SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 16
(Dept 16 is now hearing cases that were formerly in Dept 2)
Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 1-30-24 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear by video.

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.
The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

TO CONTEST THE RULING: Before 4:00 p.m. 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 and contest the ruling
(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

TO APPEAR AT THE HEARING: The Court strongly prefers in person appearances. If you must appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to Department 16.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

TO SET YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. Phone lines are now open for you to call and reserve a date before you file your motion. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Where to call for your hearing date: 408-882-2430 When you can call: Monday to Friday, 8:30 am to 12:30 pm

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

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

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	22CV395542 Hearing: Demurrer	Emily Marshall vs Eyad Abdeljawad et al	See Tentative Ruling. The Court will prepare the final order.
LINE 2	23CV412053 Motion: Strike	Rossi Hamerslough Reischl & Chuck vs Dipali Shah	See Tentative Ruling. The Court will prepare the final order.
LINE 3	23CV415894 Motion: Quash	Khayti Sheth et al vs Geralyn Glowski et al	Plaintiffs' motion to quash the subpoenas as overbroad is GRANTED. Defendant has not limited the scope of the subpoenas to the specific claims of injury made in the complaint – namely harm from the surgery and harm from loss of consortium. Therefore, (1) any subpoena for mental health records must be limited to harm related to the surgery; (2) because Plaintiffs also claim damages from loss of consortium, a subpoena for mental health treatment related to Plaintiffs' marriage would be proper, so long as limited in scope to extend forward from the surgery and a reasonable time backward so as to allow the presentation of facts demonstrating that any loss of consortium was in fact causally related to the surgery. Parties should agree on the time period, or the court will set it at one year preceding the surgery to the present.
LINE 4	21CV381458 Motion: Summary Judgment/Adjudication	Tori Moses vs Hyatt Corporation et al	See Tentative Ruling. The Court will prepare the final order.

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LINE 5	23CV411015 Motion: Compel	David Rome, Trustee et al. et al vs Asim Mughal et al. et al	The parties are referred to an informal discovery conference before J. Geffon on 2/29/24 at 1:30 p.m. to resolve or at least narrow the scope of the motions. Parties shall appear at the hearing at 9 am to confirm availability for IDC and to set a date for a continued hearing should the issues not all resolve.
LINE 6	23CV411015 Motion: Compel	David Rome, Trustee et al. et al vs Asim Mughal et al. et al	The parties are referred to an informal discovery conference before J. Geffon on 2/29/24 at 1:30 p.m. to resolve or at least narrow the scope of the motions. Parties shall appear at the hearing at 9 am to confirm availability for IDC and to set a date for a continued hearing should the issues not all resolve.
LINE 7	23CV416274 Motion: Compel	Davis Lewis vs S.B.S. Trust Deed Network et al	Notice appearing proper and good cause appearing, Defendant's motion to compel is GRANTED. Plaintiff shall provide code-compliant verified responses to requests for production of documents, interrogatories, and special interrogatories within 20 days of the final order. Plaintiff shall pay sanctions of $900 dollars within 20 days of the final order. Defendant shall submit the final order.
LINE 8	23CV416274 Motion: Admissions Deemed Admitted	Davis Lewis vs S.B.S. Trust Deed Network et al	Notice appearing proper and good cause appearing, Defendant's motion to deem admissions admitted for set one is GRANTED. Plaintiff shall pay sanctions of $450 dollars within 20 days of the final order. Defendant shall submit the final order.

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The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

LINE 9	23CV417495 Motion: Compel	Jason Crowell et al vs FORD MOTOR COMPANY et al	Off calendar.
LINE 10	19CV356647 Motion: Order to disqualify	Leal & Trejo, APC et al vs Alum Rock Union Elementary School District	See Tentative Ruling. Defendant shall submit the final order.
LINE 11	19CV358030 Motion: Sanctions	Weckworth Electric Group, Inc vs Metcalf Builders, Inc et al	Off calendar
LINE 12	22CV394810 Motion: Approve Good Faith Settlement	Stan Habr et al vs Avalon Transportation, LLC et al	See Tentative Ruling. Defendant Avalon shall submit the final order.
LINE 13	22CV394810 Motion: to Clarify Scope of Stay Pending Appeal of Order	Stan Habr et al vs Avalon Transportation, LLC et al	See Tentative Ruling. Plaintiff shall prepare the final order.
LINE 14	2000-7-CV-393402 Hearing: Claim of Exemption	First Select Corporation Vs Comer Shawnette M	The Court does not find that Debtor has made a viable claim for exemption. The claim for exemption is DENIED. Creditor shall submit the final order.
LINE 15			
LINE 16			
LINE 17			

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Calendar Line 1
Case Name: *Emily A. Marshall. v. Aldridge Pite, LLP et al.*
Case No.: 22CV395542

This action arises from a foreclosure sale. Clear Recon Corp. ("Clear Recon") and Aldridge Pite, LLP ("Aldridge") (collectively, "Defendants,") demur to the operative First Amended Complaint ("FAC") filed by Emily Marshall ("Plaintiff.")

I. Background

A. Factual[1]

According to the allegations in the operative FAC, Plaintiff and her husband George H. Marshall, Jr. ("George") lost their home via foreclosure on February 3, 2021. (FAC, ¶¶ 27-28.) Clear Recon is a corporation that served as the trustee in the foreclosure sale. (FAC, ¶¶ 20, 28.) Aldridge Pite, LLP, is a law firm that represented Clear Recon in its handling of the foreclosure sale. (FAC, ¶¶ 21, 29.)

Plaintiff's home was purchased at a trustee sale conducted by Clear Recon. (FAC, ¶ 28.) The trustee's deed upon sale shows that, after the payment of the unpaid debt, there remained an excess of foreclosure sale proceeds ("Excess Proceeds") of roughly $1.6 million. (*Ibid*.)

As Clear Recon's counsel, Aldridge sent Plaintiff and George a Notice of Surplus Funds on February 5, 2021. (FAC, ¶ 29.) The notice states: "Pursuant to California Civil Code sections 2924j and 2924k, you may have a claim to all or portion of the [roughly $1.6 + million in excess proceeds] remaining after payment of the obligation which was the subject of the Trustee's Sale, and the Trustee's costs and expenses." (*Ibid.*) Along with the notice, Aldridge sent Plaintiff and George an Affidavit of Claim for Surplus Funds, with instructions that the affidavit was to be filled out, signed, and notarized, to receive the Excess Proceeds. (FAC, ¶ 30.)

The FAC refers to the following defendants collectively as the "Kozich Defendants": Eyad Abdeljawad ("Abdeljawad,"); Bridgepoint Law Group, APC ("BLG,"); David Kozich ("Kozich,"); Equity Law Group ("ELG,"); Legis Law ("Legis"); Brycen Bradfield ("Bradfield,"); Shoreline Sales, LLC ("Shoreline,"); Bradfield Holdings Corp; and Oak Tree LS LLC ("Oak Tree.") (FAC, ¶¶ 10-19.)

The Kozich Defendants illegally solicited Plaintiff's husband George by telephone, telling him that their lawyers could prevent or "unwind" the loss of the home. (FAC, ¶ 31.) The Kozich Defendants "pressured" George to sign a contingency fee agreement, which he did on March 30, 2021. (FAC, ¶ 35.) Plaintiff was not aware of the fee agreement and she did not sign it. (*Ibid*.)

