

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

Law and Motion Calendar

Judge: HONORABLE V. RAYMOND SWOPE

Department 23

400 County Center, Redwood City

Courtroom 8A

Monday, July 15, 2024

IF YOU INTEND TO APPEAR ON ANY CASE ON THIS CALENDAR YOU MUST DO ONE OF THE FOLLOWING:

1. **EMAIL Dept23@Sanmateocourt.org BEFORE 4:00 P.M.**
CONTEMPORANEOUSLY COPIED TO ALL PARTIES OR THEIR COUNSEL OF RECORD. IF BY EMAIL, IT MUST INCLUDE THE NAME OF THE CASE, THE CASE NUMBER, AND THE NAME OF THE PARTY CONTESTING THE TENTATIVE RULING.
 2. **YOU MUST CALL (650) 261-5123 BEFORE 4:00 P.M.** with the case name, number and the name of the party contesting.
- AND**
3. **You must give notice before 4:00 P.M. to all parties of your intent to appear pursuant to California Rules of Court 3.1308 (a) (1) .**

Failure to do both items 1 or 2 and 3 will result in no oral presentation.

Appearances by Zoom are highly encouraged.

Zoom Video/Computer Audio Information:

<https://sanmateocourt.zoomgov.com/>

Meeting ID: 160 045 1177

Password: 654598

Zoom Phone-Only Information Please note: You must join by dialing in from a telephone; credentials will not work from a tablet or PC

Dial in: +1 (669)-254-5252

(Meeting ID and passwords are the same as above)

TO ASSIST THE COURT REPORTER, the parties are ORDERED to: (1) state their name each time they speak and only speak when directed by the Court; (2) not to interrupt the Court or anyone else; (3) speak slowly and clearly; (4) use a dedicated land line if at all possible, rather than a cell phone; (5) if a cell phone is absolutely necessary, the parties must be stationary and not driving or moving; (6) no speaker phones under any circumstances; (7) provide the name and citation of any case cites; and (8) spell all names, even common names.

Case

Title / Nature of Case

2:00
LINE:1

21-CIV-06550 SANDHYA KUMAR VS. PORTIA JACITO, ET AL.

SANDHYA KUMAR
PORTIA JACITO

ANDREW H. WOLFF
STEVEN SHERIFF
ABERN

MOTION FOR TERMINATING SANCTIONS BY DEFENDANT PORTIA JACITO

TENTATIVE RULING:

Defendant's unopposed Notice of Motion and Motion for Terminating Sanctions (the "Motion") is GRANTED. Defendant's unopposed Request for Judicial Notice is GRANTED.

Code of Civil Procedure section 2023.030 provides that, to the extent authorized by any particular discovery method, the Court may impose monetary, issue, evidence or terminating sanctions. Sections 2030.290 and 2031.300, which govern interrogatories and requests for production of documents, respectively, state that if a party fails to obey an order compelling a response, "the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction" (Code Civ. Proc. §§ 2030.290, subd. (c), & 2031.300, subd. (c)).

Whether to grant a sanction is entirely within the discretion of the Court. The Court is not required to grant any particular sanction. *Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 793 (superseded on other grounds); *Pember v. Superior Court* (1967) 66 Cal.2d 601, 604. The Court's choice of sanctions is reviewable only for abuse of discretion. *Sauer v. Superior Court* (1987) 195 Cal.App.3d 213, 228.

However, the Court's decision should reflect the purpose of discovery sanctions, which is to enable the party seeking the discovery to obtain the information sought, rather than to punish a disobedient party. *Ghanooni v. Super Shuttle of Los Angeles* (1993) 20 Cal.App.4th 256, 262-63. Usually, lesser sanctions should be granted before imposing terminating sanctions. *Deyo, supra*, at 771. Nonetheless, when a party persists in disobeying the Court's orders, the ultimate sanction is justified. *Deyo, supra*, at 796. Moreover, terminating sanctions may

be imposed in the first instance where there are continuing willful discovery violations. *Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal.App.3d 481, 490-491. In *J.W. v. Watchtower Bible & Tract Society of New York, Inc.*, (2018) 29 Cal.App.5th 1142 ("Watchtower"), the Court of Appeal upheld the imposition of terminating sanctions without the earlier imposition of lesser sanctions where the sanctioned party persisted in refusing to produce documents despite the Court's order compelling its responses, even as termination sanctions were "looming" (*Watchtower*, supra, at 1170).

