SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 20
Honorable Drew C. Takaichi, Presiding (for Hon. Socrates Manoukian)
Farris Bryant, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone 408.882-2120

PROBATE LAW AND MOTION TENTATIVE RULINGS
DATE: April 18, 2024 TIME: 9:00 A.M.

Lines 18 and 19 updated

*****NOTICE*****

APPEARANCES IN DEPT. 20 MAY BE IN PERSON OR REMOTELY. IF APPEARING REMOTELY, PLEASE USE DEPT. 20 TEAMS LINK FROM THE COURT WEBSITE: https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

To contest a ruling: before 4:00 P.M. today you must notify the: (1) Court by calling (408) 808-6856 and (2) other side that you plan to appear at the hearing to contest the ruling

State and local Court Rules prohibit recording of court proceedings without a Court order. This prohibition applies while on Teams or Zoom

Prevailing party shall prepare the order by e-file, unless stated otherwise below.

The court does not provide official court reporters for civil law and motion hearings. See court website for policy and forms for court reporters at hearing.

TROUBLESHOOTING TENTATIVE RULINGS

If do not see this week's tentative rulings, they have either not yet been posted or your web browser cache (temporary internet files) is accessing a prior week's rulings. "REFRESH" or "QUIT" your browser and reopen it or adjust your internet settings to *see only the current version of the web page. Your browser will otherwise access old information from old cookies even after the current week's rulings have been posted*.

LINE #	CASE #	CASE TITLE	RULING
LINE 1	16CV300709	*Joan Todd v. Dai Truong, et al.*	Order for examination of debtor Keith Tai Wong. Proof of personal service filed. Debtor will be administered oath by Clerk of Court in Dept. 20 and examination will proceed.
LINE 2	20CV369379	*Cathy Ettenger et al vs Vahe Tashjian et al*	On calendar for Further Case Management

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LINE 3	20CV369379	*Cathy Ettenger et al vs Vahe Tashjian et al*	Defendant Vahe Tashjian's ("Defendant") motion for stay of action was rejected in the e file queue and is therefore, not in the court's file or before the court for ruling. Opposition of plaintiffs is filed to the unfiled motion of Defendant. Hearing on unfiled motion is ordered OFF-CALENDAR
LINE 4	20CV370493	*Catherine Hung et al vs Vahe Tashjian et al*	Defendant Vahe Tashjian's ("Defendant") motion for stay of action was rejected in the e file queue and is therefore, not in the court's file or before the court for ruling. Opposition of plaintiffs is filed to the unfiled motion of Defendant. Hearing on unfiled motion is ordered OFF-CALENDAR
LINE 5	20CV370493	*Catherine Hung et al vs Vahe Tashjian et al*	On calendar for Further Case Management
LINE 6	20CV371801	*RICHARD SPIEKER et al vs VAHE TASHJIAN et al*	On calendar for Further Case Management
LINE 7	20CV371801	*RICHARD SPIEKER et al vs VAHE TASHJIAN et al*	Defendant Vahe Tashjian's ("Defendant") motion for stay of action not filed or in e file queue; motion is therefore not before the court for ruling. Hearing on unfiled motion is ordered OFF-CALENDAR
LINE 8	20CV372195	*RICHARD SPIEKER et al vs VAHE TASHJIAN et al*	On calendar for Further Case Management
LINE 9	20CV372195	*RICHARD SPIEKER et al vs VAHE TASHJIAN et al*	Defendant Vahe Tashjian's ("Defendant") motion for stay of action was rejected in the e file queue and is therefore, not in the court's file or before the court for ruling. Hearing on unfiled motion is ordered OFF-CALENDAR
LINE 10	21CV376460	*Janet Bocek et al vs Vahe Tashjian et al*	Defendant Vahe Tashjian's ("Defendant") motion for stay of action was rejected in the e file queue and is therefore, not in the court's file or before the court for ruling. Hearing on unfiled motion is ordered OFF-CALENDAR

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LINE 11	21CV376460	*Janet Bocek et al vs Vahe Tashjian et al*	On calendar for Further Case Management
LINE 12	21CV390848	*KATHLEEN O'CONNOR et al vs PLUM TREE CARE CENTER et al*	Click or scroll to line 12 for tentative ruling.
LINE 13	21CV390848	*KATHLEEN O'CONNOR et al vs PLUM TREE CARE CENTER et al*	Tentative ruling is included in line 12.
LINE 14	22CV399141	*Norma Santoyo et al vs Trinity Financial Services, LLC*	Click or scroll to line 14 for tentative ruling.
LINE 15	22CV400997	*ERIC BARROW vs JOHN DOE et al*	The motion to quash service of summons of defendant 7-Eleven, Inc. is GRANTED. No opposition is filed. A failure to oppose a motion may be deemed a consent to the granting of the motion. Cal.Rules of Court, Rule 8.54 (c).
LINE 16	22CV407608	*MICHAEL HOLYS vs COUNTY OF SANTA CLARA*	Click or scroll to line 16 for tentative ruling.
LINE 17	23CV426924	*Anthony Colucci et al vs David Bettinger et al*	Demurrer and motion to strike of defendant SG Service Co. LLC. No opposition filed. However, on April 5, 2024, plaintiff Anthony Colucci submitted to the e-filing queue a first amended complaint ("FAC") with proof of service on defendants. There is a pending rejection of that document. If filed, the FAC renders the demurrer/ motion to strike moot.
LINE 18	22CV400467	*John Terzic vs Slavko Micic et al*	UPDATE: Click or scroll to line 18 for tentative ruling.
LINE 19	22CV400467	*John Terzic vs Slavko Micic et al*	UPDATE: Tentative ruling is included in line 18

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LINE 20	23CV423786	*HOLLY RAMIREZ et al vs GILL MOTORS INC et al*	Motion of plaintiff Holly Ramirez ("Plaintiff") for compliance of defendant General Motors, LLC ("Defendant") with discovery ruling. Plaintiff's reply responds to defendant's opposition; however, the opposition is not filed or submitted in the e file queue of the Court. There is also no proof of service of the discovery ruling/order. Counsel for the parties are directed to appear at the hearing, and shall forthwith meet and confer prior to hearing to schedule the deposition of Defendant's PMK if not already scheduled. The issue of sanctions is reserved to time of hearing.
LINE 21	23CV426516	*FP CONTRACTING, INC. vs PRIDE ELECTRIC ENTERPRISES et al*	Plaintiff FP Contracting, Inc.'s ("Plaintiff") motion to compel further document production from third party M/A Design Group ("Third Party") is GRANTED. Proof of service of the motion is on file and no opposition is filed or in the e file queue. Third Party shall provide and serve Plaintiff with verified, code-compliant responses, without objections, to Plaintiff's Requests for Production Nos.1, 4, 5, 6, and 7, and produce all records, documents and papers responsive to each Request. Third Party shall serve responses and documents to Plaintiff on or before May 8, 2024. Third Party shall pay to Plaintiff attorneys' fees and costs of $2,060 as sanction on or before May 20, 2024.
LINE 22	20CV369499	*Eric Kutcher et al vs Vahe Tashjian et al*	Ex parte application of cross-complainant Roya Javid to continue trial date. Counsel and self-represented parties are directed to appear at hearing.
LINE 23	20CV369499	*Eric Kutcher et al vs Vahe Tashjian et al*	Motion of defendants/cross-complainants/cross-defendants Orange Coast Title Co. and Susan Trujillo to bifurcate punitive damages. Counsel and self-represented parties are directed to appear at hearing.
LINE 24	20CV369499	*Eric Kutcher et al vs Vahe Tashjian et al*	Click or scroll to line 24 for tentative ruling.

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LINE 25	20CV369499	*Eric Kutcher et al vs Vahe Tashjian et al*	Motion of defendant and cross-complainant Ahmad Javid for trial preference. Counsel and self-represented parties are directed to appear at hearing.
LINE 26	20CV369499	*Eric Kutcher et al vs Vahe Tashjian et al*	Motion of Orange Coast Title Co. to compel compliance with deposition. Counsel and self-represented parties are directed to appear at hearing.
LINE 27	20CV369499	*Eric Kutcher et al vs Vahe Tashjian et al*	Add-on motion of defendant/cross-complainant/cross-defendant Susan Trujillo to compel deposition. Counsel and self-represented parties are directed to appear at hearing.
LINE 28			
LINE 29			
LINE 30			

Calendar line 1

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Calendar lines 12-13

Case Name: *Kathleen O'Connor et al. v. Plum Tree Care Center et al.*
Case No: 21CV390848

I. Statement of Facts.

On or about October 25, 2020, decedent Dorothy Elaine O'Connor ("Decedent") was admitted to Good Samaritan Hospital in San Jose ("Good Samaritan") for generalized weakness and further care following multiple falls.[1] (Second Amended Complaint ("SAC"), ¶ 13.) Upon her admission, Decedent was diagnosed with multiple health conditions, including atrial fibrillation and acute decompensated heart failure. (Ibid.)

Based on Decedent's medical history, Good Samaritan knew or should have known that Decedent was at high risk of developing pressure sores. (SAC, ¶ 15.) Decedent presented with wounds in her right and left legs. (*Ibid*.) Pressure sore protocol should have been instituted and followed at Good Samaritan. (*Id*. at ¶ 16.) Decedent suffered the development and/or worsening of pressure sores while at Good Samaritan. (Ibid.) Good Samaritan failed to document or treat Decedent's pressure sores during her stay from October 25 to October 31, 2020. (*Id*. at ¶ 17.)

On or about October 31, 2020, Decedent was admitted to Plum Tree Care Center ("Plum Tree") for skilled nursing rehabilitation. (SAC at ¶19.) She had multiple pressure sores at the time of her admission. (*Id*. at ¶ 20.) Based on Decedent's medical history, Plum Tree knew or should have known that Decedent was at high risk of developing pressure sores. (*Id*. at ¶ 22.) Pressure sore protocol should have been instituted and followed at Plum Tree, but it was not. (*Id*. at ¶ 23.) While at Plum Tree, Decedent suffered the development and/or worsening of pressure sores. *(Id*. at ¶¶ 23-24.) Plum Tree failed to document or treat Decedent's pressure sores during her stay at the care center from October 31 to November 11, 2020. (*Id*. at ¶ 24.)

Due in part to inadequate staffing and monitoring, Decedent suffered a fall at Plum Tree on November 4, 2020. (SAC, ¶ 27.) As documented on 1 November 2020, Decedent had recently suffered a new onset of decrease in strength and functional mobility before the November 4, 2020 fall. (*Ibid*.) On November 11, 2020, Decedent had the onset of dry gangrene in her left great toe. (*Id.* at ¶ 34.)

On or about November 11, 2020, Decedent was admitted to Good Samaritan. (SAC, ¶ 36.) She was diagnosed with, among other things, stage IV ulcers on her lower leg. (Ibid.) On or about November 14, 2020, Decedent's left lower leg had frank gangrene, and the following day it was determined she may need amputation. (*Id*. at ¶ 38.) On November 28, 2020, Decedent died. (*Id.* at ¶ 41.) Gangrene of her left foot was noted as a significant condition contributing to her death. (*Id*. at ¶ 41.) She was 97 years old. (*Id.* at ¶ 50.)

On October 25, 2022, plaintiffs Kathleen O'Connor and Jerome O'Connor, individually and as successors in interest to Decedent (collectively, "Plaintiffs"), filed a complaint against defendants alleging causes of action for:

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[1] Defendants Good Samaritan Hospital and Good Samaritan Hospital, LP are referred to collectively as "Good Samaritan."

