SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

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

DATE: February 6, 2024 TIME: 9:00 A.M.

RECORDING COURT PROCEEDINGS IS PROHIBITED.

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

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

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

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

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

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

FOR YOUR NEXT HEARING DATE: Please do NOT 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**.

Where to call:408-882-2430
When to call: Monday through Friday, 8:30 am to 12:30 pm

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	23CV422753	Balboa Capital Corporation vs Rahimi Pizza Incorporated et al	Parties are ordered to appear in court for the examination.
2	22CV403419	FAIRILLIA TURNER vs TRINITY FINANCIAL SERVICES LLC	Shellpoint's demurrer to the first and fourth causes of action on the grounds of failure to state a claim is SUSTAINED with 10 days' leave to amend. Shellpoint's demurrer to the second and third causes of action is OVERRULED. Please scroll down to line 2 for full tentative ruling. Court to prepare formal order.

3	22CV406998	Pico Semiconductor, Inc. v. V-Silicon Semiconductor (Hefei) Co. Ltd.	Defendant V-Silicon Semiconductor's Demurrer to the Fourth Cause of Action for Fraud is OVERRULED. Please scroll down to line 3 for full tentative ruling. Court to prepare formal order.
4	22CV407295	Royal Farms USA LLC vs Genflora Processing LLC	Kevin Moore's Demurrer to the Fourth and Sixth Causes of Action are SUSTAINED WITH TWENTY DAYS LEAVE TO AMEND. Please scroll down to lines 4-5 for full tentative ruling. Court to prepare formal order.
5	22CV407295	Royal Farms USA LLC vs Genflora Processing LLC	Kevin Moore's Motion to Strike is MOOT. Please scroll down to lines 4-5 for full tentative ruling. Court to prepare formal order.
6	20CV374136	JOHN DOE vs TIMOTHY ANDO, MD et al	Remaining Defendants' Motions for Summary Judgment are GRANTED. Please scroll down to lines 6-9 for full tentative ruling. Court to prepare formal order.
7	20CV374136	JOHN DOE vs TIMOTHY ANDO, MD et al	Remaining Defendants' Motions for Summary Judgment are GRANTED. Please scroll down to lines 6-9 for full tentative ruling. Court to prepare formal order.
8	20CV374136	JOHN DOE vs TIMOTHY ANDO, MD et al	Remaining Defendants' Motions for Summary Judgment are GRANTED. Please scroll down to lines 6-9 for full tentative ruling. Court to prepare formal order.
9	20CV374136	JOHN DOE vs TIMOTHY ANDO, MD et al	Remaining Defendants' Motions for Summary Judgment are GRANTED. Please scroll down to lines 6-9 for full tentative ruling. Court to prepare formal order.
10	21CV390710	Institute for the Future vs Don Mullen et al	FFDAL LLC's Motion for Summary Judgment is GRANTED. Please scroll down to line 10 for full tentative ruling. Court to prepare formal order.
11	21CV390683	Ruben Ramirez et al vs J & M MAINTENANCE & REMODELING, INC. et al	This motion is off calendar per the Court's December 15, 2023 Discovery Order Following Discovery Conference
12	22CV403128	Maritza Bolanos vs Lily Li	Defendant Lily C. Li's Motions to Compel Responses to Form Interrogatories (Set One), Special Interrogatories (Set One), Request for Production of Documents (Set One), and for Sanctions came on for hearing before the Court on December 7, 2023. Pursuant to California Rule of Court 3.1308, the Court issued a tentative ruling continuing these motions for lack of notice. Defendant appeared and made his apologies to the Court, and the Court reiterated its tentative ruling and directed Defendant to serve notice of the new hearing date and time. The Court also issued a formal ruling, which stated: "Defendant is ordered to serve an amended notice of motion with the February 6, 2024 hearing date and time for these motions. If there is no proof of service demonstrating such service by the next court date, the Court will deny theses [sic] motions without prejudice." Defendant served a notice of this ruling, but Defendant never served an amended notice of motion for any of these motions with the February 6, 2024 hearing date and time. The Code of Civil Procedure, Rules of Court and Civil Local Rules require that the moving party serve a written notice of motion with the hearing date and time. (See Code Civ. Proc. §§1005(a), 1010.) A court lacks jurisdiction to hear a motion that has not been properly served, even if the non-moving party had some type of advanced notice. (See *Diaz v. Professional Community Mgmt.* (2017) 16 Cal.App.5th 1190, 1204-1205; *Five-O-Drill Co. v. Superior Court of Los Angeles County* (1930) 105 Cal. App. 232.) Defendant has now twice failed to provide proper notice, accordingly, these motions are denied without prejudice.
13	22CV403128	Maritza Bolanos vs Lily Li	Please see line 12, above.
14	22CV403128	Maritza Bolanos vs Lily Li	Please see line 12, above.
15	20CV370518	Prachee Jain et al vs Carrie Rothstein et al	Plaintiff's motion for trial preference is DENIED without prejudice. Please scroll down to line 15 for full tentative ruling. Court to prepare formal order.

16	23CV412073	Julie Campo et al vs Ok Kim et al	Richard O. McDonald, Hopkins & Carley, ALC's Motion to Withdraw as Counsel for Ok Hee Kim, Jeffery Kim, Century Development & Construction, Inc., and Business Alliance Insurance is GRANTED. Court will use form of order on file. The Court notes that Century Development & Construction, Inc. and Business Alliance Insurance are business entities and must be represented by counsel. (*Paradise v. Nowlin* (1948) 86 Cal. App. 2d 897.) Accordingly, they cannot continue to appear in this action until they file a substitution of counsel. Century Development & Construction, Inc. and Business Alliance Insurance are thus ordered to appear on April 30, 2024 at 9 a.m. in Department 6 and show cause why those entities' answers should not be stricken for failure to obtain counsel.
17	23CV418079	Golden State Lumber, Inc. a California corporation vs Nicolas Khoe et al	Richard O. McDonald's Motion to Withdraw as counsel for Ok Hee Kim, Jeffery Kim, and Century Development & Construction is GRANTED. Court to use form of order on file. The Court notes that Century Development & Construction, Inc. is a business entity and must be represented by counsel. (*Paradise v. Nowlin* (1948) 86 Cal. App. 2d 897.) Accordingly, Century Development & Construction, Inc. cannot continue to appear in this action until it files a substitution of counsel. Century Development & Construction, Inc. is thus ordered to appear on April 30, 2024 at 9 a.m. in Department 6 and show cause why its answer should not be stricken for failure to obtain counsel.

Calendar Line 2
Case Name: *Fairillia Turner v. Trinity Financial Services LLC*
Case No.: 22CV403419

Before the Court is defendant Newrez, LLC d/b/a Shellpoint Mortgage Servicing's ("Shellpoint") demurrer to plaintiff Fairillia Turner's ("Turner") Second Amended Complaint ("SAC"). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background

This action arises out of an allegedly wrongful foreclosure of a residential property. According to the operative SAC, in August 2004 Turner purchased property located at 315 Grandpark Circle in San Jose (the "Property"), which was secured by a Deed of Trust ("DOT") originally held by World Savings Bank. (SAC, ¶ 10.) Shellpoint and Trinity Financial Services, LLC[1] later acquired the DOT. (*Ibid*.)

Since 2013, Turner has repeatedly attempted to modify her loan without success. (SAC, ¶ 11.) Turner alleges that "Defendants" recorded a Notice of Trustee's Sale ("NOTS") against her property on October 26, 2016, even though they had confirmed Turner completed a short sale application only two days earlier on October 24, 2016. (*Id*., ¶ 22.)

On July 22, 2022, Turner submitted a Loss-Mitigation Opt-Out Form and Uniform Borrower Assistance Form ("UBAF") to Shellpoint stating her desire to sell the home to the company, but never received a decision on her application. (SAC, ¶¶ 17-18.) Instead, Shellpoint scheduled a foreclosure sale for the Property on September 28, 2022. (*Id.,* ¶ 19.)

On September 2, 2022, Turner initiated this action. Shellpoint's demurrer to the initial complaint was sustained with leave to amend via written order on June 1, 2023. Turner filed the operative SAC on July 24, 2023. The SAC alleges four causes of action: (1) violation of Civil Code Section 2923.5[2]; (2) violation of Section 2923.6; (3) violation of section 12 C.F.R. § 1024.41(g); and (4) violation of Business and Professions Code section 17200 ("UCL").

[1] This Court (Hon. Sunil R. Kulkarni) Judgment of Dismissal, dated August 2, 2023, removed Trinity Financial Services, LLC ("Trinity") from the instant action. (Evid. Code, § 452, subd. (d) [permitting judicial notice of a court's own records].)
[2] All statutes cited hereafter are from the Civil Code unless otherwise specified.

On September 25, 2023, Shellpoint filed the instant demurrer, contending the SAC and each cause of action therein fails to state facts sufficient to constitute any cause of action against Shellpoint. Turner filed her opposition on January 23, 2024.[3]

II. Legal Standard

"The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in [Code of Civil Procedure s]ection 430.30, to the pleading on any one or more of the following grounds: . . . (e) The pleading does not state facts sufficient to constitute a cause of action, (f) The pleading is uncertain." (Code Civ. Proc., § 430.10, subds. (e) & (f).) A demurrer may be utilized 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 treats a demurrer "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 (*Committee on Children's Television*).) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

III. Analysis

Shellpoint demurs to all causes of action within the SAC, contending that each fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

[3] The opposition indicates that it is in response to former defendant Trinity's demurrer. As mentioned above, Trinity has been dismissed from the case pursuant to the court's order sustaining Trinity's demurrer without leave to amend and the subsequent judgment of dismissal.

A. First Cause of Action: Violation of Section 2924.11

In the first cause of action, Turner appears to allege two separate violations of Section 2924.11. First, Turner alleges Shellpoint violated Section 2924.11 on October 26, 2016 by recording a NOTS after Turner completed a short sale application. (SAC, ¶¶ 22.) Second, Turner alleges Shellpoint violated 2924.11 on September 28, 2022 by holding a foreclosure sale for the Property after she completed a UBAF and Loss Mitigation Opt-Out Form on July 22, 2022. (*Id*., ¶ 24.)

Turner cites a noncurrent version of Section 2924.11 that was only operative from January 1, 2018 through January 1, 2019. (See 2018 Stats. Ch. 404, § 14-15 [repealing section 2924.11 of the Civil Code as added by Section 15 of Chapter 86 of the Statutes of 2012, and as added by Section 15 of Chapter 87 of the Statutes of 2012]; see also 2012 Stats. Ch. 86, § 15 ["[Section 2924.11] shall become operative on January 1, 2018."]; 2012 Stats. Ch. 87, § 15 [stating the same].) Turner essentially cites to a version of the statute that was not in effect at the time the alleged misconduct occurred or even at the time the initial complaint was filed.

In the SAC and again in the opposition, Turner relies on section 2924.11, subdivisions (a) and (d) as they appear in the 2018 version of the statute. To the extent Turner intends to apply the 2016 and 2022 versions of Section 2924.11 to the alleged violations in October 26, 2016 and September 28, 2022, the proper statute states:

> **(a)** If a foreclosure prevention alternative is approved in writing prior to the recordation of a notice of default, a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of default under either of the following circumstances:
>
> > **(1)** The borrower is in compliance with the terms of a written trial or permanent loan modification, forbearance, or repayment plan.
> >
> > **(2)** A foreclosure prevention alternative has been approved in writing by all parties, including, for example, the first lien investor, junior lienholder, and mortgage insurer, as applicable, and proof of funds or financing has been provided to the servicer.

(Civ. Code § 2924.11[4]; see also 2018 Stats. Ch. 404 § 16; 2016 Stats. Ch. 170, § 1.)

[4] In connection with its demurrer and on reply, Shellpoint requests judicial notice of Civil Code section 2924.11. While "[n]ew evidence is generally not permitted with reply papers," the court has discretion to consider supplemental evidence submitted with the reply, if the evidence merely explains the initially submitted evidence or fills gaps in evidence created by the opposition [*Savea v. YRC Inc*. (2019) 34 Cal.App.5th 173, 182 (trial court did not abuse discretion in considering supplemental request for judicial notice); *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1538 (court did not abuse discretion

This distinction is important because, as Shellpoint contends in the demurrer, the potentially applicable versions of section 2924.11, subdivision (a) apply "If a foreclosure prevention alternative is approved in writing[.]" (Dem., p. 6:16-17.) Here, as alleged in the SAC, Turner's application for a foreclosure prevention alternative was not approved in writing. (SAC, ¶ 24 [alleging that Turner never received any decision regarding her application].) Neither of the applicable versions of the statute contain the language Turner contends is present in section 2924.11, subdivision (a), namely, "[i]f a borrower submits a complete application for a foreclosure prevention alternative offered by, or through, the borrower's mortgage servicer, a mortgage servicer, mortgagee, [or] beneficiary…shall not record a notice of sale or conduct a trustee's sale while the complete foreclosure prevention alternative application is pending." (SAC, ¶ 22.) Thus, the SAC fails to state a claim for a violation of section 2924.11.

