SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 3
Honorable William J. Monahan, Presiding

Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2130

DATE: 11/21/2024 TIME: 9:00 A.M.

TO CONTEST THE RULING: Before 4:00 p.m. today (11/21/2024) you must notify the:

(1) Court by calling (408) 808-6856 and
(2) Other side by phone or email that you plan to appear and contest the ruling.
(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

TO APPEAR AT THE HEARING: The Court prefers in-person appearances or by Teams. If you must appear virtually, please use video.

FOR YOUR NEXT HEARING DATE: Please reserve your next hearing date using Court Schedule—an online scheduling tool that can be found on the Santa Clara County court website.

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.) **Please Note:** Any proposed orders must be submitted with the Judicial Council Form EFS-020 Proposed Order (Cover Sheet). Please include the date, time, dept., and line number.

COURT REPORTERS: The Court no longer provides official court reporters. If any party wants a court reporter, the appropriate form must be submitted. See court website for policy and forms.

LINE #	CASE #	CASE TITLE	RULING
LINE 1	24CV428732	Jill Murdock et al vs Epic Concrete Coatings LLC et al	Motion: Demurrer and Motion to Strike by Plaintiffs/Cross Defendants Jill Murdock and Daniel Murdock Ctrl Click (or scroll down) on Line 1 for tentative ruling. The court will prepare the order.
LINE 2	24CV429403	FirstService Residential California, LLC vs Kirk Pennington	Motion [**CONTINUED to 1/24/2025**]: Special Motion to Strike the Complaint (Anti-SLAPP) by defendant Kirk Penington OFF CALENDAR. [This motion was CONTINUED for hearing on 1/24/2025 at 9:00 a.m. in Dept. 20. (See Ex Parte Order filed 11/14/2024.)]

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DATE: 11/21/2024 TIME: 9:00 A.M.

LINE 3	24CV445907	Jin Yin vs Hiu Yip et al	Hearing: Demurrer Against Jin Yin for Defendants Hiuwai Yip, Zhe Zhang and JJB Beauty Holdings Corp. (pro per) OFF CALENDAR. [First Amended Complaint filed 10/25/2024; Notice of Withdrawal of Demurrer filed 11/15/2024.]
LINE 4	22CV397574	Molly Vann vs NHDC Summerwood Apartments et al	Motion: Continue Trial (and all related cutoff dates) Defendants RREEF AMERICA L.L.C. and GREYSTAR CALIFORNIA INC. ("Defendants")' motion for a trial continuance of the current trial date and to extend all related cutoff dates pursuant to California Rules of Court (CRC) rule 3.1332, Local Rule 8(B) is **unopposed and GRANTED**. Good cause exists to continue the trial date presently set for 1/21/2025. Defendants need additional time to complete discovery which is the subject of a concurrently filed motion to compel further amended supplemental responses from Plaintiff as to Form Interrogatories and Requests for Production to substantiate her 3/21/2024 Statement of Damages, to thereafter conduct Plaintiff deposition or compel her appearance at same, and for the Parties to participate in the previously agreed to mediation. The remaining fact discovery to Plaintiff is also necessary to trial preparation so that counsel and their experts will have the benefit of all information necessary to form opinions and conclusions regarding this case. At present Defendants will not have a reasonable opportunity to complete discovery and engage in meaningful participation in the agreed to mediation or explore resolution before the current trial date. Continuance of the 1/21/2025 trial date and of all related cutoff deadlines is in the best interest of justice and judicial economy. The trial date of 1/21/2025 at 8:45 a.m. in Dept: TBD is VACATED. The remote Settlement Conference on 1/15/2025 at 9:00 a.m. is VACATED. The Trial Assignment on 1/16/2025 at 1:30 p.m. in Dept. 6 is VACATED. A trial setting conference is hereby set for **12/17/2024 at 11:00 a.m. in Dept. 3.** The court will prepare the order.

