

**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: October 3, 2023 TIME: 9:00 A.M.

TO REQUEST 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.)

TO APPEAR AT THE HEARING: 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.sccscourt.org/general_info/ra_teams/video_hearings_teams.shtml

TO HAVE THE HEARING REPORTED: 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.sccscourt.org/general_info/court_reporters.shtml

TO SET YOUR NEXT hearing date: You no longer need to file a blank notice of motion to obtain a hearing date. **Phone lines are now open for you to call and reserve a date before you file your motion.** If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Civil Local Rule 8C is in the amendment process and will be officially changed by January 2024.

Where to call for your hearing date:

408-882-2430

When you can call:

Monday to Friday, 8:30 am to 12:30 pm

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
<u>1</u>	18CV337836	Cryplex, Inc. vs Bitmain Technologies Holding Company	Further Case Management – will be called at 10:00 a.m.
<u>2</u>	20CV365850	CITIBANK, N.A. vs MATTHEW OLIVIERI et al	Parties are ordered to appear for examination.
<u>3</u>	22CV396800	Leticia Villegas vs Anita Davidson et al	Defendants’ Demurrer is SUSTAINED, IN PART. Please scroll down to Lines 3-4 for full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.
<u>4</u>	22CV396800	Leticia Villegas vs Anita Davidson et al	Defendants’ Motion to Strike is GRANTED, IN PART. Please scroll down to Lines 3-4 for full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Moving party to prepare formal order.
<u>5</u>	22CV399627	CALIFORNIA DRYWALL CO., a California corporation vs ATHISH RAO, an individual et al	Plaintiff California Drywall Co.’s Motion to Compel FPC Builders, Inc.’s Further Responses to Requests for Production of Documents and Form Interrogatories is GRANTED, IN PART. Plaintiff’s motion for sanctions is DENIED. Please scroll down to Lines 5-6 for full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Moving party to prepare formal order.
<u>6</u>	22CV399627	CALIFORNIA DRYWALL CO., a California corporation vs ATHISH RAO, an individual et al	Plaintiff California Drywall Co.’s Motion to Compel FPP MB, LLC’s Further Responses to Requests for Production of Documents and Form Interrogatories is GRANTED, IN PART. Plaintiff’s motion for sanctions is DENIED. Please scroll down to Lines 5-6 for full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Moving party to prepare formal order.
<u>7</u>	18CV321297	Zhiwei Xu et al vs 230 East Street and Avenue B, LLC	Plaintiff’s Motion to Enter Judgment Pursuant to Code of Civil Procedure §664.6 is CONTINUED to November 14, 2023 at 9 a.m. in Department 6. Although the Motion appears to have merit, Plaintiff served an amended notice of motion for this October 3, 2023 hearing date on September 21, 2023. That is insufficient notice under Code of Civil Procedure section 1005, which requires “all moving and supporting papers shall be served and filed at least 16 court days before the hearing” (more if served other than by personal service). Plaintiff is ordered to serve an amended notice of motion for November 14, 2023 at 9 a.m. in Department 6. This order will be reflected in the minutes.

<u>8</u>	21CV375648	Tyler Ouimette vs Dawn Ebert et al	Cross-Defendants Renewed Motion for Attorneys' Fees is GRANTED, in part. The Court granted portions of Cross-Defendants' anti-SLAPP motion by order dated July 18, 2023 and permitted Cross-Defendants to seek attorneys fees related solely to the portion of the motion for which they prevailed. The Court first finds the \$250 per hour rate to be reasonable for this market. The Court further finds it appropriate to reduce the number of hours and amount of expenses to reflect that portion of the anti-SLAPP motion where Cross-Defendants prevailed. Accordingly, the Court awards Cross-Defendants \$1,500 in attorney's fees and \$1,121 in costs, which Cross-Complainant is ordered to pay within 60 days of service of the final order. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.
<u>9</u>	22CV405064	Rossi, Hamerslough, Reischl & Chuck, a Professional Law Corporation vs Rajani Kolli	Petitioner's Motion to Appoint Neutral Pursuant to Code of Civil Procedure Section 1281.6 is GRANTED, in part. Section 1281.6 provides: "When a petition is made to the court to appoint a neutral arbitrator, the court shall nominate five persons from lists of persons supplied jointly by the parties to the arbitration or obtained from a governmental agency concerned with arbitration or private disinterested association concerned with arbitration. The parties to the agreement who seek arbitration and against whom arbitration is sought may within five days of receipt of notice of the nominees from the court jointly select the arbitrator whether or not the arbitrator is among the nominees. If the parties fail to select an arbitrator within the five-day period, the court shall appoint the arbitrator from the nominees." The parties are ordered to appear for argument and discuss the requirements of this provision and appointment of a neutral.
<u>10</u>	23CV409820	MARIA ESTRADA vs SAM ROHAM et al	T.P. Skinner's Motion to Withdraw as Counsel for Maria Estrada is GRANTED. T.P. Skinner is ordered to give notice of the October 12, 2023 Order to Show Cause for Plaintiff's failure to appear and to file proof of service of such notice. Court will use proposed order on file.
<u>11</u>	23CV410362	The Kanavel Group, LLC, a Wyoming limited liability company vs 1-20 DOES et al	The Court orders the parties to appear for oral argument and respond to the following questions: (1) There is no arbitration agreement between Plaintiff and Redwood Holdings, thus Plaintiff's claims with Redwood Holdings will ultimately be determined by the Court. However, to rule on Redwood Holdings' motion to expunge lis pendens, the Court must examine Milestone Financial's NODs which will obviously be a subject in the arbitration. In this context, may the Court rule on Redwood Holdings' motion to expunge (please assume it was appropriately brought as part of the stay carve out.) (2) Is there any case in which the Court found an overstatement of the amount owed in a NOD was so serious a defect that it voided the foreclosure sale?

Calendar Lines 3 & 4

Case Name: *Leticia Villegas v. Anita Davidson, et al.*

Case No.: 22CV396800

Before the Court is Defendants’ Anita Davidson (“Anita”) and Stephanie Davidson (“Stephanie”) (collectively, “Defendants”) demurrer to and motion to strike portions of Plaintiff Leticia Villegas’s first amended complaint (“FAC”).¹ Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background

This is an action arising from alleged fraud. According to the FAC, Anita is a 95-year-old settlor, beneficiary, and co-trustee of the Davidson Living Trust, dated December 6, 1989. (FAC, ¶ 12.) Stephanie is her daughter. (FAC, ¶ 17.) Plaintiff is Anita’s neighbor, and she first met Defendants in the Spring of 1976. (FAC, ¶¶ 46-47.) In September 2017, Plaintiff’s relationship with Anita transitioned from neighborly gestures to a close friendship that evolved into a mother-daughter dynamic over a period of two and a half years. (FAC, ¶ 48.) During their relationship, Plaintiff and Anita often talked on the phone, spent time together at Anita’s house, dined out, shopped, went to the movies, took scenic drives, celebrated a mutual friend’s daughter’s birthday, and even attended a memorial service for a neighbor. (FAC, ¶ 49.)

