Superior Court of the State of California
County of Orange
TENTATIVE RULINGS FOR DEPARTMENT N16

HON. Donald F. Gaffney

Counsel and Parties Please Note:
Law and Motion in Department N16 is heard on Wednesdays at 9:00 a.m.

Date: May 8, 2024

Tentative Rulings will be posted on the Internet on the day before the hearing by 5:00 p.m. [or earlier] whenever possible. To submit on the tentative ruling, please contact the clerk at (657) 622-5616, after contacting opposing party/counsel. Prevailing party shall give notice of the Ruling and prepare the Order/Judgment for the Court's signature if required.

NOTE: After posting of tentative rulings, the Court will not take the motion off calendar and will grant a continuance of the motion only upon stipulation of all affected parties.

If no appearances are made on the calendared motion date, then oral argument will be deemed to have been waived and the tentative ruling will become the Court's final ruling.

#	Case Name	Tentative
1	Consolidated Design West, Incorporated vs. Top Shelf Packaging, Inc.	**TENTATIVE RULING:** For the reasons set forth below, Defendants Top Shelf Packaging, Inc. and Reuben Garcia's Demurrer to the First Amended Complaint is SUSTAINED, with leave to amend, as to the first, second, third, and fourth causes of action. The Demurrer is OVERRULED as to the fifth, sixth, and seventh causes of action. The Demurrer is also OVERRULED as to the application of the statute of frauds to the second cause of action, and application of the economic loss rule to the fourth, fifth, and sixth causes of action. The Court finds Defendants complied with their meet and confer obligations prior to filing the Demurrer. **Statement of the Law** "The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 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. As used

		in this subdivision, 'uncertain' includes ambiguous and unintelligible." (Code Civ. Proc., § 430.10, subds. (e) & (f); see Code Civ. Proc., § 430.50, subd. (a) [demurrer may be taken to whole pleading or to any of the causes of action stated therein].) "A person against whom a complaint or cross-complaint has been filed may, within 30 days after service of the complaint or cross-complaint, demur to the complaint or cross-complaint." (Code Civ. Proc., § 430.40, subd. (a).) "A demurrer shall distinctly specify the grounds upon which any of the objections to the complaint, cross-complaint, or answer are taken. Unless it does so, it may be disregarded." (Code Civ. Proc., § 430.60.) A demurrer challenges the sufficiency of a pleading by raising questions of law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *ABF Capital Corp. v. Berglass* (2005) 130 Cal.App.4th 825, 833.) As such, the only issue involved in a demurrer hearing is whether the complaint, as it stands, unconnected with extraneous matters, states a cause of action. (*McKenney v. Purepac Pharmaceutical Co.* (2008) 167 Cal.App.4th 72, 77.) If the complaint fails to state a cause of action, the court must grant the plaintiff leave to amend if there is a reasonable possibility the defect can be cured by amendment. (*Blank, supra,* 39 Cal.3d at p. 318.) On the other hand, "a trial court does not abuse its discretion by sustaining a general demurrer without leave to amend if it appears from the complaint that under the applicable substantive law there is no reasonable possibility that an amendment could cure the complaint's defect." (*Heckendorn v. City of San Marino* (1986) 42 Cal.3d 481, 486.) In ruling on a demurrer, the trial court must accept as true all material facts properly pleaded in plaintiff's petition, disregarding only conclusions of law and allegations contrary to judicially noticed facts. (*Burt v. County of Orange* (2004) 120 Cal.App.4th 273, 277.) All that is necessary as against a general demurrer is to plead facts entitling the plaintiff to some relief under any possible legal theory. (*Woods v. Superior Court* (1981) 28 Cal.3d 668, 673.) In evaluating the demurrer, the trial court gives the pleading a reasonable interpretation by reading it as a whole and all of its parts in their context. (*Blank, supra*, 39 Cal.3d at p. 318.) "'A general demurrer admits the truth of all material factual allegations in the complaint [citation]; … the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court.' [Citations.]" (*Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 936; see *Knickerbocker v. City of Stockton* (1988) 199 Cal.App.3d 235, 245 [proof of damages].)

Merits

First and Second Causes of Action for Breach of Written Contract and Breach of Oral Contract

Defendants contend the first and second causes of action for breach of written contract and breach of oral contract must fail because the allegations are uncertain and it cannot be ascertained from the FAC whether the alleged contract was written, oral, or implied by conduct. According to Defendants, Plaintiff has not pled in the alternative. In addition, Defendants contend Plaintiff has not stated which terms of the alleged oral agreement were breached.

In opposition, Plaintiff contends it has properly attached the written Agreement to the FAC, and has alleged on information and belief that the fully executed Agreement is in Defendants' possession. Plaintiff also contends it has sufficiently alleged that that the parties' 20-year course of conduct is documented in many writings which are incorporated by reference. Regarding the oral contract, Plaintiff contends it has adequately alleged breach and that proof of the oral contract is contained in several documents and communications that are in the possession of the parties.

Plaintiff's arguments are unavailing. A cause of action for breach of contract must allege the following elements: (1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff. (*Reichert v. General Ins. Co.* (1968) 68 Cal.2d 822, 830.) To successfully plead the existence of a written contract, the plaintiff must either attach a copy of the contract and incorporate it by reference, plead the terms *in verbatim*, or plead the legal effect. (*Construction Protective Services, Inc. v. TIG Specialty Ins. Co.* (2002) 29 Cal.4th 189, 198-99; *Wise v. Southern Pacific Co.* (1963) 223 Cal.App.2d 50, 59 (overruled on other grounds, *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 521, fn.10).) An oral contract may be pleaded generally as to its effect, because it is rarely possible to allege the exact words. (*Khoury v. Maly's of California, Inc*. (1993) 14 Cal.App.4th 612, 616.)

Here, Plaintiff alleges the parties entered into the written Agreement in December 2004, and it has attached a "version" of the Agreement as Exhibit B to the FAC. Plaintiff then alleges the parties proceeded under the written Agreement, "under terms of the Agreement and practice over the years", and "via a separate understanding and agreement (consistent with the written

		Agreement)". (FAC, ¶¶ 12, 13.) Thus, within a single paragraph of the FAC, Plaintiff has alleged the existence of the written Agreement, an unspecified oral agreement, and an implied-in-fact contract—with the latter two allegedly being consistent with the written Agreement. Although it is acceptable to plead in the alternative or make inconsistent factual allegations (*Mendoza v. Rast Produce Co., Inc.* (2006) 140 Cal.App.4th 1395, 1402), Plaintiff has not adequately done so here. To successfully plead in the alternative, each version of the facts or each legal theory should be pleaded in a separate cause of action. (Cal. Practice Guide: Civil Procedure Before Trial (Rutter Group, 2023 Update), § 6:244, citing to *Campbell v. Rayburn* (1954) 129 Cal.App.2d 232, 235.) Plaintiff has not done so here. Nevertheless, to the extent that any written, oral, or implied-in-fact contract may have existed, Plaintiff's first and second causes of action are uncertain because Plaintiff's allegations are contradicted by the attached exhibit. Plaintiff alleges that, under the written Agreement, Defendant Top Shelf would send its employee payroll costs to Plaintiff "as part of the reimbursed costs under the Agreement." (FAC, ¶ 13.) In addition, Plaintiff alleges that, under the purported oral agreement, the parties had agreed that "all profits and costs would be split in a 60/40 manner and that the two companies would work together as effectively a joint venture." (*Ibid.*) Plaintiff alleges that Defendants breached the written Agreement and oral contract, in part, by adding Defendant Garcia's payroll/pay to the reimbursement requests to Plaintiff. (FAC, ¶¶ 25, 30.) But the attached copy of the written Agreement does not comport with Plaintiff's allegations about the parties' agreement. The written Agreement provided by Plaintiff simply states in part: > [Top Shelf] will earn a commission of 60% > Of the gross margin on all sales to [Plaintiff's] customers identified as procured by [Top > Shelf]. Gross Margin is defined as the invoiced sales price less the direct costs of sale. > Upon collection by [Plaintiff] of the customer Invoice, [Top Shelf's] earned commission will be paid to [Top Shelf] …. [Plaintiff's] only form of remuneration to [Top Shelf] under this Agreement is for commissions earned on

