SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 10
Honorable Frederick S. Chung

Rachel Tien, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408-882-2210

DATE: September 17, 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.

The courthouse is open: Department 10 is now fully open for in-person hearings, as of April 18, 2023. The court strongly prefers **in-person** appearances for all contested law-and-motion matters. For all other hearings (*e.g.*, case management conferences), the court strongly prefers either **in-person or video** appearances. 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.

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.

CourtCall is no longer available: Department 10 uses Microsoft Teams for remote hearings. Please click on this link if you need to appear remotely, and then scroll down to click the link for Department 10: https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml. Again, the court strongly prefers in-person or video appearances. Telephonic appearances are a sub-optimal relic of a bygone era.

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.

Court reporters: Unfortunately, the court is no longer able to provide official court reporters for civil proceedings (as of July 24, 2017). If any party wishes to have a court reporter, the appropriate form must be submitted. See https://www.scscourt.org/general_info/court_reporters.shtml.

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	2015-1-CV-278449	Kathleen Hull v. W. John Nicholson	Order of examination: parties to appear.
LINE 2	23CV425297	S.J. Bayshore Development, LLC v. The Province, LLC et al.	Per the court's September 12, 2024 order, this case has been reassigned to Department 7 (along with related cases). Please check with Department 7 for the hearing.
LINE 3	23CV425297	S.J. Bayshore Development, LLC v. The Province, LLC et al.	Per the court's September 12, 2024 order, this case has been reassigned to Department 7 (along with related cases). Please check with Department 7 for the hearing.
LINE 4	23CV425297	S.J. Bayshore Development, LLC v. The Province, LLC et al.	Per the court's September 12, 2024 order, this case has been reassigned to Department 7 (along with related cases). Please check with Department 7 for the hearing.
LINE 5	24CV428585	Christopher Tripp et al. v. Norman P. Woods, M.D. et al.	Click on LINE 5 or scroll down for ruling.
LINE 6	24CV437659	Angelita Mia Canales v. David Cava et al.	Click on LINE 6 or scroll down for ruling.
LINE 7	22CV408643	Janet Kim v. Francis Lee et al.	Click on LINE 7 or scroll down for ruling in lines 7-13.
LINE 8	22CV408643	Janet Kim v. Francis Lee et al.	Click on LINE 7 or scroll down for ruling in lines 7-13.
LINE 9	22CV408643	Janet Kim v. Francis Lee et al.	Click on LINE 7 or scroll down for ruling in lines 7-13.
LINE 10	22CV408643	Janet Kim v. Francis Lee et al.	Click on LINE 7 or scroll down for ruling in lines 7-13.

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LINE #	CASE #	CASE TITLE	RULING
LINE 11	22CV408643	Janet Kim v. Francis Lee et al.	Click on LINE 7 or scroll down for ruling in lines 7-13.
LINE 12	22CV408643	Janet Kim v. Francis Lee et al.	Click on LINE 7 or scroll down for ruling in lines 7-13.
LINE 13	22CV408643	Janet Kim v. Francis Lee et al.	Click on LINE 7 or scroll down for ruling in lines 7-13.
LINE 14	23CV419811	Raymond R. Hartwig v. Motor Body Company, Inc.	OFF CALENDAR
LINE 15	23CV421587	Weiting Zhan v. Rui Tang	Click on LINE 15 or scroll down for ruling.
LINE 16	24CV429453	Chahal Services, LLC v. Vanams Corporation	Click on LINE 16 or scroll down for ruling.

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Calendar Line 5
Case Name: *Christopher Tripp et al. v. Norman P. Woods, M.D. et al.*
Case No.: 24CV428585

Plaintiffs Christopher Tripp ("Tripp") and Adriana Tripp (together, "Plaintiffs") filed this professional negligence action against defendants Norman P. Woods, Bonita Springs Hospice Care LLC, Diane McReery, Wendy Moshir Fatemi, Majestic Hospice & Home Health LLC, Hospice Preferred Choice, Inc. d/b/a Aseracare Hospice – Fresno, Navdeep Gill, Adventist Health Medical Office – Oakhurst, James Piche, Quality Palliative Care, Kevin Violette, Cathy Campbell, and Nancy Momanyi (collectively, "Defendants"), based on Tripp's alleged misdiagnosis and overprescription during hospice care. Bonita Springs Hospice Care, LLC, Fatemi, and Momanyi (collectively, the "Bonita Defendants") now demur to the second, fourth, and fifth causes of action in the first amended complaint ("FAC").

I. BACKGROUND

According to the FAC, on or about May 29, 2022, Tripp presented to defendant Adventist Health Medical Office – Oakhurst ("Adventist") with symptoms of shortness of breath. Defendant Kevin Violette diagnosed Tripp with interstitial pulmonary disease. (FAC, ¶ 21.) Tripp "was told" that the lung disease was terminal, and he "was referred to hospice care." (*Ibid*.)[1] Between April 2022 and November 2022, Tripp "[was] transferred between four different hospice care facilities": defendants Quality Palliative Care, Inc., Majestic Hospice & Home Health, LLC, AseraCare Hospice, and Bonita Springs Hospice Care ("Bonita"). (*Id.* at ¶ 23.) During the eight months that Defendants and their agents/employees undertook to care and treat Tripp, they allegedly prescribed and administered inappropriate and dangerous amounts of narcotic medications to him, including fentanyl and morphine. (*Id.* at ¶ 24.) On October 4, 2022, defendant Norman Woods recertified Tripp for hospice care, but unbeknownst to Plaintiffs, the primary terminal diagnosis changed from interstitial pulmonary disease to malignant neoplasm of the pancreas. (*Id.* at ¶ 25.) On the day before Thanksgiving 2022, Tripp's hospice care at Bonita Springs "was suddenly terminated . . . without any transfer arrangements." (*Id.* at ¶ 26.) In late November 2022, he "was taken" to an Emergency Department and "was advised" he did not have any terminal illnesses. (*Id.* at ¶ 27.) Tripp received "a clean bill of health in December 2022." (*Id.* at ¶ 28.) It then allegedly took him six more months to be weaned off the dangerous narcotics he had been prescribed. (*Ibid*.)

Plaintiffs filed their original complaint on July 28, 2023. They filed their FAC on May 23, 2024, alleging causes of action for: (1) professional negligence; (2) violation of the elder abuse and dependent adult civil protection act; (3) willful misconduct/recklessness; (4) intentional infliction of emotional distress; (5) negligent infliction of emotional distress; and (6) loss of consortium.

[1] Written to a large extent with the passive voice, the FAC is not clear as to whether Violette was the one who told Tripp that his disease was terminal and made the referral to hospice, or whether it was someone else at Adventist.

II. DEMURRER

A. General Legal Standard

As relevant to the instant case, "[t]he party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on any one or more of the following grounds: . . . [t]he pleading does not state facts sufficient to constitute a cause of action." (Code Civ. Proc., § 430.10, subd. (e).) A demurrer may be brought by "[t]he party against whom a complaint [ ] has been filed" to object to the legal sufficiency of the pleading as a whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).)

The court, in ruling on a demurrer, treats it "as admitting all properly pleaded material facts, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. [Citation.] 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.' [Citation.]" (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214, superseded by statute on other grounds as stated in *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 227.)

