SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 18b
Honorable Shella Deen, Presiding
Thomas Duarte, Courtroom Clerk
191 North First Street, San Jose, CA 95113

DATE: September 5, 2024 TIME: 9:00 A.M.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E

****Please specify the issue to be contested when calling the Court and Counsel****

LAW AND MOTION TENTATIVE RULINGS

FOR APPEARANCES: Department 18 is fully open for in-person hearings. The Court strongly prefers **in-person** appearances for all contested law and motion matters. For all other hearings, the Court strongly prefers either **in-person or video** appearances. If you must appear virtually, you must use video. Audio-only appearances are permitted, but disfavored, as they cause significant disruptions and delays to the proceedings. Please use telephone-only appearances as a last resort. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 18:
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

SCHEDULING MOTION HEARINGS: Please go to https://reservations.scscourt.org or call 408-882-2430 between 8:30 a.m. and 12:30 p.m. (Mon.-Fri.) to reserve a hearing date for your motion before you file and serve it. You must then file your motion papers no more than five court days after reserving the hearing date, or else the date will be released to other cases.

FOR COURT REPORTERS: The Court is no longer able to provide official court reporters for civil proceedings (as of July 24, 2017). If you want to have 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

RECORDING IS PROHIBITED: As a reminder, most hearings are open to the public, but state and local court rules prohibit recording of court proceedings without a court order. This prohibition applies to both in-person and remote appearances.

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LAW AND MOTION TENTATIVE RULINGS

LINE #	CASE #	CASE TITLE	RULING
LINE 1	22CV408718	Julie Ricafort vs Anthony Galvan	**Demurrer** Scroll down to Line 1 for Tentative Ruling.
LINE 2	23CV417549	KEVIN LU vs QUINCY WINSHIP #4798 et al	**Demurrer** Scroll down to Line 2 for Tentative Ruling.
LINE 3	24CV429757	ANTONIO NIEVES vs ABRAHAM LOYA	**Demurrer** Scroll down to Line 3 for Tentative Ruling.
LINE 4	21CV378957	State Farm Mutual Automobile Insurance Company vs Justin Miller et al	**Motion for Summary Judgment/Adjudication** Notices of settlement were filed August 30 and 31, 2024. This motion is therefore MOOT and ordered OFF CALENDAR. The October 2, 2024 Mandatory Settlement Conference, October 3, 2024 Trial Assignment and October 7, 2024 Trial are all VACATED. This matter is SET for review re: settlement/dismissal on February 6, 2025 at 10 a.m. in Department 18b.

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LAW AND MOTION TENTATIVE RULINGS

LINE 5	23CV421814	Elaine Lee vs AMERICAN HONDA MOTOR CO., INC. et al	**Motion to Compel (Form Interrogatories)** The court orders that all three discovery motions are CONTINUED to October 24, 2024, at 9 a.m. in Department 18b. The parties are ordered to conduct good faith, reasonable and meaningful meet and confers, either in person, by phone or video conference, to try to narrow the many issues in these motions. If any issues remain after the meet and confer efforts, which may span several sessions, the parties shall file an updated *joint* statement no later than October 9, 2024, which shall identify the remaining items in dispute and the reasons why further responses should/should not be compelled. Failure to comply with this order will result in sanctions. Moving party to prepare formal order.
LINE 6	23CV421814	Elaine Lee vs AMERICAN HONDA MOTOR CO., INC. et al	**Motion to Compel (Special Interrogatories)** See Tentative Ruling to Line 5.
LINE 7	23CV421814	Elaine Lee vs AMERICAN HONDA MOTOR CO., INC. et al	**Motion to Compel (Request for Production of Documents)** See Tentative Ruling to Line 5.

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LAW AND MOTION TENTATIVE RULINGS

LINE 8	21CV381798	Jaime Canales vs Ashley Oliver et al	**Motion to Approve Good Faith Settlement (Granite Construction and Caltrans)** Defendants Granite Construction Company Inc. and The Department of Transportation (Caltrans)'s motion for good faith settlement determination is UNOPPOSED and GRANTED. The moving parties are instructed to prepare the order.
LINE 9	21CV381798	Jaime Canales vs Ashley Oliver et al	**Motion to Approve Good Faith Settlement (Ashley Oliver and James Thomas Oliver)** Defendants Ashley Oliver and James Thomas Oliver's motion for good faith settlement determination is UNOPPOSED and GRANTED. The moving parties are instructed to prepare the order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 10	23CV419273	Christopher Minasi vs HYUNDAI MOTOR AMERICA, a California Corporation et al	**Motion for Attorney's Fees** Plaintiff, Christopher Minasi's motion for attorney's fees ($30,660.50) and costs and expenses ($1,293.07) against Defendants Hyundai Motor America and DGDG 12, LLC dba Capitol Hyundai pursuant to Civil Code § 1794(d), opposed by Defendants. The Court has reviewed the briefing and specifically the time entries submitted, and the arguments presented in support of the hourly rates requested. The Court has discretion to reduce attorney fee awards. (*Mikaeilpoor v. BMW of North America, LLC* (2020) 48 Cal.App.5th 240). Every lemon law case is different, but in this case the Court does not see any unique issues or extraordinary motions and deems the time charged for standard form lemon law discovery and the litigation of this case to be excessive and the hourly rates elevated. The Court determines that (1) the fees incurred are unreasonable and excessive – the award requested is reduced to account for overbilling, lack of accounting for using form template discovery and pleadings and litigation inefficiencies; and (2) the requested hourly rates are reduced for this standard lemon law case. (*Nightingale v. Hyundai Motor America* (1994) 31 Cal.App.4th 99, 152.) Further, Plaintiff's costs are reduced by $91.99 ("Other") as there is no explanation for this cost item. Plaintiff's motion for attorney's fees is GRANTED in the amount of $15, 575.00 and costs of $1,201.08. Moving party to prepare the order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 11	23CV424874	Shatonn Woods vs Tuem Ngo et al	**Pro Hac Vice Application (Timothy K. Masterson)** No objection filed. Good cause appearing, the application is GRANTED. Moving party to prepare formal order.
LINE 12	23CV428385	Soulbrain CA, LLC et al vs Seung Pyo (Dominic) Lee et al	**Motion to Withdraw (Attorney Douglas Winthrop)** This motion was withdrawn by Attorney Winthrop by notice of withdrawal filed on July 16, 2024. The motion is therefore ordered OFF CALENDAR.

Calendar Line 1
Case Name: *Ricafort v. Galvan*
Case No.: 22CV408718

Before the court is Plaintiff Julie Ann Ricafort's Demurrer to Defendant Anthony Halili Galvan's Answer. Pursuant to California Rule of Court 3.1308, the court issues its tentative ruling as follows.

I. Background

On December 18, 2021, Plaintiff Julie Ann Ricafort ("Plaintiff") retained the services of Great American Dental for a wisdom tooth extraction performed by Defendant Anthony Halili Galvan ("Defendant"). (First Amended Complaint ["FAC"] at ¶ 4.) Plaintiff alleges that Defendant failed to explain the risks of injury to the lingual nerve in connection with the extraction. (*Ibid.*) Plaintiff complained of persistent pain and swelling and was only able to receive a phone appointment with Defendant, who provided a written prescription for antibiotics. (*Id.* at ¶¶ 5-7.)

Thereafter, Plaintiff was unable to open her mouth, and sought an in person appointment with Defendant on January 7, 2022. (FAC at ¶¶ 9, 11.) Plaintiff is informed and believes Defendant could not inspect the surgical site due to limited movement of her jaw. (*Id.* at ¶ 11.) She was instead prescribed a muscle relaxant. (*Ibid.*)

On January 11, 2022, Plaintiff met with a Maxillofacial surgeon and underwent a CT scan procedure, and taste and sensation test. (FAC at ¶ 12.) Plaintiff was informed that a foreign body and small lingual late fracture was found near the site of the extraction. (*Ibid.*) Plaintiff alleges that she was informed that the lingual nerve may have been injured. (*Ibid.*) She was advised to have surgery to repair and explore the nerve to determine if it was still intact. (*Ibid.*) After the surgery, plaintiff alleges that the surgeon determined that the lingual nerve was severed and may be repairable through grafting. (*Ibid.*) Plaintiff alleges that the following was determined after surgery:

> 1. Lingual nerve noted to traverse within #17 tooth socket scar tissue bundle;
> 2. Under high power microscope, scar tissue and neuroma cut back to healthy fascicles;
> 3. Discontinuity noted to be 2cm after neuroma excised.
> 4. Axogen 3-4 nerve graft used within 4mm connectors and 10-0 and 8-0 Nylon sutures;

5. Neve repair completed under high power microscope using connector assisted technique;
6. Foreign body at site #17 noted on CBCT not visualized but likely within scar tissue/neuroma bundle that was excised;
7. Closure with 3-0 and 4-0 polysorb in continuous and simple interrupted fashion;
8. Total of 8cc 0.5% lidocaine with 1J200k epi administered.

(*Ibid.*)

On February 15, 2022, Plaintiff alleges that she underwent Arthrocentesis of Tempromandibular joint (TMJ) to relieve pain in the jaw. (FAC at ¶ 13.) Plaintiff alleges that she is expected to continue surgeries to remediate the damage allegedly caused by Defendant. (*Id.* at ¶ 14.)

