states a broad rule, but it has limits. We have explained that the law imposes a general duty of care on a defendant only when it is the defendant who has "'created a risk'" of harm to the plaintiff, including when "'the defendant is responsible for making the plaintiff's position worse.'" (*Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 716 [110 Cal. Rptr. 2d 528, 28

> However, as our high court held, "the 'plain meaning' rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute. The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and the provisions relating to the same subject matter must be harmonized to the extent possible." [Citation.] Moreover, the plain meaning of the statute is not to be followed when it would "frustrate[] the manifest purposes of the legislation as a whole or [lead] to absurd results." [Citation.]
>
> If an analysis of the plain meaning of the statute does not resolve the issue, courts then proceed to the second step of the inquiry, which includes looking at the statute's legislative history, among other extrinsic aids, to assist with statutory interpretation. [Citation.]

(*290 Division (EAT), LLC v. City and County of San Francisco* (2022) 86 Cal.App.5th 439, 453.)

> P.3d 249], quoting *Weirum v. RKO General, Inc.* (1975) 15 Cal.3d 40, 49 [123 Cal. Rptr. 468, 539 P.2d 36]; see *Lugtu*, at p. 716 ["Under general negligence principles, … a person ordinarily is obligated to exercise due care in his or her own actions so as not to create an unreasonable risk of injury to others … ." (Citing § 1714)].) The law does not impose the same duty on a defendant who did not contribute to the risk that the plaintiff would suffer the harm alleged. Generally, the "person who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another" from that peril. (*Williams v. State of California* (1983) 34 Cal.3d 18, 23 [192 Cal. Rptr. 233, 664 P.2d 137] (*Williams*); accord, *Weirum*, at p. 49; see Rest.3d Torts, Liability for Physical and Emotional Harm (2012) § 37 (hereafter Restatement Third of Torts) [Generally, "[a]n actor whose conduct has not created a risk of physical or emotional harm to another has no duty of care to the other."].) For example, a person who stumbles upon someone drowning generally has no legal duty to help the victim. The same rule applies to a person who stumbles upon a mugging, for "as a general matter, there is no duty to act to protect others from the conduct of third parties." (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 235 [30 Cal. Rptr. 3d 145, 113 P.3d 1159] (*Delgado*); see also *Regents*, *supra*, 4 Cal.5th at p. 619 [Generally, "'one owes no duty to control the conduct of another, nor to warn those endangered by such conduct.'"].)

(*Brown v. USA Taekwondo* (2021) 11 Cal.5th 204, 213-214 (*Brown*).)

In *Brown*, the California Supreme Court addressed "how courts should decide whether a defendant has a legal duty to take action to protect the plaintiff from injuries caused by a third party." (*Brown*, *supra*, 11 Cal.5th at p. 209.) The Court in *Brown* stated the proper legal framework requires: "First, the court must determine whether there exists a special relationship between the parties or some other set of circumstances giving rise to an affirmative duty to protect. Second, if so, the court must consult the factors described in Rowland to determine whether relevant policy considerations counsel limiting that duty." (*Id.*)

However, the framework discussed in *Brown* applies in determining "whether a defendant has a legal duty to take action to protect the plaintiff ***from injuries caused by a third party***," not where it is alleged that the defendant's conduct created the risk of harm to plaintiff. Here, without citation to any relevant legal authority, defendant Mitchell asserts there is no allegation of a special relationship between him and Decedent. As to defendant Mitchell, the existence of a special relationship with Decedent is not relevant and not part of the analysis the court undertakes since Decedent's death/injury is alleged to be the proximate result of defendant Mitchell's conduct.

Defendant Mitchell also attempts to delimit his role as a mere "co-purchaser" of a controlled substance. However, the allegations of the FAC go much further and, in relevant part, specifically allege defendant Mitchell "actively concealed evidence and misled first responders and others regarding the presence of controlled substances within the TDX house … and [his] and [Decedent's] use of controlled substances." (FAC, ¶41.) Defendant Mitchell has not persuaded this court to conclude, as a matter of law, that he owed no duty to report the use and consumption of controlled substances.

Accordingly, defendant Mitchell's demurrer to the third cause of action in plaintiffs' FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for wrongful death is OVERRULED.

2. Defendant Mitchell's demurrer to the fourth cause of action [California Drug Dealer Liability Act] in plaintiffs' FAC is SUSTAINED.

In demurring to plaintiffs' fourth cause of action, defendant Mitchell contends plaintiffs' claim is barred as untimely by Health & Safety Code section 11714 which states,

> (a) Except as otherwise provided in this section, a claim under this division shall not be brought more than one year after the defendant furnishes the specified illegal controlled substance. A cause of action accrues under this division when a person who may recover has reason to know of the harm from use of an illegal controlled substance that is the basis for the cause of action and has reason to know that the use of an illegal controlled substance is the cause of the harm.

(b) For a defendant, the statute of limitations under this section does not expire until one year after the individual potential defendant is convicted of a criminal offense involving an illegal controlled substance or as otherwise provided by law.

As is apparent from the plain language, subdivision (b) operates as an exception to subdivision (a). Since there is no allegation that defendant Mitchell was convicted of a criminal offense involving an illegal controlled substance, defendant Mitchell contends only subdivision (a) can apply. The FAC alleges defendant Mitchell "furnished" the controlled substance to Decedent no later than 17 January 2020 and since plaintiffs did not commence this action until more than one year later on 1 December 2021, defendant Mitchell contends the fourth cause of action is barred.

A court may sustain a demurrer on the ground of failure to state sufficient facts if "the complaint shows on its face the statute [of limitations] bars the action." (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1315.) A demurrer is not sustainable on statute of limitations grounds if there is only a possibility that the cause of action is time-barred; the defense must be clearly and affirmatively apparent from the allegations of the pleading [and matters of which the court may properly take judicial notice]. (*Id.*, at pp. 1315-1316.)[21]

In opposition, plaintiffs apparently suggest they must know the identity of the defendant before the cause of action accrues. However, Health and Safety Code section 11714 does not state that the cause of action accrues when a person who may recover has reason to know of the identity of the defendant. Instead, it states only that the cause of action accrues "when a person who may recover has reason to know of the harm from use of an illegal controlled substance that is the basis for the cause of action and has reason to know that the use of an illegal controlled substance is the cause of the harm." Plaintiffs' delayed discovery of the identify of defendants is not determinative.