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DATE: 11/21/2024 TIME: 9:00 A.M.

LINE 5	22CV397574	Molly Vann vs NHDC Summerwood Apartments et al	Motion: Compel Defendants RREEF AMERICA L.L.C. and GREYSTAR CALIFORNIA INC. ("Defendants")' motion to compel plaintiff MOLLY VAN ("Plaintiff")'s full and complete verified amended supplemental responses to Defendants' First Set of Supplemental Form Interrogatories Nos. 2.7, 6.4, 6.7, 8.3, 8.4, 8.5, and 8.8 and First Set of Supplemental Requests for Production of Documents Nos. 1. 8-9, 11-13, 16, and 19-22 is unopposed and GRANTED. Plaintiff shall serve Defendant with full and complete code-complaint verified amended supplemental responses to Defendants' First Set of Supplemental Form Interrogatories Nos. 2.7, 6.4, 6.7, 8.3, 8.4, 8.5, and 8.8 and First Set of Supplemental Requests for Production of Documents Nos. 1. 8-9, 11-13, 16, and 19-22 (and produce responsive documents for inspection by Defendants) within 10 days of this order. Defendants' request for monetary sanctions against Plaintiff and her counsel of record D'Egido & Pedroza, APC is GRANTED in the reasonable amount of $3,568.50 (16.6 hours at $210 per hour plus $60 filing fee and $22.50 e-filing charges). Plaintiff and her counsel of record D'Egido & Pedroza, APC (jointly and severally) shall pay Defendants $3,568.50 within 20 days of this order Moving party to prepare order for signature by court.
LINE 6	24CV444881	Michael Salisbury et al vs Alaska Airlines, Inc.	Motion: Protective Order Ctrl Click (or scroll down) on Line 6 for tentative ruling. The court will prepare the order.

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DATE: 11/21/2024 TIME: 9:00 A.M.

LINE 7	21CV388229	Byung W. Park vs Suzane Bourgault	Motion: Terminating and Monetary Sanctions Defendant SUSAN BOURGAULT ("Defendant")'s motion pursuant to California Code of Civil Procedure ("CCP") sections 2030.290. 2031.320, 2023.010 and 2023.030 for an order of terminating sanctions against plaintiff BYUNG W. PARK ("Plaintiff") who has failed to comply with the Court's Order of September 8, 2022 compelling Plaintiff's discovery responses to Defendant's Form Interrogatories, Set One, Special Interrogatories Set One and Demand for Production of Documents, Set One **is unopposed and GRANTED.** Plaintiff's complaint is dismissed with prejudice. Defendant's request for monetary sanctions against Plaintiff for the reasonable attorney's fees and costs for bringing this motion is GRANTED in the reasonable amount of $1,410 (6 hours at $225 per hours plus $60 filing fee). Plaintiff shall pay Defendant $1,410 within 20 days of this order. Moving party to prepare order for signature by the court
LINE 8	22CV407859	ADAM THOSEBY vs APPLE INC.	Hearing: Pro Hac Vice Counsel for Mariam Chamilova by defendant Apple Inc. Unopposed and GRANTED. Moving party to submit order for signature by court.
LINE 9	24CV447943	PVR Technologies, Inc. vs VM Global Partners, LLC d/b/a Clinovo	Motion: Leave to File Portions of Complaint Under Seal by Plaintiff PVR Technologies, Inc. Good cause appearing, GRANTED. The UNREDACTED complaint (and its Exhibit A) conditionally filed under seal on 9/18/2024 shall remain under seal (until further order of the court). The REDACTED complaint filed on 9/18/2024 shall remain in the public record. Moving party to submit order for signature by court with the stated grounds from its moving papers and the five necessary findings under CRC rule 2.550(d).
LINE 10			
LINE 11			
LINE 12			

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Calendar Line 1
Case Name: *Jill Murdock, et al. v. Epic Concrete Coatings LLC, et al.*
Case No.: 24-CV-428732

