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: June 27, 2024 TIME: 9:00 A.M.

RECORDING COURT PROCEEDINGS IS PROHIBITED

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

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

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

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

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

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

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

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1-2	24CV432798	Michael Karavastev vs Andrean Karavastev	Plaintiff Michael Karavastev's motions to strike are CONTINUED to July 30, 2024. Plaintiff's second motion seeks to strike Defendant's demurrer and accompanying documents, which is set for hearing on July 30, 2024 (along with his motion to stay). Code of Civil Procedure section 435, provides, "A notice of motion to strike a demurrer, or a portion thereof, shall set the hearing thereon concurrently with the hearing on the demurrer." (Code Civ. Proc., § 435, subd. (b)(3).) Therefore, Plaintiff's second motion to strike and Defendant's demurrer must be heard on the same day. Thus, in the interest of efficiency and judicial economy, the Court will hear the motions to strike, demurrer, and motion to stay on the same day. The deadlines for opposition and reply papers for the demurrer and motion to stay remain the same. (See Code Civ. Proc., § 1005, subd. (b).)
3,7	19CV356353	Jean Kim vs Pets' Rx, Inc. et al	Defendants' motion for summary judgment is GRANTED. Scroll to lines 3, 7 for complete ruling. Defendants are ordered to submit a form of judgment within 10 days of service of the formal order, which formal order the Court will prepare.
4	24CV435032	TREVOR JACKSON et al vs FORD MOTOR COMPANY et al	Moving party Ford Store Morgan Hill was dismissed without prejudiced on June 13, 2024. This motion is accordingly off-calendar.
5	19CV343179	Elise Mitchell vs Grady Williams	The parties are ordered to appear for Defendant's motion to set aside/vacate default.
6	22CV405905	Christy Martin et al vs Medsource, L.L.C.	Plaintiffs', Christy Martin and Amanda Pate, individually and on behalf of the proposed settlement class, unopposed motion for entry of judgment is GRANTED. Moving party to prepare formal order and form of judgment.
8-10	19CV360721	Kathleen Radivojec et al vs Vintage Towers et al	Defendant Avanath Capital Management, LLC's motions to compel Plaintiffs Robert Radivojec and Kathleen Radivojec to respond to special interrogatories (set one) and requests for production (set one) are GRANTED. Plaintiffs received notice of these hearing dates and times and served no oppositions. The Court also continued one of these motions, providing Plaintiffs with an additional opportunity to submit some kind of response. Still, no response was forthcoming. "[T]he failure to file an opposition creates an inference that the motion or demurrer is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) The evidence demonstrates Plaintiffs were served with these discovery requests and, to date, have served no responses. Plaintiffs are accordingly ordered to serve verified, code compliant responses without objections to these discovery requests and to pay $990 to Defendant within 20 days of service of this formal order.
11	21CV385427	Urvashi Bhagat vs Hong Guo et al	The parties are ordered to appear, and Plaintiff is ordered to show cause why her case should not be dismissed for failure to comply with the court's discovery orders, including failing to appear for deposition. If Plaintiff fails to appear as ordered, her case will be dismissed without prejudice.
12	22CV407224	Victor Flores et al vs Mark Lasecke	Defendants' demurrer to the second cause of action for premises liability is OVERRULED. Scroll to line 12 for complete ruling. Court to prepare formal order.
13	22CV409123	Esmeralda Guzman et al vs Paula Arroyo et al	Cross-defendants' demurrer is SUSTAINED with 20 days leave to amend. Scroll to line 13 for complete ruling. Court to prepare formal order.
14-16	23CV412522	Dr. Tal Lavian vs CRADAR, A1 LLC et al	These hearings will be held in Department 18b.

