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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

BLECHER COLLINS PEPPERMAN & JOYE, P.C., Plaintiff and Respondent, v. SHAHROKH MIRESKANDARI et al., Defendants and Appellants.	B263619 (Los Angeles County Super. Ct. Nos. BC540650 & BC542523)

APPEAL from a judgment and an order of the Superior Court of Los Angeles County. Suzanne G. Bruguera, Judge. Affirmed.

Esner, Chang & Boyer, Stuart B. Esner and Joseph S. Persoff for Defendants and Appellants.

Blecher Collins & Pepperman, Maxwell M. Blecher and Howard K. Alperin for Plaintiff and Respondent.

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Appellants Shahrokh Mireskandari (Mireskandari) and Paul Baxendale-Walker (Baxendale-Walker) are former solicitors in the United Kingdom who were suspended from the practice of law in 2008. Mireskandari and Baxendale-Walker (together, the former solicitors) subsequently came to the United States to file lawsuits, including some designed to collaterally attack their suspension. One of the law firms the former solicitors hired to represent them in some of their U.S.-based litigation sued them for not paying their bills; the former solicitors sued back for malpractice and breach of fiduciary duty. The trial court sustained a demurrer to the former solicitors' lawsuit without leave to amend, and awarded the law firm its unpaid fees after a bench trial. The former solicitors appeal both rulings. We conclude there was no error and affirm both judgments.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

A. Suspension from practice in United Kingdom

Mireskandari and Baxendale-Walker were duly licensed solicitors in the United Kingdom until 2008. That year, the Law Society of England and Wales (Law Society) and the Solicitors Regulatory Authority (Regulatory Authority) suspended their licenses to practice for ethical violations.[1]

B. Retention of Blecher firm

In August 2012, the former solicitors retained respondents Blecher Collins Pepperman & Joye, P.C. (the Blecher firm) to represent them in several lawsuits. Although the Blecher firm only possessed a copy of the written retainer agreement signed by Mireskandari, Mireskandari told the firm orally and in writing that Baxendale-Walker had also signed the agreement.

Under the retainer agreement, the Blecher firm specifically agreed to represent both former solicitors at a reduced hourly rate and for a small contingency fee in a

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1 We draw some of the facts set forth in this section from matters of which we have taken judicial notice. (Evid. Code, §§ 452 & 459.)

lawsuit already pending in the Central District of California against the Law Society, the Regulatory Authority, several of their officials and others.[2] In that lawsuit, the former solicitors alleged that they had been suspended solely because they were "outspoken minority solicitors," and sought more than $5 million in damages for violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 U.S.C. § 1961), violations of the Computer Fraud and Abuse Act (18 U.S.C. § 1030), defamation, and intentional interference with contractual relations (the RICO Action).

The retainer agreement also contemplated that the Blecher firm might represent the former solicitors in other matters, but at the firm's regular billing rates. The Blecher firm did just that: (1) it filed two applications with Mireskandari as the lead plaintiff, one in the Central District of California and another in the Southern District of California, to compel discovery "for use in a proceeding in a foreign or international tribunal" pursuant to section 1782 of title 28 of the United States Code (1782 Applications); and (2) it began representing Mireskandari in a lawsuit already pending in the Los Angeles Superior Court against Luxe Hotel alleging violations of the Unruh Civil Rights Act (Civ. Code, § 51 et seq.) (Luxe Hotel Action).

The retainer agreement also provided that any fee dispute would be subject to arbitration, and that "[t]he arbiter(s)" of that dispute "shall have the discretion to order that the costs of arbitration, including the arbiter(s)' fees, other costs and reasonable attorneys' fees, shall be borne by the losing party."

C. Non-payment of fees and termination of attorney-client relationship

By March 2013, the former solicitors had run up nearly $400,000 in unpaid legal fees. At that point, the Blecher firm informed Mireskandari that it would be "fil[ing] a motion to withdraw in the next few days."

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2 The former solicitors had previously sued some of these other parties in a separate federal lawsuit. This other lawsuit was filed before the former solicitors retained the Blecher firm, and the Blecher firm never represented the former solicitors in that other lawsuit.

D. Outcome of lawsuits where the Blecher firm had provided representation

Although the Blecher firm filed a third amended complaint for the former solicitors in the RICO Action, the federal district court in May 2013 dismissed the claims in that Action against the Law Society, the Regulatory Authority and their officials after concluding that they were barred by the Foreign Sovereign Immunities Act (FSIA) (28 U.S.C. § 1604). The former solicitors appealed, and the Ninth Circuit Court of Appeals affirmed the dismissal with respect to the Law Society and Regulatory Authority, but reversed the dismissal with respect to the officials of those two bodies because FSIA applies to foreign entities but not their officials. (*Mireskandari v. Mayne* (9th Cir. 2015) 599 Fed.Appx. 677, 677-678.) On remand, the district court concluded that the former solicitors' lawsuit against the Law Society's and Regulatory Authority's officials was barred by the doctrine of common law immunity.

Mireskandari had mixed results with the 1782 Applications. The application filed in the Southern District of California was granted. The application filed in the Central District of California was denied, and his appeal of that denial was dismissed as moot because Mireskandari "discontinued his appeal in the United Kingdom," foreclosing the need for any discovery to assist with that "foreign" "proceeding." (*Mireskandari v. Solicitors Regulation Auth.* (9th Cir. 2015) 599 Fed.Appx. 676, 676-677.)[3]

Mireskandari voluntarily dismissed the Luxe Hotel Action in February 2014.