In October 2017, after Anita requested assistance with security concerns, Plaintiff researched and procured a specialist to address her concerns. (FAC, ¶¶ 50-51.) After Anita voiced concerns about her husband Charles Davidson’s (“Charles”) role in her estate plan, matters surrounding the Property, and management of the Davidson Family Foundation, Plaintiff contacted professionals on how to best address those concerns.² (FAC, ¶¶ 56-58.)

On March 6, 2019, at Anita’s request, Plaintiff agreed to act as Anita’s designated support person. (FAC, ¶ 18.) On April 26, 2019, Anita executed a Limited Durable Power of Attorney (the “LPOA”), which designated Plaintiff as her agent and attorney-in-fact, with specified powers. (FAC, ¶ 19.) Anita provided services regarding various legal matters (the “Davidson Legal Matters”). (FAC, ¶

¹ Defendants share a surname, thus the Court will refer to them individually by their first names. No disrespect is intended. (*Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1136, fn. 1.)

² Anita’s divorce from Charles was pending when he died in March 2021, which was dismissed after his death.

21.) Her services resulted in intimidation, slander, and retaliation from other members of the Davidson family. (FAC, ¶ 24.) As a result, on May 11, 2019, Anita represented to Plaintiff that she would include her as “an additional child in my trust” in exchange for Plaintiff’s agreement to continue rendering services as her agent and attorney-in-fact. (*Ibid.*) Anita repeated the representation multiple times. (See FAC, ¶¶ 74-77, 85, 134.) Additionally, Stephanie and Anita made promises to indemnify Plaintiff against all claims arising out of her services. (FAC, ¶ 40.) Defendants failed to document the representations, despite Plaintiff’s requests. (FAC, ¶ 86.)

On April 20, 2020, Plaintiff sent declination and mitigation of damages notifications to Anita. (FAC, ¶ 103.) On April 21, 2020, Anita executed the Revocation of Limited Durable Power of Attorney, which released Plaintiff from her role as agent and attorney-in-fact immediately. (FAC, ¶ 104.)

Plaintiff initiated this action on April 1, 2022, asserting (1) fraudulent misrepresentation; (2) breach of contract; and (3) reasonable compensation. On February 28, 2023, she filed her FAC, which asserts (1) promissory fraud; (2) negligent misrepresentation; (3) breach of oral contract; (4) breach of implied covenant of good faith and fair dealing; (5) quantum meruit; (6) unjust enrichment; (7) reasonable compensation; and (8) accounting. On July 17, 2023, Defendants filed the instant motions, which Plaintiff opposes.

II. Demurrer

Defendants demur to the first, second, third, fourth, fifth, sixth, and eighth causes of action on the ground they fail to allege sufficient facts to state a claim. (Code Civ. Proc., § 430.10, subd. (e).)

A. 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.)

B. Sham Pleading

Generally, after an amended pleading is filed, the original pleading is superseded. (*Vallejo Development Co. v. Beck Development Co.* (1994) 24 Cal.App.4th 929, 946.) Courts will assume the truth of the factual allegations in the amended pleading for purposes of demurrer. (*Owen v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 383 (*Owen*).) However, under the sham pleading doctrine, “admissions in an original complaint... remain within the court’s cognizance and the alteration of such statements by amendment designed to conceal fundamental vulnerabilities in a plaintiff’s case will not be accepted.” (*Lockton v. O’Rourke* (2010) 184 Cal.App.4th 1051, 1061.) The purpose of the doctrine is to “enable the courts to prevent an abuse of process.” (*Hanh v. Mirda* (2007) 147 Cal.App.4th 740, 751.) “[W]here a party files an amended complaint and seeks to avoid the defects of a prior complaint either by omitting the facts that rendered the complaint defective or by pleading facts inconsistent with the allegations of prior pleadings,” the court may examine the prior complaint to ascertain whether the amended pleading is merely a sham. (*Owen, supra*, 198 Cal.App.3d at 384.)

“In these circumstances, the policy against sham pleading permits the court to take judicial notice of the prior pleadings and requires that the pleader explain the inconsistency. If he fails to do so, the court may disregard the inconsistent allegations and read into the amended complaint the allegations of the superseded complaint.” (*Ibid.*) A pleading cannot be summarily dismissed if the sham pleading doctrine applies as the pleader must be given the opportunity to provide an explanation for the

incompatible pleadings. (See *Owens, supra* [pleader must be given opportunity to explain inconsistency]; see also *Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 425-426 [sham pleading doctrine is inapplicable where pleader offers plausible explanation for amendment].)

Defendant argues the sham pleading doctrine is applicable here because Plaintiff has omitted the following allegations from the FAC:

Plaintiff informed Stephanie and Anita that she felt Anita's April 3 Statement was scripted, and although she loves Anita and continues to act in good faith, 'she will not be lied to.' (Complaint, ¶ 73.)

While Anita has failed to perform her explicit representations under the oral agreement between the parties, Plaintiff went above and beyond in continuing to act as Anita's agent and attorney-in-fact, and care for Anita as if she was Plaintiff's own mother. (Complaint, ¶ 124.)

[After requesting revocation of the LPOA] not wanting to leave Anita in a vulnerable position, Plaintiff dutifully conveyed that she would consider assisting Anita in a limited capacity as her support person moving forward. (Complaint, ¶ 90.)

Defendants argue the Complaint alleged that Plaintiff performed the services despite knowing Anita's representations were false, thus, the FAC, which omits these allegations, is subject to the sham pleading doctrine. The Court disagrees. The Complaint does not allege that Plaintiff knew the representations Anita allegedly made in May 2019 and thereafter (Complaint, ¶¶ 37, 45, 50, 55) were false at the time Anita allegedly made them. The FAC also still alleges a close a close familial relationship with Anita and that Plaintiff performed services for Anita in good faith. Thus, the sham pleading doctrine does not apply here.