(1) Negligence
(2) Elder Abuse/Willful Misconduct
(3) Wrongful Death.

On February 14, 2022, defendants GHC of Los Gatos, LLC dba Plum Tree Care Center (erroneously sued as separate entities) and Life Generations Healthcare LLC (collectively, "GHC Defendants") filed a demurrer and motion to strike portions of the complaint. On February 22, 2022, defendant Good Samaritan filed a demurrer and motion to strike portions of the complaint. In an order filed on June 8, 2022, the court sustained the demurrers to the second cause of action but otherwise overruled the demurrers. The court denied the motions to strike in part and otherwise deemed them moot.

On June 27, 2022, Plaintiffs filed the first amended complaint (FAC) alleging causes of action for (1) negligence; (2) elder abuse; (3) willful misconduct; and (4) wrongful death. The GHC defendants and defendant Good Samaritan filed demurrers to the second and third causes of action as well as motions to strike portions of Plaintiffs' FAC.

In an order filed on December 14, 2022, the court sustained the demurrers with leave to amend, and the court granted in part and denied in part the motions to strike. Plaintiffs sought clarification of the December 14, 2022 order. The court addressed this request with its order filed on October 12, 2023, explaining that the demurrers to the FAC were sustained with leave to amend and that motions to strike were granted in part and denied in part.

On October 24, 2023, Plaintiffs filed the operative SAC, alleging causes of action for:

(1) Negligence
(2) Elder Abuse
(3) Willful Misconduct
(4) Wrongful Death.

On November 22, 2023, defendant Good Samaritan filed two of the three motions now before the court: a demurrer and a motion to strike portions of Plaintiffs' SAC.

On November 29, 2023, the GHC Defendants filed the third motion now before the court: a motion to strike portions of Plaintiffs' SAC.

II. Legal Standards

A. Demurrers in General

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

A demurrer tests the legal sufficiency of a complaint. It is properly sustained where the complaint or an individual cause of action fails to "state facts sufficient to constitute a cause of action." (Code Civ. Proc., §430.10, subd. (e).) "[C]onclusionary allegations . . . without facts to support them" are insufficient on demurrer. (*Ankeny v. Lockheed Missiles and Space Co.*

(1979) 88 Cal.App.3d 531, 537.) "It is fundamental that a demurrer is an attack against the complaint on its face, it should not be sustained unless the complaint shows that the action may not be pursued." (*Yolo County Dept. of Social Services v. Municipal Court* (1980) 107 Cal.App.3d 842, 846-847.)

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

B. Motions to Strike in General

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

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

"As with demurrers, the grounds for a motion to strike must appear on the face of the pleading under attack, or from matter which the court may judicially notice." (Weil & Brown, et al., California Practice Guide: Civil Procedure Before Trial (The Rutter Group 2023) ¶7:168, p. 7(l)-77 (Weil & Brown) [citing Code Civ. Proc., § 437].) "Thus, for example, defendant cannot base a motion to strike the complaint on affidavits or declarations containing extrinsic evidence showing that the allegations are 'false' or 'sham.' Such challenges lie only if these defects appear on the face of the complaint, or from matters judicially noticeable." (*Id*. at ¶ 7:169, pp. 7(l)-75 to 7(l)-76.)

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

III. Analysis.

Defendant Good Samaritan demurs to the second and third causes of action and moves to strike portions of Plaintiffs' SAC. Defendant Plum Tree also moves to strike portions of

Plaintiffs' SAC. The Court will defer comment on the quality of the "meet & confer" that did or did not take place prior to the filing of this motion.

A. Defendant Good Samaritan's demurrer to the second cause of action [Elder Abuse] is SUSTAINED.

Defendant Good Samaritan demurs to the second cause of action [Elder Abuse] on the ground that the pleading does not state facts sufficient to constitute a cause of action.

"The purpose of the [Elder Abuse and Dependent Adult Civil Protection Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 (*Delaney*).) "The elements of a cause of action under the Elder Abuse Act [Welfare and Institutions Code section 15600, et seq.] are statutory, and reflect the Legislature's intent to provide enhanced remedies to encourage private, civil enforcement of laws against elder abuse and neglect." (*Intrieri v. Superior Court* (2004) 117 Cal.App.4th 72, 82.) Because we test for liability under the Elder Abuse Act, a statutory cause of action, we apply "the general rule that statutory causes of action must be pleaded with particularity." (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790 (*Covenant Care*).) "[Where] recovery is based on a statutory cause of action, the plaintiff must set forth facts in his [or her] complaint sufficiently detailed and specific to support an inference that each of the statutory elements of liability is satisfied. General allegations are regarded as inadequate. [Citations.]" (*Mittenhuber v. City of Redondo Beach* (1983) 142 Cal.App.3d 1, 5 (*Mittenhuber*).)

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

Welfare and Institutions Code section 15610.57 goes on to state:

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

> (1) The negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise.
> (2) The negligent failure of an elder or dependent adult to exercise that degree of self care that a reasonable person in a like position would exercise.

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

> (1) Failure to assist in personal hygiene, or in the provision of food, clothing, or shelter.
> (2) Failure to provide medical care for physical and mental health needs. No person shall be deemed neglected or abused for the sole reason that he or she voluntarily relies on treatment by spiritual means through prayer alone in lieu of medical treatment.
> (3) Failure to protect from health and safety hazards.
> (4) Failure to prevent malnutrition or dehydration.

> (5) Failure of an elder or dependent adult to satisfy the needs specified in paragraphs (1) to (4), inclusive, for himself or herself as a result of poor cognitive functioning, mental limitation, substance abuse, or chronic poor health.

(See also, CACI, No. 3103.)

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

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

> …we distill several factors that must be present for conduct to constitute neglect within the meaning of the Elder Abuse Act and thereby trigger the enhanced remedies available under the Act. The plaintiff must allege (and ultimately prove by clear and convincing evidence) facts establishing that the defendant: (1) had responsibility for meeting the basic needs of the elder or dependent adult, such as nutrition, hydration, hygiene or medical care [citations]; (2) knew of conditions that made the elder or dependent adult unable to provide for his or her own basic needs [citations]; and (3) denied or withheld goods or services necessary to meet the elder or dependent adult's basic needs, either with knowledge that injury was substantially certain to befall the elder or dependent adult (if the plaintiff alleges oppression, fraud or malice) or with conscious disregard of the high probability of such injury (if the plaintiff alleges recklessness) [citations]. The plaintiff must also allege (and ultimately prove by clear and convincing evidence) that the neglect caused the elder or dependent adult to suffer physical harm, pain or mental suffering. [Citations.] Finally, the facts constituting the neglect and establishing the causal link between the neglect and the injury "must be pleaded with particularity," in accordance with the pleading rules governing statutory claims. [Citation.]

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

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

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

Here, the parties agree on the question presented: whether the SAC sufficiently alleges understaffing to establish defendant Good Samaritan's recklessness and resultant liability under the Elder Abuse Act. (See Dem., 7:5-8; Opp., p. 10:5-6.) Good Samaritan argues the understaffing allegations are essentially identical to those appearing in the FAC, which this Court already deemed insufficient. (Dem., p. 4:17-20.) Plaintiffs assert the demurrer should be overruled because the SAC adds extensive facts to support the recklessness allegation. (Opp., p. 10:6-8.) As addressed by this Court previously in these proceedings, two cases analyzing the adequacy of understaffing allegations have reached opposite conclusions on similar facts: *Worsham v. O'Connor Hospital* (2014) 226 Cal.App.4th 331 (*Worsham*) and *Fenimore v. Regents of the University of California* (2016) 245 Cal.App.4th 1339 (*Fenimore*). The distinction between *Worsham* and *Fenimore* is discussed in a leading treatise on elder abuse litigation:

> Two cases have recently ruled on the sufficiency of allegations of inadequate understaffing to establish liability for Elder Abuse. In [*Worsham, supra*, 226 Cal.App.4th 331], the court examined the plaintiff's allegations that the nursing facility failed in its duty to maintain sufficient staff to address the needs of patients and to ensure compliance with legal requirements. Plaintiff also alleged that the nursing facility was 'chronically understaffed, and did not adequately train the staff it did have.' *Worsham* characterized the allegations as insufficient to render the nursing facility's failure to provide staffing as nothing more than professional negligence. The failure to provide staff demonstrates negligence in the undertaking of medical services, and not a 'fundamental failure to provide medical care for physical and mental health needs.' (citing [*Delaney, supra,* 20 Cal.4th at p. 34].) On the face of the *Worsham* opinion, the court seems to have described a rule that inadequate staffing can only lead to a finding of negligence, even if inadequate staffing was the result of an intentional decision to increase profitability of the facility operation with the knowledgeable and intended result that patients would suffer, sicken or die.
>
> A closer look at [*Worsham supra,* 226 Cal.App.4th 331] shows plaintiff alleged the defendant acted "recklessly" by deliberately understaffing and undertraining, these allegations of culpability which are essential to an Elder Abuse claim, were not sufficiently supported with particular facts. In other words, Worsham appears to have turned on the lack of specificity in support of allegations that in understaffing, the defendant acted recklessly.
>
> In [*Fenimore, supra,* 245 Cal.App.4th 1339], the court reviewed allegations similar to those in *Worsham*. Accordingly, the defendant argued that the failure to have adequate staff amounted to no more than negligence. *Fenimore* responded: '*Worsham's* determination that understaffing constitutes no more than negligence may be true,

> absent further allegations showing recklessness. But the Fenimores have alleged more than a simple understaffing here. The FAC identified the staffing regulation the Hospital allegedly violated and suggested a knowing pattern of violating it constituted recklessness.' [*Fenimore, supra,* 245 Cal.App.4th at p. 1350.]

(Balisok, Elder Abuse Litigation (The Rutter Group 2022) ("Balisok"), section 9:24.)

In support of its demurrer, defendant Good Samaritan cites *Worsham* for the proposition that an Elder Abuse claim must be based on more than inadequate staffing, and Good Samaritan contends the allegations here lack sufficient specificity to establish anything more than professional negligence. (Dem., p. 9.) In opposition, Plaintiffs cite to Fenimore for the proposition that recklessness may be inferred from a pattern and practice of understaffing in violation of staffing regulations. (Opp., pp.10-11.) The appellate court in *Fenimore* found that "a violation of staffing regulations here may provide a basis for finding neglect," but then went to explain that more was required to state a claim for Elder Abuse:

> Of course, the Fenimores still had to allege facts showing the Hospital acted recklessly, oppressively, fraudulently, or maliciously in the commission of neglect. [Welf. & Inst. Code, § 15657.] The FAC supplied allegations that may show recklessness. It alleged the Hospital had a pattern and knowing practice of improperly understaffing to cut costs, and had the Hospital been staffed sufficiently, George would have been properly supervised and would not have suffered injury. On a demurrer, we must accept the allegations as true and express no opinion on whether the Fenimores can ultimately prove these allegations. We must assume the Fenimores can prove by clear and convincing evidence that the Hospital was understaffed at the time George fell, that this understaffing caused George to fall or otherwise harmed him, and that this understaffing was part of a pattern and practice. If they do so, we cannot say as a matter of law that the Hospital should escape liability for reckless neglect. The trier of fact should decide whether a knowing pattern and practice of understaffing in violation of applicable regulations amounts to recklessness.