II. Procedural History

In March 2014, the Blecher firm sued the former solicitors for breaching the retainer agreement and prayed for the $355,872.08 in unpaid fees (because by then Mireskandari had paid $50,000 toward the outstanding balance) (the Fee Action). In April 2014, the former solicitors sued the Blecher firm for malpractice and breach of fiduciary duty (the Malpractice Action). The two Actions were consolidated.

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3 We take judicial notice of this opinion. (Evid. Code, §§ 452, subd. (c) & 459.)

A. Malpractice Action

1. The operative, first amended complaint

In the operative, first amended complaint (FAC), the former solicitors alleged that the Blecher firm had committed the following acts of malpractice: (1) as to the RICO Action, the firm "failed properly to consider the application and effect of the [FSIA] and particularly ignored the commercial exception" to FSIA; (2) as to the 1782 Application in the Central District of California, the application "was denied and is currently on appeal"; (3) as to the Luxe Hotel Action, the firm "missed a court appearance without any justification, and took no action on the case for several months, to the detriment of [] Mireskandari and his legal interests"; (4) as to unspecified matters, Maxwell Blecher (of the Blecher firm) "sent copies of confidential and privileged emails to opposing counsel," "fell asleep at meetings (but nevertheless billed for the time)" "[o]n several occasions," "delegated responsibility for handling cases to lawyers with insufficient knowledge and experience," and engaged in "excessive" billing and refused to "further expla[in] . . . the charges."[4]

With respect to causation on the malpractice claim, the FAC alleged: "But for the negligence of [the Blecher firm], plaintiffs would have obtained more favorable results in the actions identified in the complaint. Had defendant acted competently, the [RICO] matter would not have been dismissed with prejudice, and the appeal presently pending before the Ninth Circuit would not have been required. Had defendant acted competently, the Los Angeles 1782 application would not have been denied. In the *Luxe*

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4 The FAC also alleged that the firm did not "properly . . . advise [] Mireskandari" about the fact that the portion of the RICO Action against several media outlets was duplicative of the former solicitors' prior lawsuit with which the Blecher firm was not involved. The court hearing the RICO Action dismissed the overlapping claims for improper "claim splitting."

[*Hotel*] matter, the negligence by [the Blecher firm] caused [] Mireskandari additional expense and caused unnecessary delay in the prosecution of his claim."[5]

In the FAC, the former solicitors also alleged that the Blecher firm had breached its fiduciary duties to them by (1) not acting competently, as required by rule 3-110 of the California Rules of Professional Conduct; (2) by not maintaining confidential information, as required by Business and Professions Code section 6068, subdivision (e); (3) by breaching the duties of loyalty and confidentiality to Mireskandari; and (4) by engaging in excessive and unconscionable billing, as prohibited by rule 4-200 of the California Rules of Professional Conduct. Only one specific factual allegation supported this claim—namely, that the firm had "threatened to file a motion for leave to withdraw as counsel" in the RICO Action in "May 2013" in order to "coerc[e]" the former solicitors "into paying" their unpaid legal bills.

2. Ruling on demurrer

The Blecher firm demurred to the FAC in October 2014.

Although the former solicitors did not oppose the demurrer, the trial court evaluated the demurrer on its merits. The court examined the FAC's malpractice allegations, and ruled that the FAC "did not allege *facts* showing [the Blecher firm's] alleged malpractice caused their injuries and/or *facts* showing 'that but for the alleged malpractice, it is more likely than not . . . [they] would have obtained a more favorable result.'" (Italics in original.) The court also examined the FAC's breach of fiduciary duty allegations, and ruled that the FAC "did not allege *facts* showing *how* [the Blecher firm] breached the Rules of Professional Conduct and/or Business & Professions Code with respect to each action and/or *how* the alleged breaches qualify as breaches of *fiduciary duty*. In addition, [the former solicitors] failed to allege *facts* showing [the

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5 The original complaint had simply alleged: "As a direct and proximate result of the [Blecher firm's] failure to exercise the skill, prudence and diligence exercised by other attorneys, [the former solicitors] have been damaged in an amount to be proven at trial . . . ." The FAC and its more expansive language came after the Blecher firm demurred to the original complaint but before the trial court could rule on that demurrer.

Blecher firm's] alleged breaches of fiduciary duty caused their damages." (Italics in original.) The "conclusory allegations" as to both claims, the court reasoned, were "insufficient."

The trial court further ruled that the demurrer would be sustained without leave to amend and accordingly dismissed the Malpractice Action.

B. Fee Action

Trial in the Fee Action was set for February 23, 2015.

1. Discovery disputes

Just a few months before the trial date, in December 2014, the Blecher firm filed motions to compel the former solicitors to respond to its outstanding discovery requests. The trial court granted those motions, and ordered further disclosures by December 20, 2014. The former solicitors provided further responses on December 22, 2014 and December 24, 2014, and on January 2, 2015, filed objections to the depositions the Blecher firm had noticed for them. All of the former solicitors' filings were filed by their attorney at the time, Robert Moest (attorney Moest).

