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: September 5, 2024 TIME: 9:00 A.M.

RECORDING COURT PROCEEDINGS IS PROHIBITED

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

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

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

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

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

https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

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

https://www.scscourt.org/general_info/court_reporters.shtml

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

https://reservations.scscourt.org/

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	19CV343179	Elise Mitchell vs Grady Williams	This matter is on for Defendant's motion to set aside default. The Court continued the motion from July 2, 2024 to this date to permit the parties to discuss settlement. The parties are ordered to appear and report on efforts to settle for a payment plan.
2	19CV356353	Jean Kim vs Pets' Rx, Inc. et al	Plaintiff's motion for new trial is DENIED. Putting aside Defendants' objections to the procedural posture of Plaintiff's motion, the Court agrees that Plaintiff's arguments for new trial mirror those she made in opposition to Defendants' summary judgment motion. The evidence regarding the necrology report overwhelmingly confirms the autopsy results are Kitty's. Plaintiff's conjecture to the contrary cannot change this result. Moreover, Defendants' expert opined that even if Defendants caused Kitty's fracture, this fracture would not have caused Kitty's death approximately two months later. This evidence was sufficient to shift the burden to Plaintiff. Plaintiff has no expert testimony to counter this evidence, and summary judgment is therefore appropriately granted in Defendants' favor and against Plaintiff. The Court understands this is a very tragic and painful case for Plaintiff; she has carefully and articulately argued on her and Kitty's behalf throughout this process. However, Defendants are entitled to summary judgment, and Plaintiff's motion for new trial is DENIED.
3	20CV365723	Apex Home Builders, Inc. vs Amir Kondori et al	John L. Mlnarik's motion to withdraw as counsel for Apex Home Builder's, Inc. is GRANTED. This matter was tried before a jury, a verdict in favor of Defendants was entered on February 7, 2024, and motions for new trial and for judgment notwithstanding the verdict were denied on April 12, 2024. This matter is closed. The withdrawal will be effective upon counsel's filing a proof of service of the formal order on the client. Court will use formal order on file.
4	21CV389658	Capitol Investment Company vs Dolores Burger et al	This matter settled, and the motion is off calendar.
5	22CV395386	Midland Credit Management Inc. vs Luis Guzmanfranco	Defendant Luis GuzmanFranco's motion to (1) quash service of summons, (2) vacate and set aside default and default judgment, and (3) recall and quash writs of execution and abstracts of judgment is GRANTED. A notice of motion with this hearing date and time was served by electronic mail on July 29, 2024. Plaintiff did not oppose the motion. "[T]he failure to file an opposition creates an inference that the motion [] is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) Defendant also submits evidence that, contrary to the representation in the proof of service, he did not live at and was not present at the location where personal service was attested to have been completed on May 11, 2022. A defendant may set aside entry of default for improper service. (*Strathvale Holdings v. E.B.H.* (2005) 126 Cal.App.4th 1241, 1250; Code Civ. Pro. 473(d).) Plaintiff's filing of a proof of service creates a rebuttable presumption that service was proper, so long as the proof of service complies with applicable statutory requirements. (*Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1442; see also *Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1205; see also Evid. Code § 647; *Rodriguez v. Cho* (2015) 236 Cal.App.4th 742, 750 (a registered process server's declaration of service establishes a presumption that the facts stated in the declaration are true.) However, where a defendant challenges the court's personal jurisdiction for improper service of process, the plaintiff has the burden of proving the facts required for effective service. (*Summers v. McClanahan* (2006) 140 Cal.App.4th 403, 414-413.) Because Plaintiff failed to even respond to this motion, Defendant's evidence that he was not present in the location where personal service was effected is unrebutted. Defendants' motion is accordingly GRANTED. Moving party to promptly prepare formal order.
6-7	22CV397750	Santa Clara County Federal Credit Union vs Avelino Cargile	Scroll to lines 6-7 for complete ruling. Court to prepare formal order.

