SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 10
Hon. Sunil R. Kulkarni (covering for Hon. Frederick S. Chung)

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

DATE: September 19, 2023 TIME: 9:00 A.M.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.

The courthouse is open: Department 10 is now fully open for in-person hearings, as of April 18, 2023. The court strongly prefers **in-person** appearances for all contested law-and-motion matters. For all other hearings (*e.g.*, case management conferences), the court strongly prefers either **in-person or video** appearances. Audio-only appearances are permitted but disfavored, as they cause significant disruptions and delays to the proceedings. Please use telephone-only appearances as a last resort.

CourtCall is no longer available: Department 10 uses Microsoft Teams for remote hearings. Please click on this link if you need to appear remotely, and then scroll down to click the link for Department 10: https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml.

Recording is prohibited: As a reminder, most hearings are open to the public, but state and local court rules prohibit recording of court proceedings without a court order. This prohibition applies to both in-person and remote appearances.

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

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	19CV343781	Minh Vo v. Thai Nguyen	Continued OEX can proceed.
LINE 2	21CV376690	Nicole Grave et al. v. American Technologies, Inc. et al.	See tentative ruling. The Court will prepare the final order.
LINE 3	21CV376690	Nicole Grave et al. v. American Technologies, Inc. et al.	See line 2.
LINE 4	21CV387376	Dieu-Thanh Thi Vo v. Tam Duc Truong et al.	See tentative ruling. The Court will prepare the final order.
LINE 5	22CV407099	Leigh Gibbs v. Yichieh Schiuey et al.	See tentative ruling. The Court will prepare the final order.
LINE 6	22CV407099	Leigh Gibbs v. Yichieh Schiuey et al.	See line 5.
LINE 7	20CV374827	Jeanette Philippidis et al. v. Good Samaritan Hospital, L.P. et al.	OFF CALENDAR.
LINE 8	18CV336673	Whispering Oaks Residential Care Facility LLC et al. v. Travelers Property Casualty Company of America et al.	Defendant's motion to compel, as narrowed in its reply, is unopposed. Good cause appearing, the Court GRANTS Defendant's motion to compel compliance, and orders Plaintiff to provide verified, Code-compliant document demand responses (with no objections but privilege) and produce all responsive documents (as described in Defendant's reply separate statement) within 30 days of date of service of this order. If Plaintiff does not do so, sanctions may well be imposed after an appropriate motion.

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LINE 9	22CV398049	Connected Home Living, Inc. v. ALC Home Health Care, Inc.	Plaintiff's motion to compel is unopposed (and it is plain Defendant had notice of the hearing date). Good cause appearing, the Court GRANTS the motion to compel. Plaintiff must provide verified, Code-compliant discovery responses (with no objections other than privilege) within 30 days of date of service of this order. Because Defendant's failure to oppose this motion lacked substantial justification, the Court GRANTS the motion for sanctions and awards $3,775 in reasonable sanctions; this award is payable to Plaintiff by Defendant.
LINE 10	22CV405327	RH BAS, Inc. et al. v. Arnold R. Steiner et al.	See tentative ruling. The Court will prepare the final order.
LINE 11	19CV355846	Michael Laurent v. City of Sunnyvale	OFF CALENDAR.
LINE 12	22CV395396	Syed Nazim Ali v. Cisco Systems, Inc.	In light of Defendant's motion to dismiss, and because there is no proof that Plaintiff has paid the necessary security, the Court CONTINUES this motion to change venue to 1/18/24, the same date as the hearing on the motion to dismiss. The two motions can be heard at the same time.
LINE 13	19CV340899	Lisamarie Chatham v. CSAA Insurance Services, Inc. et al.	See tentative ruling. The Court will prepare the final order.

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Calendar Line 1

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Calendar Line 2

Case Name: *Nicole Grave, et al. v. American Technologies, Inc., et al.*
Case No.: 21CV376690

I. Background

This is a dispute arising from work performed by Defendant American Technologies, Inc. ("ATI") at a house owned by Plaintiffs Nicole Grave and Terrence Krueger ("Plaintiffs") and located at 70 West Fifth Street, Morgan Hill, California. The purpose of the work was to repair damage caused by a tree falling into Plaintiffs' home. The work was allegedly covered by Plaintiffs' insurer, Allstate.

Plaintiffs' original complaint was filed on January 27, 2021. It stated four causes of action: (1) Unjust Enrichment; (2) Negligence; (3) Fraud, and (4) Breach of Contract against two defendants, ATI and Berkeley Insurance Company, alleged to be ATI's bonding company. Attached to the complaint as exhibit A was a copy of the contract ("Work Proposal and Authorization") between Plaintiffs and ATI.

The operative First Amended Complaint ("FAC") was filed on May 11, 2022, after Plaintiffs had changed counsel. It states seven causes of action, none of which are listed on the caption page, against three defendants, ATI, ATI Restoration LLC, and Dan Ward. ATC Restoration LLC is alleged to simply be a continuation of ATI under a different name. (See FAC at ¶ 4.) A service of summons was also filed on May 11, 2022.

The seven causes of action alleged in the FAC are: (1) Breach of Contract (a contract for repair work executed on or about February 18, 2018, attached to the FAC as exhibit A; (2) Breach of Express Warranty (that the work would be performed according to plans and would be free from defects); (3) Breach of Implied Warranty (that materials and services would be reasonably fit for the purposes intended); (4) Negligence (failure to use reasonable care in performing the work and services contracted for); (5) Conversion[1] (of Plaintiffs' personal property including furniture packed and stored by Defendants that they allegedly kept after abandoning the project); (6)) Misrepresentation (fraudulent inducement of the repair contract), and; (7) Declaratory Relief (seeking a declaration as to whether Plaintiffs are entitled to indemnity and whether Defendants are entitled to offset for payments to Plaintiffs from Allstate).

On July 1, 2022 Defendant ATI Restoration "f/k/a" American Technologies, Inc. filed an answer to the FAC. On that date it also filed a Cross-Complaint against Plaintiffs stating a single cause of action for Breach of Contract. Plaintiffs filed an answer to the Cross-Complaint on August 24, 2022.

On April 18, 2023 the court (Judge Chung) granted a motion for judicial reference brought by Defendant ATI Restoration "f/k/a" American Technologies, Inc.[2]

[1] The fifth cause of action is mistakenly labeled as a second "fourth" cause of action. The sixth cause of action is mistakenly labeled as the "fifth," etc.
[2] The court takes judicial notice of Judge Chung's April 18 order on its own motion pursuant to Evidence Code section 452(d). As a court order it may be noticed as to its contents and their legal effect.

Currently before the court are the following two matters. The first is a demurrer to the FAC's first, second, third and fourth causes of action by Defendant Dan Ward only. The demurrer was filed on May 11, 2023, one year after the FAC was filed naming Dan Ward as a defendant. Plaintiffs' opposition to this demurrer was filed on September 6, 2023. The second matter is a motion for the appointment of a referee pursuant to Code of Civil Procedure ("CCP") section 638 brought by Defendant ATI Restoration on May 19, 2023. This motion is a follow-up to the motion for judicial reference which was granted by Judge Chung on April 18, 2023. Plaintiffs filed an opposition to this motion on September 6, 2023.