(*Fenimore, supra,* 245 Cal.App.4th at p. 1349.)

Plaintiffs argue they have alleged a similar "pattern and practice" of conscious understaffing from which recklessness may be inferred. (Opp., p. 16:16.) Plaintiffs point to a section of the SAC under the heading: "New Facts that Support Claims of Understaffing (New Allegations in SAC)." (See SAC, ¶¶ 125-154.) These new facts are based on documents from the California Department of Public Health ("CDPH"), incorporated into the SAC. (See Opp., pp: 12:27-17:4; Notice of Errata to Plaintiffs' SAC, p. 2, Exs. 1-5.) As summarized in the SAC, the new allegations based on CDPH documentation include the following:

- March 2019 surveys showing a failure to comply with the 1:2 nurse-to-patient ratio in the Labor and Delivery unit. (SAC, ¶ 126.)

- April 2019 survey showing a failure to report a pressure injury in a timely manner. (*Id*. at ¶ 127.)
- June 2019 survey showing a patient was overmedicated. (Id. at ¶ 128.)
- August 2019 survey showing a patient was left on a bedpan for 6 hours. (*Id*. at ¶ 129.)

- September 2019 survey showing a failure to comply with the 1:2 nurse-to-patient ratio in the Labor and Delivery unit. (*Id*. at ¶ 130.)
- February 2020 survey showing a failure to report a pressure injury in a timely manner. (*Id*. at ¶ 132.)
- September 2020 survey showing a failure to assure the availability of medical records for 1 patient. (*Id*. at ¶ 133.)
- October 2020 survey showing a failure to ensure the ICU was free from insects; maggots were found in 1 patient. (*Id*. at ¶ 134.)
- November 2020 survey showing the hospital failed to ensure staff followed the hospital policy on wound assessment with respect to 1 patient: staff did not add photographic documentation of wound to chart; every dressing did not include the wound description and measurements; and a wound assessment was not completed two emergency department registered nurses. (*Id.* at ¶ 135.)
- June 2021 survey showing failures by the governing body to (1) ensure that nursing services were provided to meet the needs of patients, and (2) carry out an effective, system-wide quality assessment program. This survey stated, "the governing body failed to address serious, systemic, and recurring issues, placing 13 of 37 sampled patients at risk for adverse events." (Id. at ¶¶ 136-141, Ex. 3.)
- August 2021 survey showing failures by the governing body to (1) ensure that nursing services were provided to meet the needs of patients, and (2) carry out an effective, system-wide quality assessment program. This survey stated, "the governing body failed to fully address serious and recurring issues, placing 15 and 37 sampled patients at risk for adverse events." (Id. at ¶¶ 136-141, Ex. 3.)
- November 2021 survey showing a failure to follow internal policies and procedures with respect to 1 patient on an involuntary psychiatric hold. (Id. at ¶ 150.)
- December 2021 survey showing a failure to ensure nursing staff followed the hospital's policies, including a lack of charge nurses in the Neurosurgical Intensive Care Unit, Emergency Department, and Labor and Delivery unit. (Id. at ¶¶ 151-154, Ex. 5.)

(Opp., pp. 13-17; SAC ¶¶ 125-154.)

Defendant Good Samaritan contends the new facts again fail to show a pattern and practice from which recklessness can be inferred. (Mot., pp. 7-10.) Good Samaritan asserts that the CDPH surveys completed after the time the Decedent stayed at the hospital (in October and November 2020) cannot be used to show a pattern and practice of understaffing in existence during her stays. In addition, Good Samaritan points to qualifying language in some of the CDPH documents that are provided: "Inspection was limited to the specific complaints and does not represent the findings of a full inspection of the facility." (SAC, Exs. 1 and 2, pp. 4, 6, 8, 12 of 138-page PDF of combined exhibits.)

Defendant Good Samaritan also points out that Plaintiffs have not provided all of the CDPH documents referenced in the SAC, and that documents from 2020, the year of the allegedly reckless care of Decedent, are conspicuously absent. (Dem., p. 2:14-16.) Plaintiffs explain that they did not attach all of the records cited in the SAC because the exhibits would be too voluminous, arguing that the records are presumably within Good Samaritan's possession. (Opp., 14:28-15:5.)

The court acknowledges the new facts alleged by Plaintiffs in an effort to establish an inference of defendant Good Samaritan's recklessness. But, as this court has stated previously, it believes the facts of this case are more analogous to those in *Worsham* than those in *Fenimore*. For the reasons discussed below, the supplemental facts found in the SAC do not change the court's mind.

The *Fenimore* decision "did not explain what sort of pattern or practice would suffice, nor how drastic the understaffing would have to be to amount to recklessness." (*Cochrum,* 25 Cal.App.5th at p. 1048.) But, the decision effectively identified three elements in the case before it which it concluded were sufficient to state a claim for Elder Abuse based on understaffing: (1) that the facility was understaffed at the time of the injury or harm to the patient; (2) that the understaffing caused the injury or harm to the elder; and (3) that the understaffing was part of a pattern and practice. (See *Fenimore, supra,* 245 Cal.App.4th at p. 1349 ["We must assume the Fenimores can prove by clear and convincing evidence that the Hospital was understaffed at the time George fell, that this understaffing cause George to fall or otherwise harmed him, and that this understaffing was part of a pattern and practice. If they do so, we cannot say as a matter of law that the Hospital should escape liability for reckless neglect."].)

Here, based on this court's review of the second cause of action as alleged in the SAC, those three elements are not met, rendering *Fenimore* distinguishable. The absence of any CDPH records from 2020 is conspicuous, particularly when the SAC references several records from 2020 and the Plaintiffs found room to include approximately 122 pages of CDPH records dated after the alleged harm here. However, a plaintiff is not required to meet an evidentiary standard at the pleading stage, and the court finds the CDPH records to be relevant to the understaffing claim. The SAC's allegations are sufficient to meet the first and third elements identified in *Fenimore*, i.e., that Good Samaritan was understaffed during the Decedent's stays in October and November of 2020, and that this understaffing was part of a pattern and practice.

What the court finds lacking is sufficient specificity in support of allegations that understaffing caused injury or harm to the Decedent. As in *Worsham,* the allegations here concern defendant Good Samaritan's alleged "negligent undertaking of medical services, rather than a failure of those responsible for attending to [the Decedent's] basic needs and comforts to carry their custodial or caregiving obligations. (*Worsham, supra*, 226 Cal.App.4th at p. 337.)

In *Fenimore,* there was a clear connection between the alleged understaffing and the alleged injury to the elder. There, the family of the elder (George) admitted him to a hospital on a psychiatric hold, and then transferred him to Resnick Neuropsychiatric Hospital to protect him from falls and wandering. (*Fenimore, supra,* 245 Cal.App.4th at pp. 1342-1343.) The hospital knew that George was an extreme fall risk, was being transferred from an involuntary psychiatric hold, and required special care and assistance to prevent further falls. (*Id*. at p. 1343.)

"Just minutes after entering the Hospital, George was left unattended and fell." (*Ibid*.) X-ray results later revealed that he had a hip fracture, and he never recovered from the ensuing hip surgery. (*Id*. at p. 1344.) The plaintiffs alleged that the hospital knowingly violated nursing staff regulations applicable to psychiatric hospitals, and that "[h]ad there been sufficient staff at the Hospital, George would have received proper supervision and assistance and would not

have suffered his injuries." (Id. at p. 1345.) The Fenimore court stressed that the plaintiffs alleged not only a knowing pattern and practice of improperly understaffing to cut costs, but also that "had the Hospital been staffed sufficiently, George would have been properly supervised and would not have suffered injury." (*Id*. at p. 1349.)

Here, by contrast, the SAC does not specify how the alleged understaffing led to an injury to the Decedent in particular. The new allegations identified in the SAC do not appear to make any reference to injury or harm suffered by Decedent. (See SAC, ¶¶ 125-154.) The only direct reference to Decedent the court is able to locate within the new allegations is the following:

> ¶ 125. Those responsible for attending to the DECEDENT'S basic needs and comforts failed to carry out their custodial and caregiving duties, due, in part, to chronic understaffing of the facilities and deficiencies regarding the quality of care/treatment and nursing services, as shown by California Department of Public Health (CDPH) records evidencing numerous incidents and complaints and violations by the Defendants, as summarized in part below.

As to the GHC Defendants, the SAC alleges the Decedent suffered a fall while at the Plum Tree nursing facility, and that Plum Tree staff knew that she required supervision, particularly in light of a documented new decrease in strength and mobility just days prior to the fall. (SAC, ¶¶ 26-27.) Though relevant to an Elder Abuse claim against the GHC Defendants, particularly considering Fenimore, these facts do not help Plaintiffs with respect to defendant Good Samaritan's demurrer to the second cause of action.

In the court's view, the connection between defendant Good Samaritan's alleged understaffing and resulting injury to Decedent is alleged at best generally in the SAC. It cannot be determined from the SAC specifically how more staff members assigned to Decedent's care would have prevented injury. Thus, the court is unable to infer recklessness as to Decedent based on the FAC's general allegations of understaffing. (See *Mittenhuber, supra*, 142 Cal.App.3d at p. 5 ["[Where] recovery is based on a statutory cause of action, the plaintiff must set forth facts in his [or her] complaint sufficiently detailed and specific to support an inference that each of the statutory elements of liability is satisfied. General allegations are regarded as inadequate. [Citations.]"].) A plaintiff has the burden to show in what manner they can amend a pleading and how that will change its legal effect. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) Plaintiffs have not met that burden here.

Accordingly, defendant Good Samaritan's demurrer to the second cause of action [Elder Abuse] on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., § 430.10, subd. (e)] is SUSTAINED without leave to amend.

B. Defendant Good Samaritan's demurrer to the third cause of action [Willful Misconduct] is OVERRULED.

Defendant Good Samaritan demurs to the third cause of action [Willful Misconduct] on the ground that the pleading does not state facts sufficient to constitute a cause of action. "Willful misconduct is an aggravated form of negligence." (*Carlsen v. Koivumaki* (2014) 227 Cal.App.4th 879, 895.) "The concept of willful misconduct has a well-established, well-defined meaning in California." (*New v. Consolidated Rock Products Co*. (1985) 171

Cal.App.3d 681, 689.) "Three essential elements must be present to raise a negligent act to the level of willful misconduct: (1) actual or constructive knowledge of the peril to be apprehended, (2) actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger, and (3) conscious failure to act to avoid the peril." (*Id*. at pp. 689-690, internal quotation marks and citations omitted.)

In demurring, defendant Good Samaritan contends this claim fails because Plaintiffs have not sufficiently alleged a pattern and practice of understaffing that amounted to reckless conduct. (Mot., p. 11:23-27.) However, Good Samaritan offers no authority in support of its apparent position that a claim for willful misconduct against can only be based upon recklessness arising from understaffing. In opposition, Plaintiffs argue the SAC sufficiently alleges the three required elements. (Opp., p. 17:27-28.)

In contrast to the Elder Abuse claim, this cause of action is not rooted in statute and can be based on the alleged substandard medical treatment of Decedent, rather than on the alleged neglect of her more basic custodial needs. The SAC alleges that defendants knew the Decedent presented heightened risks, particularly as to impaired skin integrity, and that such peril made further injury probable. (SAC, ¶¶ 183-184.) The SAC further alleges that defendants consciously failed to act to avoid the peril, including by not ordering proper medication and nutrition plans, and not sufficiently training staff. (*Id*. at ¶¶ 186-188.) It also alleges that the defendants failed to comply with the applicable standards of care, including by failing to institute and follow pressure sore protocol and would care preventative measures. (Id. at ¶¶ 189-193.) These allegations are sufficient to withstand demurrer.