B. Discussion

1. Second Cause of Action: Violation of the Elder Abuse and Dependent Adult Civil Protection Act

a) Whether Tripp is a Dependent Adult

The Bonita Defendants demur to the second cause of action[2] on the ground that Tripp has failed to plead sufficiently that he qualifies as an "elder" or "dependent adult" under California's Elder Abuse and Adult Civil Protection Act (the "Act"). (Memorandum of Points and Authorities in Support of Demurrer ("MPA"), pp. 4:7-7:6.)

The Act defines elder abuse or dependent adult abuse as either "(1) physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering; (2) the deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering." (Welf. & Inst. Code, § 15610.07, subd. (a).) "'Dependent adult' means a person, regardless of whether the person lives independently, between the ages of 18 and 64 years who resides in this state and who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age." (Welf. & Inst. Code, § 15610.23, subd. (a).) "Dependent adult" also "includes any

[2] The Bonita Defendants mislabel the elder/dependent abuse cause of action as the "first" cause of action in the demurrer but correctly refer to it as the "second" cause of action in the memorandum of points and authorities.

person between the ages of 18 and 64 years who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code." (Welf. & Inst. Code, § 15610.23, subd. (b).)

The Bonita Defendants argue that "Plaintiffs admit that defendants' diagnoses of Mr. Tripp were not reflective of any true condition from which he suffered or any medical reality." (MPA, p. 5:23-24.) As such, the Bonita Defendants contend that Tripp does not plead, and cannot plead, that he suffered from any actual physical or mental limitations that restricted his ability to carry out normal activities or to protect his rights. (*Id.* at p. 5:13-22.) Given this, "there can be no dispute that the allegations [in the FAC], of an incorrect diagnoses of terminal lung or pancreatic diseases which never truly existed because Mr. Tripp was never actually sick, are plainly insufficient to qualify Mr. Tripp as a 'dependent adult.'" (*Id.* at p. 7:1-4.)

A cause of action for elder or dependent adult abuse is statutory and therefore must be pleaded with particularity. (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790 (*Covenant*).) Tripp alleges that Defendants prescribed and administered him inappropriate and dangerous amounts of narcotic medications. (FAC, ¶ 24.) These medications then rendered Mr. Tripp "incapacitated and confined to his home for eight months" with "little to no quality of life due to his narcotized state." (*Id.* at ¶¶ 24, 33.) After Tripp was "given a clean bill of health in December 2022," it took Tripp "over six months to be weaned off the dangerous narcotics and start to pull his life back together." (*Id.* at ¶ 28.) These are the only factual allegations Tripp identifies in opposition that establish that he suffered from a physical or mental limitation, such that he qualifies (or qualified) as a "dependent adult" under the Act. (Opposition, p. 5:3-22, citing FAC, ¶¶ 1, 24, 28, 33, 42, 48.) The FAC otherwise summarily alleges Tripp's status as a dependent adult, claiming, for example, that "Defendants further owed a special duty of care to Mr. Tripp, who was a vulnerable, incapacitated person unable to care for himself independently." (FAC, ¶ 48.)

The court agrees with the Bonita Defendants and finds that Tripp has not sufficiently pled that he is an elder or dependent adult under the Act. The FAC states only that Tripp was "incapacitated," but not exactly *how* he was "incapacitated" or the specific physical or mental limitations that he experienced. The term "incapacitated" is simply too vague on its own. The FAC includes no facts or details alleging that Tripp was unable "to carry out normal activities or to protect his . . . rights." Instead, as noted, it merely conclusorily pleads that he is a dependent adult. In addition, Tripp does not plead his age, so there is no basis upon which to conclude that he is an "elder."

At the same time, the court is not persuaded by the Bonita Defendants' contention that Tripp's allegations that he was misdiagnosed and overprescribed narcotics render his elder and dependent adult abuse cause of action entirely void. While Tripp may not have had either interstitial pulmonary disease or malignant neoplasm of the pancreas, his allegations concerning "incapacitation" as a result of a misdiagnosis and narcotics overprescription suggest circumstances that *potentially* give rise to a cause of action for dependent adult abuse. Further, to the extent that the Bonita Defendants' rely on *Cabral v. County of Glenn* (E.D. Cal. 2009) 624 F.Supp.2d 1184, 1195, to argue that the court should not grant leave to amend (MPA, p. 6:7-21), the court notes that the federal district court in *Cabral* did grant the plaintiff leave to amend.

b) Whether the Bonita Defendants had Custodial Care of Tripp

The Bonita Defendants also demur to the second cause of action on the ground that they do not qualify as "care custodians" under the Act. (MPA, pp. 7:7-9:18.)

Welfare and Institutions Code section 15610.17 provides: "'Care custodian' means an administrator or an employee of any of the following public or private facilities or agencies, or persons providing care or services for elders or dependent adults, including members of the support staff and maintenance staff: (a) Twenty-four-hour health facilities, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code; (b) Clinics; (c) Home health agencies . . . (y) Any other protective, public, sectarian, mental health, or private assistance or advocacy agency or person providing health services or social services to elders or dependent adults." (Welf. & Inst. Code, § 15610.17.)

A plaintiff may succeed on a cause of action under the Act only where there is "the existence of a robust caretaking or custodial relationship – that is, a relationship where a certain party has assumed a significant measure of responsibility for attending to one or more of an elder's basic needs that an able-bodied and fully competent adult would ordinarily be capable of managing without assistance." (*Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 158 (*Winn*) [finding the defendant medical group did not assume custodial care over decedent because "[n]o allegations in the complaint support an inference that Mrs. Cox relied on defendants in any way distinct from an able-bodied and fully competent adult's reliance on the advice and care of his or her medical providers."].) This means that "the distinctive relationship contemplated by the Act entails more than casual or limited interactions." (*Ibid*.) In determining whether such a relationship exists, "the focus . . . is on the nature and substance of the relationship between an individual and an elder or a dependent adult." (*Ibid*; see also *Covenant, supra,* 32 Cal.4th at p. 786 ["That is, claims under the Elder Abuse Act are not brought against health care providers in their capacity as providers but, rather, against custodians and caregivers that abuse elders and that may or may not, incidentally, also be health care providers. Statutorily, as well as in common parlance, the function of a health care provider is distinct from that of an elder custodian . . ."].)

Tripp argues that both "health practitioners" and "care custodians – should be charged with responsibility for the health, safety, and welfare of dependent adults." (Opposition, p. 6:23-26, citing *Mack v. Soung* (2000) 80 Cal.App.4th 966 (*Mack*).) The Bonita Defendants argue that a party cannot hold hospice care providers liable under the Act because Welfare and Institutions Code section 15610.17 does not list "hospice" care providers. (MPA, p. 7:7-9.) The court disagrees with the Bonita Defendants on this point. As quoted above, section 15610.17, subdivision (y), states that liability under the Act can be found against "[a]ny other protective, public, sectarian, mental health, or private assistance or advocacy agency or person providing health services or social services to elders or dependent adults." (Welf. & Inst. Code, § 15610.17, subd. (y).) Moreover, the Bonita Defendants point to no authority stating that a hospice provider cannot qualify as a care custodian. Instead, a party may hold a hospice care provider liable under the Act, provided the requirements outlined in *Winn, supra,* are met.

