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: April 9, 2025

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	Berge vs. General Motors, LLC	**TENTATIVE RULING:** **Motion 1. Demurrer to FAC** Defendant General Motors LLC demurs to the First Amended Complaint of Plaintiff Jon Eric Berge. For the following reasons, the demurrer is OVERRULED. In ruling on a demurrer, a court must accept as true all allegations of fact contained in the complaint. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) A demurrer challenges only the legal sufficiency of the affected pleading, not the truth of the factual allegations in the pleading or the pleader's ability to prove those allegations. (*Cundiff v. GTE Cal., Inc.* (2002) 101 Cal.App.4th 1395, 1404-1405.) Questions of fact cannot be decided on demurrer. (*Berryman v. Merit Prop. Mgmt., Inc.* (2007) 152 Cal.App.4th 1544, 1556.) A demurrer tests only the sufficiency of the complaint; a court will not consider facts that have not been alleged in the complaint unless they may be reasonably inferred from the matters alleged or are proper subjects of judicial notice. (*Hall v. Great W. Bank* (1991) 231 Cal.App.3d 713, 718 n.7.)

		Although courts should take a liberal view of inartfully drawn complaints (*see* Code Civ. Proc., § 452), it remains essential that a complaint set forth the actionable facts relied upon with sufficient precision to inform the defendant of what plaintiff is complaining, and what remedies are being sought. (*Leek v. Cooper* (2011) 194 Cal.App.4th 399, 413.) Bare conclusions of law devoid of any facts are insufficient to withstand demurrer. (*Schmid v. City and County of San Francisco* (2021) 60 Cal.App.5th 470, 481; *see* Code Civ. Proc., § 425.10(a).) **Fifth Cause of Action (Fraudulent Inducement-Concealment)** The fifth cause of action alleges that Defendant GM failed to disclose that the Vehicle and its 8-speed transmission were defective and susceptible to sudden and premature failure. (FAC ¶ 66.) The fifth cause of action alleges Defendant GM continued to conceal the defect and its inability to repair it, making it difficult for Plaintiff to discover the wrongdoing. (FAC ¶ 75.) Active concealment or suppression of facts is the equivalent of actual fraud. (Civ. Code, § 1572(3).) The elements of a cause of action for fraudulent concealment are: (i) concealment or suppression of a material fact; (ii) by a defendant with a duty to disclose the fact to the plaintiff; (iii) defendant's intent to defraud plaintiff by intentionally concealing or suppressing the fact; (iv) plaintiff was unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact; and (v) as a result, the plaintiff sustained damage. (*Hambrick v. Healthcare Partners Medical Group, Inc.* (2015) 238 Cal.App.4th 124, 162; *see also* Civ. Code, § 1573.) Concealment is a species of fraud, and "[f]raud must be pleaded with specificity." (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 878.) General and conclusory allegations do not suffice. (*Lazar v. Super. Ct.* (1996) 12 Cal.4th 631, 645). The heightened pleading standard requires "'pleading facts [that] "show how, when, where, to whom, and by what means the representations were tendered." ' [Citation.]" (*Ibid*.) Further, "'[a] plaintiff's burden in asserting a fraud claim against a corporate employer is even greater. In such a case, the plaintiff must "allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." ' " (*Hamilton v. Greenwich Investors XXVI, LLC* (2011) 195 Cal.App.4th 1602, 1614.)

Statute of Limitations

Defendant contends the fifth cause of action is time-barred. Defendant contends Plaintiff cannot rely on delayed discovery where Plaintiff affirmatively concedes the alleged "[d]efects and nonconformities to warranty manifested themselves within the applicable express warranty period" (FAC ¶ 11) and the allegations show plaintiff was able to discover the claim through reasonable diligence.

Plaintiff contends the limitations period was tolled due to delayed discovery because he was not aware of the defect until after the multiple failed attempts to repair the transmission defect.

The statute of limitations for fraud claims is three years. (Code Civ. Proc., § 338(d).) "In order to rely on the discovery rule for delayed accrual of a cause of action, a plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence. . . . [C]onclusory allegations will not withstand demurrer." (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 808.) Once properly pleaded, belated discovery is a question of fact and becomes a matter of law only when "reasonable minds can draw only one conclusion from the evidence." (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1320.)

Here, the FAC alleges sufficient facts regarding the time and manner of discovery and inability to have made earlier discovery despite reasonable diligence. Plaintiff alleges he was unable to make earlier discovery because Defendant continued to attempt to repair the transmission defect and that Plaintiff discovered the wrongful conduct shortly before the filing of the complaint, after the Vehicle continued to exhibit symptoms following those unsuccessful attempts at repair. The last alleged repair attempt was on or about 08/22/2022 (FAC ¶ 27), which is less than three years from the filing of this action.

Duty to Disclose

Defendant contends the fraud claim fails as a matter of law because the FAC alleges no transactional relationship between the parties giving rise to a duty to disclose.

Generally, "[a] duty to disclose facts arises only when the parties are in a relationship that gives rise to the duty, such as 'seller and buyer, employer and prospective employee, doctor and patient, or parties entering into any kind of contractual arrangement.'" (*Bigler-Engler, Inc. v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 311.) The *Bigler-Engler* court explained:

> Our Supreme Court has described the necessary relationship giving rise to a duty to disclose as a "transaction" between the plaintiff and defendant: "In *transactions* which do not involve fiduciary or confidential relations, a cause of action for non-disclosure of material facts may arise in at least three instances: (1) the defendant makes representations but does not disclose facts which materially qualify the facts disclosed, or which render his disclosure likely to mislead; (2) the facts are known or accessible only to defendant, and defendant knows they are not known to or reasonably discoverable by the plaintiff; (3) the defendant actively conceals discovery from the plaintiff." [Citation.] . . . Such a transaction must necessarily arise from direct dealings between the plaintiff and the defendant; it cannot arise between the defendant and the public at large.

(*Id.* at pp. 311-312.)

In *Bigler-Engler*, no seller and buyer or contractual relationship existed between the plaintiff and manufacturing defendant. (*Id.* at p. 314.) The manufacturing defendant in that case sold medical devices to the physician defendant several years before the plaintiff rented one of the manufacture's devices from the physician's office. (*Id.*) The manufacturing defendant had no contact with the plaintiff, did not know plaintiff was a potential user of its products or used the device, and did not derive any direct monetary benefit from the plaintiff's rental of the device. (*Ibid.*)

The court in *Dhital v. Nissan North America* considered this principle in the context of consumers purchasing a manufacturer's vehicle and found the plaintiff consumer need not allege a transaction with the manufacture to allege a duty to disclose. Specifically, the *Dhital* court concluded that allegations that the plaintiffs bought a vehicle from a Nissan dealership that was backed by an express warranty from Nissan, and that Nissan's authorized dealerships are its agents for purposes of the sale of Nissan vehicles to consumers was sufficient at the demurrer stage to support a duty to disclose. (*Dhital v. Nissan North America, Inc.* (2022) 84 Cal.App.5th 828, 844,

petition for review granted (2023) 523 P.3d 392 and dismissed and remanded, __ P.3d __, 2024 WL5162583 (Dec. 18, 2024).)

Like the situation in *Dhital*, the FAC in this case alleges that Plaintiff purchased the subject vehicle from an authorized dealer of Defendant GM (FAC ¶ 6) and that the vehicle was covered by an express warranty from Defendant GM (FAC ¶¶ 7, 10). In addition, unlike the situation in *Bigler-Engler*, Plaintiff here alleges a contractual relationship with Defendant via the warranty agreement. (FAC ¶ 6.)

