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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

MELA FERRER, Plaintiff and Appellant, v. ARTHUR G. LESMEZ et al., Defendants and Respondents.	B286171 (Los Angeles County Super. Ct. No. SC125826)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gerald Rosenberg, Judge. Affirmed.

Law Offices of Helena Sunny Wise and Helena Sunny Wise for Plaintiff and Appellant.

Klinedinst, Heather L. Rosing, Robert M. Shaughnessy and Anastasia F. Osbrink for Defendants and Respondents.

After dismissal of her retaliation lawsuit against her former employer, plaintiff Mela Ferrer sued the attorneys who represented her in that action, Arthur G. Lesmez, the Law Offices of Arthur G. Lesmez, David Olan, David Weisberg, and Olan Law Corporation (collectively, defendants), alleging that defendants committed malpractice by failing to exhaust her administrative remedies and then fraudulently concealing that malpractice from her. The trial court sustained defendants' demurrer to plaintiff's second amended complaint and denied her leave to amend. The court ruled that the malpractice cause of action was barred by the one-year statute of limitations and that in three attempts, plaintiff had not otherwise alleged fraud to circumvent the statute's time limit. Plaintiff appeals. We affirm.

BACKGROUND

I. Plaintiff's underlying lawsuit against the hospital

This appeal comes to us after the trial court sustained a demurrer without leave to amend and so we recite the facts as alleged in the pertinent complaint. (*Branson v. Martin* (1997) 56 Cal.App.4th 300, 302.) Plaintiff was a social worker at UCLA Santa Monica Hospital (the hospital) run by the Regents of the University of California (the Regents). As a mandated reporter, plaintiff notified the Los Angeles Department of Children and Family Services (DCFS) that a postpartum celebrity patient at the hospital was consuming medication and alcohol while breastfeeding her newborn twins. Two days later, on May 12, 2011, the hospital discharged plaintiff from her job.

Convinced she was discharged in retaliation for her report to DCFS, plaintiff retained defendants on a contingency basis in the summer of 2011 to sue the hospital. Defendants entered into

a tolling agreement with the Regents on April 29, 2012 to engage in settlement talks on behalf of plaintiff.

Under the Whistleblower Protection Act (Gov. Code, § 8547, et seq. (WPA)), an employee of the University of California claiming retaliation for whistleblowing is required to submit a complaint directly to the Regents within 12 months of the most recent act of reprisal. (*Id.*, § 8547.10, subd. (a).) For plaintiff, 12 months from her discharge was May 11, 2012. The tolling agreement possibly extended the deadline to August 13, 2012. Defendants never submitted a WPA complaint to the Regents.

Plaintiff attended mediation with defendants and attorneys for the Regents in August 2012. The parties failed to settle. Defendants then filed plaintiff's civil complaint against the hospital on August 20, 2012 alleging, among other things, wrongful termination in retaliation for engaging in protected activity and in violation of public policy, and harassment and age discrimination.

In October 2012, the Regents demurred on the basis that plaintiff failed to exhaust her administrative remedies because she did not submit a WPA complaint. In December 2012, defendants amended plaintiff's complaint (the FAC) to add allegations that the Regents were estopped from raising exhaustion under the WPA. These new allegations included that the Regents failed to inform defendants that plaintiff was deemed a university employee, which would trigger the WPA, and that the Regents induced participation in settlement talks so that the one-year limitations period under the WPA would expire.

Plaintiff's relationship with defendants deteriorated over the winter of 2012 to 2013. Defendants moved to be relieved as counsel for plaintiff on May 29, 2013.

Appearing in propria persona at the hearing on the Regents's demurrer to the FAC, plaintiff argued that the Regents were estopped from raising the exhaustion defense. On June 27, 2013, the trial court overruled the demurrer to the causes of action based on the WPA concluding that plaintiff had sufficiently alleged estoppel. The court allowed plaintiff's other causes of action against the Regents to proceed.