Defendant Good Samaritan cites *Snider v. Whitson* (1960) 184 Cal.App.2d 211, 214, for the proposition that pleading willful misconduct requires specificity. "Where a plaintiff relies upon wilful misconduct there are sound reasons why he should be required to state the facts more fully than in ordinary negligence cases so that it may be determined whether they do constitute wilful misconduct rather negligence or gross negligence. The distinction is often difficult to determine." (Ibid.) Here, Plaintiffs have stated the facts more fully than would be required in an ordinary negligence case. Further, this claim itself is not statutory and Plaintiffs need not meet the heightened requirements for statutory claims as described in *Mittenhuber*, discussed previously.

Accordingly, defendant Good Samaritan's demurrer to the third cause of action [Willful Misconduct] on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., § 430.10, subd. (e)] is OVERRULED.

C. Defendant Good Samaritan's motion to strike portions of Plaintiffs' SAC is GRANTED.

Defendant Good Samaritan moves to strike Plaintiffs' requests for punitive damages, attorney's fees, and pain and suffering damages. Good Samaritan asserts that in the absence of properly pleaded facts showing recklessness, the Elder Abuse and Willful Misconduct claims fail, and Plaintiffs are not entitled to punitive damages, attorney's fees, or pain and suffering damages. (Mot., p. 3:12-18.)

1. Punitive Damages

Defendant Good Samaritan contends Plaintiffs are not entitled to an award of punitive damages because the SAC fails to sufficiently allege a pattern and practice of understaffing to support a finding of recklessness. (Mot., p. 3, p. 12-18.) In opposition, Plaintiffs argue they have sufficiently alleged such a pattern and practice of understaffing to show recklessness and have alleged malice and oppression. (Opp., pp. 4, 6-10.)

For the reasons discussed previously, the court has found insufficient allegations of a pattern and practice of understaffing to support an inference of recklessness by defendant Good Samaritan as to the Decedent. Therefore, it likewise finds that Plaintiffs are not entitled to punitive damages against Good Samaritan.[2] Accordingly, defendant Good Samaritan's motion to strike the request for punitive damages from Plaintiff's SAC is GRANTED without leave to amend.

2. Attorney's Fees

Defendant Good Samaritan contends the SAC improperly requests attorney's fees based on the Elder Abuse claim because that claim lacks merit. (Mot., pp. 3-4.) In opposition, Plaintiffs assert they may seek attorney's fees under the Elder Abuse Act. (Opp., pp. 4-6.) The requests for attorney's fees stated in the SAC expressly rely upon the Elder Abuse claim. (See SAC, p. 58.) As discussed elsewhere, this court has found the Elder Abuse claim does not withstand demurrer.

Accordingly, defendant Good Samaritan's motion to strike the request for attorney's fees from Plaintiff's SAC is GRANTED without leave to amend.

3. Pain and Suffering

Defendant Good Samaritan contends the SAC improperly requests pain and suffering damages because Code of Civil Procedure section 377.24, subdivision (a), does not permit such damages in a wrongful death action. (Mot., p. 4.) In opposition, Plaintiffs assert they may seek such damages under the Elder Abuse Act. (Opp., pp. 4-6.) The request for pain and suffering damages stated in the SAC expressly relies upon the Elder Abuse claim. (See SAC, p. 58.) As discussed elsewhere, this court has found the Elder Abuse claim does not withstand demurrer, and therefore, the motion to strike the request for pain and suffering damages is GRANTED.

Accordingly, defendant Good Samaritan's motion to strike portions of Plaintiffs' SAC is GRANTED without leave to amend.

D. The GHC Defendants' motion to strike portions of Plaintiffs' SAC is DENIED.

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[2] The court notes that the SAC seeks punitive damages under both the Elder Abuse and Willful Misconduct causes of action. (SAC, p. 58:21-22.) The court's prior order (filed on December 12, 2022 following the motions to strike portions to the FAC) discussed the issue of compliance of with Code of Civil Procedure, section 425.13, when seeking punitive damages against a healthcare provider. While neither defendant Good Samaritan nor Plaintiffs appear to address this issue here, the court finds that Plaintiffs have not cured this defect previously identified by the court.

The GHC Defendants move to strike paragraphs 155-161 of Plaintiffs' SAC. (Mot., p. 2:6.) This is the portion of the section titled, "New Facts that Support Claim of Understaffing (New Allegations in SAC" that pertains to the Plum Tree Care Center. (SAC, pp. 125, 155-161.) The allegations in question are based upon CDPH records.

In moving to strike these allegations from the SAC, the GHC defendants reply upon Health and Safety Code section 1280, subdivision (f), which states:

> In no event shall the act of providing a plan of correction, the content of the plan of correction, or the execution of a plan of correction, be used in any legal action or administrative proceeding as an admission within the meaning of Sections 1220 to 1227, inclusive, of the Evidence Code against the health facility, its licensee, or its personnel.

The GHC Defendants assert that, because this matter is a "legal action," all references to CDPH documents must be stricken from the SAC. (MPA, p. 3:16-20.) In support, they cite two decisions (*Nevarrez v. San Marino Skilled Nursing & Wellness Centre, LLC* (2013) 221 Cal.App.4th 102; *California Assn. of Health Facilities v. Dept. of Health Services* (1997) 16 Cal.4th 284), neither of which addresses a motion to strike. (MPA, p. 4:5-14.) The GHC Defendants also submitted supplemental briefing in which they assert that a motion to strike is within the discretion of the trial court, and that the court may strike facts pleaded as mere surplusage when ultimate facts are sufficiently alleged. (Reply, p. 7:1-4.) The GHC Defendants contend the CDPH documents are irrelevant because they do not pertain to the 12 days during which the Decedent was at Plum Tree. (Id. at p. 7:5-11.)

In opposition, Plaintiffs contend allegations relating to CDPH records are properly included in the SAC because the records support their claim of understaffing. (Opp., pp. 6-10.) Plaintiffs further argue that Health and Safety Code section 1280, subdivision (f), does not prevent the inclusion of the CDPH allegations because no "plan of correction" is at issue and because the admissibility of material at trial under the Evidence Code does not determine the scope of what may be alleged in a pleading. (Opp., pp. 10-14.) Finally, Plaintiffs assert they included these additional facts in response to the court's order finding that further facts were required to withstand demurrer. (Id., p. 14:6-10.)

Here, the court finds the allegations in question to be relevant to the Elder Abuse claim against the GHC Defendants.[3] The question of admissibility at trial is not before the court on demurrer. The GHC Defendants offer no authority stating the allegations must be stricken, and the court declines the invitation to strike the allegations in its discretion.

Accordingly, the GHC Defendant's motion to strike portions of Plaintiffs' SAC is DENIED.

IV. Order.

Defendant Good Samaritan's demurrer to the second cause of action [Elder Abuse] on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., § 430.10, subd. (e)] is SUSTAINED without leave to amend.

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[3] GHC Defendants have not demurred to the SAC and the cause of action remained intact as to them.

Defendant Good Samaritan's demurrer to the third cause of action [Willful Misconduct] on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., § 430.10, subd. (e)] is OVERRULED.

Defendant Good Samaritan's motion to strike portions of Plaintiffs' SAC [Code Civ. Proc., § 436, subd. (a)] is GRANTED.

Defendant Plum Tree's motion to strike portions of Plaintiffs' SAC [Code Civ. Proc., § 436, subd. (a)] is DENIED.

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Case Name: *Jose Lizaola Uribe, et al. v. Trinity Financial, et al.*

Case No.: 22CV399141

(1) Demurrer to the First Amended Complaint

Factual and Procedural Background

Plaintiffs Joel Lizaola Uribe and Norma Santoyo ("Plaintiffs") are the owners of and reside at real property commonly known as 2475 Flory Drive in San Jose ("Subject Property"). (First Amended Complaint ("FAC"), ¶¶1, 3 and 5.)

On or about April 14, 2005, Plaintiffs entered into a loan agreement with Long Beach Mortgage Company ("LBMC"), borrowing $125,000. (FAC, ¶9.) Plaintiffs executed a promissory note ("Note") secured by a deed of trust ("DO") against the Subject Property, Plaintiffs' primary residence. (FAC, ¶¶10 – 11.) The Note and DOT incorrectly identified the parcel number for the Subject Property as 599-44-020. (FAC, ¶¶12 – 13.) LBMC subsequently assigned the [DOT] to Mortgage Electronic Registration Services ("MERS") on or about 27 April 2005 listing the parcel number for the Subject Property as 601-41-049. (FAC, ¶14.)

In or about 2008, Plaintiffs obtained a loan modification and were informed that their loan from LBMC had been consolidated with their first mortgage and would no longer appear on their credit report. (FAC, ¶15.) Plaintiffs ha no manner of ascertaining that there was any further debt owed on this second mortgage. (FAC, ¶16.) From that point on, neither LBMC nor its successor-in-interest, defendant Trinity Financial Services, LLC (erroneously sued as Trinity Financial; hereafter, "Trinity") contacted Plaintiffs regarding the purportedly settled Note. (FAC, ¶17.)

Then, on or about June 2016 after eight years without contact, defendant Trinity contacted Plaintiffs and informed them that defendant Trinity was initiating foreclosure proceedings due to non-payment. (FAC, ¶18.) Plaintiffs had never received any notice that defendant Trinity had taken over as servicer of the Note or the date of the next payment. (FAC, ¶19.) Plaintiffs attempted to contact defendant Trinity to work out a payment plan or modification, but received no assistance whatsoever. (FAC, ¶20.) Plaintiffs' requests for a basic accounting were similarly and repeatedly ignored by defendant Trinity. (FAC, ¶21.)

Defendant Trinity placed a Notice of Trustee Sale on the Subject Property which indicated Financial Title was the trustee, but no substitution of trustee had ever been recorded. (FAC, ¶¶22 – 23.) The Subject Property was sold on or about May 7, 2018. (FAC, ¶24.) The Trustee's Deed, executed on May 9, 2018, identified the legal parcel number as 601-41-049, despite the fact that the Note and DOT contained this parcel number. (FAC, ¶25.)

Plaintiffs, believing the Subject Property had not been sold, attempted to file bankruptcy to stop sale of their home. (FAC, ¶26.) On or about December 2018, Plaintiffs were forced out of their home. (FAC, ¶29.) On or about June 2018, Plaintiffs had filed a lawsuit, case number 18CV329352, ("Prior Action") against defendant Trinity, among others, regarding the unlawful sale of the Subject Property. (FAC, ¶30.) Plaintiffs alleged in the Prior Action that

defendants had no right to sell the Subject Property as the DOT related to an incorrect parcel number. (FAC, ¶31.) Plaintiff Jose Uribe was forced to dismiss the Prior Action to pursue a further action against the current defendants. (FAC, ¶33.) Ony after dismissing the Prior Action did Plaintiffs learn that defendant's predecessor-in-interest had already filed a lawsuit in 2013 to rectify the incorrect DOT ("Rectify Action"). (FAC, ¶34.) Plaintiffs were never properly served with the Rectify Action and only became aware of its existence after dismissal of the Prior Action. (FAC, ¶35.)