Plaintiffs argue, additionally, that defendant Mitchell ought to be equitably estopped from asserting a statute of limitations defense based on his active concealment of drug use, his own and the Decedent's on or about 15 January 2020. "A defendant will be estopped to invoke the statute of limitations where there has been 'some conduct by the defendant, relied on by the plaintiff, which induces the belated filing of the action.' It is not necessary that the defendant acted in bad faith or intended to mislead the plaintiff. It is sufficient that the defendant's conduct in fact induced the plaintiff to refrain from instituting legal proceedings. 'Whether an estoppel exists—whether the acts, representations or conduct lulled a party into a sense of security preventing him from instituting proceedings before the running of the statute, and whether the party relied thereon to his prejudice—is a question of fact and not of law.'" (*Shaffer v. Debbas* (1993) 17 Cal.App.4th 33, 43.)

Even so, plaintiffs seemingly concede in opposition that "there was evidence that [Decedent's] death was caused by the ingestion of a controlled substance on January 17, 2020, when his body was discovered…."[22] Moreover, while it is alleged that defendant Mitchell actively concealed the existence and use of a controlled substance on 15 January 2020 from ***"first responders and others"*** when Decedent initially overdosed, there is no allegation or any inference therefrom that defendant Mitchell's conduct actually and reasonably induced ***plaintiffs*** to believe, after January 17, 2020, that Decedent's use of a controlled substance was not a cause of Decedent's harm. (See *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 385—"plaintiffs have pled no facts indicating that defendants' conduct directly prevented them from filing their suit on time.")

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[21] See also *Heshejin v. Rostami* (2020) 54 Cal.App.5th 984, 992-993: "'[A] demurrer based on an affirmative defense will be sustained only where the face of the complaint discloses that the action is necessarily barred by the defense.'" (*Stella v. Asset Management Consultants, Inc.* (2017) 8 Cal.App.5th 181, 191 [213 Cal. Rptr. 3d 850]; accord, *Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1191 [151 Cal. Rptr. 3d 827, 292 P.3d 871] [application on demurrer of affirmative defense of statute of limitations based on facts alleged in a complaint is a legal question subject to de novo review]; *Favila v. Katten Muchin Rosenman LLP* (2010) 188 Cal.App.4th 189, 224 [115 Cal. Rptr. 3d 274] ["'It must appear clearly and affirmatively that, upon the face of the complaint [and matters of which the court may properly take judicial notice], the right of action is necessarily barred.'"].)

[22] See page 12, line 27 to page 13, line 1 of the Memorandum of Points and Authorities in Support of Plaintiffs' Opposition to Mitchell's Demurrer to the Third and Fourth Causes of Action.

Accordingly, defendant Mitchell's demurrer to the fourth cause of action in plaintiffs' FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for a violation of the Drug Dealer Liability Act (i.e., barred by the applicable statute of limitations) is SUSTAINED with 10 days' leave to amend.

D. Defendant Khattak's demurrer to plaintiffs' FAC.

1. Defendant Khattak's demurrer to the third cause of action [wrongful death] in plaintiffs' FAC is OVERRULED.

For the same reasons discussed in connection with defendant Mitchell's demurrer to the third cause of action, defendant Khattak's demurrer to the third cause of action in plaintiffs' FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for wrongful death is OVERRULED.

2. Defendant Khattak's demurrer to the fourth cause of action [wrongful death] in plaintiffs' FAC is OVERRULED.

For the same reasons discussed in connection with defendant De Sa's demurrer to the fourth cause of action, defendant Khattak's demurrer to the fourth cause of action in plaintiffs' FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for a violation of the Drug Dealer Liability Act or on the ground that the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is OVERRULED.

E. Defendant Khattak's motion to strike plaintiff's FAC is DENIED.

Defendant Khattak's moves to strike plaintiffs' allegations prayer for punitive damages. Defendant Khattak concedes Health and Safety Code section 11705, subdivision (d)(3) entitles a person entitled to bring an action under the Drug Dealer Liability Act may recover exemplary damages.[23] Even so, defendant Khattak contends plaintiffs have not sufficiently alleged a factual basis for exemplary damages. Pursuant to Civil Code section 3294, punitive damages may be recovered "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice."

In *G.D. Searle & Co. v. Superior Court* (1975) 49 Cal.App.3d 22, 26 (*Searle*), the court wrote, "In California the award of damages by way of example or punishment is controlled by Civil Code section 3294, which authorizes that kind of award against a tortfeasor who has been guilty of 'oppression, fraud or malice, express or implied.'" "Notwithstanding relaxed pleading criteria, certain tortious injuries demand firm allegations. Vague, conclusory allegations of fraud or falsity may not be rescued by the rule of liberal construction. When the plaintiff alleges an intentional wrong, a prayer for exemplary damage may be supported by pleading that the wrong was committed willfully or with a design to injure. When nondeliberate injury is charged, allegations that the defendant's conduct was wrongful, willful, wanton, reckless or unlawful do not support a claim for exemplary damages; such allegations do not charge malice." (*Id.* at p. 29; internal citations omitted.)

"Punitive damage allegations cannot be pleaded generally. The complaint must allege facts showing statutory 'oppression,' 'malice' or 'fraud' (Civil Code §3294(a), (c))." (Flahavan, Rea & Kelly, CAL. PRAC. GUIDE: PERSONAL INJURY (The Rutter Group 2005) ¶5:428, p. 5-165.) "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 citing *Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6 – 7.)

"'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others."

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[23] "A person entitled to bring an action under this section may recover all of the following damages: … Exemplary damages." (Health & Saf. Code, §11705, subd. (d)(3).)

(Civil Code §3294, subd. (c)(1).) To plead a "willful and conscious disregard of the rights of others," a plaintiff need only allege, "that the defendant was aware of the probable dangerous consequences of his conduct, and that he willfully and deliberately failed to avoid those consequences." (*Lackner v. North* (2006) 135 Cal.App.4th 1188, 1211 (*Lackner*).)

In the FAC, there are no allegations that defendant Khattak intended to cause injury to Decedent. Instead, plaintiffs contend defendant Khattak acted with a willful and conscious disregard of the rights or safety of others, including Decedent, because it is alleged that defendant Khattak knew Decedent suffered an overdose on 15 January 2020 and it is reasonably inferred defendant Khattak knew Decedent's overdose occurred as a direct result of the illegal controlled substance purchased by defendant Khattak and Decedent and others since defendant Khattak intentionally concealed his and Decedent's usage of controlled substances. (FAC, ¶140.) This is a sufficient allegation that defendants were aware of the probable dangerous consequences, but to constitute malice, plaintiff must also make an allegation that defendant thereafter "willfully and deliberately failed to avoid those consequences." (*Lackner*, *supra*, 135 Cal.App.4th at p. 1211.) In *Ford Motor Co. v. Home Ins. Co.* (1981) 116 Cal.App.3d 374, 381, the court wrote, "Nonintentional conduct comes within the definition of malicious acts punishable by the assessment of punitive damages when a party ***intentionally*** performs an act from which he knows, or should know, it is highly probable that harm will result." (Emphasis added.) Plaintiffs go on to allege that, despite knowledge of Decedent's overdose on 15 January 2020, defendant Khattak thereafter furnished, administered, and distributed controlled substances to Decedent. (FAC, ¶141.) The court can reasonably infer from this allegation a deliberate failure to avoid known probable dangerous consequences.