In this case, the court finds that the FAC, as currently pled, does not meet these requirements. As noted above, a cause of action for elder abuse is statutory and, therefore must be pleaded with particularity. (*Covenant, supra,* 32 Cal.4th at p. 790.) The FAC alleges that "between April 2022 and November 2022, Mr. Tripp transferred between four different

hospice care facilities. During that time, the Defendants and their agents and employees undertook to care for and treat [] Mr. Tripp." (FAC, ¶ 23.) "During the eight months that the Defendants and their agents and employees undertook to care and treat Mr. Tripp, they prescribed and administered inappropriate and dangerous amounts of narcotic medications to Mr. Tripp . . ." (*Id.* at ¶ 24.) This is the extent of allegations related to the actual care Tripp received while in hospice care. He summarily concludes: "Defendants, and each of them, had a substantial caretaking and custodial relationship with Mr. Tripp, with responsibility for his basic needs while he was under their care." (*Id.* at ¶ 41.) The FAC includes no facts to determine whether the alleged care Tripp received meets the requirements of *Winn—e.g.*, no facts stating whether Tripp resided at any of the hospice facilities, what services he received from any of the hospice facilities or care providers, what the frequency of visits from care providers to his home was, or what the frequency of his visits to any care facilities was. (MPA, p. 8:12-18.)[3]

For the foregoing reasons, the court SUSTAINS the Bonita Defendants' demurrer to the second cause of action with 30 days' leave to amend.

2. Fourth Cause of Action: Intentional Infliction of Emotional Distress

The Bonita Defendants demur to the fourth cause of action, intentional infliction of emotional distress, on the ground that Tripp has failed to allege either intent or sufficiently outrageous conduct. According to the Bonita Defendants, the FAC alleges "a misdiagnosis of Mr. Tripp's medical condition, and resultant treatment with narcotics that is now claimed to have been unnecessary . . . . Even assuming the truth of such claims, as must be done on demurrer, this falls well short of the very high threshold for an IIED claim. In particular, no facts are pled to show an intent to cause harm, or anything that is 'beyond the bounds of civilized society.'" (MPA, p. 10:11-17.)

"A cause of action for intentional infliction of emotional distress exists when there is '(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct.' A defendant's conduct is 'outrageous' when it is so 'extreme as to exceed all bounds of that usually tolerated in a civilized community.' And the defendant's conduct must be 'intended to inflict injury or engaged in with the realization that injury will result.' [¶] Liability for intentional infliction of emotional distress 'does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities . . . .' [¶] With respect to the requirement that the plaintiff show emotional distress, this court has set a high bar. 'Severe emotional distress' 'means emotional distress of such a substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to

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[3] Tripp relies on *Mack* to support his argument that he "was vulnerable and not in any position to seek treatment from another physician while he was in the care of the [Bonita Defendants]. Under these circumstances, a 'care custodian' relationship existed . . ." (Opposition, p. 7:3-7.) In *Winn*, the California Supreme Court disapproved of *Mack* "to the extent it finds claims of neglect under the Elder Abuse Act may be brought irrespective of a doctor's caretaking or custodial relationship with an elder patient." (*Winn, supra*, 63 Cal.4th at p. 164.) A party must plead a caretaking or custodial relationship, and the court finds the FAC fails to sufficiently plead such a relationship.

endure it.'" (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050-1051 (*Hughes*), internal quotations and citations omitted.)

"[I]t is 'not . . . enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.' [Citation.]" (*Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 496.)

"[M]any cases have dismissed intentional infliction of emotional distress cases on demurrer, concluding that the facts alleged do not amount to outrageous conduct as a matter of law. [Citations.]" (*Bock v. Hansen* (2014) 225 Cal.App.4th 215, 235.) "'[T]he trial court initially determines whether a defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery. Where reasonable men can differ, the jury determines whether the conduct has been extreme and outrageous to result in liability. Otherwise stated, the court determines whether severe emotional distress can be found; the jury determines whether on the evidence it has, in fact, existed. [Citation.]' [Citation.]" (*Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1614.)

The court agrees with the Bonita Defendants that if the FAC's allegations consisted only of a misdiagnosis and resultant treatment with narcotics, then the FAC's allegations would not rise to the level of extreme and outrageous conduct. (MPA, p. 10:17-18.) Framing the FAC in this manner, however, oversimplifies the FAC's allegations. The FAC alleges that Defendants prescribed narcotic medications in a deliberate effort to keep Tripp as a patient in hospice care by "rendering him incapacitated and confined to his home with little to no quality of life due to his narcotized state." (FAC, ¶¶ 23, 24.) As noted above, defendant Norman Woods, a doctor at Bonita, allegedly recertified Tripp for hospice care on October 4, 2022 and changed Tripp's diagnosis without telling him or his spouse. (*Id.* at ¶ 25.)

The FAC further alleges that "around" this time, Tripp's narcotic prescriptions started to increase "within a short period of time." (FAC, ¶ 26.) When Adriana Tripp questioned why the prescriptions increased, Bonita allegedly terminated Tripp's hospice care without any further arrangements. (*Ibid*.) The FAC alleges that Adriana Tripp "tried reaching out to someone at Bonita Springs to understand this termination of services, but no one would help." (*Ibid*.) After Bonita terminated Tripp's hospice care, he learned he did not have any terminal illnesses. (*Id.* at ¶ 28.) "As a direct and proximate result of Defendants' wrongful conduct, Mr. Tripp [alleges that he] has sustained injury to his health, appearance, strength and activity, loss of enjoyment of life, and strained relationships with his children, all of which injuries have caused and continue to cause great pain and suffering and severe emotional distress." (*Id.* at ¶ 29.)

With these additional details, the court finds that the FAC *still* does not sufficiently allege a cause of action for intentional infliction of emotional distress. The FAC does not specify what alleged conduct by each defendant constituted an intentional infliction of emotional distress. Nor does the FAC include any allegation that any of the Bonita Defendants, or any other defendant, actually knew of Tripp's misdiagnosis or that they knowingly overprescribed narcotics. While the FAC alleges that the narcotics Tripp received

"were not medically indicated" and "inappropriate," the FAC does not allege that any defendant actually knew that the narcotics were not medically indicated or were inappropriate. (FAC, ¶ 24.) Overprescription of narcotics based on a misdiagnosis, while clearly negligent, if true, does not give rise to sufficiently outrageous conduct that shocks the conscience, and so this is not sufficient to show that any defendant intended to cause severe emotional distress. (See *Christensen v. Superior Court* (1991) 54 Cal.3d 868, 906 ["Plaintiffs here have not alleged that the conduct of any of the defendants was directed primarily at them, was calculated to cause them severe emotional distress, or was done with knowledge of their presence and of a substantial certainty that they would suffer severe emotional injury. We conclude, therefore, that the model complaint does not establish that any of the plaintiffs has standing to sue for intentional infliction of emotional distress."].)

The court also finds that Tripp has failed to plead *severe* emotional distress with sufficient facts. "Severe emotional distress means ' "emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it." ' [Citations.]" (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1004 (*Potter*).) Tripp alleges that he has "sustained injury to his health, appearance, strength and activity, loss of enjoyment of life, and strained relationships with his children, all of which injuries have caused and continue to cause great pain and suffering and severe emotional distress." (FAC, ¶ 29.) These conclusory allegations fall short of what a party needs to plead to support this cause of action. (See *Hughes, supra,* 46 Cal.4th at p. 1051 [affirming Court of Appeal's grant of summary judgment on intentional infliction of emotional distress cause of action because plaintiff's assertion that she suffered "discomfort, worry, anxiety, upset stomach, concern, and agitation" did not constitute emotional distress such that no reasonable person in civilized society should be expected to endure it]; *Pitman v. City of Oakland* (1988) 197 Cal.App.3d 1037, 1047 [mere allegation that plaintiff suffered shame, humiliation and embarrassment without further factual explanation fails to state claim for intentional infliction of emotional distress].)