17	23CV418372	Muhammed Zaidi vs William Wu et al	Defendant William Wu's motion to stay pending closure of DOA Development LLC's bankruptcy case is GRANTED. A notice of motion with this hearing date and time was served by electronic mail on May 2, 2024. No opposition was filed. "[T]he failure to file an opposition creates an inference that the motion or demurrer is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) The interests of justice also support granting this motion, as DOA Development, LLC is indispensable to the disposition of Plaintiff's claims. The Court will conduct a status conference regarding the bankruptcy on February 27, 2024 at 10 a.m. in Department 6. Court will prepare formal order. No appearances necessary at the 9 or 10 am hearings set for June 27.
18	23CV419250	D & T Foods, Inc. vs Sirelango Incorporated et al	Parties are ordered to appear for debtor's exam.
19	23CV422098	Hansen Law Firm, P.C. vs Carleen Whittelsey	Plaintiff's motion to compel deposition of Carleen Whittelsey and for sanctions is GRANTED, IN PART. Ms. Whittelsey is ordered to appear for deposition on August 15, 2024 at 10:00 a.m. at Hansen Law Firm, P.C. E. Santa Clara Street, Suite 1150, Santa Clara, CA 95113. Plaintiff's motion for sanctions is DENIED. The Court finds both parties failed to act in compliance with the Code of Civil Procedure or Code of Ethics. Defense counsel should indeed stop writing all caps email messages. But Plaintiff should also respect colleague's scheduling needs, as we all find ourselves in need of scheduling flexibility from time to time. And, other than repeatedly stating that Plaintiff should not be made to wait until August to take this deposition, Plaintiff offers no basis for demanding that the deposition take place in May, June, or July—other than personal frustration, there appears to be no prejudice in working with counsel to find a mutually agreeable time. In sum, had both parties behaved better here, there would have been no need for a motion. Court to prepare formal order.
aaa20	24CV433722	Frank Bonzell et al vs Retirement Capital Strategies, Inc., a California Corporation et al	This motion is continued to July 2, 2024 at 9 a.m. in department 6 to be heard in conjunction with Defendant's motion to compel arbitration.
21	24SC091772	Can Oral vs Apple, Inc	Plaintiff is ordered to appear (by TEAMS is acceptable for this hearing so long as Plaintiff has an enabled camera) for a brief hearing regarding this fee waiver request.

Calendar Line 3
Case Name: *Jean Kim v. Pets' Rx, Inc., et al.*
Case No.: 19CV356353

Before the Court is Defendant Pets Rx, Inc. dba VCA Vets & Pets Animal Hospital ("VCA") and Tiffany Sung, DVM ("Dr. Sung") (collectively, "Defendants") motion for summary judgment against plaintiff Jean Kim.[1] Pursuant to California Rules of Court, rule 3.1308, the Court issues its tentative ruling.

I. Background

This action arises out of care rendered by Dr. Sung, a veterinarian at VCA, to Plaintiff's cat, "Kitty" (aka "Kimmy"). According to the Second Amended Complaint ("SAC"), Plaintiff brought her cat to VCA to be evaluated on October 17, 2018. (SAC, ¶ 15.) Dr. Sung's physical exam indicated that Kitty's gait and musculoskeletal structure were normal. (*Id*., ¶ 16.) Several hours later, Kitty underwent sedation for x-rays and further examination. (*Id*., ¶ 17.) The x-ray report indicated that the cat had a femur fracture, an injury unknown to Plaintiff. (*Id*.) The physician did not discuss the injury, which now affected Kitty's gait, with Plaintiff. (*Id*., ¶¶ 18-19.) Dr. Sung stated (falsely, in Plaintiff's view) in her medical report that she did not have an opportunity to check Kitty's gait and the injury occurred weeks prior to the exam. (*Id*., ¶ 20.)

A few days later, Dr. Sung advised Plaintiff that the injury would heal on its own without surgery or stabilization. (SAC, ¶ 20.) As a result of that representation, Plaintiff choose not to seek surgical repair. (*Ibid*.)

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

[1] The motion for summary judgment came on for hearing before the Court on May 16, 2024. On June 8, 2024, the Court issued its order (the "Order") which found Defendants did not meet their burden on summary judgment. (Order, p. 11:13.) However, the Court granted Defendants leave to supplement the summary judgment record and Plaintiff the opportunity to provide any responsive evidence.

Plaintiff initiated this action on October 9, 2019. Defendants demurred to the complaint and moved to strike portions of it. Plaintiff filed a First Amended Complaint ("FAC") on December 16, 2019, asserting: (1) veterinary malpractice; (2) gross negligence; (3) intentional infliction of emotional distress (IIED); and (4) unfair competition (Bus. & Prof. Code, § 17200 et seq.). Defendants demurred to the FAC on grounds of uncertainty and failure to state facts sufficient to constitute a cause of action as to the third cause of action. (Code Civ. Proc., § 430.10, subds. (e) & (f).) Defendants also moved to strike Plaintiff's request for punitive damages, loss of companionship claims, and request for general/emotional distress damages. (Code Civ. Proc., §§ 435, 436.) The Court (Judge Kulkarni) overruled the demurrer on uncertainty grounds but sustained the demurrer with leave to amend as to the third cause of action and granted the motion to strike with leave to amend but cautioned that Plaintiff must "seek leave of court under Section 425.13 to seek punitive damages."