Here, Plaintiff's continuing willful discovery violations have become increasingly salient since January 29, 2024. On that date, Plaintiff was served notice of the Court's Order of June 12, 2023, compelling her responses to discovery, and such Notice of Entry of Order Granting Motion to Compel Plaintiff to Provide Discovery Responses (the "Notice of Order Compelling Responses") was filed that day. The Court's fourteen-day window through which Plaintiff could respond timely, plus the two Court days for electronic service of the Notice of Order Compelling Responses provided by Code of Civil Procedure section 1010.6(a)(3)(B), closed on February 14, 2024. Nonetheless, statements filed with the Court from both parties indicate that Plaintiff persists in her failure to respond to discovery, in continuing violation of the Court's order compelling her to respond. Further, Plaintiff, through her counsel, has been aware of the Court's consideration of termination sanctions, having been served with the earlier motion for terminating sanctions on August 15, 2023. Plaintiff's counsel has appeared at several hearings on that motion, on October 2, 2023, January 22, 2024, and January 29, 2024. Plaintiff was further served with the instant Motion on March 5, 2024. Plaintiff has been aware of the Court's Order compelling her responses since at least January 29, 2024. Nonetheless, she persists in failing to respond to discovery served on February 15, 2022. Under these circumstances, it is clear that a further motion to compel would be ineffective, and it is logical to conclude that lesser sanctions would be ineffective in motivating Plaintiff to comply.

Defendant's requests for judicial notice of the following documents in the Court's records for this matter are granted pursuant to Evidence Code section 452(d): (1) the Court's Minute Order of June 12, 2023, granting Defendant's motion to compel; (2) Defendant's Memorandum of Points and Authorities filed on May 6, 2022, in support of that motion; and (3) the Notice of Order Compelling Responses filed on January 29, 2024. However, judicial notice of documents (2) and (3) is limited to the fact that they were filed, and does not reach the truth of any matters asserted therein.

If the tentative ruling is uncontested, it shall become the order of the Court. Thereafter, counsel for Defendant shall prepare for the Court's signature a written order consistent with the Court's ruling, pursuant to California Rules of Court, Rule 3.1312, and provide written notice

of the ruling to all parties who have appeared in the action, as required by law and by the California Rules of Court. The Court alerts the parties to revised Local Rule 3.403(b)(iv) (amended effective January 1, 2024) regarding the wording of proposed orders.

2:00
LINE:2

22-CIV-03636 ROY MASON VS. TAQUERIA LA CUMBRE, INC., ET AL.

ROY MASON
TAQUERIA LA CUMBRE, INC.

BRIAN C. ANDREWS
ARA SAHELIAN

MOTION FOR RELIEF PURSUANT TO CCP§473 BY PLAINTIFF ROY MASON
TENTATIVE RULING:

Plaintiff Roy Mason's Motion for Relief Pursuant to CCP § 473 is GRANTED.

The Proof of Service filed July 3, 2024 for Defendant's Opposition states that it was served via email "at the emails noted below in the service list." The service list does not note any email addresses, but only the mailing address for the Andrews Law Group. The Proof of Service is therefore insufficient to show that service was accomplished. No Reply brief has been filed as of July 10, 2024. Additionally, service of the Opposition on July 3, 2024 is not timely, as it is only seven court days prior to the July 15, 2024 hearing on the Motion. See Cal. Code of Civil Procedure Section 1005(b). The Opposition brief therefore has not be considered.

A Request for Dismissal with prejudice as to the entire action was filed in this case on behalf of Plaintiff on December 11, 2023, and entered as requested on the same date. Plaintiff now seeks relief from the dismissal.

Cal. Code of Civil Procedure Section 473(b) provides, in relevant part, that when an application for relief is made no more than six months after a judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, the court shall vacate any resulting dismissal entered against the attorney's client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect. Relief is mandatory in such a case, where the exception does not apply, and is intended to promote the determination of actions on their merits. *Martin Potts & Associates, Inc. v. Corsair, LLC* (2016) 244 Cal.App.4th 432.