The court SUSTAINS the Bonita Defendants' demurrer to the fourth cause of action for a failure to plead sufficient facts. Although Plaintiffs fail to provide any explanation as to how this cause of action could be amended to cure this fundamental deficiency—and the court is skeptical that it can—the court will grant 30 days' leave to amend, given that this is the first pleading challenge in the ase.

3. Fifth Cause of Action: Negligent Infliction of Emotional Distress

The Bonita Defendants demur to the fifth cause of action on the ground that Tripp cannot bring causes of action for both negligence and negligent infliction of emotional distress ("NIED"), as a separate NIED cause of action "is surplusage." (MPA, pp. 10:24-11:4.) The Bonita Defendants also argue that Adriana Tripp fails to satisfy the requirements for an NIED cause of action under a "bystander" theory of liability. (*Id.* at pp. 11:6-15:4.)

"The law of negligent infliction of emotional distress in California is typically analyzed by reference to two 'theories' of recovery: the 'bystander' theory and the 'direct victim' theory. We have repeatedly recognized that the negligent causing of emotional distress is not an independent tort, but a tort of negligence. The traditional elements of duty, breach of duty, causation, and damages apply. Whether a defendant owes a duty of care is a question of law. Its existence depends upon the foreseeability of the risk and a weighing of policy

considerations for and against imposition of liability." (*Fluharty v. Fluharty* (1997) 59 Cal.App.4th 484, 490, internal citations and quotation marks omitted.)

a) Christopher Tripp's NIED Cause of Action

First, as to whether Tripp can bring separate causes of action for negligence and negligent infliction of emotional distress (MPA, pp. 10:24-11:4), the court concludes that he cannot. According to Tripp, the Bonita Defendants "have not cited any cases which state that a professional negligence cause of action cannot be concurrently pled with a[] [negligent infliction of emotional distress] claim" and "there are no cases that specifically state as much." (*Id.* at p. 10:14-17.) Tripp also argues that the FAC successfully pleads the damages element of a cause of action for medical negligence, and he suffered harm as a "direct victim." (Opposition, pp. 8:20-11:6.)

Tripp is incorrect that no case law exists on whether a party may plead an independent cause of action for negligent infliction of emotional distress. (See *Belen v. Ryan Seacrest Productions, LLC* (2021) 65 Cal.App.5th 1145, 1165 ["Belen alleged both negligence and negligent infliction of emotional distress as the last two causes of actions on her complaint. However, there is no independent tort of negligent infliction of emotional distress . . . the trial court neglected to strike the cause of action for negligent infliction of emotional distress. We modify the judgment in that respect and strike that cause of action because no such independent tort exists."].) As such, the demurrer on this ground is well taken.

Tripp cites *Burgess v. Superior Court* (1992) 2 Cal.4th 1064 (*Burgess*) and *Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.* (1989) 48 Cal.3d 583 (*Marlene*), and argues that these courts did not find that a separate negligence cause of action subsumed a NIED cause of action. (Opposition, p. 9:24-10:13.) The court does not find these decisions to be on point, as neither case involved, or analyzed, whether a party can bring two distinct causes of action for negligence and negligent infliction of emotional distress. Rather, the Court in *Burgess* addressed whether a mother could recover damages under an NIED cause of action when her child allegedly suffered an injury at the hands of a physician during childbirth. (See *Burgess, supra*, 2 Cal.4th at p. 1069.) Similarly, in *Marlene*, the Court merely addressed the question of whether parties could state a claim when they were neither "bystander witnesses nor the immediate objects of the tortious conduct." (*Marlene, supra,* 48 Cal.3d at p. 588.)

a) Adriana Tripp's NIED Cause of Action

As to Adriana Tripp, the Bonita Defendants argue that she fails to allege that she was a "bystander" to Tripp's injury, as the FAC includes "no allegation that she was aware of the alleged negligent care by Bonita Springs at the time it occurred." (MPA, p. 11:21-26.) Specifically, the Bonita Defendants note that Adriana Tripp did not become aware of the alleged negligence until after it occurred, as Tripp did not become a "victim" of negligence until Bonita terminated his hospice care and Tripp became aware of the alleged misdiagnosis. (*Id.* at p. 12:2-10.)

"A plaintiff may recover damages for emotional distress caused by observing the negligently inflicted injury to a third person if, but only if, said plaintiff: (1) is closely related to the injury victim; (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim; and (3) as a result suffers serious

emotional distress – a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances." (*Bird v. Saenz* (2002) 28 Cal.4th 910, 918 (*Bird*), quoting *Thing v. La Chusa* (1989) 48 Cal.3d 644, 667-668 (*Thing*).)

The court agrees with the Bonita Defendants. As Plaintiffs acknowledge in their opposition brief, "'*Thing* does not require that the plaintiff have an awareness of what caused the injury producing event, but the plaintiff must have an understanding perception of the "event as causing harm to the victim."' [Citation.]" (Opposition, p. 11:16-20, quoting *Fortman v. Forvaltningsbolaget Insulan AB* (2013) 212 Cal.App.4th 830, 841, fn. 4.) Here, Adriana Tripp could not have had an "understanding perception" of the harm arising from the alleged misdiagnosis and drug overprescription during Tripp's time in hospice care, given that the Tripps did not discover the misdiagnosis until after that care had ended. (See FAC, ¶ 27.)

The cases cited by Plaintiffs do not support their argument. (Opposition, p. 12:10-12, citing *Ochoa v. Superior Court* (1985) 39 Cal.3d 159 (*Ochoa*); *Ortiz v. HPM Corp.* (1991) 234 Cal.App.3d 178 (*Ortiz*).) In *Ochoa*, a mother "was aware of the fact that her child was in need of medical attention" and "to her knowledge the defendants had failed to provide the necessary care" when physicians ignored her requests that they address her deceased son's medical needs as he lay dying on a hospital bed. (*Ochoa, supra*, 39 Cal.3d at p. 170.) In *Ortiz*, a woman personally observed, and had awareness of, her husband's injury at the time it occurred, as an air cylinder in a plastic molding machine had pinned her husband against the machine, which in turn caused the husband to bleed, experience skin discoloration, and become deprived of oxygen. (*Ortiz, supra,* 234 Cal.App.3d at pp. 184-185.) The Court in *Ortiz* held that the bright-line rule in *Thing* "was [not] intended to deny recovery to a plaintiff who personally observes an injury-producing event in progress. The limitation, instead, excludes those plaintiffs who come upon the scene after the event, and whose observation is solely of the consequences of the occurrence. [Citation.]" (*Ortiz, supra,* 234 Cal.App.3d at p. 185.) Unlike the witnesses in *Ortiz* and *Ochoa*, Adriana Tripp is not alleged to have had awareness that the "injury-producing event"—in this case, the alleged misdiagnosis and prescription of narcotics—caused injury to her husband at the time these events occurred.