C. First Cause of Action-Promissory Fraud

“Promissory fraud or false promise ‘is a subspecies of [the action for] fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud.’” (*Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1498.) In *Tarmann v. State Farm Mutual Automobile Ins. Co.* (1991) 2 Cal.App.4th 153, 159 (*Tarmann*), the court explained, “To

maintain an action for deceit based on a false promise, one must specifically allege and prove, among other things, that the promisor did not intend to perform at the time he or she made the promise and that it was intended to deceive or induce the promisee to do or not do a particular thing.”

[T]he facts essential to the statement of a cause of action in fraud or deceit based on a promise made without any intention of performing it are: (1) a promise made regarding a material fact without any intention of performing it; (2) the existence of the intent at the time of making the promise; (3) the promise was made with intent to deceive or with intent to induce the party to whom it was made to enter into the transaction; (4) the promise was relied on by the party to whom it was made; (5) the party making the promise did not perform; (6) the party to whom the promise was made was injured.

(*Muraoka v. Budget Rent-A-Car* (1984) 160 Cal.App.3d 107, 119.)

Defendants argue Plaintiff fails to allege reasonable reliance as to Anita and to allege any element as to Stephanie.

“[A]ctual reliance occurs when a misrepresentation is ‘an immediate cause of [a plaintiff’s] conduct, which alters his legal relations’ and when absent such representations, the plaintiff ‘would not in all reasonable probability have entered into the contract or other transaction.’” (*Hall v. Time Inc.* (2008) 158 Cal.App.4th 847, 855.) 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.)

Plaintiff alleges Anita made at least six representations that she would include her as “an additional child in her trust” in *exchange* for her agreement to *continue* to act as her agent and attorney-in-fact. (FAC, ¶¶ 69, 134, emphasis added.) She further alleges she believed the representations to be true and if she had known she would not be included as an additional child, she would not have agreed to continue rendering services. (FAC, ¶¶ 135, 139.) Therefore, Plaintiff’s legal relations were altered because she would not have continued to render services without Anita’s representations. Thus, Plaintiff alleges actual reliance on the misrepresentations.

Defendant also contends it was not reasonable for Plaintiff to believe the services she provided were worth a child's share of Anita's estate and to believe Anita would add her as an "additional child" in her trust after knowing her for less than two years. (Demurrer, p. 10:18-21.)

"Except where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff's reliance is reasonable is a question of fact." (*Blankenheim v. E.F. Hutton, Co., Inc.* (1990) 217 Cal.App.3d 1463, 1475 (*Blankenheim*); *Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 503 ["[w]hether reliance is justified is a question of fact for the determination of the trial court"].) "However, whether a party's reliance was justified may be decided as a matter of law if reasonable minds can come to only one conclusion based on the facts." (*Guido v. Koopman* (1991) 1 Cal.App.4th 837, 843.)

Here, Plaintiff alleges Anita represented she would include Plaintiff "as an additional child" in her trust. (FAC, ¶ 24.) From May 11, 2019, through March 20, 2020, Anita repeated the representations. (See FAC, ¶¶ 74, 76, 84, 85, 97.) Moreover, Plaintiff alleges she rendered "thousands of hours of services that resulting in successful negotiation of substantial legal matters, safeguarding of Trust assets, and recovery of millions of dollars for Anita's benefit, the benefit of the Trust, and the benefit of Stephanie." (FAC, ¶ 25.) Consequently, there is room for a reasonable difference of opinion and Plaintiff's reliance is a question of fact that cannot be resolved on demurrer. (See *Blankenheim, supra*, 217 Cal.App.3d at p. 1475.) Thus, the demurrer cannot be sustained on this basis.

As to Stephanie, the FAC alleges theories of aiding, abetting, conspiracy, and concert of action as to Defendants. (See FAC, ¶¶ 8-10.) It further alleges "Stephanie was inextricably involved in all actions that Anita sought to carry out concerning the Davidson Legal Matters." (FAC, ¶ 36.) It alleges Stephanie acknowledged that Anita said she wanted to include Plaintiff as an additional child in her trust. (FAC, ¶ 84.) Moreover, Plaintiff has sufficiently alleged the underlying tort against Anita. (See *Casey v. U.S. Bank Nat. Assn.* (2005) 127 Cal.App. 4th 1138, 1144 (*Casey*).) Therefore, Plaintiff alleges sufficient facts to state this claim against Stephanie. Thus, the demurrer to the first cause of action is **OVERRULED**.

D. Second Cause of Action-Negligent Misrepresentation

“The elements of a negligent misrepresentation are ‘(1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another’s reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage.’ Negligent misrepresentation does not require knowledge of falsity, unlike a cause of action for fraud.” (*Tindell v. Murphy* (2018) 22 Cal.App.5th 1239, 1252.) “As is true of negligence, responsibility for negligent misrepresentation rests upon the existence of a legal duty, imposed by contract, statute, or otherwise, owed by a defendant to the injured person.” (*Eddy v. Sharp* (1988) 199 Cal.App.3d 858, 864.) “To be actionable, a negligent misrepresentation must ordinarily be as to past or existing material facts,” not a future promise to perform. (*Tarmann, supra*, 2 Cal.App.4th at pp. 158-159.)

In *Tarmann*, the court explained:

To maintain an action for deceit based on a false promise, one must specifically allege and prove, among other things, that the promisor did not intend to perform at the time he or she made the promise and that it was intended to deceive or induce the promisee to do or not do a particular thing. Given this requirement, an action based on a false promise is simply a type of intentional misrepresentation, i.e., actual fraud. The specific intent requirement also precludes pleading a false promise claim as a negligent misrepresentation, i.e., ‘The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true.’ Simply put, making a promise with an honest but unreasonable intent to perform is wholly different from making one with no intent to perform and, therefore, does not constitute a false promise. Moreover, we decline to establish a new type of actionable deceit: the negligent false promise.

(*Id.* at p. 159.)

Here, it appears Anita’s representation pertained to future performance. Moreover, Anita’s representations were not accompanied by existing facts that showed her ability to perform. (Cf. *Russ Lumber & Mill Co. v. Muscupiable Land & Water Co.* (1898) 120 Cal.521, 529-530 (*Russ Lumber*) [“if the promise is accompanied with statements of existing facts which show the ability of the promisor to

perform his promise, and without which the promise would not be accepted or acted upon, such statements are denominated representations].)³ Here, Plaintiff does not allege statements of existing fact by Anita about her ability to perform. Moreover, while “a false promise to perform in the future can support an intentional misrepresentation claim, it does not support a claim for negligent misrepresentation.” (*Stockton Mortgage, Inc. v. Tope* (2014) 233 Cal.App.4th 437, 458 (*Stockton Mortgage*)).) Thus, Plaintiff fails to allege sufficient facts to state this claim against Anita.