The FAC alleges additional facts to support a duty to disclose, including that Defendant GM manufactured the subject vehicle (FAC ¶ 6), knew of the Transmission Defect (FAC ¶¶ 69, 71), and actively concealed the defects by blaming the symptoms of the defects on other issues (FAC ¶¶ 42-43, 74-75, 77).

Other Elements

Lastly, the FAC alleges facts to support the remaining elements of a fraudulent concealment claim, including concealment and/or suppression of the transmission defect (FAC ¶¶ 70-74), Defendant's intent to defraud through concealment (FAC ¶¶ 77, 81), Plaintiff's ignorance of the concealed facts (FAC ¶ 80), that Plaintiff would not have purchased the vehicle had he known the true facts about the defect (FAC ¶¶ 79, 83), and Plaintiff's damages (FAC ¶ 83).

Defendant GM shall file a responsive pleading within 30 days of service of the notice of this ruling.

Plaintiff to give notice.

Motion 2. Motion to Strike Portions of FAC

Defendant General Motors LLC moves to strike portions of the First Amended Complaint of Plaintiff Jon Eric Berge. For the following reasons, the motion is DENIED.

Pursuant to Code of Civil Procedure Section 436 the court may, upon a motion made or at any time in its discretion, strike out "any irrelevant, false, or improper matter inserted in any pleading." The grounds for a motion to strike must appear on the face of the pleading or from matters which the court may judicially notice. (Code Civ. Proc., § 437.) In a motion to strike, a judge must read the complaint as a whole, considering all parts in their context, and must assume the truth of all well-pleaded allegations. (*Courtesy Ambulance Serv. v. Superior Court* (1992) 8 Cal.App.4th 1504, 1519.)

		A motion to strike may be used specifically to strike punitive damages allegations in a complaint lacking factual foundation. (*Turman v. Turning Point of Central Calif., Inc.* (2010) 191 Cal.App.4th 53, 63.) Defendant moves to strike the prayer for punitive damages, arguing the FAC does not allege facts supporting that claim. To plead a claim to recover punitive damages, a plaintiff must plead and show one of the following bases for imposition of exemplary damages, i.e. malice, oppression, or fraud. (Civ. Code, § 3294(a).) The statute defines fraud to mean "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." (Civ. Code, § 3294(c).) As discussed in the concurrent ruling on demurrer, Plaintiff pleads a valid claim for fraudulent concealment, which in turn supports his claim for punitive damages. Defendant GM shall file a responsive pleading within 30 days of service of the notice of this ruling. Plaintiff to give notice.
2	Frongello vs. Kozich	**TENTATIVE RULING:** **<u>Demurrer to Second Amended Complaint</u>** Defendant JP Morgan Chase Bank, N.A. ("Chase") demurs to the second, fourth, fifth, sixth, seventh, and eighth causes of action of Plaintiff Joyce Karen Frongello's Second Amended Complaint. ("SAC"). For the reasons set forth below, the demurrer is SUSTAINED with leave to amend. In ruling on a demurrer, a court must accept as true all allegations of fact contained in the complaint. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) A demurrer challenges only the legal sufficiency of the affected pleading, not the truth of the factual allegations in the pleading or the pleader's ability to prove those allegations. (*Cundiff v. GTE Cal., Inc.* (2002) 101 Cal.App.4th 1395, 1404-05.) The SAC alleges causes of action for financial elder abuse, fraud, conversion, civil conspiracy, violation of the Racketeering Influenced

		and Corrupt Organizations Act (RICO), and violation of Business & Professions Code section 17200 against Chase. (See SAC.) Chase demurs to the claims against it on the basis that the SAC does not state facts sufficient to assert causes of action against Chase. Specific to Chase, the SAC alleges that, based on information and belief, Chase employees were aware, complicit, facilitated, approved and/or authorized the deposit of the check at issue despite the highly suspicious nature of the endorsements on the check and despite the fact that the check was being deposited into an account bearing no relation to the name of the payee on the check. (SAC ¶ 25.) The SAC also alleges that Chase owned, operated, managed, and/or supervised the bank branches through which the alleged RICO laundering scheme laundered stolen foreclosure proceeds, including those of Plaintiff. (SAC ¶ 77-78.) Even when reading the SAC as a whole and its parts in their context (*Bichai v. Dignity Health* (2021) 61 Cal.App.5th 869, 876–877), these allegations are insufficient to constitute causes of action against Chase. Plaintiff does not dispute Chase's contentions and impliedly concedes that Chase is correct by giving notice of her intent to file a Third Amended Complaint in lieu of opposing the instant demurrer. (ROA 450; see also *Nazir v. United Airlines, Inc*. (2009) 178 Cal.App.4th 243, 288 [failure to address or oppose issue in motion constitutes waiver of that issue]; *Wright v. Fireman's Fund Ins. Companies* (1992) 11 Cal.App.4th 998, 1011 ["it is clear that a defendant may waive the right to raise an issue on appeal by failing to raise the issue in the pleadings or in opposition to a . . . motion"].) The demurrer is sustained in its entirety. Should Plaintiff desire to file an amended complaint that addresses the issues in this ruling, Plaintiff must file and serve it within 30 days of service of notice of ruling. Defendant JP Morgan Chase Bank, N.A. to give notice. **Motion to Strike Portions of Second Amended Complaint** Defendant JP Morgan Chase Bank, N.A. ("Chase") moves to strike the following portions of the Second Amended Complaint ("SAC"): Paragraph 78 [allegations regarding Chase providing financial support of Jeffrey Epstein's sex trafficking]; Paragraph 87 [allegations purporting to define the class for Plaintiff's class action]; and Prayer for Relief, lines 24-25 [prayer for punitive or exemplary damages]. The motion to strike paragraph 78 is GRANTED. The remainder of the motion is DENIED.

A court may strike out any irrelevant, false, or improper matter inserted in any pleading or strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule or an order of the court. (Code Civ. Proc., § 436.)

Paragraph 78

Paragraph 78 of the SAC alleges:

> Plaintiff alleges this is not the first time Defendant JPMORGAN has knowingly, purposely and/or willingly looked the other way when and while substantial illegal, illicit, and/or other unfair banking activity occurred in its accounts while JPMORGAN accepted the financial benefits and privileges of keeping those accounts open. In or about November 2022, Defendant JPMORGAN was sued in the United States District Court for the Southern District of New York in case *Jane Doe 1, individually and on behalf of all others similarly situated v. JP Morgan Chase & Co.,* Case Number 1:22-cv-10019 for allegedly benefitting financially from participating in Jeffrey Epstein's sex trafficking by providing financial support for the continued operation of Epstein's sex trafficking organization from 1998 through August 2013. In *Jane Doe 1*, Defendant JPMORGAN was alleged to have provided financial assistance and was complicit and facilitated the financial needs necessary for Epstein to fund and operate his illegal operation by maintaining and managing bank accounts through which Epstein funded his allegedly illegal sex trafficking operation and ignored warnings and signs of the illegal operation. Plaintiff FRONGELLO alleges that, in or about November 2023, Defendant JPMORGAN settled the *Jane Doe 1* action for a payment of approximately $290 million to the *Jane Doe 1* class members. Plaintiff FRONGELLO further alleges Defendant JPMORGAN employees, managers, tellers, supervisors and/or others was, is, and continues to be part of a scheme or association-in-fact that operates to provide the financial ability for others to funnel and/or launder stolen residual proceeds from foreclosure sales such as those stolen from Plaintiff FRONGELLO through the Shoreline Sales LLC account number 616232219 and the Chase Bank account bearing routing number 122100024 and account number 806002234 for a branch and account located in Florida through which stolen residual foreclosure funds were also laundered as herein alleged.