The court also agrees with the Bonita Defendants that the facts of *Bird* and *Thing, supra*, are more analogous to the present situation. (Reply, p. 10:4-14.) The Supreme Court in *Bird* held that the trial court properly granted summary judgment on plaintiffs' NIED cause of action because plaintiffs did not show that "they were aware of the [injury] at the time it occurred" or that "they were contemporaneously aware of any error in the subsequent diagnosis and treatment of that injury in the moments they saw their mother rolled through the hall by medical personnel." (*Bird, supra,* 28 Cal.4th at pp. 921-922.) In *Bird*, the Court found that "[t]he problem with defining the injury-producing event as defendants' failure to diagnose and treat the damaged artery is that plaintiffs could not meaningfully have perceived any such failure. Except in the most obvious cases, a misdiagnosis is beyond the awareness of lay bystanders." (*Id.* at p. 917 ["Here, what plaintiffs actually saw and heard was a call for a thoracic surgeon, a report of Nita suffering a possible stroke, Nita in distress being rushed by numerous medical personnel to another room, a report of Nita possibly having suffered a nicked artery or vein, a physician carrying units of blood and, finally, Nita still in distress being rushed to surgery."].) The Supreme Court in *Thing* held that a mother could not recover damages under a theory of negligent infliction of emotional distress when she did not witness the automobile at issue striking and injuring her child. (*Thing, supra,* 48 Cal.3d at p. 669.)

Both cases mirror the facts here: a party observed the consequences of an injury but did not have contemporaneous awareness of the injury itself.

Tripp argues that the "doctrine of equitable estoppel applies to Mrs. Tripp's NIED claims" because each "instance where Mr. Tripp was not evaluated before receiving ongoing medications represents a potential act of negligence." (Opposition, p. 12:13-15.) This "ongoing negligence may have actively prevented Mrs. Trupp from discovering the true facts about Mr. Tripp's condition." (*Id.* at p. 12:16-17.) The elements of equitable estoppel are "(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel has a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury. [Citation.]" (*Strong v. County of Santa Cruz* (1975) 15 Cal.3d 720, 725.)

In response, the Bonita Defendants argue that Tripp "sets forth no authorities in which the doctrine [of equitable estoppel] was applied to save a NIED claim, let alone as means to circumvent the critical contemporaneous awareness requirement set for in *Thing*." (Reply, p. 10, fn. 4). Moreover, the Bonita Defendants argue that the doctrine of equitable estoppel "comes into play only after the limitations period has run and addresses . . . the circumstances in which a party will be estopped from asserting the statute of limitations." (*Ibid.*, quoting *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 383 (*Lantzy*).)

It is unclear to the court how the doctrine of equitable estoppel could potentially apply. Plaintiffs appear to argue that the Bonita Defendants would be *estopped* from asserting that Adriana Tripp cannot bring an NIED cause of action because they concealed facts preventing her from discovering their negligence at the time. This argument is needlessly convoluted and appears to constitute an admission that Plaintiffs cannot properly plead the elements of NIED. First, if Plaintiffs have an equitable estoppel claim, they can bring that claim—but they cannot use it to mask the deficiencies in their NIED claim. Second, the court has already determined that there is no allegation in the FAC that the Bonita Defendants actually *knew* about the misdiagnosis or erroneous prescription of narcotics. To the extent that Plaintiffs allege that "the Bonita Springs Defendants intended that Mr. Tripp would continue to receive the medical care so that they could continue to bill Medicare for their financial gain"—this does not support the assertion of a *negligence* cause of action. Indeed, Plaintiffs appear to be mixing up two distinct and unrelated concepts: *deliberate* withholding of facts (under equitable estoppel) and *negligent* medical care (for NIED). The court rejects Plaintiffs effort to bootstrap a theory of equitable estoppel into their failure to allege a proper basis for NIED.

The court SUSTAINS the Bonita Defendants' demurrer to the fifth cause of action. A "[p]laintiff 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.) Plaintiffs have not shown that here, and the court cannot envision how they can, but because this is the first pleading challenge, the court grants 30 days' leave to amend.

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Calendar Line 6
Case Name: *Angelita Mia Canales v. David Cava et al.*
Case No.: 24CV437659

I. BACKGROUND

This is a lawsuit by plaintiff Angelita Canales ("Canales") against defendants Central Refrigeration Company, David Cava, and Miguel Alcantara, along with various Does, arising from an automobile accident that occurred on May 18, 2022, wherein Canales was injured. The original and still-operative complaint, a form complaint filed on April 20, 2024, states two cause of action: (1) Motor Vehicle Negligence; and (2) General Negligence.

Defendants filed a joint answer to the complaint on June 5, 2024. The answer states four affirmative defenses "to the entire complaint": (1) Comparative Negligence; (2) Failure to State a Cause of Action; (3) Apportionment; and (4) Failure to Mitigate Damages.

Currently before the court is Canales' demurrer to Defendants' answer, filed on June 17, 2024. Defendants filed an opposition on September 4, 2024.[4]

II. DEMURRER TO THE ANSWER

A. General Standards

The court, in ruling on a demurrer, treats it "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof, does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp*. (1983) 35 Cal.3d 197, 213-214.)

The court considers only the pleading under attack, any attached exhibits, and any facts or documents of which the court may take judicial notice. The court cannot consider extrinsic evidence in ruling on a demurrer or motion to strike. This includes declarations. The court has considered the declaration of counsel Simone Capers only to the extent that it addresses the meet-and-confer efforts required by statute. The court has not considered any of the attached exhibits. The court has also *not* considered the declaration from counsel David Barch or the attached exhibits.[5]

While comparatively rare, a party against whom an answer has been filed may demur to that answer upon any one or more of the following grounds: "(a) The answer does not state facts sufficient to constitute a defense. [¶] (b) The answer is uncertain . . . . [¶] (c) Where the

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[4] On the face of their papers, both sides seem to be under the mistaken impression that this case has been "assigned for all purposes" to Judge Rosen in Department 16. In Santa Clara County, most non-complex matters in civil case management are not subject to an "all-purpose" assignment, and in any event, this case is assigned to Department 10 for civil case management.

[5] While Code of Civil Procedure section 435.5 requires a declaration from the moving party, there is no authority for the submission of a declaration from the opposing party.

answer pleads a contract, it cannot be ascertained from the answer whether the contract is written or oral." (Code Civ. Proc., § 430.20.)

Affirmative defenses presented in an answer must plead ultimate facts to the same extent as required in a complaint. (*FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 384.) Affirmative defenses consisting solely of legal conclusions will not survive either a demurrer or a motion for judgment on the pleadings. (*Westly v. Board of Administration* (2003) 105 Cal.App.4th 1095, 1117.)

The determination as to "whether an answer states a defense is governed by the same principles which are applicable in determining if a complaint states a cause of action." (*South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 732.) "[T]he demurrer to the answer admits all issuable facts pleaded therein and eliminates all allegations of the complaint denied by the answer." (*Id*. at p. 733.) Unlike a demurrer to a complaint, "the defect in question need not appear on the face of the answer," as "[t]he determination of the sufficiency of the answer requires an examination of the complaint because its adequacy is with reference to the complaint it purports to answer." (*Ibid*.)

Nevertheless, to the extent that an affirmative defense is based upon the pleadings of the complaint, and not "new matter," the defense is put at issue by the general denial, and it need not be specifically pleaded. (*Walsh v. West Valley Mission Comm. College Dist.* (1998) 66 Cal.App.4th 1532, 1545.) For any "new matter" as to which a defendant has the burden of proof at trial, the defendant must plead supporting facts. (*California Academy of Sciences v. County of Fresno* (1987) 192 Cal.App.3d 1436, 1442.)