The FAC alleges theories of aiding, abetting, conspiracy, and concert of action as to Defendants. (See FAC, ¶¶ 8-10.) However, because Plaintiff fails to state the underlying tort against Anita, Plaintiff fails to state Stephanie’s liability based upon those theories. (See *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-511 [conspiracy does not result in tort liability unless an actual tort is committed]; *Casey, supra*, 127 Cal.App.4th at p. 1144.) Thus, the demurrer to the second cause of action is SUSTAINED with 20 days’ leave to amend.

E. Third Cause of Action-Breach of Oral Contract

“The elements of a breach of oral contract claim are the same as those for a breach of written contract: a contract; its performance or excuse for nonperformance; breach; and damages.” (*Stockton Mortgage, supra*, 233 Cal.App.4th at p. 453.)

Defendants argue this claim fails because Plaintiff cannot allege a valid contract for indemnity because the alleged agreement is barred by the statute of frauds. They further argue she cannot allege breach or damage.

“Where the complaint seeks to enforce an agreement required to be in writing under the statute of frauds, but nonetheless alleges the agreement was oral, a general demurrer lies. The complaint on its face discloses a bar to recovery.” (Weil & Brown et al., Cal. Prac. Guide: Civ. Pro. Before Trial (Rutter Group 2021) ¶7:58, p. 7(I)-33 citing *Parker v. Solomon* (1959) 171 Cal.App.2d 125, 136 and *Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1503 (*Rossberg*)).) The statute of frauds requires any contract subject to its provisions to be memorialized in a writing subscribed by the party to be

³ In *Russ Lumber*, the company represented that it had the water it agreed to furnish, which would enable it to fulfill its contracts. (*Id.* at p. 530.) The representation was about an existing material fact. (*Ibid.*)

charged or by the party's agent. (Civ. Code, § 1624, *Secrest v. Security National Mortgage Loan Trust* 2002-2 (2008) 167 Cal.App.4th 544, 552.)

"The statute of frauds is a collective term describing the various statutory provisions that deny enforcement to certain enumerated classes of contract unless they are reduced to writing and signed by the party to be charged." (1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 343.) As relevant here, one type of contract that is barred by the statute of frauds is "(1) an agreement that by its terms is not to be performed within a year from the making thereof; and (2) a special promise to answer for the debt, default, or miscarriage of another." (Civ. Code, § 1624, subd. (a)(1)-(2).) "The contract is unenforceable only whereby its terms it is impossible of performance in that period. If it is merely unlikely that it will be so performed, or the period of performance is indefinite, the statute does not apply." (1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §365, p. 410 citing *Dougherty v. Rosenberg* (1882) 62 Cal.32, 36.)

Plaintiff alleges Anita and Stephanie made separate and collective promises to indemnify Plaintiff against any claims arising out of her involvement in the Davidson Legal Matters. (FAC, ¶¶ 70-71.) The terms do not indicate that performance was impossible in one year. Moreover, Charles had made legal threats against Plaintiff for her involvement in the Davidson Legal Matters. (FAC, ¶ 70.) Thus, there was a chance of performance within one year. Therefore, the statute of frauds does not apply under section 1624, subdivision (a)(1).

Civil Code section 2772, provides, "[i]ndemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person." (Civ. Code, § 2772.)

Plaintiff alleges Defendants promised to answer for Plaintiff's debts and liability arising from claims brought against her for her involvement in the Davidson Legal Matters. Thus, the statute of frauds applies to the agreement, and it must be in writing. (See Civ. Code, § 1624, subd. (a)(2).) Here, the only writing regarding the promise to indemnify is in Article 3, Section 3.01 ("Section 3.01") of the Anita A. Davidson 2020 Living Trust ("2020 Trust"), titled Gifts At My Death, which provides:

To Leticia Villegas ("Letty"), the amount, if any, determined by the trustee that is necessary to defend and indemnify her for any and all claims or demands of any kinds or

character, liability, damages, losses, costs, and expenses, including attorney fees and court costs, arising out of the exercise of powers conferred by me pursuant to that certain Limited Durable Power of Attorney dated April 26, 2019 appointing Letty as my attorney-in-fact, excluding any such exercise of powers that constitutes willful misconduct, bad faith, gross negligence, or breach of fiduciary duty.

(FAC, ¶ 89.)

However, Section 3.01 is a gift at the time of Anita's death. Thus, Plaintiff fails to allege a writing for the alleged indemnification agreement. Consequently, the alleged oral agreement is barred by the statute of frauds and Plaintiff fails to allege the existence of a valid contract. Additionally, Plaintiff fails to address this cause of action in the opposition. (See *Glendale Redevelopment Agency v. Parks* (1993) 18 Cal.App.4th 1409 (*Glendale*) [issue is impliedly conceded by failing to address it]; see also *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 566 (*DuPont Merck*) [“[b]y failing to argue the contrary, plaintiffs concede this issue”].)

The demurrer to the third cause of action is SUSTAINED with 20 days leave to amend.

F. Fourth Cause of Action-Breach of the Implied Covenant of Good Faith and Fair Dealing

“The prerequisite for any action for breach of the implied covenant of good faith and fair dealing is the existence of a contractual relationship between the parties.” (*Smith v. City and County of San Francisco* (1990) 225 Cal.App.3d 38, 49.) “The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made. The covenant thus cannot be ‘be endowed with an existence independent of its contractual underpinnings.’ It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement.” (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349-350 (*Guz*).)

“The scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract...[it] rests upon the existence of some specific contractual obligation.” (*Avidity Partners, LLC v. State of California* (2013) 221 Cal.App.4th 1180, 1204.) “In essence, the covenant is implied as a supplement to the express contractual covenants, to prevent a contracting party

from engaging in conduct which frustrates the other party's rights to the benefits of the contract.” (*Love v. Fire Insurance Exchange* (1990) 221 Cal.App.3d 1136, 1153.) A breach of implied covenant good faith and fair dealing involves something beyond breach of the contractual duty itself. (See *Howard v. American National Fire Insurance Company* (2010) 187 Cal.App.4th 498, 528; see also *California Shoppers, Inc. v. Royal Globe Insurance Company* (1985) 175 Cal.App.3d 1, 54.) “Where breach of an actual term is alleged, a separate implied covenant claim, based on the same breach, is superfluous.” (*Guz, supra*, 24 Cal.4th at p. 327; see also *Smith v. International Brotherhood of Electrical Workers* (2003) 109 Cal.App.4th 1637, 1644 fn.3.)