However, it has long been held that on demurrer, a court should grant leave to amend where "'there is a reasonable possibility that the defect can be cured by amendment.'" (*Loeffler v. Target Corp*. (2014) 58 Cal.4th 1081, 1100; see also *A.J. Fistes Corp. v. GDL Best Contractors, Inc.* (2019) 38 Cal.App.5th 677, 687.) The Court therefore SUSTAINS the demurrer to the first cause of action and grants 10 days leave to amend.

B. Second Cause of Action: Violation of Section 2923.7

In the second cause of action, Turner alleges Shellpoint violated Section 2923.7, subdivisions (b)(3)-(5) by failing to provide a single point of contact ("SPOC"), warranting her claim for injunctive relief and attorney's fees. (SAC, ¶¶ 29, 32.) Shellpoint maintains that because Turner fails to allege imminent or completed foreclosure, she is limited to injunctive relief and the "claim necessarily fails." However, the SAC specifically pleads both that Trinity sold the Property and that Shellpoint had scheduled an imminent foreclosure sale on September 28, 2022. (SAC, ¶¶ 16, 19.) Shellpoint argues that this sale has not taken place, and Plaintiff alleges she wants to prevent that sale from occurring. Plaintiff need not file a *preliminary* injunction motion to seek injunctive relief in the lawsuit. In any

---

in refusing to consider reply declarations when no affirmative declarations were submitted).] Moreover, Evidence Code section 452, subdivision (a) requires the Court to take judicial notice of a "decisional, constitutional, and public statutory law of this state."

event, Shellpoint's demurrer is improper because "[t]he appropriate procedural device for challenging a portion of a cause of action seeking an improper remedy is a motion to strike." (*Brown v. Ralphs Grocery Co.* (2018) 28 Cal.App.5th 824, 844.) Shellpoint's demurrer to the second cause of action is OVERRULED. (Code Civ. Proc., § 430.10, subd. (e).)

C. Third Cause of Action: Violation of 12 C.F.R. § 1024.41(g)

In the third cause of action, Turner alleges Shellpoint violated subdivision (g) of 12 C.F.R. section 1024.41 by conducting a foreclosure sale before notifying her that she was not eligible for a loss mitigation option. As stated in the Court's June 1, 2023 order[5]:

> Section 1024.41, subdivision (g), which is part of the Real Estate Settlement Procedures Act, is essentially the federal version of Section 2924.11. That is, it provides that if a borrower submits a complete loss mitigation application within a specified time, a servicer shall not move for foreclosure judgment or conduct a foreclosure sale unless certain conditions are met.

For purposes of the statute, a borrower must submit his or her application after the servicer has made first notice, but more than 37 days before a foreclosure sale. (12 C.F.R. § 1024.41, subd. (g).)

Here, the SAC alleges that Turner submitted her Loss Mitigation Opt-Out Form on July 22, 2022. Shellpoint scheduled a foreclosure sale for September 28, 2022—well after the 37-day minimum requirement. (SAC, ¶¶ 17-19.) The SAC does not allege whether Turner submitted her application after the servicer made the first notice or filing for the foreclosure process.

Shellpoint essentially maintains that because it has not conducted the foreclosure, Turner's claim is unripe. In support of this argument, Shellpoint generally avers that, "Plaintiff's contention that the Property has been sold by Shellpoint at foreclosure sale is not only untrue, but contradicted by the many other portions of Plaintiff's SAC where the 'imminent' threat of foreclosure is discussed." (Dem., p. 9:20-22.) Shellpoint provides no further evidentiary support for this broad claim, and the Court declines to "examine undeveloped claims or to supply arguments for the litigants. [Citations.]" (*Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52; see also Cal Rules of Court, rule 3.1113(b) [requiring a memorandum supporting a motion to "contain a statement of facts, a concise statement of the law, evidence and arguments relied on, and a discussion of the statutes, cases, and textbooks cited in support

[5] The court may take judicial notice of its records on its own motion. (Evid. Code § 452, subd. (d).)

of the position advanced."]) Moreover, the Court, in ruling on a demurrer "admits the truth of all material factual allegations in the complaint." (*Committee on Children's Television, Inc., supra,* 35 Cal.3d at pp. 213-214 ["the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court."])

Thus, Shellpoint's demurrer to the third cause of action is OVERRULED. (Code Civ. Proc., § 430.10, subd. (e).)

D. Fourth Cause of Action: Violation of UCL

In the fourth cause of action, Turner alleges that Shellpoint's preceding statutory violations constitute unlawful, unfair, and/or fraudulent business practices and forms a basis for the UCL claim. (SAC, ¶ 40.) Shellpoint argues again that Turner lacks standing to allege a UCL claim because the SAC fails to allege monetary or property loss due to Shellpoint's alleged violations (*i.e.*, causation).

As noted in the Court's June 1, 2023 order,

> [T]o bring a claim for a UCL violation, a plaintiff must have "suffered injury in fact and [have] lost money or property as a result of such unfair competition." (Bus. & Prof. Code, § 17204.) To satisfy this requirement, a party must "(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., economic injury, and (2) show that that economic injury was the result of, i.e., caused by, the unfair business practice or false advertising that is the gravamen of the claim." (*Kwikset Corp. v. Supe* [*sic*] *Ct.* (2011) 51 Cal.4th 310, 322.)

The SAC alleges that, "But for Defendants' [*sic*] failure to provide a loss mitigation decision, Plaintiff would not have been assessed late fees, foreclosure costs, or any other assessed charges to her account" and "Plaintiff would not have had to expend the money for cost of suit and attorney's fees." (SAC, ¶¶ 42-43.) The SAC does not allege whether (or when) Turner defaulted on her loan with Shellpoint prior to submitting her forms. Thus, the SAC still fails to allege how Shellpoint's conduct, as opposed to Turner's own potential default on her loan, caused her to face the imminent loss. (*Id.*, ¶ 22.)

For the foregoing reasons, Shellpoint's demurrer to the fourth cause of action is SUSTAINED with 10 days leave to amend.

IV. Conclusion

The demurrer is SUSTAINED IN PART AND OVERRULED IN PART. The Court SUSTAINS the demurrer to the first and fourth causes of action on the ground of failure to state a claim and grants

10 days' leave to amend. The Court OVERRULES the demurrer as to the second and third causes of action.

Calendar Line 3
Case Name: *Pico Semiconductor, Inc. v. V-Silicon Semiconductor (Hefei) Co. Ltd.*
Case No.: 22CV406998

Before the Court is defendant V-Silicon Semiconductor Co. Ltd.'s ("V-Silicon") demurrer to plaintiff Pico Semiconductor, Inc.'s ("Pico") complaint. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background

This is a breach of contract case. On July 2, 20219, V-Silicon and Pico entered an IP Purchase Agreement (the "Agreement") where Pico provided design services to V-Silicon in exchange for $900,000 in service fees. (Complaint, ¶ 11.) Pico fully performed its obligations under the Agreement, but V-Silicon only paid $500,000 in service fees. (*Id.*, ¶ 12.) Pico issued two invoices on October 19, 2019 and January 2, 2020, each for $200,000. (*Ibid*.) V-Silicon's CFO, Linda Nie, acknowledged receipt of the October 29, 2019 invoice and planned to make payment in December 2019. (*Ibid*.) Despite exchanging confirmation of the deliverables pursuant to the Agreement in April 2020, the invoices remained outstanding. (*Id*., ¶¶ 13-15.) Pico alleges that in addition to outstanding balance of $400,000, Pico also suffered the loss of its design engineers and their revenue generating capacity. (*Id.*, ¶ 15.) Pico further alleges that given V-Silicon's failure to perform on the Agreement, Pico is entitled to ownership of all deliverables and work product generated under the Agreement. (*Id*., ¶ 16.)

Pico initiated this action by filing the still-operative complaint on November 7, 2022, which asserts claims for (1) breach of contract; (2) breach of covenant of good faith and fair dealing; (3) unjust enrichment; (4) fraud/misrepresentation; and (5) declaratory relief. V-Silicon filed the instant demurrer on September 26, 2023, which Pico opposed on January 19, 2024.

II. Procedural Issues

A. Untimely Papers

Pursuant to the July 18, 2023 Order Granting Defendant's Unopposed Motion to Set Aside Default,[6] the Court ordered V-Silicon to respond to the complaint within 20 days of service of the formal order. While V-Silicon maintains it did not receive the order by mail, counsel for V-Silicon was

[6] The court may take *sua sponte* judicial notice of its own records. (Evid. Code, § 452, subd. (d).)

nonetheless present at the hearing for the motion to set aside default and could have independently checked the case status online.

However, 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." Because the Court has discretion to consider a late filed paper and Pico has not suffered any prejudice from the late filing, the Court will look past this procedural violation and consider the demurrer on its merits to avoid the expenditure of any further judicial resources.

However, the Court admonishes and hereby places V-Silicon and its counsel on notice to comply with court rules and procedures with respect to future filings, as the Court may decline to consider future papers that are not filed and served on time. (See *Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 765 ["[A] trial court has broad discretion under rule 3.1300(d) of the California Rules of Court to refuse to consider papers served and filed beyond the deadline without a prior court order finding good cause for late submission."].)

V-Silicon insists Pico's opposition is untimely under California Rules of Court, rule 8.54, but, that the rule applies to

> Appeals from the superior courts, except appeals to the appellate divisions of the superior courts; (2) Original proceedings, motions, applications, and petitions in the Courts of Appeal and the Supreme Court; and (3) Proceedings for transferring cases within the appellate jurisdiction of the superior court to the Court of Appeal for review, unless rules 8.1000-8.1018 provide otherwise.

(Cal. Rules of Court, rule 8.4 [explaining the application of rules in the same division such as rule 8.54].)

Code of Civil Procedure section 1005, subdivision (b) provides: "All papers opposing a motion so noticed shall be filed with the court and a copy served on each party at least nine court days, and all reply papers at least five court days before the hearing." The hearing date for the demurrer was set for February 6, 2024 and Pico filed its opposition on January 19, 2024—well before the nine court day deadline of January 24, 2024. Accordingly, Pico filed a timely opposition.

B. Failure to Meet and Confer

"Before filing a demurrer pursuant to this chapter, the demurring party shall meet and confer in person or by telephone with the party who filed the pleading that is subject to demurrer for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised in the demurrer." (Code Civ. Proc., § 430.41, subd. (a).) While Pico objects that the parties only met and conferred by email, rather than in person or by telephone, "[a]ny determination by the court that the meet and confer process was insufficient shall not be grounds to overrule or sustain the demurrer." (Code Civ. Proc., § 430.41, subd. (a)(4).) The Court therefore declines to rule on the demurrer solely on this basis.

III. Legal Standard

"The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in [Code of Civil Procedure s]ection 430.30, to the pleading on any one or more of the following grounds: . . . (e) The pleading does not state facts sufficient to constitute a cause of action, (f) The pleading is uncertain." (Code Civ. Proc., § 430.10, subds. (e) & (f).) A demurrer may be utilized 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 treats a demurrer "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 (*Committee on Children's Television*).) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

IV. Analysis

V-Silicon demurs to the fourth cause of action for fraud on the ground that it fails to allege sufficient facts to state the cause of action. (Code Civ. Proc. § 430.10, subd. (e).)

> The elements of fraud are (1) the defendant made a false representation as to a past or existing material fact; (2) the defendant knew the representation was false at the time it was made; (3) in making the representation, the defendant intended to deceive the plaintiff; (4) the plaintiff justifiably relied on the representation; and (5) the plaintiff suffered resulting damages.
> …
> Fraud must be pleaded with specificity rather than with general and conclusory allegations. The specificity requirement means a plaintiff must allege facts showing how, when, where, to whom, and by what means the representations were made, and, in the case of a corporate defendant, the plaintiff must allege the names of the persons who made the representations, their authority to speak on behalf of the corporation, to whom they spoke, what they said or wrote, and when the representation was made.

(*West v. JPMorgan Chase Bank, N.A*. (2013) 214 Cal.App.4th 780, 792-793 (*West*) [citation and quotation marks omitted]; see also *Lazar v. Super. Ct.* (1996) 12 Cal.4th 631, 638-639, 645 (*Lazar*).)

V-Silicon maintains the fourth cause of action is defective because the complaint fails to allege the following elements with the requisite specificity: (1) misrepresentation; (2) scienter; (3) intent; and (4) reliance. V-Silicon also argues that Pico fails to allege who made the false representation.

