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 1, 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	Finnell vs. WC-Fullerton Ops, LLC	**CONTINUED TO 5/8/24**
2	Hoang vs. CIT Bank, N.A.	**TENTATIVE RULING:** On January 23, 2024, Defendants CIT Bank, N.A., and Loancare LLC filed a demurrer to the second amended complaint. [ROA # 223]. Defendants argue that Plaintiff has failed to plead fraud with the requisite specificity. Further, Defendants argue that Plaintiff's allegations fail to state sufficient facts to constitute the causes of action he alleges and/or are uncertain and ambiguous. For the reasons set forth below, the unopposed Demurrer is SUSTAINED without leave to amend. **Analysis** **A. Standard on Demurrer** A demurrer for sufficiency tests whether the complaint states a cause of action. *Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 747. When considering demurrers, courts read the allegations liberally and in context. (*Wilson v. Transit Authority of City of Sacramento* (1962) 199 Cal.App.2d 716, 720-21.) In a demurrer proceeding, the defects must be apparent on the face of the pleading or via proper judicial

		notice. (*Donabedian v. Mercury Ins. Co*. (2004) 116 Cal.App.4th 968, 994.) "A demurrer tests the pleading alone, and not on the evidence or facts alleged." (*E-Fab, Inc. v. Accountants, Inc. Servs.* (2007) 153 Cal.App.4th 1308, 1315.) As such, the court assumes the truth of the complaint's properly pleaded or implied factual allegations. (*Id.*) However, it does not accept as true deductions, contentions, or conclusions of law or fact. (*Stonehouse Homes LLC v. City of Sierra Madre* (2008) 167 Cal.App.4th 531, 538.) A demurrer may be sustained "only if the complaint fails to state a cause of action under any possible legal theory." (*Sheehan v. San Francisco 49ers, Ltd.* (2009) 45 Cal.4th 992, 998.) The only issue a demurrer is concerned with is whether the complaint, as it stands, states a cause of action. (*Hahn, supra*, 147 Cal.App.4th at 747.) **B. Plaintiff's Fraud Causes of Action (Causes of Action 1-11 and 17).** The elements of fraud are: "(a) misrepresentation, false representation, concealment, or nondisclosure; (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." (*Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 184.) The elements of negligent misrepresentation are: "[M]isrepresentation of a past or existing material fact, without reasonable ground for believing it to be true, and with intent to induce another's reliance on the fact misrepresented; ignorance of the truth and justifiable reliance on the misrepresentation by the party to whom it was directed; and resulting damage...." (*Hydro-Mill Co., Inc. v. Hayward, Tilton & Rolapp Ins. Associates, Inc.* (2004) 115 Cal.App.4th 1145, 1154.) Defendants argue that Plaintiff does not allege fraud with specificity. The court agrees. Plaintiff makes conclusionary allegations that certain documents are fraudulent and contain fraudulent signatures. However, Plaintiff does not provide any context—i.e., the who, what, when, where, and why—of each of Plaintiff's fraud claims. Plaintiff's allegations are unclear as to the persons involved in the alleged fraud, how Plaintiff was induced to rely on any alleged fraud, and how Plaintiff justifiably relied on any alleged fraud. Plaintiff conflates all Defendants in a group, making it unclear which agent of each defendant made what misrepresentation to Plaintiff. Indeed, given that Plaintiff has alleged multiple fraud causes of action based on different documents, the court finds how Plaintiff relied and changed Plaintiff's position, as well as Plaintiff's alleged damages as it

		pertains to each loan document, to be particularly unclear. For example, Plaintiff alleges that the HUD-1 statement included the wrong amount owed by Plaintiff. Plaintiff, however, does not allege how Plaintiff relied on those numbers and/or how/when Plaintiff discovered the truth. It is unclear whether or not Plaintiff knew the amount was incorrect at the time Plaintiff signed those documents, but was forced to sign under duress or that Plaintiff believed the numbers represented by Defendants at the time of signing each document, but later found out that the numbers were wrong. The crux of Plaintiff's claims appear to be alleged violations of foreclosure regulations and/or wrongful foreclosure, but Plaintiff is attempting to reframe these allegations as fraud. Defendants have already twice demurred to these causes of action. The court has already provided Plaintiff with detailed rulings as to the deficiencies in Plaintiff's causes of action. This is Plaintiff's third attempt to amend to allege claims against Defendants. Having had multiple opportunities to cure the defects in Plaintiff's pleadings, but having failed to do so, the court finds that any further amendment as against Defendants CIT Bank, N.A., and Loancare LLC would be futile. The demurrer is sustained without leave to amend as to the 1st through 11th and 17th causes of action as against Defendants CIT Bank, N.A., and Loancare LLC. **C. Plaintiff's Additional Causes of Action** The court has already struck Plaintiff's twelfth through sixteenth causes of action [See ROA # 237]. Defendants' demurrer to these causes of action are, therefore, moot. Moving party to give notice.
3	Zamora vs. NSC Newport Specialty Cars, Inc.	**TENTATIVE RULING:** Defendant seeks an order compelling Plaintiffs to serve verified responses to (1) Requests for Production, Set One; (2) Special Interrogatories, Set One; and (3) Form Interrogatories, Set One—General, (4) Form Interrogatories, Set One—Employment, (5) Requests for Admission, Set One without objection. For the reasons set forth below, the unopposed motions are GRANTED. For a motion to compel initial discovery responses, all a propounding party must show is that it properly served its discovery requests, that the time to respond has expired, and that the party to