However, on August 21, 2014, the trial court granted the Regents's motion for summary judgment. The court ruled that it was undisputed that plaintiff failed to proceed under the WPA and so as a matter of law plaintiff could not continue her lawsuit against the Regents. The ruling then stated, "Although the Court is foreclosing the Plaintiff's opportunity to seek redress from the [Regents], *this ruling does not prevent the Plaintiff from seeking remedies* [*for*] *the failure of Plaintiff's counsel to assist her in protecting her claims*." (Italics added.) Plaintiff's current counsel represented her in opposing the summary judgment motion.

II. Plaintiff's lawsuit against defendants

One year and eight months after the summary judgment ruling, on May 11, 2016, plaintiff filed the instant action against defendants. The long-winded second amended complaint (SAC) alleges that defendants failed to advise plaintiff of the WPA procedure and concealed from her their noncompliance with the WPA and the consequence of their inaction. Defendants allegedly withheld from plaintiff the Regents's plan to assert the exhaustion defense. The SAC alleges that defendants filed the FAC against the Regents "to cover up their failure to properly handle these matters to begin with." Plaintiff alleges that the correspondence between defendants and the Regents, "which to this day DEFENDANTS have continued to conceal," would show

that the estoppel allegations were false and that the Regents actually "invited" defendants to file a WPA complaint to avoid the anticipated dismissal of plaintiff's claims.

As for the tolling agreement, the SAC alleges that defendants refused to share it with plaintiff because it would show that the estoppel-defense allegations in the FAC were false and constituted "deliberate efforts on the part of DEFENDANTS to conceal their own fault in these matters." By concealing the WPA procedure and the tolling agreement from plaintiff, the SAC alleges defendants "sabotaged" her lawsuit against the Regents "*possibly to procure publicity surrounding the celebrity births* and the care rendered at" the hospital. (Italics added.)

The SAC alleges that in May 2013, just before withdrawing from the case, defendants wanted to discuss with plaintiff the Regents's $50,000 settlement offer. The offer was open until the hearing on the Regents's demurrer. Plaintiff responded by rejecting the Regents's offer because she believed her case was worth more.

The SAC further alleges general facts about plaintiff's relationship with defendants. When plaintiff questioned defendants' tactics in January 2013, she alleges, they "commenced a campaign to blame [her] for being a difficult client, while encouraging [her] . . . either" to take over the case in propria persona or to retain other counsel. Emails from January through May 2013 attached to the SAC as exhibit J show that plaintiff was dissatisfied with defendants' representation, screamed at one of her attorneys over the telephone, complained about defendants to the Bar Association, and wanted to fire defendants. She changed her mind, but ultimately accused defendants in May 2013 of being "unethical, underhanded, covert,

dishonest, [and] unprofessional which of course has destroyed all credibility, integrity, trust, [and] professionalism."

After these general assertions, the SAC's first cause of action for fraudulent concealment alleges that defendants hid their malpractice and the WPA's procedure; suppressed the tolling agreement, which would show that defendants knew of the WPA procedure before its submission deadline and that the estoppel allegations in the FAC were false; and hid the Regents's settlement offer. The SAC alleges defendants delayed giving plaintiff the Regents's demurrer and the FAC, and never produced correspondence with the Regents in the summer of 2012, and then represented to plaintiff throughout the winter of 2012 to 2013 that she had a strong case while knowing that, having missed the WPA submission date, her case had no merit. Plaintiff was ignorant of the fraud and suffered damages as a consequence.

In the second cause of action for negligence, the SAC alleges that defendants are estopped from asserting that the instant lawsuit is untimely because defendants prevented plaintiff from ascertaining what defendants knew before they filed the FAC by suppressing documents and correspondence between defendants and the Regents. Plaintiff then alleges that defendants breached their duties to plaintiff by failing to use the skill and care of a reasonably careful employment lawyer handling a whistleblowing case against the Regents, and that their breach was the proximate cause of plaintiff's damages.