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[1] The factual and procedural background to the action largely mirrors the Court's Order filed on August 3, 2023 on Defendants' demurrer to the initial Complaint. Consequently, the full background will not be repeated here.

On April 9, 2021, Kozich Defendants and ELG sent Aldridge a Letter of Authorization on ELG's letterhead and with the supposed electronic signatures of Plaintiff and George dated April 9, 2021. (FAC, ¶ 36.) Plaintiff did not know about or sign the Letter of Authorization. (*Ibid.*)

On or about April 13, 2021, Kozich Defendants sent Aldridge three documents:

1) An Authorization to Communicate on Behalf of the Undersigned, a form prepared by ELG and containing the supposed handwritten initials and signature of Plaintiff, as well as notarization of the same by defendant Bradfield;

2) A completed copy of the Affidavit of Claim for Surplus Funds form prepared by Aldridge and with the supposed handwritten initials and signature of Plaintiff, as well as notarization of the same by defendant Bradfield; and

3) A Request for Taxpayer Identification Number/Certification (W-9), with the supposed handwritten signature of Plaintiff.

(FAC, ¶ 37.)

Plaintiff asserts that she did not sign any of the above-referenced documents and alleges that all of her purported signatures on those documents were forged. (*Ibid*.)

Based on the Kozich Defendants' intentional misrepresentations, fraud, forgeries, and false notarizations, Aldridge sent a total of four Excess Proceeds disbursement checks to them, totaling approximately $1,588,000.00. (FAC, ¶¶ 38.) Defendant Clear Recon had deducted approximately $2,800 from the total disbursement for trustee's fees. (FAC, ¶ 39.)

Two of these checks were payable to Plaintiff, and two were payable to George. (FAC, ¶ 38.) The two checks that were payable to Plaintiff were endorsed over to defendant Shoreline, using forged signatures, and then deposited into a "fraudulently opened" JPMorgan Chase Bank account. The two checks that were payable to George were deposited into another "fraudulently opened" JPMorgan Chase account. (FAC, ¶ 42.) Neither Plaintiff nor George consented to, or were aware of, these bank accounts. (*Ibid.*)

Plaintiff retained counsel and communicated with Kozich and ELG in an attempt to find out what happened to the Excess Proceeds. (FAC, ¶ 43.) Aldridge, Clear Recon's counsel, informed Plaintiff that it sent the Excess Proceeds to the Kozich Defendants. (*Ibid*.) Both Plaintiff and George communicated repeatedly with Kozich and ELG to resolve the situation, to no avail. (FAC, ¶¶ 43-49.)

B. Procedural

Plaintiff initiated the instant action with the filing of the complaint on March 4, 2022. On October 28, 2022, Defendants filed a demurrer to the original complaint. After the hearing on Defendants' initial Demurrer on August 1, 2023, this Court issued a final order sustaining the demurrer (on failure to state sufficient facts) with thirty days leave to amend. (See Court Order Case No. 22CV395542 entitled *Emily Marshall vs. Eyad Abdeljawad, et al*., filed on August 3, 2023.) On September 6, 2023, Plaintiff filed her operative pleading, the FAC,

alleging thirteen causes of actions against eleven named defendants, including the following three causes of action against Clear Recon and Aldridge:

1) the third cause of action for professional negligence;
2) the ninth cause of action for conversion; and,
3) the thirteenth cause of action for declaratory relief.

On October 5, 2023, Defendants Clear Recon and Aldridge filed a demurrer to each of the three causes of action against them. Plaintiffs filed a late opposition on January 23, 2024. Defendants filed a reply that same day.

II. Procedural Violation

As a preliminary matter, the court notes that Plaintiff's opposition is untimely filed and served. Code of Civil Procedure section 1005, subdivision (b) states, "All papers opposing a motion … shall be filed with the court and a copy served on each party at least nine court days … before the hearing." Based on a hearing date of January 30, 2024, Plaintiff's opposition had to be filed and served no later than January 17, 2024. Plaintiff did not file and serve the opposition until January 23, 2024.

California Rules of Court, rule 3.1300, subdivision (d) states, "No paper may be rejected for filing on the ground that it was untimely submitted for filing. If the court, in its discretion, refuses to consider a late filed paper, the minutes or order must so indicate." That said, the court has discretion to consider a late filed paper. Defendants have already filed their substantive Reply to Plaintiff's Opposition, and thus, have not suffered any prejudice from the late filing. To avoid the expenditure of any further judicial resources, the court will look past this procedural violation and consider the opposition on its merits. However, Plaintiff is admonished for the procedural violation. Any future violation may result in the court's refusal to consider the untimely filed papers.

III. Defendants' Demurrer

A. Legal Standard

"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 (*Committee on Children's Television*).)

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

B. Merits of the Demurrer

Defendants challenge the third cause of action for professional negligence and/or breach of statutory duties, the ninth cause of action for conversion, and the thirteenth cause of action for declaratory relief on the grounds that they fail to state facts sufficient to constitute a cause of action under Code of Civil Procedure Section 430.1, subdivision (e). (Demurrer, p. 2.)

i. Third Cause of Action – Professional Negligence and/or Breach of Statutory Duties

In the third cause of action, the FAC alleges Defendants breached their "professional and/or statutory duties of care" to Plaintiff by negligently handling and disbursing Plaintiff's Excess Proceeds arising out of the foreclosure sale, without proper notice to Plaintiff. (FAC, p. 32: 9-28.) Specifically, Plaintiff asserts Defendants' decision to disburse Excess Proceeds "to the errant Kozich Defendants, instead of directly to Plaintiff and her husband was a breach of their duty of care. (*Ibid.*)

Defendants argue the FAC fails to state a claim for professional negligence and/or breach of statutory duties against them because their conduct was privileged pursuant to Civ. Code §§ 2924, 2924, subd. (k.) (Demurrer, pp. 13-17.)

"[T]here are four essential elements of a professional negligence claim: (1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) 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." (*Osornio v. Weingarten* (2004) 124 Cal.App.4th 304, 319 (*Osornio*) [internal quotations and citations omitted].)

1. Clear Recon (Breach of Duty and Privilege Analysis)

Defendants contend Clear Recon did not breach its limited statutory duties as the foreclosure trustee and owed no other duties to Plaintiff. Defendants cite to multiple cases (discussed, *infra*) that shed light on the "legislative history and policy reasons for the privilege." (Demurrer, pp. 13-15.) Plaintiff concedes that the foreclosure trustees' statutory privileges apply to or cover their "communications and publications," but asserts that Clear Recon owed a duty of care with respect to the disbursement of funds under Civil Code § 2924, subd. (k). (FAC, ¶¶ pp. 89-92.).

Civil Code § 2924, subd. (k) ("Section 2924k") provides in relevant part:

(a) The trustee, or the clerk of the court upon order to the clerk pursuant to subdivision (d) of Section 2924j, shall distribute the proceeds, or a portion of the proceeds, as the case may be, of the trustee's sale conducted pursuant to Section 2924h in the following order of priority:

(1) To the costs and expenses of exercising the power of sale and of sale, including the payment of the trustee's fees and attorney's fees permitted pursuant to subdivision (b) of Section 2924d and subdivision (b) of this section.

