

**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: 6/6/2024 TIME: 9:00 A.M.**

**TO CONTEST THE RULING:** Before 4:00 p.m. today (6/5/2024) 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. If you must appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to **Department 3**.

[https://www.sccscourt.org/general\\_info/ra\\_teams/video\\_hearings\\_teams.shtml](https://www.sccscourt.org/general_info/ra_teams/video_hearings_teams.shtml)

**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 here:

<https://reservations.sccscourt.org/>

**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
<a href="#">LINE 1</a>	24CV435325	Balboa Capital Corporation, a California Corporation vs Hardeep Dehal	Hearing: Order of Examination for enforcement of judgment to Herdesp Singh Dehel by Balboa Capital Corporation  OFF CALENDAR. No proof of service.
<a href="#">LINE 2</a>	24CV429335	SYLVIA JACKSON vs GILFIX & LA POLL ASSOCIATES, LLP et al	Hearing: Demurrer to First Amended Complaint by Defendant Gilfix  Ctrl Click (or scroll down) on Lines 2-3 for tentative ruling. The court will prepare the order.

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<a href="#">LINE 3</a>	24CV429335	SYLVIA JACKSON vs GILFIX & LA POLL ASSOCIATES, LLP et al	Motion: Strike punitive damage from First Amended Complaint by Defendant Gilfix  Ctrl Click (or scroll down) on Lines 2-3 for tentative ruling. The court will prepare the order.
<a href="#">LINE 4</a>	23CV420090	Why Systems LLC vs Emodo, Inc.	Motion: Order for Assignment Discovery Referee by Plt Why Systems  OFF CALENDAR. Vacated per 5/29/2024 order.
<a href="#">LINE 5</a>	23CV420090	Why Systems LLC vs Emodo, Inc.	Motion: Compel Def's Further response to Form Interrogatories, Set One, and Request for Sanctions by Plt/ Cross Def Why System LLC  OFF CALENDAR. Vacated per 5/29/2024 order.
<a href="#">LINE 6</a>	23CV420090	Why Systems LLC vs Emodo, Inc.	Motion: Compel Yehuda Lublin to Further Respond to Requests for Production of Documents and Special Interrogatories and for Sanctions by Emodo Inc.  OFF CALENDAR. Vacated per 5/29/2024 order.
<a href="#">LINE 7</a>	24CV429335	SYLVIA JACKSON vs GILFIX & LA POLL ASSOCIATES, LLP et al	Motion: Compel production of documents identified on Def's privilege log in response to Plt's Requests for production of documents, Set One and Two, and for sanctions by Plt Sylvia Jackson  This hearing is continued to July 18, 2024, at 9:00 a.m. in Dept. 3, so the court may do an in camera inspection.  Ctrl Click (or scroll down) on Line 7 for details. The court will prepare the order.
<a href="#">LINE 8</a>	22CV401773	GREGORY MALLEY et al vs MARCUS & MILLICHAP, Real Estate Investment Services Inc. et al	Hearing: Petition Compel Arbitration by Def Marcus & Millichap [*continued from 5-30-24 per stip/order*]  APPEAR.
<a href="#">LINE 9</a>			
<a href="#">LINE 10</a>			
<a href="#">LINE 11</a>			
<a href="#">LINE 12</a>			

### **Calendar Lines 2-3**

**Case Name:** *Anna Payne, et al. v. Gilfix & La Poll Associates, LLP, et al.*

**Case No.:** 24-CV-429335

Demurrer and Motion to Strike to the First Amended Complaint by Defendants Gilfix & La Poll Associates, LLP and Mark Gilfix

### **Factual and Procedural Background**

This is an action for elder abuse and negligence.

According to the first amended complaint (“FAC”), plaintiff/successor-in-interest Sylvia Jackson (“Sylvia”) was the closest friend of Anna Payne (“Anna”), who died on December 17, 2022.<sup>1</sup> (FAC at ¶¶ 1, 10-11.) For over 20 years prior to Anna’s death, Sylvia had been the beneficiary of Anna’s estate plan, through her trust and will, which defendant Gilfix & La Poll Associates, LLP (“Gilfix”), an estate planning law firm, drafted. (Id. at ¶ 1.) Gilfix was aware of Anna’s closeness with Sylvia and her intentions toward her. (Ibid.)

Despite this background, in the final days of Anna’s life (while she was on morphine and alcohol), defendant Gilfix and Mark Gilfix (collectively, “Defendants”) assisted two individuals who were Anna’s caregivers/care custodians, to draft a new estate plan leaving Anna’s estate entirely to them and cutting out Sylvia entirely as beneficiary, trustee, and executrix. (FAC at ¶¶ 1, 11.) Gilfix prepared a 26-page trust amendment and restatement and a will for Anna, which effected invalid donative transfers to two individuals and coached the caregivers on how to get the documents executed and witnessed. (Id. at ¶ 1.) No one from Gilfix was present when the documents were witnessed. (Ibid.) Instead, the caregivers arranged for their own witnesses and notary. (Ibid.)

Following Anna’s death, defendant Gilfix continued to send invoices to Sylvia and bill her for work done by Gilfix assisting Anna’s caregivers in taking her property. (FAC at ¶ 12.) Gilfix was thus taking further property from Sylvia, a senior, in the form of legal bills, for assisting Anna’s caregivers in taking Sylvia’s inheritance away. (Ibid.)