Plaintiff initiated this action on December 16, 2022. The operative First Amended Complaint was filed on March 15, 2023. Plaintiff alleges two causes of action: (1) battery; and (2) negligence. The negligence cause of action is based on lack of informed consent and medical negligence. The summons was served on April 1, 2023. Defendant filed and served his Answer to the FAC on May 22, 2024. Therein, Defendant raises thirty-four (34) affirmative defenses. (*See* Answer.) On July 5, 2024, Plaintiff filed a Demurrer to Defendant's Answer. Defendant's opposition was filed on August 22, 2024. Plaintiff filed her reply on August 28, 2024.

II. Discussion

a. Procedural Issues[1]

i. Timeliness

Under Code of Civil Procedure section 430.40, a demurrer to an Answer is due within 10 days after service of the Answer. The court has discretion to hear a late-filed demurrer to an Answer because such tardiness is "a mere irregularity" and "no question of jurisdiction is involved." (See *McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 281-282.) Furthermore, "[t]he court may, in furtherance of justice, and on any terms as may be proper,

[1] On reply, Plaintiff objects that Defendant's opposition exceeds ten pages and fails to include the requisite table of contents and authorities as required by California Rules of Court, rule 3.1113(f). (Plaintiff's Reply at p. 1:22-2:4.) Although the memorandum of points and authorities does not comply with rule 3.1113(f), which requires a table of contents and table of authorities for documents of this page length, this is a minor technical defect that should not bar the court's consideration of the substance of the motion.

… enlarge the time for answer or demurrer." (Code Civ. Proc., § 473, subd. (a)(1).)[2] "The court may exercise this discretion so long as its action does 'not affect the substantial rights of the parties.' [Citation.]" (*Id.* at p. 282.)

Defendant's Answer was filed on May 22, 2024. On June 3, 2024, Plaintiff timely filed a Declaration of Demurring or Moving Party in Support of Automatic Extension. Plaintiff filed her Demurrer on July 5, 2024, or within the 30 days granted by the automatic extension of time. Accordingly, the Demurer is timely.

ii. *Meet and Confer*

"Before filing a demurrer pursuant to this chapter, the demurring party shall meet and confer in person or by telephone with the party who filed the pleading that is subject to demurrer for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised in the demurrer." (§ 430.41, subd. (a).) "As part of the meet and confer process, the demurring party shall identify all of the specific causes of action that it believes are subject to demurrer and identify with legal support the basis of the deficiencies." (§ 430.41, subd. (a)(1).) "Any determination by the court that the meet and confer process was insufficient shall not be grounds to overrule or sustain a demurrer." (§ 430.41, subd. (a)(4).)

Plaintiff's Declaration of Demurring or Moving Party in Support of Automatic Extension provides that on May 23, 2024, Plaintiff transmitted a detailed letter to Defendant's counsel explaining the deficiencies of the Answer. Plaintiff's declaration contends that the parties further discussed the merits of a potential demurrer, and that they agreed to a 30-day extension for Plaintiff to file the demurrer, as both parties would consider amending their pleadings. As stated above, the Demurrer was filed on July 5, 2024. Alongside the Demurrer, Plaintiff filed a Declaration of Demurring or Moving Party regarding Meet and Confer contending that the parties had met and conferred by telephone at least five days prior. The Court finds the parties' meet and confer efforts sufficient. Any further effort to meet and confer would not prove fruitful.

[2] All further undesignated statutory references are to the Code of Civil Procedure.

b. Demurrer to Answer

i. *Legal Standard*

The answer to a complaint shall contain the general or specific denial of the material allegations of the complaint that are controverted by the defendant and a statement of any new matter constituting a defense. (See Code Civ. Proc., § 431.30, subd. (b).) A "new matter" is "any ground urged in avoidance of the complaint, i.e., some independent reason why plaintiff should be barred from recovery, even if everything alleged in the complaint was true." (See *id*.; see also Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2013) ¶ 6:430, pp. 6-113, 6-114.)

Although rare, a plaintiff or cross-complainant may demur to a defendant's answer. There are only three grounds for demurrer to an answer: (1) failure to state facts sufficient to constitute a defense; (2) uncertainty; and (3) failure to state whether contract alleged in the answer is written or oral. (See Code Civ. Proc., § 430.20; see also Code Civ. Proc., § 430.30.) When ruling on a demurrer, the court must regard the allegations of the answer as true; however, a demurrer does not admit contentions, deductions, or conclusions of fact or law alleged in the pleading. (See *South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 732.) The function of a demurrer is to test the legal sufficiency of a pleading. (See *Trs. of Capital Wholesale Elec. Etc. Fund v. Shearson Lehman Bros.* (1990) 221 Cal.App.3d 617, 621.) Consequently, "'[a] demurrer reaches only to the contents of the pleading and such matters as may be considered under the doctrine of judicial notice.'" (*South Shore Land Co. v. Petersen*, *supra*, 226 Cal.App.2d at p. 732; see also Code Civ. Proc., § 430.30, subd. (a).)

ii. *Analysis*

a. **Affirmative Defenses 1, 2, 4, 6, 13, and 17**

In her Demurrer, Plaintiff first challenges the first, second, fourth, sixth, thirteenth, and seventeenth affirmative defenses on the grounds that they are unintelligible because the cause of action they are referring to cannot be ascertained, and they would otherwise be inapplicable to the claim for battery. These affirmative defenses are as follows:

> AS FOR A FIRST, SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT ALLEGES:

3. That any injury, loss or damage purportedly sustained, if at all by plaintiff, was directly and proximately caused by the negligence of the plaintiff, and any damages awarded to plaintiff shall be reduced in proportion to the amount of negligence attributable to the plaintiff.

AS FOR A SECOND, SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT ALLEGES:

4.That liability of the persons ultimately determined to be responsible for plaintiff's injuries and losses, if any, including the plaintiff, shall be compared, and the damages, if any awarded to plaintiff, shall be apportioned accordingly.

. . .

AS FOR A FOURTH, SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT ALLEGES:

6. That any injury, loss or damage purportedly sustained, if at all, by plaintiff, was directly and proximately caused and contributed to by risks which were fully and actually known to plaintiff, who fully and actually appreciated the nature and scope of the hazards created thereby, and said plaintiff voluntarily assumed said risks and the potential consequences thereof.

. . .

AS FOR A SIXTH, SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT ALLEGES:

8. The incident described in the plaintiff's complaint as well as the injuries, losses, and damages allegedly sustained by plaintiff, were proximately caused by intervening and superseding causes and forces which were beyond the control of this answering defendant and which, in the exercise of reasonable prudence, were not and could not anticipated or foreseen by said answering defendant.

. . .

AS FOR A THIRTEENTH, SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT ALLEGES:

13. That if plaintiff, in fact, sustained or will sustain any injuries or damages as a result of any act or omission on the part of this answering defendant (which supposition is not admitted by this answering defendant, but is merely stated for the purpose of this affirmative defense), then plaintiff at the time and place alleged

> in said complaint was himself guilty of negligence in failing to exercise that degree of care for her own safety and protection that ordinarily prudent persons exercise under the circumstances, and said negligence contributed as a legal cause in some degree to the injuries and damages being claimed by plaintiff herein, thereby barring and/or reducing plaintiff's recovery.
>
> . . .
>
> AS FOR A SEVENTEENTH, SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT ALLEGES:
> 17. That at all times herein mentioned, plaintiff knew, or should have known, that plaintiff was submitting herself to medical techniques, treatment and medication which, because of the condition of plaintiff, rendered her susceptible to potential complications, injury, or damage and that by submitting himself to such medical techniques, treatment and medication, plaintiff freely, voluntarily and expressly assumed all risks attendant thereto, thereby barring and/or reducing plaintiff's recovery herein.

(Answer at pp. 2-5.)

Defendant argues that " 'inapplicability' is not a proper basis for demurrer to an answer under Section 430.20." (Defendant's Opposition at p. 2:1-2.) However, Plaintiff's basis for demurrer here is based on uncertainty such that she argues the affirmative defenses are unintelligible as to which cause of action applies, and that these affirmative defenses would specifically be inapplicable to the battery claim. (Plaintiff's Demurrer at pp. 3:12-16, 3:27-28, 4:9-10.) They do not state the specific cause of action to which they refer in a discernable matter.

The code requires that various affirmative defenses must be separately stated; and must refer to the causes of action to which they relate "in a manner by which they may be intelligently distinguished." (§ 431.30, subd. (g); see *Hata v. Los Angeles County Harbor/UCLA Med. Ctr.*, 31 Cal.App.4th 1791, 1805.) This is similar to complaints where each cause of action should be separately stated, separately numbered, and must identify the parties asserting the claim and against whom it is asserted. (See California Rules of Court, rule 2.112.)

Here, the first and thirteenth causes of action allege principles of comparative negligence, and, therefore, it can be determined that they refer to the negligence cause of

action. The remaining second, fourth, sixth, and seventeenth causes of action do not specify in the Answer which cause of action they refer to. Although Defendant makes clear in his opposition that these affirmative defenses refer to count two, medical malpractice for the negligence cause of action, the code requires that the applicable cause of action be clear in the responsive pleading. Therefore, the demurrer is SUSTAINED with leave to amend on grounds for uncertainty pursuant to Section 430.20, subdivision (b) as to affirmative defenses two, four, six, and seventeen, and OVERRULED as to affirmative defenses one and thirteen.

b. Affirmative Defenses 5, 8, 9, 10, 14, 15, 16, and 18

Plaintiff next challenges the fifth, eighth, tenth, fourteenth, fifteenth, sixteenth, and eighteenth affirmative defenses also on the grounds that they do not expressly distinguish between the two causes of action, and as such, they are inapplicable to the battery claim. These affirmative defenses are as follows:

> AS FOR A FIFTH, SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT ALLEGES:
> 7. That plaintiff's complaint and each purported cause of action contained therein, is barred by the provisions of Section 340.5 of the California Code of Civil Procedure.
>
> . . .
>
> AS FOR A EIGHTH, SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT ALLEGES:
> 10. That plaintiff is not entitled to recover general damages in any amount in excess of that stated in Section 3333.2 of the California Civil Code.
>
> AS FOR A NINTH, SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT ALLEGES:
> 11. That this answering defendant may elect to limit and diminish plaintiff's alleged damages pursuant to Section 3333.1 of the California Civil Code.
>
> AS FOR A TENTH, SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT ALLEGES:
> 12. Any recovery by the plaintiff pursuant to the complaint, and each purported cause of action contained therein, is controlled by

the provisions of Section 667.7 of the California Code of Civil Procedure

. . .