8-11	22CV397918	Devinder Shoker vs Venkatapathi N. Rayapati et al	Charles Wagers' motions to be relieved as counsel for Venkatapathi N. Rayapati, Vijayasri Rayapati, System Architecture Information Technology, and Cyber Forza, Inc. are GRANTED. The October 13, 2025 trial and other trial related dates will remain as set. Further, a company, regardless of corporate form, cannot represent itself in civil litigation in California. (See *Clean Air Transp. Sys. v. San Mateo County Transit Dist.* (1988) 198 Cal. App. 3d 576, 578 ("[A] corporation is a distinct legal entity, separate from its shareholders and officers. The rights and liabilities of corporations are distinct from the persons composing it. Thus, a corporation cannot appear in court except through an agent."); *Ferruzzo v. Superior Court* (1980) 104 Cal. App. 3d 501, 503 ("The rule is clear in this state that, with the sole exception of small claims court, a corporation cannot act in propria persona in a California state court."); *Merco Constr. Engineers, Inc. v. Municipal Court* (1978) 21 Cal. 3d 724, 727 ("the Legislature cannot constitutionally vest in a person not licensed to practice law the right to appear in a court of record in behalf of another person, including a corporate entity.") Accordingly, System Architecture Information Technology, and Cyber Forza, Inc. are ordered to appear on January 16, 2025 at 10 a.m. in Department 6 and show cause why their answers should not be stricken and default be entered against them for failure to obtain counsel. Court to use proposed order on file.
12	22CV405807	Taekus, Inc. vs Productfy, Inc.	Plaintiff and Cross-defendant Taekus, Inc's ("Taekus") demurrer to defendant and cross-complainant Productfy, Inc.'s ("Productfy") second amended cross-complaint ("SAXC") is OVERRULED. Scroll to line 12 for complete ruling. Court to prepare formal order.
13	22CV408035	NICHOLAS DEFAYETTE vs RAQUEL VASQUEZ et al	Plaintiff's motion to compel Erin Chessin's deposition and for sanctions is GRANTED. Plaintiff has worked amiably to locate a date for Chessin's deposition since January. Chessin set at least three dates and cancelled each at the last minute. And Defendant's opposition to this motion concedes that not only has this deposition not been taken, but a date certain for the deposition has still not been set. The Court also finds sanctions against Chessin (not Chessen's counsel) appropriate, although given the simplicity of this motion to compel and the opposition, the Court finds 3 hours multiplied by the reasonable $550/hour rate appropriate. Accordingly, Chessin is ordered to appear for deposition and to pay Plaintiff $1,650 in sanctions within 60 days of service of the formal order, which formal order the Court will prepare.
14	23CV423415	VIET LE vs KEVIN VUONG et al	This demurrer hearing is continued to October 15, 2024 at 9 a.m. in department 6 to join with another pending demurrer addressing the same issues. The Court also VACATES the December 5, 2024 dismissal review hearing and SETS a Case Management Conference for October 15, 2024 at 10:00 in department 6.
15	23CV425280	American Express National Bank vs Van Nguyen	Plaintiff's motion for summary judgment is GRANTED. A notice of motion with this hearing date and time was served by U.S. mail on May 31, 2024. Defendant did not oppose the motion. "[T]he failure to file an opposition creates an inference that the motion [] is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) The undisputed evidence also establishes Defendant opened a credit card account, made charges to the account, and failed to pay the balance due. The is accordingly no issue of material fact that Defendant owes $10,575.04 on the account, and summary judgment is appropriate. Moving party to promptly prepare formal order and judgment.
16	24CV443919	In re: C. B.	Monterra Falls, LLC's petition to approve the transfer of structured settlement payment rights by and between C.B., as transferor, and Monterra Falls, LLC, as transferee, pursuant to California Insurance Code §10134 et seq. is APPROVED. Petitioner to prepare formal order.

Calendar Lines 6-7
Case Name: Santa Clara County Federal Credit Union vs Avelino Cargile
Case No.: 22CV397750

Before the Court are Defendant/Cross-complainant Caneisha Howell's motion to compel Defendant/Cross-defendant Jacob Yarber to further respond to requests for admission (set one) without objections and for $1000 in sanctions and to respond to form interrogatories (set 1) without objections and for $1,000 in sanctions. . Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This is a suit for overdraft, money had and received, money lent, negligence and civil conspiracy. Plaintiff Santa Clara County Federal Credit Union ("Credit Union") alleges Defendants Avelino David Cargile and his mother, Caneisha Howell, opened a checking account with $.22 in it, deposited fraudulent money orders (either directly or through third party Jared Yarber) that the Credit Union initially accepted, then withdrew funds from the account creating a negative balance of $5,981.29. (Complaint, ¶¶5-6, 11-14.)