On March 4, 2023, plaintiffs Sylvia, Estate of Anne Payne, the Anne Payne Trust, and by and through her Attorney-in-Fact Steven David Jackson (collectively, “Plaintiffs”) filed the operative FAC against Defendants alleging causes of action for: (1) elder financial abuse; (2) negligence/professional negligence/negligence per se; and (3) invalid donative transfers pursuant to Probate Code §§ 21360 et seq. and 21380 et seq.

On April 3, 2024, Defendants filed the motions presently before the court, a demurrer and motion to strike to the FAC. Plaintiffs filed written oppositions. Defendants filed reply papers. Both sides filed requests for judicial notice.

A case management conference is set for June 18, 2024.

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<sup>1</sup> 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.)

## **Demurrer to the FAC**

Defendants argue the FAC is subject to demurrer for lack of standing and failure to state a cause of action.

### **Defendants' Request for Judicial Notice**

“Judicial notice is the recognition and acceptance by the court, for use by the trier of fact or by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter.” (*Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117.)

In support, Defendants request judicial notice of the complaint and FAC filed in this action. (See Request for Judicial Notice [“RJN”] at Exs. A-B.) The court however declines to take judicial notice of the complaint as it is no longer the operative pleading in the case. (See *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 884 [“It is well established that an amendatory pleading supersedes the original one, which ceases to perform any function as a pleading.”].) Nor does the court need to take judicial notice of the FAC as it must necessarily be considered in ruling on the merits of the demurrer. (See *Paul v. Patton* (2015) 235 Cal.App.4th 1088, 1091, fn. 1 [Sixth Appellate District denies request for judicial notice as unnecessary as the court must consider allegations in the complaint and attached exhibits in ruling on demurrer].)

Accordingly, the request for judicial notice is DENIED.

### **Plaintiffs' Request for Judicial Notice**

In opposition, Plaintiffs request judicial notice of Sylvia's declaration under Code of Civil Procedure section 377.32 filed on October 9, 2023. (See Plaintiffs' RJN at Ex. A.) The court may take judicial notice of the declaration as a record of the superior court under Evidence Code section 452, subdivision (d). (See *Stepan v. Garcia* (1974) 43 Cal.App.3d 497, 500 [the court may take judicial notice of its own file].) But, the court declines to take judicial notice in this instance as the declaration is not relevant to resolving issues raised by the demurrer for reasons stated below. (See *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 748, fn. 6 [a court need not take judicial notice of a matter unless it “is necessary, helpful, or relevant”].) And, to the extent that Plaintiffs are relying on the declaration to show Sylvia is Anna's successor-in-interest and succeeds to her interest, the FAC includes allegations to that effect already which must be accepted as true for purposes of demurrer. (See FAC at ¶¶ 5, 18, 24; see also *Olson v. Toy* (1996) 46 Cal.App.4th 818, 823 [for purposes of demurrer, we accept these allegations as true].)

Therefore, the request for judicial notice is DENIED.

### **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.)

### **Standing**

“Standing is the threshold element required to state a cause of action and, thus, lack of standing may be raised by demurrer. [Citations.] To have standing to sue, a person, or those whom he properly represents, must ‘have a real interest in the ultimate adjudication because [he or she] has [either] suffered [or] is about to suffer any injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented.” [Citation.]’ [Citation.] Code of Civil Procedure section 367 establishes the rule that ‘[e]very action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute.’ A real party in interest is one who has ‘an actual and substantial interest in the subject matter of the action and who would be benefitted or injured by the judgment in the action.’ [Citation.]” (*Martin v. Bridgeport Community Assn., Inc.* (2009) 173 Cal.App.4th 1024, 1031-1032.)

Defendants argue plaintiffs Sylvia and Attorney-in-Fact Steven Jackson lack standing to pursue claims this action.

### **Plaintiff Sylvia**

As to plaintiff Sylvia, the standing argument appears to be grounded in the fact that Defendants did not owe a duty to her in this case. (See Demurrer at pp. 8:2-10:7.) But, the court will more appropriately consider the duty issue in connection with the demurrer to the negligence claim below. Also, in terms of standing, plaintiff Sylvia brings claims both individually and as a successor-interest to Anna which is sufficient for pleading purposes. (See FAC at ¶¶ 5, 18-22, 25.) Thus, the demurrer is not sustainable on this ground.

Consequently, the demurrer to the FAC as to plaintiff Sylvia for lack of standing is **OVERRULED**.

### **Plaintiff Attorney-in-Fact Steven Jackson**

Defendants also contend plaintiff Attorney-in-Fact Steven Jackson lacks standing as he has no legal, fiduciary or beneficial interest in the controversy.

“The general rule of survival is that ‘[e]xcept as otherwise provided by statute, a cause of action for or against a person is not lost by reason of the person’s death, but survives subject to the applicable limitations period.’ [Citation.] With respect to causes of action belonging to a decedent, the general rule about who succeeds to such a cause of action and who may prosecute such a cause of action is contained in section 377.30 of the Code of Civil Procedure, which provides as follows:

‘A cause of action that survives the death of the person entitled to commence an action or proceeding passes to the decedent’s successor in interest, subject to Chapter 1 (commencing with Section 7000) of Part 1 of Division 7 of the Probate Code, and an action may be commenced by the decedent’s personal representative or, if none, by the decedent’s successor in interest.’ (*Lickter v. Lickter* (2010) 189 Cal.App.4th 712, 721-722 (*Lickter*).)

