SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 6
Honorable Evette D. Pennypacker, Presiding
David Criswell, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2160

DATE: May 16, 2024 TIME: 9:00 A.M.

RECORDING COURT PROCEEDINGS IS PROHIBITED

FOR ORAL ARGUMENT: Before 4:00 PM today you must notify the:

(1) Court by calling (408) 808-6856 and

(2) Other side by phone or email that you plan to appear at the hearing to contest the ruling

(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

FOR APPEARANCES: The Court strongly prefers in-person appearances. If you must appear virtually, you must use video. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 6:
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

FOR COURT REPORTERS: The Court does **not** provide official court reporters. If you want a court reporter to report your hearing, you must submit the appropriate form, which can be found here:
https://www.scscourt.org/general_info/court_reporters.shtml

FOR YOUR NEXT HEARING DATE: Use Court Schedule to reserve a hearing date for your next motion. Court Schedule is an online scheduling tool that can be found on the court's website here:
https://reservations.scscourt.org/

FREE MCLE Civil Bench Presentation:

Civil Trials and Civil Motion Practice:
Best Practices in Santa Clara County Superior Court

Date: June 20, 2024
Time: 12-1:00
Place: Microsoft Teams: https://msteams.link/YGLE

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	19CV356353	Jean Kim vs Pets' Rx, Inc. et al	Defendants' Summary Judgment/Adjudication is DENIED. Scroll to line 1 for complete ruling. Court to prepare formal order.
2-3	21CV389205	Shannon Krzycki vs Norman Y. Mineta San Jose International Airport et al	Notice of entire case settlement filed May 10, 2024.
4	23CV421366	Wells Fargo Bank, N.A. vs Bertha Barron	Wells Fargo Bank, N.A.'s motion for summary judgment against Bertha Barron is GRANTED. A notice of motion with this hearing date and time was served on Defendant by U.S. mail on March 14, 2024. Defendant failed to file an opposition. "[T]he failure to file an opposition creates an inference that the motion [] is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) There is also no dispute that Defendant has an unpaid credit card balance of $22,642.72. Summary judgment is therefore entered in favor of Plaintiff and against Defendant. Plaintiff is ordered to submit a form of judgment within 10 days of service of this formal order, which the Court will prepare.
5-6	21CV387570	Aegis Security Insurance Company vs Friendly Wholesalers of California dba SeeMoCars et al	Defendant Azzam Abdo's motions to compel further responses to requests for production (set 1) and special interrogatories (set 1) are set to be heard in this Court on May 14, 2024 at 9 a.m. The proofs of service for these motions appear erroneous. The proof of service attached to Abdo's motion to compel further responses to production of documents is a proof of service for "Cross-Complainant's, Azzam Abdo, Motion For Peremptory Challenge and Declaration." This proof of service and the proof of service for Abdo's notice of motion to compel further responses to special interrogatories are also both dated March 30, 2024 but file stamped March 29, 2024. This, coupled with Arrow Pacific Insurance Services' failure to file an opposition leads the Court to be concerned that these motions were not, in fact, properly served. The California Code of Civil Procedure, Rules of Court and Civil Local Rules require that the moving party serve a written notice of motion with the hearing date and time. (See Code Civ. Proc. §§1005(a), 1010.) A court lacks jurisdiction to hear a motion that has not been properly served, even if the non-moving party had some type of advanced notice. (See *Diaz v. Professional Community Mgmt.* (2017) 16 Cal.App.5th 1190, 1204-1205; *Five-O-Drill Co. v. Superior Court of Los Angeles County* (1930) 105 Cal. App. 232.) Accordingly, this motion is off calendar.
7	23CV416765	Yicheng Ji vs Tesla Motors, Inc.	Defendant Tesla Motor, Inc.'s motion to compel binding arbitration is GRANTED. A notice of motion with this hearing date and time was served by electronic mail on March 21, 2024. Plaintiff failed to oppose the motion, inferring Plaintiff has no meritorious arguments. (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) And Plaintiff does not. There is a binding arbitration agreement between the parties in the Order Agreement and the Retail Installment Contract. Code of Civil Procedure section 1281.2 states: "the court shall order a matter to arbitration if it determines that there is an agreement to arbitrate and (1) the agreement has not been waived or (2) the agreement has not been revoked." (See also *Cinel v. Barna* (2012) 206 Cal.App.4th 1383, 1389.) "[A] party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense." (*Ruiz v. Moss Bros. Auto Group, Inc.* (2014) 232 Cal.App.4th 836, 842.) There is a presumption against waiver, and "when allocation of a matter to arbitration. . .is uncertain, we resolve all doubts in favor of arbitration." (*Cinel*, 206 Cal.App.4th at 1389; *Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, 247.) There is no opposition, there is a binding arbitration agreement, and therefore this case is ordered to arbitration and stayed pending the outcome of that arbitration. The October 22, 2024 case management conference is VACATED, and a status conference is set for February 13, 2025 at 10 a.m. in Department 6. Court to prepare formal order.