(2) To the payment of the obligations secured by the deed of trust or mortgage which is the subject of the trustee's sale.

(3) To satisfy the outstanding balance of obligations secured by any junior liens or encumbrances in the order of their priority.

(4) **To the trustor or the trustor's successor in interest. In the event the property is sold or transferred to another, to the vested owner of record at the time of the trustee's sale**.

(Civ. Code, § 2924k, subd. (a), emphasis added.)

Plaintiff, in her Opposition, asserts Defendants knew or should have known the Kozich Defendants "would steal whatever they were errantly sent" given their reputation to commit fraud and superior industry knowledge of foreclosures. (Opposition, pp. 7-9.)

According to Plaintiff, Defendants had a mandatory duty under Civil Code section 2924j, subdivision (b) to "exercise due diligence to determine the priority of the written claims received by the trustee to the trustee's sale surplus proceeds from those persons to whom notice was sent pursuant to subdivision (a)." This duty, she contends, should extend to determining the true owner of the proceeds. She also asserts that the statutory privileges should not apply under these circumstances. (FAC, ¶¶ 88-94.)

Defendants contend the statutory privilege pursuant to Civil Code section 2924, subdivision (d)(2) extends to "[p]erformance of the procedures set forth in this article," namely disbursement of excess proceeds under Civ. Code section 2924j. (Reply, p. 2; Demurrer, pp. 13-17.) Consequently, Defendants contend the professional negligence claim fails as their foreclosure related conduct is privileged.

Courts have noted California's nonjudicial foreclosure scheme, set forth in Civil Code sections 2924 through 2924k, provides "a comprehensive framework for the regulation of a nonjudicial foreclosure sale pursuant to a power of sale contained in a deed of trust. [Citation.]" (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1154.) Because of the "exhaustive nature of this scheme," courts have "refused to read any additional requirements into the nonjudicial foreclosure statute." (*Id*.) This includes the right to bring a court action to determine whether party initiating foreclosure, prior to the trustee's sale, has the authority to do so, as permitting such a result would "interject the courts into this comprehensive nonjudicial scheme" where nothing in the statutory provisions "suggest[s] that such a judicial proceeding is permitted or contemplated." (*Ibid.*)

Civil Code section 47 provides in part: "A privileged publication or broadcast is one made: … (b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2…" (Civ. Code, § 47, subd. (b).)

Civil Code section 2924, subdivision (d), relating to nonjudicial foreclosure, states: "All of the following shall constitute privileged communications pursuant to [Civil Code] Section 47:

(1) The mailing, publication, and delivery of notices as required by this section.
(2) Performance of the procedures set forth in this article.

(3) Performance of the functions and procedures set forth in this article if those functions and procedures are necessary to carry out the duties described in Sections 729.040, 729.050, and 729.080 of the Code of Civil Procedure.

Civil Code section 47 creates two privileges: (1) an absolute privilege, commonly called the litigation privilege, that applies irrespective of the speaker's motive (§ 47, subd. (b)), and (2) a qualified privilege that "applies only to communications made without malice" (*Id*., subd. (c)). (*Schep v. Capital One, N.A.* (2017) 12 Cal.App.5th 1331, 1337 (*Schep*).) Section 2924, subdivision (d) however refers only to "Section 47" without specifying which of the two privileges applies. (*Ibid*.) Furthermore, California appellate courts appear split on the question. (See *Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 335-341 (*Kachlon*) [section 2924 incorporates section 47's qualified privilege]; compare with *Garretson v. Post* (2007) 156 Cal.App.4th 1508, 1517 [section 2924 incorporates section 47's absolute privilege].)

Defendants assert that it is irrelevant whether the absolute or qualified version of the privilege applies as Plaintiff fails to allege facts demonstrating malice to overcome the qualified privilege. (Demurrer, pp. 16-17.)

"A qualified privilege applies to 'a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information.' [Citation.]" (*Klem v. Access Ins. Co.* (2017) 17 Cal.App.5th 595, 616-617.)

As to the qualified privilege, "malice" means the defendant (1) was motivated by hatred or ill will towards the plaintiff or (2) lacked reasonable grounds for [its] belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff's rights. (*Schep, supra,* 12 Cal.App.5th at p. 1337; see also *Kachlon, supra,* 168 Cal.App.4th at pp. 343-344 [appellate court applied qualified privilege to negligence claim]; see *Champlaie v. BAC Home Loans Servicing, LP* (E.D. Cal. 2009) 706 F.Supp.2d 1029, 1062 ["[A] trustee's actions in executing a non-judicial foreclosure are privileged communications under Cal. Civ. Code section 47, and as such will not support a tort claim other than for malicious prosecution."].)

Plaintiff has not addressed this specific argument in her Opposition and only addresses malice as to the Kozich defendants. (*Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 529 (*Westside*) [failure to challenge a contention results in the concession of that argument].) Instead, Plaintiff restates that Defendants negligently performed their duties by failing to disburse funds directly to Plaintiff. She contends that the duty to distribute proceeds under Civil Code section 2924, subdivision (d) is mandatory and non-discretionary such that the statutory privileges do not apply. (FAC, ¶ 22.) As Defendants point out, both Plaintiff's FAC and the arguments raised in her Opposition to the demurrer mirror her initial complaint. (FAC, ¶¶ 32-34, Opposition, pp. 5-8.) The court previously sustained the demurrer as to this claim. The FAC does not provide additional facts to support her conclusion that a litigation privilege does not apply. Accordingly, Plaintiff has failed to rebut this point and the demurrer must be sustained as the FAC has failed to state facts amounting to malice, which could overcome the litigation privilege.

Plaintiff was already given an opportunity for leave to amend per this court's previous order. (See *City of Stockton v. Super. Ct.* (2007) 42 Cal.4th 730, 747 [if a plaintiff has not had

an opportunity to amend the complaint in response to a demurrer, leave to amend is liberally allowed as a matter of fairness].) The demurrer is therefore SUSTAINED WITHOUT LEAVE TO AMEND.

2. Aldridge (Breach of Duty Analysis and Privilege Analysis)

Defendant Aldridge, law firm for trustee Clear Recon with respect to the nonjudicial foreclosure sale, contends that it owed no duty to Plaintiff because she was never its client. (Demurrer, pp. 18-19.) Defendants, correctly point out, that the FAC alleges no new facts to support the conclusion that Aldridge had a duty of care to Plaintiff. (*Ibid.*) By failing to amend the original complaint to address this issue or to address this argument in the Opposition, Plaintiff effectively concedes it. While Plaintiff contends Aldridge faces liability as Clear Recon's "agent" or "payment agent" she still makes no attempt to establish a legal basis for a duty owed to her by Aldridge. (Opposition, pp. 8-9.)

Here, it is undisputed that Plaintiff was never a client of Aldridge, and thus the Complaint fails to sufficiently allege the existence of a duty owed by Aldridge to Plaintiff. Without a duty, there is no valid claim for professional negligence. (See *Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1128 [explaining that the elements of a cause of action for professional negligence are: (1) the duty of the professional to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; (2) breach of that duty; (3) a causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional negligence].) In addition, Aldridge argues it is also protected by the qualified privilege, which for the reasons set forth *supra* as to Clear Recon, is an additional reason to sustain the demurrer.