Code of Civil Procedure section 430.60 states: "A demurrer shall distinctly specify the grounds upon which any of the objections to the complaint, cross-complaint, or answer are taken. Unless it does so, it may be disregarded." The rules of court also require that the demurrer itself (distinct from a supporting memorandum) specify the target of any objection and the grounds. (See Cal. Rules of Court, rules 3.1103(c), 3.1112(a), 3.1320(a) ["Each ground of demurrer must be in a separate paragraph and must state whether it applies to the entire complaint, cross-complaint, or answer, or to specified causes of action or defenses."]; see also 5 Witkin, *Cal. Procedure* (5th ed., 2019) Pleading, § 953 ["Each ground of demurrer must be in a separate paragraph and must state whether the demurrer applies to the entire complaint, cross-complaint, or answer, or to specified causes of action or defenses."].)

Finally, "points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before." (*Proctor v. Vishay Intertechnology, Inc*. (2013) 213 Cal.App.4th 1258, 1273; See also *REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489, 500 ["This court will not consider points raised for the first time in a reply brief for the obvious reason that opposing counsel has not been given the opportunity to address those points."].)

B. Basis for the Demurrer

Canales' notice of demurrer states that she demurs to "the answer" on the ground that "Defendants fail to allege a single fact supporting their four affirmative defenses, which also fail to state which cause of action is associated with each defense. Thus, Plaintiff demurs [to] each affirmative defense in Defendants' answer for failure to state facts sufficient to constitute

a defense, as all defenses are ambiguous or unintelligible due to the absence of any facts." (Notice of Demurrer, pp. 1:25-2:4.) Contrary to rule 3.1320(a) of the California Rules of Court, she does not set separately state each ground in a separate paragraph, and her articulation of her grounds appears to blur a demurrer for *uncertainty* and a demurrer for *failure to state sufficient facts*. In addition, as presented, the foregoing formulation could be considered a demurrer to the entire answer, and as a technical matter, it could be overruled if any affirmative defense were property stated.

C. Discussion

1. Uncertainty

"'[D]emurrers for uncertainty are disfavored, and are granted only if the pleading is so incomprehensible that a defendant cannot reasonably respond.' '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." (*A.J. Fistes Corp. v. GDL Best Contractors, Inc.* (2019) 38 Cal.App.5th 677, 695.)

The court OVERRULES Canales' demurrer to the entire answer on uncertainty grounds, which has been confusingly framed as an argument that the court "should strike all defenses because they fail to state facts sufficient to constitute a defense and are, therefore, ambiguous and uncertain." (See Memorandum, p. 2:23-24.) A "failure to state sufficient facts" and "uncertainty"/ambiguity are two different things. Also, the court finds that the answer is not so "incomprehensible" that Canales cannot reasonably respond; there is no true uncertainty.

2. Failure to State Sufficient Facts

a) Comparative Negligence

The court SUSTAINS, with 10 days' leave to amend, Canales' demurrer to the first affirmative defense on the ground that it fails to state sufficient facts.

"Generally, a defendant has the burden of establishing that some nonzero percentage of fault is properly attributed to the plaintiff, other defendants, or nonparties to the action." (*Pfeifer v. John Crane, Inc*. (2013) 220 Cal.App.4th 1270, 1285; See also CACI no. 405.) There are no factual allegations in the answer to support this defense; there is only a conclusory statement. In addition, the sparse allegations of the form complaint do not support the defense.

Although the court is granting leave to amend, Defendants are not granted leave to add *new* affirmative defenses. (See *Zakk v. Diesel* (2019) 33 Cal.App.5th 431, 456 ["Following an order sustaining a demurrer or a motion for judgment on the pleadings with leave to amend, the [pleading party] may amend his or her complaint only as authorized by the court's order. The plaintiff may not amend the complaint to add a new cause of action without having obtained permission to do so, unless the new cause of action is within the scope of the order granting leave to amend."].)

b) Failure to State a Cause of Action

The court OVERRULES Canales's demurrer to the second affirmative defense on the ground that it fails to state sufficient facts. A defense that a complaint does not state sufficient facts to constitute a cause of action or is uncertain can be asserted in an answer. (See Code of Civ. Proc., § 430.10, subd. (a).) Such a defense is not really an "affirmative" defense at all, as it does not constitute new matter. It merely denies the sufficiency of the complaint's allegations. Therefore, no new or additional facts are required to state the defense.

c) Apportionment

The court SUSTAINS Canales' demurrer to the third affirmative defense on the ground that it fails to state sufficient facts, with 10 days' leave to amend.

As with indemnity, there must be some basis for liability in order for there to be an apportionment of fault and contribution from one party to another. (See, e.g., *American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 586.) As currently stated, the answer fails to allege *any* facts that would support the notion that any other parties or third parties are liable for Canales' injuries.

d) Failure to Mitigate Damages

Finally, the court SUSTAINS Canales' demurrer to the fourth affirmative defense on the ground that it fails to state sufficient facts, with 10 days' leave to amend.

A defendant carries the burden of proving a failure to mitigate as an affirmative defense. (See *Mize-Kurzman v. Marin Community College Dist*. (2012) 202 Cal.App.4th 832, 871.) "The doctrine of mitigation of damages holds that '[a] plaintiff who suffers damage as a result of either a breach of contract or a tort has a duty to take reasonable steps to mitigate those damages and will not be able to recover for any losses which could have been thus avoided." (*Valle De Oro Bank v. Gamboa* (1994) 26 Cal.App.4th 1686, 1691.) There are no factual allegations in the answer to support this defense. Neither the complaint nor the answer allege any facts that show how Canales acted unreasonably in mitigating damages or how damages could have been avoided in general.

The court rejects Defendants' argument that they first need discovery in order to support the foregoing affirmative defenses as to which the court is sustaining the demurrer. This argument operates as an admission that Defendants do not actually have a factual basis for asserting these defenses. If Defendants were to learn of a factual basis for any of these defenses during the course of discovery, that would be the time to bring a motion for leave to amend. In the meantime, the purpose of an answer is not to serve as a "placeholder" for possible areas of further investigation or discovery as to which a party currently has no good-faith factual basis.

It is so ordered.

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Calendar Lines 7-13
Case Name: *Janet Kim v. Francis Lee et al.*
Case No.: 22CV408643

As far as the court can tell—although it is exceptionally confusing from the file—there are 12 discovery motions before the court for this hearing:

1. Plaintiff Janet Kim's motion for relief from waiver of objections for discovery responses that were originally due on February 27, 2024.

2. Kim's motion to compel further responses to form interrogatories and inspection demands from defendant Virus Geeks, Inc.

3. Kim's motion to compel further responses to form interrogatories and inspection demands from defendant Matrix Diagnostics, Inc.

4. Virus Geeks' motion to compel further responses to form interrogatories from Kim.

5. Virus Geeks' motion to compel further responses to employment form interrogatories from Kim.

6. Virus Geeks' motion to compel further responses to special interrogatories from Kim.

7. Matrix Diagnostics' motion to compel further responses to form interrogatories from Kim.

8. Matrix Diagnostics' motion to compel further responses to special interrogatories from Kim.

9. Defendant Francis Lee's motion to compel further responses to form interrogatories from Kim.

10. Lee's motion to compel further responses to special interrogatories from Kim.

11. Lee's motion to compel further responses to requests for admissions from Kim.

12. Lee's motion to compel further responses to inspection demands from Kim.

These motions were originally calendared for hearings on various dates in September 2024 (September 17, September 19, and September 24, 2024.) At a case management conference attended by all parties on June 25, 2024, the court reset the hearings for a single date (September 17, 2024), but it appears that there was some confusion in the clerk's office about these motions, because only seven entries were set aside on the calendar (lines 7-13) for these 12 motions. At any rate, the court will now address these motions.