“While section 377.30 of the Code of Civil Procedure generally governs who succeeds to a cause of action and who may pursue that cause of action upon the death of the person to whom it belonged, special standing rules found in the Welfare and Institutions Code govern who may pursue a cause of action for elder abuse that survives the elder’s death. Specifically, subdivision (d)(1) of Welfare and Institutions Code section 15657.3 provides as follows:

‘(d)(1) Subject to paragraph (2) and subdivision (e), after the death of the elder ... , the right to commence or maintain an action shall pass to the personal representative of the decedent. If there is no personal representative, the right to commence or maintain an action shall pass any of the following, if the requirements of Section 377.32 of the Code of Civil Procedure are met:

“(A) An intestate heir whose interest is affected by the action.”

“(B) The decedent’s successor in interest, as defined in Section 377.11 of the Code of Civil Procedure.”

“(C) An interested person, as defined in Section 48 of the Probate Code, as limited in this subparagraph. As used in this subparagraph, ‘an interested person’ does not include a creditor or a person who has a claim against the estate and who is not an heir or beneficiary of the decedent’s estate.” ’ ” (*Lickter, supra*, 189 Cal.App.4th at pp. 722-723.)

“Subject to subdivision (b), ‘interested person’ includes any of the following:

- (1) An heir, devisee, child, spouse, creditor, beneficiary, and any other person having a property right in or claim against a trust estate or the estate of a decedent which may be affected by the proceeding.
- (2) Any person having priority for appointment as personal representative.
- (3) A fiduciary representing an interested person.” (Prob. Code, § 48, subd. (a).)

Furthermore, “[s]ubdivision (a) of section 48 does not purport to provide an exclusive list of recognizable interests. Rather, it permits the court to designate as an interested person anyone having an interest in an estate which may be affected by a probate proceeding. Subdivision (b) allows the court to determine the sufficiency of that party’s interest for the purposes of each proceeding conducted. Thus, a party may qualify as an interested person entitled to participate for purposes of one proceeding but not for another.” (*Estate of Davis* (1990) 219 Cal.App.3d 663, 668.)

Here, plaintiff Attorney-in-Fact Steven Jackson does not appear to qualify as an interested party with any legal, fiduciary or beneficial interest in the action. In opposition, Plaintiffs concede that Steven Jackson, plaintiff Sylvia’s son, is not bringing this action but instead is assisting his elderly mother with email communications and discovery. (See OPP at p. 12:3-24.) In doing so, Plaintiffs assure this court that Steven Jackson is not engaging in the unauthorized practice of law by assisting his mother in this capacity as Plaintiffs are represented by counsel in this case. (Id. at p. 12:8-10, 15-17; see *Drake v. Super. Ct.* (1994) 21 Cal.App.4th 1826, 1830 [persons may represent their own interests in legal proceedings but may not practice law for another in this state unless they are active members of the bar].) But, as Plaintiffs are represented by counsel, such representation would likely include addressing email communications and discovery without assistance from Steven Jackson. Nevertheless, as Plaintiffs concede Steven Jackson is not bringing suit, he does not have any beneficial interest in this case and thus lacks standing to sue.

Accordingly, the demurrer to the FAC on the ground that Attorney-in-Fact Steven Jackson lacks standing is SUSTAINED WITHOUT LEAVE TO AMEND. (See *Berkeley Police Assn. v. City of Berkeley* (1977) 76 Cal.App.3d 931, 942 [“[W]here the nature of plaintiff’s claim is clear, but under substantive law no liability exists, leave to amend should be denied, for no amendment could change the result.”].)

### **First Cause of Action: Elder Financial Abuse**

“ ‘Financial abuse’ of an elder or dependent adult occurs when a person or entity does any of the following:

- (1) Takes, secrets, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.
- (2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.
- (3) Takes, secrets, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult by undue influence, as defined in Section 15610.70. (Welf. & Inst. Code, § 15610.30, subd. (a).)

“A person or entity shall be deemed to have taken, secreted, appropriated, obtained, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains the property and the person or entity knew or should have

known that this conduct is likely to be harmful to the elder or dependent adult.” (Welf. & Inst. Code, § 15610.30, subd. (b).)

“For purposes of this section, a person or entity takes, secretes, appropriates, obtains, or retains real or personal property when an elder or dependent adult is deprived of any property right, including by means of an agreement, donative transfer, or testamentary bequest, regardless of whether the property is held directly or by a representative of an elder or dependent adult.” (Welf. & Inst. Code, § 15610.30, subd. (c).)

Financial elder abuse claims, like other statutory claims, must be pled with particularity. (See *Covenant Care, Inc. v. Super. Ct.* (2004) 32 Cal.4th 771, 790 [financial elder abuse claims must be pled with particularity]; *Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 407, 410.)

### Elder Abuse of Anna

As to elder abuse against Anna (brought by Sylvia as her successor-in-interest), Defendants argue there are insufficient facts to state a claim for financial elder abuse. But, at a minimum, there appears to be sufficient allegations of undue influence to support a claim of financial elder abuse against Anna.