Based on the foregoing, the demurrer to the third cause of action for failure to state sufficient facts is SUSTAINED WITHOUT LEAVE TO AMEND.

ii. Ninth Cause of Action – Conversion

Plaintiff alleges in her FAC that as a "proximate" cause of Defendants' failure to protect her Excess Proceeds, she "not only lost her primary residence," but also her rightful possession of the Excess Proceeds post-foreclosure sale. (FAC, ¶¶ 150-151.)

Defendants assert that Plaintiff cannot maintain a cause of action for conversion because Plaintiff: 1) alleges no new specific facts in support, and 2) never alleges that both Clear Recon and Aldridge acted with the intent to deprive Plaintiff of the Excess Proceeds "beyond the modest fees paid to Clear Recon." (Demurrer, p. 20.) Plaintiff's right to the funds at issue is merely a contractual right to payment and there is no specific, identifiable sum of money at issue. As Defendants correctly note in their Reply, Plaintiff's Opposition is silent on this issue, conceding the argument. (Reply, p. 8; see *Westside, supra*, 42 Cal.App.4th at p. 529.)

"To prove a cause of action for conversion, the plaintiff must show the defendant acted intentionally to wrongfully dispose of the property of another." (*Duke v. Superior Court* (2017) 18 Cal.App.5th 490, 508 (*Duke*).) "[T]he simple failure to pay money owed does not constitute conversion. A cause of action for conversion of money can be stated only where a defendant interferes with the plaintiff's possessory interest in a specific, identifiable sum, such as when a

trustee or agent misappropriates the money entrusted to him." (*Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 284.)

Identical to the Original Complaint, here, the FAC does not sufficiently allege the elements of conversion, namely, the element of intent. Indeed, the ninth cause of action refers to "Clear Recon's, and Aldridge's above-noted breaches, failures, and violations," adding no further specificity, and suggesting Defendants "proximately allowed such conversion" by giving the Excess Proceeds to the wrong parties. However, these facts are only relevant to the professional negligence claims against Defendants. (FAC, ¶¶ 149-151.) As discussed above, the Court has sustained the demurrer to the third cause of action for professional negligence based on the statutory privileges asserted by Defendants and the lack of any duty Aldridge owed to Plaintiff.

The FAC still fails to allege facts sufficient to show Defendants assumed control or ownership over the funds, wrongfully disposed of the funds, or intentionally took affirmative steps to deprive Plaintiff of the funds. (See *Spates v. Dameron Hospital Assn.* (2003) 114 Cal.App.4th 208, 222 ["[t]he act of removing personal property from one place to another, without an assertion of ownership or preventing the owner from exercising all rights of ownership in such personal property, is not enough to constitute conversion"]; see also *Duke, supra*, 18 Cal.App.5th at p. 508 ["plaintiff must show the defendant acted intentionally to wrongfully dispose of the property of another"].)

Accordingly, the demurrer is SUSTAINED, WITHOUT LEAVE TO AMEND as to the third cause of action (conversion). Plaintiff's conversion claim solely hinges on Defendants' failure to disburse the Excess Proceeds directly to her, which is insufficient as a matter of law. This court has already given Plaintiff leave to amend her complaint to address the element of intent. She has failed to do so.

iii. Thirteenth Cause of Action – Declaratory Relief

Plaintiff contends that her compromised "rights" and "entitlement" to the Excess Proceeds from the foreclosure sale, and the question of whether "duties of care" were owed to her by Defendants, demonstrate "a dispute and actual controversy." (FAC, p. 42:15-28; p. 52:175.)

Code of Civil Procedure section 1060, which governs actions for declaratory relief, provides: "Any person interested under a written instrument …, or under a contract, or who desires a declaration of his or her rights or duties with respect to another …may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action … for a declaration of his or her rights and duties in the premises, including a determination of any question of construction or validity arising under the instrument or contract."

Defendants contend, persuasively, that Plaintiff has failed to state a claim for declaratory relief because she impermissibly asks the Court to redress past wrongs. (Demurrer, p. 13: 5-17.) Indeed, "[d]eclaratory relief operates prospectively, serving to set controversies at rest before obligations are repudiated, rights are invaded or wrongs are committed. Thus the remedy is to be used to advance preventive justice, to declare rather than execute rights."

(*Kirkwood v. California State Auto. Assn. Inter-Insurance Bureau* (2011) 193 Cal.App.4th 49, 59.)

Moreover, declaratory relief "should not be used for the purpose of anticipating and determining an issue which can be determined in the main action. The object of the statute is to afford a new form of relief where needed and not furnish a litigant with a second cause of action for the determination of identical issues." (*California Ins. Guarantee Assn. v. Superior Court* (1991) 231 Cal.App.3d 1617.) Here, Plaintiff is asking the Court to determine the validity of something that *already happened in the past* and thus declaratory relief is not appropriate. Additionally, as noted in the court's August 3, 2023 order,[2] the alleged controversies are derivative of the third and ninth causes of action, to which the court has sustained the demurrer.

In her Opposition, Plaintiff does not address Defendants' assertion that her declaratory relief claim hinges on Defendants' past conduct, i.e., breach of duty of care. Consequently, the Court finds that Plaintiff has conceded this argument. (*Sehulster Tunnels/Pre-Con v. Traylor Brothers, Inc./Obayashi Corp.* (2003) 111 Cal.App.4th 1328, 1345, fn. 16 [failure to address point is "equivalent to a concession"].)

In accordance with the foregoing, Defendants' demurrer to the thirteenth cause of action on the ground of failure to state facts sufficient to constitute a cause of action is SUSTAINED WITHOUT LEAVE TO AMEND. "'Generally[,] it is an abuse of discretion to sustain a demurrer without leave to amend if there is any reasonable possibility that the defect can be cured by amendment. [Citation.] . . . Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading. [Citations.]'" (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) Here, Plaintiff does not explain how she could amend her FAC to cure the defect discussed above, and this was her second opportunity to do just that.

IV. Conclusion

The demurrer is SUSTAINED WITHOUT LEAVE TO AMEND as to ALL THREE causes of actions against Defendants Clear Recon and Aldridge for failure to state sufficient facts.

The Court will prepare the final Order.

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[2] Notably, the declaratory relief claim was numbered claim 14 in the original Complaint.

Calendar Line 2
Case Name: *Rossi, Hamerslough, Reischl & Chuck v. Shah*
Case No.: 23CV412053

This is a fee dispute. According to the allegations of the petition to confirm contractual arbitration award("Petition"), in January 2019, respondent Dipalo Shah ("Shah") retained Rossi Hamerslough, Reischl & Chuck ("RHRC") to represent her in the matter of Talkad, et al. v. Shah, et al. (San Francisco County Super. Ct., 2019, No. CGC-18-563635. (See Petition, ¶ 4.) On January 23, 2019, Shah and RHRC entered into a fee agreement that included an arbitration provision. (See Petition, ¶ 5, exh. A.) During RHRC's representation of Shah, a dispute arose between RHRC and Shah regarding Shah's failure to pay fees owed under the fee agreement, and as a result, RHRC withdrew as Shah's counsel on June 17, 2020. (See Petition, ¶ 6.) On August 4, 2020, RHRC served Shah with a notice of client's right to arbitration. (See Petition, ¶ 7.) On February 18, 2022, Shah submitted a request for fee arbitration/mediation with the Santa Clara County Bar Association ("SCCBA"). (See Petition, ¶ 8, exh. B.) RHRC requested that the arbitration be designated as "non-binding"; Shah changed her initial designation as non-binding to "binding." (*Id*.) The arbitration took place on September 20, 2022 before a panel of three arbitrators that formed part of the SCCBA Fee Arbitration Committee. (See Petition, ¶ 9.) On November 17, 2022, Shah and RHRC were served with the non-binding arbitration award in addition to a Notice of Rights After Fee Arbitration. (See Petition, ¶ 10, exh. C.) Shah failed to file a request for trial within thirty days of issuance of the award; as a result, the non-binding award became binding automatically effective December 22, 2022. (See Petition, ¶ 11.) The arbitrators awarded RHRC $200,064.95 against Shah. (See Petition, ¶ 12.) Shah has yet to pay the amount awarded to RHRC. (*Id*.) RHRC requests a judgment in the amount of $200,064.95 plus interest at the rate of 10% per annum, a daily rate of $54.81, commencing on the date of the award, November 17, 2022. (See Petition, ¶ 13.)