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

Defendants move for summary judgment/adjudication on the remaining claims for veterinary malpractice, gross negligence, and unfair competition. Plaintiff opposes the motion. Plaintiff also filed requests for monetary sanctions pursuant to Code of Civil Procedure section 437c, subdivision (j) against defense counsel, VCA, Dr. Sung and defense expert Dr. Gregory Marsolais.[2]

II. Legal Standard

"A defendant seeking summary judgment must show that at least one element of the plaintiff's cause of action cannot be established, or that there is a complete defense to the cause of

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

action. . . . The burden then shifts to the plaintiff to show there is a triable issue of material fact on that issue. [Citations.]" (*Alex R. Thomas & Co. v. Mut. Serv. Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72); see also Code Civ. Proc., § 437c, subd. (p)(2).) The traditional method for a defendant to meet its burden on summary judgment is by "negat[ing] a necessary element of the plaintiff's case" or establishing a defense with its own evidence. (*Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal.4th 317, 334.) The defendant may also demonstrate that an essential element of plaintiff's claim cannot be established by "present[ing] evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence--as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing." (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 855 (*Aguilar*).)

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

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

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

III. Evidentiary Objections

Plaintiff objects to the Marsolais Declaration, Sung Declaration,[3] and the necropsy report dated December 29, 2018. Defendants' Reply to Plaintiff's Opposition to Defendants' Motion for Summary Judgment/Summary Adjudication and Objections to Evidence (Reply) also raises evidentiary objections to Plaintiff's evidence. The Court need not rule on Plaintiff's or Defendants' objections as they do not fully comply with California Rules of Court, rule 3.1354. (See *Vineyard Springs Estates v. Superior Court* (2004) 120 Cal.App.4th 633, 642 [trial court has duty to rule on evidentiary objections presented in the proper form]; *Hodjat v. State Farm Mutual Automobile Ins. Co.* (2012) 211 Cal.App.4th 1, 9 [trial court not required to give party who fails to comply with formatting requirements of California Rules of Court, rule 3.31354 a second chance to file properly formatted objections.].) Objections that are not ruled on are preserved for appellate review. (See Code Civ. Proc., § 437c, subd. (q).)

IV. Service Issues

Defendants' Reply contends that Plaintiff "intentionally failed to serve Defendants with the lion's share of the papers which she wants to the Court to consider in opposition to the subject motion" and the Court should consider only properly served opposition papers. (Reply at p. 3.) Defendants raise serious concerns. The Court reminds Plaintiff that "'[w]hen a litigant is appearing in propria persona, [they are] entitled to the same, *but no greater*, consideration than other litigants and attorneys [citations]. Further, the in propria persona litigant is held to the *same* restrictive rules of procedure as

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

an attorney [citation].' [Citations.]" (*County of Orange v. Smith* (2005) 132 Cal.App.4th 1434, 1444, emphasis added; *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 985 ["A doctrine generally requiring or permitting exceptional treatment of parties who represent themselves would lead to a quagmire in the trial courts, and would be unfair to the other parties to litigation."].)

V. Analysis

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

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

(3) Dr. Sung's supplemental declaration, which were all filed on June 18, 2024, as directed by the Order.

A. First and Second Causes of Action: Veterinary Malpractice and Gross Negligence

"Veterinarians, like medical doctors, are licensed health care providers" and the standard for medical malpractice cases likewise applies to veterinary malpractice cases. (*Williamson v. Prida* (1999) 75 Cal.App.4th 1417, 1425.) A plaintiff in a veterinary malpractice action must establish: "(1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence." (*Hanson v. Grode* (1999) 76 Cal.App.4th 601, 606 [internal citations and quotations omitted].)