8	23CV422621	MICHAEL HERTZ vs MARK A. OLIVEREZ et al	Plaintiff Michael Hertz's motion for an order (1) deeming matters in Plaintiff's first set of requests for admission admitted, (2) compelling Defendant's initial responses to Plaintiff's first set of form interrogatories, first set of special interrogatories, and first set of requests for production; and (3) for sanctions is GRANTED, IN PART. Notice of this motion was served by express mail on April 17, 2024 to an address in Scotts Valley. Defendant did not oppose the motion until May 13, 2024, at which time he also served substantially Code compliant discovery responses without objection. Service of those responses before the hearing date does render the current motions moot, but the issue of sanctions remains. Defendant declares that his prior counsel did not inform him about the deadline for outstanding discovery responses. However, Defendant did receive notice of this motion and still failed to act until after the time an opposition was due. It is clear to the Court that but for Plaintiff moving to compel, it would not have received these discovery responses. Accordingly, Defendant is ordered to pay Plaintiff $800 (excludes time to draft discovery, review and argue since no substantive opposition, and to reflect more reasonable number of paralegal hours) within 20 days of service of the formal order, which the Court will prepare.
9	22CV406998	Pico Semiconductor, Inc. Vs. V-Silicon Semiconductor (Hefei) Co. Ltf	Bing Zhang Ryan's motion to withdraw as counsel for V-Silicon Semiconductor (Hefei) Co. Ltd. ("V-Silicon") is GRANTED. A company, regardless of corporate form, cannot represent itself in civil litigation in California. (See *Clean Air Transp. Sys. v. San Mateo County Transit Dist.* (1988) 198 Cal. App. 3d 576, 578 ("[A] corporation is a distinct legal entity, separate from its shareholders and officers. The rights and liabilities of corporations are distinct from the persons composing it. Thus, a corporation cannot appear in court except through an agent."); *Ferruzzo v. Superior Court* (1980) 104 Cal. App. 3d 501, 503 ("The rule is clear in this state that, with the sole exception of small claims court, a corporation cannot act in propria persona in a California state court."); *Merco Constr. Engineers, Inc. v. Municipal Court* (1978)21 Cal. 3d 724, 727 ("the Legislature cannot constitutionally vest in a person not licensed to practice law the right to appear in a court of record in behalf of another person, including a corporate entity.") Accordingly, on August 20, 2024 at 10:00 a.m. in Department 6, V-Silicon is ordered to appear and show cause why its answer should not be stricken and default be entered against it for failure to obtain counsel. Court to use proposed order on file.
10	23CV418946	Ali Rizwan et al vs Zakaria Hamadeh et al	Defendant Zakaria Hamadeh's unopposed motion to consolidate Case Nos. 23CV419984 and 23CV418946 is GRANTED. Case No. 23CV418946 is designated the lead case. All dates in Case No. 23CV419984 are VACATED. These orders will be reflected in the minutes.
11-12	23CV421107	Matthew Kastner et al vs Kummi Kim et al	Plaintiffs' unopposed petitions to approve compromise of claims for Elijah and Jeremiah Kastner are GRANTED. Court to use proposed orders on file.