		whom the requests were directed failed to provide a timely response. (See *Leach v. Superior Court* (1980) 111 Cal.App.3d 902, 905 906.) Indeed, "[o]nce [a party] 'fail[ed] to serve a timely response,' the trial court had authority to grant [opposing party's] motion to compel responses." (*Sinaiko Healthcare Counseling, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 405.) By failing to respond, the offending party waives any objection to the interrogatory or protection demand. (*Cal. Civ. Proc. Code* § 2030.290(a) (interrogatories); *Cal. Civ. Proc. Code* §2031.300(a)(requests for production)). "The court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel a response to [interrogatories/requests for production], unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." (*Cal. Civ. Proc. Code* § 2030.290(c) (interrogatories); *Cal. Civ. Proc. Code* § 2031.300(c)requests for production)). Plaintiff has established that Plaintiff served the discovery at issue on December 28, 2022. (Mvg. Phayakapong Decl., Exs. 1-5). Plaintiff has also established that counsel contacted Defendant's counsel to inquire about the failure to serve timely responses. (*Id*., Ex. 6). Now, over one year later, there is still no evidence in the record that Defendant served responses that substantially complied with the Discovery Act. Defendant failed to file an opposition to offer the court substantial justification for this delay. The court finds that Defendant's conduct is without substantial justification. The motions to compel are granted and Defendant is ordered to serve verified responses, without objections, to the discovery at issue within 30 days of notice of this order. Because Defendant has failed to provide substantial justification for its conduct, the court finds that monetary sanctions are appropriate. However, the court finds that the motions are simple, straightforward motions that have been largely copied and pasted. As such, the court imposes a total sanctions award for all five motions of $1,500. The court denies Plaintiff's request for evidentiary and terminating sanctions without prejudice. Plaintiff to give notice.

4	Highmore Financing Co. II LLC vs. RM Produce Corporation	**TENTATIVE RULING:** **<u>Application for Right to Attach Order/Writ of Attachment</u>** Plaintiff Highmore Financing Co. II LLC seeks a right to attach order and writ of attachment to secure the amount of $1,323,998.02 against Defendant Ramon Niebla Aramburo. For the reasons set forth below, Plaintiff's application is GRANTED in the amount of $1,323,998.02. A court shall issue a right to attach order if it finds all of the following: (1) the claim upon which the attachment is based is one upon which an attachment may be issued; (2) the plaintiff has established the probable validity of the claim upon which the attachment is based; (3) the attachment is not sought for a purpose other than the recovery on the claim upon which the attachment is based; and (4) the amount to be secured by the attachment is greater than zero. (Code Civ. Proc., § 484.090(a)(1)-(4).) If an action is against a defendant who is a natural person, an attachment may be issued only on a claim which arises out of the conduct by the defendant of a trade, business, or profession. (Code Civ. Proc., § 483.010(c).) A court may order the issuance of a writ of attachment only if the plaintiff's claim has probable validity; *i.e.*, where it is more likely than not that the plaintiff will obtain a judgment against the defendant on the claim. (Code Civ. Proc., § 481.190; *Kemp Bros. Constr., Inc. v. Titan Elec. Corp.* (2007) 146 Cal.App.4th 1474, 1476.) In determining an application for a writ of attachment, the court must make a preliminary determination of the merits of the action and the probable outcome. (*Kemp Bros.*, 146 Cal.App.4th at p. 1478; *Lorber Indus. v. Turbulence, Inc.* (1985) 175 Cal.App.3d 532, 535.) In analyzing the probable validity of a plaintiff's claim, the court must assess the sufficiency of the plaintiff's evidence, weigh it against the defendant's evidence, and consider the relative merits of the parties' positions. (*Kemp Bros.*, 146 Cal.App.4th at pp. 1481-82.) Facts stated in affidavits or declarations must be set forth with particularity and must affirmatively show that the affiant or declarant, if sworn as a witness, could testify competently to the facts stated. (Code Civ. Proc., § 482.040.) Plaintiff has demonstrated that the requirements for issuance of a right to attach order are present here with respect to Plaintiff's breach of guaranty claim. Plaintiff's breach of guaranty claim is a claim for money based on a contract, express or implied, where the total amount of the claim(s) is a fixed or readily ascertainable

amount not less than $500, exclusive of costs, interest and attorney's fees. (Code Civ. Proc., § 483.010(a).) Plaintiff also demonstrated that its breach of guaranty claim arises out of conduct by Defendant of a trade, business, or profession. (Code Civ. Proc., § 483.010(c).)

Having read and considered the evidence presented by Plaintiff, the court finds that Plaintiff has established the probable validity of its breach of guaranty claim.

The elements of a cause of action for breach of contract are: (i) existence of the contract; (ii) Plaintiff's performance or excuse for nonperformance; (iii) Defendant's breach; and (iv) damage to plaintiff resulting therefrom. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811.)

Here, Plaintiff shows Plaintiff's performance (Jogia Decl. ¶ 7, Exh. 3), Defendant's breach (Jogia Decl. ¶ 10); and damage to Plaintiff (see *ibid*.). Defendant does not dispute his breach of the Guaranty. Instead, he contends Plaintiff cannot prevail on its claim because Plaintiff lacks capacity to sue and because Plaintiff is not licensed as a California Finance Lender with the Department of Financial Protection & Innovation.

Defendant first contends Plaintiff lacks capacity to sue because it failed to comply with the statutory requirements to do business in California by obtaining a certificate of qualification as described in Corporations Code section 2105.

In relevant part, California Corporations Code section 2105 states: "A foreign corporation shall not transact intrastate business without having first obtained from the Secretary of State a certificate of qualification." (Corp. Code, § 2105, subd. (a).) Any corporation that fails to obtain such certificate of qualification "shall not maintain any action or proceeding upon any intrastate business so transacted in any court of this state." (Corp. Code, § 2203, subd. (c).) Corporations Code section 191, subdivision (a), defines "transact intrastate business" for purposes of Section 2105(a) as "entering into repeated and successive transactions of its business in this state, other than interstate or foreign commerce").