2. First ex parte application for a continuance

Four days before the trial date, on February 19, 2015, Mireskandari, appearing in pro. per., filed an ex parte application for himself and Baxendale-Walker to continue the trial to an unspecified date in the future to give new counsel time to prepare for trial. As grounds for the continuance, Mireskandari represented that: (1) attorney Moest had effectively abandoned them "since before the Christmas holidays"; (2) Baxendale-Walker had, in the "past few weeks . . . developed a neurological condition that has caused cognitive impairment," rendering him unable to participate in his defense of the Fee Action or to travel from London to Los Angeles for the trial in the Fee Action. For support, Mireskandari attached a declaration from attorney Moest indicating that he had generally fallen behind in his work and been neglectful, and a declaration from a general medical practitioner in Los Angeles who explained that Baxendale-Walker's blood showed a vitamin D deficiency and that Baxendale-Walker's MRI showed "plainly observable irregularities" indicative of a "severe debilitating brain illness."

The trial court denied the ex parte application for two reasons: (1) the application was procedurally defective; and (2) the application did not "provide *any* admissible substantive evidence to support [the] granting of relief." (Italics in original.)

3. Second ex parte application for a continuance

On the day before trial was set to begin, Mireskandari, again appearing in pro. per., filed a second ex parte application to continue the trial either to give new counsel time to prepare for trial or until Baxendale-Walker recovered from his brain illness. The application sought relief on the same grounds as the first application, but included (1) a declaration from Baxendale-Walker stating that he "had recently been diagnosed with a neurological condition that has caused cognitive impairment" and was "presently undergoing intensive medical treatment in England with" the Los Angeles-based general practitioner; (2) a further declaration from the Los Angeles-based general practitioner repeating his earlier findings and adding that Baxendale-Walker also had a vitamin B-12 deficiency; and (3) an updated declaration from attorney Moest, repeating his earlier declaration and adding that he was in the midst of organizing his files to transfer them to whomever the former solicitors hired as new counsel. The Blecher firm filed a written opposition, which included several documents produced and objections filed by attorney Moest in this case during the time period in which the former solicitors alleged he was being neglectful and a transcript from a proceeding before the Regulatory Authority in which *Mireskandari* sought a continuance on the grounds that the Los Angeles-based general practitioner was *his* doctor.

The trial court denied the ex parte application because (1) it was procedurally "defective in that it does[not] follow the ex parte rules," and (2) the issue with attorney Moest is "not a real issue."

4. Bench trial

The trial proceeded as scheduled. Maxwell Blecher (Blecher) testified as to the bills and their nonpayment, and explained that "the work [the Blecher firm] did was equally applicable to both [former solicitors]" because, despite differences in the underlying facts as to each former solicitor, "the legal issues were basically overlapping"

because both were asserting that they were "being disbarred by a rotten proceeding." Mireskandari cross-examined Blecher at length.

The trial court denied Mireskandari's motion for a directed verdict, and after entertaining closing arguments, ruled for the Blecher firm. The court found that the Blecher firm "ha[d] clearly carried its burden" of proof and that the former solicitors had not "asked for any better itemization" of billing entries "until late" into the process.

C. Entry of judgments

On the Malpractice Action, the trial court on March 9, 2015, entered a judgment dismissing the Action with prejudice.

On the Fee Action, the trial court on February 24, 2015, entered a judgment awarding the Blecher firm $355,822.08 in compensatory damages and $65,910 in prejudgment interest. The judgment also provided: "Pursuant to Civil Code § 1717, [the Blecher firm] is entitled to recover its attorney's fees as provided in the contract between the parties."

D. Postjudgment litigation

On March 26, 2015, the Blecher firm filed a motion for attorney's fees based on the attorney's fees provision in the retainer agreement.

The trial court granted the motion, awarded $90,165 in fees, and filed an amended judgment on May 11, 2015.

E. Appeal

On April 23, 2015, the former solicitors filed a notice of appeal challenging "the adverse judgments entered against them on or about February 24, 2015 and March 9, 2015." They never filed a notice of appeal from the amended judgment issued on May 11, 2015.

DISCUSSION

The former solicitors appeal the dismissal of the Malpractice Action and raise several arguments attacking the trial court's resolution of the Fee Action. We will address each Action separately.

I. Malpractice Action

The former solicitors argue that the trial court erred in sustaining the demurrer to the Malpractice Action without leave to amend.

In assessing whether a demurrer was properly sustained, we ask "'whether the [operative] complaint states facts sufficient to constitute a cause of action.'" (*Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1100 (*Loeffler*), quoting *City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.) In answering this question, we "'assume the truth of the complaint's properly pleaded or implied factual allegations,'" except where they are contradicted by attached exhibits or matters properly subject to judicial notice. (*Loeffler*, at p. 1100, quoting *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081; *Alborzian v. JPMorgan Chase Bank, N.A.* (2015) 235 Cal.App.4th 29, 34.) We need not accept as true "contentions, deductions or conclusions of law." (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) We independently review the operative complaint under these standards, and owe no deference to the trial court's result or its reasoning. (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1230 (*Lee*); *Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 201 (conc. & dis. opn. of Brown, J.) In assessing whether leave to amend was properly denied, we review for an abuse of discretion by asking "'whether there is a reasonable possibility that the defect can be cured by amendment.'" (*Loeffler*, at p. 1100.)