On May 31, 2022 , Plaintiffs filed a complaint against defendant Trinity asserting causes of action for:

(1) Breach of Contract
(2) Breach of the Covenant of Good Faith and Fair Dealing
(3) Fraud
(4) Promissory Estoppel
(5) Violation of California Civil Code §§2923.5 et seq. and 2934a
(6) Violation of California Civil Code §§2924 et seq. and 2934a
(7) Violation of Business and Professions Code §§17200 et seq.
(8) Violation of the Rosenthal Fair Debt Collection Practices Act

On July 19, 2023, defendant Trinity filed a demurrer to Plaintiffs' complaint. On November 14, 2023, the court (Hon. Kulkarni) issued an order sustaining defendant's demurrer with leave to amend.

On December 6, 2023, Plaintiffs filed the operative FAC which now asserts causes of action for:

(1) Breach of Contract
(2) Breach of the Covenant of Good Faith and Fair Dealing
(3) Fraud
(4) Promissory Estoppel
(5) Wrongful Foreclosure, Violation of California Civil Code §§294 et seq.
(6) Violation of Business and Professions Code §17200 et seq.

On January 9, 2024, defendant Trinity filed the motion now before the court, a demurrer to Plaintiffs' FAC.

A. Defendant Trinity's demurrer to the entirety of Plaintiffs' FAC on the ground that it is barred by the statute of limitations is OVERRULED.

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 (E-Fab). 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.) When evaluating whether a claim is time-barred, the court must determine: (1) which statute of limitations applies, and (2) when the claim accrued. (*Id*., at p. 1316.)

Defendant Trinity demurs to the entirety of Plaintiffs' FAC by asserting it is barred. Without actually identifying which particular statute(s) of limitations apply, defendant Trinity asserts all of Plaintiffs' causes of action accrued no later than M, ay 7, 2018, the date Plaintiffs allege the Subject Property was sold at which point Plaintiffs were aware of injury. Implicitly, defendant Trinity asserts the longest statute of limitations applicable to Plaintiffs' FAC is four years and since Plaintiffs did not commence this action until May 22, 2022, their FAC is barred.

The court does not accept this broad-brush argument. Plaintiffs' FAC includes causes of action for breach of contract and fraud. Accrual of these claims varies. "Ordinarily, a cause of action for breach of contract accrues on the failure of the promisor to do the thing contracted for at the time and in the manner contracted." (*Waxman v. Citizens Nat. Trust & Savings Bank of Los Angeles* (1954) 123 Cal.App.2d 145, 149.) The limitations period for a claim predicated on fraud is three years from the date of "the discovery, by the aggrieved party, of the facts constituting the fraud." (Code Civ. Proc., § 338, subd. (d); see *Britton v. Girardi* (2015) 235 Cal.App.4th 721, 734.)

Without identifying and discussing the "failure of the promisor to do the thing contracted for" or "the facts constituting the fraud," the court does not accept defendant Trinity's blanket assertion that all the claims asserted in the FAC accrued on May 7, 2018, the date the Subject Property was sold. In this court's opinion, it is certainly conceivable that a plaintiff may be aware of an injury without knowing that the reason for the injury was due to fraud. Thus, it does not appear clearly and affirmatively to this court that the entire FAC is barred by the statute of limitations.

B. Defendant Trinity's demurrer to the first cause of action [breach of contract] of Plaintiffs' FAC is SUSTAINED.

"To prevail on a cause of action for breach of contract, the plaintiff must prove (1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damage to the plaintiff." (*Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1186; see also CACI, No. 303.)

Initially, defendant Trinity demurs to the first cause of action for breach of contract insofar as it is being asserted by plaintiff Santoyo. . "[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.) "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.)

The particular agreement at issue is alleged to be a loan agreement entered into on or about April 14, 2005 between Plaintiffs and LBMC. (FAC, 41.) Despite the allegation that both Plaintiffs entered into this loan agreement, defendant Trinity asserts the agreement, in reality, was between only plaintiff Uribe and LBMC. Defendant Trinity asks the court to take judicial notice of a deed of trust recorded April 22, 2005 which establishes that the actual property at issue is located at 227 N. Claremont Avenue in San Jose, and not the alleged Subject Property

located at 2475 Flory Drive in San Jose; that only plaintiff Uribe owned the property at issue at the time; that plaintiff Uribe entered into two separate loan transactions secured against the property at issue by deeds of trust which identify only plaintiff Uribe as the borrower, not plaintiff Santoyo. Defendant Trinity also asks this court to take judicial notice of a grant deed recorded on 22 November 2013 purportedly transferring title to the property at issue from plaintiff Uribe to plaintiff Santoyo.

Plaintiffs do not object to defendant Trinity's request for judicial notice nor do Plaintiffs dispute the truth of the factual assertions made by defendant Trinity. Plaintiffs simply do not address defendant Trinity's argument that plaintiff Santoyo lacks standing. For that reason alone, defendant Trinity's demurrer to the first cause of action [breach of contract] of the FAC insofar as it is being asserted by plaintiff Santoyo on the ground that the pleading does not state facts sufficient to constitute a cause of action is SUSTAINED with 10 days' leave to amend.

Defendant Trinity also renews its earlier statute of limitations argument with regard to the first cause of action. This time, defendant Trinity acknowledges the loan agreement includes a provision which states, "that both parties and their successors and assigns would act in compliance with the laws of the State of California and the United States." It still remains unclear to this court what allegations support plaintiff Uribe's claim for breach of this provision. In any case, defendant Trinity again asserts that a breach occurred no later than the date of the Trustee's Sale which occurred on May 7, 2018. Defendant Trinity, without dispute from Plaintiffs, assert this first cause of action is governed by a four year statute of limitations so by filing the complaint on May 22, 2022, Plaintiffs' first cause of action is untimely.

Even if the court accepts defendant Trinity's assertion that the cause of action accrued on 7 May 2018, the court is also aware of the Judicial Council's Emergency Rule No. 9 in response to COVID-19. The relevant text of Emergency Rule No. 9 is as follows:

> Emergency Rule 9. Tolling statutes of limitations for civil causes of action
> (a) Tolling statutes of limitations over 180 days. Notwithstanding any other law, the statutes of limitations and repose for civil causes of action that exceed 180 days are tolled from April 6, 2020, until October 1, 2020.

(Emergency Rule 9 amended effective May 29, 2020.)

Application of this Emergency Rule would render Plaintiffs' first cause of action timely.

As a third basis for demurrer to the first cause of action, defendant Trinity contends it is unclear what facts form the basis for an alleged breach. Where a contract is written, "the terms must be set out verbatim in the body of the complaint or a copy of the written instrument must be attached and incorporated by reference." (*Otworth v. Southern Pacific Transportation Co.* (1985) 166 Cal.App.3d 452, 459.) Alternatively, "[i]n an action based on a written contract, a plaintiff may plead the legal effect of the contract rather than its precise language." (*Construction Protective Services, Inc. v. TIG Specialty Ins. Co.* (2002) 29 Cal.4th 189, 199.) "This is more difficult, for it requires a careful analysis of the instrument, comprehensiveness in statement, and avoidance of legal conclusions, and it involves the danger of variance where the instrument proved differs from that alleged; it is not frequently employed. Nevertheless, it

is an established method." (4 Witkin, California Procedure (4th ed. 1997) Pleading, §480, p. 573.)

As noted above, plaintiff Uribe does allege the relevant provision of the agreement. However, the court would agree with defendant Trinity that it is unclear what allegations support plaintiff Uribe's claim for breach of this provision. There is no clear explanation what "laws of the State of California and the United States" defendant Trinity failed to comply with. [In opposition, plaintiffs contend such language appears in Section 13 of the Deed of Trust (of which defendant Trinity has requested judicial notice), but in this court's review of that particular section of the DOT, the court did not find language stating the parties were to act "in compliance with California and State Law."]

Accordingly, defendant Trinity's demurrer to the first 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 breach of contract is SUSTAINED with 10 days' leave to amend.

C. Defendant Trinity's demurrer to the second cause of action [breach of implied covenant of good faith and fair dealing] of Plaintiffs' FAC is SUSTAINED.

"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." (Rest.2d Contracts, § 205.) "There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658; see also CACI No. 325.)

"The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made. [Citation.] The covenant thus cannot 'be endowed with an existence independent of its contractual underpinnings.' [Citations.] It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349 - 350 (Guz).)

"The implied covenant of good faith and fair dealing rests upon the existence of some specific contractual obligation. [Citation.] 'The covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purpose.' [Citation.] … 'In essence, the covenant is implied as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract.'" (*Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1031 - 1032.)

Defendant Trinity raises the same arguments to this second cause of action that it raised with regard to the first cause of action. For the reasons discussed above, defendant Trinity's demurrer to the first 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 breach of implied covenant of good faith and fair dealing is SUSTAINED with 10 days' leave

to amend. [Additionally, Plaintiffs' second cause of action includes allegations which are substantially identical to the allegations in the first cause of action. In *Guz, supra*, 24 Cal.4th at p. 327, the California Supreme Court stated, "[W]here breach of an actual term is alleged, a separate implied covenant claim, based on the same breach, is superfluous." Thus, to the extent Plaintiffs claim the allegations of breach of contract are also a breach of the implied covenant of good faith and fair dealing, the latter claim would be superfluous.]

D. Defendant Trinity's demurrer to the third cause of action [fraud] of Plaintiffs' FAC is SUSTAINED.

Defendant Trinity initially demurs to Plaintiffs' third cause of action for fraud by renewing its earlier argument that the fraud cause of action is barred by a three-year statute of limitations. However, defendant Trinity still fails to adequately address the legal and factual basis for its assertion that the claim accrued in May 2018. As noted above, an action for fraud accrues the date of "the discovery, by the aggrieved party, of the facts constituting the fraud." (Code Civ. Proc., § 338, subd. (d); see *Britton v. Girardi* (2015) 235 Cal.App.4th 721, 734.) Defendant Trinity's assertion that Plaintiffs were aware of injury no later than May 2018 is insufficient to "clearly and affirmatively" demonstrate that this third cause of action is untimely barred.

Alternatively, defendant Trinity demurs to the Plaintiffs' third cause of action for fraud because "Fraud actions are subject to strict requirements of particularity in pleading. … Accordingly, the rule is everywhere followed that fraud must be specifically pleaded." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216.) "The pleading should be sufficient to enable the court to determine whether, on the facts pleaded, there is any foundation, prima facie at least, for the charge of fraud." (*Commonwealth Mortgage Assurance Co. v. Superior Court* (1989) 211 Cal.App.3d 508, 518.) The court in Lazar v. Superior Court (1996) 12 Cal.4th 631, 645 did not comment on how these particular allegations met the requirement of pleading with specificity in a fraud action, but the court did say that "this particularity requirement necessitates pleading facts which 'show how, when, where, to whom, and by what means the representations were tendered.' A plaintiff's burden in asserting a claim against a corporate employer is even greater. In such a case, the plaintiff must 'allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." Defendant Trinity contends Plaintiffs' third cause of action lacks the requisite specificity.