Calendar Line 1
Case Name: *Jean Kim v. Pets' Rx, Inc., et al.*
Case No.: 19CV356353

This is an action for medical (veterinary) malpractice brought by pro per Plaintiff Jean Kim against defendants Pets Rx, Inc. dba VCA Vets & Pets Animal Hospital ("VCA") and Tiffany Sung, DVM, (collectively, Defendants) arising from an injury allegedly sustained by Plaintiff's cat, Kitty, while in Dr. Sung's care. Defendants now move for summary judgment, or alternatively, summary adjudication. Pursuant to California Rules of Court, rule 3.1308, the Court issues its tentative ruling.

I. BACKGROUND

A. Factual

This action arises out of care rendered by Dr. Sung, a veterinarian at VCA, to Plaintiff's cat, "Kitty" (aka "Kimmy"). According to the Second Amended Complaint ("SAC"), Plaintiff brought her cat to VCA to be evaluated on October 17, 2018. (SAC, ¶ 15.) Dr. Sung's physical exam indicated that Kitty's gait and musculoskeletal structure were normal. (*Id*., ¶ 16.) Several hours later, Kitty underwent sedation for x-rays and further examination. (*Id*., ¶ 17.) The x-ray report indicated that the cat had a femur fracture, an injury unknown to Plaintiff. (*Id*.) The physician did not discuss the injury, which now affected Kitty's gait, with Plaintiff. (*Id*., ¶¶ 18-19.) Dr. Sung stated (falsely, in Plaintiff's view) in her medical report that she did not have an opportunity to check Kitty's gait and the injury occurred weeks prior to the exam. (*Id*., ¶ 20.) A few days later, Dr. Sung advised Plaintiff that the injury would heal on its own without surgery or stabilization. (SAC, ¶ 20.) As a result of that representation, Plaintiff choose not to seek surgical repair. (*Ibid*.)

Approximately two months later, Plaintiff took Kitty to a different facility, where the exam revealed that the cat was suffering from chronic pain from the femur fracture and other issues. (SAC, ¶ 22.) Plaintiff subsequently obtained an independent evaluation of the x-rays taken at VCA in October, and the reviewing radiologist found the fracture edges appeared relatively sharp and no callus formation, consistent with an acute fracture. (*Id*., ¶ 23.) Plaintiff alleges Kitty's leg injury was the result of negligence by Defendants (*id*., ¶ 24) and Dr. Sung concealed this negligence (*id*., ¶¶ 42, 134). Kitty later passed away.

B. Procedural

Plaintiff initiated this action on October 9, 2019. Defendants demurred to the complaint and moved to strike portions of it. Plaintiff filed a First Amended Complaint ("FAC") on December 16,

2019, asserting: (1) veterinary malpractice; (2) gross negligence; (3) intentional infliction of emotional distress ("IIED"); and (4) unfair competition (Bus. & Prof. Code, § 17200 et seq.). Defendants demurred to the FAC in its entirety on grounds of uncertainty, and specifically to the third cause of action for failure to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subds. (e) & (f).) Defendants also moved to strike Plaintiff's request for punitive damages, loss of companionship claims, and request for general/emotional distress damages. (Code Civ. Proc., §§ 435, 436.) The Court (Hon. Kulkarni) overruled the demurrer on uncertainty grounds but sustained the demurrer with leave to amend as to the third cause of action on grounds of failure to state sufficient facts, and granted the motion to strike with leave to amend but cautioned that Plaintiff must "seek leave of court under Section 425.13 to seek punitive damages."

Plaintiff filed the operative SAC on August 12, 2020, asserting: (1) veterinary malpractice; (2) gross negligence; (3) negligent infliction of emotional distress; (4) IIED; and (5) unfair competition (Bus. & Prof. Code, § 17200 et seq.). The SAC sought punitive damages without leave of court. Defendants demurred to the third and fourth causes of action on the ground of failure to state sufficient facts and moved to strike Plaintiff's requests for punitive damages, emotional distress/general damages, and loss of companionship claims. The Court (Hon. Kulkarni) sustained the demurrer and granted the motion to strike, both without leave to amend.