A. Sustaining demurrer

1. Malpractice claim

To plead a claim for malpractice, a plaintiff must allege "(1) the existence of [a] duty of the professional to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; (2) breach of that duty; (3) a causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional negligence." (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821 (*Oasis West Realty*); *Kumaraperu v. Feldsted* (2015) 237 Cal.App.4th 60, 66 (*Kumaraperu*).) When it comes to the requisite causal connection, a plaintiff "[i]n a litigation malpractice action . . . must establish that *but for*

the alleged negligence of the defendant attorney, the plaintiff would have obtained a more favorable judgment or settlement in the action in which the malpractice allegedly occurred." (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1241, italics in original.)

"'A cardinal rule of pleading is that only the ultimate facts need be alleged'" in the operative complaint. (*Fenn v. Sherriff* (2003) 109 Cal.App.4th 1466, 1492; *Burke v. Superior Court* (1969) 71 Cal.2d 276, 279, fn. 4; *Schermer v. Tatum* (2016) 245 Cal.App.4th 912, 925; *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 211-212, superseded on other grounds by Bus. & Prof. Code, § 17204.) The "ultimate facts" are the "essential facts of [a plaintiff's] case," and they must be "set forth . . . '"""with reasonable precision and with particularly sufficient to acquaint [the] defendant with the nature, source and extent"""' of the plaintiff's claim." (*Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1120 (*Prakashpalan*), quoting *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 550 & 551, fn. 5 (*Doe*).) What constitutes an "ultimate fact" is harder to define: "Ultimate facts" are less specific than "evidentiary facts" (*Prakashpalan*, at p. 1120) but more specific than "legal conclusions" (*Doheny Park Terrace Homeowners Assn., Inc. v. Truck Ins. Exchange* (2005) 132 Cal.App.4th 1076, 1099 (*Doheny Park*) ["'"the distinction between conclusions of law and ultimate facts is not at all clear and involves at most a matter of degree"'"]).

However, this cardinal rule has an exception: "[W]hen . . . '"the pleaded facts of negligence and injury do not naturally give rise to an inference of causation[,]"' . . . the plaintiff must allege facts . . . explaining how the conduct caused or contributed to the injury." (*Bockrath v. Aldrich Chemical Co.* (1999) 21 Cal.4th 71, 78 (*Bockrath*); *Christensen v. Superior Court* (1991) 54 Cal.3d 868, 900-901.) Because "[l]egal malpractice is, of course, a form of negligence" (*B.L.M. v. Sabo & Deitsch* (1997) 55 Cal.App.4th 823, 830), and because substandard legal representation does not "naturally give rise to an inference" that it was the "but for" cause of a plaintiff's failure to prevail in the pertinent litigation, a plaintiff in a malpractice action must "'allege *facts* establishing that, "but for the alleged malpractice, it is more likely than not the plaintiff

would have obtained a more favorable result"'" in the proceeding in which the malpractice occurred. (*Shopoff & Cavallo LLP v. Hyon* (2008) 167 Cal.App.4th 1489, 1509, italics added; see also *Kumaraperu*, *supra*, 237 Cal.App.4th at p. 66 [applying exception in a malpractice case].) For a malpractice plaintiff, pleading "ultimate facts" is not enough.

In light of these standards, we conclude that the demurrer to the FAC was properly sustained for two reasons. First, the FAC does not allege facts explaining how, but for the Blecher firm's alleged negligence, the former solicitors would have prevailed in the RICO Action, the 1782 Application filed in the Central District of California, or the Luxe Hotel Action. Instead, the FAC generically alleges that "[b]ut for the negligence of [the Blecher firm], [the former solicitors] would have obtained more favorable results in the actions identified in the complaint," and adds only that, absent negligence, the RICO Action "would not have been dismissed with prejudice," and that "the Los Angeles 1782 application would not have been denied." There is no specific allegation with respect to the outcome of the Luxe Hotel Action.[6] These allegations parrot the legal standard of "but for" causation, but provide no facts regarding how the Blecher firm's allegedly negligent actions affected the result of these pending proceedings. The allegations are deficient.

Second, matters properly subject to judicial notice definitively disprove the allegations that any malpractice by the Blecher firm affected the outcome of the proceedings in which it represented the former solicitors. The former solicitors allege that the Blecher firm committed malpractice in the RICO Action by not considering how FSIA applied and by ignoring the "commercial exception" to FSIA, but the subsequent rulings in the RICO Action establish that the former solicitors' lawsuit against the Law Society, Regulatory Authority and their officials would have been dismissed on immunity

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6 The FAC also alleges that the Blecher firm did not advise the former solicitors regarding the claim splitting aspects of the RICO Action vis-à-vis the earlier lawsuit, but the Blecher firm did not represent the former solicitors in the other lawsuit and the former solicitors have not alleged that the claim splitting ruling was incorrect.