On March 8, 2023, RHRC filed the petition to confirm contractual arbitration award and for entry of judgment in conformance therewith. On September 12, 2023, the Court granted RHRC's petition to confirm contractual arbitration award was granted, entitling RHRC to a judgment in its favor and against Shah in the amount of $200,064.95 plus interest in the amount of 10%, a daily rate of $54.81 commencing on the date of the award of November 17, 2022 until judgment is entered. Judgment was also entered on September 12, 2023.

On August 22, 2023, Shah moved for reconsideration of the order granting the petition to confirm the arbitration. On September 25, 2023, Shah moved for a new trial. On September 27, 2023, Shah moved to set aside and vacate the judgment and enter a new and different judgment. On October 4, 2023, Shah moved for a new trial to vacate and enter a different judgment.

On October 30, 2023, Shah filed a notice of non-opposition to her motion for a new trial and motion to vacate and enter a different judgment. On October 31, 2023, RHRC filed an opposition to Shah's motions for a new trial, and to vacate and enter a different judgment.

On November 17, 2023, the Court heard the motion for new trial, motion for reconsideration and motion to set aside and vacate the judgment. At the hearing, the Court sought confirmation from Shah that those motions were the subject motions of the hearing, to which Shah stated:

> Well, I was trying to do—through ex parte—to do motion to strike because they were late on their opposition twice. Not only they were supposed to get an opposition October 10th and then ask for an extension on October 24, which they failed to do. And so I had a motion to strike so that it could be heard today.

(Cornejo decl. exh. A ("November 17, 2023 hearing transcript"), p.4:1-12.)

The Court responded that Judge Kulkarni denied the ex parte motion, so the motion to strike was not before the court that day. (*Id*. at p.4:13-21.) However, the Court continued:

> But they—the—the petitioners did talk about their late-filed motion in their responsive papers and asked the Court to consider it. So when we get to that motion, we can talk about that since it's in their motion.
> …
> All right. So let me tell you what I'm thinking, and then, Ms. Shah, you can address those particular points. Okay? Rather than just talking about things broadly, I'll—I'll let you know what I'm thinking, and then you can make your argument.
>
> So, with respect to the Motion for New Trial—let me just bring that up. Hold on—first, my inclination is to accept the opposition despite the fact that was late. I do have the discretion to do that and find that it was excusable neglect.
>
> I don't find, as I say, tentatively, that you were prejudiced, Ms. Shah. So, if you want to speak to that, you can. It seems to me that they filed on October 31st, which was still, you know, 17 calendar days before the hearing. You could have filed your response. The responses are generally due five days after an opposition is filed. So there was plenty of time for you to do that still within the five days.
>
> So I don't find that there was any prejudice from the late filing of the opposition. So I am inclined to consider it.

(*Id*. at pp.5:4-7, 12-28, 6:1-4.)

In response to the Court's statement, Shah made similar arguments that she makes in her motion to strike: Shah consults an attorney to write all these motions, and "the guy… was not available during the time that she decided that she wanted to write this opposition"; she was supposed to file her opposition on October 14th… [and s]he missed that deadline… [s]he was supposed to ask you for an extension… [s]he missed that deadline too… [a]nd only when I filed, she quickly did her opposition… [a]nd I had five days, and my guy that I consult with was not available during those five days… [a]nd it should have been just stricken on arrival." (*Id*. at pp.12:21-28, 13:1-7.)

After stating that Shah's argument regarding the purported failure to credit the full $112,000 was unconvincing, the Court then stated:

> Secondly, I will say I still don't find that there was prejudice from their late filing. You had plenty of time to file a response, and you didn't file any response. And you are pro per, and you filed your own papers. So you had the opportunity to do that if you had wanted. And you didn't file any responses on any of the other motions…. [W]hat I'm saying is there was no response to your other two motions. The Motion for Reconsideration and the Motion to Set Aside you also didn't file replies, even though the oppositions in both of those cases were timely.
>
> So I don't find that there was any prejudice to you filing a reply to their opposition. You had more than two weeks, which was more than sufficient time to do so if you had wanted to. So I am going to consider their opposition.

(November 17, 2023 hearing transcript, pp.27:16-22, 28:

Later, the Court stated, "They've filed one late thing, and I've excused that, in this particular case, finding excusable neglect, because it didn't prejudice you." (*Id*. at p.32:26-28.)

Lastly, the Court concluded the hearing, directing Ms. Cornejo, counsel for RHRC:

> … what you could do is submit a proposed order to me by the 21st on all three motions. And that way, we can get it done on the 22nd regardless.
>
> And, basically, what I think it should say is, one, the Opposition to the Motion for New Trial is being considered. The Court… found that there was excusable neglect and that,,, Ms. Shah was not prejudiced given that it was still filed more than two weeks before the hearing and it normally needs to be filed within five days of the opposition, and did not find her reason that her person that she consulted was not available sufficient prejudice to overcome allowing the opposition, particularly in light of the fact that she filed no replies… for any of the motions, even the other two where the oppositions were timely filed.

(November 17, 2023 hearing transcript, p.42:8-23.)

On November 21, 2023, the Court filed its formal order denying the motions, stating:

> Respondent argues that the Court should not consider Petitioner's opposition, as it was filed late. Petitioner does not contest that it was timely, but asks this court to consider its opposition claiming excusable neglect. The Court finds that

> there was excusable neglect and Respondent was not prejudiced given that the Opposition was filed more than two (2) weeks before the hearing on this matter. Respondent argued that she was prejudiced because the person that she consults on the case was not available during the time should would have been required to file a reply. The Court finds that this does not constitute sufficient prejudice to overcome allowing the opposition. Respondent represents herself and she does not claim not to have been available. Moreover, Respondent failed to submit a reply in support of any of the three motions currently before the Court, despite Petitioner filing timely oppositions in the case of the other two motions, suggesting that Respondent would not have filed a response regardless of the availability of her alleged consultant. Finally, there is a strong policy favoring deciding cases on their merits. See *Kapitanski v. Von's Grocery Co*. (1983) 146 Cal.App.3d 29, 32. For these reasons, Petitioner's Opposition is considered by the Court.

(November 21, 2023 order denying respondent Dipali Shah's motion for new trial, motion for reconsideration, and motion to set aside judgment, pp.1:27-28, 2:1-13.)