III. Procedural background

The trial court sustained the demurrer to the SAC and denied plaintiff leave to amend. The court ruled that the negligence and malpractice cause of action was barred by the one-

year statute of limitations in Code of Civil Procedure, section 340.6. As for the fraudulent concealment cause of action, the court ruled that the SAC alleged no facts that defendants (1) knew of the WPA procedures and intentionally concealed that information from plaintiff, (2) suppressed the tolling agreement from plaintiff with the intent to deceive, or (3) concealed the settlement offer from plaintiff. Plaintiff moved for reconsideration of the ruling (Code Civ. Proc., § 1008) and attached to her motion her proposed third amended complaint (TAC) replacing the two causes of action with two new ones under the Consumer Legal Remedies Act (Civ. Code, § 1750 et seq. (CLRA)) and the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq. (UCL)). The trial court denied plaintiff's motion and plaintiff timely appealed.

DISCUSSION

I. Standard of review

Our review of the trial court's order sustaining the demurrer without leave to amend is governed by well-settled principles. We review the sufficiency of the complaint de novo to determine whether it states a cause of action. (*Walgreen Co. v. City and County of San Francisco* (2010) 185 Cal.App.4th 424, 433.) We "accept the truth of all facts which may logically be inferred from the facts alleged in the complaint" (*Branson v. Martin*, *supra*, 56 Cal.App.4th at p. 302), " ' " 'but not contentions, deductions or conclusions of fact or law' " ' " (*Walgreen*, at p. 433). Also, we may consider matters which may be judicially noticed (*ibid.*), along with written documents that are the foundation of an action and are attached to the complaint and incorporated therein by reference, because they are part of the complaint

(*Qualcomm, Inc. v. Certain Underwriters at Lloyd's, London* (2008) 161 Cal.App.4th 184, 191).

However, courts "will not close their eyes to situations where a complaint contains allegations of fact inconsistent with attached documents, or allegations contrary to facts which are judicially noticed" (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604), or allegations that contradict facts or positions pleaded in earlier versions of the pleading (*Larson v. UHS of Rancho Springs, Inc.* (2014) 230 Cal.App.4th 336, 344).

" 'We affirm if any ground offered in support of the demurrer was well taken but find error if the plaintiff has stated a cause of action under any possible legal theory. [Citations.] We are not bound by the trial court's stated reasons, if any, supporting its ruling; we review the ruling, not its rationale.' " (*Walgreen Co. v. City and County of San Francisco*, *supra*, 185 Cal.App.4th at p. 433.)[1]

II. Plaintiff cannot state a cause of action for fraudulent concealment.

"An action against an attorney for a wrongful act or omission, *other than for actual fraud*, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers . . . the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission." (Code Civ. Proc., § 340.6, subd. (a), italics added.) The SAC plainly and repeatedly alleges defendants committed

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[1] Our de novo review of the SAC renders irrelevant plaintiff's contention that the trial court refused to accept the truth of the allegations in the SAC.

malpractice by failing to proceed under the WPA, and contains myriad allegations of plaintiff's delayed discovery of that malpractice. However, the SAC's allegations are time barred because plaintiff brought the instant lawsuit a year and eight months after *the trial court told her and her current counsel on August 21, 2014 when it ruled on the Regents's summary judgment motion, that plaintiff had a cause of action against defendants*.[2] To overcome the bar of section 340.6, plaintiff must state a cause of action for actual fraud (*ibid.*); constructive fraud and negligent misrepresentation do not suffice. (*Stueve Bros. Farms, LLC v. Berger Kahn* (2013) 222 Cal.App.4th 303, 322.)

The elements of an action for fraud based on concealment are: (1) the concealment of a material fact, (2) when the defendant was under a duty to disclose the fact to the plaintiff, (3) intent to defraud the plaintiff, i.e., the intent to induce reliance, (4) plaintiff's justifiable reliance, and (5) resulting damage. (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 868.) Attorneys' fiduciary relationship with their clients imposes the requisite obligation to disclose (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 188–189) "material facts to their clients, an obligation that includes disclosure of acts of malpractice" (*Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 514).