On June 13, 2023, Howell filed a cross-complaint against Yarber alleging fraud. Howell alleges Yarber duped her disabled adult son, Defendant Cargile, into adding Yarber to the account without telling Cargile about the fraudulent money order scheme.

Howell served Yarber form interrogatories (set one) and requests for admission (set one) on May 1, 2024. Yarber responded to the requests for admission, including by filing the responses with the Court, on June 4, 2024. To date, Yarber has not responded to the form interrogatories.

II. Howell's Motion to Compel Responses to Form Interrogatories is GRANTED.

First, a notice of motion with this hearing date and time was served by U.S. mail on July 9, 2024. Yarber did not oppose the motion. "[T]he failure to file an opposition creates an inference that the motion [] is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.)

Next, where, as here, a responding party fails to timely respond to interrogatories, absent a demonstration that the failure to respond was due to mistake, inadvertence, or excusable neglect and responses have since been served, the responding party waives all objections to the interrogatories, including objections based on privilege or on the protection for work product. (Code of Civ. Proc.

§2030.290(a).) Here, Yarber made no such effort or showing. Yarber is therefore ordered to serve code-compliant responses without objections within 20 days of service of this final order.

III. Howell's Motion to Compel Further Responses to Requests for Admission is GRANTED, IN PART.

Requests for admissions are different than other discovery devices; they are designed to compel admission to matters that cannot reasonably be controverted to expedite trial by reducing the number of triable issues that must be adjudicated. (*City of Glendale v. Marcus Cable Assoc., LLC* (2015) 235 Cal.App.4th 344, 352; *Doe v. Los Angeles County Dep't of Children & family Servs.* (2019) 37 Cal.App.5th 675, 690; *Orange County Water Dist. v. The Arnold Eng'g Co.* (2018) 31 Cal.App.5th 96, 119. Requests for admission are not restricted to just facts and documents. They are also applicable to conclusions, opinions, and legal questions. *City of Glendale v. Marcus Cable Assoc., LLC* (2015) 235 Cal.App.4th 344.

A party served with requests for admission must serve a response within 30 days. (Code of Civ. Pro. §2033.210(a).) A responding party may admit or deny the matter in the request or object. (Code of Civ. Pro. §2033.210(b).) If a part of a request is objectionable, the responding party must answer the unobjectionable part. (Code of Civ. Pro. §2033.230(a).) The denial of all or a portion of a request must be unequivocal. (See *American Fed'n of State, County & Mun. employees v. Metropolitan Water Dist.* (2005) 126 Cal.App.4th 247, 268.)

Howell argues Yarber responded to only three of her thirty requests for admission, objecting to the remaining twenty-seven. Having studied the separate statement, Howell's motion to compel is DENIED AND GRANTED, IN PART, for the reasons stated below.

Request Nos. 1-8: DENIED. These requests ask Yarber to admit that certain money orders, which are attached to the requests as exhibits, are "genuine cop[ies] of the $1,000 cashed money order given to Avelino Cargile by Defendant." Yarber responds: "OBJECTION TO REQUEST NO. []; ITS UNCERTAIN, VAGUE AND CONFUSING AS I HAVE NO KNOWN KNOWLEDGE OF THE DOCUMENT PRODUCED AS EXHBIT []." The Court takes this response to mean that Yarber lacks sufficient information to admit or deny and on that basis denies these requests. If Yarber claims he knowns nothing about the money orders, this is the answer he is stuck with at trial. Notably, if Yarber

has no reasonable basis to respond this way, and Cross-complainant incurs fees proving Yarber's knowledge and genuineness of these money orders at trial, Yarber may be ordered to pay Cross-complainant's fees incurred to make such proof.

Request Nos. 9, 10, 11: DENIED. These requests ask Yarber to admit to the genuineness of a copy of Cargile's drivers license with authentic signature and two text exchanges. Yarber's objections to the driver's license are well taken — Yarber cannot have personal knowledge of Cargile's driver's license or signature. The Court refers to the comments above regarding request nos. 1-8 regarding request nos. 10-11.