A. Misrepresentation

While V-Silicon complains that the pleadings fail to allege an affirmative misrepresentation, an action for fraud does not lie only where an affirmative misrepresentation is made but also where there has been concealment or nondisclosure. (*Jones v. ConocoPhillips* (2011) 198 Cal.App.4th 1187, 1198 ["Not every fraud arises from an affirmative misstatement of material fact."]; see also *Lazar, supra,* 12 Cal.4th at p. 638; 5 Witkin, Summary of Cal. Law (11th ed. 2017) Torts, § 890.)

Here, the complaint alleges, "[V-Silicon] made a false representation to [Pico] in entering the Agreement because [V-Silicon] intended to induce [Pico] to provide design services without paying [Pico] in full at the time when a [*sic*] such promise was made." (Complaint, ¶ 34.) The Agreement, attached as Exhibit A to the complaint, identifies Thinh Tran as the representative making the alleged misrepresentation by signature on in June 2019. (*Id*., Exh. A, p. 6.) This sufficiently alleges misrepresentation for purposes of a demurrer.

The complaint further alleges that on an unspecified date, V-Silicon's CFO Linda Nie acknowledged receipt of the first $200,000 invoice issued on October 29, 2019 and promised payment in December 2019[7] after V-Silicon resolved an unspecified issue with the Chinese Foreign Exchange Control office, but never did. (Complaint, ¶¶ 12, 15.) On April 8, 2020, V-Silicon's CEO, Thinh Tran, acknowledged receipt of all deliverables and urged V-Silicon's executive, Richard Liang to issue payment. (*Id*., ¶ 13.) On April 12, 2020, Pico's CEO, Kamran Iravani, again confirmed V-Silicon's receipt of all deliverables pursuant to the agreement, but the invoices remain unpaid to date. (*Id*., ¶¶ 14-15, 34.) These allegations are sufficient to allege misrepresentation.

B. Scienter and Intent

With respect to scienter and intent, courts have recognized certain exceptions that mitigate the rigor of the rule requiring specific pleading of fraud. (*Committee on Children's Television, Inc., supra,* 35 Cal.3d at p. 217.) For example, less specificity is required when it appears from the nature of the allegations that the defendant must necessarily possess full information concerning the facts of the controversy. (*Ibid.*) A defendant's knowledge and intent to deceive, therefore, are facts that can be generally alleged in a fraud claim. (See 5 Witkin, *Cal. Procedure* (5th Ed., 2019) Pleading §§726, 728 ["Intent, like knowledge, is a fact. Hence, the averment that the representation was made with the intent to deceive the plaintiff, or any other general allegation with similar purport, is sufficient."].)

Here, the complaint's allegation that V-Silicone made the misrepresentation with the intent to induce Pico to provide design services without paying in full is sufficient for purposes of surviving a demurrer. (Complaint, ¶ 34.)

C. Reliance

To allege actual reliance with the requisite specificity, the "plaintiff must plead that he believed the representation to be true…and that in reliance thereon (or induced thereby) he entered into the transaction." (*Younan v. Equifax Inc.* (1980) 111 Cal.App.3d 498, 513.)

[7] While the complaint does not allege the specific date that Nie acknowledge receipt of the invoice, the October 2019 to December 2019 timeframe is sufficient to place V-Silicon on notice of the charges against it. (*West, supra,* 214 Cal.App.4th at p. 793 ["We enforce the specificity requirement in consideration of its two purposes. The first purpose is to give notice to the defendant with sufficiently definite charges that the defendant can meet them."])

While the complaint does not use the words "reliance" or "rely," as V-Silicon argues, the complaint nonetheless sufficiently alleges reliance:

> Plaintiff provided design services to Defendant on the false promise from Defendant that Defendant would pay service fees in full to Plaintiff. Plaintiff *believed in* Defendant's statement in the Agreement…*induced by this false promise*, Plaintiff provided design services to Defendant *under the impression that Defendant would pay the service fee* in full in accordance with the Agreement.

(Complaint, ¶ 34 [emphasis added].) These allegations are also sufficient for purposes of surviving a demurrer. (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 872 ["To survive a demurrer, the complaint need only allege facts sufficient to state a cause of action; each evidentiary fact that might eventually form part of the plaintiff's proof need not be alleged."]; see also (*Ferrick v. Santa Clara University* (2014) 231 Cal.App.4th 1337, 1341.)

Thus, V-Silicon's demurrer to the fourth cause of action is OVERRULED.

Calendar lines 4-5
Case Name: *Royal Farms USA LLC vs Genflora Processing LLC*
Case No.: 22CV407295

Kevin Moore's Demurrer to Second Amended Complaint and Motion to Strike came on for hearing before the Court on February 6, 2024. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This cases arises out of an agreement between Plaintiff Royal Farms USA LLC ("Royal Farms") and Glenflora Processing LLC ("Glenflora") whereby Royal Farms was to receive hemp seeds from Glenfora, Royal Farms was to cultivate the hemp, Glenfora was to sell the hemp, and the parties were to share in the profits. Royal Farms alleges it had to destroy a substantial portion of the crop because it was unhealthy and that some portion of the seeds produced hemp not authorized for sale under California law. Royal Farms brings claims against Glenflora and Glenflora members Kevin Moore and Kenneth Tersini.

Kevin Moore demurrers to the fraud and Business and Professions Code section 17200 et. seq. against him and moves to strike portions of Royal Farm's Second Amended Complaint.

II. Plaintiff's Request for Judicial Notice

Plaintiff requests that the Court take judicial notice of "The Declaration of Effie F. Anastassiou in Support of Reply in Opposition to Motion for Leave to File Second Amended Complaint, dated October 3, 2023, and all supporting exhibits thereto." A court may take judicial notice of court records. (Evid. Code §§452(c) and (h).) However, the court may take judicial notice only of the existence of the documents in the court file, not the truth of the matters asserted therein. (See *Barri v. Workers' Comp. Appeals Bd.* (2018) 28 Cal.App.5th 428, 437-438.)

Much of what is attached to the Anastassiou Declaration is discovery—deposition transcripts, written responses to document requests, and some documents produced by Glenflora. Where statements in discovery responses are made by party, such as in response to interrogatories, requests for admissions, or affidavits filed on the party's behalf, the court may take judicial notice of such facts. (*C.R. v. Tenet Healthcare Corp.* (2009) 169 Cal.App.4th 1094, 1103; *Tucker v. Pacific Bell Mobile Servs.* (2012) 208 Cal.App.4th 201, 218; *Arce v. Kaiser Found. Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 485.)

However, the demurrer should not be turned into a contested evidentiary hearing. (*Bounds v. Superior Court* (2014) 229 Cal.App.4th 468, 477.)

The deposition transcripts and discovery responses attached to the Anastassiou Declaration do not comprise clear admissions of a party opponent such that it would be appropriate for the Court to take judicial notice of those materials on a demurrer. Accordingly, the request for judicial notice is DENIED

III. Legal Standard

"The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in [Code of Civil Procedure s]ection 430.30, to the pleading on any one or more of the following grounds: . . . (e) The pleading does not state facts sufficient to constitute a cause of action, (f) The pleading is uncertain." (Code Civ. Proc., § 430.10, subds. (e) & (f).) A demurrer may be utilized 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 treats a demurrer "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 (*Committee on Children's Television*).) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

Under Code of Civil Procedure section 436, a court may strike out any irrelevant, false, or improper matter inserted into any pleading or strike out all or part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court. (Code Civ. Proc., § 436.) The grounds for a motion to strike must appear on the face of the challenged pleading or from matters of which the court may take judicial notice. (Code Civ. Proc., § 437, subd. (a); see also *City and County of*

San Francisco v. Strahlendorf (1992) 7 Cal.App.4th 1911, 1913.) In ruling on a motion to strike, the court reads the complaint as a whole, all parts in their context, and assumes the truth of all well-pleaded allegations. (See *Turman v. Turning Point of Central California, Inc.* (2010) 191 Cal.App.4th 53, 63 (*Turman*), citing *Clauson v. Super. Ct.* (1998) 67 Cal.App.4th 1253, 1255.) "Thus, for example, defendant cannot base a motion to strike the complaint on affidavits or declarations containing extrinsic evidence showing that the allegations are 'false' or 'sham.'" (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2020) 7.169.)

A motion to strike portions of a complaint or petition may be brought on the ground that the allegations at issue are "irrelevant" or "improper." (Code Civ. Proc., § 436, subd. (a).) Irrelevant matter includes (1) an allegation that is not essential to the statement of a claim or defense, (2) an allegation that is neither pertinent to nor supported by an otherwise sufficient claim or defense, and (3) a demand for judgment requesting relief not supported by the allegations of the complaint or cross-complaint. (See Code Civ. Proc., § 431.10, subds. (b), (c).) Generally speaking, motions to strike are disfavored and cannot be used as a vehicle to accomplish a "line item veto" of allegations in a pleading. (*PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1683 (*PH II, Inc.*).) However, where irrelevant allegations are "scandalous, abusive, disrespectful and contemptuous," they should be stricken from the pleading. (*In re Estate of Randall* (1924) 194 Cal. 725, 731.)

"While under Code of Civil Procedure section 436, a court at any time may, in its discretion, strike portions of a complaint that are irrelevant, improper, or not drawn in conformity with the law, matter that is essential to a cause of action should not be struck and it is error to do so. Where a whole cause of action is the proper subject of a pleading challenge, the court should sustain a demurrer to the cause of action rather than grant a motion to strike." (*Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1281, internal citations omitted.)

"Liberality in permitting amendment is the rule, if a fair opportunity to correct any defect has not been given." (*Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1227.) It is an abuse of discretion for the court to deny leave to amend where there is any reasonable possibility that plaintiff can state a good cause of action. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) The burden is on the plaintiff

to show in what manner plaintiff can amend the complaint, and how that amendment will change the legal effect of the pleading. (*Id*.)

IV. Analysis

A. Second Cause of Action: Fraud

Moore demurs to the second cause of action for fraud on the ground that it fails to allege sufficient facts to state the cause of action. (Code Civ. Proc. § 430.10, subd. (e).)

> The elements of fraud are (1) the defendant made a false representation as to a past or existing material fact; (2) the defendant knew the representation was false at the time it was made; (3) in making the representation, the defendant intended to deceive the plaintiff; (4) the plaintiff justifiably relied on the representation; and (5) the plaintiff suffered resulting damages.
> …
> Fraud must be pleaded with specificity rather than with general and conclusory allegations. The specificity requirement means a plaintiff must allege facts showing how, when, where, to whom, and by what means the representations were made, and, in the case of a corporate defendant, the plaintiff must allege the names of the persons who made the representations, their authority to speak on behalf of the corporation, to whom they spoke, what they said or wrote, and when the representation was made.

(*West v. JPMorgan Chase Bank, N.A*. (2013) 214 Cal.App.4th 780, 792-793 (*West*) [citation and quotation marks omitted]; see also *Lazar v. Super. Ct.* (1996) 12 Cal.4th 631, 638-639, 645 (*Lazar*).)

Moore maintains the second cause of action is defective because the SAC fails to allege to whom the alleged misrepresentation was made, a date when the alleged misrepresentations were made, whether the misrepresentation was oral or written, or where the misrepresentations were made. Moore also argues the few allegations Royal Farms does make are mere conclusions unsupported by alleged facts.

Here, Plaintiff has detailed allegations regarding the content and nature of the alleged misrepresentations. Contrary to Moore's analysis, this is not the time for the Court to weigh credibility. Nor does the Court consider whether the allegations can be proven. The law dictates that the Court assume the allegations on demurrer are true. However, what is also apparent is that Plaintiff did not but could allege to whom the misrepresentations were made, when they were made, whether the misrepresentations were oral or written, and what facts lead Plaintiff to conclude Moore knew the statements were false when made.

Accordingly, Moore's demurrer is SUSTAINED with 20 days leave to amend.

B. Sixth Cause of Action: Violation of Business & Professions Code §17200

The parties agree that Plaintiff's sixth cause of action rises and falls with its fraud claim. Accordingly, Moore's demurrer to this claim is SUSTAINED with 20 days leave to amend.

C. Motion to Strike

Given the Court's rulings above, the motion to strike is MOOT.