“ ‘Undue influence’ means excessive persuasion that causes another person to act or refrain from acting by overcoming that person’s free will and results in inequity. In determining whether a result was produced by undue influence, all of the following shall be considered:

- (1) The vulnerability of the victim. Evidence of vulnerability may include, but is not limited to, incapacity, illness, disability, injury, age, education, impaired cognitive function, emotional distress, isolation, or dependency, and whether the influencer knew or should have known of the alleged victim’s vulnerability.
- (2) The influencer’s apparent authority. Evidence of apparent authority may include, but it not limited to, status as a fiduciary, family member, care provider, health care professional, legal professional, spiritual adviser, expert, or other qualification.
- (3) The actions or tactics used by the influencer. Evidence of actions or tactics used may include, but is not limited to, all of the following:
  - (A) Controlling necessities of life, medication, the victim’s interactions with others, access to information, or sleep.
  - (B) Use of affection, intimidation, or coercion.
  - (C) Initiation of changes in personal property rights, use of haste or secrecy in effecting those changes, effecting changes at inappropriate times and places, and claims of expertise in effecting changes.” (Welf. & Inst. Code, § 15610.70, subd. (a).)

Here, the financial elder abuse cause of action provides in relevant part that:



“During the last weeks of Anna’s life, she was unable to resist the financial elder abuse of her caregivers and Defendants because she was dying, non-verbal, and being medicated with morphine and alcohol. She was unable to communicate beyond nodding or shaking her head to simple questions. Anna was dying and lacked the capacity to understand any legal instrument or document she was being asked to sign, and Gilfix knew that. Defendants’ and Anna’s caregivers took unfair advantage of Anna’s weakness of mind at the end of her life to create a new estate plan for the benefit of her caregivers that she could not comprehend, read for herself, or physically sign.” (FAC at ¶ 15; see also ¶¶ 11-12.)

Based on these allegations, Defendants were aware of Anna’s weakened and impaired state of mind and took advantage of her so as to create a new estate plan for the benefit of her caregivers. Defendants contend these allegations are insufficient as Plaintiffs fail to plead facts suggesting motives for the Defendants to financially abuse or exploit Anna beyond the legitimate collection of reasonable attorneys’ fees for the services provided. (See Demurrer at p. 11:6-8.) This contention however is not supported by citation to legal authority. (See *Public Employment Relations Bd. v. Bellflower Unified School Dist.* (2018) 29 Cal.App.5th 927, 939 [“The absence of cogent legal argument or citation to authority allows this court to treat the contention as waived.”]; *United Grand Corp. v. Malibu Hillbillies, LLC* (2019) 36 Cal.App.5th 142, 153 [court may disregard conclusory arguments that are not supported by pertinent legal authority or fail to disclose the reasoning by which the appellant reached the conclusions he or she wants us to adopt].) And, as this is demurrer, the court must accept the allegation that Defendants’ motivations were to modify the estate plan for the benefit of the caregivers. Whether or not that motivation is accurate is an issue beyond the scope of this demurrer that will be determined by the parties as they pursue civil discovery in the case. (See *Davies v. Super. Ct.* (1984) 36 Cal.3d 291, 299 [purpose of civil discovery is to take game element out of trial preparation and assist parties in obtaining facts and evidence necessary for expeditious resolution of their dispute].)

But, at least for pleading purposes, Plaintiffs have stated a valid claim for financial elder abuse as to Anna on the basis of undue influence.

#### Elder Abuse of Sylvia

Plaintiff Sylvia, in her individual capacity, also seeks relief for financial elder abuse based in relevant part that:

“Gilfix’s actions in drafting and orchestrating the purported execution of deathbed estate planning instruments by Anna (while she was medicated with morphine and alcohol) deprived Sylvia of the inheritance Anna intended for her, and constitutes the taking and/or the assistance in taking of property of an elder (Sylvia) for a wrongful use within the meaning of Welfare & Institutions Code § 15610.30.” (FAC at ¶ 19.)

Defendants assert such allegations fail because Plaintiffs: (1) do not provide factual details on how Defendants knew (or should have known) their conduct would cause financial harm to Sylvia; (2) do not offer any explanation as to why Defendants would knowingly engage in wrongful conduct; and (3) fail to explain any benefit Defendants might receive from

amending the estate plan beyond receipt of attorneys' fees. (See Demurrer at p. 11:18-23.) These assertions however are not supported by citation to legal authority. Nor are the specifics requested by Defendants necessary to state a claim for financial elder abuse. If anything, such details can be determined as the parties engage in civil discovery in the case. Again, for pleading purposes, the court finds sufficient facts have been pled to support a claim for financial elder abuse against plaintiff Sylvia.

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

## **Second Cause of Action: Negligence/Professional Negligence/Negligence *Per Se***

The second cause of action is identified as a claim for negligence, professional negligence, and negligence per se.

### Negligence/Professional Negligence

"To state a cause of action for negligence, a plaintiff must allege (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached that duty, and (3) the breach proximately caused the plaintiff's damages or injuries." (*Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 62.)

Similarly, "[t]he elements of a cause of action in tort for professional negligence are: (1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence." (*Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 746-747.)

Defendants argue they did not owe a duty of care to Plaintiffs to support negligence. They also contend there are insufficient facts to establish the elements of breach of duty and causation.

### ***Duty***

#### 1. General Legal Principles

"A key element of any action for professional malpractice is the establishment of a duty by the professional to the claimant. Absent duty there can be no breach and no negligence." (*Goldberg v. Frye* (1990) 217 Cal.App.3d 1258, 1267.)