grounds whether or not the Blecher firm raised the "commercial exception" to FSIA. To begin, the district court, on remand from the Ninth Circuit, dismissed the lawsuit against the officials on the ground of common law immunity; FSIA's "commercial exception" is irrelevant to common law immunity. Further, the Ninth Circuit affirmed the district court's application of FSIA to the Law Society and Regulatory Authority, and its decision is in accord with the unanimous authority refusing to apply FSIA's "commercial exception"—which does not extend FSIA's immunity to "foreign state[s]" when they are sued for "commercial activity" that occurs in or has a "direct effect in the United States" (28 U.S.C. § 1605(a)(2); see also 28 U.S.C § 1603(d) [defining "commercial activity"])—to foreign entities engaged in regulatory activities, which would include the regulation of lawyers. (*Community Finance Group, Inc. v. Republic of Kenya* (8th Cir. 2011) 663 F.3d 977, 981 ["decisions regarding whether or how to investigate an allegedly fraudulent commercial transaction . . . are governmental rather than commercial activities"]; *Tucker v. Whitaker Travel, Ltd.* (E.D.Pa. 1985) 620 F.Supp. 578, 584 ["government's decisions whether and how to regulate an industry . . . are peculiarly governmental" and not commercial]; *Jin v. Ministry of State Security* (D.D.C. 2008) 557 F.Supp.2d 131, 139-140; see also *Lupert v. California State Bar* (9th Cir. 1985) 761 F.2d 1325, 1327 [California State Bar is a licensing agency]; *Hirsh v. Justices of Supreme Court of California* (9th Cir. 1995) 67 F.3d 708, 715 [extending sovereign immunity to State Bar].) The former solicitors also argue that the Blecher firm's negligence affected the result of the proceedings in the 1782 Application in the Central District of California as well as the Luxe Hotel Action, but the former solicitors on their own (and presumably on the advice of their counsel at the time) rendered the 1782 Application moot by dismissing the proceedings in the United Kingdom and voluntarily dismissed the Luxe Hotel Action.[7] These independent decisions to dismiss severed any causal link between any malpractice by the Blecher firm and the ultimate outcome of

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7 The former solicitors also voluntarily dismissed their earlier federal lawsuit that overlapped in part with the RICO Action, further severing any causal link between any malpractice and the outcome of that lawsuit.

those cases. (Accord, *Filbin v. Fitzgerald* (2012) 211 Cal.App.4th 154, 171-172 (*Filbin*) [no malpractice liability where "there was no causal nexus" between prior representation and a "subsequent decision to settle"].)

2. Breach of fiduciary duty claim

To plead a claim for breach of fiduciary claim, a plaintiff must allege (1) "the existence of a fiduciary relationship," (2) "breach of fiduciary duty," and (3) "damages." (*Oasis West Realty, supra*, 51 Cal.4th at pp. 820-821.) Among other duties, an attorney owes his client a duty (1) to act competently (Rules Prof. Conduct, rule 3-110; *Lee, supra*, 61 Cal.4th at p. 1237); (2) to maintain confidences (Bus. & Prof. Code, § 6068, subd. (e); *Gong v. RFG Oil, Inc.* (2008) 166 Cal.App.4th 209, 214); (3) to remain loyal to current and former clients (*Musser v. Provencher* (2002) 28 Cal.4th 274, 286; *Beck v. Wecht* (2002) 28 Cal.4th 289, 297); and (4) "to charge only fair, reasonable and conscionable fees" (*Bird, Marella, Boxer & Wolpert v. Superior Court* (2003) 106 Cal.App.4th 419, 431; *Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 182).

The FAC generically alleges that the Blecher firm breached the four duties enumerated above, but provides no facts whatsoever supporting those allegations. The former solicitors' breach of fiduciary claim for incompetence ostensibly involves the same deficient representation underlying their malpractice claim, so the procedural rule requiring greater specificity would appear to apply to that portion of their breach of fiduciary duty claim (*Bockrath, supra*, 21 Cal.4th at p. 78); otherwise, plaintiffs could recast *every* malpractice claim as a claim for the breach of the fiduciary duty of competence, and thereby sidestep the enhanced pleading rule. However, even if we applied the default rule requiring a plaintiff only to plead "ultimate facts" to all portions of the breach of fiduciary duty claim, the former solicitors have not carried this lower burden because their allegations are still insufficient insofar as they provide no explanation of what the Blecher firm did to breach these duties and thus do not "acquaint" the Blecher firm "with the nature, source and extent" of the former solicitors' claim. (*Prakashpalan, supra*, 223 Cal.App.4th at p. 1120.)

The FAC goes on to specifically allege that the Blecher firm "threatened to file a motion for leave to withdraw as counsel" in the RICO Action in May 2013 in order to "coerc[e]" the "payment of" the outstanding, unpaid legal bills. But this allegation does not, as a matter of law, state a breach of fiduciary duty. The Blecher firm had, by May 2013, already informed the former solicitors that it was no longer representing them and was planning to file motions to withdraw as counsel, and the judicially noticed facts indicate that the former solicitors were not near trial or any other critical stage in any of the lawsuits then handled by the Blecher firm. Indeed, the Blecher firm filed its opposition to the motion to dismiss the RICO Action several weeks before telling the former solicitors that it would seek to withdraw as counsel. In these circumstances, there is no breach of fiduciary duty. (See *Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 915 [there is "no authority preventing an attorney from withdrawing from a case when the withdrawal can be accomplished without undue prejudice to the client's interests"; an attorney must not "*abandon*[] a client" or "withdraw[] at a critical point"].)

3. Former solicitors' arguments

The former solicitors raise three further arguments in support of overturning the trial court's order sustaining the demurrer.