II. Request for Judicial Notice in support of demurrer

"Judicial notice may not be taken of any matter unless authorized or required by law." (Evidence Code § 450.) A precondition to judicial notice in either its permissive or mandatory form is that the matter to be noticed be relevant to the material issue before the court. (*Silverado Modjeska Recreation and Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 307, citing *People v. Shamrock Foods Co*. (2000) 24 Cal.4th 415, 422, fn. 2.) It is the court, and not the parties, that determines relevance. Evidence Code section 453(b) requires a party seeking notice to "[furnish] the court with sufficient information to enable it to take judicial notice of the matter."

In support of his demurrer Defendant Ward has submitted a request for judicial notice of a copy of the FAC submitted as exhibit 1 to the request. Defendant's request is DENIED as unnecessary. (See *Paul v. Patton* (2015) 235 Cal.App.4th 1088, 1091, fn.1 [denying as unnecessary a request for judicial notice of pleading under review on demurrer].)

III. Demurrer to the FAC

A. General Standards

The court in ruling on a demurrer treats it "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Factual and legal conclusions in the FAC are not accepted as true on demurrer. "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.)

Allegations will not be accepted as true if they contradict or are inconsistent with facts judicially noticed or appearing in exhibits attached to the pleading. (See *Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1474 [rejecting allegation contradicted by judicially noticed facts].) Facts appearing in exhibits attached to a complaint (part of the "face of the pleading") are given precedence over inconsistent allegations in the complaint. (See *Barnett v. Fireman's Fund Ins. Co*. (2001) 90 Cal.App.4th 500, 505 ["[T]o the extent the factual allegations conflict with the content of the exhibits to the complaint, we rely on and accept as true the contents of the exhibits and treat as surplusage the pleader's allegations as to the legal

effect of the exhibits."]; *Foxen v. Carpenter* (2016) 6 Cal.App.5th 284, 288 (*Foxen*) [citing and quoting *Barnett*].)

Where a demurrer is to an amended complaint, the Court "may consider the factual allegations of prior complaints, which a plaintiff may not discard or avoid by making contradictory averments, in a superseding, amended pleading." (*Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1034, internal quotations omitted; see also *Larson v. UHS of Rancho Springs, Inc.* (2014) 230 Cal.App.4th 336, 343 [noting "well-established precedent" allowing "courts to consider omitted and inconsistent allegations from earlier pleadings when ruling on a demurrer."]; *Doe v. United States Youth Soccer Assoc.* (2017) 8 Cal.App.5th 1118, 1122 [citing *Berg & Berg*].)

B. Basis for Defendant Ward's Demurrer

Defendant Ward demurrers to the FAC's first, second, third and fourth causes of action only, on the sole ground that they each fail to state sufficient facts as alleged against him. (See May 11, 2023 Demurrer at p. 2:5-19.)

C. Analysis of the Demurer

As an initial matter the court notes that Defendant Ward's demurrer, filed one year after the filing of the FAC and service of summons, appears to be untimely. (See CCP §§ 430.40, subd. (a) [stating that a demurrer to a complaint must be filed within 30 days after the service of the complaint]; 435, subd. (b)(1) [stating that motion to strike must be filed within time to respond to pleading]; 412.20, subd. (a)(3) [stating that defendant must file responsive pleading within 30 days after service of summons].) That said, the court has discretion to consider a demurrer filed after the 30-day period. (See CCP § 473, subd. (a)(1); *Jackson v. Doe* (2011) 192 Cal.App.4th 742, 749 [judge had discretion to consider demurrer filed eight days after 30-day period when plaintiff fails to demonstrate any prejudice from the delay].) While the delay here is significantly longer, Plaintiffs have not raised the issue of the untimeliness of this demurrer and they have filed a substantive opposition brief. In these circumstances the court will exercise its discretion to consider the late demurrer.

Defendant Ward's primary (and by far most persuasive argument) is that the targeted causes of action fail to state sufficient facts as alleged against him because the FAC hardly mentions him at all. (See supporting memorandum at pp. 3:11-4:3.)

Defendant Ward is only mentioned twice in the FAC. Paragraph 5 states that "Plaintiffs are informed and believe, and on that basis allege, that Defendant Dan Ward is an individual and an officer of ATI. Dan Ward inspected the project. Mr. Ward negligently ordered the work to proceed despite lack of permits or approved engineering and plans damaging other portions of Plaintiff[s'] residence."

Paragraph 14 alleges that "Defendant Dan Ward attended the on-site meeting for ATI, ordering the work to proceed despite Plaintiffs' concerns and resulting in damages to the residence. At the meeting, ATI falsely represented to Plaintiffs that it had obtained building permits and engineering and plan approvals. The truth is that ATI failed to do so. AYI's unpermitted work caused damages, and the local building officials tagged and stopped the project."

Defendant Ward is, in his individual capacity, clearly not a party to the contract attached to the FAC as Exhibit A. "The interpretation of a contract is a question of law unless the interpretation turns on the credibility of extrinsic evidence." (*Sierra Vista Regional Medical Center v. Bonta* (2003) 107 Cal.App.4th 237, 245.) Generally, "It is . . . solely a judicial function to interpret a written instrument unless the interpretation turns on the credibility of extrinsic evidence." (*Consolidated Theatres, Inc. v. Theatrical Stage Employees Union* (1968) 69 Cal.2d 713, 724.)

The Contract ("Work Proposal and Authorization – Home Improvement") has only two parties, American Technologies, Inc. (identified as "Contractor") and Plaintiffs Nicole Grave and Terrence Krueger (identified collectively as "Client"). Defendant Ward did not sign the contract on behalf of ATI and his name does not appear anywhere in the contract. The court therefore finds that, as a matter of law, he is not a party to that contract.

1. First and Second causes of action

Defendant Ward's demurrer to the first cause of action for breach of contract, the contract attached to the FAC as exhibit A, and the second cause of action for breach of an express warranty provision in that contract on the ground that they both fail to state sufficient facts as alleged against him is SUSTAINED.

The terms of the contract attached as exhibit A to the FAC, which control over any inconsistent or contrary allegations in the FAC, cannot be reasonably interpreted as making Defendant Dan Ward a party to the contract in his individual capacity. This means he cannot, in his individual capacity, be liable for any alleged breach of that contract by ATI or for any breach of an express warranty arising from Plaintiffs' contract with ATI (see FAC at ¶¶ 33-34). Even if this were not the case, the only references to Defendant Dan Ward in the FAC (at ¶¶ 5 and 14) are insufficient to state claims against him for breach of contract and/or breach of express warranty.

Plaintiffs' Opposition does not include any specific discussion of the first or second causes of action. It simply states that the court should overrule the entire demurrer "because whether or not one or both of the ATI Defendants is vicariously liable for Dan Ward's wrongful conduct, Dan Ward remains personally liable for his negligence and misrepresentations. In the alternative the Court should grant leave to amend so Plaintiffs can allege additional facts demonstrating Dan Ward's personal liability for falsely stating that ATI had obtained engineering, plans and permits for the additional foundation work." (Opposition at p. 2:12-17.) No claim for misrepresentation or fraud is alleged against Defendant Ward.

This does not address the primary problem with the first (FAC at ¶¶ 21-31) and second (FAC at ¶¶ 32-38) causes of action as alleged against Defendant Ward in his individual capacity; the fact that he is not a party to the contract between Plaintiffs and Defendant ATI which both of these causes of action depend upon.

It is a plaintiff's burden to show how an amendment could cure a defect identified on demurrer. (See *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081; *Heritage Pac. Fin'l, LLC v. Monroy* (2013) 215 CA4th 972, 994; *Shaeffer v. Califia Farms, LLC* (2020) 44 Cal.App.5th 1125, 1145 ["The onus is on the plaintiff to articulate the 'specifi[c] ways' to cure

the identified defect, and absent such an articulation, a trial or appellate court may grant leave to amend 'only if a potentially effective amendment [is] both apparent and consistent with the plaintiff's theory of the case. [Citation.]'"].)