AS FOR A FOURTEENTH, SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT ALLEGES:

14. That it contends that there is no basis for liability of said defendant to plaintiff. However, without withdrawing that position, it alleges in the alternative that should this answering defendant be found liable to plaintiff on the complaint herein, this answering defendant should, in whole or in part, be indemnified by the other defendants, by those responsible persons, and/or entities who would be liable to plaintiff if joined herein, according to the degree of involvement or responsibility for causing loss to plaintiff; and by plaintiff to the degree and extent of plaintiff's own contributory negligence or to the extent plaintiff is found to assume the position of any other responsible person and/or entity with whom plaintiff has settled her claims separately or in any other manner have attempted to exonerate.

AS FOR A FIFTEENTH, SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT ALLEGES:

15. That plaintiff's complaint, and each purported cause of action contained therein, is barred for failure to comply with the requirements of Section 364 of the California Code of Civil Procedure.

AS FOR A SIXTEENTH, SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT ALLEGES:

16. Plaintiff's prayer of punitive damages is inappropriate under Code of Civil Procedure section 425.13.

. . .

AS FOR A EIGHTEENTH, SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT ALLEGES:

That plaintiff's complaint, and each purported cause of action contained therein, was the result and/or cause of a natural cause or condition, or was the natural or expected result of reasonable treatment rendered for the disease or condition and thus these causes of action are barred pursuant to the provisions of Section 1714.8 of the California Civil Code.

(Answer at pp. 2-5.)

Plaintiff argues these affirmative defenses are also inapplicable to intentional torts and that they are unintelligible as pled. (Plaintiff's Demurrer at p. 5:6-16.) As stated above, the code requires that various affirmative defenses must be separately stated; and must refer to the causes of action to which they relate "in a manner by which they may be intelligently distinguished." (CCP § 431.30, subd. (g).) However, uncertainty is a disfavored ground for demurrer; it is typically sustained only where the pleading is so unintelligible and uncertain that the responding party cannot reasonably respond to or recognize the claims alleged against it. (See *Khoury v. Maly's of Cal., Inc.* (1993) 14 Cal.App.4th 612, 616.)

While these affirmative defenses do not specifically refer to the cause of action to which they relate, they are still intelligible based on the text of the statute referenced itself. For example, Code of Civil Procedure sections 340.5, 667.7, 364, 425.13 and Civil Code sections 3333.2[3], 3333.1, and 1714.8 with respect to the fifth, eighth, ninth, tenth, fifteenth, sixteenth, and eighteenth affirmative defenses make clear reference to causes of action for professional negligence or medical malpractice.

Therefore, the Court OVERRULES the demurrer as to the fifth, eighth, ninth, tenth, fifteenth, sixteenth, and eighteenth affirmative defenses on uncertainty grounds. The fourteenth cause of action, on the other hand, alleges two distinct theories including indemnification and apportionment based on contributory negligence. These theories are not separately pled. As such, the demurrer as to the fourteenth affirmative defenses is SUSTAINED with leave to amend on the grounds of uncertainty pursuant to Section 430.20, subdivision (b).

c. Affirmative Defenses 3, 7, 18, 19, 22, 23, 24, 25, 26, 27, 30, 31, 32, 33, 34, 35, 36, 37, 38

Plaintiff demurrers to affirmative defenses, three, seven, eighteen, nineteen, twenty-two, twenty-three, twenty-four, twenty-five, twenty-six, twenty-seven, thirty, thirty-one, thirty-two, thirty-three, thirty-four, thirty-five, thirty-six, thirty-seven, and thirty-eight. Plaintiff's

[3] Defendant in opposition discusses Civil Code section 3333.1 at length with respect to its applicability in this case. However, at issue is its applicability to intentional torts, as opposed to its clear reference to causes of action for professional negligence. (Defendant's Opposition p. 8:1-11:2.) Plaintiff does not attack the sufficiency of this cause of action or its applicability with respect to negligence. Therefore, the Court need not address Defendant's arguments with respect to this affirmative defense.

challenge to these affirmative defenses is that they have not been sufficiently pled. (Plaintiff's Demurrer at p. 5:17-20.) Defendant argues the Court must read the affirmative defenses in their context, and that the Answer provides statements of ultimate facts or core facts to place Plaintiff on notice of the nature of the defenses alleged. (Defendant's Opposition at p. 4:1-5.) The Court addresses each affirmative defense at issue on sufficiency grounds in turn below:

i. Third Affirmative Defense

Defendant's third affirmative defense is "That all care, treatment, and procedures rendered to and performed upon plaintiff was with the express and implied consent of said plaintiff." (Answer at ¶ 5.)

Plaintiff challenges the third affirmative defense on both insufficiency grounds and on the basis that it cannot be ascertained from the Answer whether the contract is oral or written pursuant to Code of Civil Procedure Section 430.20, subdivision (c). (Plaintiff's Demurrer at p. 12:7-15.) According to Plaintiff, "[i]t is axiomatic that with the term consent, that this defense sounds in contract such that some sort of offer was made by the Defendant to which Plaintiff consented. However, there is no indication as to whether a contract was oral or written." (Plaintiff's Demurrer at pp. 6:17-19; 12:12-15.) Defendant argues consent alone does not form a contract but he also offers to amend the Answer to indicate that Plaintiff had signed a written consent form. (Defendant's Opposition at p. 4:21-22; see Declaration of Kara E. Dome ["Dome Decl."] at ¶ 4.) In light of this, additional facts concerning the manner through which consent was obtained can be pled in the Answer. Therefore, the demurrer to the third affirmative defense is SUSTAINED with leave to amend on the grounds that the Answer does not state sufficient facts to constitute a defense pursuant to Section 430.20(a) and that it cannot be ascertained whether the contract is oral or written pursuant to Section 430.20, subdivision (c).

ii. Seventh Affirmative Defense

Defendant's seventh affirmative defense is "That plaintiff's complaint, and each purported cause of action contained therein, fails to sate facts sufficient to constitute a cause of action against the answering defendant." (Answer at ¶ 9.)

Plaintiff argues there are no ultimate facts pled in support of this affirmative defense. (Plaintiff's Demurrer at p. 6:22-25.) An assertion that the Answer fails to state a cause of action on which relief can be granted is not new matter and, therefore, does not require the pleading of additional facts. Defendants' assertion goes to the Court's power to grant relief and such an objection is never waived. (See Code Civ. Proc. § 430.80, subd. (a).) Consequently, Plaintiff would not be prejudiced if Defendants' assertion proceeds as an affirmative defense.

Additionally, section 430.10, subdivision (e) specifically allows this objection to be raised in an answer, as well as a demurrer. (See Code Civ. Proc. § 430.10, subd. (e) [the party against whom a complaint has been filed may object by answer to the pleading on the ground that the pleading fails to allege facts sufficient to constitute a cause of action].) For these reasons, Plaintiff's demurrer to the seventh affirmative defense for failure to state a claim, on the ground that it fails to state sufficient facts is OVERRULED.

iii. Eighteenth Affirmative Defense

Defendant's eighteenth affirmative defense is "That plaintiff's complaint, and each purported cause of action contained therein, was the result and/or cause of a natural cause or condition, or was the natural or expected result of reasonable treatment rendered for the disease or condition and thus these causes of action are barred pursuant to the provisions of Section 1714.8 of the California Civil Code." (Answer at ¶ 18.)

As stated, above the eighteenth affirmative defense has been overruled on uncertainty grounds pursuant to Section 430.2, subdivision (b), However, Plaintiff also demurs to the eighteenth affirmative defense on the grounds that "there are no ultimate facts recited that identify the result, cause of natural cause of condition that is alleged to give rise to this defendant." (Plaintiff's Demurrer at pp. 6:26-7:4.) That Plaintiff's condition was the natural or expected result of the treatment rendered and alleged in the Complaint is not new matter requiring additional facts. Accordingly, the eighteenth affirmative defense is sufficiently pled and Plaintiff's demurrer is OVERRULED.

iv. Nineteenth Affirmative Defense

Defendant's nineteenth affirmative defense is "That it is entitled to an offset and/or reduction and plaintiff is barred from recovering any and all amounts paid for plaintiff's alleged injuries by way of settlement or judgment of any claim, incident or lawsuit which may have contributed to the injuries referred to in the complaint, in the event this answering defendant should be found liable to plaintiff, although this supposition is denied and only stated for the purposes of this affirmative defense." (Answer at ¶ 19.)

Plaintiff argues "defendant has failed to recite any ultimate fact in support of this defense." (Plaintiff's Demurrer at p. 7:10-11.) However, similar to the above, that Defendant may be entitled to an offset or reduction of damages by way of settlement or judgment related to the causes of action in the Complaint, is not new matter requiring additional facts. Therefore, Plaintiff's demurrer to the nineteenth affirmative defense is OVERRULED.

v. Twentieth Affirmative Defense

Defendant's twentieth affirmative defense is "That plaintiff has failed to join all necessary parties pursuant to Code of Civil Procedure section 389." (Answer at ¶ 20.)