First, the former solicitors argue that they were damaged by the Blecher firm when the firm, through its negligent or unethical acts, (1) required the former solicitors to incur attorney's fees by hiring other lawyers to continue their lawsuits, (2) disclosed confidential information, and (3) breached its fiduciary duties to them, thereby warranting nominal damages. These arguments improperly conflate the element of damage with the elements of causation and breach, and thus do not cure the defects in the FAC. Even if the former solicitors had incurred fees hiring other lawyers, and even though such fees can constitute "actual injury" (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 750-751; *Laird v. Blacker* (1992) 2 Cal.4th 606, 615; *Shaoxing City Maolong Wuzhong Down Products, Ltd. v. Keehn & Associates, APC* (2015) 238 Cal.App.4th 1031, 1036 (*Shaoxing*)), the Blecher firm is not liable for those fees unless its negligence was the "but for" cause leading to a less favorable

outcome in particular lawsuits or unless it breached a fiduciary duty. As explained above, the former solicitors did not—and, indeed, cannot—allege this causal element. Even if the disclosure of confidential information constitutes negligence or a breach of fiduciary duty, the former solicitors have not explained what was disclosed or with respect to which matter it was disclosed. "'[N]egligence in the air'" is not actionable (*Palsgraf v. Long Island Railroad Co.* (1928) 248 N.Y. 339, 341 [162 N.E. 99]), and neither are "attorney breaches of the standard of care" divorced from any particular lawsuit (*Filbin, supra,* 211 Cal.App.4th at pp. 169-170). And even if nominal damages are sufficient to sustain a claim for a breach of fiduciary duty (*Werschkull v. United Cal. Bank* (1978) 85 Cal.App.3d 981, 1008-1009; cf. *Shaoxing*, at p. 1036 [nominal damages insufficient for malpractice claim]), there is no such breach for the reasons detailed above.

Second, the former solicitors contend that they should be excused from more specific pleading requirements because the Blecher firm is in a better position to know the unpled facts than they are. Although "the doctrine of 'less particularity'" empowers a plaintiff to plead only what is necessary to "'give[] notice of the issues sufficient to enable preparation of a defense'" "'when it appears that [the] defendant has superior knowledge of the facts'" (*Doe, supra*, 42 Cal.4th at pp. 549-550; *Doheny Park, supra*, 132 Cal.App.4th at p. 1099), the doctrine does not apply here when it is the former solicitors—not the law firm who no longer represents them—who are in a better position to know the eventual outcome of the cases where the firm provided representation and thus are in a better position to know whether the firm's alleged malpractice was the "but for" cause of that eventual outcome.

Lastly, the former solicitors assert that a complaint is sufficient as long as it is not "so incomprehensible that a defendant cannot reasonably respond." (*Lickiss v. Financial Industry Regulatory Authority* (2012) 208 Cal.App.4th 1125, 1135.) But this standard is the one that applies for demurrers premised on the "uncertain[ty]" of the "pleading" (Code Civ. Proc., § 430.10, subd. (f)), not the standard for demurrers based on the pleading's failure to "state facts sufficient to constitute a cause of action" (*id.*, subd. (e)).

We are dealing with the latter type of challenge, so the standard applicable to the former is not germane.

B. Without leave to amend

To establish that the trial court abused its discretion in denying them leave to amend the FAC, the former solicitors must show a "'reasonable possibility'" that the defects in the FAC "'can be cured by amendment.'" (*Loeffler*, *supra*, 58 Cal.4th at p. 1100.) They have not carried this burden. As explained above, judicially noticed documents foreclose any allegation that malpractice by the Blecher firm was the "but for" cause of the outcome of those proceedings.

The former solicitors nevertheless argue that the trial court abused its discretion in denying them leave to amend because they can (1) allege with greater specificity the costs they incurred as result of the Blecher firm's negligence, and (2) absent the Blecher firm's negligence, they would have succeeded in restoring their law licenses in the United Kingdom and would have received damages from the Law Society and Regulatory Authority. These proposed amendments do not cure the defects in the FAC. The first proposal deals with the specificity of *damages*, not *causation*, and is consequently not responsive to the critical defect in the FAC. The second proposal hinges on the success of the U.S.-based litigation, which judicially noticed documents indicate has been unsuccessful through no fault of the Blecher firm.

II. The Fee Action

The former solicitors seek an order reversing the trial court's judgment on the Fee Action for three reasons: (1) the court abused its discretion in denying Mireskandari's ex parte applications for a continuance of the trial; (2) the court erred in holding Mireskandari and Baxendale-Walker jointly and severally liable for the amount of unpaid fees; and (3) the court erred in awarding the Blecher firm attorney's fees under Civil Code section 1717.

A. Denial of continuance

The former solicitors argue that the trial court erred in denying Mireskandari's two ex parte applications to continue trial. We review a trial court's denial of a continuance for an abuse of discretion. (*Lazarus v. Titmus* (1998) 64 Cal.App.4th 1242, 1249.)