Demurrer and Motion to Strike to the Second Amended Cross-Complaint by Cross-Defendants Jill Murdock and Daniel Murdock

Factual and Procedural Background

Complaint

The underlying action alleges claims for breach of contract, negligence, fraud and others by plaintiffs Jill Murdock ("Jill") and Daniel Murdock ("Daniel") (collectively, "Plaintiffs" or "Cross-Defendants") against defendants Epic Concrete Coatings LLC ("Epic") and Brian Hartoon ("Hartoon") (collectively, "Defendants" or "Cross-Complainants").[1]

According to the complaint, this action pertains to the installation of epoxy flooring in the basement of Plaintiffs' home located at 14229 Long Ridge Road, Los Gatos, CA 95033 ("subject property"). (Complaint at ¶¶ 1, 5, 13.) Defendant Hartoon is the sole owner of Epic, a licensed building contractor in Santa Clara County. (Id. at ¶¶ 6-7.)

Plaintiffs entered into an implied-in-fact contract with Defendants by accepting a written estimate to perform construction work on the subject property and agreeing to pay Defendants for the work required, which was confirmed by several memoranda, correspondence, and invoices. (Complaint at ¶ 43.) Defendants allegedly breached the contract by performing negligent installation of epoxy flooring at the subject property and by refusing to repair defective work without payment of additional funds. (Id. at ¶ 44.)

On January 5, 2024, Plaintiffs filed a complaint against Defendants alleging causes of action for:

(1) Breach of Contract;
(2) Negligence;
(3) Fraud and Deceit;
(4) Intentional/Negligent Misrepresentation;
(5) Violation of California Business & Profession Code Section 17200 et seq.;
(6) Breach of Covenant of Good Faith and Fair Dealing; and
(7) Alter Ego Liability.

On April 4, 2024, Defendants filed a judicial council form answer generally denying allegations of the complaint and asserting affirmative defenses.

Second Amended Cross-Complaint

On April 4, 2024, Defendants/Cross-Complainants also filed a cross-complaint against Plaintiffs/Cross-Defendants alleging causes of action for:

[1] At times, the court refers to some parties by their first names for purposes of clarity. No disrespect is intended. (See *Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1136, fn. 1.)

(1) Intentional Infliction of Emotional Distress; and
(2) Defamation-Libel.

On May 20, 2024, Cross-Complainants filed a first amended cross-complaint ("FACC") setting forth a single cause of action for intentional infliction of emotional distress.

On June 24, 2024, Cross-Defendants filed a demurrer and motion to strike to the FACC. The motions were set for hearing on August 8, 2024. The motions were unopposed and the court adopted its tentative ruling sustaining the demurrer with 15 days leave to amend. The motion to strike was rendered moot.

On August 23, 2024, Cross-Complainants filed the operative second amended cross-complaint ("SACC") alleging causes of action for:

(1) Intentional Infliction of Emotional Distress (as to Daniel);
(2) False Promise (as to Daniel);
(3) Breach of Contract (as to Daniel).

According to the SACC, Cross-Complainants entered into a partially oral and partially written contract with cross-defendant Daniel to epoxy the large basement areas of the subject property for the sum of $15,500. (SACC at ¶ 1.) On June 12, 2023, Daniel and Hartoon met at the property and Daniel said he would "lock" Hartoon in the basement until the job was done, "like they do to you in your home country." (Id. at ¶ 4.) Hartoon understood Daniel to refer to his country of birth, Iran, which Hartoon told Daniel he was from at their first meeting. (Ibid.)

On June 3, 2023, cross-defendant Daniel confirmed he wanted Cross-Complainants to apply the anti-slip coating and acknowledged the price of $4,130. (SACC at ¶ 7.) Thereafter, on July 5-6, 2023, a date to fix the bubble(s) and to apply the anti-slip coating was confirmed. (Ibid.)