Calendar lines 6-9
Case Name: *John Doe v. Stanford Health Care, et al.*
Case No.: 20CV374136

Before the Court are motions for summary judgment by (1) Daniel Sung-Joon Kim M.D.; (2) Timothy Kosune Ando, M.D.; (3) Ricardo Lozano, M.D.; and (4) Stanford Health Care ("SHC"). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This is an action for medical negligence. Plaintiff John Doe is an African American male. (Third Amended Complaint ("TAC"), ¶ 13.)[8] Prior to 2019, he was diagnosed with bipolar disorder and post-traumatic stress disorder for which he had been hospitalized several times. (*Ibid*.) In 2019, Plaintiff was a graduate student at Stanford University in the neuroscience field. (TAC, ¶ 14.) On March 9, 2019, he believed he was suffering a bipolar episode and presented to Stanford Hospital for voluntary admission. (TAC, ¶¶ 15-16.) During his stay, he was prescribed medications that were not medically appropriate, given his history and symptoms. (TAC, ¶¶ 18, 27, 31-32.) On March 11, he was transferred to the involuntary unit on a "5150" hold. (TAC, ¶ 21.) Based on his behavior and symptoms, a security officer was posted outside his door, however the security officer was removed that night by his supervisor due to staff shortages. (TAC, ¶¶ 24-25.) On March 12, 2019, Plaintiff assaulted a nurse. (TAC, ¶ 29.) From March 13, 2019, through March 25, 2019, Plaintiff was prescribed medications that were not medically appropriate, given his history and symptoms, despite his worsening symptoms. (TAC, ¶ 33.) On April 17, 2019, Plaintiff was discharged from Stanford Hospital. (TAC, ¶ 38.)[9]

Plaintiff initiated this action on November 30, 2020, asserting (1) medical negligence; (2) negligent infliction of emotional distress; (3) violation of civil rights; and (4) intentional infliction of emotional distress. On October 28, 2021, Plaintiff filed his TAC, which asserts (1) medical negligence and (2) violation of civil rights. On July 26 and 28, 2023; August 1, 2023; and October 10, 2023, Dr. Kim, Dr. Ando, Dr. Lozano, and SHC filed their respective motions for summary judgment, which Plaintiff opposes.[10]

---

[8] In order to protect his constitutional right to privacy, Plaintiff brings this action under a fictitious name.
[9] Plaintiff states the scope of this case has been limited to the time period of March 10, 2019 to March 12, 2019. (Opp., p. 4, fn. 1.)
[10] On November 3, 2023, the Court granted Dr. Mytilee Vemuri's motion for summary judgment.

II. Evidentiary Objections

A. Plaintiff's Objections

Plaintiff objects to the declaration of Defendants' expert Renee Binder, M.D.

The objections do not need to be ruled upon because they do not comply with Rule of Court 3.1354. Rule 3.1354 requires two documents to be submitted when evidentiary objections are made: the objections and a separate proposed order on the objections, both of which must be in one of the two approved formats set forth in the rule. (See *Vineyard Spring Estates v. Super. Ct.* (2004) 120 Cal.App.4th 633, 642 (*Vineyard*) [trial courts only have duty to rule on evidentiary objections presented in the proper format]; *Hodjat v. State Farm Mutual Automobile Ins. Co.* (2012) 211 Cal.App.4th 1 (*Hodjat*) [trial court not required to rule on objections that do not comply with Rule of Court 3.1354 and not required to give objecting party a second chance at filing properly formatted papers].)

Here, Plaintiff submitted only one document with the objections, in violation of Rule 3.1354. Consequently, the Court declines to rule on the evidentiary objections. Objections that are not ruled on are preserved for appellate review. (Code of Civ. Proc., § 437c, subd. (q).)

B. Defendants' Objections

With their respective replies, Defendants submit identical evidentiary objections, along with proposed orders, to Plaintiff's exhibits 4 to 8, and portions of Plaintiff's expert declaration by Dr. Mohan Nair, M.D.

Objections 1 to 6 are OVERRULED.

Objections 7 to 11, which pertain to exhibits 4 to 8 are SUSTAINED.

III. Motions for Summary Judgment

Pursuant to Code of Civil Procedure section 437c, Defendants move for summary judgment against Plaintiff.[11]

A. Legal Standard

Any party may move for summary judgment. (Code of Civ. Proc., §437c, subd. (a); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) The motion "shall be granted if all the

[11] Although Defendants filed individual motions, their motions, supporting papers, and evidence are nearly identical. Thus, the Court will address them together.

papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code of Civ. Proc., 437c, subd. (c); *Aguilar, supra*, 25 Cal.4th at p. 843.) The object of the summary judgment procedure is "to cut through the parties pleading" to determine whether trial is necessary to resolve the dispute. (*Aguilar, supra*, 25 Cal.4th at p. 843.) Summary adjudication works the same way, except it acts on specific causes of action or affirmative defenses, rather than on the entire complaint. (§ 437c, subd. (f).) … Motions for summary adjudication proceed in all procedural respects as a motion for summary judgment.'" (*Hartline v. Kaiser Foundation Hospitals* (2005) 132 Cal.App.4th 458, 464.)

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, supra*, 25 Cal.4th at p. 850; see Evid. Code, § 110.) "A prima facie showing is one that is sufficient to support the position of the party in questions. (*Aguilar, supra*, 25 Cal.4th at p. 851.)

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. (Code of Civ. Proc., 437c, subd. (c); *Aguilar, supra*, 25 Cal.4th at p. 850.) A triable issue of material fact exists "if, and only if, the evidence would allow of reasonable trier of fact to find the underlying facts in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra*, 25 Cal.4th at p. 850, fn. omitted.) If the party opposing summary judgment presents evidence demonstrating the existence of a disputed material fact, the motion must be denied. (*Id*. at p. 843.)

"Another way for a defendant to obtain summary judgment is to 'show' that an essential element of plaintiff's claim cannot be established. Defendant does so by presenting evidence that plaintiff 'does not possess and cannot reasonably obtain, needed evidence' (because plaintiff must be allowed a reasonable opportunity to oppose the motion)." (*Aguilar, supra,* 25 Cal.4th at pp. 854-855.) "Such evidence usually consists of admissions by plaintiff following extensive discovery to the effect that he or she has discovered nothing to support an essential element of the cause of action." (*Ibid.*)

Throughout the process, the trial court "must consider all of the evidence and all of the inferences drawn therefrom." (*Aguilar, supra*, 25 Cal.4th at p. 856.) The moving party's evidence is strictly construed, while the opponent's is liberally construed. (*Id*. at 843.)

B. Analysis

Defendants argue they are entitled to summary judgment, or in the alternative summary adjudication because (1) they met the standard of care and (2) they did not deny Plaintiff equal access to services and medical care.

1. First Cause of Action: Medical Negligence

"The elements of a cause of action for negligence are well established. They are '(a) a legal duty to use due care; (b) a breach of such legal duty; and (c) the breach as the proximate or legal cause of the resulting injury.'" (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917 (*Ladd*).) Medical negligence is still negligence.

> With respect to professions, their specialized education and training do not serve to impose an increased duty of care but rather are considered additional "circumstances" relevant to the overall assessment of what constitutes "ordinary prudence" in a particular situation. Thus the standard for professionals is articulated in terms of exercising "the knowledge, skill, and care ordinarily possessed and employed by members of the profession in good standing…" [Citation.]

(CACI, No. 500; *Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 997-998.)

Defendants' statements of facts are as follows: On March 8, 2019, Plaintiff presented to the Standford Hospital outpatient psychiatry clinic, where he reported that he had relapsed with marijuana and he reported feeling hypomanic the day before with anxiety, not feeling grounded, having racing thoughts, and lack of sleep. (Dr. Ando's Undisputed Material Facts ("UMF"), Nos. 15-16; Dr. Kim's UMF, Nos. 15-16; Dr. Lozano's UMF, Nos. 7-8; SHC's UMF Nos. 7-8.) He was given medication recommendations and was to be reassessed in the morning. (Dr. Ando's UMF, Nos. 17-20; Dr. Kim's UMF, Nos. 17-20; Dr. Lozano's UMF. Nos. 9-10; SHC's UMF, Nos. 9-10.) On March 9, 2019, he called the outpatient psychiatry department and said he wanted to come into the hospital. (Dr. Ando's UMF, No. 21; Dr. Kim's UMF, No. 21; Dr. Lozano's UMF, No. 11; SHC's UMF, No. 11.) He reported that his medication was not working, he felt manic and he had not slept for three nights. (Dr. Ando's UMF, No. 22; Dr. Kim's UMF, No. 22; Dr. Lozano's UMF, No. 12; SHC's UMF, No. 12.) He was

advised to go to the ED. (Dr. Ando's UMF, No. 23; Dr. Kim's UMF, No. 23; Dr. Lozano's UMF, No. 13; SHC's UMF. No. 13.) The resident discussed Plaintiff in detail with the attending physician, Dr. Vemuri, who agreed with the plan of care and Plaintiff presented to the ED that evening. (Dr. Ando's UMF, Nos. 24-25; Dr. Kim's UMF, Nos. 24-25; Dr. Lozano's UMF, No. 14; SHC's UMF. No. 14.)

That evening, Plaintiff reported feeling very manic with a one-week history of hypomanic symptoms worsening over the last three days and inability to sleep. (Dr. Ando's UMF, No. 26; Dr. Kim's UMF, No. 26.) He was evaluated by the psychiatric resident who consulted with the attending psychiatrist, Dr. Vemuri. (Dr. Ando's UMF, No. 28; Dr. Kim's UMF, No. 28; Dr. Lozano's UMF, No. 15; SHC's UMF, No. 15.) Plaintiff denied suicide ideation and homicidal ideation. (Dr. Ando's UMF, No. 30; Dr. Kim's UMF, No. 30; Dr. Lozano's UMF, No. 16; SHC's UMF, No. 16.) The same evening, Plaintiff's mother was contacted, who provided information regarding past medications and their effects in addition to reporting that Plaintiff had not assaulted anyone except in a situation where he was assaulted and had to fight back. (Dr. Ando's UMF, Nos. 31-32; Dr. Kim's UMF, Nos. 31-32; Dr. Lozano's UMF, Nos. 17-18; SHC's UMF, Nos. 17-18.)

On March 10, 2019, Dr. Vemuri saw Plaintiff and noted that he did not sleep overnight despite receiving Haldol and Zyprexa. (Dr. Ando's UMF, No. 39; Dr. Kim's UMF, No. 39; Dr. Lozano's UMF, No. 20; SHC's UMF, No. 20.) Plaintiff discussed his history and symptoms with Dr. Vemuri as well as his current medications in the context of labs, which demonstrated elevated liver enzymes. (Dr. Ando's UMF, Nos. 41-42; Dr. Kim's UMF, Nos. 41-42; Dr. Lozano's UMF, No. 22; SHC's UMF, No. 22.) They acknowledged that Haldol could be helpful for him but he thought it might be the cause of his agitation. (Dr. Ando's UMF, No. 43; Dr. Kim's UMF, No. 43.) He again advised that Zyprexa was an effective rescue medication for him and he was willing to take it, in addition, he was amenable to taking Vistaril, Propranolol, and Gabapentin. (Dr. Ando's UMF, Nos. 44-45; Dr. Kim's UMF, Nos. 44-45.)

Dr. Vemuri reviewed his outpatient psychiatry notes regarding medications and symptoms/side effect, and she made adjustments to Plaintiff's medications based on the information she gathered and Plaintiff's clinical presentation. (Dr. Ando's UMF, Nos. 46-48; Dr. Kim's UMF, Nos. 46-48; Dr. Lozano's UMF, Nos. 23-25; SHC's UMF, No. 23-25.) That afternoon, the on-call psychiatry resident was called by the nursing staff after a near loss of consciousness episode where Plaintiff slumped on a

chair and became verbally nonresponsive for less than one minute. (Dr. Ando's UMF, No. 49; Dr. Kim's UMF, No. 49.) He was assessed after and the resident consulted with Dr. Vemuri, who was the attending psychiatrist. (Dr. Ando's UMF, No. 50; Dr. Kim's UMF, No. 50.)

On the evening of March 10, 2019, Dr. Ando, who was the on-call resident, was paged by nursing staff who reported that Plaintiff was agitated, was trying to leave, and uncooperative with redirection. (Dr. Ando's UMF, Nos. 52-53; Dr. Kim's UMF, No. 52-53; Dr. Lozano's UMF, Nos. 26-27; SHC's UMF, Nos. 26-27.) Dr. Ando assessed him and determined that he remained acutely dangerous to himself and gravely disabled. (Dr. Ando's UMF, No. 54; Dr. Kim's UMF, No. 54; Dr. Lozano's UMF, No. 28; SHC's UMF, No. 28.) Dr. Ando consulted with Dr. Vemuri and that evening Plaintiff was placed on an involuntary 5150 hold for danger to self and grave disability. (Dr. Ando's UMF, Nos. 55-56; Dr. Kim's UMF, No. 55-56; Dr. Lozano's UMF, No. 29; SHC's UMF, No. 29.) He was administered additional medication and transferred to a locked unit. (Dr. Ando's UMF, Nos. 57-59; Dr. Kim's UMF, Nos. 57-59; Dr. Lozano's UMF, Nos. 30-31; SHC's UMF, No. 30-32.) He became restless, agitated and more difficult to redirect. (Dr. Ando's UMF, No. 60; Dr. Kim's UMF, No. 60; Dr. Lozano's UMF, No. 32.) Around 11:05 p.m., Dr. Ando placed an order for security presence pursuant to information from and at the request of the night shift nurse. (Dr. Ando's UMF, No. 61; Dr. Kim's UMF, No. 61; Dr. Lozano's UMF, No. 33; SHC's UMF, No. 36.)