Although both former solicitors assign this as error on appeal, only Mireskandari may raise the issue. The ex parte applications were filed by Mireskandari proceeding in pro. per. Mireskandari did not have the authority to represent anyone but himself, so his ex parte application pertained only to himself. Because Baxendale-Walker did not file his own ex parte application to continue the trial, he never requested a continuance and may not do so for the first time on appeal. (See *Roman v. BRE Properties, Inc.* (2015) 237 Cal.App.4th 1040, 1056-1057; *In re A.B.* (2014) 225 Cal.App.4th 1358, 1366; *People v. Riccardi* (2012) 54 Cal.4th 758, 810, overruled in part on other grounds by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

In California, "the dates assigned for a trial are firm." (Cal. Rules of Court, rule 3.1332(a).[8]) Continuances of the trial date are accordingly "disfavored" and may only be granted for "good cause." (Rule 3.1332(c); *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1127; *In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 823.) Among other things, "[c]ircumstances that may indicate good cause include:" (1) "[t]he unavailability of a party because of death, illness, or other excusable circumstances"; (2) "[t]he unavailability of trial counsel because of death, illness, or other excusable circumstances"; and (3) "[t]he substitution of trial counsel, but only where there is an affirmative showing that the substitution is required in the interests of justice." (Rule 3.1332(c)(2)-(4).) Other factors "relevant" to whether to grant a continuance include: (1) "[t]he proximity of the trial date"; (2) "[w]hether there was any previous continuance, extension of time, or delay of trial due to any party"; (3) "[t]he length of the continuance requested"; (4) "[t]he availability of alternative means to

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8 All further rule references are to the California Rules of Court unless otherwise indicated.

address the problem that gave rise to the motion or application for a continuance"; and (5) "[w]hether the interests of justice are best served by a continuance, by the trial of the matter, or by imposing conditions on the continuance." (Rule 3.1332(d)(1)-(4) & (10).) In deciding whether to grant or deny a continuance, a trial court must be mindful of whether "'the refusal of a continuance [will] ha[ve] the practical effect of denying the applicant a fair hearing. [Citations.]'" (*In re Marriage of Hoffmeister* (1984) 161 Cal.App.3d 1163, 1169; *Oliveros v. County of Los Angeles* (2004) 120 Cal.App.4th 1389, 1395.)

We conclude that the trial court did not abuse its discretion in denying Mireskandari's two ex parte applications for a continuance, and do so for two reasons. First, both ex parte applications were procedurally defective. A litigant may request a continuance through an ex parte application, but must follow the California Rules of Court for filing such applications. (Rule 3.1332(b).) The rules governing ex parte applications require, among other things, that the application include "[a] declaration based on personal knowledge of the notice [of the ex parte application and hearing]" and "[a] proposed order." (Rule 3.1201(3) & (5).) Mireskandari's first application lacked a declaration of notice and a proposed order, and his second application lacked a proposed order. Because litigants proceeding in pro. per. are "held to the same restrictive procedural rules as an attorney" (*Bistawros v. Greenberg* (1987) 189 Cal.App.3d 189, 193; see also *Wantuch v. Davis* (1995) 32 Cal.App.4th 786, 795), Mireskandari's failure to follow the procedural rules for filing ex parte applications provides a sufficient basis on its own for denying those applications.

Second, the trial court did not abuse its discretion in rejecting Mireskandari's continuance requests on their merits. Mireskandari is correct that several of the relevant considerations cut in favor of a granting a continuance—namely, that he had not previously asked for a continuance and that he had submitted declarations indicating that attorney Moest had been neglectful and that Baxendale-Walker was ill and unable to be present for trial. But the trial court also had before it evidence that undermined the veracity of the declarations Mireskandari submitted, such as (1) the fact that attorney

Moest had been filing discovery responses and objections during the period in which Mireskandari (and attorney Moest himself) said attorney Moest was being neglectful, and (2) the fact that the Los Angeles-based general practitioner had filed a declaration in support of a continuance in the United Kingdom matter purporting to be Mireskandari's doctor rather than Baxendale-Walker's. What is more, several other factors cut against granting a continuance—namely, that the ex parte applications came just days before the scheduled trial date but months after attorney Moest purportedly abandoned the former solicitors, and that Mireskandari was requesting an open-ended continuance until his counsel had time to prepare for trial or until Baxendale-Walker recovered from his "severe debilitating brain illness." Mireskandari invites us to reweigh these various factors in a way that favors him, but we must decline that invitation because such reweighing is the antithesis of review for an abuse of discretion. (*County of Imperial v. Superior Court* (2007) 152 Cal.App.4th 13, 35.)

Mireskandari raises two arguments in response. To begin, he argues that the constitutional right to due process secures the right to be represented by counsel in civil cases, including the counsel of one's choice. (*Roa v. Lodi Medical Group, Inc.* (1985) 37 Cal.3d 920, 925; *Fallis v. Department of Motor Vehicles* (1968) 264 Cal.App.2d 373, 383; *Vann v. Shilleh* (1975) 54 Cal.App.3d 192, 200; *Smith, Smith & Kring v. Superior Court* (1997) 60 Cal.App.4th 573, 580-581.) However, this constitutionally grounded right is not a trump card that prevails over all other considerations. Instead, "the right to representation and to a continuance to allow for that representation is not unlimited and must be considered and balanced with any possible detriment to the other parties and the efficient administration of justice." (*Forrest v. Department of Corporations* (2007) 150 Cal.App.4th 183, 199-200, overruled in part on other grounds by *Shalant v. Girardi* (2011) 51 Cal.4th 1164.) The trial court balanced these competing rights and, for the reasons explained above, did not abuse its discretion in coming to the conclusion it reached. Next, Mireskandari asserts that *Jurado v. Toys "R" Us, Inc.* (1993) 12 Cal.App.4th 1615 dictates a ruling in his favor. We disagree. *Jurado* held that a trial court abused its discretion in denying a continuance when a nonparty witness failed to

appear. (*Id.* at pp. 1618-1619.) In this case, the trial court had ample basis to question the veracity of attorney Moest's claim of neglect and Baxendale-Walker's and the Los Angeles-based practitioner's claims of Baxendale-Walker's ill health; to balance that jaundiced evidence against the factors weighing against a continuance; and to conclude that the balance tipped in favor of denying the continuance.