		paid customer invoices. (FAC, Exh. B, pp. 2, 3.) There are no other provisions in the written Agreement regarding costs or the split between Plaintiff and Top Shelf. There also are no provisions in the written Agreement regarding "reimbursed costs".[1] Furthermore, it is noted that the written Agreement expressly states, "This Agreement may not be changed except in writing, signed by both parties and authorized by an officer of [Plaintiff]. This writing contains the entire Agreement between the parties." (FAC, Exh. B, p. 3.) This provision contradicts Plaintiff's allegation of the existence of an oral agreement or implied-in-fact contract between the parties. " 'While the "allegations [of a complaint] must be accepted as true for purposes of demurrer," the "facts appearing in exhibits attached to the complaint will also be accepted as true and, if contrary to the allegations in the pleading, will be given precedence."' [Citation.]" (*Moran v. Prime Healthcare Management, Inc.* (2016) 3 Cal.App.5th 1131, 1145-1146.) Here, Plaintiff bases its claims for relief on the alleged terms of the written Agreement, as well as oral and implied-in-fact contracts that are purportedly consistent with the written Agreement. However, the allegations in the FAC are contradicted by the attached written Agreement, and Plaintiff has not adequately stated any additional terms under the alleged oral or implied-in-fact contracts. The general and special Demurrer to the first and second causes of action are sustained, with leave to amend. **State of Frauds Inapplicable to Second Cause of Action for Breach of Oral Contract** Defendants contend that, to the extent Plaintiff's breach of oral contract claim is pled in the alternative, it is barred by the statute of frauds pursuant to Civil Code section 1624, subdivision (a)(1). Defendants note that Plaintiff has alleged the existence of a separate oral agreement that may have arisen sometime between 2004 and 2020, and that it involved a "joint venture" agreement.

[1] It is also noted that the copy of the written Agreement attached to the FAC is not fully executed. (*See*, FAC, Exh. B.)

		In opposition, Plaintiff contends that the oral agreement at issue is not one which, by its terms, could not be performed within one year. According to Plaintiff, the written Agreement underlying the oral agreement provides that it is terminable at any time by either party with 30 days' notice. As a result, Plaintiff argues that since the related oral agreement could have been completed within one year, the statute of frauds does not apply, and it is irrelevant that the agreement actually lasted longer than one year. Plaintiff also contends that Defendants are estopped from invoking the statute of frauds because they have received the benefit of Plaintiff's performance of the oral agreement. Defendants' argument is not well taken. "The following contracts are invalid, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent: … An agreement that by its terms is not to be performed within a year from the making thereof." (Civ. Code, § 1624, subd. (a)(1).) "The statute of frauds does not require a written contract; a 'note or memorandum ... subscribed by the party to be charged' is adequate. [Citation.]" (*Sterling v. Taylor* (2007) 40 Cal.4th 757, 765.) "A memorandum satisfies the statute of frauds if it identifies the subject of the parties' agreement, shows that they made a contract, and states the essential contract terms with reasonable certainty. [Citations.] 'Only the essential terms must be stated, " 'details or particulars' need not [be]. What is essential depends on the agreement and its context and also on the subsequent conduct of the parties...." [Citation.]' [Citations.]" (*Id.* at p. 766.) "[T]he writing requirement of the statute of frauds '"serves only to prevent the contract from being unenforceable" [citation]; it does not necessarily establish the terms of the parties' contract.' [Citation.]" (*Sterling v. Taylor* (2007) 40 Cal.4th 757, 766; accord, *Reeder v. Specialized Loan Servicing LLC* (2020) 52 Cal.App.5th 795, 801.) Unlike the parol evidence rule, "the statute of frauds 'merely serve[s] an evidentiary purpose.' [Citation.] (*Sterling, supra,* 40 Cal.4th at p. 766.) "If a term is stated in a memorandum with sufficient certainty to be enforced, it satisfies the statute of frauds." (Id. at p. 773.) In addition, the doctrine of estoppel can be relied upon to defeat a statute of fraud defense in order "to prevent fraud and unconscionable injury that would result from the refusal to enforce oral contracts in certain circumstances—i.e., after one party has been induced by the other seriously to change position in reliance

on the contract, or when unjust enrichment would result if a party who has received the benefits of the other's performance was allowed to rely upon the statute. [Citation.]" (*Whorton v. Dillingham* (1988) 202 Cal.App.3d 447, 456; *Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18, 27; see *Smyth v. Berman* (2019) 31 Cal.App.5th 183, 198 ["A party may be estopped from asserting the statute of frauds as a defense to a contract in order to 'prevent fraud that would result from refusal to enforce [an] oral contract' "].)

Furthermore, "Part performance allows enforcement of a contract lacking a requisite writing in situations in which invoking the statute of frauds would cause unconscionable injury. '[T]o constitute part performance, the relevant acts either must "unequivocally refer[]" to the contract [citation], or "clearly relate" to its terms. [Citation.] Such conduct satisfies the evidentiary function of the statute of frauds by confirming that a bargain was in fact reached. [Citation.]' [Citation.] In addition to having partially performed, the party seeking to enforce the contract must have changed position in reliance on the oral contract to such an extent that application of the statute of frauds would result in an unjust or unconscionable loss, amounting in effect to a fraud. [Citations.]" (*Secrest v. Security National Mortgage Loan Trust 2002-2* (2008) 167 Cal.App.4th 544, 555.)

Here, Plaintiff has alleged that the purported oral agreement was consistent with the written Agreement, and the parties' contractual relationship lasted from 2004 to March 2023. (FAC, ¶ 28.) As a preliminary matter, to the extent the oral agreement was consistent with the written Agreement, that writing arguably satisfies the statute of frauds. Moreover, the written Agreement upon which the oral agreement is allegedly based states in relevant part:

> This Agreement commences on 12/20/2004 and is effective for ___ calendar months thereafter, at which time this Agreement will be extended without further notice for an additional year. Either party may terminate this Agreement at any time upon thirty (30) days advanced written notice.

(FAC, Exh. B, p. 3.)

This language indicates that the written Agreement, and thus the alleged oral agreement, could, by their terms, have been performed in less than a year. Therefore, the statute of frauds does not apply.

		Notably, in their reply, Defendants do not raise the statute of frauds defense, and do not challenge Plaintiff's arguments. The Demurrer brought on this ground to the second cause of action is overruled. **Third Cause of Action for Breach of Implied Covenant of Good Faith and Fair Dealing** Defendants contend the third cause of action fails because it is duplicative of Plaintiff's breach of contract claim, and therefore, it is superfluous. As argued by Defendants, to successfully plead this cause of action, Plaintiff must do more than simply re-allege and re-label a breach of contract claim. In opposition, Plaintiff generally contends that breach of the implied covenant of good faith and fair dealing is an independent cause of action, and that a breach of the implied covenant is a breach of the contract. As argued by Plaintiff, it has alleged that Defendants are in breach because they improperly or fraudulently billed costs and expenses not contemplated in the "contract". Plaintiff contends this conduct as alleged can constitute both a breach of contract and a breach of the implied covenant. A breach of the implied covenant of good faith and fair dealing involves unfair dealing in the form of a conscious and deliberate act that unfairly frustrates the agreed common purpose of the contract and disappoints the reasonable expectations of the other party to the contract. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1394.) "The prerequisite for any action for breach of the implied covenant of good faith and fair dealing is the existence of a contractual relationship between the parties, since the covenant is an implied term in the contract." (*Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 525, quoting *Smith v. City and County of San Francisco* (199) 225 Cal.App.3d 38, 49.) "Without a contractual underpinning, there is no independent claim for breach of the implied covenant." (*Jenkins, supra,* quoting *Fireman's Fund Ins. Co. v. Maryland Casualty Co.* (1994) 21 Cal.App.4th 1586, 1599.) Here, Plaintiff's argument is unavailing and ignores Defendants' contention. Defendants do not contend that Plaintiff has not sufficiently stated an underlying breach of contract claim, but that Plaintiff's breach of contract claims and breach of implied covenant claim are duplicative. A review of Plaintiff's breach of contract causes of action and breach of implied covenant cause of