The definition of malice also requires that the conduct be despicable and it is defendant Khattak's contention that the conduct attributed to him in the FAC was not despicable. "'Despicable conduct' has been described as conduct which is so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people. [Citation.] Such conduct has been described as '[having] the character of outrage frequently associated with crime.'" (*American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1050.) "[I]n cases involving conduct performed without intent to harm, a finding of 'malice' for punitives purposes requires proof by clear and convincing evidence that defendant's tortious wrong amounted to 'despicable conduct' and that such despicable conduct was carried on with a 'willful and conscious disregard' of the rights or safety of others." (See *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704 (*College Hospital*).)

> "Malice" is defined 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." [Citation.] As noted earlier, the italicized words were added by the 1987 Reform Act. We assume they are not surplusage. [Citation.]
>
> By adding the word "willful" to the "conscious-disregard" prong of malice, the Legislature has arguably conformed the literal words of the statute to existing case law formulations. [Citation.] However, the statute's reference to "despicable" conduct seems to represent a new substantive limitation on punitive damage awards. Used in its ordinary sense, the adjective "despicable" is a powerful term that refers to circumstances that are "base," "vile," or "contemptible." [Citation.] As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, "malice" requires more than a "willful and conscious" disregard of the plaintiffs' interests. The additional component of "despicable conduct" must be found.

(*College Hospital*, *supra*, 8 Cal.4th at p. 725.)

"Punitive damages are appropriate if the defendant's acts are reprehensible, fraudulent or in blatant violation of law or policy. The mere carelessness or ignorance of the defendant does not justify the imposition of punitive damages.... Punitive damages are proper only when the tortious conduct rises to levels of extreme indifference to the plaintiff's rights, a level which decent citizens should not have to tolerate." (*Lackner*, *supra*, 135 Cal.App.4th at p. 1210.) In *Lackner*, the court held, as a matter of law, that a snowboarder who struck a skier while racing through a rest area did not engage in despicable conduct.

> Applying these criteria, we find the evidence is insufficient as a matter of law to show that North's conduct was despicable and that he acted with base or evil intent. It is undisputed that North did not intentionally hit Lackner and that when he saw her, he desperately attempted to avoid

> hitting her but lost control and was unable to do so. While North was traveling at a high rate of speed, Mammoth did not prohibit racing on an advanced run and no signs were posted warning skiers to slow down. Skiing conditions were very good at the time. The snow was good, the visibility was excellent, and the run was largely deserted. Given North's level of expertise and the conditions on the mountain, his speed alone was not despicable. While his decision to race through the rest area may have been reckless, as a practical or technical matter, he was not out of control until he saw Lackner and attempted to avoid hitting her. His error was in snowboarding at a high rate of speed without looking in the direction he was heading. However, when he did see her, he attempted to avoid hitting her, which is entirely inconsistent with evil or criminal intent.

(*Id.* at p. 1213.)

At the pleading stage, the court cannot determine, as a matter of law, whether defendant Khattak's conduct in continuing to furnish, administer, and distribute controlled substance to Decedent despite knowledge of Decedent's overdose from that very controlled substance amounts to despicable conduct. Without a fully developed set of facts, the court declines to make such a determination as a matter of law.

Accordingly, defendant Khattak's motion to strike prayer for punitive damages from plaintiffs' FAC is DENIED.

III. Tentative Ruling.

The tentative ruling was duly posted.

IV. Case Management.

Deferred.

V. Order.

Defendant TDX Corp.' motion for summary judgment or, in the alternative, summary adjudication of the second cause of action in plaintiffs' FAC by plaintiffs Amir Weiner and Julia Erwin-Weiner is DENIED.

Defendant De Sa's demurrer to the fourth cause of action in plaintiffs' FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for a violation of the Drug Dealer Liability Act or on the ground that the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is OVERRULED.

Defendant Mitchell's demurrer to the third cause of action in plaintiffs' FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for wrongful death is OVERRULED.

Defendant Mitchell's demurrer to the fourth cause of action in plaintiffs' FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for a violation of the Drug Dealer Liability Act (i.e., barred by the applicable statute of limitations) is SUSTAINED with 10 days' leave to amend.

Defendant Khattak's demurrer to the third cause of action in plaintiffs' FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for wrongful death is OVERRULED.

Defendant Khattak's demurrer to the fourth cause of action in plaintiffs' FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for a violation of the Drug Dealer Liability Act or on the ground that the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is OVERRULED.

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Defendant Khattak's motion to strike prayer for punitive damages from plaintiffs' FAC is DENIED.

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

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

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(For Clerk's Use Only)

CASE NO.: 21CV383107 **Giuliani Construction and Restoration, Inc. v. Rancho HOA, et al.**
DATE: 8 February 2024 **TIME: 9:00 am** **LINE NUMBER: 7**

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 07 February 2024. Please specify the issue to be contested when calling the Court and Counsel.

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Order On Giuliani Construction And Restoration's Motion For Summary Adjudication.

I. Statement of Facts.

Complaint

Plaintiff Giuliani Construction and Restoration, Inc. ("GCR") is a licensed general contractor. (Complaint, ¶1.) Defendant Rancho Homeowners Association ("HOA") is a homeowners' association comprised of eight condominium units, designated A through H, within a single building located at 95 Rancho Drive in San Jose ("Property"). (Complaint, ¶3.) Defendant Albert Yeong ("Yeong") resides at Unit F of the Property and is a member of defendant HOA. (Complaint, ¶5.)

In or about 2018, the Property suffered damage caused by a water leak. (Complaint, ¶8.) The leak originated in one of the units at the Property but damaged a substantial portion of the building. (*Id.*) In or about March 2018, defendant HOA, by and through its Chief Executive Officer Sergio Gonzalez, contracted with plaintiff GCR to repair the water damage as it related to the structure of the building but not the interior of the individual condominium units ("Project"). (Complaint, ¶¶4 and 9.) Defendant HOA made payments to plaintiff GCR through September 2020, but ceased all further payments thereafter leaving the amount of $95,000 due and owing for work performed. (Complaint, ¶10.)