The Court denied the motion for new trial. (*Id*. at p.4:8 (stating "Respondent's Motion for New Trial is DENIED").)

Shah now moves to strike RHRC's October 31, 2023 opposition to her motions.

SHAH'S MOTION TO STRIKE RHRC'S OPPOSITION TO SHAH'S MOTIONS

Shah contends that RHRC's opposition to her motions were tardy and the Court's discretion to allow additional time is limited to 10 days. (Shah's memorandum of points and authorities in support of motion to strike opposition ("Shah's memo"), p.4:5-6.) Shah asserts that she was prejudiced because she "do[es] not have an attorney… [and] need[s] time to go the law library to conduct research and that late filing hampered my ability to respond effectively and adds an undue burden…." (*Id*. at p.4:11-17.) Shah also argues that while the SCCBA award stated that she paid $78.250.74, she has actually paid $112,000. (*Id*. at pp.5:24-28, 6:1-12.) Acknowledging the Court's discretion, Shah "requests the Court exercise its discretion and Strike the entire untimely Opposition Response made by Plaintiff on October 31, 2023…." (*Id*. at p.7:1-3.)

In opposition, RHRC argues that the motion to strike RHRC's opposition to Shah's motion for new trial: is moot since the motion for new trial was already decided; and, should also be denied because RHRC has demonstrated excusable neglect.

Here, RHRC is correct. Shah does not merely seek to strike the opposition to her motion for new trial, she seeks to "grant my Motion for New Trial, Vacate and enter a different judgment, and a award for Monetary Sanctions at an amount yet to be determined as requested." (Shah's memo, p.7:5-7.) However, a motion to strike does not accomplish those things. Instead, it appears that Shah seeks to reconsider the November 21, 2023 order denying the motion for a new trial; however, her motion to strike does not fulfill the requirements of a

motion for reconsideration as Shah fails to include an affidavit stating what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown. (See Code Civ. Proc. § 1008.) The striking of an opposition to a motion that has already been ruled upon does not set aside the order denying the motion. The motion to strike the opposition to the motion for new trial is moot.

Further, the statutory 10-day period of Code of Civil Procedure section 650a regarding motions for new trial is not jurisdictional. (See *Fredrics v. Paige* (1994) 29 Cal.App.4th 1642, 1648 (finding "no abuse of discretion by the trial court in considering respondent's counterdeclarations" despite appellant's argument that "the trial court should not have considered respondent's counterdeclarations because they were filed beyond the statutory 10-day period… [because t]he 10-day period is not jurisdictional'); see also *Kabran v. Sharp Memorial Hospital* (2017) 2 Cal.5th 330, 347 (California Supreme Court stating that "[i]n light of section 659a's purposes as well as the presumption against depriving courts of jurisdiction and the absence of explicit language in section 659a doing so, we conclude that the 30-day aggregate period for the submission of affidavits is not jurisdictional").) Thus, even if the motion to strike the opposition to the motion for new trial was not moot, the Court still had discretion to consider the late-filed opposition, exercised its discretion in previously considering the opposition as stated in its November 21, 2023 order, and likewise exercises its discretion here in not striking the opposition to the motion for new trial for the same reasons.

Accordingly, Shah's motion to strike RHRC's opposition to Shah's motion for new trial is DENIED.

The Court will prepare the Order.

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Calendar line 4
Case Name: *Moses v. Hyatt Corporation, et al.* (and related cross-actions)
Case No.: 21CV381458

I. Factual and Procedural Background

This is an action for negligence and premises liability, among other things, arising from injuries plaintiff Tori Moses ("Plaintiff") sustained while a guest at the Hyatt Centric Mountain View Hotel ("Hotel"). (Fourth Amended Complaint ("4AC"), ¶ 1.) Plaintiff alleges claims against several defendants, including Palmetto Hospitality of Mountain View LLC ("Palmetto"), Oto Development, LLC ("Oto"), Lusardi Construction Company ("Lusardi"), Simmons Glass and Window, Inc. ("Simmons") and Hyatt Corporation ("Hyatt"). (*Id.* at ¶¶ 1, 11-14.)

Plaintiff alleges that on August 7, 2020, while using the shower in her hotel room, the shower door exploded onto her, causing severe bodily injuries and other damages. (4AC, ¶ 1.) According to Plaintiff, the named defendants are responsible for her injuries, including by failing to comply with safety standards and exercise ordinary care with respect to the shower door that caused her injuries. (*Id.* at ¶¶ 34-54.)

Defendant/cross-complainant Hyatt filed a first amended cross-complaint ("FAXC") against Lusardi and Simmons asserting the following claims:

1) Equitable Indemnity [against Lusardi and Simmons];
2) Implied Indemnity [against Lusardi and Simmons];
3) Contribution [against Lusardi and Simmons];
4) Total Indemnity [against Lusardi and Simmons];
5) Declaratory Relief [against Lusardi and Simmons]; and
6) Breach of Contract [against Lusardi].

On March 15, 2016, Hyatt and Palmetto entered into a Technical Service Agreement (or "TSA") where the parties agreed Hyatt would serve as a consultant to Palmetto. (UMF Nos. 1-3.) On May 24, 2016, Lusardi entered into a contract with Palmetto ("Lusardi-Palmetto Agreement") where Lusardi agreed to act as general contractor for the construction of the Hotel. (UMF No. 1.) Pursuant to this agreement, Lusardi agreed to construct the Hotel and indemnify and defend Palmetto and it's consultants, among others. (UMF No. 14.)

On June 2, 2021, following Plaintiff's allegations of injuries resulting from the shattering of her glass shower door at the Hotel, which was supplied and installed by Simmons, Lusardi's subcontractor, Hyatt tendered its defense and indemnity to Palmetto, which was accepted. (UMF No. 15.) Lusardi accepted the tender of Palmetto and Oto. (UMF No. 16.)

On October 24, 2022, Hyatt filed its cross-complaint and on April 28, 2023, it tendered its defense and indemnity to Lusardi requesting Lusardi immediately defend Hyatt against Plaintiff's claims. (UMF Nos. 17, 18, 19.) Hyatt amended its pleading on September 6, 2023 (UMF No. 20.) To date, Lusardi has neglected to accept Hyatt's tender of defense. (UMF No. 21.)

II. Motion for Summary Adjudication

Hyatt moves for summary adjudication of the FAXC's second, fifth, and sixth causes of action on the ground Lusardi owes Hyatt a duty to defend in the underlying action.

a. Legal Standard

A motion for summary judgment "shall be granted if all the papers submitted show that there is no triable issue of material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).)

The "party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact[.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).)

If the moving party makes the necessary initial showing, the burden of production shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. (*Aguilar*, *supra*, 25 Cal.4th at p. 850.) "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." (*Ibid.*) "[I]f the court concludes that the [opposing party's] evidence or inferences raise a triable issue of material fact, it must conclude its consideration and deny the [moving party's] motion." (*Id.* at p. 856.)

Throughout the process, the trial court "must consider all of the evidence and all of the inferences reasonably drawn therefrom[.]" (*Aguilar*, *supra*, 25 Cal.4th at p. 844 [internal quotations omitted].) The moving party's evidence is strictly construed, while the opposing party's evidence is liberally construed. (*Id.* at p. 843.)