On March 11 at 2:00 a.m., the nurse documented that security had to be pulled because of staffing issues. (Dr. Ando's UMF, No. 62; Dr. Kim's UMF, No. 62; Dr. Lozano's UMF, No. 34; SHC's UMF, No. 37.) There is no record of another request or any further communication regarding security presence. (Dr. Ando's UMF, Nos. 63-64; Dr. Kim's UMF, Nos. 63-64; Dr. Lozano's UMF, Nos. 35-36; SHC's UMF, Nos. 39-41.) Later that day, Plaintiff was seen by the attending psychiatrist Dr. Kim and resident Dr. Lozano. (Dr. Ando's UMF, No. 65; Dr. Kim's UMF, No. 65; Dr. Lozano's UMF, No. 37; SHC's UMF, No. 42.) Plaintiff reported feeling like he was "calming down" and was tired. (Dr. Ando's UMF, No. 66; Dr. Kim's UMF, No. 66; Dr. Lozano's UMF, No. 38; SHC's UMF, No. 43.) Dr. Kim and Dr. Lozano did not believe a security presence was necessary and did not order any for that day. (Dr. Ando's UMF, No. 69; Dr. Kim's UMF, No. 69; Dr. Lozano's UMF, No. 41; SHC's UMF, No. 46.) Throughout the day, he was noted to be anxious, agitated, and restless but he denied thoughts of

harming others or himself. (Dr. Ando's UMF, No. 72; Dr. Kim's UMF, No. 72; Dr. Lozano's UMF, No. 43; SHC's UMF, No. 84.) On March 12, he was seen again by Dr. Kim and Dr. Lozano in the morning, they did not believe security presence was necessary and did not order any that day. (Dr. Ando's UMF, No. 73-76; Dr. Kim's UMF, No. 73-76; Dr. Lozano's UMF, No. 44-47; SHC's UMF, No. 50-53.)

On March 12, 2019, the nursing staff continued to monitor and assess Plaintiff throughout the day; Plaintiff was noted to be watching TV with his girlfriend/visitor from 6:21 p.m. to 7:45 p.m. (Dr. Ando's UMF, No. 77; Dr. Kim's UMF, No. 77; Dr. Lozano's UMF, No. 48; SHC's UMF, No. 54.) At approximately 8:00 p.m., Plaintiff physically assaulted a nurse when he threw/pushed her to the ground, stood over her, hit, and attacked her. (Dr. Ando's UMF, Nos. 79-80; Dr. Kim's UMF, Nos. 79-80; Dr. Lozano's UMF, Nos. 49-50; SHC's UMF, Nos. 55-56.) Security was immediately called, and he was placed in 4-point restraints and administered medication via injection. (Dr. Ando's UMF, No. 81; Dr. Kim's UMF, No. 81; Dr. Lozano's UMF, No. 51; SHC's UMF, No. 57.) He was evaluated after by resident Dr. Matthew Edwards, who noted Plaintiff was agitated and it was appropriate for him to remain in restraints. (Dr. Ando's UMF, Nos. 82-83; Dr. Kim's UMF, Nos. 82-83; Dr. Lozano's UMF, No. 52-53; SHC's UMF, Nos. 58-59.) Dr. Edwards requested 2 security officers and a 1:1 sitter. (Dr. Ando's UMF, No. 84; Dr. Kim's UMF, No. 84; Dr. Lozano's UMF, No. 54; SHC's UMF, No. 59.)

On March 13, Dr. Ando assessed Plaintiff again and noted he was still agitated, he could not comprehend the behavior that resulted in the restraints, could not contract for safety, and he determined it was still appropriate for Plaintiff to remain in the restraints for safety purposes. (Dr. Ando's UMF, Nos. 85-87; Dr. Kim's UMF, Nos. 85-87; Dr. Lozano's UMF, Nos. 55-57; SHC's UMF, Nos. 60-62.) Plaintiff had constant security presence with him throughout the rest of his admission to SHC due to the assault. (Dr. Ando's UMF, No. 93; Dr. Kim's UMF, No. 93; Dr. Lozano's UMF, No. 60; SHC's UMF, No. 65.)

a. Breach/Standard of Care

> The standard of care in malpractice cases is also well known. With unimportant variations in phrasing, we have consistently held that a physician is required to possess and exercise, in both diagnosis and treatment, that reasonable degree of knowledge and

skill which is ordinarily possessed and exercised by other members of his profession in similar circumstances.

(*Landeros v. Flood* (1976) 17 Cal.3d 399, 408; see also CACI, No. 501; *Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 36.)

"California courts have incorporated the expert evidence requirement into their standard for summary judgment in medical malpractice cases. When a defendant moves for summary judgment and supports his motion with expert declarations that his conduct fell within the community standard of care, he is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence." (*Munro v. Regents of the University of California* (1989) 215 Cal.App.3d 977, 984-985; see also *Meier v. Ross General Hospital* (1968) 69 Cal.2d 420, 428-429 ["Ordinarily, a doctor's failure to possess or exercise the requisite learning or skill can only be established by the testimony of experts"].)

Defendants argue they met the standard of care. In support they rely on Dr. Binder's declaration, which is Exhibit B in each Defendants' Appendix of Evidence. Dr. Binder reviewed the pleadings, medical records, deposition transcripts, and discovery responses. Dr. Binder opines SHC's providers, including but not limited to, Dr. Ando, Dr. Kim, and Dr. Lozano met the standard of care in the care, treatment, diagnosis, medication management, and medical services provided to Plaintiff. (Dr. Binder Decl., ¶ 5, 38-48.) This is sufficient to meet Defendants' initial burdens regarding the standard of care. Thus, the burden shifts to Plaintiff to demonstrate a triable issue of material fact.

Plaintiff's statement of facts are as follows: On March 10, 2019, at approximately 8:30 p.m. Plaintiff was moved from the voluntary unit to the locked psychiatric unit. (Plaintiff's Additional Material Facts ("Plaintiff's AMF"), No. 1.) The locked unit is the highest security area at Stanford and is reserved for patients severely disable or a danger to themselves or others. (Plaintiff's AMF, No. 2.) When he was moved, Plaintiff remained grandiose and became increasingly tangential and preservative with a blunted and irritable affect, and it was noted that the staff should take "assault precautions." (Plaintiff's AMF, Nos. 3-4.) After he was moved, Plaintiff was observed pacing the hall, going into other patient rooms, putting on his roommates clothing, throwing his cup of water in his own face, and becoming more difficult to redirect. (Plaintiff's AMF, No. 5.) At 9:50 p.m., Nurse Zate-Perry requested "standby security" because she had to give Plaintiff medication. (Plaintiff's AMF, No. 6.) "Standby

security" is for a short period of time, whereas "security presence" is for longer periods of time. (Plaintiff's AMF, No. 7.)

At 10:00 p.m., Nurse Zate-Perry requested, and the charge Nurse Mary Ockerman agreed to move Plaintiff from a double room to a single room with a camera close to the nurse's station for closer observation because he needed constant redirection, was loud, noncompliant, and would not calm down or sleep despite medication. (Plaintiff's AMF, No. 8.) The security guard who was present while Nurse Zate-Perry was administering medication stayed to assist in moving Plaintiff to a single room and then left. (Plaintiff's AMF, No. 9.) Nurse Zate-Perry felt 1:1 security was necessary to redirect Plaintiff. (Plaintiff's AMF, No. 11.)

At his deposition, Dr. Kim stated that doctors, not nurses, enter orders for "longer term" or a "more long-standing security presence." (Plaintiff's AMF, No. 13.)

Dr. Ando ordered that security presence was required "3/10/19 2305 [11:05 p.m.]- until specified," and Dr. Ando did not discontinue his order for security presence until 3/12/19 at 9:01 p.m., after the assault. (Plaintiff's AMF, No. 14.) Plaintiff was self-laughing and mumbling, in and out of his bed. (Plaintiff's AMF, No. 15.) On March 11, at 2:00 a.m., the security supervisor recalled the security guard, without consultation with any psychiatrist, and despite the order that security should be present "until specified." (Plaintiff's AMF, No., 16.)

At the time security presence was removed, Nurse Zate-Perry still wanted security to be present for 1:1 monitoring and Plaintiff was still manic despite medication. (Plaintiff's AMF, No. 17.) The 1:1 security guard monitoring was withdrawn without a medical determination that it was no longer necessary. (Plaintiff's AMF, No. 18.) Dr. Ando did not keep himself informed about whether Plaintiff was being supervised. (Plaintiff's AMF, No. 19.) At approximately 3:25 a.m., Nurse Zate-Perry informed Dr. Ando that she had given Plaintiff medication but he still had not slept. (Plaintiff's AMF, No. 20.) When she ended her shift, Nurse Zate-Perry believed that assault precautions should be in place for Plaintiff, given his manic behavior, the fact that he was delusional, and the fact that he was not following directions. (Plaintiff's AMF, No. 21.) She wrote "safety concerns: assault precautions" on his chart. (*Ibid*.)

There was nothing in the medical chart to inform nurses on the following shift that 1:1 monitoring had been withdrawn without psychiatric approval. (Plaintiff's AMF, No. 22.) On March 11, Dr. Kim and Dr. Lozano saw Plaintiff. (Plaintiff's AMF, No. 25.) Dr. Kim was unaware that Dr. Ando had ordered a security presence when he was treated Plaintiff. (Plaintiff's AMF, No. 26.) Neither Dr. Kim nor Dr. Lozano spoke to Dr. Ando about Plaintiff after Dr. Ando entered his security order. (Plaintiff's AMF, No. 27.) Plaintiff was specifically identified as an assault risk by nurses when Dr. Ando entered the order and the following morning, the day of the assault. (Plaintiff's AMF, No. 28.) Dr. Kim testified that when he saw Plaintiff on March 11, he remained "restless, intrusive, and disorganized." (Plaintiff's AMF, No. 29.) He further testified that during this hospital stay, Plaintiff had "multiple episodes of attempted assaults or actual assaults on staff." (Plaintiff's AMF, No. 32.) He noted Plaintiff's later attempted assault on a security guard was "in the context of severe thought disorganization, and only 1-2 hours of sleep over the course of 2-3 days"- the same concerns about thought disorganization and lack of sleep that also existed in the 42 hours before the assault. (Plaintiff's AMF, No. 33.)

Over the course of Plaintiff's stay at SHC, Dr. Kim noted that Plaintiff's symptoms did not respond to medications, stating, "the patient had been tried on and has failed numerous medications at maximum doses, including antidepressants, typical antipsychotics, atypical antipsychotics, and mood stabilizers." (Plaintiff's AMF, No. 37.) Plaintiff was delusional when 1:1 continuous monitoring was ordered, and he remained delusional after the security staff overrode the doctor's orders for required monitoring. (Plaintiff's AMF, No. 38.)

In support of his argument, Plaintiff provides the declaration of Dr. Nair, who opines that Dr. Ando fell below the standard of care by selecting a security guard to provide monitoring of Plaintiff. (Dr. Nair Decl., ¶ 6b.) While Plaintiff characterizes the order as a request for "continuous 1:1 monitoring", Defendants point out Nurse Zate-Perry's progress notes from March 11, 2019 at 2:22 a.m., state, she "obtained an order to have a security officer with pt." (Plaintiff's Exh. 2, p. 229.) Moreover, Plaintiff's medical records reflect the request by Dr. Ando for *security presence* from March 10, 2019 at 11:05 p.m. "until specified", which was discontinued by Dr. Ando on March 12, 2019 at 9:01 p.m. (Plaintiff's Exh. 2, p. 491.)

Dr. Nair further opines Dr. Ando was on duty when the security guard was removed without further evaluation. (Dr. Nair Decl., ¶ 6c.) On that basis, Dr. Nair opines that Dr. Ando's care fell below the standard of care because he decided that Plaintiff required 1:1 continuous monitoring, but he did not effectively communicate with Plaintiff's immediate caregivers to ensure that he actually received that monitoring. (*Ibid*.) He further opines Dr. Ando fell below the standard of care when he: (1) failed to take steps to communicate to psychiatrists in the following shifts that they had made the determination that the patient's condition required 1:1 continuous monitoring; (2) allowed a supervising security guard to override their medical judgment; (3) failed to keep informed of the patient's status; and (4) failed to be aware that a supervising security guard had overridden their judgment. (*Ibid*.)