Plaintiff argues "defendant has failed to recite any ultimate facts in support of this defense, i.e. what parties has plaintiff failed to join and why are said parties necessary." (Plaintiff's Demurrer at p. 7:13-15.) The assertion that additional necessary parties exist is new matter independent from the existing facts of the Complaint. Therefore, this affirmative defense is insufficiently alleged. The Court SUSTAINS the twentieth affirmative defense with leave to amend on the grounds that the Answer does not state sufficient facts to constitute a defense pursuant to Section 430.20, subdivision (a).

vi. Twenty-First Affirmative Defense

Defendant's twenty-first affirmative defense is "Plaintiff lacks the capacity to sue pursuant to Code of Civil Procedure section 430.10." (Answer at ¶ 21.)

Plaintiff argues "defendant has failed to recite any ultimate fact in support of its allegation that Plaintiff lacks capacity." (Plaintiff's Demurrer at p. 7:17-19.) The basis for Plaintiff's lack of capacity is likewise new matter independent from the existing facts of the Complaint. Therefore, this affirmative defense is insufficiently alleged. The Court

SUSTAINS the twenty-first affirmative defense with leave to amend on the grounds that the Answer does not state sufficient facts to constitute a defense pursuant to Section 430.20, subdivision (a).

vii. Twenty-Second, Twenty-Third, and Twenty-Fourth Affirmative Defenses under the California Business and Professions Code

Defendant's twenty-second, twenty-third, and twenty-fourth affirmative defenses are:

> AS FOR A TWENTY-SECOND, SEPARATE, DISTINCT, AND AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT ALLEGES:
> 22. That plaintiff's complaint, and each purported cause of action contained therein, fails to state facts sufficient to constitute a cause of action in that plaintiff's claim is barred by Section 2395[4] of the California Business and Professions Code.
>
> AS FOR A TWENTY-THIRD, SEPARATE, DISTINCT, AND AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT ALLEGES:
> 23. That plaintiff's complaint, and each purported cause of action contained therein, fails to state facts sufficient to constitute a cause of action in that plaintiff's claim is barred by Section 2396[5] of the California Business and Professions Code.
>
> AS FOR A TWENTY-FOURTH, SEPARATE, DISTINCT, AND AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT ALLEGES:
>
> 24. That plaintiff's complaint, and each purported cause of action contained therein, fails to state facts sufficient to constitute a cause of action in that plaintiff's claim is barred by Section 2397[6] of the California Business and Professions Code.

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[4] California Business and Professions Code section 2395 provides, "[n]o licensee, who in good faith renders emergency care at the scene of an emergency, shall be liable for civil damages as a result of any acts or omissions by such person in rendering the emergency care."

[5] California Business and Professions Code Section 2396 provides, "[n]no licensee, who in good faith upon the request of another person so licensed, renders emergency medical care to a person for medical complication arising from prior care by another person so licensed, shall be liable for any civil damages as a result of any acts or omissions by such licensed person in rendering such emergency medical care.

[6] California Business and Professions Code section 2397 provides:

> (a) A licensee shall not be liable for civil damages for injury or death caused in an emergency situation occurring in the licensee's office or in a hospital on account of a failure to inform a patient of the possible

(Answer at p. 6)

With respect to each of these affirmative defenses, Plaintiff argues Defendant has failed to recite any facts giving rise to the existence of any emergency. (Plaintiff's Demurrer at pp. 7:26-27, 8:8-9, 8:22-23.) The existence of an emergency would be new matter. There are no facts in either the FAC or the answer alleging the existence of an emergency for these sections of the Business and Professions Code to be applicable. Therefore, these affirmative defenses are insufficiently stated. The Court SUSTAINS the demurrer as to the twenty-second, twenty-third, and twenty-fourth affirmative defense with leave to amend on the grounds that the Answer does not state sufficient facts to constitute a defense pursuant to Section 430.20, subdivision (a).

viii. Twenty-Fifth Affirmative Defense

Defendant's twenty-fifth affirmative defense is "That plaintiff's damages are barred or limited by Proposition 51, as set forth in Section 1430 et. seq. of the California Civil Code." (Answer at ¶ 25.)

Plaintiff argues there are no facts recited in the Answer giving rise to this affirmative defense. (Plaintiff's Demurrer at p. 8:27-28.) As noted by Plaintiff, this section deals with joint and several liability. (*Id.* at p. 8:26-27.) However, Plaintiff avers that it presupposes the existence of said liability. (*Ibid.*) Anthony Halili Galvan is the only named defendant in this lawsuit. (*See generally* FAC.) Plaintiff has not alleged any other persons or entities that may be jointly and severally liable with Defendant Galvan. Similarly, Defendant does not allege any facts indicating that another person or entity may be jointly and severally liable to impact his portion of financial liability in proportion to his degree of fault. Therefore, the Court

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consequences of a medical procedure where the failure to inform is caused by any of the following:

(1) The patient was unconscious.

(2) The medical procedure was undertaken without the consent of the patient because the licensee reasonably believed that a medical procedure should be undertaken immediately and that there was insufficient time to fully inform the patient.

(3) A medical procedure was performed on a person legally incapable of giving consent, and the licensee reasonably believed that a medical procedure should be undertaken immediately and that there was insufficient time to obtain the informed consent of a person authorized to give such consent for the patient.

SUSTAINS the demurrer to the twenty-fifth affirmative defense with leave to amend on the grounds that the Answer does not state sufficient facts to constitute a defense pursuant to Section 430.20, subdivision (a).

ix. Twenty-Sixth Affirmative Defense

Defendant's twenty-sixth affirmative defense is "That plaintiff's complaint, and each purported cause of action contained therein, fails to state facts sufficient to constitute a cause of action in that plaintiff's claim is barred by the doctrine of estoppel." (Answer at ¶ 26.)

Plaintiff argues "Defendant has failed to recite any ultimate facts in support of this affirmative defense." (Plaintiff's Demurrer at p. 9:1-4.) Estoppel is an equitable defense consisting of the following elements: "(1) that the party to be estopped must be apprised of the facts; (2) he must intend that his conduct will be acted upon, or act in such a manner that the party asserting the estoppel could reasonably believe that he intended that his conduct to be acted upon; (3) the party asserting the estoppel must be ignorant of the true state of the facts; and (4) he must rely upon the conduct to his injury." (*Schrader Iron Works, Inc. v. Lee* (1972) 26 Cal.App.3d 621, 636, internal quotes and citations omitted; see also *Redevelopment Agency of Richmond v. Maynard* (1966) 244 Cal.App.2d 260, 264.) Here, the affirmative defense merely raises estoppel without any assertion of factual allegations, or the governing authority Defendant seeks estoppel pursuant to. Therefore, the demurrer as to the twenty-sixth affirmative cause of action must be SUSTAINED with leave to amend on the grounds that the Answer does not state sufficient facts to constitute a defense pursuant to Section 430.20, subdivision (a).

x. Twenty-Seventh Affirmative Defense

Defendant's twenty-seventh affirmative defense is "That plaintiff's complaint, and each purported cause of action contained therein fails to state facts sufficient to constitute a cause of action in that plaintiff's claim is barred by the doctrine of waiver." (Answer at ¶ 27.)

Plaintiff likewise argues here that "Defendant has failed to recite any ultimate facts in support of this affirmative defense." (Plaintiff's Demurer at p. 9:5-8.) Waiver is an affirmative defense. (*Williams v. Marshall* (1951) 37 Cal.2d 445, 456.) There are no facts recited to support this affirmative defense. The opposition does not explain why the facts

alleged in the body of the answer support the defense or waiver. There does not appear to be any facts that Plaintiffs "intentionally relinquishe[d their] right" to assert a claim. (*Prudential Lmi Com. Ins. v. Superior Court* (1990) 51 Cal.3d 674, 689.) Therefore, the twenty-seventh affirmative defense will be SUSTAINED with leave to amend on the grounds that the Answer does not state sufficient facts to constitute a defense pursuant to Section 430.20, subdivision (a).

xi. Thirtieth Affirmative Defense

Defendant's thirtieth affirmative defense is "That plaintiff's complaint, and each purported cause of action contained therein, fails to state facts sufficient to constitute a cause of action in that plaintiff's claim is barred by Section 856.4 of the California Government Code." (Answer at ¶ 28.)

Plaintiff argues Defendant has failed to recite ultimate facts in support of this affirmative defense and that it is uncertain how Government Code section 856.4 applies given that there are no government employees implicated in this action. (Plaintiff's Demurrer at p. 9:13-15.) "Except as provided in Section 815.6, neither a public entity nor a public employee acting in the scope of his employment is liable for an injury resulting from the failure to admit a person to a public medical facility." Plaintiff is correct that it is uncertain how Government Code section 856.4 applies to the facts of this Complaint and Defendant has not alleged that any public employees are implicated by the causes of action. Therefore, the thirtieth affirmative defense is SUSTAINED with leave to amend on the grounds that the Answer does not state sufficient facts to constitute a defense pursuant to Section 430.20, subdivision (a).

xii. Thirty-First Affirmative Defense

Defendant's thirty-first affirmative defense is "That the instant dispute arises from a matter covered by a binding arbitration agreement between the parties, and that this answering defendant desires that this matter be therefore submitted to binding arbitration in accordance with the terms of the Arbitration Agreement." (Answer at ¶ 29.)