"Opinion testimony from a properly qualified witness is generally necessary to demonstrate the elements for medical malpractice claims. [Citations.]" (*Borrayo v. Avery* (2016) 2 Cal.App.5th 304, 310 (*Borrayo*).) "When a defendant health care practitioner moves for summary judgment and supports his motion with an expert declaration that his conduct met the community standard of care, the defendant is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence. [Citation.]" (*Ibid.*) There exists an exception to the expert evidence requirement, but this "'common knowledge' exception is principally limited to situations in which the plaintiff can invoke the doctrine of res ipsa loquitur, i.e., when a layperson is able to say as a matter of common knowledge and observation that the consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised. The classic example, of course, is the X-ray revealing a scalpel left in the patient's body following surgery. Otherwise, expert evidence is conclusive and cannot be disregarded." (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001 (*Flowers*) [internal citations and quotations omitted]; *Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, 741 (*Garibay*) ["'In professional malpractice cases, expert opinion testimony is required to prove or disprove that the defendant performed in accordance with the prevailing standard of care [citation], except in cases where the negligence is obvious to laymen. [Citation.]' [Citation.]"].)

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

> [Kitty's] necropsy report documented aggressive cancer "disseminated diffusely" throughout her Lungs, Liver, Kidneys, Spleen, Bladder, and right femur fracture "assessed at that time as a chronic pathologic fracture." Given this widespread systemic cancer, it is highly likely that the femur fracture was pathologic and present prior to the presentation at the VCA veterinary practice and that the clinical signs of the bladder infection were actually associated with the tumor being present already in the urinary bladder.
>
> As such, even in the unlikely event the femur fracture occurred at VCA on October 17, 2018, it was not due to any deviation from standard of care or negligence by Dr. Sung or any VCA staff — rather, it was due to the weakened state of the bone due to the undiagnosed sarcoma in which normal activity and handling could cause a fracture.
>
> Additionally, I do not believe that the cat's death 2+ months after the care rendered at VCA was related in any manner to the care received at VCA or the subject femur fracture. The fracture was simply a symptom of the undiagnosed aggressive cancer that "Kimmy" was suffering from.

(Dr. Marsolais Decl., ¶ 9.)

Critically, Dr. Marsolais opines that even in the event the fracture occurred at VCA on October 17, 2018, it was not due to a deviation from the standard of care or negligence on Defendants' part due to Kitty's pre-existing cancer—that is, even if Defendants fractured Kitty's leg, Defendants are entitled to summary judgment because the fracture would be attributable to Kitty's underlying medical

condition (cancer) rather than Defendants' negligence. Dr. Marsolais' opinion and the cancer diagnosis derive from the necropsy report.

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

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

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

(Evid. Code, § 1271.)

Defendants submit the declaration Stephanie Gonzalez, who is the custodian of records of Sage Veterinary and Emergency Centers. (Gonzalez Decl., p. 2.) She certifies the medical records, X-rays, and Necropsy Report, dated December 29, 2018. (*Ibid*.) She states the writings were made in the regular course of business, at or near the time of the event, and she testifies to the records identity and mode of preparation, and that the sources of information and method and time of preparation were such as to indicate its trustworthiness. (*Ibid.*) This sworn statement meets the authentication

requirements. (See Evid. Code, § 1271.) The necropsy report is also authenticated by Taylor Spangler, DVM, DACVP, who performed the necropsy and drafted the report. (Dr. Spangler Decl., ¶ 7.) Dr. Spangler's declaration meets the authentication requirements. (See Dr. Spangler Decl., ¶¶ 7-9; Evid. Code, § 1271.) Defendants thus provide an evidentiary basis for Dr. Marsolais' opinion that "even in the unlikely event the femur fracture occurred at VCA on October 17, 2018, it was not due to any deviation from standard of care or negligence by Dr. Sung or any VCA staff — rather, it was due to the weakened state of the bone due to the undiagnosed sarcoma in which normal activity and handling could cause a fracture." [5] Defendants meet their burden to show there is no triable issue of material fact regarding the standard of care, and the burden shifts to Plaintiff.

Plaintiff does not provide any new evidence. She relies on previously provided evidence such as the necropsy report and the December 6, 2018, report from Centers for Veterinary Specialty and Emergency Care. Plaintiff contends "the issue is not technical to compel expert to explain." (Opp., p. 2:28.) The Court disagrees; the facts here do not fall within the "common knowledge" exception. Plaintiff's opinions and assertions as a layperson are insufficient to meet her burden and her failure to provide any conflicting expert testimony is fatal. (See *Garibay*, *supra*, 161 Cal.App.4th at p. 741 ["In professional malpractice cases, expert opinion testimony *is required to prove or disprove* that the defendant performed in accordance with the prevailing standard of care, except in cases where the negligence is obvious to laymen"] [emphasis added and internal citations omitted].) As a result, Plaintiff fails to establish a triable issue of material fact and Defendants are entitled to summary adjudication of these claims. (See *Borrayo, supra,* 2 Cal.App.5th at p. 310 ["When a defendant health care practitioner moves for summary judgment and supports his motion with an expert declaration that his conduct met the community standard of care, the defendant is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence].)