As it is not apparent to the court how the first or second causes of action could be amended to state claims against Defendant Ward without contradicting the terms of the contract attached to the FAC as exhibit A, leave to amend the first and second causes of action as alleged against Defendant Ward is DENIED.

2. Third Cause of Action

The third cause of action for breach of implied warranty (FAC at ¶¶ 39-42) alleges in pertinent part that "[e]ach Defendant, in analyzing, designing, selecting, preparing, building, supervising . . . the materials and products used in performing the Project, impliedly warranted that the various materials, products, services, items . . . supplied, manufactured, distributed assembled, designed or constructed by each of the [defendants?] would be reasonably fit for the purposes intended and impliedly warranted that the services, construction work, and installation of material would be done in a good and workmanlike manner." (FAC at ¶ 40, brackets added.)

The claim incorporates all prior allegations by reference. However, as the only mentions of Defendant Ward in the FAC (¶¶ 5 and 14) do not allege that he impliedly warranted anything, the third cause of action fails to state facts sufficient to support a claim for breach of an implied warranty against Defendant Ward in his individual capacity. This conclusion is also supported by the court's finding that Defendant Ward is not a party to the contract attached to the FAC as Exhibit A. Therefore the demurrer to the third cause of action on the ground that it fails to state sufficient facts as alleged against Defendant Ward is SUSTAINED.

Plaintiffs' opposition does meet their burden to show how the third cause of action could be amended to state a claim against Defendant Ward. Nonetheless, as it is not apparent to the court that it would be futile to do so, the court GRANTS 10 DAYS' LEAVE TO AMEND the third cause of action.

3. Fourth Cause of Action

The fourth cause of action for Negligence (FAC at ¶¶ 43-48) alleges in pertinent part that "each Defendant negligently, carelessly and wrongfully failed to use reasonable care in consulting, designing, selecting . . . repairing, inspecting and assembling the improvements *under the Contract and Subcontract*, including without limitation the Project." (FAC at ¶ 44, emphasis added.) In further alleges in paragraph 46 that "Defendants each had a duty to the Plaintiff to perform the work *under the Contract* with reasonable care but breached that duty." (Emphasis added.) The fourth cause of action incorporates all prior allegations by reference, but again, the only allegations mentioning Defendant Ward (§§ 5 and 14) do not provide any support for the claim as alleged against him.

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

917.) "Negligence may be alleged in general terms; that is, it is sufficient to allege an act was negligently done without stating the particular omission which rendered it negligent." (*Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 747.) "While negligence is ordinarily a question of fact, the existence of duty is generally one of law. Thus, a demurrer to a negligence claim will properly lie only where the allegations of the complaint fail to disclose the existence of any legal duty owed by the defendant to the plaintiff." (*Osornio v. Weingarten* (2004) 124 Cal.App.4th 304, 316, internal citations omitted.)

Since he is not a party to the contract between ATI and Plaintiffs, the FAC fails to identify the basis for any legal duty Defendant Ward might owe, in his individual capacity, to Plaintiffs, or to sufficiently allege breach and proximate causation of injury.

Plaintiffs' opposition does meet their burden to show how the fourth cause of action could be amended to state a negligence claim against Defendant Ward. Nonetheless, as it is not apparent to the court that it would be futile to do so, the court GRANTS 10 DAYS' LEAVE TO AMEND the fourth cause of action.

Plaintiffs are reminded that when a demurrer is sustained with leave to amend, the leave must be construed as permission to the pleader to amend the causes of action to which the demurrer has been sustained, not add entirely new causes of action. (*Patrick v. Alacer Corp*. (2008) 167 Cal.App.4th 995, 1015.) To raise claims entirely unrelated to those originally alleged requires either a new lawsuit or a noticed motion for leave to amend. Absent prior leave of court an amended complaint raising entirely new and different causes of action may be subject to a motion to strike. "Following an order sustaining a demurrer or a motion for judgment on the pleadings with leave to amend, the plaintiff may amend his or her complaint only as authorized by the court's order. The plaintiff may not amend the complaint to add a new cause of action without having obtained permission to do so, unless the new cause of action is within the scope of the order granting leave to amend." (*Zakk v. Diesel* (2019) 33 Cal.App.5th 431, 456, citing *Harris v. Wachovia Mortgage, FSB* (2010) 185 Cal.App.4th 1018, 1023.) The court has only granted leave to amend the third and fourth causes of action, and does not grant leave to add new claims or parties.

While it is not relevant to the outcome of this demurrer the court notes that Defendant Ward's argument that the "public policy" codified in Labor Code section 2802(a) requires that the claims alleged against him be dismissed is unpersuasive, as that statute does not provide support for this demurrer.

Labor Code section 2802 is an indemnification statute. Section 2802(a) states that: "An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful."

This statute does not provide a separate ground for a demurrer to the FAC and it does not establish that any particular cause of action in the FAC fails to state sufficient facts against Defendant Ward. Generally, Labor Code section 2802 requires an employer to pay defense costs incurred by employees when defending unfounded third-party civil actions challenging the employees' conduct within the course and scope of their employment. (See *Douglas v. Los Angeles Herald-Examiner* (1975) 50 Cal. App. 3d 449, 461; *Los Angeles Police Protective*

League v. City of Los Angeles (1994) 27 Cal.App.4th 168, 177.) The statute has also been applied to require an employer to reimburse an employee for expenses or losses incurred by an employee as a result of the employee following the directions of his or her employer. (*Gallano v. Burlington Coat Factory of California, LLC* (2021) 67 Cal.App.5th 953, 960-964.)

The statute applies to the relationship between Defendant Ward and his employer, not the relationship (if any) between Ward in his individual capacity and Plaintiffs. It typically arises in lawsuits *between* employees and their current or former employers. The statute itself does not somehow bar Plaintiffs from suing Ward for acts allegedly performed by him in the course of his employment with Defendant ATI; but it may require that his employer indemnify him for his costs incurred in defending against such claims.

The federal decision in *Rojas v. Sea World Parks & Entertainment, Inc.* (2021) 538 F.Supp.3d 1008, cited by Defendant Ward, is not controlling on any issue of California law and does not support Ward's argument. "Fraudulent joinder," discussed in the portion of *Rojas* Defendant Ward quotes in his supporting memorandum, is a concept in federal law, which sometimes arises in analyzing diversity jurisdiction. The closest California equivalent, misjoinder, has not been cited as a basis for Defendant Ward's demurrer. The current demurrer is exclusively based on CCP section 430.10(e) (failure to state sufficient facts) and is not based on section 430.10(d) (misjoinder). (See Defendant Ward's May 11, 2023 Demurrer.)

IV. Motion for Appointment of Referee

A. General Authority

Pursuant to CCP section 638,

> A referee may be appointed upon the agreement of the parties filed with the clerk, or judge, or entered in the minutes, or upon the motion of a party to a written contract or lease that provides that any controversy arising therefrom shall be heard by a referee if the court finds a reference agreement exists between the parties:
>
> (a) To hear and determine any or all of the issues in an action or proceeding, whether of fact or of law, and to report a statement of decision.
> (b) To ascertain a fact necessary to enable the court to determine an action or proceeding.
> (c) In any matter in which a referee is appointed pursuant to this section, a copy of the order shall be forwarded to the office of the presiding judge. The Judicial Council shall, by rule, collect information on the use of these referees. The Judicial Council shall also collect information on fees paid by the parties for the use of referees to the extent that information regarding those fees is reported to the court. The Judicial Council shall report thereon to the Legislature by July 1, 2003. This subdivision shall become inoperative on January 1, 2004.