Defendants now move for summary judgment/adjudication on the remaining claims for veterinary malpractice, gross negligence, and unfair competition. Plaintiff opposes the motion. Plaintiff also filed requests for monetary sanctions pursuant to Code of Civil Procedure section 437c, subdivision (j) against defense counsel, VCA, Dr. Sung, and defense expert Dr. Gregory Marsolais.[1]

II. LEGAL STANDARD

"A defendant seeking summary judgment must show that at least one element of the plaintiff's cause of action cannot be established, or that there is a complete defense to the cause of action. . . . The burden then shifts to the plaintiff to show there is a triable issue of material fact on that issue. [Citations.]" (*Alex R. Thomas & Co. v. Mut. Serv. Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72); see also Code Civ. Proc., § 437c, subd. (p)(2).) The traditional method for a defendant to meet its

[1] Plaintiff's requests for sanctions are DENIED. Plaintiff cannot seek sanctions under Code of Civil Procedure section 437c, subdivision (j) since Defendants are the moving party and therefore did not submit an affidavit "in opposition to a motion for summary judgment or summary adjudication, or both, that facts essential to justify opposition may exist but cannot, for reasons stated, be presented" pursuant to Code of Civil Procedure section 437c, subdivision (h).

burden on summary judgment is by "negat[ing] a necessary element of the plaintiff's case" or establishing a defense with its own evidence. (*Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal.4th 317, 334.) The defendant may also demonstrate that an essential element of plaintiff's claim cannot be established by "present[ing] evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence--as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing." (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 855 (*Aguilar*).)

These standards provide for shifting the burden of production; that is, the burden to make a prima facie showing of evidence sufficient to support the position of the party in question. (*Aguilar*, *supra*, 25 Cal.4th at pp. 850-851.) The burden of persuasion remains with the moving party and is shaped by the ultimate burden of proof at trial. (*Ibid.*) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Id*. at p. 850.) The opposing party must produce substantial responsive evidence that would support such a finding; evidence that gives rise to no more than speculation is insufficient. (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 162-163.)

On summary judgment, "the moving party's declarations must be strictly construed, and the opposing party's declaration liberally construed. [Citation.]" (*Hepp v. Lockheed-California Co*. (1978) 86 Cal.App.3d 714, 717 (*Hepp*); *Johnson v. American Standard, Inc*. (2008) 43 Cal.4th 56, 64 (*Johnson*) [the evidence is viewed in the light most favorable to the opposing plaintiff; the court must "liberally construe plaintiff's evidentiary submissions and strictly scrutinize defendant's own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiff's favor"].) Summary judgment may not be granted by the court based on inferences reasonably deducible from the papers submitted, if such inferences are contradicted by others which raise a triable issue of fact. (*Hepp*, *supra*, 86 Cal.App.3d at pp. 717-718.)

Even if there are some triable issues in the case, the court has the power to summarily adjudicate that one or more causes of action has no merit, there is no affirmative defense to one or more causes of action, there is no merit to a claim for punitive damages (Civil Code section 3294), or one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. (Code Civ. Proc., § 437c, subd. (f)(1).) Absent a stipulation approved by the court, "[a] motion for summary

adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (*Ibid.*)

III. EVIDENTIARY OBJECTIONS

Plaintiff objects to the Marsolais Declaration, Sung Declaration,[2] and the necropsy report dated December 29, 2018. Defendants' Reply to Plaintiff's Opposition to Defendants' Motion for Summary Judgment/Summary Adjudication and Objections to Evidence (Reply) also raises evidentiary objections to Plaintiff's evidence. The Court need not rule on Plaintiff's or Defendants' objections as they do not fully comply with California Rules of Court, rule 3.1354. (See *Vineyard Springs Estates v. Superior Court* (2004) 120 Cal.App.4th 633, 642 [trial court has duty to rule on evidentiary objections presented in the proper form]; *Hodjat v. State Farm Mutual Automobile Ins. Co.* (2012) 211 Cal.App.4th 1, 9 [trial court not required to give party who fails to comply with formatting requirements of California Rules of Court, rule 3.31354 a second chance to file properly formatted objections.].) In any event, there is no need to rule on the objections given the Court's ruling. (See Code Civ. Proc., § 437c, subd. (q).)