Plaintiff challenges the thirty-first affirmative defense on both insufficiency grounds and on the basis that it cannot be ascertained from the Answer whether the contract is oral or written pursuant to Code of Civil Procedure section 430.20, subdivision (c). (Plaintiff's

Demurrer at p. 12:17-21.) Plaintiff argues there is no indication as to whether the Arbitration Agreement was oral or written and none of the terms or parties of the purported agreement are alleged as part of this affirmative defense. (Plaintiff's Demurrer at p. 9:19-23.) Defendant concedes that the arbitration provision is moot as neither party has chosen to enforce this provision and are actively involved in the litigation. (Defendant's Opposition at p. 9:4-24-26.) Defendant further offers to amend the Answer to remove this affirmative defense. (*Ibid.* at p. 9:27-28.) Since Defendant concedes that the arbitration provision is now moot, the Court SUSTAINS the thirty-first affirmative defense with leave to amend on the grounds that the Answer does not state sufficient facts to constitute a defense pursuant to Section 430.20, subdivision (a) and that it cannot be ascertained whether the contract is oral or written pursuant to Section 430.20, subdivision (c).

xiii. Thirty-Second Affirmative Defense

Defendant's thirty-second affirmative defense is that "Defendant claims that a reasonable person in plaintiff's position would have consented to the treatment provided; and even if a reasonable person in plaintiff's position would not have consented to such treatment, plaintiff still would have consented to the treatment at issue." (Answer at ¶ 30.)

Plaintiff argues Defendant has not recited ultimate facts giving rise to this defense and there are no facts "identifying the procedure/treatment to which this defense applies so that the reasonableness of the consent could be determined." (Plaintiff's Demurrer at p. 9:27-10:2.) The treatment sought by Plaintiff with respect to her wisdom tooth extraction is clear from the facts of the Complaint, and does not constitute new matter for which Plaintiff's consent would rest upon. The Court finds this defense sufficiently pled. Therefore, the demurrer to the thirty-second affirmative defense is OVERRULED.

xiv. Thirty-Third Affirmative Defense

Defendant's thirty-third affirmative defense is that "That plaintiff's alleged damages are subject to a duty to mitigate her future damages, including her future claim for medical care. Subsumed within this duty, is the duty to obtain medical insurance under the Patient Protection and Affordable Care Act §42 U.S.C. 1800-18121." (Answer at ¶ 31.)

Plaintiff contends Defendant has failed to recite any ultimate facts in support of this affirmative defense. (Plaintiff's Demurrer at p. 10:20-21.) Both parties discuss the validity of the Affordable Care Act at length. (Plaintiff's Demurrer at p. 10:3-21; Defendant's Opposition at 5:1-7:28.) Defendant relies on the Affordable Care Act as a basis for asserting his defense that Plaintiff failed to mitigate her damages. In opposition, Defendant also raises Cal. Civil Code Section 3333.1, permitting the introduction of collateral-source payments as evidence, as a basis for this defense. However, nowhere in the Complaint or the Answer has either party alleged any facts with respect to whether Plaintiff had medical insurance or not for the Court to consider the merits of these arguments as a basis for mitigating damages. Accordingly, there are no ultimate facts alleged whatsoever to support that Plaintiff failed to mitigate her damages by failing to obtain insurance or that collateral-source payments are available to her in the first place. Therefore, the demurrer as to the thirty-third affirmative defense is SUSTAINED with leave to amend on the grounds that the Answer does not state sufficient facts to constitute a defense pursuant to Section 430.20, subdivision (a).

xv. Thirty-Fourth Affirmative Defense

Defendant's thirty-fourth affirmative defense is that "As a separate and distinct affirmative defense, defendant contends that even if a reasonable person in plaintiff's position might not have consented to the procedure(s) or treatment performed by defendant if he or she had been given enough information about its risks, plaintiff still would have consented to the procedure or treatment. (CACI 550.)" (Answer at ¶ 32.)

Plaintiff argues Defendant has not recited ultimate facts to give rise to this defense and that Defendant does not identify the procedure or treatment to which the defense applies. (Plaintiff's Demurrer at p. 10:26-27.) Much like the thirty-second affirmative defense, the treatment sought by Plaintiff with respect to her wisdom tooth extraction is clear from the facts of the Complaint, and does not constitute new matter for which Plaintiff's consent would rest upon. The Court finds this defense sufficiently pled. Therefore, the demurrer to the thirty-fourth affirmative defense is OVERRULED.

xvi. Thirty-Fifth of Affirmative Defense

Defendant's thirty-fifth affirmative defense is that "As a separate and distinct affirmative defense, defendant contends that he had no duty to disclose to plaintiff the likelihood of success or risks associated with procedure(s) or treatment performed on the plaintiff, because plaintiff asked not to be informed of the likelihood success or risks of the procedure or treatment. (CACI 551.)" (Answer at ¶ 33.)

Plaintiff argues Defendant has not recited ultimate facts to give rise to this defense and that Defendant does not identify the procedure or treatment to which the defense applies. (Plaintiff's Demurrer at p. 11:8-9.) Much like the thirty-second and thirty-fourth affirmative defenses, the treatment sought by Plaintiff with respect to her wisdom tooth extraction is clear from the facts of the Complaint, and does not constitute new matter for which Plaintiff's consent would rest upon. The Court finds this defense sufficiently pled. Therefore, the demurrer to the thirty-fifth affirmative defense is OVERRULED.

xvii. Thirty-Sixth Affirmative Defense

Defendant's thirty-sixth affirmative defense is that "As a separate and distinct affirmative defense, defendant contends that he was not required to inform Plaintiff of the likelihood of success or risks of the procedure(s) or treatment performed on plaintiff as the treatment or procedure is a simple procedure and it is understood that the risks are minor and not likely to occur. (CACI 552.)" (Answer at ¶ 34.)

Plaintiff argues Defendant has not recited ultimate facts to give rise to this defense and that Defendant does not identify the procedure or treatment to which the defense applies or suggest why the procedure would be considered minor. (Plaintiff's Demurrer at p. 11:14-17.) Much like the above affirmative defenses, the treatment sought by Plaintiff with respect to her wisdom tooth extraction is clear from the facts of the Complaint; however, Defendant does not offer any facts to support why the extraction under these circumstances was considered a "simple procedure." The Court finds this defense insufficiently pled. Therefore, the demurrer to the thirty-sixth affirmative defense is SUSTAINED with leave to amend on the grounds that the Answer does not state sufficient facts to constitute a defense pursuant to Section 430.20, subdivision (a).

xviii. Thirty-Seventh Affirmative Defense

Defendant's thirty-seventh affirmative defense is "As a separate and distinct affirmative defense, defendant contends that he was not required to inform Plaintiff of the likelihood of success or risks of the procedure(s) or treatment performed on the plaintiff as the information would have so seriously upset plaintiff that plaintiff would not have been able to reasonably consider the risks of refusing to have the medical procedure. (CACI 553.)" (Answer at ¶ 35.)

Plaintiff argues Defendant has not recited ultimate facts to give rise to this defense and that there are no facts explaining why plaintiff would not have been able to reasonably consider the risks of refusing the medical procedure to determine the reasonableness of consent. (Plaintiff's Demurrer at p. 11:23-26.) Much like the above affirmative defenses, the treatment sought by Plaintiff with respect to her wisdom tooth extraction and the ensuing risk that resulted are clear from the facts of the Complaint, and does not constitute new matter for which Plaintiff's consent would rest upon. The Court finds this defense sufficiently pled. Therefore, the demurrer to the thirty-sixth affirmative defense is OVERRULED.

xix. Thirty-Eighth Affirmative Defense

Defendant's thirty-eighth affirmative defense is "As a separate and distinct affirmative defense, defendant contends that he was not required to inform plaintiff of the likelihood of success or risks of the procedure(s) or treatment performed on plaintiff because an emergency existed. (CACI 554.)" (Answer at ¶ 36.)

Plaintiff argues Defendant has not recited any ultimate facts that give rise to this defense and that there are no facts identifying the procedure to which the defense applies or why an emergency existed. (Plaintiff's Demurrer at p. 12:2-4.) Much like the above affirmative defenses, the treatment sought by Plaintiff with respect to her wisdom tooth extraction is clear from the facts of the Complaint; however, Defendant does not offer any facts to support why an emergency existed. The Court finds this defense insufficiently pled. Therefore, the demurrer to the thirty-eighth affirmative defense is SUSTAINED with leave to amend on the grounds that the Answer does not state sufficient facts to constitute a defense pursuant to Section 430.20, subdivision (a).

III. Conclusion

Plaintiff's Demurrer to Defendant's Answer is OVERRULED as to affirmative defenses 1, 13, 5, 7, 8, 9, 10, 15, 16, 18, 19, 32, 34, 35, 37, and SUSTAINED with 20 days leave to amend as to affirmative defenses 2, 3, 4, 6, 14, 17, 20, 21, 22, 23, 24, 25, 26, 27, 30, 31, 33, 36.

The Court will prepare the formal order.

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Calendar Line 2
Case Name: *Kevin Lu v. Quincy Winship, et al.*
Case No.: 23CV417549

Before the Court is defendants' demurrer to plaintiff's complaint. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background.