The allegations concerning Jeffrey Epstein and the *Jane Doe 1* case are irrelevant. The motion to strike is granted as to paragraph 78, 85:23-86:10.

Paragraph 87

Paragraph 87 sets forth a class definition as:

A. All persons who had residual proceeds of foreclosure sales stolen by Defendants;
B. All persons whose stolen residual proceeds of foreclosure sales were laundered by Defendants.

"California's judicial policy [is to allow] potential class action plaintiffs to have their action measured on its merits to determine whether trying their suits as a class action would bestow the requisite benefits upon the litigants and the judicial process to justify class action litigation." (*Beckstead v. Superior Court* (1971) 21 Cal.App.3d 780, 783 (*Beckstead*).) "In order to effect this judicial policy, the California Supreme Court has mandated that a candidate complaint for class action consideration, if at all possible, be allowed to survive the pleading stages of litigation." (*Id.* citing *La Sala v. American Sav. & Loan Assn.* (1971) 5 Cal.3d 864, 868-869 [reversing trial court's sustaining of demurrer against class action suit]; *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 816 [same]; *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 716-717 [same]; *Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 121 [affirming trial court's overruling of demurrer attacking class allegations].)

Given the policy disfavoring the determination of class suitability issues at the pleading stage, the motion to strike is denied as to paragraph 87. Whether Plaintiff's proposed class definition is tenable may be determined at the class certification stage.

Prayer for Punitive or Exemplary Damages

Given the concurrent ruling to sustain the demurrer to each of the causes of action alleged against Chase with leave to amend Chase's motion to strike the prayer for punitive damages is denied as moot.

Defendant JP Morgan Chase Bank, N.A. to give notice.

3	Henry vs. Black Knight Patrol Inc.	**TENTATIVE RULING:** **Demurrer** Defendant Manuel Jimenez demurs to the Complaint filed by Plaintiffs Kara Henry and Mackenzie Andrade. For the following reasons, the demurrer is OVERRULED, in part, and SUSTAINED, in part. The demurrer is SUSTAINED as to the second cause of action (premises liability), the sixth cause of action (violation of federal civil rights), the seventh cause of action (negligent infliction of emotional distress), and the eighth cause of action (negligent hiring, retention, and supervisions). The demurrer is OVERRULED as to the first cause of action (negligence), the third cause of action (assault), the fourth cause of action (battery), and the fifth cause of action (false imprisonment). In ruling on a demurrer, a court must accept as true all allegations of fact contained in the complaint. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) A demurrer challenges only the legal sufficiency of the affected pleading, not the truth of the factual allegations in the pleading or the pleader's ability to prove those allegations. (C*undiff v. GTE Cal., Inc*. (2002) 101 Cal.App.4th 1395, 1404-05.) **First Cause of Action - Negligence** To prevail on a negligence claim, a plaintiff must show the defendant owed a legal duty to him or her, the defendant breached that duty, and the breach proximately caused injury to the plaintiff. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1145.) Plaintiffs' negligence claim alleges that Defendant Jimenez (DOE 1) breached his duty of care to ensure Plaintiffs' safety and exposed them to a dangerous condition when they attended a show at Strut night club. (Complaint, ¶ 14.) Defendant seems to contend that Plaintiffs must allege a negligence claim with specificity, but there is no heightened pleading standard for a negligence claim. (See *Hoyem v. Manhattan Beach City School District* (1978) 22 Cal.3d 508, 514 ["Under well established principles, ... general allegations of negligence, proximate causation and resulting injury and damages suffice to state a cause of action."].) Defendant also contends that the Complaint is vague and uncertain. A demurrer for uncertainty will only be sustained where the complaint is so poorly pled that a defendant 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*

California, Inc. (1993) 14 Cal. App. 4th 612, 616.) That is not the case here. The Complaint contains sufficient allegations to apprise Defendant what issues must be admitted or denied.

The demurrer to the negligence claim is OVERRULED.

Third Cause of Action (Assault) and Fourth Cause of Action (Battery)

The elements of a cause of action for assault are: (1) the defendant acted with intent to cause harmful or offensive contact, or threatened to touch the plaintiff in a harmful or offensive manner; (2) the plaintiff reasonably believed he was about to be touched in a harmful or offensive manner or it reasonably appeared to the plaintiff that the defendant was about to carry out the threat; (3) the plaintiff did not consent to the defendant's conduct; (4) the plaintiff was harmed; and (5) the defendant's conduct was a substantial factor in causing the plaintiff's harm. (*So v. Shin* (2013) 212 Cal.App.4th 652, 668–669.) The elements of a cause of action for battery are: (1) the defendant touched the plaintiff, or caused the plaintiff to be touched, with the intent to harm or offend the plaintiff; (2) the plaintiff did not consent to the touching; (3) the plaintiff was harmed or offended by the defendant's conduct; and (4) a reasonable person in the plaintiff's position would have been offended by the touching. (*Id.* at p. 669.)

The Complaint alleges that DOES 1-50 (including Jimenez) committed assault in that they "intentionally, willfully, wantonly, and maliciously threatened to strike Plaintiffs KARA HENRY and MACKENZIE ANDRADE to cause a reasonable apprehension by Plaintiffs of an immediate harmful or offensive contact with their persons." (Complaint, ¶ 28.) The Complaint also alleges DOES 1-50 "intentionally, willfully, wantonly, and maliciously caused a harmful and/or offensive contact and excessive force against Plaintiffs without consent…." (Complaint, ¶ 31.) These allegations are sufficient to constitute claims for assault and battery. The demurrer to the assault and battery causes of action is OVERRULED.

Fifth Cause of Action – False Imprisonment

"The elements of a tortious claim of false imprisonment are: (1) the nonconsensual, intentional confinement of a person, (2) without lawful privilege, and (3) for an appreciable period of time ...." (*Easton v. Sutter Coast Hospital* (2000) 80 Cal.App.4th 485, 496.)

The Complaint alleges Plaintiffs "were intentionally deprived of their freedom of movement by use of handcuffs and use of force by

BLACK KNIGHT, STRUT and DOES 1." (Complaint, ¶ 33.) The Complaint further alleges that Defendants' restraint compelled Plaintiffs to stay for an appreciable time and Plaintiffs did not consent to the use of force. (Complaint, ¶¶ 34-38.) These allegations are sufficient to constitute claims for false imprisonment. The demurrer to the false imprisonment claim is OVERRULED.

Seventh Cause of Action – Negligent Infliction of Emotional Distress

Defendants are correct that negligent infliction of emotional distress is not itself an independent tort. (*Ess v. Eskaton Properties, Inc*. (2002) 97 Cal.App.4th 120, 126; *Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc*. (1989) 48 Cal.3d 583, 588.) Instead, the claim is one for negligence. Because the Complaint already asserts a negligence claim, the NIED claim is duplicative and redundant. The demurrer to the negligent infliction of emotional distress claim is SUSTAINED.

Second Cause of Action (Premises Liability), Sixth Cause of Action (Violation of Federal Civil Rights), and Eighth Cause of Action (Negligent Hiring, Retention, and Supervision)

Plaintiffs do not oppose the demurrer to these causes of action. Thus, the demurrer to these causes of action is SUSTAINED.