IV. SERVICE ISSUES

Defendants' Reply contends that Plaintiff "intentionally failed to serve Defendants with the lion's share of the papers which she wants to the Court to consider in opposition to the subject motion" and the Court should consider only properly served opposition papers. (Reply at p. 3.) Defendants raise serious concerns. The Court reminds Plaintiff that "'[w]hen a litigant is appearing in propria persona, [they are] entitled to the same, *but no greater*, consideration than other litigants and attorneys [citations]. Further, the in propria persona litigant is held to the *same* restrictive rules of procedure as an attorney [citation].' [Citations.]" (*County of Orange v. Smith* (2005) 132 Cal.App.4th 1434, 1444, emphasis added; *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 985 ["A doctrine generally requiring or permitting exceptional treatment of parties who represent themselves would lead to a quagmire in the trial courts, and would be unfair to the other parties to litigation."].)

[2] Defendants present two Sung Declarations (one dated October 1, 2020, and another in support of the present motion for summary judgment/adjudication dated February 13, 2024). Plaintiff does not specify if she objects to one or both.

V. ANALYSIS

Defendants move for summary judgment, or alternatively, summary adjudication, on Plaintiff's remaining claims for veterinary malpractice, gross negligence,[3] and unfair competition. Defendants contend they are entitled to summary judgment because "all care and treatment provided to Plaintiff's cat was compliant and consistent with the standard of care and was rendered with such reasonable skill, diligence and attention as might ordinarily have been expected of careful, skillful, and trustworthy persons in the profession." (Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment, or Alternatively, Summary Adjudication (MPA) at p. 3.) Defendants support their motion with the declaration of defense counsel, Elizabeth Gong Landess ("Landess Decl.") as well as the following attachments to the Landess Declaration: (1) VCA records and the Necropsy Services Group ("NSG") necropsy report dated December 29, 2018, for Kitty (Landess Decl., Exh. A); (2) a copy of the SAC (*id*., Exh. B); (3) a copy of the Court's Order of December 8, 2020 (re: demurrer and motion to strike as to the SAC) (*id*., Exh. C); (4) Dr. Sung's declaration filed October 1, 2020, in support of Defendant's Opposition to Plaintiff's Motion to Amend Complaint to Add Punitive Damages (Sung Decl. of October 1, 2020) (*id*., Exh. D); (5) Declaration of Dr. Tiffany Sung, DVM in Support of Defendants' Motion for Summary Judgment/Summary Adjudication (Sung Decl. of February 13, 2024); and (6) Declaration of Dr. Gregory Marsolais, DVM, MS, DACVS-SA in support of Defendants' Motion for Summary Judgment/Summary Adjudication ("Marsolais Decl.").

"Veterinarians, like medical doctors, are licensed health care providers" and the standard for medical malpractice cases likewise applies to veterinary malpractice cases. (*Williamson v. Prida* (1999) 75 Cal.App.4th 1417, 1425.) A plaintiff in a veterinary malpractice action must establish: ""'(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." [Citation.]' [Citation.]" (*Hanson v. Grode* (1999) 76 Cal.App.4th 601, 606.) "Opinion testimony from a properly qualified witness is generally necessary to demonstrate the elements for medical malpractice claims. [Citations.]" (*Borrayo v. Avery* (2016) 2

[3] "California does not recognize a distinct common law cause of action for gross negligence apart from negligence. [Citations.] As a degree of negligence, '[g]ross negligence is pleaded by alleging the traditional elements of negligence: duty, breach, causation, and damages.' [Citation.]" (*Jimenez v. 24 Hour Fitness USA, Inc.* (2015) 237 Cal.App.4th 546, 552, fn. 3, alteration original.)

Cal.App.5th 304, 310.) "When a defendant health care practitioner moves for summary judgment and supports his motion with an expert declaration that his conduct met the community standard of care, the defendant is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence. [Citation.]" (*Ibid*.) There exists an exception to the expert evidence requirement, but this " 'common knowledge' exception is principally limited to situations in which the plaintiff can invoke the doctrine of res ipsa loquitur, i.e., when a layperson 'is able to say as a matter of common knowledge and observation that the consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised.'[] [Citation.] The classic example, of course, is the X-ray revealing a scalpel left in the patient's body following surgery. [Citation.] Otherwise, ' "expert evidence is conclusive and cannot be disregarded. [Citations.]"' [Citation.]" (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001 (*Flowers*); *Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, 741 (*Garibay*) ["'In professional malpractice cases, expert opinion testimony is required to prove or disprove that the defendant performed in accordance with the prevailing standard of care [citation], except in cases where the negligence is obvious to laymen. [Citation.]' [Citation.]"].)