Some individual owners of units at the Property entered into separate contracts with plaintiff GCR for the interior. (Complaint, ¶11.) Defendant Yeong was one such owner who contracted with plaintiff GCR for work on the interior of his unit F. (Complaint, ¶12.) More than one year after completion of the Project, defendant Yeong made allegations against plaintiff GCR for defective work. (*Id.*) However, defendant Yeong has refused and presently refuses to allow plaintiff GCR to meaningfully assess the allegations in the manner and form requested by plaintiff GCR. (*Id.*) Defendant Yeong has made statements to defendant HOA to prevent defendant HOA from making payments to plaintiff GCR. (*Id.*)

On 27 May 2021[1], plaintiff GCR filed a complaint against defendants HOA and Yeong asserting causes of action for:

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

(1) Breach of Contract [against defendant HOA]

(2) Common Counts [against defendant HOA]

(3) Quantum Meruit [against defendant HOA]

(4) Prompt Payment Penalties [against defendant HOA]

(5) Intentional Interference with Contractual Relations [against defendant Yeong]

(6) Breach of Implied Covenant of Good Faith and Fair Dealing [against defendant Yeong]

(7) Declaratory Relief [against defendant Yeong]

On 23 August 2021, defendant Yeong filed an answer to plaintiff GCR's complaint and also filed a cross-complaint against GCR asserting causes of action for:

(1) Breach of Contract

(2) Negligence

(3) Violation of Business and Professions Code §17200 et seq.

On 8 September 2021, defendant HOA filed an answer to plaintiff GCR's complaint.

On 24 September 2021, plaintiff/ cross-defendant GCR filed an answer to defendant/ cross-complainant Yeong's cross-complaint.

Yeong's First Amended Cross-Complaint

On 6 September 2023, the court issued an order, pursuant to stipulation, allowing defendant/ cross-complainant Yeong leave to file a first amended cross-complaint ("FAXC") which defendant/ cross-complainant Yeong did on 7 September 2023. Yeong's FAXC alleges in or around January 2018, a fire caused damage to the Property, including Yeong's unit. (FAXC, ¶¶7 – 8.) On or around 29 March 2018, GCR entered into a contract with HOA whereby GCR agreed to furnish labor, materials, equipment, and machinery necessary to complete demolition and reconstruction work on the Property in exchange for payment ("HOA Contract"). (FAXC, ¶9.) On or around 9 April 2018, Yeong entered into a written home improvement agreement ("Yeong Contract") with GCR whereby GCR would perform certain upgrades or additional work to the interior of Yeong's unit, beyond that performed pursuant to GCR's contract with HOA. (FAXC, ¶10 and Exh. B.) Among the renovations, GCR agreed to installation of new flooring and baseboards; kitchen countertops; laundry area reconfiguration; and installation of ceiling fans and lights. (FAXC, ¶11.)

Despite being paid on time and in full, GCR failed to properly and timely perform repairs. (FAXC, ¶¶12 - 14.) In addition to inadequately performing on the Yeong Contract, GCR failed to adequately perform on its contract with HOA. (FAXC, ¶15.) Among other things, GCR failed to property install the water heater; failed to make the walls flush with the floor; failed to properly install electrical; and the HVAC is faulty. (*Id.*) As a result of GCR's failure to adequately and timely perform repairs, Yeong has been displaced from his home for over five years. (FAXC, ¶16.) GCR has refused to address the workmanship issues and unfinished/ delayed construction. (FAXC, ¶17.).

Based on these allegations, Yeong's FAXC now asserts causes of action for:

(1) Breach of Yeong Contract

(2) Breach of HOA Contract

(3) Negligence

(4) Violation of Business Professions Code §17200 et seq.

On 11 October 2023, GCR filed an answer to Yeong's FAXC and also filed its own cross-complaint against various subcontractors asserting causes of action for:

(1) Breach of Contract

(2) Express Indemnity

(3) Equitable Indemnity

(4) Comparative Indemnity/ Fault

(5) Contribution/ Apportionment

(6) Declaratory Relief

On 1 November 2023, plaintiff GCR filed a request for dismissal, with prejudice, of defendant HOA.

On 7 November 2023, plaintiff/ cross-defendant GCR filed the motion now before the court, a motion for summary adjudication of defendant/ cross-complainant Yeong's FAXC.

II. Analysis.

F. Cross-defendant GCR's motion for summary adjudication of cross-complainant Yeong's FAXC.

1. Cross-defendant GCR's motion for summary adjudication of the second cause of action [breach of HOA Contract] of cross-complainant Yeong's FAXC is GRANTED.

a. Release.

Yeong's second cause of action alleges, in relevant part, that he was an intended beneficiary of the HOA Contract between GCR and HOA and that GCR breached the HOA Contract by specifically, "fail[ing] to properly install the water heater, fail[ing] to make the walls flush with the floor, fail[ing] to properly install electrical [and] the HVAC system is also faulty." (FAXC, ¶¶31 – 33.) In addition, GCR "improperly and sloppily installed the flooring in various locations of the Unit." (FAXC, ¶34.)

In moving for summary adjudication of Yeong's second cause of action for breach of HOA Contract, cross-defendant GCR argues initially and essentially that any obligations it had under the HOA Contract have been extinguished by virtue of a release agreement entered into between GCR and HOA. "In general, a written release extinguishes any obligation covered by the release's terms, provided it has not been obtained by fraud, deception, misrepresentation, duress, or undue influence." (*Skrbina v. Fleming Companies* (1996) 45 Cal.App.4th 1353, 1366.)

Here, GCR proffers evidence that on 18 August 2023, it entered into a Settlement and Mutual Release Agreement ("SAR") with HOA.[2] The recitals of the SAR acknowledged that HOA commenced an inspection of the Property and presented GCR with a list of possible workmanship issues.[3] Pursuant to the SAR, HOA as well as its agents, employees, owners, officers, assignees, spouses, and successors in interest, released GCR from all claims, known or unknown, suspected or unsuspected, in any way related to the dispute, ***the defect claims***, and the instant lawsuit.[4] (Emphasis added.)

In opposition, Yeong argues the SAR is not binding against him. By its very terms, the SAR is a release ***by HOA*** and its agents, employees, owners, officers, assignees, spouses, and successors in interest; the SAR is not a release ***by Yeong***. Without citation to any particular legal authority, GCR asserts the release provision of the SAR is enforceable against Yeong even though Yeong was not a party to the SAR.[5]

b. Standing – intended beneficiary.

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[2] See GCR's Separate Statement of Undisputed Material Facts in Support of Motion for Summary Adjudication ("GCR UMF"), Issue No. 1, Fact No. 54.

[3] See GCR UMF, Issue No. 1, Fact No. 55.

[4] See GCR UMF, Issue No. 1, Fact No. 57.

[5] In general, the court is aware of *Gold v. Gibbons* (1960) 178 Cal.App.2d 517, 519, where the court held, "Breach of contract cannot be made the basis of an action for damages against defendants who did not execute it and who did nothing to assume its obligations." (See also *Clemens v. American Warranty Corp.* (1987) 193 Cal.App.3d 444, 452—"Under California law, only a signatory to a contract may be liable for any breach.")