Leave to Amend

On demurrer, a court determines whether the complaint states facts sufficient to constitute a cause of action. If the court sustains the demurrer, it must decide whether to grant leave to amend. Leave to amend should be granted if there is a reasonable possibility that the defect can be cured by amendment. Plaintiff has the burden of proving that there is a reasonable possibility that the defect can be cured by amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

"'[F]or an original complaint, regardless whether the plaintiff has requested leave to amend, it has long been the rule that a trial court's denial of leave to amend constitutes an abuse of discretion unless the complaint "shows on its face that it is incapable of amendment." ' " (*Tarrar Enterprises, Inc*., at p. 688, quoting *Eghtesad v. State Farm General Insurance. Co., supra*, 51 Cal.App.5th at pp. 411-412; see also *Cabral v. Soares* (2007) 157 Cal.App.4th 1234, 1240 ("Only rarely should a demurrer to an initial complaint be sustained without leave to amend").)

		As this is the first demurrer, the Court grants Plaintiff leave to amend. Should Plaintiffs desire to file an amended complaint that addresses the issues in this ruling, Plaintiffs must file and serve it within 30 days of service of notice of ruling. Defendant to give notice.
4	Reed vs. Marriott International, Inc.	**TENTAITVE RULING:** **I. <u>Demurrer</u>** For the reasons set forth below, the demurrer by Defendant USA Hotel Group, LLC, d/b/a Four Points by Sheraton (e/s/a Four Points by Sheraton Anaheim) ("Sheraton") to the first, third, fourth, sixth, and seventh causes of action to the complaint by Plaintiffs Twyla Lumsey, Silver Lumsey (a minor), and Latherio Reed, Jr. (a minor) is SUSTAINED with 30 days leave to amend. The demurrer is SUSTAINED without leave to amend as to the fifth cause of action. **A. First Cause of Action for Battery** "The elements of a cause of action for battery are: (1) the defendant touched the plaintiff, or caused the plaintiff to be touched, with the intent to harm or offend the plaintiff; (2) the plaintiff did not consent to the touching; (3) the plaintiff was harmed or offended by the defendant's conduct; and (4) a reasonable person in the plaintiff's position would have been offended by the touching. [Citation.]" (*Carlsen v. Koivumaki* (2014) 227 Cal.App.4th 879, 890.) The tort is not limited to direct body-to-body contact. (*See e.g., Mount Vernon Fire Insurance Corporation v. Oxnard Hospitality Enterprise, Inc.* (2013) 219 Cal.App.4th 876, 881 [battery occurred when patron threw glass full of a flammable liquid on insured's employee and set her on fire].) The element of intent requires that the defendant intended to commit a battery *or was substantially certain that battery would result* from his/her conduct. (CACI 1320; *Ashcraft v. King* (1991) 228 Cal.App.3d 604, 613 [where medical consent conditioned on using family-donated blood, battery claim stated where other blood used in surgery, resulting in HIV transmission – intent adequately alleged by claimed *willful disregard* of condition re blood source].) "As a general rule, California law recognizes that '... every person is presumed to intend the natural and probable consequences of his acts. [Citation.] Thus, a person who acts willfully may be said to intend

		'those consequences which (a) represent the very purpose for which an act is done (regardless of the likelihood of occurrence), or (b) are known to be substantially certain to result (regardless of desire). [Citations]" (*Gomez v. Acquistapace* (1996) 50 Cal.App.4th 740, 746.) Accordingly, "[i]n an action for civil battery the element of intent is satisfied if the evidence shows defendant acted with a 'willful disregard' of the plaintiff's rights" (*Ashcraft, supra,* 228 Cal.App.3d at p. 613.) Defendant argues that Plaintiffs have not sufficiently alleged that Defendants touched Plaintiffs, deliberately placed bed bugs in Plaintiffs' room, or that Defendants somehow controlled the bedbugs. The court agrees. Plaintiffs allege: "The intent of Defendants, and DOES 1 through 20, is satisfied and evident from Defendants, and DOES 1 through 20, inclusive, recklessly failing to warn Plaintiffs of the dangerous bedbug infestation in their room, given Defendants', and DOES 1 through 20, inclusive, prior knowledge of an infestation. Plaintiffs did not receive any kind of warning or statement from Defendants, and DOES 1 through 20, inclusive, that the Subject Hotel had an infestation of bedbugs and did not regularly change the bedding, bed sheets, pillows, and skirts of the beds or thoroughly check and inspect them for infestations. Such an extreme departure from an ordinary standard of care amounts to wanton and reckless misconduct." (Complaint, ¶ 57). Those allegations amount to conclusions that, even if true, are insufficient to allege deliberate intent to harm. In opposition, Plaintiffs contend that awareness of a condition that is known to cause harm and the absence of effort to stop such contact from occurring constitutes a battery. In support, they rely on *Mathias v. Accor Economy Lodging, Inc.* (7th Cir. 2003) 347 F.3d 672 (*Mathias*). That reliance is misplaced. Although *Mathias* was a bed bug case, it was a negligence action (a cause of action to which Defendant does not demur) and a post-judgment appeal of a punitive damages award. It does not go to the issue of the "intentional" element of battery. Plaintiffs quote a portion of the opinion in which the court noted that the defendant's "failure either to warn guests or to take effective measures to eliminate the bedbugs amounted to fraud and probably to battery as well." (*Id*. at p. 675.) However, neither fraud nor battery causes of action were litigated in *Mathias*, making the portion on which Plaintiffs rely dicta. In any event, the facts in *Mathias* are also distinguishable from Plaintiffs' allegations here. The *evidence* in *Mathias* showed that the defendant was aware of a bed bug infestation *for years*, reaching

		"farcical proportions" where it continued to rent rooms it knew had bed bugs, including the one rented to the plaintiffs. (*Mathias, supra*, 347 F.3d at p. 675.) There are no such allegations here—i.e., allegations of the basis of Plaintiffs' knowledge that Defendant knew of a bedbug infestation for years and that it rented it to Plaintiffs having already known of the infestation. Plaintiffs also rely on a passage in *Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1099-1100 (*Ornelas*), in which the court stated that a real property owner "owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give recreational users warning of hazards on the property, unless: (1) the landowner willfully or maliciously fails to guard or warn against a dangerous condition, use, structure or activity; (2) permission to enter for a recreational purpose is granted for a consideration; or (3) the landowner expressly invites rather than merely permits the user to come upon the premises." Plaintiffs' reliance on *Ornelas* is also misplaced. *Ornelas* was a negligence action (again a cause of action to which Defendant did not demur) and an appeal of a summary judgment ruling. The California Supreme Court considered the applicability of Civil Code section 846, which provides limited liability for private landowners for injuries sustained by another from recreational use of the land. The court finds that, as pled and as argued by Plaintiffs (i.e., Defendant had a duty of care that they breached) Plaintiffs have, at most, pled a negligence case. The facts alleged are insufficient to establish the "intentional" element for battery. Specifically, there are insufficient allegations other than mere conclusions of pervasive knowledge of a bedbug infestation, that Defendant intentionally disregarded these conditions and how, and that Defendant intentionally rented the room to Plaintiffs knowing that it was substantially certain that Plaintiffs would get bitten by bedbugs. Plaintiffs allege only conclusions without the factual basis to support any intentionality. Accordingly, the demurrer to the first cause of action for battery is sustained with leave to amend. **B. Third Cause of Action for IIED** The elements of a cause of action for IIED are: "(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff suffered severe emotional distress; and (3) the defendant's extreme and outrageous conduct was the actual and proximate cause