B. Request for Judicial Notice

Defendant ATI has submitted a request for judicial notice with its reply filed on September 12, 2023. Defendant ATI seeks judicial notice of a declaration filed by Defendant Ward in support of the reply to the already granted motion for judicial reference.

Defendant ATI's request is DENIED. Deposition transcripts and declarations cannot be noticed as to the truth of their contents. (See *Oh v. Teachers Ins. & Annuity Assn. of America* (2020) 53 Cal.App.5th 71, 79-81 [truth of contents of court records cannot be judicially noticed]; *Intengan v. BAC Home Loans Servicing LP* (2013) 214 Cal.App.4th 1047, 1057 [court may take judicial notice of existence of declaration but not of facts asserted in it]; *Bach v. McNelis* (1989) 207 Cal.App.3d 852, 865 (court may not notice the truth of declarations or affidavits filed in court proceedings); *Garcia v. Sterling* (1985) 176 Cal App 3d 17, 22 ["Although the existence of statements contained in a deposition transcript filed as part of the court record can be judicially noticed, their truth is not subject to judicial notice."]) The fact that Defendant Ward filed a declaration as part of the already granted motion for judicial reference is irrelevant to the material issue now before the court.

C. Analysis

The court notes at the outset that whether there will be a judicial reference in this case has already been decided and that issue is no longer a matter for debate. Judge Chung's April 18, 2023 order clearly granted the motion for judicial reference and Plaintiffs' counsel could not reasonably believe otherwise.

The reason for the current motion is Judge Chung's statement in his April 18, 2023 order that "the court . . . orders the parties to meet and confer in an effort to reach a stipulation regarding the referee to be appointed. The parties should then come to court with either a stipulation or a contested motion, in accordance with section 638, 640, 641 and 642 of the Code of Civil Procedure and rules 3.901-3.905 of the California Rules of Court, including all of the information for an order appointing a referee." (April 18, 2023 order at p. 2:5-10.)

CCP section 640(b) states in pertinent part that: "If the parties do not agree on the selection of the referee or referees, each party shall submit to the court up to three nominees for appointment as referee and the court shall appoint one or more referees, not exceeding three, from among the nominees against whom there is no legal objection. If no nominations are received from any of the parties, the court shall appoint one or more referees, not exceeding three, against whom there is no legal objection, or the court may appoint a court commissioner of the county where the cause is pending as a referee."

Defendant ATI's motion asks the court to "appoint a referee from the slate of candidates proposed by ATI. While each of the 3 candidates are highly qualified to act in this capacity, and ATI will accept the appointment of any of the 3, if accorded its preference, ATI requests that the Court appoint the Hon. Richard Freedman." (ATI's

The evidence submitted by Defendant ATI in support of the current motion, a declaration from ATI counsel David Myers (who also represents Defendant Ward) and attached exhibits, demonstrates that on April 17, 2023 ATI submitted the names of three potential referees to Plaintiffs: Richard Chernik, Hon. Bill Cahill and Hon. Robert Freedman. Following the issuance of Judge Chung's April 18 order Plaintiffs' Counsel for the most part did not participate in the court-ordered meet and confer process. Only on May 8, 2023 did Plaintiff's counsel offer a substantive response to Defendant ATI's several communications, stating that Plaintiffs were "willing to consider" Richard Chernik as a referee. By that point time Defendant ATI had already begun preparing the current motion. As Plaintiffs would not

ultimately agree to stipulate to the appointment of Richard Chernik the current motion was filed and the meet and confer process ended.

Plaintiffs' opposition does not state any legal objection to any of the proposed referees and is almost completely nonresponsive to the motion that is actually before the court. Instead of addressing the relevant question, the merits or qualifications of any of the proposed candidates to serve as the court-ordered referee, the opposition states that Plaintiffs' oppose a motion by Dan Ward to participate in the judicial reference (no such motion has been made by Defendant Ward) and argues that a judicial reference should be "denied."

Again, the motion for judicial reference was already granted in Judge Chung's April 18 order. That order also clearly considered and rejected Plaintiffs' arguments regarding the inclusion of other parties (and specifically Defendant Ward) in the judicial reference as well as their arguments regarding the validity of the underlying agreement and enforceability of the judicial reference clause. (See April 18, 2023 Order at pp. 2:22-6:10.) Plaintiffs' Counsel could not reasonably believe that these issues had not already been settled by Judge Chung's April 18 order.

Plaintiffs' evidence submitted with the opposition is not relevant to the material issue before the court. The declaration submitted by Plaintiff Nicole Grave attempts to reargue the already granted motion for judicial reference. The court notes that footnote 1 in Judge Chung's April 18 order already informed Plaintiffs that further declarations "would not change the outcome," begging the question why was Ms. Grave's declaration submitted in connection with a motion whose only purpose is to determine who will be the referee.

The declaration of Plaintiffs' counsel Frederick Hagan also attempts to reargue the prior motion, both as to the proper interpretation of the contract between the parties and as to the inclusion of Defendant Ward in the already ordered judicial reference. Mr. Hagan could not reasonably believe that Judge Chung's order had not decided these issues or believe that the fact that counsel for Defendant ATI now also represents Defendant Ward somehow provided an opportunity to reargue the prior motion.

Plaintiffs' opposition is most reasonably construed as an ineffective request for reconsideration of Judge Chung's April 18 order. This request does not comply with CCP sections 437c(f)(2) or 1008 and will not be considered by the court. "We cannot prevent a party from communicating the view to a court that it should reconsider a prior ruling (though any such communication should never be ex parte). . . . But a party may not file a written motion to reconsider that has procedural significance if it does not satisfy the requirements of section 437c, subdivision (f)(2), or 1008. The court need not rule on any suggestion that it should reconsider a previous ruling and, without more, another party would not be expected to respond to such a suggestion. . . . Unless the requirements of section 437c, subdivision (f)(2), or 1008 are satisfied, any action to reconsider a prior interim order must formally begin with the court on its own motion." (*Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1108, internal citations omitted.)

As he is the one candidate whom Plaintiffs have indicated (at least at one time) that they would find acceptable, the court orders that Richard Chernik shall be appointed as the referee in this matter for all purposes pursuant to CCP section 638.

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Calendar Line 3

See line 2.

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Calendar Line 4

Case Name: *Dieu-Thanh Vo v. Tam Truong, et al.*
Case No.: 21CV387376

I. Background

This lawsuit arises from a dispute over the ownership of a mobile home located in San Jose.

Plaintiff Dieu-Thanh Vo ("Vo") filed her original complaint (an unverified form complaint) on October 5, 2021 stating claims for (1) Constructive Trust; (2) Preliminary Injunction, both of which are remedies rather than free-standing causes of action, against Defendant Tam Duc Truong ("Defendant" or "Truong"). Vo was self-represented when the original complaint was filed.

Vo brought a motion for preliminary injunction which was denied by the court (Judge Williams) on January 11, 2022. Defendant Truong then brought a demurrer to both causes of action alleged in the original complaint. Plaintiff Vo failed to file any opposition to this demurrer and on March 10, 2022 the court (Judge Kirwan) adopted its uncontested tentative ruling sustaining the demurrer with 10 days' leave to amend. A formal order was issued on March 21, 2022.