Here, the Motion for Relief was filed March 5, 2024, less than six months after entry of the December 11, 2023 dismissal. The Motion is in proper form and accompanied by an attorney's sworn affidavit. The Andrews Decl. states that Plaintiff instructed counsel to dismiss this action due to

Plaintiff's medical problems, that counsel instructed an associate to dismiss the case without explaining to the associate that the dismissal should be without prejudice, that the associate assigned the Request to Dismiss to a legal assistant, that the assistant sent a copy to counsel, and that counsel failed to catch her error. Andrews Decl., ¶¶4-5. The resulting dismissal with prejudice was therefore the caused by the attorney's mistake or neglect in failing to explain that dismissal without prejudice should be requested and in failing to see the error in the document before it was filed.

On these facts, relief from the dismissal is mandatory.

If the tentative ruling is uncontested, it shall become the order of the Court. Thereafter, counsel for Plaintiff shall prepare a written order consistent with the Court's ruling for the Court's signature, pursuant to California Rules of Court, Rule 3.1312, and provide written notice of the ruling to all parties who have appeared in the action, as required by law and the California Rules of Court. The Court alerts the parties to revised Local Rule 3.403(b)(iv) (amended effective January 1, 2024) regarding the wording of proposed orders.

2:00
LINE:3

22-CIV-03682 JOHN DOE VS. LUCIANA PARK, ET AL.

JOHN DOE
LUCIANA PARK

CHRISTOPHER J. KEANE
ILANA KOHN

PETITION FOR APPROVAL OF COMPROMISE OF CLAIM OR ACTION OR DISPOSITION
OF PROCEEDS OF JUDGMENT FOR MINOR OR PERSON WITH A DISABILITY BY PLAINTIFF
JOHN DOE, A MINOR, BY GUARDIAN AD LITEM, HERB THOMAS

TENTATIVE RULING:

APPEAR.

2:00
LINE:4

23-CIV-00570 BERNARD GOMEZ, ET AL VS. LILIAN ARQUEZA, ET AL.

BERNARD GOMEZ
LILIAN ARQUEZA

CONSTANTINE P. TSAGARIS

PETITION FOR APPROVAL OF COMPROMISE OF CLAIM OR ACTION OR DISPOSITION
OF PROCEEDS OF JUDGMENT FOR MINOR OR PERSON WITH A DISABILITY BY PLAINTIF
BERNARD GOMEZ

TENTATIVE RULING:

APPEAR.

2:00
LINE:5

23-CIV-00715 RONALD WILSON VS. TN HAULING & DEMOLITION INC., ET AL.

RONALD WILSON
TN HAULING & DEMOLITION INC.

RUBEN ESCOBEDO

MOTION FOR ORDER ALLOWING SERVICE OF SUMMONS AND COMPLAINT ON INMATE JOSEPH CHRISTOPHER RICARD BY MAIL BY PLAINTIFF RONALD WILSON

TENTATIVE RULING:

The Motion of Plaintiff Ronald Wilson ("Plaintiff") for Order Allowing Service of Summons and Complaint on Inmate Joseph Christopher Ricard ("Defendant") by Mail is DENIED WITHOUT PREJUDICE.

California law describes four basic methods for serving a summons and complaint on a defendant: (1) personal delivery to the defendant; (2) delivery to someone else at the defendant's usual residence or place of business; (3) service by mail coupled with acknowledgment of receipt; and (4) service by publication. (Code Civ. Proc., §§ 415.10, 415.20, 415.30, 415.50.) Also, "[w]here no provision is made in this chapter or other law for the service of summons, the court in which the action is pending may direct that summons be served in a manner which is reasonably calculated to give actual notice to the party to be served and that proof of such service be made as prescribed by the court." (Code Civ. Proc., § 413.30.)

Plaintiff seeks an order to serve Defendant through an alternative method under section 413.30 because Plaintiff claims that Defendant is currently incarcerated at the Federal Correctional Institution in Victorville, California ("FCI Victorville"). Plaintiff's counsel claims that previous attempts at personal service and service by mail with acknowledgment of receipt have failed. (Escobedo Decl., ¶¶ 5-6.)