		action reveal that Defendants are correct—the causes of action are practically identical. It is well settled that if a plaintiff's allegations of breach of the implied covenant of good faith "do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated." (*Careau, supra,* 222 Cal.App.3d at p. 1395; see also, *Bionghi v. Metropolitan Water Dist. of Southern California* (1999) 70 Cal.App.4th 1358, 1370.) In this instance, Plaintiff's claim of the breach of the implied covenant relies on the same acts, and seeks the same damages, as its claims for breach of written contract and breach of oral contract. (*See,* FAC, ¶¶ 33-40.) Although Plaintiff may be able to successfully allege this claim, it has not done so here. The Demurrer to the third cause of action is sustained, with leave to amend. **Fourth, Fifth, and Sixth Causes of Action Not Barred by Economic Loss Doctrine** "In general, there is no recovery in tort for negligently inflicted 'purely economic losses,' meaning financial harm unaccompanied by physical or property damage." (*Moore v. Centrelake Med. Grp., Inc.* (2022) 83 Cal. App. 5th 515, 534–35.) "The economic loss rule applies, inter alia, where the parties are in contractual privity and the plaintiff's claim arises from the contract (in other words, the claim is not independent of the contract)." (*Id*. at 535.) However, one exception to the economic loss rule is if a party is fraudulently induced to enter into the contract. "To establish a claim of fraudulent inducement, one must show that the defendant did not intend to honor its contractual promises when they were made." (*Food Safety Net Servs. v. Eco Safe Sys. USA, Inc.* (2012) 209 Cal. App. 4th 1118, 1131.) "[A] party alleging fraud or deceit in connection with a contract must establish tortious conduct independent of a breach of the contract itself, that is, violation of 'some independent duty arising from tort law.'" (*Id*. at 1130.) "[S]omething more than nonperformance is required to prove the defendant's intent not to perform his promise." (*Id*. at 1131.)

		"Tort damages have been permitted in contract cases where a breach of duty directly causes physical injury [citation]; for breach of the covenant of good faith and fair dealing in insurance contracts [citation]; for wrongful discharge in violation of fundamental public policy [citation]; or where the contract was fraudulently induced. [Citation.]" (*Robinson Helicopter Co. v. Dana Corp.* (2004) 34 Cal. 4th 979, 989–90.) "[I]n each of these cases, the duty that gives rise to tort liability is either completely independent of the contract or arises from conduct which is both intentional and intended to harm." (*Id*. at 990.) "[T]ortious breach of contract ... may be found when (1) the breach is accompanied by a traditional common law tort, such as fraud or conversion; (2) the means used to breach the contract are tortious, involving deceit or undue coercion; or (3) one party intentionally breaches the contract intending or knowing that such a breach will cause severe, unmitigable harm in the form of mental anguish, personal hardship, or substantial consequential damages." (*Id*.) Here, in their Demurrer and Reply, Defendants contend the causes of action for intentional interference with prospective economic relations, fraud, and intentional misrepresentation—i.e., the fourth through sixth causes of action—are barred under the economic loss doctrine. Regarding the fourth cause of action for intentional interference, Defendants contend that the economic loss doctrine bars tort claims based on the same facts and damages as a breach of contract claim. According to Defendants, Plaintiff has only brought this cause of action against Defendant Garcia and alleged that he "interfered" with Top Shelf's contractual relationship with Plaintiff. Defendants contend this allegation is nonsensical because Garcia is Top Shelf's owner and operator. In addition, Defendants argue this cause of action simply restates the breach of contract claim by alleging that Garcia interfered with Plaintiff's receipt of the benefit of the alleged agreement. In citing to *Robinson Helicopter*, Defendants contend the economic loss rule "prevents the law of contract and the law of tort from dissolving one into the other." Similarly, regarding the fourth and fifth causes of action for fraud and intentional misrepresentation, Defendants contend the claims simply re-allege Plaintiff's breach of written contract claim. The breach of contract claim alleges that Defendants breached the Agreement by "improperly and fraudulently adding [Defendant] Garcia's payroll/pay into the reimbursement requests", improperly billing certain costs and expenses, failing to share PPP funds, and

		improperly recouping monies from customers without reimbursing Plaintiff. (FAC, ¶ 25.) Defendants contend, however, that the fraud and intentional misrepresentation causes of action state the exact same allegations and use substantially similar language as the breach of contract claim. (FAC, ¶¶ 57, 64.) In opposition, Plaintiff does not address Defendants' application of the economic loss doctrine to the intentional interference claim. However, regarding the fraud and intentional misrepresentation causes of action, Plaintiff first contends the economic loss rule is inapplicable because it is meant to apply to product defects cases. Alternatively, Plaintiff contends the rule generally does not apply to intentional tort claims, and is inapplicable to its intentional misrepresentation and fraud claims in the FAC because it has been held that the negligent performance of a contract for services can give rise to claims sounding in tort and in contract. Plaintiff also argues that the economic loss rule does not apply where there is a special relationship between the parties—although Plaintiff fails to define the "special relationship" between it and Defendants. Contrary to Defendants' position, these three causes of action are not merely repackaged breach of contract claims. Instead, they reflect Plaintiff's allegation that Garcia's and/or Top Shelf's conduct—namely, fraudulently including Garcia's pay in reimbursement requests, fraudulently billing costs and expenses to Plaintiff and its customers, and otherwise fraudulently inducing Plaintiff to make non-contractual payments to Defendants—was intentional, and these actions were taken with the intent of harming Plaintiff and Plaintiff's relationships with its customers. As the California Supreme Court has held, the economic loss rule does not bar such claims. (*Robinson Helicopter, supra,* 34 Cal.4th at p. 990.) The Demurrer to the fourth, fifth, and sixth causes of action brought on this ground is overruled. **Fourth Cause of Action for Intentional Interference With Prospective Economic Advantage** Defendants also contend the fourth cause of action fails because Plaintiff does not allege sufficient facts to state the claim. Defendants argue that Plaintiff has not adequately alleged that any of their customers terminated their contracts with Plaintiff, or that any customers did less business or failed to enter into a contract with Plaintiff.

		In opposition, Plaintiff contends that Defendants are improperly applying a fraud-like specificity in pleading requirement that does not pertain to a claim of interference with prospective economic relations. Plaintiff then generally asserts that it has properly alleged the elements of the claim. A claim for intentional interference with prospective economic relations requires a plaintiff to establish: (1) an economic relationship existing between the plaintiff and third party, (2) probability of future economic benefit to plaintiff, (3) defendant's knowledge of the relationship, (4) defendant's intentional acts designed to disrupt the relationship, (5) defendant engaged in an independently wrongful act in disrupting the relationship beyond just inducing disruption of economic advantage, (6) actual disruption of the relationship, and (7) economic harm to the plaintiff caused by the acts. (*Salma v. Capon* (2008) 161 Cal. App. 4th 1275, 1290; *see also Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1153-54.) With this cause of action, some wrongfulness apart from the impact of the defendant's conduct on that prospect is required. (*Quelimane Co., Inc. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 56, citing to *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 392.) Here, Plaintiff has failed to adequately allege the elements of this cause of action. In the FAC, Plaintiff first alleges that Defendant Garcia knew of Plaintiff's economic relationships with Defendant Top Shelf and third party customers. (FAC, ¶¶ 42-44.) Plaintiff then alleges that as to Top Shelf, Garcia's submission of improper reimbursement claims, improper billing of costs and expenses, and failure to return Plaintiff's confidential information "disrupted" the relationship between Plaintiff and Top Shelf. (FAC, ¶¶ 44-45.) However, Plaintiff has also alleged that Top Shelf "improperly and fraudulently added Garcia's payroll/pay into the reimbursement requests, … purposefully and intentionally hid additional payroll and reimbursement in line items in the reimbursement requests", and did so in order to "improperly obtain additional money from [Plaintiff]." (FAC, ¶ 16.) Such affirmative allegations of inconsistent facts are not permitted because they are inherently contradictory and incapable of reconciliation. (*Manti v. Gunari* (1970) 5 Cal.App.3d 442, 449.) Regarding Plaintiff's allegations of interference with third party relationships, they are also inadequate. Plaintiff has failed to allege any actual disruption of any relationships with its current or potential customers. (*See,* FAC, ¶¶ 46-49.) Instead, Plaintiff has