No amended pleading was filed within the time permitted by Judge Kirwan's order and Defendant Truong filed a motion to dismiss on April 21, 2022 which was set for hearing on July 5, 2022. On June 20, 2022 (approximately 2 and a half months after the time permitted to amend had expired) Vo belatedly filed a verified First Amended Complaint ("FAC") stating two causes of action, a first cause of action for Constructive Trust and a newly added second cause of action for Quiet Title. The FAC also added a new defendant without leave of Court, Foothill Mobilodge. Vo was still self-represented at this point. On July 5, 2022 the court (Judge Kirwan) denied Defendant's motion to dismiss, choosing to exercise its discretion to allow the late filing of the FAC but ordering Plaintiff to pay Defendant's reasonable costs and fees in the amount of $500.

Defendant Truong brought a motion to strike the unauthorized second cause of action in the FAC and a demurrer to the first cause of action, both of which were opposed by Vo. On October 11, 2022 the court (Judge Kirwan) adopted it's uncontested tentative ruling granting the motion to strike the unauthorized second cause of action without leave to amend and sustaining the demurrer to the first cause of action with leave to amend to add a fraud claim which could serve as support for the request for a constructive trust.

On October 26, 2022 Plaintiff Vo, still self-represented, filed a verified Second Amended Complaint ("SAC") stating claims for (1) Intentional Misrepresentation and (2) Imposition of Constructive Trust (which attempted to add other, unauthorized, claims). On November 17, 2022 attorney Sidney Flores substituted in as counsel for Plaintiff Vo. On January 18, 2023 Plaintiff Vo filed a motion for leave to file a Third Amended Complaint

("TAC"). This motion, unopposed by Defendant, was granted by the court (Judge Chung) on April 27, 2023. A formal order was issued on May 25, 2023.[3]

The operative verified TAC, filed on May 2, 2023, states nine causes of action: (1) Intentional Misrepresentation; (2) Fraud and Deceit; (3) Conversion; (4) Promissory Estoppel; (5) Unjust Enrichment/Restitution; (6) Breach of Contract; (7) Breach of the Implied Covenant of Good Faith and Fair Dealing (based on identical allegations as the sixth cause of action); (8) Intentional Infliction of Emotional Distress, and; (9) Negligent Infliction of Emotional Distress. There are three exhibits (A-C) attached to the TAC.

Currently before the court is Defendant Truong's demurrer to the TAC, filed on June 7, 2023. Plaintiff Vo's opposition to the demurrer was filed on September 6, 2023.

II. Demurrer to the TAC

A. General Standards

The court in ruling on a demurrer treats it "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Factual and legal conclusions are not accepted as true on demurrer. "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.)

Allegations will not be accepted as true if they contradict or are inconsistent with facts judicially noticed or appearing in exhibits attached to the pleading. (See *Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1474 [rejecting allegation contradicted by judicially noticed facts].) Facts appearing in exhibits attached to a complaint (part of the "face of the pleading") are given precedence over inconsistent allegations in the complaint. (See *Barnett v. Fireman's Fund Ins. Co*. (2001) 90 Cal.App.4th 500, 505 ["[T]o the extent the factual allegations conflict with the content of the exhibits to the complaint, we rely on and accept as true the contents of the exhibits and treat as surplusage the pleader's allegations as to the legal effect of the exhibits."]; *Foxen v. Carpenter* (2016) 6 Cal.App.5th 284, 288 (*Foxen*) [citing and quoting *Barnett*].)

Where a demurrer is to an amended complaint, the Court "may consider the factual allegations of prior complaints, which a plaintiff may not discard or avoid by making contradictory averments, in a superseding, amended pleading." (*Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1034, internal quotations omitted; see also *Larson v. UHS of Rancho Springs, Inc.* (2014) 230 Cal.App.4th 336, 343 [noting "well-established precedent" allowing "courts to consider omitted and inconsistent allegations from earlier pleadings when ruling on a demurrer."]; *Doe v. United States Youth Soccer Assoc.* (2017) 8 Cal.App.5th 1118, 1122 [citing *Berg & Berg*].)

[3] The court, on its own motion pursuant to Evidence Code 452(d), takes judicial notice of Judge Kirwan's March 21, 2022 and October 11, 2022 orders, and of Judge Chung's May 25, 2023 order.

The court cannot consider extrinsic evidence when ruling on a demurrer or motion to strike. The court has only considered the declaration submitted by Defense Counsel Seth Weiner to the extent it describes the required meet and confer efforts and has not considered the attached exhibits. The court has also not considered the declaration of Plaintiff's Counsel Sidney Flores submitted with the opposition. Code of Civil Procedure ("CCP") section 430.41(a)(3) requires a demurring party to submit a declaration describing the meet and confer efforts but it does authorize the submission of a declaration from the opposing party.[4]

While inadequate meet and confer efforts are not a basis for overruling or sustaining a demurrer (CCP § 430.41(a)(4)), the court notes that CCP section 430.41(a) states that the parties "shall meet and confer in person or by telephone." The mere exchange of correspondence (letters, emails, etc.) does not comply with the plain terms of the statute. Despite CCP section 430.31(a)(4) trial courts are not required to ignore defects in the statutory meet and confer process prior to filing demurrer; if, upon review of a declaration, a court learns no meet and confer has taken place, or concludes further conferences between counsel would likely be productive, it retains discretion to order counsel to meaningfully discuss the pleadings with an eye toward reducing the number of issues or eliminating the need for a demurrer, and to continue the hearing date to facilitate that effort. (*Dumas v. Los Angeles County Bd. of Supervisors* (2020) 45 Cal.App.5th 348, 355 fn. 3.)

B. Defendant Truong's grounds for demurrer to the TAC

Defendant Truong demurs to the TAC's first, second, third, fifth, seventh and ninth causes of action on the sole grounds that they each fail to state sufficient facts. (See Truong's June 7, 2023 Demurrer.)

As an initial matter the court notes that, after this demurrer was filed, Plaintiff dismissed the ninth cause of action for negligent infliction of emotional distress on August 4, 2023. The demurrer to the ninth cause of action is therefore OVERRULED as MOOT.

1. First and Second causes of action

Defendant Truong asserts that the first cause of action for intentional misrepresentation and the second cause of action for fraud and deceit both fail to state sufficient facts for the same reason; they are not pled with the level of specificity required for fraud claims.

The elements of intentional misrepresentation are: (1) a misrepresentation; (2) knowledge of its falsity by the defendant (or cross-defendant); (3) the defendant's intent to induce the plaintiff's reliance on the misrepresentation; (4) the plaintiff's actual and justifiable reliance; and (5) resulting damage. (*Chapman v. Skype, Inc*. (2013) 220 Cal.App.4th 217, 230-231.) The elements of fraud, which gives rise to the tort for deceit, are: (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage. (*Lazar v. Super. Ct*. (1996) 12 Cal.4th 631, 638.) The general rule is that each of the elements of fraud must be pled with specificity. (*Id*. at p. 645.)

[4] Unless Plaintiff actually brings a motion for sanctions the court will not entertain arguments that the present demurrer was brought in bad faith.

Defendant Truong contends that both claims are insufficiently pled because they "do not allege the particulars of the alleged representations." (Supporting Memorandum at p. 4:18.) The court disagrees. The first cause of action (TAC at ¶¶ 26-35) and the second cause of action (TAC at ¶¶ 36-46) each incorporate all preceding allegations by reference and read together with those incorporated allegations they state all the elements with adequate specificity.