GCR's alternative argument is better supported by legal authority. GCR's alternative argument is, essentially, that contrary to Yeong's allegation that he is an intended beneficiary of the HOA Contract, Yeong is not an intended beneficiary of the HOA Contract and, thus, lacks the appropriate standing to enforce the HOA Contract. Thus, instead of considering whether the SAR is enforceable against Yeong, a third party, the court is asked to consider whether Yeong, as a third party, is entitled to enforce the HOA Contract in the first instance. "[S]omeone who is not a party to [a] contract has no standing to enforce the contract or to recover extra-contract damages for wrongful withholding of benefits to the contracting party." (*Gantman v. United Pacific Ins. Co.* (1991) 232 Cal.App.3d 1560, 1566 (*Gantman*).) "A third party should not be permitted to enforce covenants made not for his benefit, but rather for others. He is not a contracting party; his right to performance is predicated on the contracting parties' intent to benefit him." (*Neverkovec v. Fredericks* (1999) 74 Cal.App.4th 337, 348.) However,

> under California's third party beneficiary doctrine, a third party—that is, an individual or entity that is not a party to a contract—may bring a breach of contract action against a party to a contract only if the third party establishes not only (1) that it is likely to benefit from the contract, but also (2) that a motivating purpose of the contracting parties is to provide a benefit to the third party, and further (3) that permitting the third party to bring its own breach of contract action against a contracting party is consistent with the objectives of the contract and the reasonable expectations of the contracting parties.

(*Goonewardene v. ADP, LLC* (2019) 6 Cal.5th 817, 821 (*Goonewardene*).)

> [The court must] carefully examine[] the express provisions of the contract at issue, as well as all of the relevant circumstances under which the contract was agreed to, in order to determine not only (1) whether the third party would in fact benefit from the contract, but also (2) whether a motivating purpose of the contracting parties was to provide a benefit to the third party, and (3) whether permitting a third party to bring its own breach of contract action against a contracting party is consistent with the objectives of the contract and the reasonable expectations of the contracting parties. ***All three elements must be satisfied to permit the third party action to go forward.***

(*Goonewardene*, *supra*, 6 Cal.5th at p. 830; emphasis added.)

In *Goonewardene*, the plaintiff worked for a travel-related services company (Altour) performing such tasks as making travel reservations and issuing electronic tickets and refunds. "Because she worked on teams that provided services '24 hours a day 365 days of the year,' she accrued overtime hours." (*Goonewardene*, *supra*, 6 Cal.5th at p. 824.) The plaintiff sued her employer alleging Altour failed to pay her the wages she was due and then wrongfully terminated her when she brought the omission to her employer's attention. Plaintiff alleged that Altour had an unwritten contract with ADP, a payroll services provider, whereby "ADP calculated payrolls, maintained employee records, offered legal advice, and provided other wage-related services for the benefit of Altour and its employees." (*Id.* at p. 824.) Plaintiff attempted to assert, among others, a breach of contract cause of action directly against ADP. The trial court entered judgment dismissing plaintiff's claims against ADP. The Court of Appeal, however, concluded plaintiff could assert a breach of contract cause of action against ADP based on its determination that plaintiff's allegations were sufficient to demonstrate that plaintiff could be a third party beneficiary of the contract between Altour and ADP. The California Supreme Court in *Goonewardene* concluded that the Court of Appeal erred in that regard and set forth the rule above for determining whether a third party can assert breach of contract against a contracting party.

> With regard to the second element, we note that our past cases have sometimes referred to this element of the third party beneficiary doctrine as a requirement that the "purpose" of the contract be to benefit the third party (see, e.g., *Lucas v. Hamm*, *supra*, 56 Cal.2d at pp. 589–590) and sometimes as a requirement that there be "an intent to benefit" the third party (see, e.g., id. at p. 591; *Murphy v. Allstate Ins. Co.*, *supra*, 17 Cal.3d at p. 944; *Garcia v. Truck Ins. Exchange*, *supra*, 36 Cal.3d at p. 436). Because of the ambiguous and potentially confusing nature of the term "intent" (see Eisenberg, supra, 92 Colum. L.Rev. at p. 1378), this opinion uses the term "motivating purpose" in its iteration of this element to clarify that the contracting parties must have a motivating purpose to benefit the third party, and not simply knowledge that a benefit to the third party may follow from the contract.

(*Goonewardene*, *supra*, 6 Cal.5th at p. 830.)

Applying this second element to the allegations in *Goonewardene*, the court determined the motivating purpose of a contract between an employer and a payroll services provider was not to benefit the employees, explaining:

> When an employer hires a payroll company, providing a benefit to employees with regard to the wages they receive is ordinarily not a motivating purpose of the transaction. Instead, the relevant motivating purpose is to provide a benefit to the employer, with regard to the cost and efficiency of the tasks performed and the avoidance of potential penalties. Although the employer intends that the payroll company will accurately calculate the wages owed to its employees under the applicable labor statutes and wage orders, in situations in which it may be unclear or debatable as to how the applicable rules should be interpreted or applied, the employer would reasonably expect the payroll company to proceed with the employer's interest in mind. In short, the relevant motivating purpose of the contract is simply to assist the employer in the performance of its required tasks, not to provide a benefit to its employees with regard to the amount of wages they receive.

(*Id.* at p. 835.)

> the third element does not focus upon whether the parties specifically intended third party enforcement but rather upon whether, taking into account the language of the contract and all of the relevant circumstances under which the contract was entered into, permitting the third party to bring the proposed breach of contract action would be "consistent with the objectives of the contract and the reasonable expectations of the contracting parties." (*Ante*, p. 830.) In other words, this element calls for a judgment regarding the potential effect that permitting third party enforcement would have on the parties' contracting goals, rather than a determination whether the parties actually anticipated third party enforcement at the time the contract was entered into.
>
> Furthermore, the requirement in the third element that third party enforcement be consistent with "the objectives of the contract" is comparable to the inquiry, proposed in Professor Eisenberg's article, regarding whether third party enforcement will effectuate "'the contracting parties' performance objectives,'" namely "those objectives of the enterprise embodied in the contract, read in the light of surrounding circumstances … ." (Eisenberg, *supra*, 92 Colum. L.Rev. at p. 1385, original italics; see also Rest.2d Contracts, § 302, subd. (1) ["a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties"].) And the additional requirement in this element that third party enforcement be consistent as well with "the reasonable expectations of the contracting parties" reflects the teaching of prior California decisions that have denied application of the third party beneficiary doctrine when permitting the third party to maintain a breach of contract action would not be consistent with the reasonable expectations of the contracting parties. (See, e.g., *Socoma Companies*, *supra*, 11 Cal.3d at pp. 402–403; *Hess v. Ford Motor Co.*, *supra*, 27 Cal.4th at pp. 526–528; *Garcia v. Truck Ins. Exchange*, *supra*, 36 Cal.3d at pp. 436–438; see also Eisenberg, *supra*, 92 Colum. L.Rev. at pp. 1375–1376, 1386–1387.)