As the Court stated above, Plaintiff fails to allege a valid contract for the indemnity agreement. As a result, Plaintiff's derivative claim for breach of the implied covenant of good faith and fair dealing fails. (See *Pacific States Enterprises, Inc. v. City of Coachella* (1993) 13 Cal.App.4th 1414, 1425 [“a cause of action for breach of the implied contractual covenant of good faith and fair dealing cannot be stated in the absence of a valid contract to which the covenant appertains.”]) Thus, the demurrer to the fourth cause of action is SUSTAINED with 20 days leave to amend.

G. Fifth Cause of Action-Quantum Meruit⁴

The requisite elements of quantum meruit are “(1) the plaintiff acted pursuant to ‘an explicit or implicit request for the services’ by the defendant; (2) the services conferred a benefit on the defendant.” (*Port Medical Wellness, Inc. v. Connecticut General Life Ins. Co.* (2018) 24 Cal.App.5th 153, 180 (*Port Medical Wellness*).)

Plaintiff alleges she provided services regarding Stephanie's employment and tax matters. (FAC, ¶¶ 21, 103, 124.) However, she fails to allege she acted pursuant to an “explicit or implicit request for the services” by Stephanie. (See *Port Medical Wellness, supra*, 24 Cal.App.5th at p. 180.) Additionally, Plaintiff fails to address this cause of action in the opposition. (See *Glendale, supra*, 18 Cal.App.4th 1409 [issue is impliedly conceded by failing to address it]; see also *DuPont Merck, supra*, 78 Cal.App.4th at p. 566 [“[b]y failing to argue the contrary, plaintiffs concede this issue”].) Thus, the demurrer to the fifth cause of action is SUSTAINED with 20 days leave to amend.

H. Sixth Cause of Action-Unjust Enrichment

⁴ Only Stephanie demurs to this claim.

“Unjust enrichment is not a cause of action or even a remedy, but rather a general principle underlying various legal doctrines and remedies. It is synonymous with restitution.” (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 387, citations omitted.) “Unjust enrichment has also been characterized as describing the result of a failure to make restitution.” (*Ibid.*)

The law of restitution allows an individual to make restitution if he or she is unjustly enriched at the expense of another. (*First Nationwide Savings v. Perry* (1992) 11 Cal.App.4th 1657, 1662 (*First Nationwide Savings*).) “A person is enriched if the person receives a benefit at another’s expense. Benefit means any type of advantage.” (*Ibid.*, citations omitted.)

“The fact that one person benefits another is not, by itself, sufficient to require restitution. The person receiving the benefit is required to make restitution only if the circumstances are such that, as between the two individuals, it is *unjust* for the person to retain it.” (*First Nationwide Savings, supra*, 11 Cal.App.4th at p. 1663, emphasis original.)

Here, Plaintiff alleges she conferred a benefit upon Anita, the Trust, and Stephanie to retain acceptable benefits. (FAC, ¶ 175.) She further alleges it would be inequitable for Defendants to retain the benefits without paying Plaintiff for her services. (FAC, ¶ 178.) Therefore, Plaintiff alleges sufficient facts to support a claim for unjust enrichment.

In the reply, Defendants argue that the claim fails because it is duplicative of Plaintiff’s tort claim. The Court declines to consider this argument because it was raised for the first time in the reply. (See *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764 [points raised for the first time in reply brief will not ordinarily be considered, because this would deprive respondent of an opportunity to counter the argument]; *L.A. Taxi Cooperative, Inc. v. The Independent Taxi Owners Assn. of Los Angeles* (2015) 239 Cal.App.4th 918, 926, fn. 7 [contention forfeited where raised for the first time in reply brief without a showing of good cause].) Moreover, Defendants rely on district court cases, which are not binding on this Court. (See *Futrell v. Payday California, Inc.* (2010) 190 Cal.App.4th 1419, 1432, fn. 6 (*Futrell*) [federal cases are not binding, although they may be considered for persuasive value].) Moreover, as the Court stated above, Plaintiff sufficiently alleges the promissory fraud claim. Thus, the demurrer to the sixth cause of action is **OVERRULED**.

I. Eighth Cause of Action-Accounting

An action for an accounting is equitable in nature. It may be brought to compel the defendant to account to the plaintiff for money or property, (1) where a fiduciary relationship exists between the parties, or (2) where, even though no fiduciary relationship exists, the accounts are so complicated that an ordinary legal action demanding a fixed sum is impracticable. (*Los Defensores, Inc. v. Gomez* (2014) 223 Cal.App.4th 377, 401 (*Los Defensores*).) “A cause of action for an accounting requires a showing that a relationship exists between the plaintiff and defendant that requires an accounting, and that some balance is due the plaintiff that can only be ascertained by an accounting.” (*Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 179.) “An accounting is an equitable proceeding which is proper where there is an unliquidated and unascertained amount owing that cannot be determined without an examination of the debits and credits on the books to determine what is due and owing. Equitable principles govern, and the plaintiff must show the legal remedy is inadequate... some underlying misconduct on the part of the defendant must be showing to invoke the right to this equitable remedy.” (*Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1136-1137 (*Prakashpalan*).)

Plaintiff alleges a relationship with Defendants and Anita received a substantial benefit from her services. (FAC, ¶ 191.) She alleges she cannot ascertain the exact amount of money due without an accounting. (FAC, ¶ 192.) However, Plaintiff fails to allege how the legal remedy is inadequate. (See *Prakashpalan, supra* 223 Cal.App.4th at p. 1136-1137.) Moreover, Plaintiff fails to address this cause of action in the opposition. (See *Glendale, supra*, 18 Cal.App.4th at p. 1409 [issue is impliedly conceded by failing to address it]; see also *DuPont, supra*, 78 Cal.App.4th at p. 566 [“[b]y failing to argue the contrary, plaintiffs concede this issue”].) Thus, the demurrer to the eighth cause of action is SUSTAINED with 20 days leave to amend.

III. Motion to Strike

A. Legal Standard

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.)