Defendants' motion for summary adjudication as to the first and second causes of action is GRANTED.

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

B. Fifth Cause of Action: Unfair Competition (Bus. & Prof. Code, § 17200)

Business and Professions Code section 17200, otherwise known as the Unfair Competition Law ("UCL") "prohibits unfair competition, including unlawful, unfair, and fraudulent business acts." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1143 (*Korea Supply Co.*).) "The UCL covers a wide range of conduct. It embraces anything that can properly be called a business practice and that at the same time is independently actionable as unfair competitive practices. In addition, under Section 17200, a practice may be deemed unfair even if not specifically proscribed by some other law." (*Id*.)

This claim is based on the negligence claims. (SAC, ¶¶ 133-138.) Not only did the Court grant summary judgment as to those claims, Plaintiff fails to offer any response as to this cause of action. (See *Sehulster Tunnels/Pre-Con v. Traylor Brothers, Inc.* (2003) 111 Cal.App.4th 1328, 1345, fn. 16 [failure to address point is "equivalent to a concession"]; see also *Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 529 [failure to challenge a contention in a brief results in the concession of that argument].) Nor does Plaintiff provide any evidence of unfair, fraudulent, or unlawful business practices that can support this claim.

Defendants' motion for summary adjudication to the fifth cause of action is GRANTED.

Accordingly, Defendants' motion for summary judgment is GRANTED.

Calendar Line 12
Case Name: *Maria Flores et. al. v. Mark Lasecke*
Case No.: 22CV407224

Before the Court is Defendant Mark Lasecke's demurrer to Plaintiff's second amended complaint ("SAC"). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

Plaintiffs Maria Flores, individually and as Guardian ad litem for minor Sebastian Flores, David Flores and Victor Flores, are surviving heirs to Victor M. Flores ("Decedent"). Maria is Decedent's wife. Sebastian, David, and Victor are Decedent's children. (SAC; PLD-PI-001, MC-025.)

The Complaint alleges that on November 12, 2020, Defendant hired the Decedent to cut down and remove trees from his private property located at 18702 Bear Creek Road, Los Gatos, California, 95033 ("Subject Property") knowing that Decedent did not have a contractor's license. Allegedly, Defendant created a dangerous condition or allowed a dangerous condition to exist, without adequate warnings, causing Decedent's fall from a tree. Due to Decedent's unlicensed status, Defendant is responsible and liable for the incident and Decedent's severe injuries. (SAC; PLD-PI-001(2), GN-1; PLD-PI-001(4), Prem.L-1.)

Decedent died on March 13, 2022, approximately a year and a half after the accident. The certificate of death lists the causes of death as acute myocardial infarction, coronary artery disease, and chronic kidney disease. (Defendant's Request for Judicial Notice, Ex. B)

Plaintiffs initiated this suit on November 10, 2022, and subsequently amended it on January 8, 2024, and again on February 13, 2024, asserting (1) negligence – survival action and (2) premises liability – survival action.

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. Judicial Notice

Defendant requests the Court to take judicial notice of Plaintiffs' operative SAC, and declarations containing Decedent's death certificate. Pursuant to Evidence Code sections 452 and 453, the Court GRANTS Defendant's unopposed request for judicial notice.

IV. Analysis

Defendant demurrers to Plaintiffs second cause of action for premises liability on the grounds of insufficient facts to state a cause of action. The elements of a cause of action for premises liability are the same as those for negligence. i.e.: duty, breach, causation, and damages. (*McIntyre v. The Colonies-Pacific, LLC* (2014) 228 Cal.App.4th 664, 671.) Those who own, possess, or control property generally have a duty to exercise ordinary care in managing the property to avoid exposing others to an unreasonable risk of harm. (*Annocki v. Peterson Enterprises, LLC* (2014) 232 Cal.App.4th 32, 37.) Consequently, the "duty to exercise reasonable care can be inferred from the assertion of the fact that defendant owned and managed the property." (*Pultz v. Holgerson* (1986) 184 Cal.App.3d 1110, 111 .) The rules of premises liability "govern a land possessor's duty to third parties when a dangerous condition exists on the property." (*Zuniga v. Chery Avenue Auction, Inc.* (2021) 61

Cal.App.5th 980, 992.) "[B]efore liability may be thrust on a landlord for a third party's injury due to a dangerous condition on the land, the plaintiff must show that the landlord had actual knowledge of the dangerous condition in question, plus the right and ability to cure the condition." (*Stone v. Center Trost Retail Properties, Inc.* (2008) 163 Cal.App.4th 608, 612.)