		only generally alleged that Garcia's conduct: (1) disrupted the relationship between Plaintiff and its customers, (2) prevented Plaintiff "from receiving benefits under other contracts and relationships with third parties, including other customers and clients", and (3) interfered with "other current/potential customers." (*Ibid.*) These allegations are not sufficient to state this claim. The Demurrer to the fourth cause of action is sustained, with leave to amend. **Fifth and Sixth Causes of Action for Fraud and Intentional Misrepresentation** Defendants contend that Plaintiff has failed to allege the elements of the fifth and sixth causes of action with the requisite specificity. According to Defendants, Plaintiff has not alleged the specific nature of the fraud or misrepresentations made by Defendants, but instead, has only stated conclusory allegations that Defendants made false "representations" without alleging how, when, where, or to whom the representations were made. In addition, Defendants contend that Plaintiff has not alleged that Defendant had knowledge of any alleged misrepresentations, that Defendants had the intent to defraud, or that Plaintiff justifiably relied on any alleged misrepresentations. To adequately state a fraud-based cause of action, a plaintiff must allege the following *prima facie* elements: (1) misrepresentation (false representation or concealment); (2) knowledge of falsity; (3) intent to deceive; (4) justifiable reliance; and (5) resulting damage. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638; *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951.) "'In California, fraud must be pled specifically; general and conclusory allegations do not suffice. [Citations.] "Thus '"the policy of liberal construction of the pleadings … will not ordinarily be invoked to sustain a pleading defective in any material respect."' [Citation.] This particularity requirement necessitates pleading facts which 'show how, when, where, to whom, and by what means the representations were tendered.'"' [Citation.]" (*Small v. Fritz Companies Inc.* (2003) 30 Cal.4th 167, 184.) The purpose of the requirement that fraud be pled specifically is to "provide[] enough information for respondents to know what purported falsehoods they must defend against. [Citation.]" (*Murphy v. BDO Seidman, LLP* (2003) 113 Cal.App.4th 687, 693.) Furthermore, in the case of a corporate defendant, "a plaintiff must allege the names of the persons who made the misrepresentations, their authority to speak

for the corporation, to whom they spoke, what they said or wrote, and when it was said or written." (*Perlas v. GMAC Mortgage, LLC* (2010) 187 Cal.App.4th 429, 434; *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645.) Thus, a general pleading of the legal conclusion of "fraud" is insufficient to survive demurrer.

An exception to the strict pleading standard is recognized when it appears the facts lie more within defendant's knowledge than plaintiff's, i.e., less specificity is required where "defendant must necessarily possess full information concerning the facts of the controversy." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216, superseded by statute on other grounds, as discussed in *Sanchez v. Bear Stearns Residential Mortg. Corp.* (S.D.Cal. May 11, 2010, No. 09-CV-2056 JLS (CAB)) 2010 U.S.Dist.LEXIS 46043, at *18, fn. 4 [discussing how the November 2, 2004 enactment of Proposition 64 requires a private person has standing to sue under the UCL only if he or she has suffered injury in fact, and has lost money or property as a result of such unfair competition]; see *Miles v. Deutsche Bank Nat'l Trust Co.* (2015) 236 Cal.App.4th 394, 403-404 [omission of names of mortgage servicer employees and their authority to speak not fatal to fraud claim where defendants had more knowledge of the facts than did plaintiffs]; *Tenet Healthsystem Desert, Inc. v. Blue Cross of Calif.* (2016) 245 Cal.App.4th 821, 840 [complaint need not specify information uniquely within defendants' knowledge, such as who prepared documents in question].)

Here, Defendants' arguments are not well taken. As noted by Plaintiff, the FAC alleges the following:

- Top Shelf improperly and fraudulent added Garcia's pay into reimbursement requests (FAC, ¶ 57);
- Top Shelf would hide the line item in the reimbursement requests in order to hide its inclusion (*Ibid.*);
- Top Shelf knew the reimbursement was improper (*Ibid.*);
- Defendants mispresented certain facts and information in order to fraudulently induce Plaintiff to pay additional money to Defendants. These misrepresentations (identified in the FAC) concerned material facts that would have prevented Plaintiff from continuing its business relationship with Defendants (*Id.*, ¶ 59);
- Defendants "knew and were actively engaged" in this fraudulent behavior (*Id.*, ¶ 60);
- Plaintiff justifiably relied on Defendants' misrepresentations, including relying on certain facts and information provided by Defendants that they would abide

by the terms of the agreements (*Id.*, ¶ 69);
- As a result of Plaintiff's reliance on Defendants' misrepresentations, Plaintiff has suffered economic and non-economic damages (*Id.*, ¶ 70).

Contrary to Defendants' arguments, Plaintiff has adequately alleged the elements of the fraud and intentional misrepresentation claims. By their allegations, Plaintiff implies that Garcia, as owner and operator of Top Shelf, made these misrepresentations. Because of the nature of the misrepresentations, Defendants ostensibly have more knowledge of the facts, thus necessitating less specificity by Plaintiff.

The Demurrer to the fifth and sixth causes of action is overruled.

Seventh Cause of Action for Unfair Business Act or Practice

Defendants contend that the unfair business practices claim must fail because the allegations are "conclusory" and "threadbare". According to Defendants, Plaintiff does not identify any specific acts or conduct that were allegedly unlawful, unfair, or fraudulent, and only bases its UCL claim on the contractual dispute between the parties.

In opposition, Plaintiff contends it has sufficiently alleged the claim since it has properly alleged that Defendants acted with the intent to defraud.

The Unfair Competition Law ("UCL"), as codified in Bus. & Prof. Code section 17200 *et seq.*, prohibits any unlawful, unfair or fraudulent business practice. The UCL is written in the disjunctive, which means a business act or practice can be alleged to be all or any of the three prongs. (*Berryman v. Merit Property Management, Inc.* (2007) 152 Cal.App.4th 1544, 1554.) The UCL was enacted "to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services." (*Linear Technology Corp. v. Applied Materials, Inc.* (2007) 152 Cal.App.4th 115, 135, quoting *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 949.)

To successfully state a claim for violation of Section 17200, a plaintiff must successfully allege that the defendant engaged in unlawful, unfair, or fraudulent business practices. (*Berryman v. Merit Property Management, Inc.* (2007) 152 Cal.App.4th 1544, 1554.) Moreover, a claim for violation of the UCL must plead with reasonable particularity the facts that support the statutory

		elements of the violation. (*Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 619.) In addition, a private plaintiff must be able to show economic injury caused by unfair competition. (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 336.) Here, as discussed above, Plaintiff has adequately alleged its fraud and intentional misrepresentation causes of action. This is enough to maintain its claim of UCL violations. As a result, the Demurrer to the seventh cause of action is overruled. Defendants to give notice.
2	Monarch Bay Association vs. MSSK Ventures, LLC	**TENTATIVE RULING:** Cross-Defendants Monarch Bay Association, Marc Kazarian, Len Shulman, Lisa Klasky, Peter Burke, and George O'Connell demur to the first through ninth causes of action in the cross-complaint by Cross-Complainant MSSK Ventures, LLC. For the reasons below, the demurrer is DENIED as moot. On February 22, 2024, the court entered an order relieving Miles Scully and Gordon Rees Scully Mansukhani as counsel for Defendants and Cross-Complainants MSSK Ventures, LLC, and Kelly Gwin. (ROA #285). At the February 21, 2024, hearing on that motion, the court admonished that Defendant and Cross-Complainant MSSK Ventures, LLC, is a corporate entity that cannot represent itself. (ROA #298, citing *Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1284 n.5.) Defendant MSSK Ventures, LLC, must obtain representation or risk forfeiting important rights through nonrepresentation (*Ibid*.) The court's Minute Order, dated February 21, 2024 (ROA 298), set a hearing on March 26, 2024, regarding the status of Defendant and Cross-Complainant MSSK Ventures, LLC's obtaining counsel. There was no appearance on behalf of MSSK Ventures at the March 26th hearing. To date, there is no evidence in the court's record that MSSK Ventures, LLC has since retained counsel. "[U]nder a long-standing common law rule of procedure, a corporation, unlike a natural person, cannot represent itself before courts of record in propria persona, nor can it represent itself through a corporate officer, director or other employee who is not an attorney. It must be represented by licensed counsel in proceedings before courts of record. [Citation omitted.])" (*CLD Const., Inc. v.*