On July 9, 2023, Hartoon took a male friend with him to perform the anti-slip coating and to fix the bubbles. (SACC at ¶ 8.) Hartoon took his friend because he believed and feared that cross-defendant Daniel may try to lock him up in the basement of the subject property. (Ibid.)

Cross-Complainants further allege that cross-defendant Daniel failed to pay the agreed upon $4,130 for installation of the anti-slip coating on the basement floor of the subject property. (SACC at ¶¶ 26, 33.)

On October 3, 2024, Cross-Defendants filed the motions presently before the court, a demurrer and motion to strike to the SACC. Cross-Complainants filed written oppositions.[2] Cross-Defendants filed reply papers.

A further case management conference is set for February 19, 2025.

Demurrer to the SACC

[2] The court notes the moving papers and the opposition address both motions in a single memorandum.

Cross-Defendants argue each cause of action in the SACC is subject to demurrer for failure to state a valid claim. (Code Civ. Proc., § 430.10, subd. (e).)

Legal Standard

"In reviewing the sufficiency of a complaint against a general demurer, we are guided by long settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. We also consider matters which may be judicially noticed.' " (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. 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." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213–214.)

"The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. The court does not, however, assume the truth of contentions, deductions or conclusions of law. … [I]t is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment." (*Gregory v. Albertson's, Inc.* (2002) 104 Cal.App.4th 845, 850.)

Cross-Defendant Jill

Cross-Defendants first argue there are no facts pled and no causes of action alleged against cross-defendant Jill. The argument is persuasive given that each cause of action is alleged only against cross-defendant Daniel. Cross-Complainants concede this point in opposition and request leave to amend to plead facts against cross-defendant Jill which will be granted. (See OPP at p. 8:19-23; see also *Howard v. County of San Diego* (2010) 184 Cal.App.4th 1422, 1428 ["[T]he court's discretion will usually be exercised liberally to permit amendment of the pleadings. The policy favoring amendment is so strong that it is a rare case in which denial of leave to amend can be justified."].)

Therefore, the demurrer to the SACC is SUSTAINED WITH 10 DAYS LEAVE TO AMEND for failure to state a claim as to cross-defendant Jill.

First Cause of Action: Intentional Infliction of Emotional Distress (IIED)

The elements of an intentional infliction of emotional distress claim are (1) the defendant's conduct was extreme and outrageous; (2) the defendant intended to cause emotional distress or recklessly disregarded the probability of causing emotional distress; (3) the plaintiff suffered severe emotional distress; and (4) the defendant's outrageous conduct was the cause of the severe emotional distress. (*Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 209.)

"An essential element of a cause of action for intentional infliction of emotional distress is 'extreme and outrageous conduct by the defendant.' [Citation.]" (*Yurick v. Super. Ct.* (1989) 209 Cal.App.3d 1116, 1123.) "[T]he standard for judging outrageous conduct does

not provide a 'bright line' rigidly separating that which is actionable from that which is not. Indeed, its generality hazards a case-by-case appraisal of conduct filtered through the prism of the appraiser's values, sensitivity threshold, and standards of civility." (*Id.* at p. 1128.) "[I]t is generally held that there can be no recovery for mere profanity, obscenity, or abuse, without circumstances of aggravation, or for insults, indignities, or threats which are considered to amount to nothing more than mere annoyances. The plaintiff cannot recover merely because of hurt feelings." (*Ibid.*) Thus, "[c]onduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001 (*Potter*).)

Cross-Defendants contend there are insufficient facts establishing extreme and outrageous conduct to support a claim for IIED. The conduct consists of the alleged racial and ethnic slur uttered by cross-defendant Daniel to Hartoon on July 12, 2023 about locking him up in the basement with reference to similar acts being done in his home country of Iran. (SACC at ¶¶ 4, 15-17.) Hartoon allegedly feared this statement so much that he later brought a friend with him to the property. (Id. at ¶ 8.) Despite these allegations, Cross-Defendants assert they are nothing more than mere "insults" or "indignities" lacking any context to constitute extreme and outrageous conduct.