Furthermore, "a motion for summary adjudication may be made … as an alternative to a motion for summary judgment and shall proceed in all procedural respects as a motion for summary judgment." (Code Civ. Proc., § 437c, subd. (f)(2).) "A party may seek summary adjudication on whether the cause of action, affirmative defense or punitive damages claim has merit or whether a defendant owed a duty to a plaintiff." (*California Bank & Trust v. Lawlor* (2013) 222 Cal.App.4th 625, 630; Code Civ. Proc., § 437c, subd. (f)(1).)

b. Indemnity Agreements and Duty to Defend Generally

"The existence and scope of duty are legal questions for the court." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 477.)

"Parties to a contract, including a construction contract, may define their duties toward one another in the event of a third party claim against one or both arising out of their relationship." (*Crawford v. Weather Shield Mtf. Inc.* (2008) 44 Cal.4th 541, 551 (*Crawford*), citing Civ. Code, § 2772.) "They may also assign one party, pursuant to the contract's language, responsibility for the other's legal defense when a third party claim is made against the latter." (*Ibid*.) "The person indemnifying is bound, on request of the person indemnified, to defend actions or proceedings brought against the latter in respect to the matters embraced by the indemnity, but the person indemnified has the right to conduct such defenses, if he chooses to do so[.]" (Civ. Code, § 2778, subd. (4).) "[T]he duty to defend upon the indemnitee's request, as set forth in subdivision 4 of section 2778, *is* distinct from, and broader than, the duty expressed in subdivision 3 of the statute to reimburse an indemnitee's defense costs as part of any indemnity otherwise owed." (*Crawford*, *supra*, 44 Cal.4th at p. 564 [emphasis original].)

c. Lusardi's Evidentiary Objections

In support of its opposition, Lusardi objects to Exhibit 2 and Exhibit 3 of Hyatt's Alberto Declaration.

Exhibit 2 is the Technical Service Agreement between Hyatt and Palmetto. Lusardi objects on the grounds of lack of authentication; lack of personal knowledge; and lack of foundation. Lusardi proffers the exact same Technical Service Agreement that it objects to. Thus, the objections to Ex. 2 are OVERRULED.

Exhibit 4 is the June 2, 2021 Tender of Defense Letter sent by Hyatt. Lusardi objects on the grounds of lack of foundation, lack of personal knowledge, and lack of authentication. Lusardi's objections lack merit and therefore the objections to Ex. 4 are OVERRULED.

d. Hyatt's Burden

Hyatt seeks summary adjudication of its second, fifth, and sixth causes of action with respect to Lusardi's contractual duty to defend Hyatt against Plaintiff's underlying claims.

Hyatt asserts it executed a Technical Services Agreement with Palmetto in which the parties agree at section 5.1 that Hyatt is functioning as a consultant to Palmetto. (See Memo, p. 2:22-23; Hyatt UMF No. 2 [citing Alberto Decl., Ex. 2]; No. 3 [citing same].)

Section 5.1 of the Technical Services Agreement states, in relevant part:

> 5.1 Owner Retention of Consultants. [. . .]
>
> [. . .]
>
> Hyatt shall not be liable for any errors or omissions in the plans and specifications or designs for the Hotel, or for any misfeasance or malfeasance by any specialists or consultant retained by Owner, whether or not upon recommendation of Hyatt, or for any defects in design, manufacture or construction . . ., or for any operational deficiencies in the design or construction of the Hotel . . . it being the intention of the parties that in rendering its Technical Services and assistance to Owner, Hyatt shall be functioning solely as a consultant[.]

Hyatt further contends that Lusardi contractually agreed to provide a defense to Hyatt for claims against Hyatt resulting from Lusardi's work. (Memo, p. 6:15-16.) To support this, Hyatt proffers evidence of a contract between Palmetto and Lusardi wherein Lusardi agreed to defend Palmetto's consultants against any claims resulting from Lusardi's work or the work of its subcontractors. (Hyatt UMF, No. 1 [citing Alberto Decl., Ex. 1; No. 14 [citing same].)

The relevant portion of the Lusardi-Palmetto Agreement states:

> To the fullest extent permitted by applicable law, Contractor [Lusardi] agrees to indemnify, defend and hold harmless Owner, Owner's Representative, Owner's Lender, Owner's Licensor, and MGP and each of the aforementioned parties' respective affiliated companies (if designated in writing), partners, successors, assigns, heirs, legal representatives, devises, officers, directors, shareholders, employees, ***consultants*** and agents, now existing or which may hereafter exist, . . . for, from and against all claims, demands, causes of action, proceedings, suits, damages, liabilities, losses . . . judgments, and reasonable

> expenses of any kind or nature . . . including, but not limited to, any and all claims, demands, causes of action, proceedings or suits for bodily injury, . . . directly or indirectly arising out of, or caused by, resulting from[:]
>
> 1) Work performed by Lusardi or its subcontractors;
> 2) Lusardi's breach of the contract; or
> 3) Any act or omission by Lusardi or its subcontractors or its employees.

(Alberto Decl., Ex. 1, pp. 27-28, § 8.12.)

Hyatt further asserts that the duty to defend was triggered when Plaintiff filed her action against Lusardi, among other defendants, for the work its subcontractor did which resulted in Plaintiff's bodily injuries. (See UMF Nos. 11-13, 15 [citing Alberto Decl., Exs. 3 and 4].) Therefore, Lusardi is obligated to defend Hyatt. (See Memo, p. 6:19-24.)

Here, the terms of the Technical Service Agreement between Hyatt and Palmetto indicate the agreement terminates no later than December 31, 2018. (See Alberto Decl., Ex. 2, p. 4, § 4.1 ["Term."].) Thus, without evidence of an agreement extension, after December 31, 2018, Hyatt no longer served as a consultant to Palmetto. Plaintiff alleges her injury occurred at approximately 10:00 PM on August 7, 2020. (See Hyatt's UMF, Nos. 3-4 [citing 4AC, ¶¶ 20, 26, 27.].) At the date of the injury, Hyatt was no longer a "consultant" under the TSA, and therefore does not fall under the categories listed in the Lusardi-Palmetto Agreement. (See e.g., *Fire Ins. Exchange v. Abbott* (1988) 204 Cal.App.3d 1012, 1029 ["'where there is no possibility of coverage, there is no duty to defend'"]; *Michaelian v. State Comp. Ins. Fund* (1996) 50 Cal.App.4th 1093, 1106 [determining "whether the insurer owes a duty to defend is usually made in the first instance by comparing the allegations of the complaint with the terms of the policy"].) Hyatt provides no further evidence that it falls under a different category under the Lusardi-Palmetto agreement. Based on the foregoing, Hyatt has failed to meet its initial prima facie burden of showing the existence of a valid written agreement to impose a duty to defend on Lusardi. However, even if Hyatt had met its burden, Lusardi proffered evidence that no relationship exists between Palmetto and Hyatt and that there was a contractual relationship during the design phase of the hotel but that relationship "ceased" and further, that Hyatt does not have a contractual relationship with Oto, Lusardi, or Simmons. (See Lusardi UMF Nos. 8, 9, 10; Burden Decl., Ex. C, PMK Deposition, pp. 30:16-20; 32:6-10; 32:19-33:2.)

Accordingly, the motion for summary adjudication as to the issue of Lusardi's duty to defend Hyatt is DENIED.