A judicial conclusion that a duty is present or absent is merely a shorthand statement rather than an aid to analysis. (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 397.) The element of duty is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection. (*Ibid.*) But, courts have invoked the concept of duty to limit generally the otherwise potentially infinite liability which would follow from every negligent act. (*Ibid.*)

“Whether a lawyer sued for professional negligence owed a duty of care to the plaintiff ‘is a question of law and depends on a judicial weighing of the policy considerations for and against the imposition of liability under the circumstances.’ [Citations.]” (*Chang v. Lederman* (2009) 172 Cal.App.4th 67, 76 (*Chang*).)

“[A] demurrer to a negligence claim will properly lie only where the allegations of the complaint fail to disclose the existence of any legal duty owed by the defendant to the plaintiff.” (*Osornio v. Weingarten* (2004) 124 Cal.App.4th 304, 316 (*Osornio*).)

## 2. Nonclients/Intended Beneficiaries

“The traditional rule in California, as in other jurisdictions, was an attorney could be held liable only to his or her client with respect to actions based on professional negligence. [Citation.] ‘[I]t was reasoned that there could be no recovery for mere negligence where there was no privity by contract or otherwise between the defendant and the person injured.’ [Citations.]” (*Chang, supra*, 172 Cal.App.4th at p. 76.)

In *Biakanja v. Irving* (1958) 49 Cal.2d 647 (*Biakanja*), the California Supreme Court rejected the strict privity test for professional liability in considering the liability of a notary public who had negligently allowed the will of the plaintiff’s brother, which left the entire estate to the plaintiff, to be improperly attested. As a consequence, the plaintiff received only his one-eighth intestate succession share of the estate. The Supreme Court held the notary public owed a duty of reasonable care to the plaintiff and that duty had been breached. (*Biakanja, supra*, 49 Cal.2d at p. 650.) In reaching its conclusion, the Court set forth the following factors and balancing test:

“The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, and the policy of preventing future harm.” (*Ibid.*)

Three years later, in *Lucas v. Hamm* (1961) 56 Cal.2d 583 (*Lucas*), the California Supreme Court applied the *Biakanja* factors to determine whether an attorney may be liable to the intended beneficiaries of a deceased testator for losses resulting from negligence in drafting a will. (*Lucas, supra*, 56 Cal.2d at p. 588 [“same general principle (articulated in *Biakanja*) must be applied in determining whether a beneficiary is entitled to bring an action for negligence in the drafting of a will when the instrument is drafted by an attorney rather than by a person not authorized to practice law”].) The residuary trust in the will prepared by the defendant contained language that arguably violated the rule against perpetuities and statutory restrictions relating to restraints on alienation. As a result, following the testator’s death, the plaintiffs entered into a settlement with some of the testator’s relatives where they received a share of the estate significantly less than they would have received under the testamentary instruments properly drafted in accordance with the testator’s directions. (*Id.* at pp. 586-587.)

As the defendant in *Lucas* was an attorney and, in addition to the *Biakanja* factors, the Supreme Court held it was necessary to consider “whether the recognition of liability to beneficiaries of wills negligently drawn by attorneys would impose an undue burden on the profession.” (*Lucas, supra*, 56 Cal.2d at p. 589.) The Court concluded the extension of a drafting attorney’s liability to “beneficiaries injured by a negligently drawn will” did not threaten an undue burden on the legal profession and held the other factors in *Biakanja* supported recognition of a cause of action for professional negligence in these circumstances. (*Ibid.*)

“As in *Biakanja*, one of the main purposes which the transaction between defendant and the testator intended to accomplish was to provide for the transfer of property to plaintiffs; the damage to plaintiffs in the event of invalidity of the bequest was clearly foreseeable; it became certain, upon the death of the testator without change of the will, that plaintiffs would have received the intended benefits but for the asserted negligence of defendant; and if persons such as plaintiffs are not permitted to recover for the loss resulting from negligence of the draftsman, no one would be able to do so and the policy of preventing future harm would be impaired.” (*Ibid.*)

Thereafter, in *Heyer v. Flaig* (1969) 70 Cal.2d 223 (*Heyer*), disapproved on other grounds in *Laird v. Blacker* (1992) 2 Cal.4th 606, 617, the California Supreme Court reaffirmed the basic principles of *Biakanja* and *Lucas*, explaining that the basis for tort liability to an intended beneficiary in the absence of privity with the defendant was a breach of duty owed directly to the beneficiary.

“When an attorney undertakes to fulfill the testamentary instructions of his client, he realistically and in fact assumes a relationship not only with the client but also with the client’s testamentary scheme; and thus the possibility of thwarting the testator’s wishes immediately becomes foreseeable. Equally foreseeable is the possibility of injury to an intended beneficiary. In some ways, the beneficiary’s interests loom greater than those of the client. After the latter’s death, a failure in his testamentary scheme works no practical effect except to deprive his intended beneficiaries of the intended requests...only the beneficiaries suffer real loss.” (*Heyer, supra*, 70 Cal.2d at p. 228.)

The *Biakanja* and *Lucas* principles, which involved negligent drafting or execution of wills, were later extended to permit suit by trust beneficiaries in *Bucquet v. Livingston* (1976) 57 Cal.App.3d 914 (*Bucquet*). There, the First Appellate District observed there was no rational basis for distinguishing a trust instrument and a will for purposes of recognizing the drafting lawyer’s duty of care to intended beneficiaries and held the creation of the trust involved “was directly intended to affect the beneficiaries and the avoidance of federal estate tax and state inheritance tax was directly related to the amounts that [the husband] intended the beneficiaries to receive after [the wife’s] death.” (*Bucquet, supra*, 57 Cal.App.3d at pp. 922-923.)