(*Goonewardene*, *supra*, 6 Cal.5th at pp. 830-831.)

On the third element, the *Goonewardene* court again found the factual circumstances militate against allowing third party enforcement of a contract.

> there is no need to permit a third party employee to bring suit to enforce an alleged breach by ADP of its obligations under the contract, because Altour is available and is fully capable of pursuing a breach of contract action against ADP if, by failing to comply with its contractual responsibilities, ADP renders Altour liable for any violation of the applicable wage orders or labor statutes. Simply put, permitting an employee to sue ADP for an alleged breach of its contractual obligations to Altour is not necessary to effectuate the objectives of the contract.

> Further, if a typical contract between an employer and a payroll company were interpreted to authorize each of the employer's employees to sue the payroll company for any alleged wage violation, such an interpretation would clearly impose substantial additional costs on the payroll company in light of the significant legal expense that would be entailed in defending the numerous wage and hour disputes that regularly arise between employees and employers. As a result, such an interpretation would likely lead a payroll company to pass these additional litigation costs on to the employer through a higher price for its payroll services, an increased cost that an employer would typically prefer to avoid. Thus, permitting employees to sue a payroll company for alleged wage violations would ordinarily be inconsistent with the reasonable expectations of the employer as well as the payroll company and also unnecessary because employees retain the right to obtain full recovery for unpaid wages from their employer.

(*Id.* at p. 836.)

Interestingly, the *Goonewardene* court reached its conclusion without knowledge of any of the specific terms of the actual contract and relying only on properly pleaded facts contained in the plaintiff's proposed amended complaint. (See *Goonewardene*, *supra*, 6 Cal.5th at p. 832—"it is important to note that in this case we do not have before us the specific terms of the actual contract between Altour and ADP. … Because of the present procedural posture of the case—an appeal of a dismissal of the action against ADP after the trial court sustained ADP's demurrer to the 5AC without leave to amend—we must assume the properly pleaded facts contained in the 6AC are true.")

In *Prouty v. Gores Technology Group* (2004) 121 Cal.App.4th 1225, 1233, the court held, "Generally, it is a question of fact whether a particular third person is an intended beneficiary of a contract. [Citation.] However, where, as here, the issue can be answered by interpreting the contract as a whole and doing so in light of the uncontradicted evidence of the circumstances and negotiations of the parties in making the contract, the issue becomes one of law that we resolve independently." (See also *Souza v. Westlands Water Dist.* (2006) 135 Cal.App.4th 879, 891 citing *Prouty*.)

As *Goonewardene* makes clear, all three elements of the third party beneficiary doctrine must be satisfied in order for a third party to move forward and sue on a contract not its own. In moving for summary adjudication, GCR contends Yeong cannot satisfy either the second or third element. Beginning with the second element, GCR asserts the motivating purpose "was to repair the fire damage which occurred throughout [the Property], particularly the common areas."[6] "[T]he contracting parties must have a motivating purpose to benefit the third party, and not simply knowledge that a benefit to the third party may follow from the contract." (*Goonewardene*, *supra*, 6 Cal.5th at p. 830.) GCR contends Yeong's lack of involvement in the formation and negotiation of the HOA Contract; that Yeong never saw the HOA Contract; and that Yeong could not submit change orders or alter the scope of the HOA Contract are facts which establish that HOA and GCR did not have a motivating purpose to benefit Yeong. The court is not persuaded that such facts are determinative of the issue.

The *Goonewardene* court relied upon one of the "prominent third party beneficiary decisions," *Lucas v. Hamm* (1961) 56 Cal.2d 583, involving the issue of "whether the intended beneficiaries of a will could sue the attorney who had contracted with the testator to prepare the will, when, after the testator's death, the beneficiaries had not obtained their intended inheritance because of the attorney's alleged failure to fulfill his contractual obligation to properly prepare the will." (*Goonewardene*, *supra*, 6 Cal.5th at p. 831.) The *Goonewardene* court cites *Lucas* as perhaps a quintessential application of the third party beneficiary doctrine. While there is no specific discussion of such facts from *Lucas*, it seems highly unlikely and improbable that the beneficiaries of the will were involved in the formation and negotiation of the agreement between the testator and the attorney or that the beneficiaries would have seen the will, let alone the contract to prepare the will. Yet, the *Lucas* court nevertheless held that the beneficiaries of the will could sue the attorney for breach of contract as third party beneficiaries.

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[6] See page 10, lines 19 – 20 of GCR's memorandum of points and authorities in support of its motion for summary adjudication ("GCR MPA").

The more relevant consideration is whether the HOA Contract is made "expressly" for the benefit of the third party, here Yeong. GCR suggests that such an expression must be by name. On that point, the court is more persuaded by Yeong's citation to *Souza v. Westlands Water Dist.* (2006) 135 Cal.App.4th 879, 891 where the court wrote:

> If the terms of the contract necessarily require the promisor to confer a benefit on a third person, then the contract, and hence the parties thereto, contemplate a benefit to the third person. The parties are presumed to intend the consequences of a performance of the contract.' [Citation.]" (*Prouty v. Gores Technology Group*, *supra*, 121 Cal.App.4th at p. 1232.) ***A party need not show that it was intended to benefit as an individual and may prevail by showing that it is a member of a class the parties intended to benefit.*** (*Ibid*.)

(Emphasis added.)

There is no dispute here that the HOA Contract was intended to repair fire damage to the Property, an eight-unit condominium building, and that Yeong is the owner of one of the eight individual condominium units therein. Even if the scope of the work of the HOA Contract was for restoration of common areas of the Property, who else would benefit if not the owners of each of the condominium units within the Property? By GCR's own recognition, HOA is a homeowners' association, identified in its bylaws as a "mutual benefit" corporation. The HOA exists for the "mutual benefit" of its owners. Unlike *Goonewardene*, a contract to repair fire damage does not relieve the HOA from the performance of a task that the HOA itself would otherwise be required to undertake. The HOA Contract provides no benefit to the HOA which is separate and distinct from the benefit it provides to the HOA members and specifically the owners of the fire-damaged Property.