Request Nos. 14, 15, 16, 17, 18, 25, 30: DENIED. These requests seek admissions regarding depositing or removing money in or from Cargile's bank account, including that the money orders and/or the signatures on the money orders were fraudulent. Yarber objects to the requests for assuming he had certain knowledge about the fraud. The Court refers to the analysis for request nos. 1-8, above.

Request Nos. 19, 20, 26, 27, 28: DENIED. These requests ask for admissions regarding what Cargile and/or Howell did or was aware of.

Request Nos. 22, 29: GRANTED. Yarber's answer is not responsive to the question asked. The Answer is to the cross-complaint, to which he is a named party.

Request Nos. 23 and 24: GRANTED. This information is relevant to the allegations in the cross-complaint that Yarber took advantage of Cargile and is directly in Yarber's possession, custody, or control.

IV. Howell's Request for Sanctions is GRANTED, IN PART.

Howell and Yarber are self-represented. Although a judge should ensure that self-represented litigants are not being misled or unfairly treated (*Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1284), self-represented litigants are not entitled to special treatment regarding the Rules of Court or Code of Civil Procedure. "[W]e cannot disregard the applicable principles of law and accord defendant any special treatment because he instead elected to proceed in propria persona." (*Stein v. Hassen* (1973) 34 Cal. App. 3d 294, 303.) "A litigant has a right to act as his own attorney [citation] 'but, in so doing, should be restricted to the same rules of evidence and procedure as is required of those qualified to practice law before our courts.'" (*Lombardi v. Citizens Nat'l Trust & Sav. Bank* (1955) 137

Cal.App.2d 206, 208-209; *Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 543 (self-represented litigants "are held to the same standards as attorneys" and must comply with the rules of civil procedure); see also *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985; *County of Orange v. Smith* (2005) 132 Cal.App.4th 1434, 1444.)

Here, the Code of Civil Procedure requires sanctions where a party fails to properly respond to requests for admission and sanctions for failing to respond to interrogatories at all are appropriate.

The Court accordingly orders Yarber to (1) pay Howell $500 in monetary sanctions, (2) serve code compliant responses to the form interrogatories without objections, and (3) serve code compliant supplemental responses to request for admission nos. 22-24 and 29 within 20 days of service of this formal order.

Calendar Line 12
Case Name: *Taekus, Inc. v. Productfy, Inc., et al.*
Case No.: 22CV405807

Before the Court is plaintiff and cross-defendant Taekus, Inc's ("Taekus") demurrer to defendant and cross-complainant Productfy, Inc.'s ("Productfy") second amended cross-complaint ("SAXC"). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

According to the SAXC, Productfy is a startup "banking-as-a-service" ("BaaS") company that provides an embedded finance platform enabling any organization to launch financial application products in a safe, compliant, and efficient manner. (SAXC, ¶ 7.) Taekus is a fintech startup payment card company that provides banking services and reward cards to consumers and businesses. (*Ibid.*) Each time a consumer "swiped" their Taekus debit card to make a purchase, a series of complex transactions would take place that had the effect of debiting the consumer's account and crediting the retailer's account. (SAXC, ¶ 8.) Because it is not a bank, Taekus needed to work with a bank to establish the customer's prepaid accounts, hold customer funds, issue debit or credit cards, and coordinate and effectuate these series of complex transactions. (*Ibid*.) Productfy offered banking services through Stearns Bank, N.A. ("Stearns Bank"). (SAXC, ¶ 9.)

For the benefit of taking payment by debit or credit card, the merchant pays a transaction fee ("Interchange Fee"), which is split among the other parties to the transaction. (SAXC, ¶ 11.) Interchange Fees cover the cost of handling the transactions and sending payments to the acquiring bank and the merchant's bank account, as well as covering the risk of fraud. (*Ibid*.) Separate from the Interchange Fees are fees and costs for Productfy's services, such as a fee for its platform and the pass-throughs of third-party fees. (*Ibid*.)

In early 2021, the parties entered a Master Subscription Agreement ("MSA") and Order Form, that was most recently amended on November 11, 2021. (SAXC, ¶ 12.) The Order Form contains a fee chart, setting forth the fees payable to Taekus for consumer debit cards and consumer credit cards. (*Ibid*.) Cross-complainant alleges commercial cards were not contemplated by the MSA. (*Ibid*.)