However, Plaintiff's counsel only states that an attempt at personal service was made on Defendant at a federal prison in Florida on April 24, 2023. (Escobedo Decl., ¶ 5.) Plaintiff fails to provide a declaration or other admissible evidence from the process server showing an attempt at personal service though. Moreover, Plaintiff fails to show any attempt at personal service on Defendant at FCI Victorville, where Plaintiff now claims that Defendant is incarcerated. Thus, Plaintiff fails to adequately show that Defendant cannot be personally served.

Further, Plaintiff has not shown that service by mail with acknowledgment of receipt was attempted on the warden or jailer at FCI Victorville on behalf of Defendant, pursuant to Code of Civil Procedure section 416.30 and Penal Code section 4013(a). (See *Sakaguchi v. Sakaguchi* (2009) 173 Cal.App.4th 852, 858-859 [service may be effectuated on a prisoner by serving process on the sheriff or jailer who has custody of the prisoner based on Code of Civil Procedure section 416.90 and Penal Code section 4013].) Under section 416.90, "[a] summons may be served on a person not otherwise specified in this article by delivering a copy of the summons and of the complaint to such person or to a person authorized by him to receive service of process." (Code Civ. Proc., § 416.90.) Pursuant to Penal Code section 4013, a warden, sheriff or jailer is authorized to receive service of process on behalf of a prisoner in his or her custody. (Penal Code, § 4013; *Sakaguchi*, supra, 173 Cal.App.4th at pp. 858-859.) Also, in *Crane v. Dolihite* (2021) 70 Cal.App.5th 772, 782, 794, the plaintiff attempted to serve the litigation coordinator at the prison on behalf of the defendant by mail with acknowledgment of receipt, but the litigation coordinator refused to accept service.

Thus, Plaintiff has not demonstrated that these methods of service failed such that section 413.30 applies.

If the tentative ruling is uncontested, it shall become the order of the Court. Thereafter, counsel for Plaintiff shall prepare a written order consistent with the Court's ruling for the Court's signature, pursuant to California Rules of Court, Rule 3.1312, and provide written notice of the ruling to all parties who have appeared in the action, as required by law and the California Rules of Court. The Court alerts the parties to revised Local Rule 3.403(b)(iv) (amended effective January 1, 2024) regarding the wording of proposed orders.

2:00
LINE:6

23-CIV-02464 LITTLE MAD FISH LLC VS. JOHN S. KRUG, ET AL.

| | | | | |
|--------------|-----|------|-------------------|--------|
| LITTLE | MAD | FISH | LLC FARID | NOVIAN |
| JOHN S. KRUG | | | W. ETHAN MCCALLUM | |

DEMURRER TO LORTON AVENUE COMMERCIAL CONDOMINIUMS CROSS-COMPLAINT BY
CROSS-DEFENDANTS MARC POPE (MOE 1) AND CUSHMAN & WAKEFIELD U.S., INC.
(MOE 2)

TENTATIVE RULING:

In this action, Plaintiffs allege that they signed a written purchase agreement ("PSA") with the seller Defendants to purchase a commercial condominium in Burlingame CA, intending to operate it as an oral surgery practice. However, Defendants allegedly intentionally misled Plaintiffs about the state of water intrusion and mold damage in the unit, which actually rendered it unusable. On September 21, 2023, Defendant Lorton Avenue Commercial Condominiums ("Lorton") filed its Cross-Complaint against Moes 1 through 50, inclusive, seeking (1) equitable/implied indemnity, (2) apportionment/contribution, and (3) declaratory relief. On November 15, 2023, Lorton amended its Cross-Complaint to name Marc Pope as Moe 1 and Cushman & Wakefield as Moe 2.

Defendants/Cross-Defendants Marc Pope and Cushman & Wakefield were the real estate agent and brokerage, respectively, acting for Plaintiffs in purchasing the property. The First Amended Complaint, filed May 3, 2024, asserts causes of action for professional negligence (13th COA) and breach of fiduciary duty (14th COA) against Pope and Cushman & Wakefield. Plaintiffs then dismissed the complaint without prejudice as to Defendants Marc Pope and Cushman & Wakefield on May 9, 2024. Cross-Defendants Pope and Cushman & Wakefield ("CW") now demur to the Lorton Cross-Complaint on grounds that the Cross-Complaint fails to state facts sufficient to constitute a cause of action against them. (Code Civ. Proc. § 430.10(e).)