		of the severe emotional distress. [Citation.] [¶] A defendant's conduct is considered to be outrageous if it is so extreme as to exceed all bounds of that usually tolerated in a civilized community. [Citations.]" (*Crouch v. Trinity Christian Center of Santa Ana, Inc.* (2019) 39 Cal.App.5th 995, 1007.) An IIED cause of action based on reckless disregard of the probability of causing emotional distress requires an intent to injure the plaintiff. (*Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 210 (*Davidson*); *Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903-906.) Absent such intent, inaction by a defendant does not constitute extreme and outrageous conduct. (*Davidson, supra,* 32 Cal.3d at p. 210 [affirming trial court's sustaining of demurrer on IIED cause of action based on police officers' failure to intervene when, during surveillance of a public laundromat, they observed an assault suspect enter and stab the plaintiff].) Defendant argues that this cause of action fails because Plaintiffs have failed to allege intentionality, the existence of any outrageous conduct, and/or the nature, extent, and duration of the alleged emotional distress. Defendant argues that Plaintiffs' allegations of "reckless disregard" and intention are based on contentions, deductions, and conclusions, rather than facts. Plaintiffs argue that they alleged that Defendant's actions were outrageous by directing employees not to clean or inspect for bedbugs, which heightened Plaintiffs' anxiety and concern. Here, Plaintiffs' allegations of reckless disregard, outrageous conduct, and intention are similar to their battery allegations. For the same reasons as above, the court finds that Plaintiffs have failed to sufficiently allege intentional outrageous conduct—i.e., the basis and extent of Defendant's prior knowledge, etc. Plaintiffs allegations amount to conclusions, at best. Plaintiffs have failed to plead sufficient facts to show that the alleged actions or inactions of Defendant, or any of its employees or agents, were so extreme and outrageous as to exceed all bounds usually tolerated in a civilized community. Further, there are insufficient allegations regarding the exact nature, duration, and extent of each Plaintiffs' alleged severe emotional distress. (See *Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1227 [Only emotional distress of 'such substantial quantity or enduring quality' that an individual in civilized society should not be expected to endure it constitutes severe emotional distress. (Citation); As such, trial court correctly found failure to allege facts showing severe emotional distress when plaintiff had "pleaded no facts

demonstrating the nature, extent or duration of her alleged emotional distress."]

The demurrer to the third cause of action is, therefore, sustained with leave to amend.

C. Fourth Cause of Action for Fraudulent Concealment

The elements of an action for fraud and deceit based on a concealment are: "(1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage. (*Boschma v. Home Loan Center, Inc.* (2011) 198 Cal.App.4th 230, 248.)

"Concealment is a species of fraud, and '[f]raud must be pleaded with specificity.'" (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 878.) General and conclusory allegations do not suffice. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645). The particularity requirement "necessitates pleading facts which show how, when, where, to whom, and by what means the representations were tendered." (*Id.*) "A plaintiff's burden in asserting a fraud claim against a corporate employer is even greater. In such a case, the plaintiff must 'allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written.' [Citation.]" (*Id.*)

Defendant argues that Plaintiffs failed to allege fraud with the requisite specificity. Defendant argues that Plaintiffs failed to sufficiently allege that Defendant had actual knowledge of the infestation and/or what alleged misrepresentation Defendant made.

Plaintiffs argue that the fraudulent concealment cause of action is sufficient because Plaintiffs sufficiently alleged that Defendants had intentionally concealed a bedbug infestation prior to Plaintiffs' stay, but rented the room anyway.

For the same reasons as above, the court agrees with Defendant that Plaintiffs have failed to allege this cause of action with sufficient specificity—namely, what is the basis for Plaintiffs' allegations that

Defendant had prior knowledge of a bedbug infestation that they intentionally chose to ignore? Plaintiffs' allegations are insufficient to establish that Defendant knew that they were renting a room with a bedbug infestation to Plaintiffs, but decided to rent the room anyway.

The demurrer to this cause of action is sustained with leave to amend.

D. Fifth And Sixth Causes of Action for Private and Public Nuisance

"A nuisance is statutorily defined as anything 'injurious to health' or 'indecent, or offensive to the senses, or an obstruction to the free use of property' that interferes 'with the comfortable enjoyment of life or property....'" (Civ.Code, § 3479.) "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." (Civ.Code, § 3480.) "Every nuisance not included in the definition of the last section is private." (Civ. Code § 3481.)

Elements of an action for private nuisance are: (1) plaintiff must prove an interference with his use and enjoyment of his property; (2) invasion of the plaintiff's interest in the use and enjoyment of the land must be substantial, that is, that it causes plaintiff to suffer substantial actual damage; (3) interference with the protected interest must not only be substantial, but it must also be unreasonable, that is, it must be of such a nature, duration, or amount as to constitute unreasonable interference with the use and enjoyment of the land. (*Mendez v. Rancho Valencia Resort Partners, LLC* (2016) 3 Cal.App.5th 248, 262-263.) "Although 'any interest sufficient to be dignified as a property right' will support an action based on a private nuisance, and this includes within its purview a tenancy for a term, such right does not inure in favor of a licensee, lodger or employee." (*Venuto v. Owens-Corning Fiberglas Corp.* (1971) 22 Cal.App.3d 116, 125.)

To plead a cause of action for public nuisance, Plaintiff must allege the following: (1) that Defendants, by acting or failing to act, created a condition or permitted a condition to exist that was, among other things, either harmful to health; or was indecent or offensive to the senses; or was an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property; (2) that the condition affected a substantial number of people at the same time; (3) that an ordinary person would be reasonably annoyed or disturbed by the condition; (4) that the seriousness of the harm outweighs the social utility of Defendants' conduct; (5) that Plaintiff did not consent to Defendants' conduct; (6) that Plaintiff suffered harm that was

different from the type of harm suffered by the general public; and (7) that Defendants; conduct was a substantial factor in causing Plaintiff's harm. (CACI 2020; see *Birke v. Oakwood Worldwide* (2009) 169 Cal.App.4th 1540, 1548 (*Birke*).)

As the California Supreme Court has explained, 'public nuisances are offenses against, or interferences with, the exercise of rights common to the public.' [Citation.] The interference must be both substantial and unreasonable. [Citation.]" (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 542.) "A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise." (Civ. Code, § 3493.)

Defendant argues that Plaintiffs' nuisance claims are subsumed by their negligence claims and as such Plaintiff may not allege nuisance.

Plaintiffs cite to the Second Restatement of Torts for the proposition that the threat of smallpox communication to a single person may be enough to constitute a public nuisance because of the possibility of an epidemic and likens it to Plaintiff's exposure to a bedbug infestation, which poses a threat to the public. Plaintiffs also conclusively argue that they have also alleged a private nuisance cause of action.

While the court does not agree that Plaintiffs may not allege alternative theories of liability for negligence and nuisance at the pleading stage, the court agrees that Plaintiffs allegations are insufficient to constitute either a private or public nuisance.

Plaintiffs' fifth cause of action for private nuisance fails. Plaintiffs allege that they rented a hotel room from Defendant. Pursuant to *Venuto,* these facts are insufficient as a matter of law to show that Plaintiffs had a property right in the hotel room sufficient to support standing for a private nuisance claim. (*See Venuto, supra,* 22 Cal. App. 3d at p. 125 ["Although 'any interest sufficient to be dignified as a property right' will support an action based on a private nuisance, and this includes within its purview a tenancy for a term, such right does not inure in favor of a licensee, lodger or employee."] The court sees no amendment in which Plaintiffs could cure this defect. The demurrer is sustained without leave to amend as to the fifth cause of action for a private nuisance cause of action.