Dr. Nair further opines Dr. Lozano and Dr. Kim's care fell below the standard of care because, despite seeing Plaintiff the morning of March 11, 2019, both doctors failed to notice and address the fact that Dr. Ando/Dr. Vemuri had made an order for 1:1 continuous monitoring less than 12 hours previously, failed to notice its unapproved absence, and failed to make an assessment about whether such monitoring was still required despite the hospital's untrained security staff overriding Dr. Ando/Dr. Vemuri's still active order for 1:1 monitoring, due to security guard staffing shortages. (Dr. Nair Decl., ¶ 6d.) However, both Dr. Kim and Dr. Lozano provided responses to special interrogatories stating they "did not believe security presence was necessary for that time and did not order or recommend such at any point that day." (Dr. Kim's Exh. D & E, No. 15; Dr. Lozano, Exh. D & E, No. 15.)

Dr. Nair also opines that SHC fell below the standard of care by allowing its untrained security staff to make medical decisions. In the judgment of Dr. Ando, who was being supervised by Dr. Vemuri, Plaintiff's condition required 1:1 continuous monitoring, yet the security guard assigned to monitor Plaintiff was removed by the security guard's supervisor without a medical determination that 1:1 monitoring was no longer necessary. These actions fell below the standard of care. (Dr. Nair Decl., ¶ 6e.)

However, Dr. Nair does not provide any explanation as to how these steps by any Defendant would have prevented this assault.

b. Causation

Causation in a medical malpractice case must ordinarily be determined by expert medical testimony. (*Salasquevara v. Wyeth Laboratories, Inc.* (1990) 222 Cal.App.3d 379, 385.) To show the element of causation cannot be established in a medical malpractice action, then defendant must present sufficient expert testimony showing that the plaintiff's injury was not "caused by anything that defendants did or failed to do." (*Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 508.)

Dr. Binder opines,

> Plaintiff was admitted to SHC on March 9, 2019, on a voluntary basis. On the evening of March 10, 2019, it was appropriate to have placed Plaintiff on a 5150 hold for danger to self and gravely disabled based on his deteriorating mental status and clinical conduction. Plaintiff did not have a history of violence towards others based on information that he and his mother provided and based on prior medical records available to SHC providers. As such, he was not determined at that time to be a danger to others. He was appropriately transferred to the locked unit the same evening. Plaintiff continued to be closely assessed and monitored by the nursing staff and the on-call resident, Dr. Ando. At one point in time the night shift nurse requested that Dr. Ando place an order for security presence, which Dr. Ando agreed to do. However, it should be noted while security standbys or security escorts are routinely requested for brief periods of time in acute situations, unless a patient has displayed violent behavior or continued/consistent threatening and/or aggressive behavior, it is not expected that security remain, one to one, with a patient for extended periods of time. At the time when records indicate that security was called off (approximately 2 am on March 11, 2019), Plaintiff was not noted to be violent or exhibiting continued aggressive/threatening behavior. The standard of care did not require security presence for the remainder of that shift. Later that morning, Plaintiff was assessed/evaluated by Dr. Lozano and Dr. Kim and while he was still agitated and manic, Dr. Lozano and Dr. Kim acted well within the standard of care in not

ordering/requesting security presence either on March 11 or March 12, 2019, as such was not indicated.

The attack on the SHC nurse did not occur until 48 hours after it was noted that security had been called off. During those 48 hours, while Plaintiff was still manic, restless, and agitated, he had not displayed any violent behavior and there would have been no reason for the physician to order (or for the nursing staff to request an order) security presence for any extended period of time. The assault on the SHC nurse by Plaintiff could not have been anticipated by the SHC providers and nursing staff. It was completely unpredictable and unprovoked.

(Dr. Binder Decl., ¶ 44.)

This is sufficient to meet Defendants' initial burdens regarding causation. Thus, the burden shifts to Plaintiff to demonstrate a triable issue of material fact.

To prevail on a medical negligence claim, the plaintiff must demonstrate that the defendant's breach of the standard of care caused injury to the plaintiff. (*Bolen v. Woo* (1979) 96 Cal.App.3d 944, 953.)

The law is well settled that in a personal injury action causation must be proven within a reasonable medical probability based on competent expert testimony. Mere possibility alone is insufficient to establish a prima facie case. That there is a distinction between a reasonable medical "probability" and a medical "possibility" needs little discussion. There can be many possible "causes," indeed, an infinite number of circumstances that can produce an injury or disease. A possible cause only becomes "probable" when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action. This is the outer limit of inference upon which an issue may be submitted to the jury. Thus, proffering an expert opinion that there is some theoretical possibility the negligent act could have been a cause-in-fact of a particular injury is insufficient to establish causation. Instead, the plaintiff must offer an expert opinion that contains a reasoned explanation illuminating why the facts have convinced

> the expert, and therefore should convince the jury, that it is more probable than not the negligent act was a cause-in-fact of the plaintiff's injury.

(*Jennings v. Palomar Pomerado Health Systems, Inc.* (2004) 114 Cal.App.4th 1108, 1117-1118; internal citations and punctuation omitted (*Jennings*).)

Without citation, Plaintiff asserts there is a triable issue of material fact as to whether the passage of 48 hours between the removal of security and the assault, with intervening observations by medical providers negates causation as a matter of law. The Court disagrees.

Dr. Nair opines it was a nurse who initially requested a security guard, and that Dr. Ando ordered the security guard as requested. (Dr. Nair Decl., ¶ 5j.) He also opines that Plaintiff saw Nurse Mary Ockerman, Dr. Lozano, Dr. Kim, Nurse Ellen Deffenbaugh, Nurse Jason Smith, and Nurse King in the 48 hours period between the time security was removed and the assault. According to Dr. Nair's review of the records, while the individuals made notes about their observations of Plaintiff, none of those notes stated an ongoing concern which necessitated 1:1 security. Plaintiff cites to nurse Zate-Perry's testimony, in which she states,

> Q. Okay. So I'm just trying to figure out if – at some point, between the time that the security guard assigned by Dr. Ando to—and you, to be present for Mr. Doe, at some point after that, did you determine, independent of any call you may have received from the security office, that you no longer needed a security guard to be present?
>
> A. Well, at that time he was still in and out of his bed, even though he's drowsy.
>
> Q. So your assessment was, I still need a security guard? That's why you had not let them go yet?
>
> A. Yes.

(Plaintiff's Exh. 3, p. 146:4-16.)

However, Nurse Zate-Perry did not testify that she noted her concern anywhere or communicated it to anyone else. Dr. Nair opines the failure of SHC and Dr. Ando, Dr. Lozano, and Dr. Kim caused the assault because if 1:1 monitoring had been in place, Plaintiff would have been prevented from leaving his room and assaulting the nurse, and there would have been time to call for additional assistance if necessary. (Dr. Nair Decl., ¶ 6f.) However, Dr. Nair does not offer any facts, explanations, or opinions

in support of this conclusion. Moreover, he fails to provide any opinion as to how any act or failure to act by any Defendant could have prevented the unprovoked assault that took place over 40 hours after the security was removed. (See *Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 525 [the summary judgment standard "is not satisfied by laconic expert declarations which provided only an ultimate opinion, unsupported by reasoned explanation"].)

To address the issues identified by the Court in its order granting Dr. Vemuri's motion for summary judgment, Plaintiff relies on deposition testimony from Dr. Kim and Nurse Zate-Perry. However, this cannot cure deficiencies in Dr. Nair's opinion. To establish a triable issue of material fact, Plaintiff must provide conflicting expert evidence. (See *Munro, supra,* 215 Cal.App.3d at pp. 984-985 [a medical malpractice defendant who supports a summary judgment motion with applicable declarations "is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence"]; see also *Jennings, supra,* 114 Cal.App.4th at p. 1118.)

Plaintiff relies on the same declaration Dr. Nair submitted in opposition to Dr. Vemuri's motion. That declaration still fails to establish a triable issue of material fact as to causation. Thus, Dr. Ando's, Dr. Kim's, and Dr. Lozano's motions for summary adjudication of the first cause of action are GRANTED. An, as a result, SHC's motion for summary adjudication of the first cause of action is GRANTED.

2. Second Cause of Action- Violation of Civil Rights

The Unruh Action provides "[a]ll persons within the jurisdiction of the state are free and equal" no matter their "sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status." (Civ. Code, § 51, subd. (b).) The Act broadly outlaws arbitrary discrimination on the basis of protected characteristics in public accommodations and business establishments. (*Ibid.; Jankey v. Song Koo Lee* (2012) 55 Cal.4th 1038, 1044.)

To establish an Unruh Act violation, a plaintiff must plead and prove: (1) defendant denied the plaintiff full and equal accommodations, advantages, facilities, privileges, or services, (2) a substantial motivating reason for defendant's conduct was plaintiff's protected characteristic, (3) plaintiff was harmed, and (4) defendant's conduct was a substantial factor in causing plaintiff's harm. (CACI, No.

3060.) To prevail under the Unruh Civil Rights Act, the plaintiff must present proof of intentional acts of discrimination; the act does not cover disparate impact. (*Mackey v. Board of Trustees of California State University* (2019) 31 Cal.App.5th 640, 660-661 (*Mackey*).)

Defendants argue the gravamen of the claim is the alleged professional negligence, however, Plaintiff's claim is based on unequal accommodations, advantages, facilities, privileges, and services because of his race and color. (See Complaint, ¶ 48.) Plaintiff's claim is also based on the fact that Defendants ignored his statements and his mother's statements warning against certain medications and failed to treat Plaintiff with the care and concern they would have use for Caucasian patients. (*Ibid*.)

Defendants state they did not discriminate against Plaintiff on the basis of his race or any other basis, intentionally or otherwise. (Dr. Ando Decl., ¶ 2; Dr. Kim Decl., ¶ 3; Dr. Lozano Decl., ¶ 2; Dr. Vemuri Decl., ¶ 2.) They further state they treated Plaintiff in the same manner and provided the same medical services and level of care as they would have provided any other patient at SHC under their care. (*Ibid*.) Dr. Binder opines the medical services provided to Plaintiff were "within the scope of services that would be expected for any patient who presents to a teaching hospital such as SHC with the same or similar medical conditions as Plaintiff." (Dr. Binder Decl., ¶ 49.) On that basis, Dr. Binder opines, "there is no suggestions or evidence whatsoever, that Plaintiff received disparate treatment or was in any way discriminated against with respect to the medical and nursing services he received at SHC and by the healthcare providers." (*Ibid*.) This is sufficient to meet Defendants' initial burden. Thus, the burden shifts to Plaintiff to demonstrate a triable issue of material fact.

In opposition, Plaintiff fails to provide any evidence of intentional discrimination or any admissible evidence from which discriminatory intent could be inferred. (See *Mackey, supra,* 31 Cal.App.5th at pp. 660-661.) Plaintiff cannot rely on allegations in his TAC to create a triable issue of fact. (See *College Hospital, Inc. v. Sup Ct*. (1994) 8 Cal.4th 704, 720, fn. 7; *Roman v. BRE Properties, Inc*. (2015) 237 Cal.App.4th 1040, 1054; *California Public Records Research, Inc. v. County of Yolo* (2016) 4 Cal.App.5th 150, 182.) Therefore, Plaintiff fails to meet his burden. Thus, Dr. Ando's, Dr. Lozano's, and Dr. Kim's motions for summary adjudication of the second cause of action are GRANTED. Ans, as a result, SHC's motion for summary adjudication of the second cause of action is GRANTED.

Calendar Line 10
Case Name: *Institute For The Future v. Don B. Mullen and Carol Mullen*
Case No.: 21CV390710

Before the Court is Defendant's, FFDAL, LLC ("FFDAL") (erroneously sued as Carol Mullen) motion for summary judgment against Institute for the Future's ("IFTF") complaint for declaratory relief. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Factual Background

This action stems from a disputed commercial lease. Carol Mullen, along with the other two named Defendants in this action, was one of the three owners of the commercial building located at 201-225 Hamilton Avenue, Palo Alto, CA (the "Property"). On February 28, 2014, Carol Mullen, along with the other two landlords, Don B. Mullen and Scher Holdings, LLC, leased the Property's first floor and basement (the "Premises") to IFTF. (IFTF's Responses and Objections to Defendant's Separate Statement of Undisputed Facts ("IFTF SS" No. 3.) The Lease term, as set forth in Article 2, is for ten years. Under Articles 3 and 4 of the Lease, IFTF is required to pay "Rent," which (as stated in Section 4.1) is defined to include both Base Rent and Additional Rent, at the rates set forth in the Lease. (IFTF SS Nos. 5, 6.) The lease terms include a Force Majeure provision.

In 2018, Carol and Don Mullen divorced. Subsequently, Carol Mullen transferred her 25% ownership interest in the Property, which included her interest in the lease with IFTF, to FFDAL LLC. Accordingly, a Trust Transfer Deed was recorded on August 27, 2018.