Corporations Code section 2105 applies only to intrastate business. If a party is engaged wholly in interstate commerce and did not do any intrastate business, then Corporations Code section 2105 is inapplicable because, "in view of the commerce clause of the

		federal constitution, the state cannot put any burden upon persons or corporations engaged wholly in interstate commerce." (*W.W. Kimball Co. v. Read* (1919) 43 Cal.App. 342, 345.) A defendant claiming that a plaintiff's claim is barred by Corporations Code section 2105 bears the burden of proving that the action arises out of the transaction of intrastate business by a foreign corporation. (*United Medical Management Ltd. v. Gatto* (1996) 49 Cal.App.4th 1732, 1740.) This case involves a guaranty between Plaintiff, a Delaware corporation, and California-based Defendant. Defendant did not meet his burden to prove that the action arises out of intrastate business by Plaintiff. Thus, Corporations Code section 2105 is not applicable. Based on the record before the Court, the court finds Plaintiff has capacity to sue. Additionally, Defendant has arguably waived his right to raise Plaintiff's lack of capacity to sue as a plea in abatement. (*The Rossdale Group, LLC v. Walton* (2017) 12 Cal.App.5th 936, 943 [the proper time to raise a plea in abatement is in the original answer or by demurrer at the time of the answer].) Defendant next contends Plaintiff cannot main the instant action because Plaintiff is not a licensed finance lender or broker. Financial Code section 22100, subdivision (a) provides, "[n]o person shall engage in the business of a finance lender or broker without obtaining a license from the commissioner." Defendant has not demonstrated that Plaintiff is required to obtain a California lending or broker license or that the consequence for failing to do so is an inability to maintain claims in court. Defendant has not met his burden to show that Plaintiff's failure to obtain a license from the commissioner is fatal to the probable validity of Plaintiff's breach of guaranty claim. Plaintiff has also submitted evidence from which the court could determine an anticipated amount of attorneys' fees and costs. (Kubisch Decl. ¶ 8.) Plaintiff is ordered to submit proposed orders utilizing the appropriate Judicial Council form order by May 10, 2024. Before writ of attachment may issue, Plaintiff must post an undertaking in the amount of $10,000.00 for the writ of attachment against Ramon Niebla Aramburo. (Code Civ. Proc., §§ 489.210, 489.220.) Plaintiff to give notice.

5	Hong vs. Nguyen	**TENTATIVE RULING:** For the reasons set forth below, Plaintiffs Danh Hong and Nhu Thuan T. Nguyen's Motion to Quash Defendant Ngoc Hong Nguyen's Deposition Subpoena for Production of Medical Records to Bolsa Medical Group is GRANTED. Defendant is ordered to pay $2,780.00 in sanctions to Plaintiffs within 30 calendar days of Plaintiffs giving notice of this Court's ruling. **<u>Statement of Law</u>** "Any consumer whose personal records are sought by a subpoena duces tecum and who is a party to the civil action in which this subpoena duces tecum is served may, prior to the date for production, bring a motion under Section 1987.1 to quash or modify the subpoena duces tecum." (Code Civ. Proc., § 1985.3, subd. (g).) "Personal records" include "any copy of books, documents, other writings, or electronically stored information pertaining to a consumer and which are maintained by any 'witness' which is a physician, …, hospital, medical center, clinic, radiology or MRI center, clinical or diagnostic laboratory …." (Code Civ. Proc., § 1985.3, subd. (a)(1).) "If a subpoena requires … the production of books, documents, electronically stored information, or other things before a court, or at the trial of an issue therein, or at the taking of a deposition, the court, upon motion reasonably made by any person described in subdivision (b), or upon the court's own motion after giving counsel notice and an opportunity to be heard, may make an order quashing the subpoena entirely, modifying it, or directing compliance with it upon those terms or conditions as the court shall declare, including protective orders. In addition, the court may make any other order as may be appropriate to protect the person from unreasonable or oppressive demands, including unreasonable violations of the right of privacy of the person." (Code Civ. Proc., § 1987.1, subd. (a).) "[I]n making an order pursuant to motion made under … Section 1987.1, the court may in its discretion award the amount of the reasonable expenses incurred in making or opposing the motion, including reasonable attorney's fees, if the court finds the motion was made or opposed in bad faith or without substantial justification or that one or more of the requirements of the subpoena was oppressive." (Code Civ. Proc., § 1987.2, subd. (a).)

The scope of discovery is broad, and doubts concerning the permissibility of discovery are generally resolved in favor of allowing discovery. (Code Civ. Proc., § 2017.010; *Advanced Modular Sputtering, Inc. v. Superior Court* (2005) 132 Cal.App.4th 826, 837; *Glenfed Development Corp. v. Superior Court* (1997) 53 Cal.App.4th 1113, 1119.) This includes questions of relevancy. (*Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 98.)

This is because the purpose of statutes establishing the expansive scope of discovery is to eliminate surprise at trial, to educate parties concerning their claims and defenses so as to encourage settlements and to expedite and facilitate trial, and to minimize opportunities for fabrication and forgetfulness. (*Puerto v. Superior Court* (2008) 158 Cal.App.4th 1242, 1249.) Given the liberal application of the discovery rules, "'fishing expeditions are permissible in some cases.' [Citations.]" (*Stewart v. Colonial Western Agency, Inc.* (2001) 87 Cal.App.4th 1006, 1013.)