On June 15, 2023, plaintiff Kevin Lu ("Lu"), a self-represented litigant, filed a Judicial Council form complaint against, among others, SJPD, Quincy Winship badge #4798, Dwight Saiki 3602, Eric Chen 4986, Castro 4894, Andrew Raymond Scott 4671, Erika Ortgea Vasquez 4834, Alex Nvarez Jr. 4990, Abraham Nuno Lizaola 4772, Lydia Gerardieta 1890, Laura Martello 025F, and Lt. Habib 3993 (collectively, "Defendants"). Plaintiff Lu's form complaint indicates he is asserting causes of action for general negligence, intentional tort, products liability, premises liability, and other, but plaintiff Lu's complaint does not include any attachments further explaining the factual basis for these causes of action. (See Complaint at ¶10.) Instead, plaintiff Lu, in handwriting, makes the following statements: "I can't get money back, property on Monterey road – don't know if I'll get back – important stuff on table cuffed to hospital bed – chained in chair – told wrist hurt – didn't care targeted by police & paramedics – wanted to rob & cut my clothes turn me into inmate, patient & client to dr, court, public defender I have to take psych. meds, because in Manley's court he won't release you if you don't & turned diabetic."

On June 6, 2024, Defendants filed the motion now before the court, a demurrer to plaintiff Lu's complaint.

II. Defendants' demurrer to plaintiff Lu' complaint is SUSTAINED.

Initially, Defendants demur to plaintiff Lu's complaint on the grounds that the pleading is uncertain. (Code Civ. Proc., §430.10, subd. (f).) "As used in this subdivision, 'uncertain' includes ambiguous and unintelligible." (*Id.*) "Doubt in the complaint may be resolved against plaintiff and facts not alleged are presumed not to exist." (*Kramer v. Intuit Inc.* (2004) 121 Cal.App.4th 574, 578.) "A demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures." (*Khoury v. Maly's of California* (1993) 14 Cal.App.4th 612, 616

(*Khoury*).) A "demurrer for uncertainty will be sustained only where the complaint is so bad that the defendant cannot reasonably respond; i.e. he or she cannot reasonably determine what issues must be admitted or denied, or what counts or claims are directed against him." (Weil & Brown, et al., CAL. PRAC. GUIDE: CIV. PRO. BEFORE TRIAL (The Rutter Group 2017) ¶7:85, pp. 7(I)-41 to 7(I)-42 citing *Khoury*, *supra*, 14 Cal.App.4th at p. 616.)

It is the court's opinion that the complaint here is unintelligible, to the degree that Defendants cannot reasonably determine what issues must be admitted or denied and what claims are directed against them. In opposition, plaintiff Lu appears to reiterate what appears in the complaint asserting that he is the victim of strong arm robbery by the police, but that he does not know which cop caused him injury. Plaintiff Lu indicates in opposition that he has "subpoenaed use of force report."

Defendants demur additionally on the ground that the pleading fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc., §430.10, subd. (e).) In opposition, plaintiff Lu maintains the causes of action being asserted are general negligence, intentional tort, products liability, premises liability, and other. While plaintiff Lu provides some accompanying explanation for each cause of action, the court agrees with Defendants that the factual allegations required to support such causes of action remain woefully inadequate.

Accordingly, Defendants' demurrer to plaintiff Lu's complaint on the grounds that the pleading is uncertain and the pleading does not state facts sufficient to constitute a cause of action is SUSTAINED with 15 days' leave to amend.

The Court will prepare the formal order.

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Calendar Line 3
Case Name: *Antonio Nieves v. Abraham Nieves Loya, et al.*
Case No.: 24CV429757

Before the Court is the demurrer to verified first amended complaint of Antonio Nieves. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background.

Plaintiff Antonio Nieves ("Plaintiff") is the equitable and beneficial owner of real property located at 336 West Court in San Jose ("West Court Property"). (First Amended Complaint ("FAC"), ¶9.)

Plaintiff has worked in construction for more than 30 years, primarily performing concrete and landscaping work. (FAC, ¶10.) Defendant Abraham Nieves Loya ("Defendant") is Plaintiff's 24 year old son. (FAC, ¶10.) Plaintiff and Defendant's mother never married. (*Id.*)

Plaintiff previously worked with his brothers investing in, improving, and re-selling residential properties, primarily in Madera and Fresno counties. (FAC, ¶12.)

In August 2021, Defendant was 22 years old and in college with no steady employment and no assets with which to purchase any real property. (FAC, ¶11.) In August 2021, Plaintiff decided to work with Defendant on future real estate investments and believed his son would be helpful as Defendant was born, raised and educated in California, college-educated, and fluent in English. (FAC, ¶13.) Furthermore, Defendant had studied to become a real estate agent in California which gave Plaintiff confidence that Defendant could assist with many aspects of the anticipated real estate transactions. (*Id.*)

On or about August 23, 2021, Defendant promised and agreed to assist Plaintiff in certain respects of Plaintiff's real estate investments including management and control of the funds Plaintiff would set aside and use for the investment and development of real estate; providing advice and guidance concerning real estate acquisitions; and assisting and obtaining loans and financing; reviewing documentation. (FAC, ¶14.) Defendant further agreed and promised that any money or property contributed by Plaintiff for the investment and development of real estate would remain Plaintiff's property; any property acquired with funds and property contributed by Plaintiff would be owned by Plaintiff; and that in the event that

legal title to any such acquired property was placed in Defendant's name, such legal title would be transferred to Plaintiff upon request. (FAC, ¶15.) At no time thereafter did Plaintiff ever agree that he was not the sole owner of the money and property that he contributed to his real estate investments. (*Id.*)

Plaintiff and Defendant agreed that Defendant's sole compensation would be a portion of the profits earned from the sale of the properties that were to be developed in Madera County. (FAC, ¶16.) By reason of said promises and agreements, Defendant became an express trustee for the benefit of Plaintiff. (FAC, ¶17.)

On or about November 8, 2007, Plaintiff's brother, Alfredo Nieves ("Alfredo")[1], purchased the West Court Property, a single-family residence, for $555,000. (FAC, ¶18.) Plaintiff and Alfredo entered into an agreement whereby Plaintiff would purchase the West Court Property for the sum of $720,000 to be paid in two installments. (FAC, ¶19.) The first installment was made by Plaintiff's transfer to Alfredo of $300,000 of equity Plaintiff held in a single-family residence in Madera that Plaintiff and Alfredo jointly invested in. (*Id.*) The second installment was made by Plaintiff on or about February 7, 2022 when Plaintiff paid $420,000 to pay off the existing mortgage that Alfredo had on the West Court Property. (*Id.*) The funds used to pay off the mortgage came from the proceeds of Plaintiff's sale of property Plaintiff owned in Madera ("Steward Property"). (FAC, ¶¶23 – 24.)

After Plaintiff paid both installments, Alfredo (at Plaintiff's direction) transferred legal title of the West Court Property to Defendant. (FAC, ¶20.) In selling the West Court Property, Alfredo had no communication with Defendant and dealt only with Plaintiff on all matters related to the sale. (*Id.*) Defendant did not contribute any funds or assets toward the purchase of the West Court Property. (FAC, ¶22.) Consistent with their agreement in August 2021, Defendant held title to the West Court Property for the benefit of Plaintiff. (FAC, ¶21.)

Since purchase and to the present, Plaintiff has resided at the West Court Property and used his own funds to pay for property taxes, insurance, and maintenance. (FAC, ¶¶25 and 29.) Plaintiff used his own funds to construct an Accessory Dwelling Unit (ADU) on the West

[1] At times, the Court refers to the 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.)

Court Property. (FAC, ¶¶26 and 29.) Plaintiff has made no rental payments to Defendant. (FAC, ¶27.)

After purchasing the West Court Property, Plaintiff obtained a $150,000 home equity line of credit on or about July 9, 2023 which Plaintiff used for his real estate investments. (FAC, ¶31.) Although the loan was in Defendant's name, Defendant did not provide any assets to obtain that loan. (*Id.*) The loan was secured by the West Court Property. (*Id.*) Consistent with the fact that the loan funds were for Plaintiff's benefit, Defendant delivered blank checks to Plaintiff on that line of credit with Defendant's signature to be used by Plaintiff. (FAC, ¶32.)

Throughout 2022 and 2023, Plaintiff provided funds to Defendant that Plaintiff received for his work on landscaping/ concrete projects for Defendant to hold for Plaintiff's benefit and used for the purchase and development of Plaintiff's real estate investments. (FAC, ¶33.) Defendant held those funds for Plaintiff's benefit in one or more bank accounts in Defendant's name. (FAC, ¶34.)

On December 20, 2023, without Plaintiff's knowledge or consent, Defendant obtained a loan in the amount of $533,000 secured by a deed of trust on the West Court Property. (FAC, ¶38.) Defendant has not disclosed and Plaintiff does not know what Defendant has done with the proceeds. (FAC, ¶38.)

On or about January 12, 2024, Defendant falsely claimed ownership of the West Court Property. (FAC, ¶39.) Plaintiff demanded Defendant transfer legal title of the West Court Property into Plaintiff's name, but Defendant refused, prompting Plaintiff to file this action. (*Id.*)

On January 24, 2024, Plaintiff filed a complaint against Defendant.

On July 17, 2024, Plaintiff filed the operative FAC against Defendant asserting causes of action for:

(1) Specific Performance of Oral Contract

(2) Breach of Oral Contract

(3) Declaratory Relief (Resulting Trust)

(4) Declaratory Relief (Constructive Trust)

(5) Declaratory Relief (Express Trust)

(6) Declaratory Relief (Ownership of Real Property)

(7) Quiet Title

(8) Restitution Based on Unjust Enrichment

(9) Breach of Fiduciary Duty

(10) Conversion

(11) False Promise

On August 5, 2024, Defendant filed the motion now before the court, a demurrer to the first, second, and seventh through eleventh causes of action of Plaintiff's FAC.