One of the purposes of the specificity requirement is to provide "notice to the defendant, to furnish the defendant with certain definite charges which can be intelligently met." (Committee on Children's Television, Inc. v. General Foods Corp. (1985) 35 Cal.3d 197, 216, internal quotations omitted.) However, when "it appears from the nature of the allegations that the defendant must necessarily possess full information concerning the facts of the controversy, even under strict rules of common law pleading, one of the canons was that less particularity is required when the facts lie more in the knowledge of the opposite party …." (*Id*., at p. 217.) Here, it is clear from the nature of the relationship between the parties and the TAC's allegations that Defendant Truong at all times necessarily possessed full information concerning the controversy between himself and Plaintiff Vo.

There are other well-established exceptions to the general rule of specificity in pleading fraud. Because a Defendant's knowledge of falsity is a fact, it may be generally pled. (See 5 Witkin, *California Procedure* (5th Ed., 2019) Pleading §726.) Also, "[i]ntent, like knowledge, is a fact. Hence, the averment that the representation was made with the intent to deceive the plaintiff, or any other general allegation with similar purport, is sufficient." (*Id*., at §728 [internal citation omitted].) These exceptions also apply here.

The demurrer to the first and second causes of action is OVERRULED.

2. Third cause of action

Conversion can only be committed against personal property not real property. As described by the Supreme Court of California, "[c]onversion is an 'ancient theory of recovery' with roots in the common law action of trover" (a remedy against a finder of lost goods who refused to return them to the owner). (*Voris v. Lampert* (2019) 7 Cal.5th 1141, 1150, citations omitted.) Today, the tort "is understood more generally as 'the wrongful exercise of dominion *over personal property* of another.'" (*Ibid*. Emphasis added.) "As it has developed in California, the tort comprises three elements: '(a) plaintiff's ownership or right to possession *of personal property*, (b) defendant's disposition of property in a manner inconsistent with plaintiff's property rights, and (c) resulting damages.'" (*Ibid*. Emphasis added.)

Defendant Truong contends that because the "New Model Home" the third cause of action (TAC at ¶¶ 47-56) is based on was "installed" on a foundation it now constitutes a fixture and real property improvement under Health and Safety Code section 18551(a)(4). Defendant contends exhibit C to the TAC supports this contention. (See supporting memorandum at p. 5:3-11.)

Health and Safety Code section 18551 generally sets forth requirements regarding foundation systems and installation of manufactured homes and mobile homes. Section 18551(a)(4) states in pertinent part that "[o]nce installed on a foundation system in compliance

with this subdivision, a manufactured home, mobilehome, or commercial modular shall be deemed a fixture and a real property improvement to the real property to which it is affixed."

While certain documents in Exhibit C (and Exhibit B) describe the Home as "installed" at the subject location there are no specific references to it being installed on any foundation. Even if there were, as the opposition points out, Health and Safety Code section 18551(b) states in pertinent part that "[t]he installation of a manufactured home or a mobilehome on a foundation system *as chattel* shall be in accordance with Section 18613 and shall be deemed to meet or exceed the requirements of Section 18613.4." (Emphasis added.) Therefore, installation on a foundation, by itself and without more information, cannot establish that a manufactured home or mobilehome has become a fixture or improvement to real property.

As it is not apparent from the face of the pleading that the "New Model Home" the third cause of action is based on has become a fixture or improvement to real property the demurrer on this ground is OVERRULED.[5]

3. Fifth cause of action

Defendant Truong contends that the fifth cause of action for Unjust Enrichment and Restitution (TAC at ¶¶ 64-71) fails to state sufficient facts solely because he contends that there is no cause of action for unjust enrichment. (See supporting memorandum at p. 5:14-16.)

The demurrer to the fifth cause of action is OVERRULED as follows. First, the demurrer does not address the availability of restitution and a demurrer does not lie to only part of a cause of action. (See *Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1167, overruled in part on other grounds in *Sheen v. Wells Fargo Bank, N.A*. (2022) 12 Cal.5th 905.)

Second, California authorities consistently recognize a common law claim based on principles of reimbursement and restitution due to unjust enrichment. (See, e.g., *Hartford Cas. Ins. Co. v. J.R. Mktg., LLC* (2015) 61 Cal.4th 988, 998 [discussing cause of action for unjust enrichment entitling plaintiff to reimbursement]; *Professional Tax Appeal v. Kennedy-Wilson Holdings, Inc*. (2018) 29 Cal.App.5th 230, 238 [The elements of a cause of action for unjust enrichment are simply stated as receipt of a benefit and unjust retention of the benefit at the expense of another]; *Hirsch v. Bank of America* (2003) 107 Cal.App.4th 708, 721-722 [plaintiffs stated "a valid cause of action for unjust enrichment based on" defendants' unjust retention of fees at the expense of plaintiffs]; *Lectrodryer v. SeoulBank* (2000) 77 Cal.App.4th 723, 726 [plaintiff "satisfied the elements for a claim of unjust enrichment" by alleging receipt and unjust retention of a benefit at the expense of another]; see also *Dinosaur Development, Inc. v. White* (1989) 216 Cal.App.3d 1310, 1315 ["there is no particular form of pleading necessary to invoke the doctrine of restitution."])

4. Seventh cause of action

[5] That said, the opposition's assertion that even if the home had become real property Plaintiff could proceed on a quiet title theory is incorrect. Plaintiff already attempted to bring an unauthorized quiet title claim which was struck by the court without leave to amend on October 11, 2022. It is now unavailable.

Defendant Truong contends that the seventh cause of action for breach of the implied covenant of good faith and fair dealing (TAC at ¶¶ 81-88) fails to state sufficient facts because it essentially duplicates the sixth cause of action for breach of contract.

"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. [citation]. The covenant thus cannot be 'be endowed with an existence independent of its contractual underpinnings.' [citation] 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.)

The sixth cause of action alleges that Defendant Truong breached the parties' contract by refusing to vacate the "New Model Home" and surrender possession and title to Plaintiff. (See TAC at ¶¶ 75.) The seventh cause of action is based on the same alleged conduct. (See TAC at ¶¶ 84-86.) Describing this same conduct as preventing Plaintiff from receiving the benefits of the agreement plainly does not state a claim for breach of the implied covenant. Unless and until Plaintiff Vo alleges conduct separate and distinct from the breach of contract itself, she cannot state a claim for breach of the implied covenant.

Defendant Truong's demurrer to the seventh cause of action is SUSTAINED.

A Plaintiff bears the burden of proving an amendment would cure the defect identified on demurrer. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081; See also *Shaeffer v. Califia Farms, LLC* (2020) 44 Cal.App.5th 1125, 1145 ["The onus is on the plaintiff to articulate the 'specifi[c] ways' to cure the identified defect, and absent such an articulation, a trial or appellate court may grant leave to amend 'only if a potentially effective amendment [is] both apparent and consistent with the plaintiff's theory of the case. [Citation.]'"].)

Plaintiff has failed to meet this burden as the opposition does not even request leave to amend, much less indicate how the seventh cause of action could be amended. It is not apparent to the court how the seventh cause of action could be amended. Nonetheless, as this is the first pleading challenge to this claim 10 DAYS LEAVE TO AMEND IS GRANTED.

This is the third time that Plaintiff Vo has been given leave to amend after a demurrer and/or motion to strike has been ruled upon. There will not be a fourth unless a higher standard is met. CCP sections 430.41(e)(1) and 435.5(e)(1) both state in pertinent part that "a pleading shall not be amended more than three times, absent an offer to the trial court of additional facts to be pleaded that, if pleaded, would result in a reasonable possibility that the defect can be cured. The three-amendment limit does not include an amendment made without leave of the court pursuant to Section 472, if the amendment is made before a [demurrer/motion to strike] to the original complaint or cross-complaint is filed."