However, the scope of discovery is not unlimited. "The court shall limit the scope of discovery if it determines that the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." (Code Civ. Proc., § 2017.020, subd. (a.)) One way the Court can limit the scope of discovery is through a motion to quash. (Code Civ. Proc., § 1987.1, subd. (a.).) Even where information may be highly relevant and non-privileged, it may still be shielded from discovery if its disclosure would impair a person's inalienable right of privacy, as guaranteed by both the United States and California Constitutions. (*Britt v. Superior Court* (1978) 20 Cal.3d 844, 855-856; *Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360, 370; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2023) ¶ 8:293.) However, "the right to privacy protects the individual's *reasonable* expectation of privacy against a serious *invasion*." (*Pioneer*, *supra*, 40 Cal.4th at p. 370.)

This privilege is not absolute. In each case, the court must carefully balance the right of privacy against the need for discovery; in some cases, a simple balancing test is sufficient while, in others, a compelling interest must be shown. (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 34-35; *Williams v. Superior Court* (2017) 3 Cal.5th 531, 557 [disapproving cases that required a party seeking discovery of private information to always establish compelling interest or need,

		without regard to the other considerations articulated in *Hill*]; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2023) ¶¶ 8:294, 8:323.) Communications between a patient and her physician are confidential and privileged. (Evid. Code, § 992.) "[D]isclosure to third persons falls within the rule of reasonably necessary purpose when it aims to promote the patient's treatment." (*Blue Cross v. Superior Court* (1976) 61 Cal.App.3d 798, 801; see *Snibbe v. Superior Court* (2014) 224 Cal.App.4th 184, 192 fn. 5 [orders signed by a physician assistant may be covered by the physician-patient privilege][1].) Section 992 of the Evidence Code "must be liberally construed in favor of the patient." (*Carlton v. Superior Court* (1968) 261 Cal.App.2d 282, 288.) However, "there is no privilege under this article as to a communication relevant to an issue concerning the condition of the patient if such issue has been tendered by the patient." (Evid. Code, § 996; see *Darab Cody N. v. Olivera* (2019) 31 Cal.App.5th 1134, 1141 [under the "tender doctrine," disclosure of a patient's records permissible when "the patient's own action initiates the exposure"].) When a party raises her physical condition as an issue in a case, she waives the right to claim the relevant records are privileged. A party cannot generally claim defendant must compensate him for his physical, mental or emotional injuries, but then attempt to limit the types of records defendant may request. The plaintiff "cannot have his cake and eat it too." (*City & County of San Francisco v. Superior Court In and For City and County of San Francisco* (1951) 37 Cal.2d 227, 232.) "The reason for the waiver is self-evident. It is unfair to allow a party to raise an issue involving her medical condition while depriving an opposing party of the opportunity to challenge her claim. A challenge requires access to the medical records on which a party relies and an opportunity to be heard. Otherwise, the challenge is in name only." (*Vesco v. Superior Court* (2013) 221 Cal.App.4th 275, 279.) Nevertheless, this waiver "'must not be construed as a complete waiver of the privilege but only as a limited waiver concomitant with the purposes of the exception.' [Citation.]" (*Britt, supra,* 20 Cal.3d at p. 863.) While parties "may not withhold information

[1] The Court rejects Defendant's argument that "communications made to nurses, interns, pharmacists and paramedics would not be privileged" (Opposition, 8:27-8:28), as Defendant's subpoena seeks the production of communications, where the disclosures to third parties were "reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the physician is consulted…." (Evid. Code, § 992.)

		which relates to any physical or mental condition which they have put in issue by bringing this lawsuit, they are entitled to retain the confidentiality of all unrelated medical or psychotherapeutic treatment they may have undergone in the past." (*Id.* at p. 864.) "'The patient thus is not obligated to sacrifice all privacy to seek redress for a specific mental or emotional injury; *the scope of the inquiry permitted depends upon the nature of the injuries which the patient-litigant himself has brought before the court*.' [Citation.]" (*Britt*, *supra*, 20 Cal.3d at p. 864.) Specifically, "although in seeking recovery for physical and mental injuries plaintiffs have unquestionably waived their physician-patient and psychotherapist-patient privileges as to all information concerning the medical conditions which they have put in issue, past cases make clear that such waiver extends only to information relating to the *medical questions in question*, and does not automatically open *all* of a plaintiff's past medical history to scrutiny." (*Id.* at pp. 849, 864; see *Hallendorf v. Superior Court* (1978) 85 Cal.App.3d 553, 557 [requiring production of 20 years of medical records overbroad].) However, in at least one case, the California Supreme Court held a psychiatrist had no right to refuse to produce his records even though the records were 10 years old, and even though the court expressed doubt the records would be directly related to the issues the plaintiff had tendered by filing his lawsuit. (*In re Lifschutz* (1970) 2 Cal.3d 415, 436-437.) "The Supreme Court recognized that at times the pleadings may be sufficient to put mental or physical condition in controversy, as when a plaintiff in a negligence action alleges mental or physical injury. [Citation.]" (*Vinson v. Superior Court* (1987) 43 Cal.3d 833, 839.) In *Vinson*, the plaintiff accused defendants of causing her various mental and emotional ailments. (*Ibid*.) The Supreme Court recognized that the plaintiff placed "his *own* mental state in controversy by alleging mental and emotional distress." (*Ibid*.) "[B]y asserting a causal link between her mental distress and defendants' conduct, plaintiff implicitly claims it was not caused by a preexisting mental condition, thereby raising the question of alternative sources for the distress. We thus conclude that her mental state is in controversy." (*Id*. at p. 840.) The *Vinson* court further held the plaintiff waived her right to privacy of her present mental and emotional condition, as they were directly relevant to her claim, and essential to a fair resolution of her suit. (*Id*. at p. 842.) When the right to discovery conflicts with a privilege, the court "must balance the right of civil litigants to discover relevant facts