From March 2014 through February 2020, IFTF operated in accordance with the Lease and paid the required rent. (IFTF SS No.12) In March 2020 in response to the COVID-19 Pandemic, California Governor Gavin Newsom granted local officials the authority to issue eviction moratoriums. (IFTF SS No. 13.) On March 16, 2020, the County of Santa Clara issued a Shelter in Place Order (the "First County Order") mandating all businesses in the County, except for those qualifying as "Essential Businesses," cease all activities at any facility located within the County except for "Minimum Basic Operations." (IFTF SS No.14; Complaint ¶ 7.) On March 31, 2020, the County of Santa Clara issued a second order (the "Second County Order") in which it reaffirmed the terms of the First County Order and added some other terms regarding social distancing. (IFTF SS No.15; Complaint ¶ 10.)

IFTF did not qualify as an "Essential Business" under the First County Order or the Second County Order. (IFTF SS No. 16; Complaint ¶¶ 9-10.) On January 25, 2021, the County of Santa Clara issued a third order (the "Third County Order") which mandated that all businesses in the County comply with the restrictions in the Purple Tier of the State's Blueprint of a Safer Economy along with additional restrictions imposed by the County. The Third County Order prohibited indoor lecture classes. (IFTF SS No. 17; Complaint ¶ 11.)

On June 21, 2021, California terminated its orders relating to the Pandemic; however, on August 2, 2021, the County of Santa Clara issued its fourth order (the "Fourth County Order") in which it recommended that businesses implement mandatory face covering and vaccine requirements for all personnel and move operations and activities outdoors where possible. (IFTF SS No. 18; Complaint ¶ 12.) (Hereinafter, referred to collectively as the "County Orders.") IFTF claims that, due to the County Orders, it was not able to use or occupy the Premises from March 16, 2020, to August 18, 2021. (Complaint ¶ 13.) During that time, IFTF paid no rent for the Premises. (IFTF SS No. 19.)

On August 26, 2021, FFDAL (and its co-landlord defendants) issued a notice to IFTF requiring payment of $606,474.00 (which was one-half of the of the rental arrearage) by February 18, 2022, and if not paid by that date, then the landlords would serve a three-day notice to pay or quit on IFTF. (IFTF SS No. 26; Complaint ¶ 18.)

On November 2, 2021, IFTF commenced this action for declaratory relief against Don Mullen, Carol Mullen and SCHER Holdings LLC seeking a judgment that it did not owe the rental arrearage demanded by the landlords. (IFTF SS No. 27.) On March 10, 2022, Don B. Mullen and SCHER Holdings, LLC, answered IFTF's Complaint. On June 27, 2022, FFDAL voluntarily appeared and answered IFTF's Complaint as defendant erroneously sued as Carol Mullen. In 2022, Don B. Mullen and SCHER Holdings, LLC, settled with IFTF regarding their seventy-five percent (75%) of the rental arrearage owed by IFTF. On April 26, 2023, IFTF dismissed Don Mullen and SCHER Holdings as defendants in this action.

II. Request for Judicial Notice

IFTF's unopposed Request for Judicial Notice, requests that the Court take judicial notice of FFDAL's Article of Organization dated June 10, 2016. The request is GRANTED pursuant to Evid. Code, § 452, subds. (c)-(d).

FFDAL's unopposed Request for Judicial Notice, requests that the Court take judicial notice of the March 4, 2020, Governor's Executive Order N-28-20, Plaintiff's verified complaint No. 21CV381058 filed in Santa Clara Superior Court on March 24, 2021, and a copy of a printout from ProPublica's website publication showing IFTF's approved loans totaling $2,249,302.00 and loan forgiveness totaling $2,272,140.00 under the Paycheck Protection Program ("PPP"). The Court GRANTS FFDAL's Request pursuant to Evidence Code section 452. The Court notes ProPublica's data is from the Small Business Administration's records, which is a government website. These records are official acts under Evidence Code section 452 (c). (See *In re N.M.*, (2008) 161 Cal. App. 4th 253, 268 n. 9, (taking judicial notice of content in the Federal Register and information on a California government website).

III. Evidentiary Objections

The Court OVERRULES IFTF's objections to Carol Mullen's declaration paragraphs 1, 2, 3, 4, 5, 6, 8, 15 16, 19.

The Court SUSTAINS IFTF's objections to Carol Mullen's declaration paragraphs 10, 11, 12, and 17. A declaration is inadmissible to prove content of writing where writing is offered into evidence. (Evid. Code §§ 1520-1523).

IV. Legal Standard

The purpose of a motion for summary judgment or summary adjudication "is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atl. Richfield Co.* (2001) 25 Cal. 4th 826, 843.) "Code of Civil Procedure section 437c, subdivision (c), requires the trial judge to grant summary judgment if all the evidence submitted, and 'all inferences reasonably deducible from the evidence' and uncontradicted by other inferences or evidence, show that there is no triable issue as to

any material fact and that the moving party is entitled to judgment as a matter of law." (*Adler v. Manor Healthcare Corp.* (1992) 7 Cal.App.4th 1110, 1119.)

A defendant moving for summary judgment bears two burdens: (1) the burden of production, i.e., presenting admissible evidence, through material facts, sufficient to satisfy a directed verdict standard; and (2) the burden of persuasion, i.e., the material facts presented must persuade the court that the plaintiff cannot establish one or more elements of a cause of action, or a complete defense vitiates the cause of action. (Code Civ. Proc., § 437c(p)(2); *Aguilar, supra*, 25 Cal.4th at p. 850-851; See also, *Scalf v. D. B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1519.) A defendant may satisfy this burden by showing that the claim "cannot be established" because of the lack of evidence on some essential element of the claim. (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 574, 590.) Once the defendant meets this burden, the burden shifts to the plaintiff to show that a "triable issue of one or more material facts exists as to that cause of action or defense thereto." (*Id*.)

"On ruling on a motion for summary judgment, the court is to 'liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party.'" (*Cheal v. El Camino Hospital*—(2014) 223 Cal.App.4th 736, 760.) The court must, therefore, consider what inferences favoring the opposing party a factfinder could reasonably draw from the evidence. "While viewing the evidence in this manner, the court must bear in mind that its primary function is to identify issues rather than to determine issues. [Citation.]" (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th—832, 839.)

Defeating summary judgment requires only a single disputed material fact. (See Code Civ. Proc. § 437c(c) [a motion for summary judgment" shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."] [emphasis added].) Thus, any disputed material fact means the court must deny the motion; the court has no discretion to grant summary judgment. (*Zavala v. Arce* (1997) 58 Cal.App.4th 915, 925, fn. 8; *Saldana v. Globe-Weis Systems Co.* (1991) 233 Cal.App.3d 1505, 1511-1512.)

V. Analysis

A. Parties' Contentions and Evidence

FFDAL contends IFTF cannot prevail on its complaint because (1) its single cause of action for declaratory relief improperly seeks judgment to address a past act, (2) under the unambiguous terms of the lease, IFTF was obligated to pay rent at all times irrespective of the Covid-19 Pandemic, and (3) IFTF's arguments based on impossibility, impracticability and frustration of purpose are meritless.

In support of its position, FFDAL submits:

- Declaration of Carol Mullen and attached exhibits
    - A – Lease
    - A1 – Floor Plan
    - B – blank amendment form
    - C- Rules & Regulations
    - D- Tenant's letter of credit
- Supplemental Declaration of Carol Mullen submitted in reply to IFTF's opposition
- Declaration of Mark Isola and attached exhibits submitted in reply to IFTF's opposition
    - Cover pages of IFTF's discovery requests for production of documents and special interrogatories
    - Cover pages of FFDAL's responses to IFTF's discovery requests and Carol Mullen's verifications
    - Cover pages of IFTF's responses to FFDAL's written discovery requests.

The general rule of motion practice, which applies here, is that new evidence is not permitted with reply papers. … "[T]he inclusion of additional evidentiary matter with the reply should only be allowed in the exceptional case … and if permitted, the other party should be given the opportunity to respond." (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537–1538 [161 Cal. Rptr. 3d 700].) Whether to accept new evidence with the reply papers is vested in the trial court's sound discretion. (*Alliant Ins. Services, Inc. v. Gaddy* (2008) 159 Cal.App.4th 1292, 1308; *Carbajal v. CWPSC, Inc.,* (2016) 245 Cal. App. 4th 227, 241, *Hahn v. Diaz-Barba* (2011) 194 Cal.App.4th 1177, 1193 ["While additional evidentiary matter submitted with the reply ordinarily should not be allowed, the court has discretion to consider it when it poses no prejudice to the opposing party"].)

There is good cause to consider Ms. Mullen's supplemental declaration and Mr. Isola's declaration submitted with FDAL's reply. FFDAL voluntarily appeared and filed its answer on June 27, 2022, as a defendant named erroneously as Carol Mullen. The answer expressly provided: (1) FFDAL is a California Limited Liability Company that was formed in June 2016 and is entirely owned by Carol Mullen and (2) on August 27, 2018, Carol Mullen transferred her 25% ownership interest in the Property to FFDAL pursuant to her marital dissolution. IFTF did not demurrer to the answer nor did it object to FFDAL's standing and appearance. From June 27, 2022, until January 23, 2024, (the filing date of its opposition herein) IFTF did not challenge FFDAL's standing and in fact propounded written discovery to FFDAL and responded to the written discovery that was propounded by FFDAL. (Declaration of Mark Isola, Exs. A, B, C.) As such, FFDAL could not have reasonably anticipated IFTF's objection to its standing prior to receipt of its opposition to the summary judgment motion. Furthermore, IFTF will not be prejudiced by the Court's acceptance of FFDAL's supplemental evidence since it has been in possession of the same evidence, i.e., discovery responses, since April 2023. Accordingly, the Court will consider FFDAL's evidence provided in its reply to IFTF's opposition.

IFTF contends (1) FFDAL lacks standing, (2) a current controversy exists regarding IFTF's obligation to pay rent accrued during the Pandemic, (3) articles 5, 13 and paragraph 26.17 of the lease are in conflict and create an ambiguity, (3) the landlord's obligation to provide IFTF with the use of the Premises was/is a condition precedent to its obligation to pay rent, (4) the Force Majure clause of the lease does not apply to the Covid-19 pandemic, and (5) its obligation to pay rent was excused because the purpose of its use was frustrated and rendered impossible by the local and state closure orders.

In support, IFTF submits:

- Declaration of Marina Gorbis with attached exhibits
    - A – Lease
    - B- August 18, 2020, Notice of Default from Ventana
    - C- Bank Statements
    - D- August 20, 2020, IFTF's response to the Notice of Default
    - E- September 8, 2020, and September 18, 2020, correspondences between FFDAL's and IFTF

- F- August 25, 2021, correspondence from FFDAL

B. Lack of Standing

IFTF contends FFDAL does not have standing to appear because (1) it was not a party to the Lease Agreement, (2) the lease mandates any modifications to its provision be in writing and signed by the parties, and (3) no evidence of a valid transfer of interest or a written signed modification has been provided. In opposition, FFDAL asserts (1) it is Carol Mullen's successor-in-interest and obtained ownership of Ms. Mullen's interest via a Trust Transfer Deed that was recorded on August 27, 2018, and (2) IFTF waived any challenge to its standing. (Supplemental Declaration of Carol Mullen ("Supp. Mullen Decl."), ¶ 2.)

A party asserting a claim must have standing to do so. In asserting a claim based upon a contract, this generally requires the party to be a signatory to the contract, an intended third-party beneficiary, or an assignee. (*Howard Contracting, Inc. v. G.A. MacDonald Construction Co., Inc.* (1998) 71 Cal.App.4th 38, 60; *Berclain America Latina v. Baan Co.* (1999) 74 Cal.App.4th 401.) Waiver is the intentional relinquishment of a known right or "'conduct so inconsistent with the intent to enforce the right in question as to induce a reasonable belief that it has been relinquished.'" (*Kay v. Kay* (1961) 188 Cal.App.2d 214, 218.) The conduct is not the fact which establishes the waiver; the conduct is evidence of the fact of intent, because "[waiver] always rests upon intent." (*Roesch* v. *De Mota* (1944) 24 Cal.2d 563, 572; *Kay* v. *Kay* (1961) 188 Cal.App.2d 214, 218; *Freshman v. Superior Court* (1985)173 Cal. App. 3d 223, 238.) FFDAL bears the burden of proving IFTF waived its objection to standing. (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Café & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 60.)

The evidence is indisputable that:

- The Lease Agreement was executed by Carol Mullen and Don Mullen as undivided 50% owners of the Property. The term of the lease is for 10 years and was not modified to reflect the transfer of interest to FFDAL. (Declaration of Marina Gorbis ("Gorbis Decl."), Ex. A.)
- Once the complaint was filed, FFDAL voluntarily appeared, answered the complaint, and stated its status as the successor-in-interest to Carol Mullen. (FFDAL Answer.)
- IFTF did not demurrer to the answer, nor did it raise an objection to FFDAL's appearance.
- IFTF did not seek a default against Carol Mullen for her failure to answer.