Also, in *Osornio*, the Sixth Appellate District recognized the right of an intended beneficiary, who was the care custodian of the testator, a dependent adult, to pursue a legal malpractice action against the attorney who drafted the testator’s will naming her as executor and sole beneficiary. The plaintiff had alleged the lawyer was negligent in failing to advise the testator that his intended beneficiary was a presumptively disqualified donee under Probate Code section 21350, subdivision (a)(6), and in failing to take appropriate measures to ensure

the testator's wishes were carried out by referring her to counsel to obtain a certificate of independent review under Probate Code section 21351, subdivision (b). (*Osornio, supra*, 124 Cal.App.4th at pp. 312-313, 329.) Following a comprehensive review of California cases discussing legal malpractice claims by nonclients and balancing of the *Biakanja/Lucas* factors, the appellate court held:

“The case before us is similar to other cases in which courts have imposed a duty of care upon attorneys where beneficiaries are deprived of intended transfers of property as a result of failed wills and trusts.” (*Id.* at p. 332.)

As to any potential burden on the profession, the Sixth District explained:

“Imposing liability in this instance would not compromise the attorney's duty of undivided loyalty to the testator. The attorney's duty here was to take appropriate action to carry out the testator's wishes—that were *expressed and formalized* in her signed will—that her intended beneficiary, Osornio, inherit her entire estate.” (*Osornio, supra*, 124 Cal.App.4th at p. 336.)

Thus, based on the aforementioned cases and others, “California decisions recognize an enforceable duty of care in cases involving a negligently drafted or executed testamentary instrument when the plaintiff was an *expressly named* beneficiary of an *express bequest*—in the words of the *Lucas* court, a duty of care ‘to beneficiaries injured by a negligently drawn will.’ [Citation.] In each of those cases the wills or trusts did not fail because of any defect in the expression of the testator's intent, but because of some failure either in other language of the instrument or in the circumstances of its execution. [Citations.]” (*Chang, supra*, 172 Cal.App.4th at p. 82.)

Conversely, when the claim is that a will or trust, although properly executed and free of other legal defects, did not accurately express the testator's intent, no duty or liability to the nonclient potential beneficiary has been recognized. (*Chang, supra*, 172 Cal.App.4th at p. 82.) “That is, where there is a question about whether the third party beneficiary was, in fact, the decedent's intended beneficiary—where intent is placed in issue—the lawyer will not be held accountable to the potential beneficiary. [Citation.]” (*Id.* at pp. 82-83.)

“The difficulty, of course, is that any disappointed potential beneficiary—even a total stranger to the testator—could make factual allegations similar in most respects to those in the second amended complaint; and, without requiring an explicit manifestation of the testator's intentions, the existence of a duty—a legal question—would always turn on the resolution of disputed facts and could never be decided as a matter of law. **If a complaint alleges the decedent intended to benefit the plaintiff and the lawyers responsible for the decedent's estate plan were aware of that intent, no more would be required to survive a demurrer.**” (*Chang, supra*, 172 Cal.App.4th at p. 83, emphasis in bold added.)

### 3. Analysis

The duty allegations are primarily set forth in paragraph 25 of the FAC which provides:

Sylvia also has standing to pursue negligence claims in her own right because Gilfix owed a duty to Sylvia as well. Gilfix's duty to Sylvia arose, among other factors,

because Gilfix knew its actions (taken at the direction of Anna's caregivers) would affect Sylvia, the documents they drafted would harm Sylvia by eliminating her inheritance, the documents they drafted did harm Sylvia (by, among other losses, having to spend hundreds of thousands of dollars to restore her rightful inheritance), the closeness of connection between Gilfix's actions (drafting the invalid instruments) and Sylvia's loss (incurring legal fees to restore her rightful inheritance), and the public policy of the State of California in preventing this kind of misconduct on the part of Defendants. Gilfix, acted negligently and unreasonably and, by its own wrongful acts and omissions, breached its duty to Anna and to Sylvia, as a third-party beneficiary of Anna's agreement with Gilfix, by assisting Anna's caregivers in taking/obtaining Anna's property by a trust amendment and will benefitting the caregivers and not effectuating the intent of Anna to leave her estate to Sylvia. Anna and Sylvia, as a third-party beneficiary, were harmed financially and Gilfix's wrongful acts and omissions and negligent actions were a substantial factor in causing them. (FAC at ¶ 25.)

As an initial matter, the moving papers do not attempt to specifically dispute or challenge the allegations pled in support of a duty. Nor do Defendants engage in the *Biakanja/Lucas* analysis to demonstrate the absence of a duty in this case. (See *Osornio*, *supra*, 124 Cal.App.4th at pp. 330-335 [Sixth District examines *Biakanja/Lucas* factors in analyzing duty element]; *Radovich v. Locke-Paddon* (1995) 35 Cal.App.4th 946, 962-966 [same]; see also *Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52 ["We are not required to examine undeveloped claims or to supply arguments for the litigants"].)