		against the privacy interests of persons subject to discovery." (*Vinson*, *supra*, 43 Cal.3d at p. 842; see *Anderson v. Abercrombie and Fitch Stores, Inc.* (S.D. Cal., Jul. 2, 2007, No. 06cv991-WQH(BLM)) 2007 WL 1994059, at *2-9[2] [district court rejected right to privacy argument that subpoena encompassed irrelevant records unrelated to claims and injuries].) Discovery may be compelled only upon a showing of a compelling public interest. (*Tylo v. Superior Court* (1997) 55 Cal.App.4th 1379, 1387.) In situations where it is argued a party waived a privilege by filing a lawsuit, the court must construe the concept of "waiver" narrowly, and a compelling public interest is demonstrated only where the material sought is directly relevant to the litigation. (*Britt*, *supra*, 20 Cal.3d at pp. 858-859; *Tylo*, *supra*, 55 Cal.App.4th at p. 1387.) **<u>Analysis</u>** Defendant issued a subpoena to Bolsa Medical Group for: [A] complete file for Danh Hong's health care, including but not limited to the following: (1) Progress notes (2) Nurses' notes (3) Consultation notes (4) Histories (5) Reports of laboratory examinations (6) Emails concerning Danh Hong (7) Telephone messages concerning Danh Hong (8) Correspondence of any kind with Danh Hong (9) Correspondence of any kind with third parties concerning Danh Hong, including other physicians, surgeons, pharmacists, and family members (10) Advance Health Care Directives signed by Danh Hong (11) POLST For the period of January 1, 2021, to present. (Exhibit 1 to Griffith Declaration.) Defendant contends that Plaintiff Hong's medical records are directly relevant to his financial elder abuse claim, and she

[2] Unpublished federal district court opinions citable as persuasive, although not as precedential, authority. (*Olinick v. BMG Entertainment* (2006) 138 Cal.App.4th 1286, 1301, fn. 11.)

		maintains Hong waived any right to privacy by bringing such a claim. The court disagrees. While Plaintiffs allege in their Complaint that Defendant exerted undue influence on Hong during a period of time when Hong was in an emotionally vulnerable condition, Plaintiffs also explain that Hong was not in an emotionally vulnerable condition due to his incapacity or illness. (Welf. & Inst. Code, § 15610.70, subd. (a)(1).) Instead, Plaintiffs have alleged Hong's vulnerability was due to his wife's advanced dementia, which Defendant was aware of. They also allege Defendant used her position as Plaintiffs' daughter to unduly influence them. (Welf. & Inst. Code, § 15610.70, subd. (a)(2); see *Newman v. Casey* (2024) 99 Cal.App.5th 359, 376-377 [daughter had apparent authority over her mother, and she used affection, intimidation or coercion, and she hastily initiated changes in mother's personal property rights].) In other words, and contrary to the arguments raised in Defendant's Opposition, Plaintiff Hong's medical records are not directly related to the claims and defenses in the underlying action, they are not directly relevant to the action, or essential to a fair determination thereof, and Plaintiffs have not waived Hong's objectively reasonable expectation of privacy relating to his medical records simply by filing a lawsuit. Further, by filing this lawsuit, Hong has not placed his medical condition at issue. While Plaintiffs have alleged they have suffered severe emotional distress as a result of Defendant's conduct, Defendant has presented no evidence that the medical records she has subpoenaed pertain to Hong's mental or emotional state, and the subject subpoena does not support a finding that the documents sought pertain to Plaintiff Hong's mental or emotional condition. Even in a simple balancing test, Defendant's right to discover relevant facts does not outweigh Hong's privacy interests (*Vinson*, *supra*, 43 Cal.3d at p. 842). Further, Defendant has not met her burden of showing that a compelling public interest overcomes Plaintiff Hong's privacy rights. (*Britt*, *supra*, 20 Cal.3d at pp. 858-859; *Tylo*, *supra*, 55 Cal.App.4th at p. 1387.) Given the foregoing, the Court finds Defendant's proposed intrusion into Hong's right to privacy is serious, and she is not entitled to discovery regarding Hong's medical records, which are not relevant to Plaintiffs' financial elder abuse claims.

In her Opposition, Defendant argues Plaintiffs' meet and confer efforts were insufficient, as the meet and confer letter did not address Plaintiffs' contentions regarding the physician-patient privilege, the attorney-client privilege, and the attorney-work product doctrine. (Exhibit 2 to Griffith Declaration.) The Court finds this argument unavailing, as Defendant made clear she had no intention of withdrawing the subpoena. (Exhibit 3 to Griffith Declaration.) Further, Defendant's Opposition makes clear she disagrees with Plaintiff's positions, such that the Court finds requiring Defendant to meet and confer further would not have meaningfully changed the parties' positions.

<u>Sanctions</u>

"Except as specified in subdivision (c), in making an order pursuant to motion made under subdivision (c) of Section 1987 or under Section 1987.1, the court may in its discretion award the amount of the reasonable expenses incurred in making or opposing the motion, including reasonable attorney's fees, if the court finds the motion was made or opposed in bad faith or without substantial justification or that one or more of the requirements of the subpoena was oppressive." (Code Civ. Proc., § 1987.2, subd. (a).)

Since the Court grants Plaintiffs' Motion, the Court denies Defendant's request for $5,040.00 in sanctions. (Becker-Zymet Declaration, ¶ 3.)