- IFTF served FFDAL with its request for production of documents and special interrogatories. (Isola Decl., Ex. A.)
- IFTF responded to FFDAL's written discovery requests. (Isola Dec., Exs. B, C.)
- In its discovery requests and responses, IFTF captioned FFDAL as the defendant erroneously named herein as Carol Mullen. (Isola Decl., Exs. B, C.)
- IFTF accepted Carol Mullen's discovery verification as the managing member of FFDAL. (Isola Decl., Exs. B, C.)

IFTF's conduct clearly demonstrates its intent to waive and its actual waiver of any objections to FFDAL's standing to appear.

C. Declaratory Relief

For a party to seek declaratory relief, there must be (1) an actual controversy about justiciable questions regarding the rights or obligations of a party which (2) involves a proper subject of declaratory relief. (Code Civ. Proc. § 1060; *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 80; *Alameda County Land Use Assn. v. City of Hayward* (1995) 38 Cal.App.4th 1716, 1722.) The "proper subject" for declaratory relief must be a future issue for the parties; a declaratory judgment acts prospectively, not retroactively to redress past wrongs. (*Gafcon v. Ponsor & Associates* (2002) 98 C.A.4th 1388, 1403; 5 Witkin, Cal.Proc. (6th Ed. 2021, March 2023 Update), Pleading, § 846.)

FFDAL argues IFTF's past failure to pay rent is not a proper subject for a declaratory relief. There is no dispute that IFTF did not pay rent from July 2020 through August 2021 during the Covid-19 closure orders. (IFTF's SS No. 25.) While it is true that IFTF's failure to pay the rent at the time of the shutdown is past activity, an actual controversy exists as to whether IFTF must now pay the rent that accrued during the Covid-19 closures.

D. Alleged Conflict Between Lease Article 5 and Paragraph 26.17

"When interpreting a contract, a court seeks to ascertain the mutual intent of the parties solely from the written contract so long as possible." (*West Pueblo Partners, LLC v. Stone Brewing Co., LLC* (2023) 90 Cal.App.5th 1179, 1185 *(West Pueblo Partners*); See *Gilkyson v. Disney Enterprises, Inc*. (2021) 66 Cal.App.5th 900, 916 (*Gilkyson*) "When the contract is clear and explicit, the parties' intent is determined solely by reference to the language of the agreement." (*Gilkyson*, at 916.)

Article 5, titled "Use of Premises" provides:

"The Premises shall be used for trade school, for general office purposes and for other trade school and business office "strategic uses consistent therewith, including space-sharing arrangements with start-up or "incubator" entities or programs and their members, fundraising events, and workshop events (the "Acceptable Uses"). Notwithstanding the foregoing, Tenant understands and acknowledges that use of the Premises is ultimately limited by, among other things, applicable Laws (as defined below), specifically including, without limitation, zoning ordinances of the City of Palo Alto, and Landlord makes no representation or warranty whatsoever with regard to whether any prospective use of the Premises (including, without limitation, the Acceptable Uses) is permitted under applicable Laws."

(Gorbis Decl., Ex. A.)

Paragraph 26.17, titled "Force Majeure" states:

"Any prevention, delay or stoppage due to strikes, lockouts, labor disputes, acts of God, inability to obtain services, labor, or materials or reasonable substitutes therefor, governmental actions, civil commotions, fire or other casualty, and other causes beyond the reasonable control of the party obligated to perform, except with respect to the obligations imposed with regard to Rent and other charges to be paid by Tenant pursuant to this Lease (collectively, the "Force Majeure"), notwithstanding anything to the contrary contained in this Lease, shall excuse the performance of such party for period equal to any such prevention, delay or stoppage and, therefore, if this Lease specifies time period for performance of an obligation of either party, that time period shall be extended by the period of any delay in such party's performance caused by Force Majeure."

(Gorbis Decl., Ex. A.)

Article 5 defines the permissible uses of the Property and provides that any use is limited by applicable laws. Paragraph 26.17 defines what constitutes Force Majeure events that excuse the parties' performance, except as to payment of rent and other charges by the tenant. There is no conflict.

According to this plain language, even if the Court was to add the terms Covid-19, pandemic, or Coronavirus as a Force Majeure event to paragraph 26.17, IFTF's obligations to use the premises within the legal limitations and to pay rent are not negated. There is no ambiguity that IFTF was/is still obligated to pay rent and other charges even should a Force Majure event occur.

E. Impossibility

The doctrine of impossibility or impracticability excuses performance of a contractual obligation when performance is impossible or extremely impracticable. (30 Williston on Contracts (4th ed. 2023) § 77:94; See, *Lloyd v. Murphy* (1944) 25 Cal.2d 48, 53; accord *Dorn v. Goetz* (1948) 85 Cal.App.2d 407. 502.) Circumstances that "'may make performance more difficult or costly than contemplated when the agreement was executed do not constitute impossibility.'" (*Kashmiri v. Regents of University of California,* (2007), 156 Cal.App.4th 809, 839; *Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co*. (1977) 66 Cal.App.3d 101, 154.)

FFDAL contends IFTF's claim of impossibility fail because (1) Covid-19 restrictions did not make IFTF's rent payment legally impossible, (2) economic crises making performance more difficult or costly do not constitute impossibility, and (3) a temporary impossibility merely extends the time for performance and does not eliminate a contractual obligation. IFTF argues its performance, i.e., paying rent, was rendered impossible by FFDAL's inability or failure to allow use and possession of the premises. IFTF bases its argument on Article 13 of the Lease Agreement, which provides:

> "Landlord covenants that Tenant, on paying the Rent, charges for services and other payments herein reserved and on keeping, observing and performing all the other terms, covenants, conditions, provisions and agreements herein contained on the part of Tenant to be kept, observed and performed, shall, during the Lease Term, peaceably and quietly have, hold and enjoy the Premises subject to the terms, covenants, conditions, provisions and agreements hereof without interference by any persons lawfully claiming by or through Landlord. The foregoing covenant is in lieu of any other covenant express or implied."

(Marina Gorbis Decl., Ex. A.)

IFTF interprets this section as creating a condition precedent to its obligation to pay rent. In other words, the landlord is obligated to provide the quite use and enjoyment of the premises in exchange for the payment of rent. IFTF argues that since Covid-19 closure orders prevented the landlord from providing the use and enjoyment of the property, IFTF's obligation was rendered temporary impossible. The Court is not persuaded by this argument.

First, IFTF did not sue for breach of the covenant of quiet enjoyment, nor did it seek declaratory relief regarding obligations created by this article. In assessing the propriety of summary judgment, the Court first looks to the allegations in the operative complaint, which frame the issues pertinent to a motion for summary judgment. (*Frittelli, Inc. v. 350 N. Canon Drive, LP* (2011) 202 Cal.App.4th 35, 4.) However, even if the Court were to consider this argument, the language contained in this provision clearly states: "Landlord covenants that Tenant, *on paying* the Rent, charges for services and other payments herein. . ." (Marina Gorbis Decl., Ex. A (emphasis added).) The Landlord's covenant is clearly conditioned on the Tenant's payment of rent, not the reverse.

F. Frustration of Purpose

The doctrine of frustration excuses contractual obligations where "[p]erformance remains entirely possible, but the whole value of the performance to one of the parties at least, and the basic reason recognized as such by both parties, for entering into the contract has been destroyed by a supervening and unforeseen event. A party seeking to escape the obligations of its lease under the doctrine of frustration must show: (1) the purpose of the contract that has been frustrated was contemplated by both parties in entering the contract; (2) the risk of the event was not reasonably foreseeable and the party claiming frustration did not assume the risk under the contract; and (3) the value of counter performance is totally or nearly totally destroyed. Governmental acts that merely make performance unprofitable or more difficult or expensive do not suffice to excuse a contractual obligation." (*SVAP III Poway Crossings, LLC v. Fitness Int'l* (2023) 87 Cal.App.5th 882, 895 (internal citations and quotations omitted); *Lloyd v. Murphy* (1944) 25 Cal.2d 48, 55; *Dorn v. Goetz* (1948) 85 Cal.App.2d 407, 410-413.) Where the doctrine of frustration applies, "the 'legal effect … is the immediate termination of the contract.'" (*Poway Crossings*, 87 Cal.App.5th at 896; *Johnson v. Atkins* (1942) 53 Cal.App.2d 430, 435; *20th Century Lites, Inc. v. Goodman* (1944) 64 Cal.App.2d Supp. 938,

945 ["frustration brings the contract to an end forthwith"].) For this reason, California law does not recognize a "temporary frustration defense." (*Poway Crossings,* 87 Cal.App.5th at 896.) Frustration of purpose is also not available when "counterperformance has been and remains valuable." (*Id*. at 895.)

Applying these principals, *Poway Crossing,* 87 Cal.App.5th 882, recently held a "temporary government closure of a fitness facility for a period of months during the pandemic when the premises were leased for more than 19 years did not amount to the kind of complete frustration required for the doctrine to apply. The court also held the tenant's obligation was not made impossible since there was no evidence that the closure orders hindered its ability to pay rent. (*Id*. at 893, 895.)

In *W. Pueblo Partners, LLC v. Stone Brewing Co.* (2023) 90 Cal.App.5th 1179, the court similarly rejected the tenant's argument of impossibility and frustration of purpose and granted summary judgment in favor of the landlord, reasoning the tenant failed to raise a triable issue of fact that it was delayed, interrupted, or prevented from paying rent due to Covid-19 and the related closure orders.

Here, IFTF submits no evidence showing (1) the value of its 10-year lease was totally or substantially destroyed, or (2) closure orders thwarted or hindered its ability to pay rent. To the contrary, undisputed facts, FFDAL's evidence, and IFTF's evidence show: (1) IFTF did not rescind the lease, (2) IFTF remained and continues to remain in possession of the premises, (3) IFTF obtained a PPP loan in approximate sum of $2,249,302.00 to pay for rent and to pay its employees, (4) IFTF's alleged frustration of purpose was only temporary, and (5) the parties contemplated "governmental actions" in the Force Majeure provision and did not provide for abatement of rent. (Gorbis Decl., ¶¶ 8, 13, Ex A; Mullen Decl. ¶¶ 15, 18; IFTF's SS Nos. 29, 30; FFDAL's Request for Judicial Notice.) Therefore, IFTF's purpose for the lease was not frustrated by the Covid-19 closure orders.

FFDAL's motion for summary judgment is GRANTED.

Calendar Line 15
Case Name: *Prachee Jain et al vs Carrie Rothstein et al*
Case No.: 20CV370518

Before the Court is Plaintiff's Motion for Trial Preference. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background

This is a medical malpractice action. Plaintiff Prachee Jain alleges her obstetrics and gynecology physician, Dr. Carrie Beth Rothstein, who worked for Stanford and Menlo Medical Clinic, failed to diagnose a lump in her breast as malignant which resulted in the cancer spreading to her liver. Ms. Jain and her spouse, Tony Luong, brought this case on September 10, 2020, and later filed a first amended complaint alleging medical negligence and loss of consortium. The case was set for trial to commence on December 4, 2023. However, no courtroom was available that week, and the case was consequently set for a further trial setting conference for January 16, 2024, which was continued to February 6, 2024 to be heard on the same day as Plaintiffs' motion for trial preference.

Plaintiffs seek to have their trial set for February 12, 2024 pursuant to California Rule of Court 3.1335 and Code of Civil Procedure sections 36 (e) and (f) on the grounds that Ms. Jain has stage 4 metastatic breast cancer.

II. Legal Standard and Analysis

Under Code of Civil Procedure section 36(e), the Court has discretion to grant a party trial preference where the party makes "a showing that satisfies the court that the interests of justice will be served by granting preference." Citing to *Fox v. Superior Court* (2018) 21 Cal. App. 5th 529, Ms. Jain argues that "she just can't predict with any certainty" how long she will live and whether her cancer with recur. (Motion, p. 3.) Defendants argue Plaintiffs' deposition testimony and that of Ms. Jain's treating physician show that Ms. Jain is currently doing well and is not imminently facing death. For this reason, Plaintiffs state "in situations in which a party's life expectancy is just a few years but still longer than six months, Section 36(e), rather than 36(d), is appropriate.

This is an extremely sensitive matter. Plainly Plaintiffs continue to live with the threat of Ms. Jain's cancer once again growing. However, the evidence in this record does not demonstrate a need for

trial preference. *Fox* was not decided under Section 36(e); the operative issue in *Fox* was the party's advanced age in addition to the cancer diagnosis. The Court therefore DENIES Plaintiffs' motion for trial preference WITHOUT PREJUDICE. If Ms. Jain's health changes, she may move ex parte for trial preference.

While the Court denies Plaintiffs' motion for trial preference, the Court will nevertheless endeavor to timely reset this trial and note that it has already been continued once so that it has priority for a courtroom when the trial date arrives.