B. Analysis

Defendant moves to strike the following portions from the FAC:

- (1) Paragraph 12, “...the estimated value of the Trust is \$200 million”;
- (2) Paragraph 33, “...\$600,000.00...”;

- (3) Paragraph 13, in its entirety;
- (4) Paragraph 24, "...following Anita's most recently deceased daughter-Sandra L. Davidson's attack on Plaintiff...";
- (5) Paragraph 27, in its entirety;
- (6) Paragraph 28, "...5,000,000.00...", "...in the amount of \$699,135.55...", "in the amount of \$1,000,000.00...", "...in the amount of \$151,596.45...", "...in the amount of \$49,400.00...";
- (7) Paragraph 29, in its entirety;
- (8) Paragraph 34, in its entirety;
- (9) Paragraph 35, "...that confirm...by attorney Jill Rowe and verified by Anita";
- (10) Paragraph 38, in its entirety;
- (11) Paragraph 42, "...the Davidson Family's... over a substantial duration of time...";
- (12) Paragraphs 43-44, in their entirety;
- (13) Paragraph 61, in its entirety;
- (14) Paragraph 66, in its entirety;
- (15) Paragraph 67, in its entirety;
- (16) Paragraph 69, "...and following... attack on Plaintiff...";
- (17) Paragraph 70, "...and following Sandra's hostile attack on Plaintiff...";
- (18) Paragraph 71, "...in furtherance of... had never sued anyone in his life";
- (19) Paragraph 72, in its entirety;
- (20) Paragraph 73, "...Helen then told... that gets trampled";
- (21) Paragraphs 78-80, in their entirety;
- (22) Paragraph 82, in its entirety;
- (23) Paragraph 102, in its entirety;
- (24) Paragraph 103, "...and Plaintiff's intervening discovery... over a substantial duration of time...";
- (25) Paragraphs 110-113, in their entirety;

- (26) Paragraph 118, in its entirety;
- (27) Paragraphs 121-123, in their entirety;
- (28) Paragraphs 123-124, in their entirety; and
- (29) Paragraphs 127-128, in their entirety.

1. Confidential Settlement Communications

Defendants argue paragraphs 43 and 44, which allege Anita's release offer to Plaintiff after she sent declination and mitigations of damages notifications to Anita, should be struck because they pertain to confidential settlement communications.

Evidence Code section 1152, provides,

Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it.

(Evid. Code, § 1152.)

Evidence Code section 1152 excludes evidence of offers to compromise for the purpose of proving liability. Thus, Evidence Code section 1152 is a rule governing the admissibility of evidence; it is not a rule of pleading and procedure that justifies striking allegations in a pleading.

Defendants also argue the allegations are irrelevant. However, the allegations are relevant to Plaintiff's theory that Anita engaged in a conspiracy to defraud Plaintiff. Thus, the motion to strike paragraphs 43-44 is DENIED.

2. Attorney-Client Privilege

Defendants argue paragraphs 27, 29, and 66 are protected by attorney-client privilege.

The attorney-client privilege authorizes a client to refuse to disclose, and to prevent others from disclosing, confidential communications between attorney and client. (*Mitchell v. Superior Court* (1984) 37 Cal. 3d 591, 599.) The evidentiary privilege, while not constitutionally based, is the oldest recognized confidential communication privilege. (*Sullivan v. Superior Court* (1972) 29 Cal.App.3d 64,

71.) The privilege applies not only to communications made in anticipation of litigation, but also to legal advice when no litigation is threatened. (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 371.) The term "confidential communication" is broadly construed, and defined as either information transmitted between a client and his lawyer or advice given by the lawyer. The privilege does not protect independent facts related to a communication, that a communication took place, and the time, date and participants in the communication. Further, the privilege does not protect disclosure of underlying facts which may be referenced within a qualifying communication, and it does not extend to independent witnesses. (*State Farm Fire & Casualty Co. v. Superior Court* (1997) 54 Cal.App.4th 625, 639-640.)

Here, paragraph 29 is about the work conducted by Plaintiff, not any actions or communications by or between Defendants or their counsel. Thus, the motion to strike paragraph 29 is DENIED. On the other hand, paragraphs 27 and 66 pertain to work done by Defendants' counsel related to Defendants' legal matters. Thus, the motion is GRANTED with 20 days' leave to amend as to paragraphs 27 and 66.

3. Confidential Financial Information

Defendants argue paragraphs 12, 28, 82, 110-113, fn. 7, and fn. 21, which allege the estimated value of the Trust, financial details about the divorce proceedings, and financial details about funds advanced to Anita, should be stricken because they reveal confidential financial information and are immaterial. In opposition, Plaintiff argues the allegations are predicated on information ascertained from public records. She further argues the allegations are relevant because they demonstrate the extensiveness and complexity associated with the Davidson Legal Matters. The financial information is from court documents, which are public records. While the Court may strike allegations that are not essential to the elements of a claim, Defendants fail to provide any authority that it is required to strike any relevant probative allegations.⁵ Here, the allegations pertain to services rendered by Plaintiff and the benefit to Defendants from those services. Thus, the motion to strike is DENIED.

4. Medical Information

⁵ Defendants cite to *Hanson v. Board of Trustees*(1925) 74 Cal.App.585 (*Hanson*), however, in *Hanson*, the appellate court affirmed the lower court's decision to strike facts, which were probative but not ultimate facts. It did not state or analyze whether courts must strike such allegations. Thus, Defendants' reliance on *Hanson* is unavailing.

Defendants argue paragraphs 78 -80, which pertain to support Plaintiff provided Anita regarding medical matters, should be stricken as irrelevant and unnecessary.⁶ The allegations do not reveal any specifics about Anita's medical information, status, or treatment, but rather, they allege the scope of services and support Plaintiff provided Anita. Thus, the motion to strike is DENIED.

5. Allegations Regarding Family Dynamic

Defendants argue paragraphs 13, 24, 38, 42, 61, 67, 69-73, 102-103, 110, 118 and 127-128 should be stricken because they are inflammatory and prejudicial.

Paragraphs 38, 42, 61, 67, 72, 102, 118, 127, and portions of paragraphs 24, 69, 71, 73 and 103 are prejudicial and irrelevant. Thus, the motion is GRANTED as to those paragraphs. The identified portion of paragraph 70 and paragraphs 110, 128 are relevant to Plaintiff's theory of the amount of work she did and the nature of her relationship with Defendants. Thus, the motion is DENIED as to those paragraphs.

6. Allegations Regarding Plaintiff's Work

Defendants argue paragraphs 34-35 and 121-123 should be stricken because Plaintiff exaggerates the value of her work. However, on a motion to strike, the court takes the allegations as true. (See *Turman, supra*, 191 Cal.App.4th at p. 63.) Moreover, the allegations regarding the scope of Plaintiff's work and the benefits to Defendants from that work are relevant and essential to her claims. Thus, the motion is DENIED.

⁶ Defendants rely on *Board of Medical Quality Assurance v. Gherardini* (1979) 93 Cal.App. 3d 669 (*Board of Medical Quality Assurance*), in support of its assertion that medical information is confidential. However, *Board of Medical Quality Assurance* is distinguishable from the matter at hand because it pertained to a state medical board's review of patient's medical-hospital records, which is not at issue here.