" 'Substantial justification' means 'that a justification is clearly reasonable because it is well grounded in both law and fact. [Citations.]' [Citation.]" (*Vasquez v. California School of Culinary Arts, Inc.* (2014) 230 Cal.App.4th 35, 40; *Evilsizor v. Sweeney* (2014) 230 Cal.App.4th 1304, 1312.)

Plaintiffs' Motion was well-grounded in both law and fact. The billing rate ($300 per hour) and the total amount requested ($2,780.00) both appear reasonable. Thus, the Court grants Plaintiffs' request for $2,780.00 in sanctions. (Griffith Declaration, ¶¶ 8-9.)

Moving party to give notice.

6	Hulsey vs. Nguyen	**TENTATIVE RULING:** **<u>Motion for Leave to Amend</u>**. Plaintiff Rickie Hulsey moves for leave to file a Second Amended Complaint. For the following reasons, the motion is DENIED without prejudice. California Rules of Court, Rule 3.1324 requires that a motion for leave to amend must include a copy of the proposed amended pleading. Specifically, Rule 3.1324(a)(1) states that a motion for leave to amend must "[i]nclude a copy of the proposed amendment or amended pleading, which must be serially numbered to differentiate it from previous pleadings or amendments." Plaintiff did not include a copy of the proposed Second Amended Complaint with the motion. Defendants to give notice. **<u>Motion for Default Judgment.</u>** Plaintiff Rickie Hulsey seeks entry of judgment by default for Defendants' failure to respond to the Second Amended Complaint. Plaintiff has not filed the Second Amended Complaint and has not yet been granted leave to file that pleading. Defendants have no obligation to file a responsive pleading to the Second Amended Complaint. Further, Plaintiff has not obtained entry of Defendants' default. (*See, e.g., People v. One 1986 Toyota Pickup* (1995) 31 Cal.App.4th 254, 259 ("Entry of default by the court clerk is a statutory prerequisite to both a clerk's default judgment (Code Civ. Proc., § 585, subd. (a)) and a default judgment by the court (Code Civ. Proc., § 585, subds. (b) and (c)).").) Thus, the motion is DENIED. Defendants to give notice.
7	Aguirre vs. City of Brea	**TENTATIVE RULING:** For the reasons set forth below, Defendant A&E Consultants Group, Inc.'s Motion for Summary Judgment, or, in the Alternative, Summary Adjudication of Issues, is DENIED. Defendant's evidentiary objections to portions of Exhibit B of the Simon Declaration are overruled.

		Statement of Law "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) "A party may move for summary judgment in an action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding." (Code Civ. Proc., § 437c, subd. (a)(1).) "The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining if the papers show that there is no triable issue as to any material fact, the court shall consider all of the evidence set forth in the papers, except the evidence to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except summary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence if contradicted by other inferences or evidence that raise a triable issue as to any material fact." (Code Civ. Proc., § 437c, subd. (c).) "A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty, if the party contends that the cause of action has no merit, that there is no affirmative defense to the cause of action, that there is no merit to an affirmative defense as to any cause of action, that there is no merit to a claim for damages, as specified in Section 3294 of the Civil Code, or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (Code Civ. Proc., § 437c, subd. (f)(1); *R.J. Land & Associates Construction Co. v. Kiewit-Shea* (1999) 69 Cal.App.4th 416, 424.) "A motion for summary adjudication may be made by itself or as an alternative to a motion for summary judgment and shall proceed in all procedural respects as a motion for summary judgment." (Code Civ. Proc., § 437c, subd. (f)(2).) "If a motion for summary adjudication is granted, at the trial of the action, the cause or causes of action within the action, affirmative defense or defenses, claim for damages, or issue or issues of duty as to the motion that has been granted shall be deemed to be

		established and the action shall proceed as to the cause or causes of action, affirmative defense or defenses, claim for damages, or issue or issues of duty remaining." (Code Civ. Proc., § 437c, subd. (n)(1).) For purposes of a motion for summary adjudication, "A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if the party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to the cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto. The plaintiff or cross-complainant shall not rely upon the allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to the cause of action or a defense thereto." (Code Civ. Proc., § 437c, subd. (p)(2).) "First, and generally, from commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar*, *supra*, 25 Cal.4th at p. 850.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Ibid*.) "Second, and generally, the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Aguilar*, *supra*, 25 Cal.4th at p. 850; § 437c, subd. (p)(1) [plaintiff meets its burden by proving each element of its cause of action].) Unless the moving party meets its initial burden, summary judgment cannot be ordered, even if the opposing party has not responded sufficiently, or at all. (*Vesely v. Sager* (1971) 5 Cal.3d 153, 169-170, superseded by statute on another point, as noted in *Ennabe v. Manosa* (2014) 58 Cal.4th 697, 701, 707; *FSR Brokerage, Inc. v. Superior Court* (1995) 35 Cal.App.4th 69, 73, fn. 4.)

The moving party's evidence is strictly construed, while the opposing party's evidence is liberally construed, and any doubts as to whether summary judgment should be granted must be resolved in favor of the opposing party. (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 64; accord, *Atkins v. St. Cecilia Catholic School* (2023) 90 Cal.App.5th 1328, 1344-1345; *Trop v. Sony Pictures Entertainment, Inc.* (2005) 129 Cal.App.4th 1133, 1143.) "The court focuses on finding issues of fact; it does not resolve them. The court seeks to find contradictions in the evidence or inferences reasonably deducible from the evidence that raise a triable issue of material fact. [Citation.]" (*Trop*, *supra*, 129 Cal.App.4th 1133, 1143-1144.)

Merits

Defendant contends it cannot be liable for any of Plaintiff's alleged injuries under the "Completed and Accepted" doctrine.