Here, the SAC alleges the Subject Property was in a dangerous condition because Defendant knowingly hired an unlicensed contractor to remove trees and knew or should have known that he failed to provide (1) safety harnesses, (2) a safe job site, (3) safety training to his contractors, (4) adequate supervision, (5) warnings of unsafe practices and/or conditions, (6) required personal protective equipment, and (7) safety measure guidelines. The SAC further alleges that Defendant negligently created the dangerous condition and/or failed to adequately inspect, maintain and/or control the premises. (SAC, PLD-PI-001(4); prem.L-1.)

The Court finds these allegations sufficient at the pleading stage. Accordingly, Defendant's demurrer to the second cause of action for premises liability is OVERRULED.

Calendar line 13
Case Name: *Esmeralda Guzman et al vs Paula Arroyo et al*
Case No.: 22CV409123

Before the Court is Cross-Defendant Wells Fargo Bank, N.A.'s, ("Wells Fargo") demurrer to Excellence RE Real Estate Inc.'s ("Excellence") and Paula Arroyo's cross-complaint. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

Excellence is a brokerage firm that represented Plaintiffs in their purchase of real property located at 14111 Buckner Drive in San Jose ("Property"). On September 21, 2022, Plaintiffs executed a California Residential Purchase Agreement and Joint Escrow Instructions, including a seller Multiple Counteroffer No. 1 executed on September 23, 2022, indicating a purchase price of $1,280,000 (collectively the "Purchase Agreement"). Ms. Arroyo was Plaintiffs' real estate agent under the Purchase Agreement. Ms. Sosa was assisting or otherwise working with and on behalf of Arroyo and Excellence as a Certified Transaction Coordinator. (First Amended Complaint ("FAC") ¶¶ 9-12.)

On October 11, 2022, pursuant to the Purchase Agreement, Plaintiffs were to wire $1,245,818.05 to Fidelity National Title Company as escrow holder for the transaction. That morning, at 8:52 a.m., Plaintiffs received an email from Ms. Sosa containing wire transfer instructions. Minutes later, at 8:57 a.m., Plaintiffs received an email purporting to be from Ms. Arroyo requesting the transfer amount of $1,245,818.05 and attached a wire transfer instruction that was later discovered to be fraudulent. (FAC ¶¶ 15, 16.) Ms. Arroyo's email address was manipulated to appear that an email originated from her when in fact it was sent from another source. (Cross-complaint ¶ 8.) Unaware of the fraud, Plaintiffs complied with the request and wired $1,245,818.05 from their Wells Fargo account to an account other than the intended recipient. (FAC ¶ 17.)

Excellence and Ms. Arroyo believe Wells Fargo knew or should have known the subsequent wire transfer instruction was different, even though the information about the escrow holder, the buyer and the property address were all the same as that in the first set of instructions. Wells Fargo did not verify the veracity of the subsequent wire transfer instruction. (Cross-complaint ¶ 9.)

Plaintiffs initiated this action on December 23, 2022, and filed their FAC on August 22, 2023, against Excellence, Ms. Arroyo and Ms. Sosa alleging (1) breach of contract, (2) breach of fiduciary duty, (3) negligence, (4) professional negligence, and (5) constructive fraud.

On February 22, 2024, Excellence and Ms. Arroyo filed their Cross-complaint against Wells Fargo Bank, N.A. alleging (1) indemnification, (2) contribution, (3) declaratory relief, and (4) negligence.

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. Untimely Opposition

Cross-complainants' opposition was served a day late, on June 14, 2014, and Wells Fargo thus asks the Court not to consider it. Code of Civil Procedure section 1005(b) requires all opposing papers

to be filed and served at least nine court days before the hearing. The hearing for this action is scheduled for June 27, 2024. Therefore, the statutory deadline for Cross-complainants' opposition was indeed June 14, 2024.