In opposition, Cross-Complainants argue such a racial and ethnic slur amounts to extreme and outrageous conduct, relying on the California Supreme Court decision in *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493 (*Alcorn*). There, the plaintiff was a Black truck driver employed by defendant Anbro. One day, in his capacity as shop steward for the Teamsters Union, Alcorn told another Anbro employee not to drive a certain truck at the job site, because the other employee was not a teamster. Then plaintiff told his supervisor what he had done. The supervisor allegedly shouted at plaintiff as follows: "You goddam 'niggers' working for me. I am getting rid of all the 'niggers'; go pick up and deliver that 8-ton roller to the other job site and get your pay check; you're fired." (*Id*. at pp. 496-497.) In a subsequent lawsuit, plaintiff alleged that the supervisor's conduct was "intentional and malicious, and done for the purpose of causing plaintiff to suffer humiliation, mental anguish and emotional and physical distress…" (*Id*. at p. 497.) The trial court sustained a demurrer to the complaint without leave to amend, and entered judgment. The Supreme Court reversed and found that plaintiff had alleged facts that could lead a trier of fact to conclude that defendants' conduct was extreme and outrageous, having a severe and traumatic effect upon the employee's tranquility. Although mere insulting language, without more, ordinarily would not constitute extreme outrage, the Court found that the aggravated circumstances alleged were sufficient to uphold the complaint against general demurrer. (*Id*. at pp. 498-499.) The Court alluded to aggravating circumstances that may include: (1) defendant standing in a position or relation of authority over plaintiff; and (2) defendant being aware of a plaintiff's particular susceptibility to emotional distress. (*Id*. at p. 498.)

In *Newby v. Alto Riviera Apartments* (1976) 60 Cal.App.3d 288, superseded by statute on a different ground in *Western Land Office, Inc. v. Cervantes* (1976) 175 Cal.App.3d 724, the First Appellate District summarized extreme and outrageous conduct as follows:

> "Behavior may be considered outrageous if a defendant (1) abused a relation or position which gives him power to damage the plaintiff's interest; (2) knows the plaintiff is susceptible to injuries through mental distress; or (3) acts intentionally or unreasonably

with the recognition that the acts are likely to result in illness through mental distress." (*Id*. at p. 297.)

In opposition, Cross-Complainants suggest their case is analogous to *Alcorn* given the power dynamics between Hartoon as a subcontractor and Daniel as the owner-contractor who held a monetary sway over him. (See OPP at p. 4:17-19.) But, no such power dynamic has been alleged in the operative pleading. Nor are there are facts demonstrating any other aggravating circumstances to provide context to the racial and ethnic slur in this action. And, without such circumstances, there are no facts pled to establish extreme and outrageous conduct in support of the IIED claim.

Cross-Defendants also argue the first cause of action fails to allege the nature, extent or duration of any alleged emotional distress. (See Demurrer at p. 8:14-17.)

"With respect to the requirement that the plaintiff show severe emotional distress, [the California Supreme Court] has set a high bar." (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1051.) "Severe emotional distress means ' "emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it." ' [Citations.] " (*Potter, supra,* 6 Cal.4th at p. 1004.) Failure to plead facts showing the severity of distress—as opposed to the facts causing distress—is a proper basis for demurrer. (*Angie M. v. Super. Ct.* (1995) 37 Cal.App.4th 1217, 1227 [demurrer properly sustained where plaintiff pleaded daily sexual abuse for eight months but "no facts demonstrating the nature, extent or duration of her alleged emotional distress"]; see *Kelly v. General Telephone Co.* (1982) 136 Cal.App.3d 278, 286 [failure to allege degree of distress].)