The party against whom a complaint has been filed may object by demurrer to the pleading on any one or more of the grounds laid out in CCP § 430.10, including that the pleading does not state facts sufficient to constitute a cause of action. (CCP § 430.10.) A ruling on a general demurrer is a method of deciding the merits of a cause of action on assumed facts without a trial, but the only issue involved in such a demurrer hearing is "whether the complaint, as it stands, unconnected with extraneous matters, states a cause of action." (McKenney v. Purepac

Pharmaceutical Co. (2008) 167 Cal.App.4th 72, 77 (quoting Griffith v. Dept. of Public Works (1956) 141 Cal.App.2d 376, 381.) The question of a plaintiff's ability to prove their allegations does not arise on demurrer, and the Court assumes the truth of the allegations in the Complaint. (Fisher v. San Pedro Hospital (1989) 214 Cal.App.3d 590, 604.) If there is any reasonable possibility that plaintiff can cure the deficiency by amendment, then leave to amend should be granted even if the demurrer is sustained. (Hale v. Sharp Healthcare (2010) 183 Cal.App.4th 1373, 1379.) Notwithstanding this liberal policy favoring amendment, a court may deny leave to amend when the pleading party fails to demonstrate the possibility of amendment to cure the pleading's defects. (Hedwall v. PCMV, LLC (2018) 22 Cal.App.5th 564, 579.)

Equitable indemnity and contribution call for the fair apportionment of loss between the wrongdoers in proportion to their relative culpability. (Tech-Bilt, Inc. v. Woodward-Clyde & Associates (1985) 38 Cal.3d 488, 495; Leko v. Cornerstone Building Inspection Serv. (2001) 86 Cal.App.4th 1109, 1117; Jaffe v. Huxley Architecture (1988) 200 Cal.App.3d 1188 ["Since indemnification is an equitable doctrine existing only to correct potential injustice, it has no utility where there is no such potential."] The operative First Amended Complaint ("FAC") by Plaintiffs no longer alleges any causes of action against the Cross-Defendant parties, since they were dismissed without prejudice from the action after the filing of the FAC. Nor are there factual allegations in either the FAC or the Cross-Complaint which would support the possibility of fault on the part of the Cross-Defendants. "The elements of a cause of action for equitable indemnity are (1) a showing of fault on the part of the indemnitor and (2) resulting damages to the indemnitee for which the indemnitor is equitably responsible." (C.W. Howe Partners Inc. v. Mooradian (2019) 43 Cal.App.5th 688, 700.) Such elements are conspicuously missing from both the Complaint and Cross-Complaint. Furthermore, the Cross-Complaint's allegations against Cross-Defendants consist wholly of legally conclusory language, which this Court need not take as true on demurrer. (Zelig v. County of Los Angeles (2002) 27 Cal.4th 1112, 1126.) Nor has Cross-Complainant offered this Court any argument or support in opposition which shows otherwise.

As for the contribution cause of action, the right to contribution arises after a money judgment has been entered against two or more joint tortfeasors. (Caterpillar Tractor Co. v. Teledyne Industries, Inc. (1975) 53 Cal.App.3d 693, 697; Code Civ. Proc. § 875.) As discussed above, the FAC no longer alleges any causes of action against Cross-Defendants, who are no longer in the action as Defendants, and thus it is unclear how any money judgment could be entered against them on Plaintiffs' action. Without such a judgment, Cross-Complainant will not be able to seek contribution from Cross-Defendants as a "joint tortfeasor." Here too, Cross-Complainant has offered no explanation, argument, authority, or factual allegation to support the possibility of contribution.

To state a claim for declaratory relief, a cross-complainant must allege facts showing that there is a dispute between the parties constituting an "actual controversy." (Code Civ. Proc. § 1060; *Artus v. Gramercy Towers Condominium Assn.* (2018) 19 Cal.App.5th 923, 930.) A claim for declaratory relief fails when it is wholly derivative of other failed claims. (*Smyth v. Berman* (2019) 31 Cal.App.5th 183, 191-192.) Here, Cross-Complainants' other claims against Cross-Defendants fail, and therefore their derivative declaratory relief claim must likewise fail.