However, just as the *Goonewardene* court observed, "even if a motivating purpose of such a contract were to provide a benefit to [third parties], it still would not follow that the [third parties] would be entitled to sue the [contracting party] for breach of contract under the third party beneficiary doctrine." (*Goonewardene*, *supra*, 6 Cal.5th at pp. 835-836.) On the third element necessary for application of the third party beneficiary doctrine, the *Goonewardene* court found very significant that allowing the third party to sue for breach of contract is unnecessary to effectuate the objectives of the contract where the contracting party is available and is fully capable of pursuing a breach of contract action. Here, not only was HOA available and fully capable of suing GCR for breach of contract, it had already embarked on that process of hiring an architect to inspect the common areas and all units to ensure GCR's work was properly performed prior to final payout.[7] The architect drafted a report identifying the perceived defects in the Property.[8] Although HOA did not commence a breach of contract action (presumably because preempted by GCR's complaint), HOA's answer raised the issue of GCR's breach in its answer[9] and any defects with GCR's work was contemplated by the settlement agreement (SAR).

Furthermore, just as in *Goonewardene*, allowing third party Yeong to sue GCR "would clearly impose substantial additional costs on [GCR] that would be entailed in defending" and "would likely lead [GCR] to pass these additional litigation costs on to [HOA], … an increased cost that an [HOA] would typically prefer to avoid." (*Id.* at p. 836.) For that reason, allowing the third party to bring suit would be inconsistent with the reasonable expectations of GCR and HOA. Yeong counters by arguing that he would be left without a remedy if not allowed to sue GCR. The court does not believe that is the case. HOA has obligations to its members with regard to common areas. If Yeong contend issues with the common area are not adequately addressed, Yeong can enforce his rights against the HOA.

After considering the express provisions of the HOA Contract as well as all of the relevant circumstances under which the contract was agreed to, the court concludes that permitting Yeong to bring his own breach of contract action against GCR is not consistent with the objectives of the contract and the reasonable expectations of the contracting parties. (See *also Gantman*, *supra*, 232 Cal.App.3d 1560 [plaintiffs, as individual members of a

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[7] See GCR UMF, Issue No. 2, Fact Nos. 33 – 34.

[8] See GCR UMF, Issue No. 2, Fact No. 40.

[9] See HOA's Answer to Plaintiff's Complaint filed 8 September 2021. Specifically, the 28th Affirmative Defense entitled "Setoff," alleges HOA incurred damages and expenses by virtue of the acts and omissions of GCR.

homeowners' association, did not have standing to maintain an action against defendants (insurance companies) on policies purchased and issued to the homeowners' association.])

Consequently, cross-defendant GCR's motion for summary adjudication of the second cause of action [breach of HOA Contract] of cross-complainant Yeong's FAXC is GRANTED.

2. Cross-defendant GCR's motion for summary adjudication of the third cause of action [negligence] of cross-complainant Yeong's FAXC is DENIED.

In his third cause of action, Yeong alleges GCR owed a duty of care to him under the Yeong Contract and owed Yeong, a third party beneficiary, a duty of care under the HOA Contract but that GCR breached the duty of care under both contracts by carelessly performing construction work. (FAXC, ¶40.)

In moving for summary adjudication of this third cause of action of Yeong's FAXC for negligence, GCR contends the cause of action is barred by the economic loss rule, which provides that "where a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only economic losses." (*Robinson Helicopter Company v. Dana Corporation* (2004) 34 Cal.4th 979, 988 (*Robinson*).) This doctrine hinges on a "distinction drawn between transactions involving the sales of goods for commercial purposes where economic expectations are protected by commercial and contract law, and those involving the sale of defective products to individual consumers who are injured in a manner which has traditionally been remedied by resort to the law of torts." (*Robinson*, *supra*, 34 Cal.4th at p. 988.) The rule requires a purchaser to recover solely in contract for purely economic loss due to disappointed expectations, unless the purchaser can demonstrate harm above and beyond a broken contractual promise. (*Ibid*.)

The economic loss rule operates in the nature of an affirmative defense. On a motion for summary adjudication, it is cross-defendant GCR's initial burden to establish that there is a complete defense. (See Code Civ. Proc., §437c, subd. (p)(2)—" A … cross-defendant has met his or her burden of showing that a cause of action has no merit if the party has shown … that there is a complete defense to the cause of action.")

> Under the economic loss rule a manufacturer or distributor may be liable in strict liability or negligence for physical injury to property caused by a defective product, but not for purely economic losses. (E.g., *Seely v. White Motor Co.* (1965) 63 Cal.2d 9 [45 Cal. Rptr. 17, 403 P.2d 145] (*Seely*); *Cronin v. J. B. E. Olson Corp.* (1972) 8 Cal.3d 121, 130 [104 Cal. Rptr. 433, 501 P.2d 1153].) "Economic loss" or harm in this context has been defined as " ' " 'damages for inadequate value, costs of repair and replacement of the defective product or consequent loss of profits … .' " ' [Citation.]" (*Jimenez*, *supra*, 29 Cal.4th at p. 482.)

(*KB Home v. Superior Court* (2003) 112 Cal.App.4th 1076, 1084 (*KB Home*).)

> the economic loss rule allows a plaintiff to recover in strict products liability in tort when a product defect causes damage to 'other property,' that is, property other than the product itself. The law of contractual warranty governs damage to the product itself. [Citations.]" (*Id.* at p. 483.) Tort recovery was permissible against the window manufacturer, the Court explained, because " California decisional law has long recognized that the economic loss rule does not necessarily bar recovery in tort for damage that a defective product (e.g., a window) causes to other portions of a larger product (e.g., a house) into which the former has been incorporated.

(*KB Home*, *supra*, 112 Cal.App.4th at p. 1085.)

In recognition that the economic loss rule does not bar recovery when a product defect causes damage to other property, GCR contends Yeong has no evidence of other property damage caused by GCR's purportedly defective work. GCR points to Yeong's discovery responses as being factually devoid.[10] (See *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 590—"a moving defendant may rely on factually devoid discovery responses to shift the burden of proof pursuant to section 437c, subdivision (o)(2). Once the burden shifts as a result of the factually devoid discovery responses, the plaintiff must set forth the specific facts which prove the existence of a

[10] See GCR UMF, Issue No. 3, Fact Nos. 47 – 49 and 51.

triable issue of material fact.") However, the court does not consider the cited discovery responses to be factually devoid because the discovery did not pointedly ask Yeong to identify property damage caused by GCR's purportedly defective work. As such, the court finds GCR has not met its initial burden to establish that Yeong's third cause of action for negligence is barred by the economic loss rule.

Accordingly, cross-defendant GCR's motion for summary adjudication of the third cause of action [negligence] of cross-complainant Yeong's FAXC is DENIED.

3. Cross-defendant GCR's motion for summary adjudication of the fourth cause of action [violation of Business & Professions Code §17200 et seq.] of cross-complainant Yeong's FAXC is GRANTED.