Cross-Complainants here allege only that they suffered severe emotional distress caused by cross-defendant Daniel's racial and ethnic slur, his unwarranted attempt not to pay Hartoon the money owed for the anti-slip coating and the reporting of Hartoon to the Contractors State Licensing Board. (SACC at ¶ 18.) Cross-Complainants however do not allege facts demonstrating the nature, extent or duration of any alleged emotional distress. Thus, the demurrer is also sustainable on this ground.

Accordingly, the demurrer to the first cause of action is SUSTAINED WITH 10 DAYS LEAVE TO AMEND for failure to state a claim.

Second Cause of Action: False Promise

"The facts essential to the statement of a cause of action in fraud or deceit based on a promise made without any intention of performing it are: (1) a promise made regarding a material fact without any intention of performing it; (2) the existence of the intent at the time of making the promise; (3) the promise was made with intent to deceive or with intent to induce the party to whom it was made to enter into the transaction; (4) the promise was relied on by the party to whom it was made; (5) the party making the promise did not perform; and (6) the party to whom the promise was made was injured." (*Regus v. Schartkoff* (1957) 156 Cal.App.2d 382, 389.)

In the second cause of action, Cross-Complainants allege: (1) cross-defendant Daniel made a promise to Hartoon to pay him $4,130 to apply an anti-slip coating on the basement floor of the subject property; (2) at the time of making the promise, Daniel did not intend to

perform the promise he made; (3) Daniel intended that Hartoon rely on his promise; (4) Hartoon reasonably relied on Daniel's promise; and (5) Daniel did not pay back Hartoon resulting in damages. (SACC at ¶¶ 21-28.)

On demurrer, Cross-Defendants contend the false promise claim fails as there are no additional facts supporting the allegation that Hartoon intended not to perform the promise at the time he made it. (See Demurrer at p. 9:19-20.) But, no further specificity is needed in support of the allegation already pled. Nor do Cross-Defendants direct this court to any legal authority which requires further specificity on this issue. Also, to the extent that Cross-Defendants dispute these allegations, such arguments are not proper on demurrer which assumes the truth of matters stated in the pleading. (See *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604 ["[I]n testing a pleading against a demurrer the facts alleged in the pleading are deemed true, however improbable they may be."].)

Finally, Cross-Defendants assert the damages associated with this claim fall within the limit for small claims court, not the superior court. But, this is not a proper ground for demurrer. And, as pointed out in opposition, the second cause of action also seeks an award of punitive damages which brings it within the unlimited division of the superior court. (See OPP at p. 7:3-4.)

Consequently, the demurrer to the second cause of action on the ground that it fails to state a claim is OVERRULED.

Third Cause of Action: Breach of Contract

"[T]he elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.)

In the third cause of action, Cross-Complainants allege: (1) cross-defendant Daniel entered into an oral contract, whereby Hartoon would apply a coat of anti-slip material to the epoxy coating at the basement of the subject property, for a sum of $4,130; (2) Hartoon did all of the significant things that the contract required him to do; (3) Daniel failed to pay Hartoon the $4,130 as agreed; and (4) Daniel's breach of contract was a substantial factor in causing financial harm to Hartoon. (SACC at ¶¶ 30-34.)

Cross-Defendants argue the third cause of action fails as Cross-Complainants do not specifically allege performance or excuse for nonperformance under the oral contract. (See *Stop Loss Ins. Brokers, Inc. v. Brown & Toland Medical Group* (2006) 143 Cal.App.4th 1036, 1051 [party seeking to prevail on breach of contract must prove its own full performance under contract or demonstrate its performance was excused]; *Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 380 ["It is elementary a plaintiff suing for breach of contract must prove it has performed all conditions on its part or that it was excused from performance."].) Cross-Complainants here do not allege any excuse for nonperformance but instead assert Hartoon did "all of the significant things that the contract required him to do." (SACC at ¶ 32.) This allegation however appears to fall short of stating Hartoon fully performed under the oral contract and thus fails to state a valid claim.