According to Cross-complainant, under the MSA, Productfy charged Taekus a monthly software usage fee in return for Productfy's service, and Taekus received a portion of interchange

revenue net of, among other things, payments of amounts owed to Productfy, processing fees of 30 basis points for personal debit card transactions, as agreed upon in the MSA. (SAXC, ¶ 13.)

Cross-complainant contends the MSA contemplated, governed, and controlled only the parties' duties and obligations regarding personal (or consumer) debit card transactions and makes no reference to commercial debit transactions, which limitation was confirmed by the parties' words and conduct. (SAXC, ¶ 14.) According to the SAXC, commercial cards present greater risks for banks, so they have higher Interchange Fees and other related fees, and it is thus industry custom to have separate agreements with for consumer and commercial transactions. (SAXC, ¶ 15.)

Cross-complainant further alleges that in early 2022, Productfy developed a platform to offer personal debit cards to Taekus customers. (SAXC, ¶ 16.) By mid-2022, the platform and network was in place for personal consumer transactions, and consumer accounts were opened through Stearns Bank. (*Ibid*.) In anticipation of signing an agreement for commercial cards, the parties began working on experimenting with commercial debit cards for Taekus customers. (SAXC, ¶ 17)

According to Cross-complainant, throughout 2022, the parties continued to gather and analyze information to negotiate and memorialize a final, written agreement regarding the Commercial Debit Program. (SAXC, ¶ 18.) The parties knew and understood the words and conduct controlling the Commercial Debit Program were not yet memorialized in a final, written agreement. (*Ibid*.) Productfy agreed to continue providing services to Taekus, which services Taekus utilized, with the understanding that a final reconciliation and accounting would need to be completed when the parties' completed a final, written agreement. (SAXC, ¶ 19.)

Taekus initiated the underlying action on October 17, 2022, asserting: (1) breach of written contract; (2) breach of the implied covenant of good faith and fair dealing; (3) violations of the California Business & Professions Code section 17200; (4) conversion; and (5) theft by false pretenses. On June 26, 2023, Productfy filed its Cross-Complaint and on August 23, 2023, Productfy filed its FAXC asserting (1) breach of contract (MSA); (2) breach of oral contract (commercial); (3) breach of implied contract; (4) account stated; (5) open book account; (6) goods and services rendered; (7) quasi contract; (8) declaratory relief; and (9) quantum meruit. On December 15, 2023, the Court issued its order overruling Taekus' demurrer in part and sustaining in part. On January 9, 2024,

Productfy filed its SAXC, asserting the same claims. On May 20, 2024, Taekus filed the instant demurrer, which Productfy opposes.

II. Demurrer

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.)

Taekus demurs to the second, third, fourth, fifth, sixth, and ninth causes of action on the grounds they fail to allege sufficient facts, or in the alternative, they are uncertain. (Code of Civ. Proc., § 430.10, subds. (e) & (f).)[1]

[1] Although Productfy offers arguments regarding the seventh cause of action for quasi contract in its opposition, Taekus did not identify that claim in its demurrer, nor does Taekus offer any argument as to the quasi contract claim in its moving papers or its reply. Thus, a demurrer to the seventh cause of action is not before the Court.

1. Second and Third Causes of Action

On August 21, 2024, Productfy filed a request for dismissal of the second and third causes of action. Thus, the demurrer to the second and third causes of action is MOOT.

2. Uncertainty

Uncertainty is a disfavored ground for demurrer; it is typically sustained only where the pleading is so unintelligible and uncertain that the responding party cannot reasonably respond to or recognize the claims alleged against it. (See *Khoury v. Maly's of Cal, Inc.* (1993) 14 Cal.App.4th 612, 616 (*Khoury*).) "A demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures." (*Ibid*.)

"[U]nder our liberal pleading rules, where the complaint contains substantive factual allegations sufficiently apprising defendant of the issues it is being asked to meet, a demurrer for uncertainty should be overruled or plaintiff given leave to amend. (*Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 139, fn. 2.)