However, the Court has discretion to consider late filed papers. (*Gonzalez v. Santa Clara County Dep't of Social Servs.* (2017) 9 Cal.App.5th 162, 168.) And, where a party provides a substantive response to a late filing, the party waives all defects in service. (*Moofly Productions, LLC v. Favila* (2020) 46 Cal. App. 5th 1, 10.) Wells Fargo filed a substantive reply to Cross-complainants' opposition. The Court will accordingly address the demurrer on the merits, including consideration of Cross-complainants' opposition.

IV. Analysis

Wells Fargo contends, Cross-complainants' causes of action are not viable because (1) common law claims are displaced and preempted by Article 4A of the Uniform Commercial Code ("U.C.C.") and Division 11 of the California Uniform Commercial Code ("Cal. U.C.C."), (2) Cal. U.C.C. § 11202(a) precludes its liability since Plaintiffs authorized the wire transfer, and (3) it does not owe a duty of care to noncustomer Cross-complainants. Wells Fargo cites *Zengen, Inc. v. Comerica Bank* (2007) 41 Cal.4th 239, 253-254 (*Zengen*) for the idea that the Commercial Code displaces any common law claim where the gravamen is that the bank improperly accepted and executed a funds transfer.

A. Uniform Commercial Code Article 4A – California Uniform Commercial Code, Division 11.

California has adopted the Uniform Commercial Code, which expressly displaces or preempts common law to the extent that its particular provisions apply. (*Chino commercial Bank, N.A. v. Peters*, (2010) 190 Cal.App.4th 1163, 1170 (*Chino*); Cal. U.C.C. § 1103(b).) Article 4A of the Uniform Commercial Code has been adopted as Division 11 of the California Uniform Commercial Code governing funds transfers including wire transfers. (*Id.* at 1173.) Division 11 provides that common law causes of action based on allegedly unauthorized funds are preempted or displaced in two specific areas: (1) where the common law claims would create rights, duties, or liabilities inconsistent with Division 11 and (2) where the circumstances giving rise to the common law claims are specifically

covered by the provision of Division 11. (See, *Zengen, supra,* at 253.) The exclusivity of Article 4A is restricted to any situation covered by particular provision of the Article; "conversely, situations not covered are not the exclusive province of the Article." (*Zenga, supra*, at 254; See, *Chino, supra,* at 1174.)

U.C.C. section 4A-212 provides that the liability of a receiving bank for acceptance of a payment order "is limited to that provided in this Article. … [T]he bank owes no duty to any party to the funds transfer except as provided in this Article or by express agreement." (See also, Cal. U.C.C. §11212.) A wire transfer is a "payment order." (Cal. U.C.C. § 11103(a)(1).) Article 4A includes specific provisions governing the liability of receiving banks concerning wire transfers. For example, Article 4A addresses a receiving bank's liability for unauthorized wire transfers (Cal. U.C.C. §§ 11201-11204), erroneous wire transfers (Cal. U.C.C. §§ 11205, 11207, 11208), amended and canceled wire transfers (Cal. U.C.C. § 11211), and erroneously executed wire transfers (Cal. U.C.C. §§ 11302-11305.) Since Cal. U.C.C. establishes bright-line rules for banks and the parties involved in wire transfers, its provisions displace common law claims based on banks' improper funds transfers. (See *Zengen, supra,* at 254-255.)

Cross-complainants contend that as third-party agents of the Plaintiffs they do not have standing to raise the statutory rights afforded to the Plaintiffs and as such their claims fall outside the purview of Article 4A and Cal. U.C.C. Cross-complainants provide no authority to support this proposition, and it is not well taken. Each of Cross-complainants' claims against Wells Fargo is based on the allegation that Wells Fargo made an improper funds transfer. An improper funds transfer is unequivocally addressed by Article 4A.

In the drafting Article 4A, "[a] deliberate decision was [] made to use precise and detailed rules to assign responsibility, define behavioral norms, allocate risks and establish limits on liability, rather than to rely on broadly stated, flexible principles. In the drafting of these rules, a critical consideration was that the various parties to funds transfers need to be able to predict risk with certainty, to insure against risk, to adjust operational and security procedures, and to price funds transfer services appropriately." (*Chino, supra*, at 1173.)