"Every element of the cause of action for fraud must be alleged in the proper manner and the facts constituting the fraud

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[2] Plaintiff's appellate briefs do not raise any claims that the trial court erred in sustaining the demurrer to the negligence and malpractice cause of action and denying her leave to amend. Accordingly, we treat the contention as forfeited. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784–785.)

must be alleged with sufficient specificity to allow defendant to understand fully the nature of the charge made" (*Roberts v. Ball, Hunt, Hart, Brown & Baerwitz* (1976) 57 Cal.App.3d 104, 109), and " 'enable the court to determine whether there is any basis for the cause of action' " (*Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1167).[3]

A. *The WPA procedure and defendants' malpractice*

The SAC's allegations that defendants concealed the WPA procedure from plaintiff and their malpractice in overlooking it, are contradicted by other allegations and by documents plaintiff attached to the SAC. Plaintiff alleges that defendants suppressed the possibility that the Regents would demur to the complaint. But the SAC's exhibits include an email to plaintiff on September 6, 2012 stating that the Regents "will likely *file a demurrer* and motion to strike punitive damages." (Italics

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[3] Plaintiff argues she is relieved of the specificity requirement and cites *Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153. " 'The specificity requirement means a plaintiff must allege facts showing how, when, where, to whom, and by what means the *representations* were made.' " (*Daniels v. Select Portfolio Servicing, Inc.*, *supra*, 246 Cal.App.4th at p. 1166, italics added.) *Tarmann* stated at page 158, "the requirement of specificity is relaxed when the allegations indicate that 'the defendant must necessarily possess full information concerning the facts of the controversy' [citations] or 'when the facts lie more in the knowledge of the opposite party.' " The allegations in *Tarmann* were that unnamed agents of the defendant committed the fraud. (*Id.* at p. 157.) In contrast, plaintiff has alleged who suppressed what and who said what to whom. Thus, this relaxation rule is irrelevant here.

added.) Plaintiff alleges defendants filed the FAC to conceal malpractice, but as an attorney would do, defendants filed the FAC to enable plaintiff's lawsuit to survive a demurrer by the Regents under the WPA. And according to plaintiff's exhibits, the FAC withstood the demurrer in June 2013. In fact, the attachments reveal that plaintiff knew about the estoppel argument because she argued it in propria persona at the hearing on the Regents's demurrer and so she knew by then at the latest that defendants had missed the WPA submission requirement. Plaintiff also alleges that defendants hid the WPA procedure by being "*dilatory*" in giving her copies of the FAC and the Regents's demurrer. (Italics added.) That is, plaintiff alleges that defendants *gave these documents to plaintiff* and so defendants did not hide them.

In a different tack, the SAC alleges that defendants repeatedly represented that the lawsuit against the Regents was viable and had merit, all the while knowing that this was false because of their malpractice. Plaintiff contends on appeal that this "aggravated" defendants' wrongdoing. But, the SAC also alleges that as early as November 2012, plaintiff "questioned the representations that DEFENDANTS were then making" and "expressed concern about" how defendants were litigating her case. According to the exhibits attached to the SAC, by December 2012, plaintiff had overtly questioned defendants' approach and was looking for other attorneys to represent her. By March 14, 2013, plaintiff was accusing defendants of having "mismanaged" and "misinformed" her. Therefore, she was skeptical of defendants' representations and was on inquiry notice that something was amiss. Accordingly, although defendants negligently failed to proceed under the WPA, nothing in the SAC

and attachments show that defendants actively concealed this from plaintiff. At most, these allegations show that her discovery of the malpractice was delayed in 2012. Plaintiff cannot amend to allege otherwise.[4]

B. *The tolling agreement*

The SAC's allegations concerning the tolling agreement are likewise contradicted by plaintiff's exhibits. One such attachment is the very tolling agreement plaintiff claims defendants concealed. Plaintiff alleges that by concealing it, defendants hid their malpractice. But that contract says nothing about administrative requirements in general or the WPA procedure specifically, thus negating the alleged reason for concealing it.