I. THE MOTIONS INVOLVING THE ENTITY DEFENDANTS

As an initial matter, the court notes that it granted Virus Geeks and Matrix Diagnostics' counsel's motion to be relieved on August 22, 2024, and these entities are no longer

represented in this case. Because Virus Geeks and Matrix Diagnostics are not pursuing their motions to compel at this time (Items 4-8 above), the court takes them OFF CALENDAR. In addition, the court takes OFF CALENDAR Kim's motions to compel further responses from Virus Geeks and Matrix Diagnostics (Items 2-3 above), as there is currently no manner in which these companies can actually participate in discovery. Kim may place her motions back on calendar, without prejudice, if the entity defendants reappear in the case.

That leaves Kim's motion for relief from waiver (Item 1) and Lee's four motions to compel against Kim (Items 9-12). The issues in these five remaining motions are interrelated.

II. KIM'S MOTION FOR RELIEF FROM WAIVER

Lee served his discovery requests on Kim on January 26, 2024; Kim's responses were due on February 27, 2024, but Kim did not serve them until March 26, 2024, a month later. Kim states that she requested, and expected to receive, an extension on her deadline to respond, just as she had previously granted defendants' request for "an additional month to respond to Plaintiff's discovery requests." (Memorandum, p. 3:16-18.) Instead, Lee's counsel informed Kim's counsel on March 19, 2024 that Lee did not agree to any extension, and that Kim had thereby waived any objections to the discovery requests. (*Id.* at pp. 3:27-4:2.) After further discussions between the parties, Kim filed this motion for relief from waiver on May 24, 2024.

The parties agree that the same basic legal standard applies to a motion for relief, regardless of whether it pertains to interrogatories, requests for admissions, or inspection demands: the responding party must show that its failure to provide a timely response was the result of "mistake, inadvertence, or excusable neglect" *and* that it has meanwhile served responses that are "in substantial compliance" with the Discovery Act. (See Code Civ. Proc., §§ 2030.290, 2031.300, and 2033.280.)

In this case, the court finds that Kim and Kim's counsel's failure to respond was not the product of "mistake" or "inadvertence," as these terms denote a lack of awareness. Here, the failure was a *knowing* one: counsel was well aware of the deadline and in fact reached out to Lee's counsel on the deadline. On the other hand, Kim's counsel's actions were arguably a result of "excusable neglect," as counsel avers that they needed additional time to respond to Lee's voluminous discovery requests and were just not adequately prepared. Indeed, the court agrees with Kim that the number of requests at issue—a few *hundred* requests—was indeed exceptionally high and therefore involved a significant burden. The court would have expected Lee's counsel to be more accommodating and to allow an extension of a month (or possibly even more) for Kim to provide more complete responses to these numerous items.

The problem for Kim, however, is that even if her negligence were excusable, she does not show that the responses she served on March 26, 2024 in response to the form interrogatories, requests for admissions, or inspection demands were "in substantial compliance," as required by sections 2030.290(a)(1), 2031.300(a)(1), and 2033.280(a)(2). She did not even come close. The court has reviewed Kim's responses to these categories of discovery and finds that they are devoid of any substantive answer or response. They either consist entirely of objections, or they consist solely of objections plus an unhelpful boilerplate sentence: *e.g.*, "Plaintiff is not able to furnish a response to this interrogatory as written," or "As a result of the objectionable issues described, Plaintiff is unable to furnish a response to this request as written." Although Kim argues that her responses were verified, there was

nothing to verify in these responses, as they contain no substantive information. Moreover, in the *more than five months* since these responses were served, it does not appear that Kim has made any reasonable attempt to supplement them. Although she notes in her responses to Lee's motions to compel that she "will be serving amended responses . . . in advance of this Motion's hearing date," Lee points out that nothing has been served as of the filing of the reply briefs on these motions (September 10, 2024). Accordingly, the court must DENY the motion as it pertains to the form interrogatories, requests for admissions, and inspection demands.

As for the special interrogatories, the court observes that Kim did at least make a minimal effort to provide some answers to these interrogatories. Although the answers were somewhat perfunctory, the court finds them to be a good-faith effort to comply with the obligation to respond, particularly given the unusually large number of interrogatories at issue. The court therefore GRANTS the motion as to the special interrogatories.

The objections are waived as to the form interrogatories, requests for admissions, and inspection demands. They are not waived as to the special interrogatories.

The court DENIES Kim's request for monetary sanctions against Lee in connection with this motion.

III. LEE'S MOTIONS TO COMPEL FURTHER RESPONSES FROM KIM

Kim has filed "oppositions" to all four of Lee's motions to compel further responses with a statement acknowledging the inadequacy of her current responses and stating that "Plaintiff will be serving amended responses to these [requests/interrogatories] in advance of this Motion's hearing date." (E.g., Opposition to Motion to Compel Further Responses to Requests for Admission[s], p. 2:5-8.) As noted above, Lee's reply briefs indicate that as of September 10, 2024, those amended responses still have not been served. Given that the parties' dispute over the adequacy of these discovery responses has been pending for many months now, Kim's statement that she intends to supplement her responses on the eve of the hearing is ridiculously late. It is discourteous not only to her opponent, but also to the court. The court agrees with Lee that it is an abuse of the discovery process.

Thus, the court GRANTS each of these motions and orders Kim to supplement her responses ***within five days*** of notice of entry of this order. In addition, the court finds that Kim and her attorneys did not act with substantial justification in leaving any potential resolution of this dispute to the eleventh hour. While Lee has requested a total of $12,135 in sanctions for these four motions ($3,365 (form interrogatories) + $1,982.50 (special interrogatories) + $2,887.50 (RFAs) + $3,900 (inspection demands)), the court instead orders Kim and her attorneys to pay Lee monetary sanctions in the total amount of **$4,500** (12 hours at $375/hour) for the costs involved with these four motions, within 30 days of notice of entry of this order. As a reminder, the purpose of discovery sanctions is compensatory, not punitive.

It is so ordered.

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Calendar Line 15
Case Name: *Weiting Zhan v. Rui Tang*
Case No.: 23CV421587

1. Background

This is a motion for sanctions under Code of Civil Procedure section 128.7 by defendant Rui Tang against plaintiff Weiting Zhan. In this case, the court sustained Tang's demurrer to Zhan's first amended complaint on March 19, 2024 with leave to amend, and then the court sustained Tang's demurrer to Zhan's second amended complaint on July 9, 2024 without leave to amend. In between these two demurrers, the court also heard and denied Zhan's motions for leave to file a "second" amended complaint and "third" amended complaint (which were different from the second amended complaint at issue in the second demurrer) on May 21, 2024. The basis for all three of the court's rulings was the same: the allegations of the first amended complaint, second amended complaint, and proposed "second" and "third" amended complaints were all barred by the litigation privilege.

Although the court expected Tang to file a request for dismissal under Code of Civil Procedure section 581, Tang has apparently held off on doing so in order to seek monetary sanctions from Zhan, as requested here, in the amount of $14,000.[6] The court ultimately concludes that a lesser award of monetary sanctions is necessary to deter repetition of Zhan's misconduct. The court therefore grants the motion in part.