Alternately, Cross-complainants argue that Cal. U.C.C. §§11202(b) and (c) do not preclude Wells Fargo's liability because the wire transfer at issue was clearly erroneous, and Wells Fargo failed to follow commercially reasonable security procedures.

Cal. U.C.C. § 11202(b) provides:

"If a bank and its customer have agreed that the authenticity of payment orders issued to the bank in the name of the customer as sender will be verified pursuant to a security procedure, a payment order received by the receiving bank is effective as the order of the customer, whether or not authorized, if (i) the security procedure is a commercially reasonable method of providing security against unauthorized payment orders, and (ii) the bank proves that it accepted the payment order in good faith and in compliance with the security procedure and any written agreement or instruction of the customer restricting acceptance of payment orders issued in the name of the customer. The bank is not required to follow an instruction that violates a written agreement with the customer or notice of which is not received at a time and in a manner affording the bank a reasonable opportunity to act on it before the payment order is accepted."

Cal. U.C.C. § 11202(c) provides:

"Commercial reasonableness of a security procedure is a question of law to be determined by considering the wishes of the customer expressed to the bank, the circumstances of the customer known to the bank, including the size, type, and frequency of payment orders normally issued by the customer to the bank, alternative security procedures offered to the customer, and security procedures in general use by customers and receiving banks similarly situated. A security procedure is deemed to be commercially reasonable if (i) the security procedure was chosen by the customer after the bank offered, and the customer refused, a security procedure that was commercially reasonable for that customer, and (ii) the customer expressly agreed in a record to be bound by any payment order, whether or not authorized, issued in its name and accepted by the bank in compliance with the bank's obligations under the security procedure chosen by the customer."

Cross-complainants' reliance on these sections is misplaced because they were not Wells Fargo's customers, and these provisions only apply to instances where the customer did not authorize the wire. Cross-complainants have acknowledged that the payment order Plaintiffs sent and received by Wells Fargo was authorized. (Opposition pp. 4-5, lines 28, 1.) Nonetheless, the Cross-complaint fails to allege facts showing violations of either section and fails to identify any violation of "commercially reasonable banking practices" with any causal connection to Cross-complainants' alleged loss.

Accordingly, Wells Fargo's demurrer to the Cross-complaint is SUSTAINED WITH 20 DAYS LEAVE TO AMEND.

B. Negligence

Wells Fargo contends the negligence cause of action fails because banks do not owe any duty of care to noncustomers or to police customer accounts and scrutinize transactions.

"To state a cause of action for negligence a plaintiff must allege (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached that duty, and (3) the breach proximately caused the plaintiff's damages or injuries. Whether a duty of care exists is a question of law to be determined on a case-by-case basis." (*Luceras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 62.) Here, the only element that Wells Fargo attacks is duty.

First, Cross-complainants' negligence claim is based on violation of Cal. U.C.C. §11202(b) and Wells Fargo's failure to have reasonable security procedures to verify the wire instructions. Negligence occurring within the four corners of a wire transfer transaction is preempted or displaced by Division 11 of the Cal. U.C.C. applicable to wire transfers. (See, *Zengen, supra*, at 250.)

Second, while a bank has a duty to act with reasonable care in transactions with its depositors, the bank is not a fiduciary and owes no duty to supervise account activity or to inquire into the purpose for which the funds are being used. (*Kurtz-Ahlers, LLC v. Bank of America, N.A.* (2020) 48 Cal.App.5th 952, 956 (citations omitted).)

Third, "absent extraordinary and specific facts, a bank does not owe a duty of care to a noncustomer." (*Software Design & Application, Ltd., v. Hoefer & Arnett, Inc.* (1996) 49 Cal.App.4th

472, 479.) The cross-complaint lacks allegations showing extraordinary and specific facts giving rise to Wells Fargo's duty of care.

Accordingly, Wells Fargo's demurrer to the negligence cause of action is SUSTAINED WITH 20 DAYS LEAVE TO AMEND.

C. Indemnification, Contribution, and Declaratory Relief

Wells Fargo contends Cross-complainants' causes of action for indemnification, contribution, and declaratory relief fail because they are based on a theory of comparative negligence that requires a viable negligence claim against Wells Fargo. The Court agrees.

Accordingly, Wells Fargo's demurrer to causes of action for indemnification, contribution, and declaratory relief is SUSTAINED WITH 20 DAYS LEAVE TO AMEND.