In reviewing Plaintiffs' third cause of action, the court could only identify the allegation found at paragraph 95 which states Defendants "engaged in a practice of fraud up to and including providing a fraudulent proof of service to the Court in order to gain permission to amend this invalid Deed." The court understands this allegation to reference Plaintiffs' earlier allegation at paragraph 36 which states, "Defendants had not only recorded an invalid deed of trust, but had then fraudulently informed the Court that they had served Plaintiffs with a Complaint in order to obtain permission to amend the Deed with the correct legal parcel number - thereby retroactively attempting to validate their unlawful actions without giving actual notice to Plaintiffs." In opposition, Plaintiffs contend their claim of fraud is also premised on the allegations found at paragraphs 13 - 14 wherein Plaintiffs allege the discrepancy in parcel numbers and also in the DOT of which defendant Trinity requested judicial notice.

In those allegations and in the DOT, the court is unable to locate the names of the persons who purportedly made representations on behalf of defendant Trinity or their authority to speak. Accordingly, defendant Trinity'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 fraud is SUSTAINED with 10 days' leave to amend.

E. Defendant Trinity's demurrer to the fourth cause of action [promissory estoppel] of Plaintiffs' FAC is OVERRULED.

"The required elements for promissory estoppel in California are … (1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) his reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance." (*Laks v. Coast Fed. Sav. & Loan Assn*. (1976) 60 Cal.App.3d 885, 890; see also *US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 901 (US Ecology).).)

"The doctrine of promissory estoppel is set forth in section 90 of the Restatement of Contracts. It provides: 'A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promise and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.'" (*Signal Hill Aviation Co. v. Stroppe* (1979) 96 Cal.App.3d 627, 637 (*Signal Hill*).) "California recognizes the doctrine. 'Under this doctrine a promisor is bound when he should reasonably expect a substantial change of position, either by act or forbearance, in reliance on his promise, if injustice can be avoided only by its enforcement." (*Signal Hill*, *supra*, 96 Cal.App.3d at p. 637.) In essence, "the estoppel is a substitute for consideration." (1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §248, p. 250.) "Cases have characterized promissory estoppel claims as being basically the same as contract actions, but only missing the consideration element." (US Ecology, supra, 129 Cal.App.4th at p. 903.) "[P]romissory estoppel claims are aimed solely at allowing recovery in equity where a contractual claim fails for a lack of consideration, and in all other respects the claim is akin to one for breach of contract." (*Id*. at p. 904; see also *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, 310-"Promissory estoppel is 'a doctrine which employs equitable principles to satisfy the requirement that consideration must be given in exchange for the promise sought to be enforced.' [Citation.]")

As against Plaintiffs' fourth cause of action, defendant Trinity renews its statute of limitations argument. However, without identifying what the underlying promise was, defendant Trinity contends Plaintiffs would have been aware of a breach of such promise no later than May 2018, when the Subject Property was sold through foreclosure. Since the argument is not adequately developed, defendant Trinity'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 promissory estoppel is OVERRULED.

F. Defendant Trinity's demurrer to the fifth cause of action [wrongful foreclosure] of Plaintiffs' FAC is OVERRULED.

To Plaintiffs' fifth cause of action for wrongful foreclosure, defendant Trinity again renews its statute of limitations argument citing *Susilo v. Wells Fargo Bank, N.A.* (C.D.Cal. 2011) 796 F.Supp.2d 1177, 1195 where the court wrote, "When the action to set aside the sale is based on fraud, a fraudulent conspiracy or breach of statutory duty, the statute of limitations is three years from the date of the sale. [Citation.]" Defendant Trinity, however, omitted the very next sentence where the court wrote, "Where based on fraud, the statute commences to run only upon discovery of the facts by the aggrieved party. [Citation.]" (*Ibid*.) As this court noted earlier, it is certainly conceivable that a plaintiff may be aware of an injury without knowing that the reason for the injury was due to fraud. Thus, Plaintiffs' awareness that the Subject Property was sold in May 2018 does not necessarily mean that Plaintiffs were aware of or discovered the factual basis was fraud.

Defendant Trinity's demurrer to the fifth 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 foreclosure is OVERRULED.

G. Defendant Trinity's demurrer to the seventh cause of action [violation of Business and Professions Code section 17200 et seq.] of Plaintiffs' FAC is OVERRULED.

Defendant Trinity demurs to the seventh cause of action by again renewing its argument that it is barred by a four-year statute of limitations. (See Bus. & Prof. Code, §17208- "Any action to enforce any cause of action pursuant to this chapter shall be commenced within four years after the cause of action accrued.")

"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.) "By proscribing unlawful business practices, the UCL borrows violations of other laws and treats them as independently actionable. In addition, practices may be deemed unfair or deceptive even if not proscribed by some other law. Thus, there are three varieties of unfair competition: practices which are unlawful, or unfair, or fraudulent." (*Blakemore v. Superior Court* (2005) 129 Cal.App.4th 36, 48.)

In light of the court's ruling above with regard to the fifth cause of action, defendant Trinity's demurrer to the fifth 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 violation of Business and Professions Code section 17200 et seq. is OVERRULED.

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Calendar line 15

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Calendar line 16

Case Name: *Michael Holys v. County of Santa Clara, et al.*

Case No.: 22CV407608

(1) Defendant County of Santa Clara's Demurrer to Plaintiff's Second Amended Complaint

Factual and Procedural Background

Defendant County of Santa Clara ("County") was authorized by the State of California to place and care for children in foster care, including in private homes, juvenile halls, and group homes in Santa Clara County. (Second Amended Complaint ("SAC"), ¶2.) Children in foster care within County are in the legal custody of defendant County. (Id.) Defendant County was responsible for the care and safety of children within Santa Clara County. (Id.)

Defendant County provided child welfare, child protective, and childcare services to foster children in Santa Clara County, including plaintiff Michael Holys ("Holys"). (SAC, ¶9.)

At all relevant times, plaintiff Holys was in foster care under the custody, care, and control of defendant County. (SAC, ¶23.) In approximately 1998, defendant County placed plaintiff Holys in the foster home of Jason Mero and Eric Morrison ("Foster Parents") located in Palo Alto ("Foster Home"). (SAC, ¶24.) Foster Parents and Foster Home were approved, licensed, trained, supervised, and/or compensated by defendant County. (Id.)

From approximately 1998 to 2001, when plaintiff Holys was approximately thirteen (13) to sixteen (16) years old, plaintiff Holys's foster father, Jason Daniel Mero ("Perpetrator"), sexually abused and assaulted plaintiff Holys approximately daily while plaintiff Holys resided in the Foster Home. (SAC, ¶25.) Perpetrator was an individual to whom defendant County entrusted plaintiff Holys's care and custody. (SAC, ¶27.)

During the course of the aforementioned sexual abuse, plaintiff Holys's other foster parent observed plaintiff Holys being sexually assaulted by Perpetrator and was undeniably aware of the ongoing abuse. (SAC, ¶29.) The Foster Home was filthy and had only one bed which was observed by the social worker or defendant County's agent checking on plaintiff Holys while at Foster Home, who then instructed Foster Parents to make improvements to the living conditions. (Id.) Plaintiff Holys was regularly bruised and dirty with inadequate clothing during social worker visits. (Id.) Plaintiff Holys reported to defendant County that he was not being given enough food and that he was regularly locked in the garage and had to wear dirty clothing to school. (Id.) Foster parents stopped taking plaintiff to medical appointments immediately after plaintiff was placed into foster care. (Id.) Plaintiff Holys threatened to notify the social worker about the abuse and reported the abuse along with his friends to plaintiff's school including his teachers Pace, Ms. G, and Leo. (Id.) Perpetrator forced plaintiff Holys to write a letter to the social worker stating he was not being abused. (Id.) No action was taken, no investigation completed, and Perpetrator continued to sexually assault and abuse plaintiff Holys. (Id.)

Defendant County knew the foster home in which it placed plaintiff Holys was unsafe and it was thus foreseeable that plaintiff Holys would be sexually assaulted and/or abused. (SAC, ¶30.) Defendant County knew of Perpetrator's misconduct that created a risk of childhood sexual assault and/or abuse against plaintiff Holys and defendant County failed to take reasonable steps and/or implement safeguards to avoid such acts of childhood sexual assault and abuse. (SAC, ¶¶31 – 34.) Despite such actual knowledge, defendant County provided Perpetrator unsupervised access to plaintiff Holys. (SAC, ¶35.) Defendant County knew or were otherwise on notice of sexual assault and abuse of plaintiff Holys by Perpetrator and failed to take reasonable steps/ implement safeguards to avoid foreseeable acts of childhood sexual assault. (SAC, ¶36.) In addition to actual notice provided to defendants, there were substantial structural and systemic flaws and deficiencies in the foster care system designed and/or implemented by defendant County. (SAC, ¶37.) Sexual assaults and abuse of juveniles placed in foster care was a chronic, unmitigated, systemic, and pervasive problem known to defendants. (SAC, ¶¶38 and 40.)

On November 17, 2022, plaintiff Holys filed a complaint against defendant County asserting a claim for negligence.

On April 3, 2023, plaintiff Holys filed a first amended complaint ("FAC") alleging causes of action for:

(1) Negligence [against defendant County]
(2) Breach of a Mandatory Duty [against defendant County]
(3) Negligence [against Doe defendants 2 through 25]

On May 1, 2023, defendant County filed a demurrer to plaintiff Holys's FAC. On January 18, 2024, the court sustained defendant County's demurrer with leave to amend.

On January 26, 2024, plaintiff Holys filed the operative SAC which continues to assert the same causes of action asserted in the FAC.

On February 29, 2024, defendant County filed the motion now before the court, a demurrer to plaintiff Holys's SAC.

A. Defendant County's demurrer to the first and second causes of action in plaintiff Holys's SAC is SUSTAINED.

Preliminarily, defendant County points out that, "because 'all governmental tort liability is based on statute, the general rule that statutory causes of action must be pleaded with particularity is applicable. Thus, "to state a cause of action against a public entity, every fact material to the existence of its statutory liability must be pleaded with particularity." ' (*Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 795 [221 Cal.Rptr. 840, 710 P.2d 907] (*Lopez*).)" (*City of Los Angeles v. Superior Court* (2021) 62 Cal.App.5th 129, 138; see also *Zipperer v. County of Santa Clara* (2005) 133 Cal.App.4th 1013, 1020-"Under the Government Tort Liability Act, all liability is statutory. Hence, the rule that statutory causes of action must be specifically pleaded applies, and every element of the statutory basis for liability must be alleged.").) "[Where] recovery is based on a statutory cause of action, the plaintiff must set forth facts in his [or her] complaint sufficiently detailed and specific to support an inference

that each of the statutory elements of liability is satisfied. General allegations are regarded as inadequate. [Citations.]" (*Mittenhuber v. City of Redondo Beach* (1983) 142 Cal.App.3d 1, 5.)

1. First cause of action - negligence.

With that particular rule in mind, the two causes of action plaintiff Holys asserts against defendant County are negligence and breach of a mandatory duty. "To prevail in a negligence action, a plaintiff must show the defendant owed a legal duty to her, the defendant breached that duty, and the breach proximately caused injury to the plaintiff." (*Doe v. L.A. County Dep't of Children & Family Servs.* (2019) 37 Cal.App.5th 675, 682 (*Doe*).) However, "[u]nder the [Government Claims] Act, governmental tort liability must be based on statute; all common law or judicially declared forms of tort liability, except as may be required by state or federal Constitution, were abolished." (*Michael J. v. Los Angeles County Dept. of Adoptions* (1988) 201 Cal.App.3d 859, 866.) "[P]ublic entities are immune from liability except as provided by statute (§ 815, subd. (a))…." (*Caldwell v. Montoya* (1995) 10 Cal.4th 972, 980.) "Except as otherwise provided by statute[,] [a] public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." (Gov. Code, §815, subd. (a).)