Therefore, the demurrer to the third cause of action is SUSTAINED WITH 10 DAYS LEAVE TO AMEND for failure to state a claim.

Motion to Strike Portions of the SACC

Cross-Defendants separately move to strike punitive damages allegations from the SACC. (See Notice of Motion at pp. 3-4.)

Legal Standard

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." (Edmon & Karnow, *California Practice Guide: Civil Procedure Before Trial* (The Rutter Group 2024) ¶ 7:168, p. 7(l)-79 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, p. 7(l)-79.)

"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.*)

Analysis

"In order to state a prima facie claim for punitive damages, a complaint must set forth the elements as stated in the general punitive damage statute, Civil Code section 3294. These statutory elements include allegations that the defendant has been guilty of oppression, fraud, or malice. 'Malice' is defined in the statute as conduct 'intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.' 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. 'Fraud' is 'an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby

depriving a person of property or legal rights or otherwise causing injury.' " (*Turman v. Turning Point of Central California, Inc*. (2010) 191 Cal.App.4th 53, 63, internal citations omitted.)

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

Here, Cross-Complainants seek punitive damages in connection with their claims for IIED and false promise. As stated above, the court sustained the demurrer with leave to amend to the IIED claim. Thus, the motion to strike allegations with respect to the first cause of action is rendered moot. The motion to strike punitive damages allegations to the false promise claim is denied as a valid fraud claim supports a basis for punitive damages. (See *Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1498 [promissory fraud or false promise is a subspecies of the action for fraud and deceit]; see also *Stevens v. Super. Ct.* (1986) 180 Cal.App.3d 605, 610 [pleading of fraud is sufficient to support punitive damages].)

Accordingly, the motion to strike the punitive damages allegations arising from the IIED claim is MOOT. The motion to strike the punitive damages allegations arising from the false promise claim is DENIED.

Disposition

The demurrer to the SACC is SUSTAINED WITH 10 DAYS LEAVE TO AMEND for failure to state a claim as to cross-defendant Jill.

The demurrer to the first and third causes of action in the SACC is SUSTAINED WITH 10 DAYS LEAVE TO AMEND for failure to state a claim as to cross-defendant Daniel.

The demurrer to the second cause of action in the SACC on the ground that it fails to state a claim is OVERRULED as to cross-defendant Daniel.

The motion to strike the punitive damages allegations arising from the first cause of action is MOOT.

The motion to strike the punitive damages allegations arising from the second cause of action is DENIED.

The court will prepare the Order.

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Calendar Line 6
Case Name: *Michael Salisbury, et al. vs Alaska Airlines, Inc, et al.*
Case No.: 24CV444881

Defendant Alaska Airlines, Inc. ("Alaska")'s motion for a protective order staying discovery in this case until 30 days after Alaska files an Answer to the then operative complaint of plaintiffs Michael Salisbury and Christian Le ("Plaintiffs") once the court rules on Alaska's demurrer(s) pursuant to Code of Civil Procedure sections 2017.010, 2030.060 and 2031.060, and this court's inherent authority to control its calendars and dockets (see *Walker v. Superior Court* (1991) 53 Cal.3d 257, 266, quoting *Hays v. Superior Court* (1940) 16 Cal.2d 260, 264 ["the inherent power to stay proceedings in the interest of justice and to promote judicial efficiency"]; see *Freiberg v. City of Mission Viejo* (1995) 33 Cal.App.4th 1484,1489) is GRANTED IN PART.

Alaska's motion for protective order staying discovery in this case is GRANTED until 10 days after (1) the court overrules Alaska's demurrer to at least one cause of action in the then operative complaint of Plaintiffs; or (2) Alaska files an answer; whichever occurs first.