		City of San Ramon (2004) 120 Cal. App. 4th 1141, 1145.) A trial court may strike a pleading upon terms the court deems proper. (Cal. Civ. Proc. Code § 436). Because MSSK Ventures, LLC still remains unrepresented, the cross-complaint (ROA 249) is stricken. The Answer by MSSK Ventures, LLC (ROA 87) is also stricken, but only as it relates to MSSK Ventures, LLC. The Answer remains as it relates to Defendant Kelly Gwin. Moving party to give notice.
3	Spark vs. General Motors LLC	**OFF CALENDAR**
4	Flores vs. Kia America, Inc.	**TENTATIVE RULING:** Plaintiff moves to compel further responses to Plaintiff's Request for Production of Documents, Set one. For the following reasons, hearing on the Motion is CONTINUED to August 21, 2024, at 9:00 a.m. in this Department. Trial is continued to 2/24/25, and the pre-trial conference is continued to 2/21/25, both at 9:00 a.m. in this Department. All discovery and motion cut-off dates will correspond to the new trial date. The court has reviewed the Complaint in this case. Based on that review, the court tentatively finds that the Complaint does not contain allegations sufficient to support venue in Orange County. Thus, the court hereby sets for hearing an OSC re Change of Venue, to be heard in this Department on 7/17/24 at 9:00 a.m. Any written response to the OSC re Change of Venue must be filed at least 5 court days prior to the hearing. The court orders that any such written response include a true and correct copy of the sales/lease agreement of the vehicle at issue. Plaintiff to give notice.
5	Peper vs. City of Costa Mesa	**TENTATIVE RULING:** **Motion to Compel Deposition**. Plaintiff Aida Peper moves to compel the deposition of the person most qualified for Defendant Segerstrom Center for the Arts. For the following reasons, the motion is DENIED without prejudice.

		Plaintiff brings this motion pursuant to Code Civ. Proc. § 2025.450, which states: "If, after service of a deposition notice, a party to the action…without having served a valid objection under Section 2025.410, fails to appear for examination, or to proceed with it, or to produce for inspection any document…the party giving the notice may move for an order compelling the deponent's attendance and testimony, and the production for inspection of any document…" Here, Plaintiff served a Notice of Deposition on Defendant Segerstrom Center for the Arts ("Segerstrom") on October 27, 2023, noticing the deposition of Segerstrom's Person Most Knowledgeable for November 14, 2023. (Reyes Dec., Ex. 1.) Counsel for the parties discussed the timing of the deposition and on November 13, 2023, someone from Plaintiff's counsel's office stated in email, "we'll coordinate for early December." (Id., Ex. 4.) Plaintiff's counsel evidently did not communicate any further on this topic until December 29, 2023, when Plaintiff's counsel sent a letter requesting a deposition date. (Id., Ex. 5.) Counsel began communicating on the topic further. (Id., Exs. 6-8.) On January 12, 2024, Plaintiff's counsel sent a "last and final attempt to meet and confer" requesting deposition dates within 3 days. Defendant's counsel evidently began paternity leave on January 18, 2024. (Webber Dec., ¶ 9.) The attorneys began speaking further on the topic and Segerstrom proposed that the depositions occur on April 26, 2024, but Plaintiff did not respond to this offer. (Id., ¶¶ 11-13, Ex. D.) Accordingly, the motion is denied without prejudice for failure to meet and confer adequately. The parties should be able to resolve this dispute informally. Further, the motion is also denied without prejudice as premature because Plaintiff has not shown that Defendant failed to appear for examination under Code Civ. Proc. § 2025.450. Finally, even if the Court were to grant the motion to compel the deposition, the Court would need to deny the motion to compel the deponent to produce the documents requested in the deposition notice. Code Civ. Proc. § 2025.450(a) provides that the moving party may seek an order compelling production of documents sought in the deposition notice, but such motion must set forth facts showing good cause justifying the production of the documents sought. (Code Civ. Proc. § 2025.450(b)(1).) To establish "good cause," the burden is on the moving party to show both: (1) relevant to the subject matter (e.g., how the information in the document would tend to prove or disprove some issue in the

		case); and (2) specific facts justifying discovery (e.g., why such information is necessary for trial preparation or to prevent surprise at trial). (*Glenfed Develop. Corp. v. Superior Court (National Union Fire Ins. Co. of Pittsburgh, Pa.)* (1997) 53 Cal. App. 4th 1113, 1117.) Plaintiff has not made a showing of good cause for the documents requested in the deposition notice, either in Plaintiff's counsel's declaration or in the motion itself. Both parties' requests for sanctions are denied. Both parties should have been more diligent to resolve this informally. Plaintiff's counsel should not have waited over a month and a half to resume communications on scheduling the deposition and Defendant's counsel should have been able to provide a deposition date quicker. Plaintiff to give notice.
6	Valencia vs. General Motors LLC	**TENTATIVE RULING:** Plaintiff moves to compel further responses to Plaintiff's Request for Production of Documents (Set One), Form Interrogatories (Set One), and Special Interrogatories (Set One). For the following reasons, hearing on the Motion is CONTINUED to August 21, 2024, at 9:00 a.m. in this Department. Trial is continued to 2/24/25, and the pre-trial conference is continued to 2/21/25, both at 9:00 a.m. in this Department. All discovery and motion cut-off dates will correspond to the new trial date. The court has reviewed the Complaint in this case. Based on that review, the court tentatively finds that the Complaint does not contain allegations sufficient to support venue in Orange County. The court hereby sets for hearing an OSC re Change of Venue, to be heard in this Department on 7/17/24 at 9:00 a.m. Any written response to the OSC re Change of Venue must be filed at least 5 court days prior to the hearing. The court orders that any such written response include a true and correct copy of the sales/lease agreement of the vehicle at issue. Plaintiff to give notice.
7	Aztec Leasing Inc vs. Baronhr, LLC	**CONTINUED TO 5/22/24**

8	Asics America Corporation vs. Shoebacca Ltd.	**TENTATIVE RULING:** For the reasons set forth below, Plaintiff and Cross-Defendant Asics America Corporation's Motion to Seal Certain Documents is GRANTED. Exhibits A, B, and E to the Supplemental Declaration of Braden M. Wayne in support of Defendant Shoebacca, Ltd.'s Reply Brief to its Motion to Reopen the Deposition of Travis Velez [ROA # 1101, 1102, and 1103], and portions of Defendant's Reply Brief to its Motion to Reopen the Deposition of Travis Velez [ROA # 1104], are sealed. **Statement of Law** "Unless confidentiality is required by law, court records are presumed to be open." (Cal. Rules of Court, rule 2.550(c); *In re Marriage of Tamir* (2021) 72 Cal.App.5th 1068, 1079.) "A record must not be filed under seal without a court order. The court must not permit a record to be filed under seal based solely on the agreement or stipulation of the parties." (Cal. Rules of Court, rule 2.551(a).) "A party requesting that a record be filed under seal must file a motion or an application for an order sealing the record. The motion or application must be accompanied by a memorandum and a declaration containing facts sufficient to justify the sealing." (Cal. Rules of Court, rule 2.551(b)(1); see Cal. Rules of Court, rule 2.551(b)(2) [motion must be served on all parties]; see also Cal. Rules of Court, rule 2.551(b)(4)-(b)(5), (d) [rules regarding lodging of redacted and unredacted records].) The court may order that a record be filed under seal only if it expressly finds facts that establish: (1) There exists an overriding interest that overcomes the right of public access to the record; (2) The overriding interest supports sealing the record; (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) The proposed sealing is narrowly tailored; and

(5) No less restrictive means exist to achieve the overriding interest.

(Cal. Rules of Court, rule 2.550(d); *Timothy W. v. Julie W*. (2022) 85 Cal.App.5th 648, 301; *In re Marriage of Tamir, supra*, 72 Cal.App.5th at p. 1079; see *Kirk v. Ratner* (2022) 74 Cal.App.5th 1052, 1056, fn. 2 [settlement agreement obligated any party petitioning to vacate the arbitrator's award to seek an order sealing all documents in the court file, and the superior court granted motions by all parties to seal all documents filed with the court].)