Calendar Lines 5 & 6**Case Name:** *CALIFORNIA DRYWALL CO., a California corporation vs ATHISH RAO, et al***Case No.:** 22CV399627

Before the Court is Plaintiff California Drywall Co.’s (“California Drywall”) Motions to Compel Further Production of Documents and Things and Responses to Interrogatories from Defendants Full Power Construction, Inc. (“FPC”) and FPC Builders, Inc. (“FPC Builders”). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background

This matter arises out of a condominium construction project at 188 West St. James (“Property”). Defendant FPP MB, LLC (“FPP MB”) allegedly owns the Property, at least with respect to the individual units that have not yet been sold to the public. (First Amended Complaint, ¶4.) On or about July 26, 2016, Plaintiff entered a written subcontract with Defendant FPC to perform certain drywall construction work at the Property (“Drywall Subcontract”). (FAC, ¶¶4, 15.) California Drywall alleges FPC “materially breached the terms of the Drywall Subcontract by, among other things, failing to properly administer and schedule the work of improvement, hindering California Drywall’s performance and failing, [sic] refusing to process change orders, breaching the covenant of good faith and fair dealing and refusing to pay California Drywall in the amount of \$1,698,011.20.” (FAC, ¶17.)

On or about August 31, 2018, California Drywall entered a contract for certain painting work at the Property (“Painting Subcontract”) with Defendant FPC Builders. (FAC, ¶20.) California Drywall alleges FPC Builders “materially breached the terms of the Painting Subcontract by, among other things, failing to properly administer and schedule the work of improvement, hindering California Drywall’s performance and failing, [sic] refusing to process change orders, breaching the covenant of good faith and fair dealing and refusing to pay California Drywall the balanced owed to it for the work performed by California Drywall in the amount of \$709,974.87.” (FAC, ¶22,)

California Drywall initiated this action on June 8, 2022, filed the FAC on August 29, 2022 and asserts: breach of contract against FPC and FPC Builders (first and second causes of action), prompt payment penalties against FPC and FPC Builders (third cause of action), and enforcement of mechanics lien against all defendants (fourth cause of action).

On October 21, 2022, Plaintiff served first sets of requests for production of document and form interrogatories on defendants. Defendants served initial responses on December 23, 2022 and verifications on December 27, 2022. The parties then met and conferred by telephone, emails and letters between February 9, 2023 and June 22, 2023. On March 3, 2023, FPC Builders and FPP MB served first amended, and on May 4, 2023, FCP Builders and FPP MB served second amended responses to California Drywall's first set of requests for production and form interrogatories. Plaintiff now moves to compel further responses.

II. Legal Standard

Discovery is generally permitted “regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence.” (Cal. Code Civ. Pro. § 2017.010.) Everything that is relevant to the subject matter is presumed to be discoverable. (*Id.*) The Discovery Act further declares that “the court shall limit the scope of discovery” if it determines that the burden, expense, or intrusiveness of that discovery “clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence.” (Code Civ. Pro. § 2017.020(a); *Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 383-385.) The California Supreme Court teaches in *Greyhound* that the judge exercising discretion to limit discovery should construe disputed facts liberally in favor of discovery; reject objections such as hearsay that only apply at trial; permit fishing expeditions (within limits), avoid extending limitations on discovery, such as privileges; and, whenever possible, impose only partial limitations rather than denying discovery entirely. (*Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 383-385; *see also Tylo v. Superior Court* (1997) 55 Cal.App.4th 1379, 1386.)

The party to whom a request for production of documents has been directed can make one of three responses: (1) a statement that the party will comply with the demand, (2) a representation that the party lacks the ability to comply, or (3) an objection. (Code Civ. Pro. §2031.210(a).) A party may move for an order compelling a further response to a document demand on the ground that (1) an objection is without merit or too general, (2) a statement of compliance with the demand is incomplete, or (3) a representation of inability to comply is inadequate, incomplete, or evasive. (Code Civ. Pro.

§2031.210(a).) A party seeking to compel is required to “set forth specific facts showing good cause justifying the discovery sought by the demand.” (Code Civ. Pro. §2031.210(b)(1); *Kirkland v. Superior Court* (2002) 95 Cal.App.4th 92, 98.) This burden may be satisfied by a fact-specific showing of relevance. (*TBG Ins. Services Corp. v. Superior Court* (2002) 96 Cal.App.4th 443, 448.) Information is relevant to the subject matter of the action if it might reasonably assist a party in evaluating the case, preparing for trial, or facilitating settlement. (*Gonzalez v. Superior Court* (1995) 33 Cal.App.4th 1539, 1546.)

A party responding to interrogatories must respond in writing, under oath separately to each interrogatory with an answer that contains the information sought, an exercise of the party’s option to produce writings from which the answer can be determined, or an objection to the interrogatory. (Code Civ. Pro. §2030.210(a).) The responding party must make a reasonable, good faith effort to obtain information to provide a response and generally may not respond to the interrogatory by simply stating it cannot respond. (*Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 406; Code Civ. Pro. §2030.210(c).)

III. Analysis

A. Late Filed Oppositions

California Drywall first argues the Court should not consider FCP Builder’s or FFP MB’s oppositions because those papers were filed late. 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.) The Court will accordingly consider the motions to compel on the merits.

B. Requests for Production to FFP MB

Requests for Production Nos. 4 and 5 seek “all documents” regarding any contracts concerning the Property. The Court agrees with Defendant that these requests are overbroad. Plaintiff argues that it needs information regarding payouts to other vendors. There are other ways to get this information rather than collecting every documents concerning every contract related to the Property. The Court orders FFP MP to supplement its written response to identify what documents it has already produced

and whether it plans to produce any additional documents. The motion to compel concerning these requests is otherwise DENIED.

Request for Production No. 6 seeks “all documents” concerning the design and engineering for the project. This is a breach of contract case concerning nonpayment for drywall and painting. Plaintiff fails to explain how “all documents” concerning the design and engineering relate to these issues. The Court orders FPP MP to supplement its written response to identify what documents it has already produced and whether it plans to produce any additional documents. The motion to compel concerning this request is otherwise DENIED.

Request for Production No. 7 seeks “any and all documents concerning the construction of the project.” The Court agrees with Defendant that this is overbroad. The motion to compel further response to this request is DENIED.

Request for Production No. 8 seeks “any and all documents concerning the financing of the project.” The Court agrees with Defendant that this is overbroad. The motion to compel further response to this request is DENIED.

Request for Production No. 9 seeks “any and all documents concerning budgets and projections for the project.” The Court agrees with Defendant that this is overbroad. The motion to compel further response to this request is DENIED.