Defendant County's liability for negligence is premised upon Government Code section 815.2 , subdivision (a), which states, "A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative." "This section imposes upon public entities vicarious liability for the tortious acts and omissions of their employees." (Legislative Committee Comment to Gov. Code, §815.2; see also *Hoff v. Vacaville Unified School District* (1998) 19 Cal.4th 925, 932-"Through this section, the California Tort Claims Act expressly makes the doctrine of respondeat superior applicable to public employers. [Citation.] 'A public entity, as the employer, is generally liable for the torts of an employee committed within the scope of employment if the employee is liable. [Citations.]' [Citation.] Under section 820, subdivision (a), '[e]xcept as otherwise provided by statute . . ., a public employee is liable for injury caused by his act or omission to the same extent as a private person.' Thus, 'the general rule is that an employee of a public entity is liable for his torts to the same extent as a private person (§ 820, subd. (a)) and the public entity is vicariously liable for any injury which its employee causes (§ 815.2, subd. (a)) to the same extent as a private employer (§815, subd. (b)).'")

Defendant County demurs, initially, by arguing that plaintiff Holys has not adequately alleged the existence of a duty. "[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.

Defendant County relies principally upon *Doe, supra*, 37 Cal.App.5th at pp. 682-683 where the court explained:

A defendant does not owe a legal duty to protect against third party conduct, unless there exists a special relationship between the defendant and the plaintiff. (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 235 [30 Cal. Rptr. 3d 145, 113 P.3d 1159].) In that circumstance, "[i]n addition to the special relationship … , there must also be evidence showing facts from which the trier of fact could reasonably infer that the [defendant] had prior actual knowledge, and thus must have known, of the offender's assaultive propensities. [Citation.]" (*Romero v. Superior Court* (2001) 89 Cal.App.4th 1068, 1084 [107 Cal. Rptr. 2d 801] (*Romero*).) In short, the third party's misconduct must be foreseeable to the defendant. (*Delgado, supra*, 36 Cal.4th at p. 244; Romero, supra, 89 Cal.App.4th at p. 1081.)

In *Doe*, minor plaintiff sued a county department of children and family services and a private foster care agency for negligence and failure to perform mandated duties after becoming pregnant by one adult son of the foster parent she had been placed with and being raped by another adult son. On plaintiff's claim against the private foster care agency for negligently screening the foster parent's home, placing plaintiff there, and monitoring plaintiff's placement, the trial court granted nonsuit finding no evidence that the private foster care agency owed plaintiff a duty to protect against the foster parent's two adult sons because their sexual abuse was not foreseeable or imminent.

Here, there is no real dispute that Children's Institute had a special relationship with Doe. However, nonsuit was properly granted as there was no evidence from which the jury could reasonably infer Children's Institute knew Doe had contact with [the adult sons of the foster parent], much less that the [adult sons] possessed criminal propensities that posed a risk to Doe. … Because there was no evidence showing Defendants had actual knowledge of the [adult sons'] criminal tendencies or that they posed any risk of harm, their conduct was not foreseeable. Children's Institute thus did not owe Doe an affirmative duty to protect her from the [adult sons].

(*Doe, supra*, 37 Cal.App.5th at p. 683.)

As against the defendant county and the county social worker, the Doe court's "conclusion that there was insufficient evidence of foreseeability applies equally to the negligence claim against [the county social worker] as it does to [the private foster care agency]." (*Id.* at p. 687, fn. 8.)

Although Doe involves a motion for nonsuit, it is nevertheless instructive. "A motion for nonsuit has the effect of a demurrer to the evidence: it concedes the truth of the facts presented by the plaintiff, but contends those facts are insufficient as a matter of law to establish a prima facie case." (*Conte v. Girard Orthopaedic Surgeons Medical Group, Inc.* (2003) 107 Cal.App.4th 1260, 1266.) Similarly, in ruling on a demurrer to a complaint, the court treats the demurrer as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of law." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

Defendant County contends, even if there is a special relationship between plaintiff Holys and defendant County, there are no specific allegations that defendant County had prior actual knowledge, and thus must have known, of Perpetrator's sexually assaultive propensities despite plaintiff Holys now having had another opportunity to plead his claims. As this court previously concluded, it is insufficient for plaintiff Holys to make generic and conclusory

allegations that defendant County had knowledge of Perpetrator's "misconduct … that created a risk of childhood sexual assault and/or abuse against Plaintiff" and "knew that Perpetrator was unfit, dangerous, and a threat to the health, safety, and welfare of minors." (SAC, 31.)

The only specific factual allegations made by plaintiff Holys are that "Plaintiff's other foster parent walked in while Plaintiff was being sexually abused by Perpetrator;" "the foster home was filthy and had only one bed;" "Plaintiff was regularly bruised and dirty with inadequate clothing during Social Worker visits, and Plaintiff reported to Defendants that he was not being given enough food and that he was regularly locked in the garage and had to wear dirty clothing to school;" "Foster Parents also stopped taking Plaintiff to [medical] appointments;" and "Perpetrator forced Plaintiff to write a letter to the Social Worker stating that he was not being abused." (SAC, 29.) These allegations previously existed in plaintiff Holy's FAC.

As defendant County points out, the only new factually specific allegation found in the SAC but not in the FAC is the following: "Plaintiff threatened to notify the Social Worker about the abuse and reported the abuse along with his friends to Plaintiff's school including to his teachers Pace, Ms. G, and Leo." (SAC, 29.) As this court previously explained and the Doe court requires, a plaintiff must be able to establish and allege the defendant had actual knowledge of the offender's assaultive propensities. Moreover, since plaintiff is complaining of sexual abuse, plaintiff Holys must allege defendant County's actual knowledge of Perpetrator's sexually assaultive propensities, not just generally assaultive propensities. An allegation that Plaintiff threatened to notify a social worker about Perpetrator's sexual abuse implicitly acknowledges no actual notification was made. Also as defendant County points out, plaintiff Holys's notice of Perpetrator's sexual abuse to teachers at school is not sufficient because a school and the County are different entities.

In opposition, plaintiff begins with a discussion of immunity which does not address defendant County's point which is that it did not have actual notice of Perpetrator's sexually assaultive propensity or conduct and, consequently, defendant County did not owe an affirmative duty to protect plaintiff Holys. It is not until the last two pages of his opposition that plaintiff Holys addresses the issue by asserting that teachers are mandated reporters and since plaintiff Holys alleges that he reported Perpetrator's abuse to teachers at school, this leads to the necessary inference that defendant County received actual notice of Perpetrator's abuse from the school but ignored the reports from the school.

The court returns to the legal principle stated at the outset, i.e., "because 'all governmental tort liability is based on statute, the general rule that statutory causes of action must be pleaded with particularity is applicable. Thus, "to state a cause of action against a public entity, every fact material to the existence of its statutory liability must be pleaded with particularity." ' (*Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 795 [221 Cal.Rptr. 840, 710 P.2d 907] (*Lopez*).)" (*City of Los Angeles v. Superior Court* (2021) 62 Cal.App.5th 129, 138.) As such, the court will not draw the inference here that plaintiff Holys's report of Perpetrator's conduct to school teachers necessarily resulted in actual notice to defendant County.

So for the second time, defendant County's demurrer to the first cause of action in plaintiff Holys's SAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] and on the ground that the

pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is SUSTAINED with 10 days' leave to amend.

2. Second cause of action - breach of a mandatory duty.

Another "[o]ne of the provisions 'otherwise' creating an exception to the general rule of immunity is Government Code section 815.6, which provides: 'Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.'" (*State of California v. Superior Court* (*Perry*) (1984) 150 Cal.App.3d 848, 854 (*Perry*).)

"Government Code section 815.6 contains a three-pronged test for determining whether liability may be imposed on a public entity: (1) an enactment must impose a mandatory, not discretionary, duty; (2) the enactment must intend to protect against the kind of risk of injury suffered by the party asserting section 815.6 as a basis for liability; and (3) breach of the mandatory duty must be a proximate cause of the injury suffered." (*Perry, supra*, 150 Cal.App.3d at p. 854; citations omitted.)

"Whether an enactment is intended to impose a mandatory duty, as opposed to a mere obligation to perform a discretionary function, is a question of law for the court." (*Corona v. State of California* (2009) 178 Cal.App.4th 723, 728.) "An enactment creates a mandatory duty if it requires a public agency to take a particular action." (*County of Los Angeles v. Superior Court* (2002) 102 Cal.App.4th 627, 639.) For purposes of Government Code section 815.6, the term "enactment" means "a constitutional provision, statute, charter provision, ordinance or regulation." (Gov. Code, § 810.6.)

As to this second cause of action for breach of mandatory duty, the Doe court granted nonsuit because there was insufficient evidence that the breach of a mandatory duty was a proximate cause of the injury suffered. Just like plaintiff Holys here, the plaintiff in Doe asserted a claim that the defendant county breached mandatory duties to visit her at the foster home at least three times in the first 30 days of her placement; failed to conduct monthly visits; and failed to report plaintiff's statutory rape despite knowing she was pregnant by an 18 year old. The court found it "pure speculation to conclude the sexual abuse would not have occurred had" the county social worker fulfilled her mandatory duties and met with the plaintiff additional times. (*Doe, supra*, 37 Cal.App.5th at p. 688.) Additionally, the court held that the county social worker's failure to report plaintiff's pregnancy as statutory rape was the proximate cause of plaintiff's injury "as the injury had already occurred by the time she asserts it should have been reported." (*Id*. at p. 688.)

This court previously sustained defendant County's demurrer because, in light of the requirement for specificity for pleading statutory claims, "plaintiff Holys ha[d] not sufficiently alleged facts to support the generic allegation that his injuries were proximately caused by defendant County's failure to discharge mandatory duties. (FAC, 72 - 73.)" Defendant County again reiterates this deficiency and notes that plaintiff Holys's SAC continues to make the same generic allegations concerning proximate causation (See SAC, 72 - 73.) Again, plaintiff Holys fails to address the lack of particularity with regard to proximate causation in its SAC.

Accordingly, defendant County's demurrer to the second cause of action in plaintiff Holys's SAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] and on the ground that the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is SUSTAINED with 10 days' leave to amend.

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Calendar line 17

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Calendar lines 18-19

Case Name: John Terzic v. Slavko Micic, Paola Vega, Martin Lettunich, et al
Case no.: 22CV400467

On January 2, 2024, plaintiff John Terzic ("Plaintiff") filed motions to compel further responses to form interrogatories and request for production of documents from defendant Slavko Micic ("Micic") (line 18) and defendant Martin Lettunich ("Lettunich") (line 19) (collectively "Defendants").

On March 22, 2024, Micic and Lettunich filed opposition, and on April 11, 2024, Plaintiff filed reply.

On March 8, 2024 Lettunich served second supplemental responses to form interrogatories, set one, and supplemental answers to Demand for Request for production, set one. On March 12, 2024, Mici served second supplemental responses to form interrogatories, set one and responses to demand for request for production, set one.

Summary of contentions

Plaintiff acknowledges receipt of Defendants' further responses and asserts that deficiencies in the responses to Form Interrogatories and Request for Production of Documents remain.

Defendants assert that Plaintiff blindsided Defendants in filing the motions which Defendants assert were filed more than two weeks before the stipulated due date for further responses, and hence, filing of the motions was premature. Defendants also assert that Plaintiff failed to conduct good faith meet and confer before filing the motions.