Although Taekus identifies uncertainty as a basis for demurrer for each claim, it only offers substantive arguments as to the second and third causes of action. Those claims have been dismissed and as a result, the arguments regarding their purported deficiencies are moot. Moreover, the pleading is not so unintelligible or uncertain that Taekus cannot reasonably respond to it. (See *Khoury, supra*, 14 Cal.App.4th at p. 616.) Thus, Taekus' demurrer on the basis of uncertainty is OVERRULED.

3. Fourth, Fifth, and Sixth Causes of Action

Taekus demurs to the remaining causes of action on the grounds that they fail because the second and third causes of action fail. (Demurrer, p.13:13-15.)

"In California, it has long been settled the allegation of claims using common counts is good against special or general demurrers. [Citation.] The only essential allegations of a common count are '(1) the statement of indebtedness in a certain sum, (2) the consideration, i.e., goods sold, work done, etc., and (3) nonpayment.'" (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 460 (*Farmers Ins. Exchange*).) "When a common count is used as an alternative way of seeking the same recovery demanded in a specific cause of action, and is based on the same facts, the common count is

demurrerable if the cause of action is demurrable. (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 394.) In other words, the common count "must stand or fall on the viability of plaintiffs' other claims." (*Berryman v. Merit Property Management, Inc.* (2007) 152 Cal.App.4th 1544, 1560.)

The common counts are alleged in the alternative to the second and third causes of action, and Productfy dismissed those claims. It follows that whether those claims are sufficiently alleged is not before the Court, and Productfy is not seeking the same relief in those claims. Thus, Taekus cannot use Productfy's dismissal of second and third causes of action to demonstrate the purported deficiencies in the common counts.

Similarly, Taekus contends Productfy fails to state the common counts because it already has a claim based on the MSA and it seeks the same damages on that claim as it does with the common counts. However, Productfy's common count claims are based on the alleged agreement regarding the commercial transactions and Productfy alleges that agreement is separate from the MSA, which the Court accepts as true for the purposes of the demurrer. (See *Olson v. Toy* (1996) 46 Cal.App.4th 818, 823 [for purposes of demurrer, we accept these allegations as true] (*Olson*); see also *Committee on Children's Television, supra,* 35 Cal.3d at pp. 213-214 ["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."].) Therefore, Productfy's claim based on the MSA does not preclude it from asserting the common counts.

Productfy alleges the specific amount of indebtedness for services it rendered to Taekus' commercial users, at Taekus' request, and the nonpayment. (See *Farmers Ins. Exchange, supra,* 53 Cal.App.4th at p. 460; see also SAXC, ¶¶ 52-56, 58-60, 62-65.) Thus, Taekus' demurrer to the fourth, fifth, and sixth causes of action is OVERRULED.

4. Ninth Cause of Action-Quantum Meruit

> Quantum meruit refers to the well-established principle that the law implies a promise to pay for services performed under circumstances disclosing that they were not gratuitously rendered. To recover in quantum meruit, a party need not provide the existence of a contract, but it must show the circumstances were such that the services

> were rendered under some understanding or expectation of both parties that compensation therefore was to be made. The measure of recovery in quantum meruit is the reasonable value of the services rendered, provided that they were of direct benefit to the defendant. A plaintiff must establish both that he or she was acting pursuant to either an express or implied request for such services from the defendant and that the services rendered were intended to and did benefit the defendant.

(*Advanced Choices, Inc. v. State Dept. of Health Services* (2010) 182 Cal.App.4th 1661, 1673.)

First, quantum meruit is a common count. (See *Iverson, Yoakum, & Hatch v. Berwald* (1999) 76 Cal.App.4th 990, 996, citing *Parker v. Solomon* (1959) 171 Cal.App.2d 125, 134 ["…an action generally will lie upon a common count for quantum meruit"].)

Taekus argues the ninth causes of action is deficient because it is alleged in the alternative to Productfy's second and third causes of action, which have been dismissed. (Demurrer, p.13:13-15.) As the Court stated above, it is not persuaded by this argument.

Moreover, even if the alleged agreement regarding the commercial transactions is deficient, Productfy may still assert a claim for quantum meruit. (See *MKB Management, Inc. v. Melikian* (2010) 184 Cal.App.4th 796, 805 ["Even if the entire contract was illegal and unenforceable, a plaintiff may recover the reasonable value of services rendered provided that those particular services were not legally prohibited"].) Thus, Taekus' demurrer to the ninth cause of action is OVERRULED.