Request for Production No. 10 seeks “any and all documents concerning loan draw requests for the project.” The Court agrees with Defendant that this is overbroad. The motion to compel further response to this request is DENIED.

Request for Production No. 11 seeks “any and all documents concerning loan disbursements for the project.” The Court agrees with Defendant that this is overbroad. The motion to compel further response to this request is DENIED.

Request for Production No. 12 seeks “any and all documents concerning any project cost overruns.” The Court agrees with Defendant that this is overbroad. The motion to compel further response to this request is DENIED.

Request for Production No. 13 seeks “any and all accounting documents for the project. . . .” The Court agrees with Defendant that this is overbroad. The motion to compel further response to this request is DENIED.

Request for Production No. 14 seeks “any and all documents concerning requests for compensation you received for the project.” The Court agrees with Defendant that this is overbroad. The motion to compel further response to this request is DENIED.

Request for Production No. 15 seeks “any and all documents concerning compensation that you received concerning the project.” The Court agrees with Defendant that this is overbroad. The motion to compel further response to this request is DENIED.

Request for Production No. 16 seeks “any and all documents concerning any payments that you made to any person concerning the project.” The Court agrees with Defendant that this is overbroad. The motion to compel further response to this request is DENIED.

Request for Production No. 17 seeks “any and all documents concerning any costs or expenses that you incurred for the project.” The Court agrees with Defendant that this is overbroad. The motion to compel further response to this request is DENIED.

Request for Production No. 34 seeks “any and all documents concerning communications between you and any other person, or between your employees, representatives, agents, servants, officers, or directors concerning the costs of the project.” The Court agrees with Defendant that this is overbroad. The motion to compel further response to this request is DENIED.

Request for Production No. 35 seeks “any and all documents concerning communications between you and any other person, or between your employees, representatives, agents, servants, officers, or directors concerning the funding of the project.” The Court agrees with Defendant that this is overbroad. The motion to compel further response to this request is DENIED.

C. Form Construction Interrogatories to FPP MB

Form Interrogatory Nos. 305.11-305.13 and 311.3-311.4 seek information regarding any construction defects. In response to each, FPP MB provides the same high level answer referencing defects associated with Plaintiff’s work without detail. The Court agrees with Plaintiff that more detail is required and therefore Plaintiff’s motion to compel further responses to these form interrogatories is

GRANTED.

Form Interrogatory No. 324.1 seeks information regarding denials of material allegations and each special or affirmative defense. For the vast majority of Defendant's responses, it merely parrots back the affirmative defense without providing any supporting facts. Accordingly, Plaintiff's motion to compel a further response to this form interrogatory is GRANTED.

D. Requests for Production to FPC Builders

Request for Production No.5 seeks "any and all documents concerning contracts or agreements between you and any other person concerning the project. . . ." The Court agrees with Defendant that this request is overbroad. The motion to compel further response to this request is DENIED.

Request for Production No. 6 seeks "all documents" concerning the design and engineering for the project. This is a breach of contract case concerning nonpayment for drywall and painting. Plaintiff fails to explain how "all documents" concerning the design and engineering relate to these issues. The motion to compel further response to this request is DENIED.

Request for Production No. 7 seeks "any and all documents concerning the construction of the project." The Court agrees with Defendant that this is overbroad. The motion to compel further response to this request is DENIED.

Request for Production No. 8 seeks "any and all documents concerning budgets and projections for the project." The Court agrees with Defendant that this is overbroad. The motion to compel further response to this request is DENIED.

Request for Production No. 9 seeks "any and all documents for your work on the project. . . ." The Court agrees with Defendant that this is overbroad. The motion to compel further response to this request is DENIED.

Request for Production No. 10 seeks "any and all documents concerning requests for compensation that you submitted for the project." The Court agrees with Defendant that this is overbroad. The motion to compel further response to this request is DENIED.

Request for Production No. 11 seeks "any and all documents concerning compensation that you received concerning the project." The Court agrees with Defendant that this is overbroad. The motion to compel further response to this request is DENIED.

Request for Production No. 12 seeks “any and all documents concerning any payments that you made to any person concerning the project.” The Court agrees with Defendant that this is overbroad. The motion to compel further response to this request is DENIED.

Request for Production No. 13 seeks “any and all documents concerning any costs or expenses that you incurred for the project.” The Court agrees with Defendant that this is overbroad. The motion to compel further response to this request is DENIED.

Request for Production No. 31 seeks “any and all documents concerning communications between you and any other person, or between your employees, representatives, agents, servants, officers, or directors concerning the costs of the project.” The Court agrees with Defendant that this is overbroad. The motion to compel further response to this request is DENIED.

Request for Production No. 32 seeks “any and all documents concerning communications between you and any other person, or between your employees, representatives, agents, servants, officers, or directors concerning the funding of the project.” The Court agrees with Defendant that this is overbroad. The motion to compel further response to this request is DENIED.

E. Form Construction Interrogatories to FPC Builders

Form Interrogatory Nos. 305.13, 311.1, 311.4 seek information regarding any construction defects. In response to each, FPP MB provides the same high level answer referencing defects associated with Plaintiff’s work without detail. The Court agrees with Plaintiff that more detail is required and therefore Plaintiff’s motion to compel further responses to these form interrogatories is GRANTED.

Form Interrogatory No. 321.3 asks FPC Builders to “describe all locations on the property where you performed work or services.” The Court agrees with Plaintiff that FPC Builders should provide this information, and therefore Plaintiff’s motion to compel further response to this form interrogatory is GRANTED.

Form Interrogatory No. 321.4 seeks all dates, including first and last, that FPC Builders performed work or supervision for at the property or supplied materials. FPC Builders provides a partial response and states that it will supplement. The Court agrees with Plaintiff that FPC Builders should provide this information. The motion to compel further response to this form interrogatory is

GRANTED.

Form Interrogatory No. 321.5 seeks detailed information regarding any contractor or subcontractor other than FPC Builders that performed work at the project site. As phrased for the context of this case, this form interrogatory is overbroad. FPC Builders is ordered to supplement its response to this form interrogatory for any painting or drywall work.

Form Interrogatory No. 324.1 seeks information regarding denials of material allegations and each special or affirmative defense. For the vast majority of Defendant's responses, it merely parrots back the affirmative defense without providing any supporting facts. Accordingly, Plaintiff's motion to compel a further response to this form interrogatory is GRANTED.

Defendants' supplemental responses ordered herein shall be produced 20 days from service of the formal order.

Plaintiff's motion for sanctions is DENIED.