In reply, Plaintiff identifies the remaining Form Interrogatories and Requests for Production of Documents that Plaintiff considers deficient. Plaintiff further contests the assertion that Plaintiff did not conduct sufficient meet and confer and responds that Plaintiff granted Defendants multiple extensions of time to provide further responses, all to no avail. Plaintiff does not address Defendants' assertion that the motions were filed before the agreed due date for further responses.

After consideration of the evidence and argument of counsel in the papers filed in support, opposition and reply, the Court makes the following tentative ruling:

While the papers evidence meet and confer has been conducted, the remaining discovery issues do not infer significant or complex discovery issues or abuse of the discovery process by either side. Instead, the papers suggest that resolution of most issues, if not all, can be reached through prompt face to face meet and confer.

Accordingly, attorneys for the parties are ordered to conduct face to face (in person, telephone or remote platform such as Teams or Zoom) meet and confer to work out prompt production of documents responsive to the requests and to provide further responses to form interrogatories. If meet and confer does not resolve all issues by May 31, 2024, the parties (counsel) shall forthwith participate in Informal Discovery Conference with a Discovery

Facilitator stipulated to from the Court's list of discovery neutrals through the Discovery Facilitator Program, Superior Court of California, Santa Clara County. Information and list of neutrals is at the following link:

https://www.scscourt.org/court_divisions/civil/adr/civil_adr_dfp.shtml

The current motions to compel are continued to Case Management Conference on August 13, 2024 10:00 A.M. in Dept. 20, for setting purposes only if issues remain unresolved. In that event, counsel shall prepare and file a joint statement prior to hearing, not exceeding three pages, listing the unresolved issues.

Sanctions

Plaintiff's motion was brought in compliance with the Discovery Act. Plaintiff does not contest the veracity or seriousness of Defendant's attorney's health which largely dispels a concern of willful abuse of discovery. While the court is sympathetic to counsel's health condition, counsel for Plaintiff has obligations to Plaintiff which includes moving the case to conclusion.

Defendants shall pay to Plaintiff attorney's fees of $1,000 as sanctions on or before May 20, 2024. Sanctions in excess of $1,000 would be unjust under the circumstances.

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Case Name: *Eric Kutcher, Lauren Kutcher and Chicago Title Insurance Co. v. Ahmad Javid and Safoora Javid, et al*, a related cross action
Case no.: 20CV369499

On February 26, 2024 defendant and cross-defendant Vahe Setrak Tashjian ("Tashjian") filed ex parte application for order staying civil action pending resolution of criminal proceeding.

On February 26, 2024 and March 29, 2024, Cross-complainant Ahmad Javid ("Javid") filed opposition, and on March 29, 2024, plaintiff-in-intervention Chicago Title Insurance Company and cross-complainant Roya Javid (R Javid") each filed joinder in Javid's opposition (collectively "Objectors").

On March 29, 2024, defendant and cross complainant Orange Coast Title Company of Northern California ("Orange Coast") and defendant, cross-defendant and cross-complainant Susan Trujillo (Trujillo) filed response to Tashjian's motion to stay in support of stay.

Evidentiary objections

Orange Coast and Trujillo filed evidentiary objections to Javid's opposition, specifically to the declaration of attorney for Javid, Douglas Stern, filed March 7, 2024.

The Court will not restate the objections which are set forth in the evidentiary objections, and makes the following rulings:

Objection no. 1: Objection is OVERRULED, except the last sentence of paragraph 2 of the Stern declaration beginning with "Dr. Javid has expressed to me …" which is SUSTAINED. The last sentence is stricken.

Objection no. 2: Objection is OVERRULED.

Objection no. 3: Objection is OVERRULED.

Objection no. 4: Objection is OVERRULED.

Objection no. 5: Objection is OVERRULED, but statement has limited relevance.

Objection no. 6: Objection is OVERRULED.

Discussion and Analysis

The parties do not contest that the Sixth District Court of Appeal opinion in *Avant! Corp v. Superior Court* (2000) 79 Cal.App.4th 876 *("Avanti!*") sets forth the criteria for the decision of the trial court, in the discretion of the trial court, whether to stay a civil action pending resolution of a criminal proceeding.

The parties dispute whether *Pacers, Inc. v. Superior Court* (1984) 162 Cal.App.3d 686 ("*Pacers*") is analogous to the facts of the instant case.

Pacers involved a civil action brought plaintiffs against defendants for assault and battery. The United States attorney also sought criminal indictments against defendants for criminal assault and battery based on the same incident, facts and alleged victims in the civil action. The federal grand jury refused to issue an indictment; however, the United States attorney continued to maintain an "open file" on the case. *Pacers, supra,* 162 Cal.App.3d at p. 687.

At defendants' depositions in the civil action, defendants asserted their Fifth Amendment privilege against self-incrimination due to the threatened criminal proceedings, refusing to answer questions unless given immunity. Defendants asked the court to grant immunity, but because the United States attorney, the Attorney General and the district attorney each objected, the court denied the request. Id. at p. 688. Plaintiffs requested an order prohibiting defendants from testifying at trial because they failed to answer deposition questions. Defendants' opposition requested postponement of depositions until after the statute of limitations had run on the criminal prosecution. The trial court granted plaintiffs' request and issued a ruling prohibiting defendants from testifying at trial "as to all matters forming the subject matter of the lawsuit." *Pacers, supra,* 162 Cal.App.3d at p. 688.

The court of appeal found that defendants were civil defendants facing possible, threatened criminal prosecution involving the same facts as the civil action. Defendants reasonably believed that the information asked during deposition might be used against them in that possible criminal prosecution. *Pacers, supra,* 162 Cal.App.3d at p. 688-689. The court of appeal determined, in accord with federal practice, "that when both civil and criminal proceedings arise out of the same or related transactions, an objecting party is generally entitled to a stay of discovery in the civil action until disposition of the criminal matter." The *Pacers* court granted writ of mandate directing the trial court to set aside its order prohibiting defendants from testifying at trial and further staying defendants' depositions, finding under the circumstances of the case, that defendants' properly exercised the Fifth Amendment privilege, and the trial court should have weighed the competing interests of both parties. *Id.* at p. 690.

Here, the criminal felony complaint alleges 24 counts against Tashjian for grand theft occurring on various dates in 2019 and 2020. Each count sets forth alleged victims, none of whom are parties to the instant civil action.

Tashjian does not contest Objectors' assertions that the claims alleged in the criminal proceeding against Tashjian (a) are not based on actions alleged as committed by Tashjian against Objectors in the civil action; (b) are not based on the same transactions underlying the civil action; and (c) that there is no evidence that Tashjian is threatened with a criminal action related to the claims of Objectors in the civil action.

Instead, Tashjian asserts that the criminal proceeding and civil action involve "similar *allegations of fraud* and the same *theories of liability* as the present case before this Court",

and therefore if Tashjian is to proceed litigating the civil matter … he will be at risk of impediment to his Fifth Amendment rights." [4]

As discussed, the facts in Pacers involved a civil case and a possible, threatened criminal prosecution involving the same incident, facts and victims-plaintiffs. The United States attorney, the Attorney General and the district attorney, the offices posing the threatened criminal prosecution, each appeared in the civil action and objected to the granting of immunity to the defendants.

Here, the criminal action does not involve the same incident, facts and alleged victims-parties in the civil action, and there is no evidence of a threatened criminal prosecution being brought by the district attorney, or other office, against Tashjian for the same incident, facts or parties-victims in the civil action. *Pacers* is distinguishable on this basis.

Assuming for argument that the *Pacers* Court reference to "both civil and criminal proceedings arise out of the same or related transactions" is extended here to the assertions of "similar allegations of fraud and the same theories of liability", the weighing of factors in Avant! do not favor a stay of the civil action.

First, Tashjian asserts that his Fifth Amendment rights are strongly implicated, citing *Pacers* as primary authority. As discussed, *Pacers* is factually distinguishable from the facts in the instant case. Further, Tashjian fails to provide sufficient evidence to support the assertion. The court is not persuaded that similar allegations of fraud and same theories of liability necessarily "strongly implicate" the Fifth Amendment privilege here, where the criminal proceeding does not involve the same incident, facts or victim-parties in the civil action, and there is no evidence of threatened criminal prosecution for the transaction, facts and alleged victims-parties in the civil action.

The interests of Objectors, particularly Javid, opposing the stay in proceeding expeditiously with the action and potential prejudice from a stay, are significant. Javid is 84 years old with compromised health, and his spouse has passed during the approaching four-year pendency of the civil action. Tashjian does not contest Javid's assertion that Javid has the largest financial claim in the civil action. There is no evidence of a trial set in the criminal proceeding, and the papers suggest that the matter is in the plea stage. The personal circumstances of Javid and his stake in the civil action support that a stay is substantially prejudicial to Javid. Javid is prepared to try the case, regardless of Tashjian's exercise of the Fifth Amendment privilege.

Tashjian asserts that the convenience of the court will be served by a grant of stay because the criminal case may narrow the issues and thereby streamline the civil case. That said, Tashjian fails to provide sufficient evidence to show how disposition of the criminal case that does not involve the same incident/transaction, facts or victim-parties will narrow the issues here. The assertion is not persuasive. Tashjian cites *Douglas v. United States* 2006 U.S.Dist.LEXIS 52754 ("*Douglas*") and *Bridgeport Harbour Place I, LLC v. Ganim* (2002) 269 F.Supp.2d 6 ("Bridgeport") in support.

[4] Tashjian ex parte application p. 6, l. 13-14 (*italics* added).

Douglas involved a criminal tax case alleging illegal tax shelters and two civil cases that involved the same CARD tax shelter at issue in the criminal case. The court considered the cases "parallel" actions. The facts in *Douglas* are distinguishable from the facts here.

Bridgeport Harbour Place I, LLC v. Ganim (2002) 269 F.Supp.2d 6 involved a defendant Ganin, mayor of city of Bridgeport, who was indicted on 24 criminal counts relating to bribery and kickbacks allegedly received in exchange for grants of city contracts for a real estate development, Bridgeport Harbor Place (BHP). The civil action alleged defendants, including Ganin, accepted bribes, fraud, extortion ect. in connection with the development of BHP. The facts distinguish Bridgeport from the case here.

The burden to the parties if stay is not granted is asserted by Tashjian as primarily financial, that he has limited financial means. Tashjian also asserts that it is logistically and emotionally burdensome to require Tashjian to defend simultaneously the criminal and civil cases. These concerns are factors but are afforded less weight than the significant circumstances of Javid discussed previously.

Orange Coast and Trujillo assert that Tashjian's exercise of the Fifth Amendment privilege during deposition hinders their defense against the claims of Objectors, who claim Orange Coast and Trujillo are complicit with Tashjian concerning allegations of fraud. Orange Coast and Trujillo have also filed a cross complaint against Tashjian in this action. Orange Coast and Truillo also cite to *Pacers* in support of grant of stay requested by Tashjian.

As discussed, the facts in Pacers are distinguishable from the facts in this matter. That said, the Court has considered and weighed the assertions of Orange Coast and Trujillo in reaching its tentative ruling.

Disposition

After consideration of the authority, evidence and argument in the papers filed in support, opposition and response, and consideration and weighing of factors and other considerations set forth in *Advent!,* the motion of Tashjian for stay of the civil action is DENIED.

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