As for Plaintiffs' sixth cause of action for public nuisance, the allegations are insufficient to establish that any alleged nuisance affects at the same time an entire community, neighborhood, or a considerable number of persons. Here, Plaintiffs merely allege that a bedbug infestation "affects the community at large." [Complaint, ¶

131.] The court finds that this allegation is conclusory and devoid of facts—e.g., what is the factual basis for the extensiveness of the infestation, how many people were affected, how were these people affected, etc. For these reasons, the demurrer to the sixth cause of action is sustained with leave to amend.

E. Seventh Cause of Action for Breach of Contract

"To state a cause of action for breach of contract, it is required that there be a pleading of the contract, plaintiffs' performance (or excuse for nonperformance), defendant's breach, and damage to plaintiff therefrom." (*Gautier v. General Tel. Co.* (1965) 234 Cal.App.2d 302, 305.) Furthermore, in an action founded upon a contract, a party must be able to ascertain from the pleading whether the contract was written, oral, or implied by conduct. (Code Civ. Proc. § 430.10(g).)

Defendant argues that while Plaintiffs have alleged they entered into a written contract with Defendants (Complaint, ¶ 136), Plaintiffs fail to allege the contract by its terms, set out the terms verbatim, or attach a copy of the written contract.

Plaintiffs argue that the "nature of booking a hotel room in this modern age is not so clear-cut. A hotel may originally begin by being booked online, which would feasibly be a written contract, or booked by telephone or in person, which would be an oral transaction." They argue that further discovery would be needed to exactly classify the contract for the room, but the key element is that Plaintiffs paid.

The court disagrees with Plaintiffs. As made clear by Plaintiffs' arguments, it is unclear whether or not Plaintiffs' contract claim is based on implied conduct or an actual written contract. Further, while Plaintiffs allege that they paid (i.e., their alleged performance), their failure to allege Defendant's obligations and terms under the alleged agreement is vague and uncertain.

The demurrer is sustained as to the seventh cause of action with leave to amend.

II. <u>Motion to Strike</u>

Defendant moves to strike Plaintiffs' punitive damages allegations, attorneys' fees, and allegations relating to bedbug reviews of Defendant's hotel. Given the court's ruling on the, the motion to strike is denied as moot.

		Should Plaintiffs desire to file an amended complaint that addresses the issues in this ruling, Plaintiffs must file and serve it within 30 days of service of notice of ruling. Defendant to give notice.
5	Akue vs. Brandlin	**TENTATIVE RULING:** **Motion to Compel** Defendants A.C. Towing, Inc., Joan E. Cumbo, Paul Cumbo, and Trevis L. Cumbo move to compel Plaintiff Adoukoe Akue Plaintiff to provide responses without objections to the form interrogatories (set one) and the request for production of documents (set one). For the following reasons, the motion is DENIED. After Defendants filed this motion, Plaintiff served responses to the interrogatories and requests for production of documents at issue in this motion. (Opp, Ex. B.) Defendants concede that the responses "mooted all issues in the motion, except for sanctions." (Reply at 2:7.) Sanctions are available on a motion to compel a response to interrogatories and inspection demands. (Code Civ. Proc. §§ 2030.290, 2031.300 ("The court shall impose a monetary sanction … against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel … 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.").) Defendants seek sanctions in the amount of $1,300 for each of the two motions. However, Plaintiff provides evidence that she was never served with the discovery requests at all. (ROA 140.) Plaintiff also provides evidence that the discovery requests served by Defendants reflected a different case number, Case No. 30-2022-01258177, which was another case against the same defendants but was dismissed on February 14, 2024. Defendants did not respond to these contentions in their reply. The Court denies Defendants' request for sanctions because the imposition of sanctions would be unjust under these circumstances. Moving Defendants to give notice.

6	Palacios vs. Satin Topless Gentlemen's Club	**TENTATIVE RULING:** **Motion to Compel** Defendant South Bay Entertainment, LLC dba Satin Topless Gentlemen's Club moves to compel Plaintiff Minerva Palacios to serve responses without objections to Plaintiff's first set of form interrogatories and special interrogatories. For the following reasons, the motions are GRANTED. Responses to interrogatories and requests for production of documents are due 30 days after service (plus appropriate time for method of service). (Code Civ. Proc. §§ 2030.260; 2031.260.) On January 17, 2024, Defendant served the first set of form interrogatories and special interrogatories on Plaintiff. (Ji Dec., ¶ 2, Exs. A and B.) Plaintiff failed to respond, despite Defendant's efforts to meet and confer. (Id. at ¶¶ 3-6, Exs. C and D.) Given Plaintiff's failure to provide timely responses, Defendant is entitled to an order compelling responses without objection. (Code Civ. Proc. §§ 2030.290, 2031.300.) Because Plaintiff did not timely respond, objections to the discovery requests are waived. (Code Civ. Proc. §§ 2030.290(a), 2031.300(a).) Plaintiff is ordered to provide verified responses without objections to the first set of form interrogatories and special interrogatories within 30 days of service of notice of this ruling. Sanctions are available on motions to compel responses to interrogatories. (Code Civ. Proc. § 2031.300(c) ("The court shall impose a monetary sanction … against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel a response … 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.").) Plaintiff is ordered to pay sanctions to Defendant in the amount of $735 (3 hours at $225 per hour + $60 filing fee) for each of the two motions, for a total of $1,470, payable within 30 days of service of notice of this ruling. Defendant to give notice.

7	Ally Bank vs. Qwest Engineering Inc.	**OFF CALENDAR**
8	Cemex Construction Materials Pacific, LLC vs. Gunner Concrete, Inc.	**TENTATIVE RULING:** The hearing on the motion of Douglas L. Mahaffey & Mahaffey Law Group to be relieved as counsel of record for Defendant Gunner Concrete, Inc. is CONTINUED to April 16, 2026, at 9:00 a.m. in Department N16. The proof of service attached to the motion shows service on Plaintiff but not on Defendant Gunner Concrete, Inc. Defendant's counsel's declaration states that the client was served by mail, but it does not state when such service was accomplished. Counsel shall file a proof of service showing service on Defendant Gunner Concrete, Inc. by April 10, 2025. Moving counsel to give notice and file a proof of service of such notice.
9	Molina vs. Miller	**TENTATIVE RULING:** For the reasons set forth below, Defendant Carol Jean Miller, Executrix of the Estate of Gertrude Frances Mysliwy's unopposed motion for attorneys' fees is GRANTED. Defendant Carol Jean Miller, Executrix of the Estate of Gertrude Frances Mysliwy's is awarded a total of $22,886.67 in attorneys' fees. Costs to be awarded separately. **Applicable Law** Prob. Code § 9354 provides: (a) In addition to any other county in which an action may be commenced, an action on the claim may be commenced in the county in which the proceeding for administration of the decedent's estate is pending. (b) The plaintiff shall file a notice of the pendency of the action with the court clerk in the estate proceeding, together with proof of giving a copy of the notice to the personal representative as provided in Section 1215. Personal service of a copy of the summons and complaint on the personal representative is equivalent to the filing and giving of the notice. Any property distributed under court order, or any payment properly made, before the notice is filed and given is