(1) If the court grants an order sealing a record and if the sealed record is in paper format, the clerk must substitute on the envelope or container for the label required by (d)(2) a label prominently stating "SEALED BY ORDER OF THE COURT ON (DATE)," and must replace the cover sheet required by (d)(3) with a filed-endorsed copy of the court's order. If the sealed record is in electronic form, the clerk must file the court's order, maintain the record ordered sealed in a secure manner, and clearly identify the record as sealed by court order on a specified date.

(2) The order must state whether--in addition to the sealed records--the order itself, the register of actions, any other court records, or any other records relating to the case are to be sealed.

(3) The order must state whether any person other than the court is authorized to inspect the sealed record.

(4) Unless the sealing order provides otherwise, it prohibits the parties from disclosing the contents of any materials that have been sealed in anything that is subsequently publicly filed.

(Cal. Rules of Court, rule 2.551(e).)

(1) An order sealing the record must:

(A) Specifically state the facts that support the findings; and

(B) Direct the sealing of only those documents and pages, or, if reasonably practicable, portions of those documents and pages, that contain the material that needs to be placed under seal. All other portions of each document or page must be included in the public file.

(Cal. Rules of Court, rule 2.550(e).)

"While the findings may be set forth in cursory terms, '[i]f the trial court fails to make the required findings, the order is deficient and cannot support sealing.' [Citation.]" (*In re Marriage of Tamir*, *supra*, 72 Cal.App.5th at p. 1079.)

Plaintiff's Motion to Seal

Exhibits A, B, and E to the Supplemental Declaration of Braden M. Wayne in support of Defendant's Reply Brief to its Motion to Reopen the Deposition of Travis Velez, as well as portions of the Reply Brief, reference Plaintiff's non-public information regarding its business practices and strategies surrounding the sale of its off-price footwear. (Durken Declaration, ¶¶ 4-5.) (*Overstock.com, Inc. v. Goldman Sachs Group, Inc.* (2014) 231 Cal.App.4th 471, 503 [the right to privacy extends to one's confidential financial affairs].)

In addition, Exhibits A, B, and E to the Supplemental Declaration of Braden M. Wayne were documents produced in discovery, and they were designated as "Confidential" pursuant to the Stipulation and Protective Order entered by this Court on April 9, 2021. (Wedel Declaration, ¶¶ 2-3.)

Since Defendant has not challenged the sealing of the subject documents, and it has not raised any arguments, or produced any evidence, that would override Plaintiff's right to privacy, the Court finds Plaintiff has met its burden to seal the subject records. (Cal. Rules of Court, rule 2.550(d); see *In re Marriage of Tamir*, *supra*, 72 Cal.App.5th at p. 1088 [while party may have general right to privacy, it should identify any specific prejudice or privacy concerns that would override the right to public access].)

Other than the Court, no persons or parties are authorized to inspect the sealed record. The sealed material may not be disclosed in anything that is subsequently publicly filed. (Cal. Rules of Court, rule 2.551(e).)

		Plaintiff to give notice.
9	Coast Realty Solutions, Inc. vs. Hsiao	**OFF CALENDAR**
10	Finnell vs. WC-Fullerton Ops, LLC	**TENTATIVE RULING:** **Motion 1 - Demurrer** For the reasons set forth below, Defendant WC-Fullerton OPS, LLC's Demurrer to Plaintiff's FAC is SUSTAINED in part, with leave to amend, and OVERRULED in part. Plaintiff's request for judicial notice is denied. **Statute of Limitations** The first, second, and third causes of action are survivor causes of action. "Code of Civil Procedure section 366.1 provides that survived causes of action may be commenced before the later of two terms: (1) six months after the person's death, or (2) the limitation period that would have been applicable had the person not died." *Parsons v. Tickner* (1995) 31 Cal. App. 4th 1513, 1525; Code Civ. Proc., § 377.30. The two-year statute of limitations, CCP § 335.1, applies to statutory elder abuse and negligence claims. Defendant argues the statute of limitations has run, even with the application of Emergency Rule 9(a), which states: "Notwithstanding any other law, the statutes of limitations and repose for civil causes of action that exceed 180 days are tolled from April 6, 2020, until October 1, 2020." (Cal. R. Ct., Appendix I, Emergency Rule 9 ["Emergency Rule 9"].) Thus, Emergency Rule 9 extends the time to file an action 178 days, or 5 months and 25 days. Here, Plaintiff filed the Complaint 2 years, 5 months and 30 days after the alleged rape. However, as noted by Plaintiff, in addition to the above, the limitations period is tolled for these causes of action under CCP § 352. Code of Civil Procedure section 352, subdivision (a) provides: "If a person entitled to bring an action, mentioned in Chapter 3 (commencing with Section 335) is, at the time the cause of action accrued either under the age of majority or lacking the legal capacity to make decisions, the time of the disability is not part of the time limited for the commencement of the action."

As set forth in the Complaint, Ms. Kane suffered from severe dementia until her death and was a resident of the Facility from December 2018 through approximately June 2019. Defendant Arnwine, an employee of Defendant, was discovered sexually assaulting Ms. Kane on May 23, 2019. Ms. Kane passed away on July 8, 2019. The Complaint was filed on November 22, 2021.

Thus, Ms. Kane's dementia tolled the statute of limitations governing any claims she would have had after she was raped, during the period of her disability and until her death on July 8, 2019. Plaintiff had two years, or until July 8, 2021, to bring negligence and elder abuse causes of action, but Emergency Rule 9 extends that time for 178 days. Thus, Plaintiff had until January 2, 2022, to file the survival claims. Accordingly, the demurrer is overruled on this ground.

Plaintiff also argues, persuasively, that a demurrer on limitations grounds will not lie where the action may be, but is not necessarily, barred: it must appear clearly and affirmatively that, upon the face of the complaint, the right of action is necessarily barred. *(Lee v. Hanley* (2015) 61 Cal.4th 1225, 1232). CCP § 340.16(a) provides, adult victims of sexual abuse and assault can file an action within 10 years of the event, or within three years since the discovery of any injury or illness resulting from the assault, whichever is later. Although the Complaint does not specifically name sexual abuse as a distinct cause of action, the Complaint does allege that Plaintiff was a victim of sexual abuse. Thus, pursuant to CCP § 340.16(a), the statute of limitations had not yet run upon the filing of the Complaint. The demurrer is also overruled on this ground.

Uncertainty

A demurrer for uncertainty will be sustained only where the complaint is so bad that defendant cannot reasonably respond—i.e., he or she cannot reasonably determine what issues must be admitted or denied, or what counts or claims are directed against him or her. *Khoury v. Maly's of Calif., Inc.* (1993) 14 CA4th 612, 616(citing text); *A.J. Fistes Corp. v. GDL Best Contractors, Inc*. (2019) 38 CA5th 677, 695.