Instead, Defendants' duty argument can be summarized as follows:

Plaintiff Sylvia Jackson was neither expressly named nor was she an intended beneficiary of the decedent's amended trust. Rather, she was a deliberately disinherited beneficiary rendering the *Lucas* exception inapplicable. Nothing in Plaintiffs' FAC points to any claim that the Defendants' alleged negligence resulted in any legal deficiency that would frustrate the testator's expressed intent. (Demurrer at p. 9:5-9.)

Here, Defendants correctly point out that plaintiff Sylvia was not expressly named as an intended beneficiary under Anna's amended estate plan. But, this court disagrees with the notion that Defendants' alleged negligence did not frustrate Anna's expressed intent. This is because Plaintiffs allege Anna intended to benefit Sylvia with her estate plan and Defendants were aware of that intent when they cut Sylvia out of her inheritance. (See FAC at ¶¶ 1, 11, 12, 19, 23-25.) And, despite this knowledge, Defendants, at the direction and assistance of the caregivers, unduly influenced Anna to modify her estate plan in favor of the caregivers. (Id. at ¶¶ 11-12, 15.) Such actions would clearly frustrate Anna's expressed intent and weigh in favor of imposing a duty. Furthermore, as the Sixth District reiterated in *Osornio*:

"When a lawyer knows...that a client intends a lawyer's services to benefit a third person who is not a client, allowing the nonclient to recover from the lawyer for negligence in performing those services may promote the lawyer's loyal and effective pursuit of the client's objectives. The nonclient, moreover, may be the only person likely to enforce the lawyer's duty to the client, for example because the client has

died.” (*Osornio, supra*, 124 Cal.App.4th at p. 338, citing *Moore v. Anderson Ziegler Disharoon Gallagher & Gray* (2003) 109 Cal.App.4th 1287, 1301-1302.)

As a final point, the court notes that none of the authorities cited by either side are directly analogous to the facts in this case. Nor do Defendants assist this court with a duty discussion addressing the factors outlined in the *Biakanja/Lucas* balancing test. Thus, the court concludes there are sufficient facts to support the existence of a duty for pleading purposes. The court may revisit the issue of duty at a later time on a dispositive motion for summary judgment or summary adjudication after the conclusion of civil discovery or resolution at trial.

### ***Breach of Duty/Causation***

Defendants also contend Plaintiffs fail to allege sufficient facts supporting the elements of breach of duty and causation to establish negligence. (Demurrer at pp. 12:28-13:10.) The court however finds there are sufficient allegations for the elements of breach of duty and causation for pleading purposes and thus the demurrer is not sustainable on this ground. (See FAC at ¶¶ 25, 27.)

Consequently, the demurrer to the second cause of action on the ground that it fails to state a claim is **OVERRULED**. As Plaintiffs have stated a cause of action for negligence and professional negligence, the court declines to consider the arguments on demurrer challenging negligence per se. (See *Gomez v. Volkswagen of Am.* (1985) 169 Cal.App.3d 921, 925 [“A general demurrer should never be sustained if a pleading states a cause of action on any theory.”].)

### **Third Cause of Action: Invalid Donative Transfers Pursuant to Probate Code §§ 21360 et seq. and 21380 et seq.**

The third cause of action is a claim for invalid donative transfers under Probate code sections 21360 et seq. and 21380 et seq. Plaintiffs here allege the two individuals who directed Gilfix to amend Anna’s estate planning documents were care custodians within the meaning of Probate Code section 21362. (FAC at ¶ 29.) Plaintiffs allege they were harmed by the will and trust amendments which contained invalid donative transfers to the two care custodians that eliminated Sylvia’s interest as a beneficiary in Anna’s estate plan. (*Id.* at ¶ 32.)

Defendants assert the third cause of action is defective as Plaintiffs fail to plead facts demonstrating the two individuals met the legal definition of a care custodian. (See Demurrer at p. 15:18-23.) Probate Code section 21362, subdivision (a) defines a care custodian as follows:

“(a) ‘Care custodian’ means a person who provides health or social services to a dependent adult, except that ‘care custodian’ does not include a person who provided services without remuneration if the person had a personal relationship with the dependent adult (1) at least 90 days before providing those services, (2) at least six months before the dependent adult’s death, and (3) before the dependent adult was admitted to hospice care, if the dependent adult was admitted to hospice care. As used in this subdivision, ‘remuneration’ does not include the donative transfer at issue under this chapter or the reimbursement of expenses.” (Prob. Code, § 21362, subd. (a).)

The court does not find this assertion to be persuasive as Defendants do not cite legal authority requiring a plaintiff to plead such additional facts to state a cause of action. (See *Jones v. Super. Ct.* (1994) 26 Cal.App.4th 92, 99 [“Issues do not have a life of their own; if they are not raised or supported by argument or citation to authority, we consider the issues waived.”].) Plaintiffs here clearly allege that the individuals were care custodians in support of the invalid donative transfers claim. (See FAC at ¶¶ 11-12, 28-32.) Whether these individuals are actually “care custodians” within the meaning of the Probate Code can be ascertained by the parties during civil discovery.

Accordingly, the demurrer to the third cause of action on the ground that it fails to state a claim is **OVERRULED**.

### **Motion to Strike Portions of the FAC**

Defendants separately move to strike Plaintiffs’ punitive damages allegations from the FAC.

### **Defendants’ Request for Judicial Notice**

Defendants’ request for judicial notice in support of the motion to strike is **DENIED** for reasons stated above in connection with the request filed in support of the demurrer.