2. Legal Standard

As a general matter, a trial court may impose sanctions under section 128.7 when a "paper": (1) is "presented primarily for an improper purpose" (such as to harass a litigant, drive up the costs of litigation, or cause undue delay), (2) contains a claim, defense, or other legal contention that is not warranted by existing law "or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law," (3) contains allegations and factual contentions that do not have any evidentiary support or are not "likely to have evidentiary support after a reasonable opportunity for further investigation or discovery," or (4) contains denials of factual contentions that are not "warranted on the evidence or . . . are [not] reasonably based on a lack of information or belief." (Code Civ. Proc., § 128.7, subd. (b)(1)-(b)(4).) In other words, in order to prevail on a sanctions motion under § 128.7, a party must show that the other side's papers were brought for a dilatory or obstructive purpose, or are legally or factually "frivolous." (*Guillemin v. Stein* (2002) 104 Cal.App.4th 156, 167 (*Guillemin*); *Peake v. Underwood* (2014) 227 Cal.App.4th 428, 440-441 (*Peake*).)

The Courts of Appeal have repeatedly cautioned that sanctions should be "used sparingly in the clearest cases to deter the most egregious conduct." (*Wallis v. PHL Associates, Inc.* (2008) 168 Cal.App.4th 882, 893 [discussing sanctions under Code of Civil Procedure section 128.5].) As the Court noted in *Peake*, *supra*, section 128.7, subdivision (d), expressly provides that any sanction imposed "'shall be limited to what is sufficient to deter

[6] Tang served this motion on Zhan on June 10, 2024 before filing it on July 5, 2024, thereby complying with the 21-day safe harbor period of section 128.7, subdivision (c)(1).

repetition of [the improper] conduct or comparable conduct by others similarly situated.'" (*Peake*, 227 Cal.App.4th at p. 441 [quoting Code Civ. Proc., § 128.7, subd. (d)].)

3. Discussion

Tang argues that Zhan has repeatedly been told that there is no legal basis for her lawsuit (which alleged defamation against Tang arising out of Tang's work as an attorney and translator for an opposing party in a civil harassment proceeding in Santa Cruz County), but Zhan doggedly continued to pursue a legally frivolous case. In addition, Tang argues that Zhan revealed, in a May 20, 2024 email, her "true intent" "to cause financial harm to Tang" by driving up Tang's legal costs, regardless of the merits of the case. According to Tang, this email from Zhan revealed that the present suit was brought for an improper purpose. (Memorandum, p. 5:1-12.) The last two paragraphs of the May 20 email from Zhan to Tang's counsel read as follows:

> *According to the American rule*, your client is responsible for her attorney fees. *I hope you charge your client accordingly for your services*, and perhaps she can learn how to be a better attorney.
>
> For the record, *I have sued an attorney before, and that attorney hired another attorney to represent her. Win~*

(Declaration of Cassidy Chivers, Exhibit B, emphasis added.)

If this motion were brought solely on the ground that Zhan's causes of action were legally and factually frivolous, the court would find that the evidence appears to cut both ways on the question of whether sanctions should issue, and the court would likely deny the motion. Zhan's relentless determination in pursuing her allegations against Tang—even after the court tried to explain to Zhan how they were barred by the litigation privilege in its March 19, 2024 and May 21, 2024 orders, and even before the final order on July 9, 2024—could arguably be chalked up to a genuine lack of understanding of the law by a self-represented litigant, rather than a hardheaded and deliberate attempt to pursue a meritless claim. The "litigation privilege" is a concept that even some lawyers can have difficulty mastering.

But there is evidence here—previously unknown to the court—that Zhan's relentless efforts were also made in order to drive up Tang's litigation costs, regardless of the outcome of the case. The court is alarmed by the language of the italicized sentences quoted above: "*I hope you charge your client accordingly for your services*," and "*I have sued an attorney before, and that attorney hired another attorney to represent her. Win~*." Not only does this reveal a deliberate attempt to burden Tang by forcing Tang to hire and pay for an attorney, but it also reveals that Zhan has done this before, to a different defendant, and that she considers it a "win" if defendants have to hire attorneys to defend themselves against her (and to pay for them, under "the American rule"). This is clear and unmistakeable evidence of an improper purpose under section 128.7, subdivision (b)(1): *i.e.*, "needless increase in the cost of litigation."

Taken together, the evidence indicates that Zhan continued to pursue her meritless allegations—after both of the court's March 19 and May 21 rulings—not only knowing that they were unlikely to lead to a different result, but also knowing that they would continue to require Tang to incur attorney's fees. This is exceedingly improper.

The fact that Zhan has done this before means that sanctions are warranted and necessary to deter such conduct going forward. At the same time, sanctions should be "limited to what is sufficient to deter repetition of [the improper] conduct or comparable conduct," as noted above, and the court finds that $14,000 is quite a bit more than what is necessary. (*Peake, supra*, 227 Cal.App.4th at p. 441.) Accordingly, the court reduces the amount and awards sanctions of **$3,540** against Zhan (representing 12 hours at Tang's counsel's hourly rate of $295), ordering Zhan to pay this amount within 60 days of notice of entry of this order.

In short, the motion is GRANTED in part and DENIED in part. The court also DENIES Zhan's retaliatory request for monetary sanctions under Code of Civil Procedure section 128.5.

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Calendar Line 16
Case Name: *Chahal Services, LLC v. Vanams Corporation*
Case No.: 24CV429453

This is a petition to compel arbitration by Chahal Services, LLC ("Chahal"), based on a sales agreement with respondent Vanams Corporation ("Vanams"). The sales agreement included an arbitration provision that states: "Any disputes relating to this Agreement by any party shall be decided by binding arbitration as provided in the California Code of Civil Procedure, beginning at section 1280, and shall include full rights of discovery." (Petition, Exhibit B, ¶ 28(B).) There is a related case between the parties—Santa Clara Superior Court Case No. 23CV411215—in which this court (Judge Rosen) signed an order compelling arbitration on July 3, 2023, based on the same arbitration provision.

In the present case (No. 24CV429453), Vanams is not represented by counsel and has not made a proper appearance in the case. Instead, Vanams's President, Vandana Gariney, who is apparently not a lawyer, purports to submit an "Amended Response in Opposition to Petition to Compel Arbitration." This is improper. In fact, in the prior case, this court (Judge Kuhnle) denied a motion for preliminary injunction by Gariney on the ground that she lacked the inability to represent Vanams. (See May 11, 2023 Order, p. 1:27-23 ["First, the party to the Water World agreement was Vanams Corporation, not Plaintiff, thus raising a standing issue."].)[7] It appears that Gariney is again trying to stand in the shoes of Vanams, but she is not permitted do so.

In any event, Gariney's response fails to provide any reasons why arbitration should not be compelled. Instead, her response simply makes a number of arguments that go to the merits of the dispute between Chahal and Vanams.

Accordingly, the court GRANTS the motion to compel and orders the parties to arbitrate their dispute. Chahal's motion also requests that "the Court appoint an individual to be the arbitrator for this matter," but no arbitrator(s) have been proposed by either side. The court therefore orders the parties to meet and confer about an arbitrator, and if no agreement can be reached within the next 90 days, then either party may make a further motion pursuant to Code of Civil Procedure section 1281.6.

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[7] On its own motion, this court takes judicial notice of the court's May 11, 2023 and July 3, 2023 orders in Case No. 23CV411215. (See Evid. Code, § 452, subd. (d).)