As previously noted in this case, when a demurrer is sustained with leave to amend, the leave must be construed as permission to the pleader to amend the causes of action to which the demurrer has been sustained, not add entirely new causes of action. (*Patrick v. Alacer Corp*. (2008) 167 Cal.App.4th 995, 1015.) To raise claims entirely unrelated to those originally alleged requires either a new lawsuit or a noticed motion for leave to amend. Absent prior leave of court an amended complaint raising entirely new and different causes of action may be subject to a motion to strike. (See *Harris v. Wachovia Mortg., FSB* (2010) 185 Cal.App.4th 1018, 1023 ["Following an order sustaining a demurrer or a motion for judgment on the pleadings with leave to amend, the plaintiff may amend his or her complaint only as authorized by the court's order. The plaintiff may not amend the complaint to add a new cause of action without having obtained permission to do so, unless the new cause of action is within the scope of the order granting leave to amend."]) The court is only granting leave to amend the seventh cause of action for breach of the implied covenant of good faith and fair dealing. No new claims or parties may be added in a fourth amended complaint, if Plaintiff Vo chooses to file one.

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Calendar Line 5
Case Name: *Leigh Gibbs v. Yichieh Schiuey et al*
Case No.: 22CV407099

I. FACTS

This is a medical negligence action brought by plaintiff Leigh Gibbs against defendants Yichieh Shiuey, Sutter-Health Palo Alto Medical Foundation, Palo Alto Foundation Medical Group, Munnerlyn Eye Institute, Peninsula Eye Surgery Center, and Sutter Health.

The complaint filed on November 22, 2022 alleges that Gibbs consulted with Shiuey regarding medical options for corrective vision surgery to her right and left eye in 2021. (Complaint, ¶ 16.) After an extensive consult in October 2021, Shiuey recommended that Gibbs consider and undergo implantable collamer lens ("ICL") surgery for both eyes. (*Id*. at 21.)

On December 6, 2021 and December 8, 2021, Shiuey performed ICL surgery on Gibbs' left and right eyes. (*Id*. at ¶¶ 26-27.) Immediately after the surgery on the right eye, Shiuey informed Gibbs that he incorrectly inserted the ICL implant in her right eye and corrected the insertion at an unspecified date. (*Id*. at ¶¶ 28-30.)

Gibbs had three follow-up appointments at Shiuey's office and complained of blindness in her right eye each time. (*Id*. at ¶¶ 33-36.) On January 18, 2022, Shiuey referred Gibbs to Stanford Medical Center, where she was diagnosed with corneal edema and received a cataract and cornea transplant in her right eye on February 14, 2022. (*Id*. at ¶¶ 39-44.) Approximately nine months after the ICL surgery on Gibbs' right eye, Gibbs experienced loss of vision in her left eye as well. (*Id.* at ¶ 49.) Stanford Medical Center advised Gibbs that she would need cataract surgery for the left eye as well. (*Id*. at ¶ 50.)

Gibbs alleges under information and belief that she needed the cataract surgeries in both eyes because of the ICL surgeries, and therefore, was not a good candidate for ICL surgery. (*Id*. at ¶¶ 42, 51-52.)

The complaint alleges the following causes of action:

1. MEDICAL NEGLIGENCE;
2. MEDICAL NEGLIGENCE;
3. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS; AND
4. MEDICAL BATTERY.

Currently before the court is a demurrer by Defendants Yichieh Shiuey and Palo Alto Foundation Medical Group (collectively, "Defendants"), filed on June 7, 2023, and a motion to strike by Defendants filed on July 3, 2023.

The court notes within its records that Gibbs filed a request for dismissal as to defendants Sutter Health-Palo Alto Medical Foundation and Palo Alto Foundation Medical Group. To the extent that the inclusion of defendant Palo Alto Foundation Medical Group in the demurrer and motion to strike was in error, the court will proceed with reviewing the papers as to Shiuey only.

II. DEMURRER

A. Legal Standard

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

reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214.) In liberally construing the allegations within a pleading, the court draws inferences favorable to the pleader. (*Perez v. Golden Empire Transit Dist.* (2012) 209 Cal.App.4th 1228, 1239.)

B. Analysis

Shiuey demurs to the second cause of action on the ground that it is uncertain and duplicative of the first cause of action. (Code Civ. Proc. § 430.10, subd. (f).) Shiuey also demurs to the third and fourth causes of action on the ground that the complaint fails to allege sufficient facts. (Code Civ. Proc. § 430.10, subd. (e).)

1. Second Cause of Action: Medical Negligence

As a threshold matter, it is clear from the overall demurrer that Shiuey understands the nature of the claim and misapplies Code of Civil Procedure section 430.10, subdivision (f) to contend that the FAC fails to allege facts sufficient to state a cause of action pursuant to Code of Civil Procedure section 430.10, subdivision (e). (*Lickiss v. Financial Industry Reg. Authority* (2012) 208 Cal.App.4th 1125, 1135 ["[D]emurrers for uncertainty are disfavored and are granted only if the pleading is so incomprehensible that a defendant cannot reasonably respond."].) Accordingly, the court OVERRULES Shiuey's demurrer to the second cause of action on uncertainty grounds. (Code Civ. Proc. § 430.10, subd. (f).)

The fact that a cause of action is duplicative is not a ground on which a demurrer may be sustained. (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 890 ("*Blickman*"); see *Tracfone Wireless, Inc. v. Los Angeles County* (2008) 163 Cal.App.4th 1359, 1368 ("*Tracfone Wireless*") [indicating same]; see also Code Civ. Proc., § 430.10 [setting forth the grounds for demurrer].)

While some cases indicate that duplicative causes of action "may be disregarded," stricken, or demurred to on the ground of insufficient facts (see e.g. *Bionghi v. Metropolitan Water Dist. of So. California* (1999) 70 Cal.App.4th 1358, 1370; *Ponce-Bran v. Trustees of Cal. State Univ.* (1996) 48 Cal.App.4th 1656, 1658; *Award Metals, Inc. v. Superior Court* (1991) 228 Cal.App.3d 1128, 1135; *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395.), the Sixth District Court of Appeal found that duplicative pleading "is the sort of defect that, if it justifies any judicial intervention at all, is ordinarily dealt with most economically at trial, or on a dispositive motion such as summary judgment" (*Blickman, supra,* 162 Cal.App.4th at 890.).

The court follows the Sixth District's guidance and declines to sustain the demurrer on this basis. (See *McCallum v. McCallum* (1987) 190 Cal.App.3d 308, 315 [as a practical matter, a superior court ordinarily will follow an appellate opinion emanating from its own district].) Thus, the court OVERRULES the demurrer to the second cause of action on the grounds of uncertainty and duplicate claim. (Code Civ. Proc. § 430.10, subd. (f).)

2. Third Cause of Action: Negligent Infliction of Emotional Distress

Shiuey contends Gibbs cannot allege a negligent infliction of emotional distress claim on behalf of herself. (See *Ko v. Maxim Healthcare Services, Inc.* (2020) 58 Cal.App.5th 1144, 1153 [holding a negligent infliction of emotional distress claim is properly established if the plaintiff: "is closely related to the injury victim"].) Gibbs concedes that the negligence infliction of emotional distress claim is "part and parcel of the medical malpractice damages." (Plaintiff's Response to Demurrer, p. 6.) Accordingly, the court SUSTAINS the demurrer to the third cause of action without leave to amend. (Code Civ. Proc. § 430.10, subd. (e).)