Thus, the demurrers to all three causes of action in the Cross-Complaint are properly SUSTAINED. While leave to amend is generally liberally granted, the burden rests with the pleading party to show the possibility of amendment. (*Hedwall*, supra, at 579.) The Court will not rewrite a pleading in response to demurrer. (*Rakestraw v. Calif. Physicians' Service* (2000) 81 Cal.App.4th 39, 44.) Because Cross-Complainant has offered no allegations to support the possibility of amendment, and no legal authority showing the viability of these causes of action or any other, the demurrer is properly SUSTAINED in its entirety WITHOUT LEAVE TO AMEND.

If the tentative ruling is uncontested, it shall become the order of the Court. Thereafter, counsel for Cross-Defendants shall prepare a written order consistent with the Court's ruling for the Court's signature, pursuant to California Rules of Court, Rule 3.1312, and provide written notice of the ruling to all parties who have appeared in the action, as required by law and the California Rules of Court.

The Court alerts the parties to revised Local Rule 3.403(b)(iv) (amended effective January 1, 2024) regarding the wording of proposed orders.

2:00
LINE:7

23-CIV-04119 GRAND LODGE OF CALIFORNIA VS. COMMERCE HOLDING
COMPANY, INC., ET AL.

GRAND LODGE OF CALIFORNIA
COMMERCE HOLDING COMPANY, INC.

TODD A. ROBERTS
CANDACE H. SHIRLEY

DEMURRER TO COMPLAINT BY DEFENDANTS COMMERCE HOLDING COMPANY, INC.,
STEVE DOUKAS AND TULA DOUKAS

TENTATIVE RULING:

Before the court is defendants Commerce Holding Company, Inc.'s and Steve Doukas' demurrer and motion to strike the request for punitive damages to plaintiffs Grand Lodge of California Independent Order of Odd Fellows' and John Rector's complaint filed on September 1, 2023. Defendants have also filed two requests for judicial notice. The demurrer is SUSTAINED WITH LEAVE TO AMEND in part and OVERRULED in part. Plaintiff shall be allowed leave to amend. The motion to strike punitive damages from the complaint is GRANTED and the requests for judicial notice are GRANTED.

Real Party in Interest Requirement

Code of Civil Procedure, section 367 states "[e]very action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute." This doctrine has long been known as standing. (Ho & Ross, Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921-2006 (2010) 62 Stan. L.Rev. 591, 648 [historical cognizability of standing].) "A litigant's standing to sue is a threshold issue to be determined by the court before addressing the merits. [Citation]" (Boorstein v. CBS Interactive, Inc. (2013) 222 Cal.App.4th 456, 465.) "Generally speaking, a party lacks standing to assert a claim that belongs to another person. [Citation]. Thus, it has been said on many occasions '[a] real party in interest ordinarily is defined as the person possessing the right sued upon by reason of the substantive law.'" (Limon v. Circle K Stores Inc. (2022) 84 Cal.App.5th 671, 691, review denied (Jan. 25, 2023).)

Numerous recent California cases have also indicated that standing requires a beneficial interest in the action, equated to the "injury-in-fact" requirement for federal standing. (Id. at 698.) A plaintiff may assert a claim on behalf of a third party as a successor in

interest only where (a) the plaintiff has suffered an injury in fact; (b) the plaintiff has a relationship with the third party so that the plaintiff can and will effectively present the third party's rights; and (c) obstacles prevent the third party from asserting his or her own rights. (citations).” (4 Witkin, Cal. Proc. (6th ed. March 2024 Update) Claim on Behalf of Third Party § 127.) The prerequisites for standing to assert statutorily-based causes of action are determined from the statutory language. (Boorstein v. CBS Interactive, Inc., supra, 222 Cal.App.4th at 466.)

Here, defendants assert plaintiffs lack standing to bring the underlying action because Grand Lodge is not a successor in interest to Odd Fellows Cemetery Association (hereinafter OFCA) and John Rector is not a personal representative or successor in interest to the relatives buried first at the San Francisco Odd Fellows Cemetery in the late 1800s then later re-buried at Greenlawn Cemetery in 1924.