B. Joint and several liability

The former solicitors argue that the trial court erred in holding each of them jointly and severally liable for the full amount of the unpaid fees when the Blecher firm represented Mireskandari alone on several matters, including the investigation of a lawsuit against Ventura County, the investigation of two malpractice cases against other Los Angeles law firms, the continued representation in the Luxe Hotel Action, and the two 1782 Applications. Although "[a]n obligation imposed upon several persons . . . is presumed to be joint, and not several" unless "overcome . . . by express words to the contrary" (Civ. Code, § 1431), the former solicitors contend that they have rebutted the presumption because (1) Baxendale-Walker never signed the retainer agreement, and (2) Baxendale-Walker should not be held liable for the fees the Blecher firm billed on Mireskandari's matters, as Baxendale-Walker did not benefit from that work. These arguments question whether there was sufficient evidence to support the trial court's findings fixing joint and several liability; we accordingly review the record for substantial evidence, viewing the record in the light most favorable to the verdict and indulging all inferences to support that verdict. (*Webb v. Special Electric Co., Inc.* (2016) 63 Cal.4th 167, 192.)

We conclude there was substantial evidence to support the trial court's rulings on both of the issues the former solicitors contest on appeal. With respect to the former solicitors' first argument, although the hard copy of the retainer agreement produced at trial by the Blecher firm contains only Mireskandari's signature, Mireskandari informed the Blecher firm at the time the retainer agreement was circulating that Baxendale-Walker had also signed the agreement. With respect to the former solicitors' second argument, consistent with the thrust of the 1782 Applications, Maxwell Blecher testified

at the trial that much of the work done by the Blecher firm "was equally applicable" to both solicitors, despite differences in the underlying facts. Although there is certainly evidence suggesting some areas where the overlap was minimal (such as in Mireskandari's lawsuit against Luxe Hotel), we must disregard conflicting evidence when examining the record for substantial evidence. In any event, there are also no "express words to the contrary" from the parties to the retainer agreement that would rebut the statutory presumption that both signatories to that agreement would be liable for the full amount of fees incurred pursuant to that agreement. (Civ. Code, § 1431.)

C. Award of attorney's fees

The former solicitors lastly argue that the trial court erred in awarding the Blecher firm $90,165 in attorney's fees under Civil Code section 1717 because the firm was representing itself in the Fee Action, and it is well settled that a firm representing itself in litigation is not allowed to recover for its own attorney's fees under section 1717. (*Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 93; *Soni v. Wellmike Enterprise Co. Ltd.* (2014) 224 Cal.App.4th 1477, 1490; *Trope v. Katz* (1995) 11 Cal.4th 274, 292; cf. *Lockton v. O'Rourke* (2010) 184 Cal.App.4th 1051, 1075-1076 [this rule may be rebutted if the contract allowing for fees contemplates that a firm may recover for its own attorney's fees].) We cannot reach the merits of this claim because the former solicitors did not file a notice of appeal from the amended judgment awarding those fees.

A notice of appeal from a judgment reaches an appeal from a subsequent, postjudgment award of attorney's fees if "the *entitlement* to fees was *adjudicated* by the original judgment, leaving only the issue of amount for further adjudication." (*DeZerega v. Meggs* (2000) 83 Cal.App.4th 28, 44, italics in original; *Grant v. List & Lathrop* (1992) 2 Cal.App.4th 993, 996-997; *Green v. County of Riverside* (2015) 238 Cal.App.4th 1363, 1373.) However, if a party's entitlement to fees is not addressed by the judgment, a notice of appeal from that judgment does *not* reach an appeal from a subsequent, postjudgment award of fees. (*Silver v. Pacific American Fish Co., Inc.* (2010) 190

Cal.App.4th 688, 694 (*Silver*); *Robinson v. City of Yucaipa* (1994) 28 Cal.App.4th 1506, 1517-1518 (*Robinson*).)

With respect to attorney's fees, the original February 24, 2015 judgment provided: "Pursuant to Civil Code § 1717, [the Blecher firm] is entitled to recover its attorney's fees as provided in the contract between the parties." Although the language on its face is somewhat ambiguous as to whether the Blecher firm's entitlement to attorney's fees had been adjudicated, it is clear from the record it had not been. The Blecher firm had yet to request such fees. More to the point, the current controversy on appeal regarding the Blecher firm's right to obtain fees incurred by its own attorneys had yet to be litigated. In this context, the language in the judgment indicates the Blecher firm's *eligibility* to seek whatever fees might be available under the retainer agreement pursuant to Civil Code section 1717 rather than the firm's *entitlement* to fees following adjudication of the pertinent issues, with only the amount to be inserted later.

Because the former solicitors did not file a notice of appeal from the amended judgment finding that the Blecher firm was entitled to fees and fixing the amount of those fees, their challenge to the attorney's fees award is beyond our jurisdictional reach. (*Silver, supra*, 190 Cal.App.4th at p. 694; *Robinson, supra*, 28 Cal.App.4th at pp. 1517-1518.)

DISPOSITION

The judgments in the Malpractice Action and the Fee Action are affirmed. The Blecher firm is entitled to its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
CHAVEZ