Furthermore, demurrers for uncertainty will almost certainly be overruled where the facts alleged in the complaint are presumptively within the knowledge of the demurring party or ascertainable by invoking discovery procedures *Chen v. Berenjian*

		(2019) 33 CA5th 811, 822; *A.J. Fistes Corp. v. GDL Best Contractors, Inc.*, *supra,* 38 CA5th at 695. In this instance, the demurrer based on uncertainty lacks merit. The causes of action are not so badly pled so as Defendant cannot respond, and the facts of the complaint are certainly within Defendant's knowledge. As such, the demurrer based on uncertainty is overruled. **First Cause of Action: Elder Abuse and Neglect** Pursuant to the Elder Abuse and Dependent Adult Civil Protection Act [(Welf. & Inst. Code, § 15600 et seq.)], heightened remedies are available to plaintiffs who successfully sue for dependent adult abuse. Where it is proven by clear and convincing evidence that a defendant is liable for neglect or physical abuse, and the plaintiff proves that the defendant acted with recklessness, oppression, fraud, or malice, a court shall award attorney fees and costs. Additionally, a decedent's survivors can recover damages for the decedent's pain and suffering." (Sababin v. Superior Court (2006) 144 Cal.App.4th 81, 88, 50 Cal.Rptr.3d 266.) The Elder Abuse and Dependent Adult Civil Protection Act requires proof of either "physical abuse ..., or neglect ..., and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse." (Welf. & Inst. Code, § 15657.) Welfare and Institutions Code section 15610.57 includes both a general definition of "neglect" and specific examples. The general definition is: "The negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise." (Id., subd. (a)(1).) The statute then provides that neglect "includes, but is not limited to," "(1) Failure to assist in personal hygiene, or in the provision of food, clothing, or shelter." "(2) Failure to provide medical care for physical and mental health needs." "(3) Failure to protect from health and safety hazards." "(4) Failure to prevent malnutrition or dehydration." (Id., subd. (b)(1)-(4).) "Recklessness involves '"deliberate disregard" of the "high degree of probability" that an injury will occur' and 'rises to the level of a "conscious choice of a course of action ... with knowledge of the serious danger to others involved in it." ' " (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 405, 129 Cal.Rptr.3d 895 (Carter).) " 'Recklessness' refers to a subjective state of culpability greater than simple negligence ...

		[citations]. Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' ...." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 31, 82 Cal.Rptr.2d 610, 971 P.2d 986.) "[T]o obtain the [Elder Abuse] Act's heightened remedies, a plaintiff must allege conduct essentially equivalent to conduct that would support recovery of punitive damages." (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 789, 11 Cal.Rptr.3d 222, 86 P.3d 290.) The Complaint alleges Defendants WC-Fullerton Ops, LLC d/b/a Crescent Landing At Fullerton Memory Care a/k/a Fullerton Gardens ("WC Ops"), MC Care Properties, LLC d/b/a Crescent Landing At Fullerton Memory Care a/k/a Fullerton Gardens ("MCP"), own, operate, manage, staff, and otherwise control an acute care hospital in Fullerton, California known as "Fullerton Gardens" or Crescent Landing at Fullerton Memory Care, located at 1510 E. Commonwealth Ave., Fullerton, California. (FAC, ¶ 2.) Damaria Arnwine was employed by Defendants WC Ops, and/or MCP and DOES 1 through 10, inclusive, and each of them, was a nursing assistant while acting within the course, scope, purpose, and authority of such agency and employment with the full knowledge, permission and consent of Defendants WC Ops, MCP and DOES 1 through 10, inclusive, and each of them. (Id. at ¶ 3.) Defendants DOES 20 through 40 are administrators, staff, employees, and agents of Defendants WC Ops, MCP or DOES 1-20 who owed a duty of care to Plaintiffs and breached that duty of care, as described in more detail herein, and/or had the duty to supervise Arnwine. (Id. at ¶ 4.) Ms. Kane was a patient at the Facility from December 2018 through approximately June 2019 and Defendant Arnwine had been hired by the Fullerton Garden Defendants sometime in or around late 2018 early 2019. (Id. at ¶¶ 9-10.) Defendant Arnwine did not have any experience working at a senior care facility prior to being employed at the Facility, but Arnwine had a familial relationship or close friendship with an employee of Fullerton Gardens, and as such Fullerton Gardens Defendants failed to properly conduct a background check, failed to properly train Defendant Arnwine, and permitted Defendant Arnwine to engage with residents, such as Decedent, with little to no supervision or oversight, despite being a newly hired employee. (Id. at ¶¶ 11-12.) On or about May 23, 2019, Defendant Arnwine was discovered sexually assaulting Decedent. (Id. at ¶ 13.) Many months before Plaintiff discovered the abuse, Defendant Arnwine had not only sexually assaulted the Decedent on May 23, 2019, but had sexually assault Decedent and other residents at the Facility, as a result of the Fullerton Garden Defendants' failure to properly train, monitor and supervisor, Defendant Arnwine, despite being

		newly employed with the company, and having had no prior experience working at a senior care facility. (Id. at 15.) As of the time Decedent was abused by Defendant Arnwine, the Fullerton Garden Defendants had knowledge or should have and knowledge of at least one previous allegation of sexual abuse by Defendant Arnwine on Facility residents. (Id. at 16.) Defendants failed to exercise that degree of care that a reasonable person in a like position would exercise with respect to caring for Decedent by failing to follow Decedent's care plan, failing to assist her with her basic needs, failing to comply with the Facility's policies and procedures, and failing to protect Decedent from health and safety hazards, including but not limited to the sexual assault committed upon her on May 23, 2019. (Id. at ¶ 22.) Defendant failed to follow various statutory requirements for Ms. Kane's care and wellbeing. (Id. at ¶¶ 23-24.) The conduct by Defendants was intentional and in reckless disregard of the high probability that severe injury would result from their failure to carefully adhere to their duties. At all relevant times these Defendants had knowledge Decedent was at risk of suffering injury or death from failing to provide the necessary assistance because she was dependent on Facility staff to provide this assistance to him [sic]. (Id. at ¶ 25.) Defendants chose to operate the Facility with untrained, un-monitored and unsupervised staff to meet the high acuity needs of the patient population in the Facility, including the needs of Decedent. In instructing, directing, and mandating the activities herein, the principals, agents, representatives, and employees of the Defendants each knew, or in the exercise of reasonable caution, should have known they were violating state and federal regulations in the operation of a skilled nursing facility in the State of California, as well as their own policies and procedures when they chose not to employ sufficient staff in numbers, training, and supervision to meet the needs of high acuity patients such as Decedent which were actively sought to be admitted by Defendants. Nonetheless, the principals, agents, representatives, and employees of the Defendants made a conscious and purposeful decision to ignore and violate state and federal regulations governing the operation of skilled nursing facilities for the sole and express purpose of maximizing profit while compromising resident care. (Id. at ¶ 26.) Defendants each accomplished their conduct and practice of maximizing profit at the expense of the legally mandated care to be provided to residents in a skilled nursing facility by purposefully

		understaffing the Facility and employing staff not sufficiently trained or experienced to provide the necessary care and services needed by higher acuity residents residing at facilities. (Id. at ¶ 27.) The physical harm inflicted upon Decedent would not have occurred but for the willful disregard by the Defendants of their duties to him [sic]. (Id. at ¶ 28.) The Facility's officers, directors, and managing agents via the Administrator directed, approved, and ratified the conduct complained of herein. The Facility's officers, directors, and managing agents were aware of Decedent's condition and needs yet took no action to protect her from harm and therefore ratified the conduct. Further, the Facility, and its officers, directors, and/or managing agents and each of them, agreed, approved, authorized, ratified and/or conspired to commit all the acts and omissions alleged herein. (Id. at ¶ 30-33.) In *Delaney v. Baker* (1999) 20 Cal.4th 23, the California Supreme Court affirmed the Court of Appeal's judgment that the defendant nursing home and its administrators were subject to the heightened remedies of the Welfare & Institutions Code. (Id. at pp. 41-42.) In that case, the plaintiff had brought an action against the nursing facility and its administrators, alleging neglect as a result of the rapid turnover of nursing staff, staffing shortages, inadequate training of employees, violations of medical monitoring and recordkeeping regulations, etc. (Id. at pp. 27-28.) The jury found in favor of plaintiff on the elder abuse claim based on neglect. (Id. at p. 28.) The court finds Plaintiff has, at the pleading stage, alleged facts sufficient to show that Moving Defendant may be subject to liability for neglect in its capacity as the Facility's owner, operator, manager, staffer and otherwise controller. (*Delaney v. Baker* (1999) 20 Cal.4th 23, 27 ["The neglect was apparently the result, in part, of rapid turnover of nursing staff, staffing shortages, and the inadequate training of employees."]; see also *Fenimore v. Regents of University of California* (2016) 245 Cal.App.4th 1339, 1349 ["trier of fact should decide whether a knowing pattern and practice of understaffing in violation of applicable regulations amounts to recklessness"].) Whether Plaintiff can prove this claim to be true will be determined upon the consideration of evidence at the summary judgment or trial stage. At the pleading stage, the allegations are sufficient to plead elder abuse. The demurrer to the first cause of action is overruled.