Dr. Marsolais bases his opinion on "the records of Dr. Tiffany Sung, DVM of VCA Vets and Pets Animal Hospital (including radiographs), SAGE, and the Necropsy report of Necropsy Services Group of December 2018 related to the care of [Kitty] in October and December 2018" as well as the Sung Declaration of October 1, 2020. (Marsolais Decl. at ¶ 6.)[4] Dr. Marsolais opines:

> [Kitty's] necropsy report documented aggressive cancer "disseminated diffusely" throughout her Lungs, Liver, Kidneys, Spleen, Bladder, and right femur fracture "assessed at that time as a chronic pathologic fracture." Given this widespread systemic cancer, it is highly likely that the femur fracture was pathologic and present prior to the presentation at the VCA veterinary practice and that the clinical signs of the bladder infection were actually associated with the tumor being present already in the urinary bladder.
>
> As such, even in the unlikely event the femur fracture occurred at VCA on October 17, 2018, it was not due to any deviation from standard of care or negligence by Dr. Sung or any VCA staff — rather, it was due to the weakened state of the bone due to the undiagnosed sarcoma in which normal activity and handling could cause a fracture.

[4] The radiographs and SAGE records Dr. Marsolais reviewed are not included in Exhibit A to the Landess Declaration.

> Additionally, I do not believe that the cat's death 2+ months after the care rendered at VCA was related in any manner to the care received at VCA or the subject femur fracture. The fracture was simply a symptom of the undiagnosed aggressive cancer the "Kimmy" was suffering from.

(Marsolais Decl. at ¶ 9.)

Critically, Dr. Marsolais opines that even in the event the fracture occurred at VCA on October 17, 2018, it was not due to a deviation from the standard of care or negligence on Defendants' part due to Kitty's pre-existing cancer—that is, even if Defendants fractured Kitty's leg, Defendants are entitled to summary judgment because the fracture would be attributable to Kitty's underlying medical condition (cancer) rather than Defendants' negligence. But this opinion and the cancer diagnosis derive from the necropsy report, which has not been authenticated by a custodian of records as a business record.[5] (*Garibay*, *supra*, 161 Cal.App.4th at pp. 742-743.)

This is critical because Plaintiff alleges that Defendants were responsible for Kitty's fracture and Kitty did not have a fractured leg before her visit. (SAC, ¶¶ 14-18, 24, 28, 39; *Flowers*, *supra*, 8 Cal.4th at p. 1001; *Garibay*, *supra*, 161 Cal.App.4th at p. 741.) As the Marsolais Declaration makes clear, Defendants are not certain the fracture did not occur during the visit. (Marsolais Decl. at ¶ 9 ["even in the unlikely event the femur fracture occurred at VCA on October 17, 2018"]; see MPA at p. 8 ["The Cat's Femur was Most Likely Fractured Prior to Her Visit to VCA[.]"], bold omitted.) Defendants' own evidence conflicts on whether Kitty's gait was normal or not, and evidence of normal gait could suggest Kitty's leg was not fractured prior to the visit. (See Sung Decl. of February 13, 2024, at ¶ 8, fn. 1 ["The cat's computer-generated clinic notes inadvertently stated that ambulation/gait were 'normal' as I used a pre-filled template that was loaded into the physical examination portion of the clinic notes (which is common to save time in generating records/notes). There was an error in the record because I inadvertently forgot to edit the pre-filled text to note the gait could not be checked."], italics omitted.)