C. *The settlement offer*

The SAC finally alleges that in mid-May 2013, defendants *told* plaintiff about the settlement offer from the Regents, which was open only until the hearing on the Regents's demurrer. An attorney's failure to " 'disclose a settlement offer . . . [exposes] the attorney to a claim of legal malpractice.' " (*Wiley v. County of San Diego* (1998) 19 Cal.4th 532, 538.) But the allegations are

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[4] Plaintiff also contends that she brought the WPA requirement to defendants' attention in September 2012 and cites to exhibit H to her SAC. That exhibit shows she notified defendants about a *hospital policy* requiring mandated reporters to take certain steps before they made reports to DCFS. Nothing in this exhibit refers, even obliquely, to the statutory WPA requirements for exhausting administrative remedies (Gov. Code, § 8547.10). However, if it had, then *plaintiff* knew about the WPA requirements before she hired defendants.

that defendants *told* plaintiff about the offer and hence did not conceal it. *Stueve Bros. Farms, LLC v. Berger Kahn*, *supra*, 222 Cal.App.4th 303, cited by plaintiff, is irrelevant. The fraud alleged in that case was an elaborate scheme to siphon off the client's assets. (*Id*. at p. 311.) Here, plaintiff argues defendants engaged in "deliberate efforts to mislead Ferrer and to induce her to accept $50,000.00, at a time when Defendants knew Ferrer could not recover same for having been a whistleblower who was retaliated again[st]." But, the SAC alleges that *plaintiff* refused the settlement offer.

Throughout, the SAC suggests that defendants knew about the WPA's filing requirement before the August 2012 date by which they had to submit a WPA complaint to the Regents. Plaintiff alleges that the tolling agreement would show that the estoppel arguments in the FAC were false and that the Regents had invited defendants during the summer of 2012 to file the WPA complaint. But, as noted, the tolling agreement does not mention any administrative process. Also, the Regents did not invite a WPA complaint; they argued in their summary judgment motion that they *had no obligation to inform plaintiff* of the WPA requirement.

Other allegations include that defendants "sabotaged" plaintiff's lawsuit "*possibly* to procure publicity surrounding the celebrity births and the care rendered at" the hospital, and that had defendants disclosed the requirements under WPA to plaintiff before August 31, 2012, she would have filed a WPA complaint. However, an email attached to the SAC indicates that defendants kept plaintiff informed of the Regents's position, stating, "[W]e, 3 lawyers, spent most of the mediation *as well as Judge* . . . advising *you of their* [the Regents's] *position*." (Italics

added.) Otherwise, it is simply illogical to conclude that defendants knew of the WPA procedure during the summer of 2012 and chose to sabotage plaintiff's lawsuit by committing malpractice "to procure publicity." The more effective publicity would have been *not* to commit malpractice but to win her lawsuit against the Regents.

The SAC's fraudulent concealment allegations that defendants refused to turn over documents in order to hide their malpractice, and concealed their malpractice to induce plaintiff to pursue an action against the Regents rather than against defendants, are contradicted by the pleading's allegations and attachments, and constitute nothing more than garden variety malpractice along with plaintiff's delayed discovery of it. But these allegations do not constitute fraudulent concealment. Although plaintiff alleges that defendants committed fraud with the intent to induce plaintiff to pursue "her action against the REGENTS in Court, rather than against DEFENDANTS," pursuit of the lawsuit against the Regents never precluded plaintiff from suing defendants for malpractice; those two actions were not mutually exclusive. Plaintiff's eventual action against defendants was unsuccessful, not because she was busy suing the Regents, but because she failed to file her lawsuit against defendants in a timely manner after being told by a court that she had a malpractice claim against them.