3. Fourth Cause of Action: Medical Battery

Schiuey argues Gibbs conflates a medical battery claim with a claim for medical negligence. The court finds this argument well taken.

Medical battery addresses a situation in which the doctor obtains consent for one procedure and performs another. (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 239 (*Cobbs*); see also CACI, No. 530A.) Gibbs consented to the ICL implant in her eyes. (Complaint, ¶ 23.) Shiuey did not perform another procedure separate from what Gibbs consented to. The alleged failure to fully disclose and inform Gibbs of the risks of the procedure may support a claim for medical negligence, but it does not support a claim for medical battery based on the complaint's allegations.

In *Cobbs*, a patient brought a medical battery claim against a surgeon on the basis that the surgeon did not have consent to touch the patient's spleen during an operation to remove a duodenal ulcer. In addressing the plaintiff's claim of medical battery, the *Cobbs* court explained that an action for negligence arises "when the patient consents to certain treatment and the doctor performs that treatment but an undisclosed inherent complication with a low probability occurs, no intentional deviation from the consent given appears." (*Id.* at p. 240.) The *Cobbs* court noted that "when an undisclosed potential complication results, the occurrence of which was not an integral part of the treatment procedure but merely a known risk," a case for negligence is more appropriate. (*Id.* at 239; see also *Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 324 ["An action 'should be pleaded in negligence' when the doctor performs an operation to which plaintiff consents, but without disclosing sufficient information about the risks inherent in the surgery."].)

It does not appear to the court that Gibbs can successfully amend this claim given the circumstances present here, thus, it will not grant leave to amend. (See *Camsi IV v. Hunter Technology Corp*. (1991) 230 Cal.App.3d 1525, 1542 ["absent an effective request for leave to amend in specified ways," it is an abuse of discretion to deny leave to amend "only if a potentially effective amendment were both apparent and consistent with the plaintiff's theory of the case"]; *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349 ["Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading"].)

Thus, the court SUSTAINS Defendants' demurrer to the fourth cause of action without leave to amend. (Code Civ. Proc. § 430.10, subd. (e).)

III. MOTION TO STRIKE

> The court may, upon a motion made pursuant to Section 435, or at any time in its discretion, and upon terms it deems proper:
>
> (a) Strike out any irrelevant, false, or improper matter inserted in any pleading.
>
> (b) Strike out all or any 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.)

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, citing *Clauson v. Super. Ct.* (1998) 67 Cal.App.4th 1253, 1255.)

Schiuey moves to strike Gibbs' claim for punitive damages (*i.e.,* paragraph 81 and lines 11-12 on page 11) on the ground that punitive damages against health care providers cannot be included in a complaint without a court order.

Code of Civil Procedure section 425.13, subdivision (a) states, "In any action for damages arising out of the professional negligence of a health care provider, no claim for punitive damages shall be included in a complaint or other pleading unless the court enters an order allowing an amended pleading that includes a claim for punitive damages to be filed."

While Gibbs filed an opposition to the motion, she requests that the punitive damages be stricken without prejudice. Gibbs maintains that she filed the complaint before obtaining legal representation and requests the opportunity to conduct discovery to show a substantial probability that she can prevail on her claim pursuant to Civil Code Section 3204. (Plaintiff's Response to Defendant's Motion to Strike Portions of the Complaint, p. 2.) Gibbs' citation to Civil Code section 3204 is inapposite as the section was repealed in 2012.

Notwithstanding the above, as this is the first pleading challenge, the court GRANTS with 20 days' leave to amend Shiuey's motion to strike paragraph 81 and line 11-12 on page 11 of the complaint. (See *Price v. Dames & Moore* (2001) 92 Cal.App.4th 355, 360 [with respect to motion to strike, leave to amend is routinely and liberally granted to give the plaintiff a chance to cure the defect in question].)

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Calendar Line 6

See line 5.

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Calendar Line 10

22CV405327
RH BAS, Inc. et al. v. Arnold R. Steiner et al.

In this business litigation case, Defendants/Cross-Complainants Arnold Steiner and Joanna Steiner move to compel further responses to certain special interrogatories, form interrogatories, and two requests for admission. Plaintiffs/Cross-Defendants RH BAS and Allied Aire Service oppose this motion. After reviewing the submitted papers and the record in this case, the Court makes the following rulings:

1. The Court GRANTS the motion to compel further responses to the special interrogatories at issue, all of which are contention interrogatories. These contention interrogatories are proper and not premature; after all, once more discovery occurs, the interrogatory responses can be amended.

2. The Court GRANTS the motion to compel a further response to Form Interrogatory 17.1 relating to RFA 3. Plaintiffs need to give more detail on why they believe they don't owe the $200,000, "due to the terms and conditions stated in the Stock Purchase Agreement, Amendments/Addendums and supporting documentation, as well as text messages." Plaintiffs need to specify which terms or conditions give rise to this belief, and which text messages give rise to this belief.

The Court also GRANTS the motion to compel a further response to Form Interrogatory 50.1. Plaintiffs' response is inadquate. Plaintiffs need to identify specific agreements by name (and now by Bates number, as apparently they have been produced).

3. The Court DENIES the motion to compel further responses to RFAs 5 and 8. The Court believes the RFAs are compound and could give rise to ambiguous answers. And it is easy for Defendants to separate out the parts of these RFAs into separate, "smaller" RFAs.

4. All further responses must be verified and Code-compliant, and contain no objections (except for privilege). These further responses must be served within 30 days of service of this order.

5. Defendants prevailed on the majority of their arguments, and the Court sees no substantial justification for Plaintiff's arguments. Nor do "other circumstances" make the imposition of monetary sanctions unjust. But Defendants did not prevail on all of their arguments. In light of that, the Court awards reasonable monetary sanctions of $2,5000, payable by Plaintiffs to Defendants payable to Defendants' counsel within 30 days of this order.

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Calendar Line 13

19CV340899
Lisamarie Chatham v. CSAA Insurance Services, Inc. et al.

Plantiff Lisamarie Chatham originally had counsel, but that counsel substituted out in April 2022 and Plaintiff began representing herself. Unfortunately for her, she did not file an oppositions to the summary judgment motions of Defendants Gagne Brothers Enterprises, Mathew J Wesley Construction, and MG Remediation. The Court (Judge Chung) ruled in favor of Defendants in February 2023.

Now Plaintiff, represented by new counsel, moves to set aside the Court's summary judgment rulings and associated judgments, and asks the Court allow her to file oppositions to these summary judgment motions. Defendants oppose this motion.

Plaintiff seeks relief under the "discretionary prong"[6] of Code of Civil Procedure section 473, subdivision (b) ("section 473(b)").

"Where the mistake is excusable and the party seeking relief has been diligent, courts have often granted relief pursuant to the discretionary relief provision of section 473 if no prejudice to the opposing party will ensue." (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 258.) But here, Plaintiff has not been diligent in conducting this litigation or in not responding—even after ample notice—to the summary judgment motions. The Court is sympathetic to Plaintiff's health issues and family circumstances, and her self-represented status, but those do not excuse Plaintiff's failure to file her summary judgment oppositions on time—or even at all.

The Court therefore DENIES Plaintiff's motion.

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[6] The "mandatory prong" of section 473(b) is not available to set aside a summary judgment, as this prong is limited to defaults and default judgments. (See *Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 838.)