GCR moves for summary adjudication of Yeong's fourth cause of action for violation of Business & Professions Code section 17200. "Section 17200 'borrows' violations from other laws by making them independently actionable as unfair competitive practices. In addition, under section 17200, a practice may be deemed unfair even if not specifically proscribed by some other law." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1143, internal quotations and citations omitted.) Section 17200 prohibits five different types of wrongful conduct, each of which has become a term of art … (1) Unlawful business act or practice; (2) Unfair business act or practice; (3) Fraudulent business act or practice; (4) Unfair, deceptive, untrue or misleading advertising; and (5) Any act prohibited by [Bus. & Prof. Code §§17500 – 17577.5]." (Stern, BUS. & PROF. C. §17200 PRACTICE (The Rutter Group 2005) ¶3:13, pp. 3-2 to 3-3.)

In the fourth cause of action, Yeong alleges, in relevant part, GCR's "breach of contract constitutes unfair and unlawful business practices." (FAXC, ¶47.) GCR relies on *Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 619, where the court wrote, "A plaintiff alleging unfair business practices under these statutes must state with reasonable particularity the facts supporting the statutory elements of the violation." Presumably, GCR contends such a vague allegation is insufficient to even state a cause of action. (See *American Airlines, Inc. v. County of San Mateo* (1996) 12 Cal.4th 1110, 1117–1118—"A defendant's motion for summary judgment necessarily includes a test of the sufficiency of the complaint. [Citation omitted.] When a motion for summary judgment is used to test whether the complaint states a cause of action, the court will apply the rule applicable to demurrers[11] and accept the allegations of the complaint as true. [Citations omitted.]")

"[A] breach of contract may … form the predicate for Section 17200 claims, *provided it also constitutes conduct that is 'unlawful, or unfair, or fraudulent.'* " (*Puentes v. Wells Fargo Home Mortgage, Inc.* (2008) 160 Cal.App.4th 638, 645; italics original and citations omitted.) For Yeong to allege simply that GCR's breach of contract constitutes an unfair or unlawful business practice is a conclusion of law which the court does not assume to be true under generally recognized rules applicable to demurrers. The court agrees with GCR that Yeong has not sufficiently stated a cause of action for violation of Business & Professions Code section 17200 et seq.

Yeong does not directly address this argument in opposition. Yeong appears to argue instead that the unfair or unlawful business practice is GCR's "negligent work." The pleadings serve as the "outer measure of materiality" in a summary judgment/ adjudication motion, and the motion may not be granted or denied on issues not raised by the pleadings. (See *Government Employees Ins. Co. v. Sup. Ct.* (2000) 79 Cal App 4th 95, 98; *Laabs v. City of Victorville* (2008) 163 Cal App 4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health Ins.* (2010) 181 Cal App 4th 60, 73—"the pleadings determine the scope of relevant issues on a summary judgment motion.") Having alleged only that GCR's breach of contract constitutes an unfair or unlawful business practice, the court will not consider this change of allegation raised in opposition to GCR's motion for summary adjudication.

Accordingly, cross-defendant GCR's motion for summary adjudication of the fourth cause of action [violation of Business & Professions Code §17200 et seq.] of cross-complainant Yeong's FAXC is GRANTED.

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[11] "The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] ***The court does not, however, assume the truth of contentions, deductions or conclusions of law***. [Citation.]" (*Aubry v. Tri-City Hospital District* (1992) 2 Cal.4th 962, 966 – 967; emphasis added.)

4. Cross-defendant GCR's motion for summary adjudication of cross-complainant Yeong's request for consequential damages is DENIED.

Finally, cross-defendant GCR seeks summary adjudication of cross-complainant Yeong's request for consequential damages. The court must deny cross-defendant GCR's motion in that regard because the relief being sought is not authorized.

Code of Civil Procedure section 437c, subdivision (f)(1) which states, "***A party may move for summary adjudication as to*** one or more causes of action within an action, one or more affirmative defenses, ***one or more claims for damages***, or one or more issues of duty, ***if that party contends*** that the cause of action has no merit or that there is no affirmative defense thereto, or that there is no merit to an affirmative defense as to any cause of action, or both, or ***that there is no merit to a claim for damages, as specified in Section 3294 of the Civil Code***, or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (Emphasis added.)

The statute does not authorize the relief being sought. The language of the summary adjudication statute suggests a claim for damages may be summarily adjudicated only if it pertains to punitive damages. This is so because of the reference to the punitive damages statute, Civil Code section 3294. To read it otherwise would render the reference to Civil Code section 3294 superfluous.

Even the practice guide authors limit this type of summary adjudication to a claim for punitive damages. (Weil & Brown, et al., CAL. PRAC. GUIDE: CIV. PRO. BEFORE TRIAL (The Rutter Group 2020) ¶¶10:41 – 10:43, pp. 10-12 to 10-13 citing *Catalano v. Superior Court* (2000) 82 Cal.App.4th 91 (*Catalano*).) In *Catalano*, the court reiterated the policy behind summary adjudication motions and stated, "The purpose of the enactment of Code of Civil Procedure section 437c, subdivision (f) was to stop the practice of piecemeal adjudication of facts that did not completely dispose of a substantive area." (*Catalano*, *supra*, 82 Cal.App.4th at p. 97.)

Such an interpretation is also supported by Code of Civil Procedure section 437c, subdivision (t) which states, in relevant part, "Notwithstanding subdivision (f), a party may move for summary adjudication of a legal issue or a claim for damages ***other than punitive damages*** that does not completely dispose of a cause of action, affirmative defense, or issue of duty pursuant to this subdivision." (Emphasis added.)

Notwithstanding the reference to Civil Code section 3294, Code of Civil Procedure section 437c, subdivision (f)(1) only allows summary adjudication "if it completely disposes of … a claim for damages." Cross-defendant GCR requests relief which does not completely dispose of Yeong's claim for damages. The only avenue for such relief is to comply with Code of Civil Procedure section 437c, subdivision (t)[12] which cross-defendant GCR has not done here.

For the above stated reasons, cross-defendant GCR's motion for summary adjudication of cross-complainant Yeong's prayer for consequential damages is DENIED.

III. Tentative Ruling.

The tentative ruling was duly posted.

IV. Case Management.

The parties should discuss setting the matter for trial.

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[12] A motion for partial summary adjudication pursuant to subdivision (t) must be pursuant to joint stipulation and order of the court. (See Code Civ. Proc., §437c, subd. (t)(1)-(2).)

V. Order.

Cross-defendant GCR's motion for summary adjudication of the second cause of action [breach of HOA Contract] of cross-complainant Yeong's FAXC is GRANTED.

Cross-defendant GCR's motion for summary adjudication of the third cause of action [negligence] of cross-complainant Yeong's FAXC is DENIED.

Cross-defendant GCR's motion for summary adjudication of the fourth cause of action [violation of Business & Professions Code §17200 et seq.] of cross-complainant Yeong's FAXC is GRANTED.

Cross-defendant GCR's motion for summary adjudication of cross-complainant Yeong's prayer for consequential damages is DENIED.

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

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