It is one thing if a pet goes to see a veterinarian without a broken leg but *leaves* with one. (See *Flowers*, *supra*, 8 Cal.4th at p. 1001; *Garibay*, *supra*, 161 Cal.App.4th at p. 741; MPA at p. 7 [expert testimony required to prove standard of care "'unless the conduct required by the particular

[5] Among other things, the necropsy report (at p. 3) states: "The cause of death is disseminated, metastatic histiocytic sarcoma involving lungs, kidneys, spleen, liver, and bladder. . . . The chronic fracture of the femur was also associated with metastatic infiltration of neoplastic cells indicative of pathological fracture of weakened bone."

circumstances is within the common knowledge of the layman' "].) But it is a different thing if the pet had an underlying medical condition unknown to the veterinarian rendering that pet susceptible to injury even with the exercise of due care under the circumstances.

"A properly qualified expert may offer an opinion relating to a subject that is beyond common experience, if that expert's opinion will assist the trier of fact. [Citation.] Even so, the expert opinion may not be based on assumptions of fact that are without evidentiary support or based on factors that are speculative or conjectural, for then the opinion has no evidentiary value and does not assist the trier of fact. [Citation.]" (*Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510.) Hospital and medical records can serve as a basis for expert medical opinion. (*Garibay*, *supra*, 161 Cal.App.4th at p. 743.) "Although hospital and medical records are hearsay, they can be admitted under the business records exception to the hearsay rule. [Citations.] Such records, however, must be properly authenticated. [Citation.]" (*Id*. at p. 742.)

Evidence Code section 1271, codifying the business records exception to the hearsay rule, provides:

> Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:
>
> (a) The writing was made in the regular course of a business;
>
> (b) The writing was made at or near the time of the act, condition, or event;
>
> (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and
>
> (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

Dr. Sung's declaration shows she was a percipient witness to certain events, but Dr. Sung did not conduct Kitty's necropsy and her declaration does not meet the authentication requirements of Evidence Code section 1271. Dr. Sung's declaration only states: "The copies of the Vets & Pets records, including a copy of the Necropsy Report of NSG dated December 29, 2018, attached as Exhibit A to the Declaration of Elizabeth Gong Landess are a true and correct copy of 'Kitty' Kim's records/chart and/or records obtained through discovery in this matter." (Sung Decl. of February 13, 2024, at ¶ 14.) Nor does defense counsel's declaration suffice. Defense counsel's declaration states:

"Attached as Exhibit A to this declaration are true and correct copies collectively of excerpts of pertinent portions of records of Defendant, VCA Vets and Pets Animal Hospital for 'Kitty' (aka 'Kimmy') Kim, the cat, which is the object of the subject litigation, as well as the NSG Necropsy report dated December 29, 2018 on the subject cat which was obtained through discovery in this matter from SAGE." (Landess Decl. at ¶ 5.) The Landess Declaration does not establish defense counsel as a "custodian or other qualified witness" nor the other requirements pursuant to Evidence Code section 1271. In short, neither declaration establishes the requirements to admit the medical records, including the necropsy report, under the business records exception to the hearsay rule.[6]

VI. CONCLUSION

Defendants rely on the Marsolais Declaration, the Sung Declarations, and medical records to meet its initial burden of production as to the applicable standard of care and the lack of any such breach in seeking summary judgment or summary adjudication in the alternative. The medical records, including the necropsy report, are hearsay as they have not been properly authenticated under the business records exception to the hearsay rule. The Marsolais and Sung Declarations cannot be considered by the Court to the extent the declarations rely on these records. Significantly, Dr. Marsolais' opinion that "even in the unlikely event the femur fracture occurred at VCA on October 17, 2018, it was not due to any deviation from standard of care or negligence by Dr. Sung or any VCA staff — rather, it was due to the weakened state of the bone due to the undiagnosed sarcoma in which normal activity and handling could cause a fracture" has no evidentiary basis and therefore no evidentiary value.

As Defendants acknowledge, Plaintiff's claims rise and fall with the issue of professional negligence (MPA at pp. 2-3, 10-11), but Defendants fail to meet their initial moving burden. Therefore, Defendants' motion for summary judgment, or alternatively, summary adjudication, is DENIED.

[6] Even if either declaration were sufficient, the radiographs and SAGE records reviewed by Dr. Marsolais are still not authenticated since, as noted above, they are not included in Exhibit A of the Landess Declaration.