> "[W]hen a contractor completes work that is accepted by the owner, the contractor is not liable to third parties injured as a result of the condition of the work, even if the contractor was negligent in performing the contract, unless the defect in the work was latent or concealed. [Citation.] The rationale for this doctrine is that an owner has a duty to inspect the work and ascertain its safety, and thus the owner's acceptance of the work shifts liability for its safety to the owner, provided that a reasonable inspection would disclose the defect. [Citation.]" [Citations.] Stated another way, "when the owner has accepted a structure from the contractor, the owner's failure to attempt to remedy an obviously dangerous defect is an intervening cause for which the contractor is not liable." [Citation.] The doctrine applies to patent defects, but not latent defects. "If an owner, fulfilling the duty of inspection, cannot discover the defect, then the owner cannot effectively represent to the world that the construction is sufficient; he lacks adequate information to do so." [Citation.]

(*Neiman v. Leo A. Daly Co.* (2012) 210 Cal.App.4th 962, 969.)

As in *Neiman*, Defendant met its initial burden of establishing the affirmative defense of the completed and accepted doctrine by way of the City of Brea's admissions that:

		(1) Defendant designed the subject curb in accordance with the City's standard plans. (2) The City did not request, and the standard plans did not require, the subject curb be painted yellow. (3) The City determined Defendant had completed its scope of work designing the subject curb. (4) The City paid Defendant in full for its design work. (5) The City accepted Defendant's design work. (6) The City did not request Defendant redesign any portion of the subject curb. (See *Neiman*, *supra*, 210 Cal.App.4th 962, 969 [defendant met its burden of establishing the affirmative defense of the completed and accepted doctrine through its co-defendant's discovery responses].) (Material Fact nos. 14-19: Exhibit J to Harris Declaration.) Defendant next contends the Completed and Accepted Doctrine applies because the purported defect was patent. " 'A patent defect " 'is one which can be discovered by such an inspection as would be made in the exercise of ordinary care and prudence. [Citations.] This is contrasted with a latent defect, one which is hidden and which would not be discovered by a reasonably careful inspection. [Citations.]' " [Citations.] [¶] "Whether a defect is apparent by reasonable inspection is a question of fact." [Citations.] What constitutes a *reasonable* inspection "is a matter to be determined from the totality of circumstances of the particular case[ ]" and "must vary with the nature of the thing to be inspected and the nature and gravity of the harm which is sought to be averted." [Citation.] Whether a reasonable inspection would render a defect apparent is determined in light of "the reasonable expectations of the average consumer." [Citations.]' [Citations.]" (*Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625, 644; see *Neiman*, *supra*, 210 Cal.App.4th at p. 970 [a latent defect is one that is "concealed or hidden," and "which the owner would not discovery by reasonable inspection"].) "The test to determine whether a construction defect is patent is an objective test that asks 'whether the average consumer, during the course of a reasonable inspection, would discover the defect. The test assumes that an inspection takes place.' [Citations.] This test generally presents a question of fact, unless the defect is obvious in the context of common experience; then a determination of patent defect may be made as a matter of law (including on summary

judgment). [Citations.]" (*Creekridge Townhome Owners Assn., Inc. v. C. Scott Whitten, Inc.* (2009) 177 Cal.App.4th 251, 256.)

In Defendant's view, the defect of the subject curb was patent, as it was not hidden, and because Plaintiff testified he had no information or evidence that the curb's design was unsafe or dangerous, that it was not built according to its design, or that it was defective in any manner. (Material Fact nos. 20-22: Exhibit K to Harris Declaration.)

Defendant's own evidence presents a triable issue of material fact as to whether the defect was patent or latent, as Plaintiff's discovery responses provide explanations as to why the curb's defect was hidden, and why a reasonable inspection would not have led to its discovery. (Exhibit L to Harris Declaration [Special Interrogatory nos. 1, 8, 16, 18, 19, 20, 24, 29, 58, 59]; Exhibit M to Harris Declaration [Form Interrogatory no. 17.1].)

In addition, attached as Exhibit N to the Harris Declaration is the declaration of Plaintiff's expert, Jay William Preston. Preston's declaration highlights why there is a triable issue of material fact as to whether the defect was latent. For example, he describes in paragraph 11 of his declaration how the overall color of the area, including the absence of differentiation between the change in levels, as well as the lighting of the area, made it difficult, if not impossible, to identify the hazard. (Exhibit N to Harris Declaration [Preston Declaration, ¶ 11].) Mr. Preston also explained the curb was in an unexpected location, the curb was lower than typical curbs, and it was not clearly marked to bring attention to the change in elevation. (Exhibit N to Harris Declaration [Preston Declaration, ¶¶ 12-13, 20].)

Contrary to Defendant's position, the defect is not so "obvious in the context of common experience." Thus, the Court finds the defect was not patent as a matter of law. (*Creekridge*, *supra*, 177 Cal.App.4th 251, 256.)

Given the foregoing evidence, Defendant has not met its initial burden of showing it is protected by the Completed and Accepted Rule, as there are triable issues of material fact as to Material Fact nos. 21-24, and as to the issue of whether the subject defect was patent or latent.

Thus, the Court denies Defendant's motion for summary judgment, as well as its motion for summary adjudication of issues.