		not subject to the claim. The personal representative, distributee, or payee is not liable on account of the prior distribution or payment. (c) The prevailing party in the action shall be awarded court costs and, if the court determines that the prosecution or defense of the action against the prevailing party was unreasonable, the prevailing party shall be awarded reasonable litigation expenses, including attorney's fees. It is undisputed that Defendant is the prevailing party in this action, as this Court sustained Defendant's demurrer to Plaintiff's first amended complaint in its entirety without leave to amend, and issued an order of dismissal on 9/16/24. (ROA 84). Pursuant to subdivision (c), Defendant may be awarded attorneys' fees for defending this action if the court determines that Plaintiff's prosecution of this action was "unreasonable." In *Uzyel v. Kadisha* (2010) 188 Cal.App.4th 866, the court determined whether attorneys' fees should be awarded under Prob. Code § 17211, which allowed for attorneys' fees to be awarded to the trustee if the beneficiary's contesting of the trustee account was "unreasonable". The court concluded that an award of fees under this statute is appropriate only if "no reasonable attorney would have believed that the opposition had any merit." (*Id.* at 927). This Court previously determined that the one-year statute of limitations began after the decedent's death on September 19, 2020. (ROA 29 [Order], FAC ¶ 9) Plaintiff did not file her claim or complaint by the September 19, 2021, deadline. In Plaintiff's opposition, she attempted arguments that failed under the applicable statutes. First, Plaintiff argued that if a creditor did not receive proper notice of administration or if there was an omission or defect in the notice, the creditor may file a petition under Code Civ. Proc. § 9103 to file a late claim. However, this court found that Section 9000 *et seq*. repeatedly makes clear that these sections do not extend the time set forth in Section 366.2. (See Prob. Code § 9013, subd. (f) ["Nothing in this section authorizes allowance or approval of a claim barred by, or extends the time provided in, Section 366.2 of the Code of Civil Procedure."]). Second, Plaintiff argued that her claim was filed in compliance with the probate code because it was filed within "four months after letters or within 60 days of the notice", but this court once again found that the outer-limit deadline of one year from the decedent's death was still in effect. Plaintiff also argued that the doctrine of equitable estoppel tolled her claim because both Robert Misliwy and Defendant

		Miller caused plaintiff to delay the filing of her claim believing that if and when Plaintiff was appointed as personal representative, she would approve her own valid claim, but she was ultimately never appointed, and had to make a late, formal claim. However, Plaintiff presented no facts establishing that Miller or Misliwy undertook any action to make Plaintiff believe that she would be appointed, or any other action causing her to delay her claim. To the contrary, when Robert Misliwy filed a petition to be appointed two months later in December, Plaintiff filed an objection, and "believed in good faith that the litigation would result in her proving that Robert was disqualified." (FAC, ¶ 21). Plaintiff has not opposed this motion, and, accordingly, failed to provide any argument or evidence justifying her opposition to the demurrer. **Amount of Fees** The lodestar method for calculating attorneys' fees applies to any statutory attorneys' fees award, unless the statute authorizing the award provides for another method of calculation. (*Galbiso v. Orosi Pub. Util. Dist*. (2008) 167 Cal.App.4th 1063, 1089; see also *K.I. v. Wagner* (2014) 225 Cal.App.4th 1412, 1425.) When determining a reasonable attorneys' fees award using the lodestar method, the court begins by deciding the reasonable hours the prevailing party's attorney spent on the case and multiplies that number by the reasonable hourly compensation of each attorney. (*Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 998). The reasonable hourly rate is based on the reasonable market value of the attorney's services. (*See PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1094-1095.) This standard applies regardless of how much the attorney actually charged the client. (*See ibid*.) Thus, the same reasonable hourly rate will apply whether the attorney charged nothing for their services, charged below-market or discounted rates, represented the client on a contingent fee basis, or are in-house counsel paid a fixed salary. To determine the reasonable market value of the legal services provided, the court must look to the range of reasonable rates charged by and judicially awarded to comparable attorneys for comparable work. (*See Children's Hospital & Medical Center v. Bonta* (2002) 97 Cal. App. 4th 740, 783; see also *PLCM Group v. Drexler, supra*, 22 Cal.4th at p. 1095 ["[The] reasonable hourly rate is that prevailing in the community for similar work."].)

		Defendant counsel's seeks fees at an hourly rate of $800 per hour. (Decl. of Shekerlian, ¶ 3). Counsel has not provided any information to justify this high hourly rate. Accordingly, the court will award attorneys' fees at half the hourly rate ($400.00), for a total award of $22,886.67 in attorneys' fees. The court finds this better reflects the reasonable hourly rate prevailing in the community for similar work. Defendant shall give notice.
10	Rhodes vs. Emano	**TENTATIVE RULING:** For the reasons set forth below, the motion by Shaun J. Bauman, counsel for Plaintiff, to be relieved as counsel is DENIED without prejudice. On February 19, 2024, the court initially continued the hearing on the motion due to service issues. While the proof of service on the initial motion showed service on opposing counsel, the record was unclear as to when, if ever, the moving papers were served on the client. The court gave counsel an additional opportunity to cure that defect. On March 6, 2025, counsel filed an amended notice of motion and motion. The proof of service states that service of the moving papers were made on both opposing counsel and the client by electronic mail. However, the proof of service fails to identify the email address for the client at which service was purportedly made. CRC 2.251(c)(3)(B) provides that self-represented parties "are to be served by non-electronic methods unless they affirmatively consent to electronic service." While the client is not technically self-represented yet, the court finds that the notice concerns of electronic service on a client exists here. Further, the amended declaration of counsel on the motion [ROA # 46] states that the attorney has served the client by mail. Thus, the court does not know if the client was served by mail or electronically served. Because counsel has been given two opportunities to cure service defects but has not done so, the motion is DENIED without prejudice. Counsel to give notice.
11	Hultman vs. Wang	**TENTATIVE RULING:** For the reasons set forth below, Defendants Peter Huei Hsiang Wang and Esther Tsan Ya Wang's motion to strike Plaintiffs' First Amended Complaint is DENIED.

As a preliminary matter, the instant motion appears to be untimely. "Any party, within the time allowed to respond to a pleading may serve and file a notice of motion to strike the whole or any part thereof…." (Code Civ. Proc., § 435.) A responsive pleading must be filed and served within thirty days of service of the complaint. (See Code Civ. Proc. § 412.20(a)(3)).

Plaintiff Natsuko filed and served the First Amended Complaint on 12/9/24. Defendants filed this motion on 1/17/25, more than 30 days after the filing of the First Amended Complaint. Defendants have not shown that Plaintiffs granted Defendants an extension to respond to the First Amended Complaint. The Court notes that Plaintiffs did not raise this argument in their Opposition.

Applicable Law

Code of Civil Procedure section 436, subd. (b) provides that the court may, "in is discretion, and upon terms it deems proper: … (b) [s]trike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court."

This power includes the right to strike a pleading filed in an untimely manner. (*See Collins v. Bicknell* (1919) 41 Cal.App. 291, 292.)

Merits

Defendants contend that Plaintiff Natsuko's First Amended Complaint is untimely, and improperly excludes Jon Hultman.

Plaintiff Natsuko Hultman moved for leave to file an amended complaint on 6/20/24. Defendants did not oppose Plaintiff's motion for leave. (See Notice of Non-Opposition [ROA 143]).

This Court granted Plaintiff's motion on 10/30/24, and noted the following in the court order: "No later than five (5) court days from the date of ruling, Moving Plaintiff shall file a 'clean' copy of the FAC that incorporates all proposed changes, except those changes deleting the claims of Plaintiff Jon Hultman, reflected in Exhibit A to the Weisskopf Declaration."