III. Conclusion and Order

The motion for summary adjudication is DENIED. The Court shall prepare the final Order.

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Calendar Lines 5 and 6

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Calendar line 10
Case Name: Leal & Trejo v. Alum Rock Union Elementary School District
Case No.: 19CV356647

Plaintiff, Leal and Trejo, is suing Defendant Alum Rock Union Elementary School District (the District) for unpaid legal fees, as Plaintiff was its general counsel between February 2018 and December 2018. Plaintiff now brings a motion to disqualify defense counsel Rogelio Ruiz based on Cal. Rule of Professional Conduct 3.7 which states:

> (a) A lawyer shall not act as an advocate in a trial in which the lawyer is likely to be a witness unless:
>
> (1) the lawyer's testimony relates to an uncontested issue or matter;
>
> (2) the lawyer's testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) the lawyer has obtained informed written consent* from the client. . .
>
> (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm* is likely to be called as a witness unless precluded from doing so by rule 1.7 or rule 1.9.

Plaintiff claims that because Mr. Ruiz, who has been counsel in this case over four years, conducted the investigation into the Plaintiff's billing of Alum Rock, he will be a witness at trial, and thus cannot represent Defendant under the advocate-witness rule of Rule 3.7.

Plaintiff's evidentiary objectives are overruled.

Plaintiff claims that Ruiz is a "necessary, material" witness in this case. The Court fails to see how this is the case. Mr. Ruiz was not a percipient to any of the factual questions at issue and he has no personal knowledge of them. Plaintiff claims that it is "entitled to know from the investigator what the Alum Rock employees informed the investigator." (Mot. P6). But this is not actually true. The investigator's statements as to what he was told is inadmissible hearsay. Accordingly, Plaintiff fails to present argument demonstrating that Mr. Ruiz would be a necessary or material witness requiring his disqualification.

It is also worth noting that Plaintiff nowhere actually states that it intends to call Mr. Ruiz, but instead only states that it told Mr. Ruiz that it "believed" it would call him. See Decl. of Tafoya in Reply, para. 19. Even to the extent that Mr. Ruiz would be asked to testify about his investigation (perhaps to impeach a witness), it is hard to see how the fact-finder would be confused as to whether he was testifying as to proof or analysis of proof. In fact, the testimony of Mr. Ruiz would seem only to benefit Plaintiff who could argue Mr. Ruiz's clear bias in being both investigator and lawyer.

Finally, Defendant would be greatly prejudiced by the granting of the motion given that Mr. Ruiz has been involved in this litigation for more than four years, couple with defendant's strong interest in counsel of its choice and avoiding the duplicate expense and time-consuming effort involved in replacing counsel a more month before trial.

The motion is denied.

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Calendar line 11

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Calendar lines 12 and 13
Case Name: Stan Habr et al v Avalon Transportation et al
Case No.: 22CV394810

Scope of stay

Defendant Russ Riddle brings a motion asking this court to confirm that the matter is stayed in its entirety due to the Tenney Defendants' appeal of the order denying their motion to compel arbitration.

Under Code of Civil Procedure § 916, "the perfecting of an appeal stays proceedings in the trial court upon . . . the matters embraced [in the order appealed from] or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order." The question is therefore whether the order denying the Tenney defendants' motion to compel arbitration embraces or affects the instant motion for good faith settlement between Plaintiffs and the Avalon defendants.

Defendant Riddle claims that the Tenney Defendants' appeal of the order denying their motion to compel arbitration stays the entire case, citing *Varian Med. Systems, Inc. v. Delfino* (2005) 35 Cal. 4th 180, 186. It is clear from rule § 916 and from the *Varian* opinion itself, discussing various times when there is an exception to the stay, that an appeal of the order does not stay matters not affected by that order. See also *Hedwall v. PCMV, LLC* (2018) 22 Cal. App. 5th 564, 580, fn 11 ("the automatic stay does not suspend trial court proceedings on the remaining components of the litigation, for example, claims against other parties . . . not resolved by the . . .order under appeal"). The question, therefore, is whether the appeal of the denial of motion to compel affects or is affected by a good faith settlement determination between plaintiff and other defendants.

The Court fails to see how the motion for good faith settlement affects the arbitrability of the claims against the Tenney Defendants. This is particularly so given that the only claim being made in opposition to the settlement is one of collusion, and one having nothing to do with the possible comparative liability of the defendants or the amount of the settlement. Because the settlement between Plaintiffs and the Avalon Defendants is not affected by the order being appealed, the matter now before the court is not stayed.

The Court declines to express any further opinion as the scope of the stay.

Good Faith Settlement

The Avalon Defendants bring a motion for a good faith settlement determination, pursuant to Code of Civil Procedure §877.6. Defendant Riddle opposes the motion on the basis that the settlement is the product of collusion.

Code of Civil Procedure § 877.6 states in relevant part that "any party to an action in which it is alleged that two or more parties are joint tortfeasors or co-obligors on a contract debt shall be entitled to a hearing on the issue of the good faith of a settlement entered into by

the plaintiff or other claimant and one or more alleged tortfeasors or co-obligors . . .” Where the settlement is contested, the settling defendant must first make a sufficient showing that the settlement is in good faith. *City of Gran Terrace v. Sup. Ct.* (1987) 192 Cal.App.3d 1251, 1261. In determining good faith the court considers a number of factors as laid out in *Tech-Bilt, Inc. v. Woodward-Clyde Assocs*. (1985) 38 Cal.3d 488. As explained in *Tech-Bilt,* the court should consider the plaintiff’s likely total recovery, the settlor's proportionate liability, the amount paid in settlement, the allocation of settlement proceeds among plaintiffs, the financial condition of settling defendants, as well as the existence of collusion, fraud or tortious conduct aimed to injure the interests of nonsettling defendants. *Tech-Bilt*, 192 Cal.App.3d at 499. The party asserting the lack of good faith has the burden of proof on that issue (§ 877.6, subd. (d)).

Here, Defendant Riddle does not contest any part of the settlement other than that the parties colluded. It is therefore not necessary to address any issue other than that. In support of its claim of collusion, Defendant Riddle presents the affidavit of Nicholas Begakis. Even assuming that the declaration is admissible, which the Avalon Defendants contest, it is insufficient to support a showing of collusion. The claim of collusion is based on the fact that the mediator spent less than 20 minutes speaking with Riddle and his attorney, that the mediator’s conversations with Riddle and his attorney consisted primarily of updates regarding the status of Plaintiffs negotiations with the Avalon Defendants, and the fact that Plaintiffs did not make any offers of settlement or counter Riddle’s offer. Even assuming these facts are true, the claim of collusion is nothing more than rank speculation.

Defendant Riddle also claims that he is entitled to discovery to determine whether there has been collusion, citing *City of Grand Terrace v. Superior Court* (1987) 192 Cal.App.3d 1251, 1265. Yet, Riddle has not in fact asked for a continuance of the motion to allow for discovery, as indicated as the proper procedure in *City of Grand Terrace*. Rather, he asks that the motion be denied. Opp. p7. Even if the opposition could itself be construed as a motion for continuance, which it is not, Riddle fails to state what discovery he might need or how it might show collusion. Given that his basis for claiming collusion is rank speculation and he presents nothing to suggest there is discoverable evidence which would support his claim, his motion opposing the good faith settlement is DENIED.

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