		Plaintiff to give notice.
8	Bonakdar vs. Ranger Construction Inc.	**TENTATIVE RULING:** **Motion for Summary Judgment.** Defendant Ranger Construction Inc. moves for summary judgment on the Complaint filed by Plaintiff Monica Bonakdar. For the following reasons, the motion is DENIED. **Legal Standard** A plaintiff moving for summary judgment "bears the burden of persuasion that 'each element of' the 'cause of action' in question has been 'proved,' and hence that 'there is no defense' thereto. [Citation.]" (*Aguilar* v. *Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850; Code Civ. Proc. § 437c, subd. (p)(1).) "Once the plaintiff ... has met that burden, the burden shifts to the defendant ... to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The defendant ... may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto." (Code Civ. Proc. § 437c, subd. (p)(1).) In determining whether the parties have met their respective burdens, "the court must 'consider all of the evidence' and 'all' of the 'inferences' reasonably drawn therefrom [citation], and must view such evidence [citations] and such inferences [citations], in the light most favorable to the opposing party." (*Aguilar, supra*, 25 Cal.4th at p. 843.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Id*. at p. 850, fn. omitted.) Thus, a party " 'cannot avoid summary judgment by asserting facts based on mere speculation and conjecture, but instead must produce admissible evidence raising a triable issue of fact. [Citation.]' [Citation.]" (*Dollinger DeAnza Associates v. Chicago Title Ins. Co.* (2011) 199 Cal.App.4th 1132, 1144-1145.) The moving party's papers are to be strictly construed, while the opposing party's papers are to be liberally construed. (*Committee to Save Beverly Highland Homes Ass'n v. Beverly Highland* (2001) 92 Cal.App 4th 1247, 1260.) A court may not make credibility

		determinations or weigh the evidence on a motion for summary judgment or adjudication, and all evidentiary conflicts are to be resolved against the moving party. (*McCabe v. American Honda Motor Corp.* (2002) 100 Cal.App.4th 1111, 1119.) **<u>Merits</u>** Plaintiff and Defendant entered into a contract in August 2019. (Bonakdar Dec., ¶ 4.) Defendant's counsel provided a copy of the contract. (Burke Dec., Ex. 1.) Although counsel likely does not have personal knowledge sufficient to authenticate the contract, Plaintiff did not object to this evidence and does not dispute the authenticity of the contract. The only remaining claims in the FAC are for (1) breach of a construction contract; (2) breach of implied covenant to perform work in a good and competent manner; and (3) breach of the implied covenant of good faith and fair dealing. Defendant contends that each of these claims fails because Plaintiff did not give Defendant notice of allegedly defective work and allow Defendant to cure the alleged defects before hiring replacement construction. The Contract provides in Section 3.8.5., "If after the one-year correction period but before any other agreed upon applicable limitation period the Owner discovers any Defective Work, the Owner shall, unless the Defective Work requires emergency correction, promptly notify the Contractor. The Owner may either (a) allow the Contractor at its option to correct the Work or (b) have the work corrected by itself or others and charge the Contractor for the reasonable cost of the correction." (Burke Dec., Ex. 1.) [3] Section 3.8.6 of the Contract states: > 3.8.6 If the Contractor fails to correct Defective work within a reasonable time after receipt of written notice from the Owner, the Owner may correct it in accordance with the Owner's right to carry out the Work in subparagraph 11.2. In such case, an appropriate Change Document shall be issued deducting the reasonable cost of correcting such deficiencies from payments then or thereafter due the

[3] The parties appear to agree that Section 3.8.5 applies rather than Section 3.8.2, which applies when the owner discovers defective work within one year after the date of substantial completion of the work. Neither party addresses Section 3.8.2.

> Contractor. If payments then or thereafter due Contractor are not sufficient to cover such amounts, the Contractor shall pay the difference to the Owner.

Pursuant to Section 11.2, if Defendant failed to cure any contractual breach within seven working days after receiving notice thereof, Plaintiff was entitled to retain a third party to remedy the work, and “charge the cost thereof to the Contractor, who shall be liable for the payment of same including reasonable overhead, profit, and attorneys’ fees.” (Burke Dec., Ex. 1.)

Defendant contends that it completed work on the property in January 2021. As evidence of this, Defendant’s counsel submits an “Owner Certification and Authorization for Disbursement” between Plaintiff and Tetra Tech, Inc. Defendant’s counsel does not have sufficient personal knowledge to authenticate this document. Further, this document does not establish that the construction work was “completed.” Defendant contends in its Reply that Plaintiff’s First Amended Complaint (FAC) “expressly alleged” that Defendant completed the work in January 2021. Paragraph 10 of the FAC states, “10. Defendant did not complete the Work until January 15, 2021. Nor did Defendant use best efforts to perform the Work expeditiously.” But Plaintiff appears to dispute that the work was completed at all in that certain deficiencies had not been corrected. (Plaintiff’s response to UMF 5.)

Defendant provides evidence that Plaintiff retained Creative Construction 360 in response to Defendant’s work on March 12, 2021. (UMF 7-8.) Defendant contends that Plaintiff failed to provide notice as required under the contract, but Defendant does not provide any evidence of this. Defendant does not support this contention in its separate statement, and there is no declaration or evidence establishing that Plaintiff failed to provide notice to Defendant of defective work. Thus, Defendant has not met its initial burden on the motion.

Further, Plaintiff has provided evidence that, between July 2, 2020, and February 25, 2021, Plaintiff provided written notice of several instances of defective work to Defendant’s project manager, Joseph Corasaniti. (Plaintiff’s UMF 14-16.) Despite these notices, Defendant failed to cure the defective work. (Plaintiff’s UMF 17.) In its Reply, Defendant contends that these text messages and emails do not constitute a notice to cure as required by Section 11.2 of the Contract. But Section 11.2 does not detail a specific form that a notice to cure must take – it only requires written

		notification. (Burke Dec., Ex. 1.) Finally, Plaintiff does not state in her First Amended Complain that March 2021 was the first time Plaintiff sent Defendant a notice to cure. Plaintiff to give notice.
9	Californians For Homeownership, Inc. vs. City of La Habra	**CONTINUED TO 5/8/24**
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