III. Leave to amend to add CLRA and UCL claims

Plaintiff contends that the trial court erred in failing to grant her motion for reconsideration to amend her SAC to allege causes of action under the CLRA and the UCL. We need not address plaintiff's argument under Code of Civil Procedure section 1008 because she is permitted to show she could cure the

legal defects in her complaint as late as on appeal. (*Sierra Palms Homeowners Assn. v. Metro Gold Line Foothill Extension Construction Authority* (2018) 19 Cal.App.5th 1127, 1132.)

Nonetheless, viewing plaintiff's proposed TAC according to the usual rules (See *Branson v. Martin*, *supra*, 56 Cal.App.4th at p. 302), we conclude she has not demonstrated she can state these two statutory causes of action.

The CLRA makes unlawful various " 'unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer.' " (*Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, 639.) Civil Code section 1770 sets forth a list of proscribed practices. The TAC relies on four of those practices: Representing that services have characteristics that they do not have (*id*, § 1770, subd. (a)(5)), that services are of a particular standard, quality or grade, if they are of another (*id.* subd. (a)(7)), that a transaction confers or involves rights, remedies or obligations that it does not (*id.*, subd. (a)(14)), and that the subject of a transaction has been supplied in accordance with a previous representation when it has not (*id.*, subd. (a)(16)). The CLRA requires a showing that the defendant's conduct was deceptive in these ways and caused the plaintiff harm. (*Tucker v. Pacific Bell Mobile Services* (2012) 208 Cal.App.4th 201, 222.)

Under the CLRA, the TAC alleges defendants each (1) "represented at all times that they . . . [were] skilled in handling civil litigation and employment disputes, including against the REGENTS" and advertised as such, and (2) opined that her lawsuit would provide plaintiff "with a remedy including substantial damages," and (3) opined that they had provided the

quality of legal services as experts during 2012 and 2013. The TAC alleges that defendants made these representations about the quality and grade of their services but failed to follow settled law requiring "resort to an internal procedure instead."

Regardless of whether attorneys in California are subject to the CLRA, as a matter of law, plaintiff cannot state a cause of action under that statute because the failure to follow the WPA procedure did not render false or deceptive defendants' representations about their expertise "in handling civil litigation and employment disputes, including against the Regents." Attorneys may not make false or misleading communications about their services. "A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the communication considered as a whole not materially misleading." (Rules Prof. Conduct, rule 7.1(a).) Although attorneys may not state that they are *certified* specialists in a particular field of law when they are not, *they may nonetheless communicate the fact that they practice in, specialize, or concentrate, in a particular field*. (Rules Prof. Conduct, rule 7.4.)[5] But the TAC does not allege defendants

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[5] Rule 7.4 of the Rules of Professional Conduct reads in pertinent part, "(a) A lawyer shall not state that the lawyer is a *certified* specialist in a particular field of law, unless: [¶] (1) the lawyer is currently certified as a specialist by the Board of Legal Specialization . . . and [¶] (2) the name of the certifying organization is clearly identified in the communication. [¶] (b) Notwithstanding paragraph (a), a lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may also communicate that his or her practice specializes in, is limited to, or is concentrated in a

represented they were certified. Moreover, failing to submit a WPA complaint to the Regents, while patently malpractice, does not render defendants' statements about their skill in labor and employment law false when made. Furthermore, the WPA allows a wronged employee to bring "an action for damages," including punitive damages and attorney fees (Gov. Code, § 8547.10, subd. (c)). Therefore, defendants' alleged opinion that plaintiff could recover substantial damages against the Regents was also not false when made.

In the fourth cause of action, plaintiff merely alleges that "by their actions, advertisements and representations, DEFENDANTS have engaged in unfair and unlawful business practices, including as evidenced by their failure to be honest and forthright in their dealings with their client." These allegations simply rehash plaintiff's fraudulent concealment cause of action against defendants. Yet, as we have explained, plaintiff cannot state a cause of action for fraudulent concealment. Necessarily, therefore, she cannot amend to state a cause of action under the UCL.

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particular field of law, subject to the requirements of rule 7.1." (Italics added.)

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

EDMON, P. J.

EGERTON, J.