Plaintiffs did not file the first amended complaint until 12/9/24, and when Plaintiff Natsuko did file the verified FAC, it was the version attached as the exhibit to Plaintiff Natsuko's motion for leave, which excluded Plaintiff Jon Hultman. Plaintiffs then filed a notice of errata on 3/25/25 correcting this error, and submitting a "revised" verified

		FAC reinstating Jon, in compliance with this Court's order. (ROA 176). Plaintiffs also included a declaration from Jon Hultman in support of Plaintiffs' Opposition wherein he declares that he approves of the verified FAC. (Decl. of J. Hultman, ¶ 3). Counsel for Plaintiffs declares that the failure to timely file the first amended complaint was due to inadvertence. (Decl. of Weisskopf, ¶ 3). Once Defendants' counsel informed him, he "quickly filed the amended complaint that [he] had attached to the motion", but did not realize the note in the Court's Order about Jon Hultman being reinstated. (Decl. of Weisskopf, ¶ 3). The court has discretion to accept an untimely pleading. (See *Harlan v. Dept. of Transportation* (2005) 132 Cal.App.4th 868, 873). As Plaintiffs argue, Defendants have not suffered any prejudice by way of the fact that Plaintiffs' counsel did not realize that he had to separately file the proposed FAC (with Jon reinstated), until after the 5 days had lapsed. Accordingly, the motion is DENIED. Defendants shall give notice.
12	National Funding, Inc. vs. Circletree Media LLC	**TENTATIVE RULING:** **<u>Motion for Summary Judgment</u>** Plaintiff National Funding, Inc., moves for summary judgment against Defendants Circletree Media LLC dba Circletree Enterprises and Kyle Borgman. For the following reasons, the motion is DENIED without prejudice as to Defendant Circletree Media LLC, and GRANTED as to Defendant Kyle Borgman. Under Code of Civil Procedure section 437c(c), a summary judgment motion shall be granted if all the papers submitted show there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. A 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 . . . ." (*See Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 [re MSJ].) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Id.* at 851.) The parties must set forth admissible evidence. (Code Civ. Proc., § 437c(d).)

Only when the moving party meets that initial burden does the burden shifts to the party opposing summary judgment to show, by reference to specific facts, the existence of a triable issue as to that affirmative defense or cause of action. (*See Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850; *Villacres v. ABM Industries, Inc.* (2010) 189 Cal.App 4th 562, 575.)

First Cause of Action (Breach of Settlement Agreement)

The first cause of action alleges that on or about February 16, 2024, Defendants breached the parties' settlement agreement. (Compl. ¶¶ 8-9, Ex. 1.) The Complaint alleges $56,700.00, together with prejudgment interest thereon, is due and payable to Plaintiff. (Compl. ¶ 11.)

"[T]he elements of a cause of action for breach of contract are: (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.)

Here, Plaintiff does not meet its initial burden to show the existence of a contract between Plaintiff and Defendant Circletree Media LLC. The evidence submitted by Plaintiff shows that on or about December 27, 2023, Kyle Borgman and an entity identified as "Circletree Enterprises LLC" entered into a settlement agreement with Plaintiff (the "Settlement Agreement"). (*See* Otero Decl., Ex. 1.) The named entity defendant against whom Plaintiff seeks summary judgment is Defendant "Circletree Media LLC dba Circletree Enterprises." (*See* Compl.) Plaintiff submits no evidence explaining the discrepancy in the "Circletree" names or showing the two entities to be one and the same. (*See generally* Pltf.'s Sep. St., Mot.)

Plaintiff does, however, meet its burden to show the existence of a settlement agreement between Plaintiff and Defendant Borgman. (Otero Decl. ¶ 4, Ex. 1.) Plaintiff also submits evidence showing that Plaintiff performed its obligations under the parties' settlement agreement, Defendant Borgman breached by failing to pay the amounts due, and Plaintiff was damaged in the amount of $56,700. (Otero Decl. ¶¶ 6-8.) Defendant Borgman chose not to oppose the motion and, thus, does not meet his shifted burden to show the existence of a triable issue of material fact.

Plaintiff is ordered to give notice.

13	National Funding, Inc. vs. New Vista Properties LLC	**TENTATIVE RULING:** **<u>Motion for Summary Adjudication</u>** Plaintiff National Funding, Inc., moves for summary judgment in Plaintiff's favor and against Defendants New Vista Properties LLC and Michael Lerner on the Complaint. For the following reasons, the unopposed motion for summary judgment is GRANTED. Under Code of Civil Procedure section 437c(c), a summary judgment motion shall be granted if all the papers submitted show there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. A 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 . . . ." (*See Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 [re MSJ].) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Id.* at p. 851.) The parties must set forth admissible evidence. (Code Civ. Proc., § 437c(d).) **<u>First Cause of Action (Breach of Agreement)</u>** The first cause of action alleges that Defendant New Vista Properties breached its obligations under business loan agreement, agreement number FWC729610 ("Loan Agreement No. 1") by failing to make the payment due on or about 11/29/2023 and now owes the entire balance of $82,136.00. (Compl. ¶ 10.) "[T]he elements of a cause of action for breach of contract are: (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) Here, Plaintiff meets its burden to show the existence of Loan Agreement No. 1, Plaintiff's performance, Defendant New Vista's failure to pay the indebtedness owed under the agreement, and Plaintiff's resulting damages in the amount of $82,136.00. (Pltf.'s Sep. St. Nos. 1, 2, 5, 6, 8, 10, 11 [and evidence cited therein].)

Second Cause of Action (Breach of Guaranty)

The second cause of action alleges that Defendant Lerner breached the personal guaranty ("Guaranty No. 1") executed in connection with Loan Agreement No. 1 by refusing to pay the sum of $82,136.00 due under Loan Agreement No. 1. (Compl. ¶ 18.)

Here, Plaintiff meets its burden to show the existence of Guaranty No. 1, Plaintiff's performance, Defendant Lerner's failure to pay the indebtedness, and Plaintiff's resulting damages in the amount of $82,136.00. (Pltf.'s Sep. St. Nos. 1-6, 8, 10, 11 [and evidence cited therein].)

Third Cause of Action (Breach of Agreement)

The third cause of action alleges that Defendant New Vista Properties breached its obligations under business loan agreement, agreement number FWC729610-1 ("Loan Agreement No. 2") by failing to make the payment due on or about 11/28/2023 and now owes the entire balance of $115,464.46. (Compl. ¶ 23.)

Here, Plaintiff meets its burden to show the existence of Loan Agreement No. 2, Plaintiff's performance, Defendant New Vista's failure to pay the indebtedness owed under the agreement, and Plaintiff's resulting damages in the amount of $82,136.00. (Pltf.'s Sep. St. Nos. 12, 13, 16, 17, 19, 21, 22 [and evidence cited therein].)

Fourth Cause of Action (Breach of Guaranty)

The fourth cause of action alleges that Defendant Lerner breached the personal guaranty ("Guaranty No. 2") executed in connection with Loan Agreement No. 2 by refusing to pay the sum of $115,464.46 due under Loan Agreement No. 2. (Compl. ¶ 31.)

Here, Plaintiff meets its burden to show the existence of Guaranty No. 2, Plaintiff's performance, Defendant Lerner's failure to pay the indebtedness, and Plaintiff's resulting damages in the amount of $115,464.46. (Pltf.'s Sep. St. Nos. 11-17, 19, 21, 22 [and evidence cited therein].)

Defendants filed no opposition and, thus, do not meet their shifted burden to show a triable issue of material fact as to any cause of action.

Plaintiff to give notice.

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