II. Procedural violation.

As a preliminary matter, the court notes the memorandum of points and authorities in support of Defendant's demurrer exceeds the page limitations set forth in California Rules of Court, rule 3.1113, subdivision (d) which states, "no opening or responding memorandum may exceed 15 pages." Defendant's memorandum of points and authorities in support of demurrer, exclusive of the table of contents and table of authorities, is 26 pages. Defendant did not seek leave in advance from this court for a page extension as permitted by California Rules of Court, rule 3.113, subdivision (e).

"A memorandum that exceeds the page limits of these rules must be filed and considered in the same manner as a late-filed paper." (Cal. Rules of Court, rule 3.1113, subd. (g).) A court may, in its discretion, refuse to consider a late-filed paper but must indicate so in the minutes or in the order. (Cal. Rules of Court, rule 3.1300, subd. (d).) Defendant and his counsel are hereby placed on notice that any future failure to comply with the California Rules of Court may result in the court's refusal to consider their papers.

III. Defendant's demurrer to Plaintiff's complaint is OVERRULED.

A. First cause of action – specific performance.

"Specific performance is an alternative remedy; the cause of action is for breach of contract." (5 Witkin, California Procedure (5th ed. 2008) Pleading, §784, p. 203.) "To prevail on a cause of action for breach of contract, the plaintiff must prove (1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's

breach, and (4) the resulting damage to the plaintiff." (*Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1186; see also CACI, No. 303.)

The court understands Defendant to argue first that Plaintiff has not alleged there was adequate consideration to enforce the agreement. Where the contract is written, consideration is presumed. (See Civ. Code, §1614—"A written instrument is presumptive evidence of a consideration.") However, the statutory presumption of consideration does not apply to an oral contract. "In an action on an oral agreement, the essential element of consideration must normally be alleged." (See 4 Witkin, California Procedure (5th ed. 2010) Pleading, §525 citing *Acheson v. Western Union Tel. Co.* (1892) 96 Cal. 641, 644.) Civil Code section 1605 defines good consideration as, "Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise."

The court finds Plaintiff has alleged adequate consideration. Defendant apparently overlooks the allegation found at paragraph 16 wherein Plaintiff alleges, "Defendant and Plaintiff agreed that Defendant's sole compensation would be a portion of the profits earned from the sale of the properties that were to be developed in Madera County."

Defendant argues next that the subject agreement falls within the statute of frauds. "Where the complaint seeks to enforce an agreement required to be in writing under the statute of frauds, but nonetheless alleges the agreement was oral, a general demurrer lies. The complaint on its face discloses a bar to recovery." (Weil & Brown et al., CAL. PRAC. GUIDE: CIV. PRO. BEFORE TRIAL (The Rutter Group 2020) ¶7:58, p. 7(I)-34 citing *Parker v. Solomon* (1959) 171 Cal.App.2d 125, 136 and *Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1503.)

> The statute of frauds requires any contract subject to its provisions to be memorialized in a writing subscribed by the party to be charged or by the party's agent. (§ 1624; *Secrest v. Security National Mortgage Loan Trust 2002-2* (2008) 167 Cal.App.4th 544, 552 [84 Cal. Rptr. 3d 275].)

(*Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1503.)

Defendant contends the subject agreement is either:

> (3) An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein; such an agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent is in writing, subscribed by the party sought to be charged.
>
> (4) An agreement authorizing or employing an agent, broker, or any other person to purchase or sell real estate, or to lease real estate for a longer period than one year, or to procure, introduce, or find a purchaser or seller of real estate or a lessee or lessor of real estate where the lease is for a longer period than one year, for compensation or a commission.

(Civ. Code, §1624, subd. (a)(3)-(4).)

The court does not agree with Defendant's assertion that the subject agreement is either one of these. Instead, Plaintiff alleges, in relevant part, Defendant agreed to "assist Plaintiff in certain respects of Plaintiff's real estate investments" and "that in the event that legal title to any such [Plaintiff-]acquired property was placed in the name of Defendant, such legal title would be transferred to Plaintiff upon Plaintiff's request." (FAC, ¶¶14 – 15.) This is not an agreement to lease or sell real property nor is it an agreement which authorizes or employs Defendant as an agent or broker. Defendant offers no legal authority to support his assertion that the subject agreement falls within either of these provisions.[2]

Nor does Defendant offer any legal authority to support his assertion that the subject agreement falls within Civil Code section 1624, subdivision (a)(7), "A contract, promise, undertaking, or commitment to loan money or to grant or extend credit, in an amount greater than one hundred thousand dollars ($100,000), not primarily for personal, family, or household purposes, made by a person engaged in the business of lending or arranging for the lending of money or extending credit. For purposes of this section, a contract, promise, undertaking, or commitment to loan money secured solely by residential property consisting of one to four dwelling units shall be deemed to be for personal, family, or household purposes."

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[2] Defendant's reliance on *Harrison v. Hanson* (1958) 165 Cal.App.2d 370 which undisputedly involved an oral contract for the sale of real property.

The allegations at paragraph 31 of the FAC state that Plaintiff obtained a $150,000 loan through Defendant's name, but the subject agreement is not one "to loan money or to grant or extend credit," nor is it "made by a person engaged in the business of lending or arranging for the lending of money or extending credit."

In anticipation that Plaintiff will argue part performance as an exception to the statute of frauds, Defendant devotes the next part of his argument toward why part performance does not apply. However, since the court is of the opinion that the subject agreement is not subject to the statutes of frauds cited by Defendant, the court finds it unnecessary to address Defendant's arguments concerning part performance.

"The availability of the remedy of specific performance is premised upon well established requisites. These requisites include: A showing by plaintiff of (1) the inadequacy of his legal remedy; (2) an underlying contract that is both reasonable and supported by adequate consideration; (3) the existence of a mutuality of remedies; (4) contractual terms which are sufficiently definite to enable the court to know what it is to enforce; and (5) a substantial similarity of the requested performance to that promised in the contract. [Citations.]" (*Tamarind Lithography Workshop, Inc. v. Sanders* (1983) 143 Cal.App.3d 571, 575.)

As a final argument in support or demurrer to the first cause of action, Defendant (without any citation to the FAC) contends the FAC includes an allegation by Plaintiff that he has lost money in this transaction and, as such, a legal remedy exists. In order to seek specific performance, Plaintiff must establish the inadequacy of his legal remedy.

"A complaint may allege inconsistent theories of a cause of action in the alternative, including theories seeking specific performance of an agreement, or in the alternative, damages for the breach thereof and, the court may award damages if plaintiffs are not entitled to specific performance." (*Brandolino v. Lindsay* (1969) 269 Cal.App.2d 319, 324.)

Here, Plaintiff has alleged inconsistent theories in that his first cause of action seeks specific performance whereas Plaintiff's second cause of action seeks damages from breach of contract. While it may be inconsistent with other allegations, Plaintiff does allege at paragraph 47 of the FAC that "real property is unique and cannot be adequately compensated for by monetary damages."

For the reasons discussed above, Defendant's demurrer to the first cause of action of Plaintiff's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for breach of contract and on the ground that the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is OVERRULED.

B. Second cause of action – breach of oral contract.

"The elements of a breach of oral contract claim are the same as those for a breach of written contract: a contract; its performance or excuse for nonperformance; breach; and damages." (*Stockton Mortgage, Inc. v. Tope* (2014) 233 Cal.App.4th 437, 453.)

Defendant raises the same arguments to this second cause of action that he raised with regard to the first cause of action. For the same reasons discussed above, Defendant's demurrer to the second cause of action of Plaintiff's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for breach of oral contract and on the ground that the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is OVERRULED.

C. Seventh cause of action – quiet title.

> The purpose of a quiet title action is to establish title against any adverse claims to property or any interest therein. (§ 760.020, subd. (a).) …an action to quiet title "is for the purpose of stopping the mouth of a person who has asserted or is asserting a claim to the plaintiff's property … . It is not aimed at a particular piece of evidence, but at the pretensions of an individual." (*Castro v. Barry* (1889) 79 Cal. 443, 446 [21 P. 946] (*Castro*).) The ultimate fact to be found is the ownership of the property. (*Rahlves & Rahlves, Inc. v. Ambort* (1953) 118 Cal.App.2d 465, 476 [258 P.2d 18].)

(*Water for Citizens of Weed California v. Churchwell White LLP* (2023) 88 Cal.App.5th 270, 281.)

"The elements of a quiet title action include all of the following: [1] A description of the property that is the subject of the action; [2] The title of the plaintiff as to which a determination is sought and the basis of the title; [3] The adverse claims to the title of the plaintiff against which a determination is sought; [4] The date as of which the determination is

sought; [5] A prayer for the determination of the title of the plaintiff against the adverse claims." (5 Witkin, California Procedure (4th ed. 1997) Pleading, §622, pp. 87 citing Code Civ. Proc. §761.020.)

In demurring to the Plaintiff's seventh cause of action, Defendant again appears to repeat his earlier argument that the subject agreement is subject to the statute of frauds and Plaintiff has not adequately alleged part performance to take the subject agreement outside of the statute of frauds.

For the same reasons discussed earlier, Defendant's demurrer to the seventh cause of action of Plaintiff's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for quiet title and on the ground that the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is OVERRULED.

D. Eighth cause of action – restitution based on unjust enrichment.

In *Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779, 793, the court wrote, "[T]here is no cause of action in California for unjust enrichment. "The phrase 'Unjust Enrichment' does not describe a theory of recovery, but an effect: the result of a failure to make restitution under circumstances where it is equitable to do so." [Citations.] Unjust enrichment is "'a general principle, underlying various legal doctrines and remedies,' " rather than a remedy itself. [Citation.] It is synonymous with restitution."