Discussion

CCP section 2025.420 provides courts with the authority to control discovery through protective orders. Section 2025.420(b) provides that "[t]he court, for good cause shown, may make any order that justice requires to protect any party, deponent, or other natural person or organization from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense" by entering a protective order with directions including "[t]hat the deposition not be taken at all," and that "the method of discovery be interrogatories to a party instead of an oral deposition." CCP section 2017.020 also provides "[t]he court shall limit the scope of discovery if it determines that the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence. The court may make this determination pursuant to a motion for protective order by a party or other affected person." A party seeking a protective order has the burden to show good cause for the order sought. (CCP § 2025.420(b); see also *Nativi v. Deutsche Bank National Trust Co.* (2014) 223 Cal.App.4th 261, 318; *Emerson Elec. Co. v. Superior Court* (1997) 16 Cal.4th 1101, 1110.)

Before filing a motion for a protective order, the moving party must make a reasonable and good faith attempt at an informal resolution of each issue presented by the motion. (CCP, §§ 2025.420(a), 2016.040.) The amount of effort required to constitute a reasonable and good faith attempt depends on the circumstances. (*Obregon v. Superior Court* (1998) 67 Cal.App.4th 424, 431.)

Alaska has a demurrer pending on various grounds including that each cause of action in Plaintiff's complaint is preempted by federal law, the Airline Deregulation Act of 1978, as amended, 49 U.S.C. section 41713(b)(1) ("the ADA"). It is not clear how fact discovery will enable Plaintiffs to overcome the preemption argument if Alaska prevails on its preemption argument. The prejudice in allowing for the stay appears to be minimal. If the demurrer is meritless as Plaintiffs suggest, the demurrer will be overruled, and Plaintiffs can proceed with discovery. And if the demurrer on the preemption argument is meritorious, Alaska has avoided

unnecessary costs and expenses in responding to discovery, particularly if it prevails on its preemption argument where there may be no basis for leave to amend.

Generally, a party is entitled to conduct discovery to obtain facts to support a pleading amendment. (*See Mattco Forge, Inc. v. Arthur Young & Co.* (1990) 223 Cal.App.3d 1429, 1436, fn. 3.) However, a court retains broad discretion to impose limitations on the timing and scope of discovery. (See *Pratt v. Union Pacific Railroad Co.* (2008) 168 Cal.App.4th 165, 181.) In the interests of justice, a court may issue protective orders to restrict the frequency or extent of use of a discovery method if it determines that "[t]he selected method of discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, and the importance of the issues at stake in the litigation." (CCP, §§ 2017.020, subds. 23 (a), (b). 2025.420.) When, as here, the defendant seeks to avoid the costs and efforts associated with discovery to prepare for litigation while a demurrer is pending, the trial court may stay discovery in the action until the plaintiff has filed a complaint stating at least one viable cause of action. (See Pacific Architects Collaborative v. State of California (1979) 100 Cal.App.3d 110, 127, citing to *Silver v. City of Los Angeles* (1966) 245 Cal.App.2d 673,676.)

In *Kahn v. Superior Court* (1987) 188 Cal.App.3d 752 [overruled on other grounds in *Williams v. Superior Court* (2017) 3 Cal.5th 531] the Sixth District refers to a trial court's granting in part a protective order staying discovery in the context of a demurrer. (*Id*., at pp. 758-759.)

Untimely Opposition

The court exercises its discretion to consider the late opposition papers on the merits especially considering Plaintiff was able to timely reply on the merits. (See *Jack v. Ring LLC* (2023) 91 Cal.App.5th 1186, 1210 ["a trial court has broad discretion to accept or reject late filed papers."].)

Conclusion/Orders

Alaska's motion for a protective order staying discovery in this case is GRANTED IN PART.

Alaska's motion for protective order staying discovery in this case is GRANTED until 10 days after (1) the court overrules Alaska's demurrer to at least one cause of action in the then operative complaint of Plaintiffs; or (2) Alaska files an answer; whichever occurs first.

The court will prepare the order.

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