### **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.” (Weil & Brown, et al., *California Practice Guide: Civil Procedure Before Trial* (The Rutter Group 2023) ¶ 7:168, p. 7(1)-77 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(1)-78.)



“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.)

Also, “[u]nder Civil Code section 3294, subdivision (b), punitive damages can properly be awarded against a corporate entity as a principal, because of an act by its agents, if the corporate employer authorized or ratified wrongful conduct. Ratification is shown if an officer, director, or managing agent of the corporation has advance knowledge of, but consciously disregards, authorizes, or ratifies an act of oppression, fraud, or malice.” (*Pulte Home Corp. v. American Safety Indemnity Co.* (2017) 14 Cal.App.5th 1086, 1124.)

“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, Plaintiffs request an award of punitive damages in connection with the first cause of action for financial elder abuse. (See FAC at ¶ 21.) But, as pointed out in the moving papers, Plaintiffs do not allege sufficient facts of malice, oppression, or fraud to support punitive damages but will be afforded an opportunity for leave to amend. (See *Price v. Dames & Moore* (2001) 92 Cal.App.4th 355, 360 [with respect to motion to strike, leave to amend is routinely and liberally granted to give the plaintiff a chance to cure the defect in question].)

Therefore, the motion to strike Plaintiffs’ punitive damages allegations is GRANTED WITH 15 DAYS’ LEAVE TO AMEND.

### **Disposition**

The demurrer to the FAC as to plaintiff Sylvia for lack of standing is OVERRULED.

The demurrer to the FAC on the ground that Attorney-in-Fact Steven Jackson lacks standing is SUSTAINED WITHOUT LEAVE TO AMEND.

The demurrer to the first, second, and third causes of action on the ground that they fail to state a claim is OVERRULED.

The motion to strike Plaintiffs' punitive damages allegations is GRANTED WITH 15 DAYS' LEAVE TO AMEND.

The court will prepare the Order.

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## Calendar Line 7

**Case Name:** Anna Payne, et al, vs Gilfix & La Pol Associates, LLP, et al.

**Case No.** 24CV429335

On May 6, 2024, plaintiff Sylvia Jackson ('Plaintiff') filed this motion to compel production of [six] documents identified on Defendant's privilege log in response to Plaintiff's request for production of documents, sets one and two and request for monetary sanctions against defendant Gilfix & La Poll Associates, LLP and its counsel. Defendants Gilfix & La Pol Associates, LLP and Mark Gilfix (collectively "Defendants") filed opposition papers seeking monetary sanctions against Plaintiff and her counsel. Plaintiff filed reply papers.

First, the court notes that the privileged basis for which the six documents are being withheld is the attorney work product privilege, not attorney-client privilege. (See Plaintiff's Separate Statement, p. 2.)

Code of Civil Procedure section 2018.030 states:

- (a) A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances.
- (b) The work product of an attorney, other than a writing described in subdivision (a), is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice.

The attorney work product privilege "stated purpose is to preserve the rights of attorneys in the preparation of their cases and to prevent attorneys from taking advantage of the industry and creativity of opposing counsel. The attorney is the exclusive holder of the privilege." (*State Comp. Insurance Fund v. Superior Court* (2001) 91 Cal.App.4th 1080, 1091.)

The attorney work product privilege "creates for the attorney a qualified privilege against discovery of general work product and an absolute privilege against disclosure of writings containing the attorney's impressions, conclusions, opinions or legal theories.' (BP Alaska Exploration, Inc. v. Superior Court (1988) 199 Cal. App. 3d 1240, 1250.) *The protection afforded by the privilege is not limited to writings created by a lawyer in anticipation of a lawsuit.* It applies as well to writings prepared by an attorney while acting in a nonlitigation capacity. [Citation.]" (*County of Los Angeles v. Superior Court* (2000) 82 Cal.App.4th 819, 833 [emphasis added].)

Here, the declaration of Mark Gilfix filed 5/23/2024 in opposition states:

The six (6) documents withheld on the basis of work product privilege and other objections *all contain my impressions, conclusions, opinions, and theories* about developments beginning with Plaintiff Jackson's niece reaching out to us on December 20, 2022 about concerns Decedent was taken advantage of and that her estate had change (which it did per Decedent's wishes), and later Plaintiff Jackson's petition against Neto. *The documents also contain other the impressions, conclusions, opinions*

*and theories* about these developments *of other attorneys in our office*, including Michael Gilfix.

(*Id.*, ¶5 [emphasis added].)

Defendants claim that these six documents are protected by the attorney work product privilege because they were prepared in anticipation of litigation. The declaration of Mark Gilfix claims that they contain “impressions, conclusions, opinions and theories” about anticipated litigation. This evidence suggests that the attorney work product privilege may apply to all six documents. Accordingly, the court requests an in camera inspection of the six documents to resolve the matter. (See e.g., *County of Los Angeles v. Superior Court*, *supra*, 82 Cal.App.4th 819, 833 [“An in camera inspection of the documents will resolve the matter.”])

Defendants shall file *under seal* a copy of the six documents that are the subject matter of this motion by June 28, 2024, so the court may do an in camera inspection. A curtesy copy shall be delivered to Department 3 at the time of filing.

The hearing on this motion is continued to July 18, 2024, at 9:00 a.m. in Dept. 3, so the court may do an in camera inspection.

The court does not request any further briefing at this time.

The court will prepare the order.

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