In *McBride v. Houghton* (2004) 123 Cal.App.4th 379 (*McBride*), the court wrote, "Unjust enrichment is not a cause of action, however, or even a remedy, but rather a general principle, underlying various legal doctrines and remedies. It is synonymous with restitution. Unjust enrichment has also been characterized as describing the result of a failure to make restitution. [¶] In reviewing a judgment of dismissal following the sustaining of a general demurrer, we ignore erroneous or confusing labels if the complaint pleads facts which would entitle the plaintiff to relief. Thus, we must look to the actual gravamen of [plaintiff's] complaint to determine what cause of action, if any, he stated, or could have stated if given leave to amend. In accordance with this principle, we construe [plaintiff's] purported cause of action for unjust enrichment as an attempt to plead a cause of action giving rise to a right to restitution."

> There are several potential bases for a cause of action seeking restitution. For example, restitution may be awarded in lieu of breach of contract damages when the parties had an express contract, but it was procured by fraud or is unenforceable or ineffective for some reason. [Citations.] Alternatively, restitution may be awarded where the defendant obtained a benefit from the plaintiff by fraud, duress, conversion, or similar conduct. In such cases, the plaintiff may choose not to sue in tort, but instead to seek restitution on a quasi-contract theory (an election referred to at common law as "waiving the tort and suing in assumpsit"). [Citation.] In such cases, where appropriate, the law will imply a contract (or rather, a quasi-contract), without regard to the parties' intent, in order to avoid unjust enrichment. [Citation.]

(*McBride*, *supra*, 123 Cal.App.4th at pp. 387 – 388; internal citations and punctuation omitted.)

Significantly, "there is no particular form of pleading necessary to invoke the doctrine of restitution." (*Dinosaur Development, Inc. v. White* (1989) 216 Cal.App.3d 1310, 1315 [internal quotation marks omitted].) As the *McBride* court instructs, the court should overlook the labels given by the plaintiff and instead focus on whether there is a basis for restitution.

To the extent Plaintiff has stated a cause of action for breach of fiduciary duty (see, *infra*), there is a factual basis to support a claim for unjust enrichment. Accordingly, Defendant's demurrer to the eighth cause of action of Plaintiff's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for restitution/ unjust enrichment and on the ground that the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is OVERRULED.

E. Ninth cause of action – breach of fiduciary duty.

"The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach." (*Knox v. Dean* (2012) 205 Cal.App.4th 417, 432; see also CACI, No. 4100.)

Apart from restating all his earlier arguments, Defendant contends Plaintiff has not alleged the existence of a fiduciary duty. Defendant apparently overlooks Plaintiff's allegation

that, pursuant to the subject agreement, "Defendant became an express trustee for the benefit of Plaintiff." (FAC, ¶¶17 and 87.)

> Trustees owe all beneficiaries … a fiduciary duty. A fiduciary relationship is a recognized legal relationship such as trustee and beneficiary, principal and agent, or attorney and client. (*Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141, 1160 [23 Cal. Rptr. 3d 335].) Where a fiduciary relationship exists, there is a duty " 'to act with the utmost good faith for the benefit of the other party.' " (*Ibid.*)
>
> The fiduciary duty of a trustee includes "the duty of loyalty (Prob. Code, § 16002); *the duty to deal impartially with the beneficiaries* (Prob. Code, § 16003); the duty to avoid conflicts of interest (Prob. Code, § 16004); the duty to control and preserve trust property (Prob. Code, § 16006; Rest.2d Trusts, §§ 175, 176); the duty to make trust property productive (Rest.2d Trusts, § 181); the duty to dispose of improper investments (Rest.2d Trusts, §§ 230, 231); and the duty to report and account (Prob. Code, § 16060)." (*Harnedy v. Whitty* (2003) 110 Cal.App.4th 1333, 1340 [2 Cal. Rptr. 3d 798], italics added.)

(*Hearst v. Ganzi* (2006) 145 Cal.App.4th 1195, 1208.)

Defendant questions whether such a trust – beneficiary relationship "could even reasonably exist." However, 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.)

Accordingly, Defendant's demurrer to the ninth cause of action of Plaintiff's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for breach of fiduciary duty and on the ground that the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is OVERRULED.

F. Tenth cause of action – conversion.

> "Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages. Conversion is a strict liability tort. The foundation of the action rests neither in the knowledge nor the intent of the defendant. Instead, the tort consists in the breach of an absolute duty; the act of conversion itself is tortious. Therefore, questions of the defendant's good faith, lack of knowledge, and motive are ordinarily immaterial. [Citations.]" (*Burlesci v. Petersen* (1998) 68 Cal.App.4th 1062, 1066, [80 Cal.Rptr.2d 704].) The basis of a conversion action " 'rests upon the unwarranted interference by defendant with the dominion over the property of the plaintiff from which injury to the latter results. Therefore, neither good nor bad faith, neither care nor negligence, neither knowledge nor ignorance, are the gist of the action.' [Citations.]" (*Ibid*.)

(*Los Angeles Federal Credit Union v. Madatyan* (2012) 209 Cal.App.4th 1383, 1387; see also CACI, No. 2100.)

In demurring to the conversion cause of action, Defendant highlights the allegation from Plaintiff's FAC that Plaintiff himself directed his brother, Alfredo, to transfer legal title of the West Court Property to Defendant. (See FAC, ¶21.) As such, Defendant contends his title is not wrongful. Defendant cites no legal authority, but the court understands Defendant to argue, essentially, the following principle: "[T]he law is well settled that there can be no conversion where an owner either expressly or impliedly assents to or ratifies the taking, use or disposition of his property." (*Farrington v. A. Teichert & Son, Inc.* (1943) 59 Cal.App.2d 468, 474, internal citations omitted.) "As to intentional invasions of the plaintiff's interests, his consent negatives the wrongful element of the defendant's act, and prevents the existence of a tort. 'The absence of lawful consent,' said Mr. Justice Holmes, 'is part of the definition of an assault.' The same is true of false imprisonment, conversion, and trespass." (*Tavernier v. Maes* (1966) 242 Cal.App.2d 532, 552, internal citations omitted.)

Defendant's argument, however, ignores Plaintiff's allegations that Defendant agreed "that in the event that legal title to any such acquired property was placed in the name of Defendant, such legal title would be transferred to Plaintiff upon Plaintiff's request," "Plaintiff then demanded that Defendant transfer legal title to the West Court Property into Plaintiff's name," and "Defendant refused." (See FAC, ¶¶15 and 39.) In essence, Plaintiff has alleged that he withdrew his consent to title of the West Court Property remaining with Defendant.

Accordingly, Defendant's demurrer to the tenth cause of action of Plaintiff's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for conversion and on the ground that the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is OVERRULED.

G. Eleventh cause of action – false promise.

"'Promissory fraud' is a subspecies of fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud." (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 973 – 974; see also CACI, No. 1902.)

Defendant argues the eleventh cause of action fails to plead fraud with the requisite specificity. "Fraud actions are subject to strict requirements of particularity in pleading. … Accordingly, the rule is everywhere followed that fraud must be specifically pleaded." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216.) "The pleading should be sufficient to enable the court to determine whether, on the facts pleaded, there is any foundation, prima facie at least, for the charge of fraud." (*Commonwealth Mortgage Assurance Co. v. Superior Court* (1989) 211 Cal.App.3d 508, 518.) The court in *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645 did not comment on how these particular allegations met the requirement of pleading with specificity in a fraud action, but the court did say that "this particularity requirement necessitates pleading facts which 'show how, when, where, to whom, and by what means the representations were tendered.'" Defendant challenges the sufficiency of Plaintiff's allegations asserting Plaintiff "fails to describe the mechanism by

which Defendant allegedly made the promise, the alleged representations of Defendant, and Plaintiff's justification for reliance on Defendant's alleged promises."[3]

The alleged promissory fraud is set forth at paragraphs 14 – 17 of the FAC. It is not clear to the court what Defendant means in arguing Plaintiff has not described the "mechanism," but the court can reasonably infer that the alleged promises were oral as the alleged promises are also the basis of the "oral contract" Plaintiff claims Defendant breached. (See FAC, ¶42.) The same paragraphs also set for the purported representations or promises which were purportedly made by the Defendant.

Plaintiff alleges his reliance on Defendant's promises at paragraph 104 of the FAC. To the extent Defendant challenges whether Plaintiff's reliance was reasonable, the court does not make such a determination on demurrer.

> " 'Besides actual reliance, [a] plaintiff must also show "justifiable" reliance, i.e., circumstances were such to make it reasonable for [the] plaintiff to accept [the] defendant's statements without an independent inquiry or investigation.' [Citation.] The reasonableness of the plaintiff's reliance is judged by reference to the plaintiff's knowledge and experience. (5 Witkin, Summary of Cal. Law, supra, Torts, § 808, p. 1164.) '"Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, ***the question of whether a plaintiff's reliance is reasonable is a question of fact***." [Citations.]' [Citation.]" (*OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 864–865 [68 Cal. Rptr. 3d 828] (*OCM Principal*).)

(*Public Employees' Retirement System v. Moody's Investors Service, Inc.* (2014) 226 Cal.App.4th 643, 672; emphasis added.)

[3] See page 30, lines 13 – 16, of the Memorandum of Points and Authorities in Support of Demurrer to Verified First Amended Complaint of Antonio Nieves.

Accordingly, Defendant's demurrer to the eleventh cause of action of Plaintiff's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for false promise and on the ground that the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is OVERRULED.

The Court will prepare the formal order.

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