		Third Cause of Action: Negligent Hiring and Retention The elements of a cause of action for negligent hiring and retention are: (1) that defendant hired the employee, (2) the employee was unfit or incompetent to perform the work for which he was hired, (3) the employer knew or should have known that the employee was unfit or incompetent to perform such work and that such unfitness or incompetence was a particular risk to others, (4) that the employee's unfitness harmed plaintiff, and (5) that the employer's negligence in hiring, supervising and/or retaining the employee was a substantial factor in causing plaintiff's harm. (See CACI 426*; Delfino v. Agilent Technologies, Inc*. (2006) 145 Cal.App.4th 790, 815; *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1054.) Unlike the elder abuse claim, Plaintiff is not required to plead a cause of action based on negligence with particularity. (*Guilliams v. Hollywood Hosp.* (1941) 18 Cal.2d 97, 100-01 (very general language was sufficient to state a claim for negligence where the particular facts constituting the negligence lie more in the knowledge of the opposite party; "it is established that a cause of action may be stated in which negligence is alleged in general terms, without detailing the specific manner in which the injury occurred").) The FAC alleges that Defendant Arnwine was employed by Moving Defendant. Plaintiff is informed and believes, and thereupon alleges, that, at all times relevant herein, Defendant Arnwine was an employee acting within the course and scope of his duties for his employers the Fullerton Garden Defendants. Plaintiff is further informed and believes, and thereupon alleges, that the Fullerton Garden Defendants authorized Defendant Arnwine to occupy and assist residents, including Decedent, alone, unmonitored and unsupervised. Plaintiff is informed and believes, and thereupon alleges, that the Fullerton Garden Defendants had reason to know that Defendant Arnwine was likely to harm others in view of the work entrusted to him, at the time of hiring, and thereafter. Plaintiff further is informed and believes, and thereon alleges, that the Fullerton Garden Defendants were aware, or should have been aware, of Defendant Arnwine's reckless and predatory disposition at the time of the hiring, but failed to exercise due care in selecting and knowingly employing Defendant Arnwine to do an act which necessarily brought him in contact with vulnerable women while in the performance of his duties as a [staff member at an assisted living facility]. The Fullerton Garden Defendants knew or should have known that Defendant Arnwine

		was unfit or incompetent and this created a particular risk of harm to Plaintiff and others who were placed in similarly vulnerable positions with Defendant Arnwine without any oversight or supervision. Defendants consciously disregarded the rights of Plaintiff and willfully and deliberately failed to prevent the foreseeable consequences of Defendant Arnwine's unlawful behavior. As a result of Defendants negligence aforementioned, Plaintiff was caused to suffer harm. (FAC at ¶¶ 3, 65-66, 68-69.) These allegations are sufficient at the pleading stage. Accordingly, the demurrer to the negligent hiring and supervision claim is overruled. **Fourth Cause of Action: Wrongful Death** Wrongful death is a statutory cause of action that may be asserted when "the death of a person [is] caused by the wrongful act or neglect of another"; the cause of action belongs not to the decedent but to certain surviving heirs. (Code Civ. Proc., § 377.60.) The purpose of a wrongful death cause of action is to compensate such persons for their own losses of comfort and companionship resulting from the decedent's death. (*Fraizer v. Velkura* (2001) 91 Cal.App.4th 942, 945.) The elements of the cause of action for wrongful death are the tort (negligence or other wrongful act), the resulting death, and the damages, consisting of the pecuniary loss suffered by the heirs." (*Lattimore v. Dickey* (2015) 239 Cal.App.4th 959, 968.) "In any action for wrongful death resulting from negligence, the complaint must contain allegations as to all the elements of actionable negligence." (Novak v. Continental Tire North America (2018) 22 Cal.App.5th 189, 195.) Plaintiff's wrongful death action is based upon elder abuse – neglect and negligence. Wrongful death may be based upon an elder abuse claim. (See *Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256; *Intrieri v. Superior Court* (2004) 117 Cal.App.4th 72, 82-83.) As discussed above, Plaintiff has alleged sufficient facts to state an elder abuse cause of action. The demurrer to the fourth cause of action is overruled. **Fifth Cause of Action: Survival** As noted by Plaintiff in the Opposition, "Unlike a cause of action for wrongful death, a survivor cause of action is not a new cause of action that vests in the heirs on the death of the decedent. It is instead a separate and distinct cause of action which belonged to the decedent before death but, by statute, survives that event.

		Grant v. McAuliffe (1953) 41 Cal.2d 859, 864. The survival statutes do not create a cause of action. Rather, "[t]hey merely prevent the abatement of the cause of action of the injured person, and provide for its enforcement by or against the personal representative of the deceased." (Ibid.) (See, Opp. pp. 5:25-6:2.) Thus, "Survivor" is not, by itself, a separate cause of action. It involves causes of action which belonged to the decedent before death but, by statute, survives that event. From the allegations in the FAC, it appears that the first, second, and third causes of action are survival causes of action. The demurrer to this cause of action is sustained, with leave to amend. Should Plaintiff desire to file an amended complaint that addresses the issues in this ruling, Plaintiff shall file and serve the amended complaint within 30 days of service of the notice of ruling. Moving party to give notice. **Motion 2 – Motion to Strike** For the reasons set forth below, Defendant WC-Fullerton OPS, LLC's Motion to Strike is DENIED. **First, Second, and Third Cause of Action** Motions to strike can be used to reach defects in or objections to pleadings that are not challengeable by demurrer. "A motion to strike does not lie to attack a complaint for insufficiency of allegations to justify relief; that is a ground for general demurrer." (*Pierson v. Sharp Memorial Hospital, Inc*. (1989) 216 Cal.App.3d 340, 342.) Defendant's argument that the first, second, and third causes of action should be stricken as untimely is addressed above in the tentative ruling on Defendant's Demurrer. **Punitive Damages** Welfare and Institutions Code section15657 provides for the awarding of reasonable attorney's fees and costs under a claim for elder abuse. (See Welf. & Inst. Code, § 15657 ["The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article."].) A complaint including a request for punitive damages must include allegations showing that the plaintiff is entitled to an award of

		punitive damages. (*Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253, 1255.) A claim for punitive damages cannot be pleaded generally and allegations that a defendant acted "with oppression, fraud and malice" toward plaintiff are insufficient legal conclusions to show that the plaintiff is entitled to an award of punitive damages. (*Brousseau v. Jarrett* (1977) 73 Cal.App.3d 864, 872.) Specific factual allegations are required to support a claim for punitive damages. (Id.) Civil Code § 3294 authorizes a plaintiff to obtain an award of punitive damages when there is clear and convincing evidence that the defendant engaged in malice, oppression, or fraud. Section 3294(c) defines the terms in the following manner: (1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others. (2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. (3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury. "In order to obtain the [Elder Abuse] Act's heightened remedies, a plaintiff must allege conduct essentially equivalent to conduct that would support recovery of punitive damages." (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 789.) "[M]aking it more difficult for Elder Abuse Act plaintiffs to plead punitive damages would, as a general matter, likely diminish the willingness of attorneys to undertake such cases on a contingency basis. (See Welf. & Inst.Code, § 15600, subd. (h) [reciting Legislature's observation when enacting Elder Abuse Act that "few civil cases are brought in connection with this abuse due to … the lack of incentives to prosecute such suits"].)." (Id., at p. 787.) Defendant argues Plaintiff's claim for attorneys' fees, costs, punitive and exemplary damages fails because Plaintiff cannot allege a cause of action for elder abuse against it. However, as set forth above, the Court's tentative is to overrule Defendant's demurrer to the first cause of action for elder abuse. At the pleading stage, the Court takes the allegations of the FAC as true.

		Thus, at this time, the FAC sufficiently alleges elder abuse, as well as sufficient facts to plead malice or oppression on the part of Moving Defendant for its alleged part in directly overseeing, managing, and controlling the operation and management of the Facility, including staffing, training, policy, and procedures and that it acted with reckless disregard in choosing profits over care of the Facility's patients. (FAC. ¶¶ 22-28, 30-33.) The motion to strike as to attorneys' fees, costs, punitive and exemplary damages is denied. Moving party to give notice.
11	Californians For Homeownership, Inc. vs. City of La Habra	**CONTINUTED TO 6/12/24**
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