In reviewing the facts as stated in the complaint, the court finds that the OFCA ended its interest in Greenlawn Cemetery as of 1933 with the sale of the cemetery to Bay Cities Cemetery Association. (Complaint at ¶ 28.) Subsequent sales of the cemetery ultimately resulted in its ownership by [Commerce Holding Company] in 1980. (Complaint at ¶¶ 36-42.) Grand Lodge contends it is the successor in interest to the OFCA however the facts stated in the complaint do not support that contention. Furthermore, even if Grand Lodge were a successor in interest to OFCA, any rights regarding the cemetery would have been extinguished with the sale of Greenlawn to Bay Cities Cemetery Association in 1933 when the OFCA transferred “all rights and interest” in the cemetery to Bay Cities Cemetery Association. (Complaint ¶28.) Nor is the court persuaded that the Perpetual Care Fund set forth in the sale agreement between Bay Cities Cemetery Association and purchaser A.J. Casebeer established a successor interest in Grand Lodge.

John Rector bases his standing on the fact that he is a direct descendant of no less than twelve persons interred in the Oddfellows section of Greenlawn and as a third party for the benefit of the general public. (See Complaint at ¶1, Plaintiff’s Memorandum of Points and Authorities in Opposition to Demurrer, filed July 1, 2024, at p.6.) Rector does not satisfy the requirements to represent the general public as a third-party nor does his status as direct descendent, taken on its own, establish his right to bring suit. (See Code Civ. Proc., § 377.11 [defining decedent’s successor interest] and Code Civ. Proc., § 377.30 [cause of action surviving death of person entitled to commence action passes to decedent’s successor in interest or decedent’s personal representative].) Accordingly, the court finds neither plaintiff is a real party in interest and thus both lack standing to bring this suit. However, as claims two and three are brought as representative actions, to the extent such claims are

properly exhausted, plaintiff potentially has standing with respect to claim three.

Demurrer

"Where the plaintiff is not the real party in interest, i.e., where the action is brought by the wrong person, a general demurrer lies. This is because no cause of action is stated in favor of the plaintiff." (4 Witkin, Cal. Proc. (6th ed. March 2024 Update) Effect of Violation of Rule, § 124.) For this reason, the court could sustain the entire demurrer.

A demurrer founded on section 430.10(e) which arises when an allegation essential to a cause of action is missing, is familiarly called a "general demurrer." (McKenney v. Purepac Pharmaceutical. Co. (2008) 167 Cal.App.4th 72, 77). Accordingly, "[a] ruling on a general demurrer is thus a method of deciding the merits of a cause of action on assumed facts without a trial." (Ibid. [internal quotations omitted].) Since a general demurrer "admits the truth of all material factual allegations in the complaint," a plaintiff's ability to prove these allegations "does not concern the reviewing court. The plaintiffs need only plead facts showing that they may be entitled to some relief." (Fisher v. San Pedro Peninsula Hosp. (1989) 214 Cal.App.3d 590, 604 [internal quotations omitted] (superseded by statute on other grounds).) " 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (Blank v. Kirwan (1985) 39 Cal.3d 311, 318.) When a plaintiff "has stated a cause of action under any possible legal theory," it is error to sustain a demurrer. (Bush v. California Conservation Corps (1982) 136 Cal.App.3d 194, 200 [emphasis added].) "It is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment." (Hale v. Sharp Healthcare (2010) 183 Cal.App.4th 1373, 1379.) Defendant demurs to the complaint on five grounds. They are discussed as follows:

The first cause of action for breach of contract should be sustained because plaintiffs "have not identified any contracts to which they are parties," nor have they attached said contracts to the complaint nor have they recited its terms. (Memorandum of Points and Authorities ISO Demurrer, p.7.) The essential elements of a contract are: "1. Parties capable of contracting; 2. Their consent; 3. A lawful object; and, 4. A sufficient cause or consideration." (Civ. Code, § 1550.) Here, plaintiff's unsupported, conclusory allegations that plaintiffs "have either been parties to or express third-party beneficiaries of

written and oral contracts to provide for dignified burial sites for descendants lack the specific facts required to determine whether there was a meeting of the minds, the terms involved, and consideration. (Complaint at p.13.) Absent the contracts themselves it would be impossible for the court to determine if plaintiffs are beneficiaries or entitled to recover damages for emotional distress. Accordingly, the court SUSTAINS the demurrer as to the first cause of action WITH LEAVE TO AMEND.

To the extent plaintiff Rector alleges entitlement to damages for emotional distress as an exception to the general rule precluding emotional distress for breach of contract in California, again, lack of any contractual agreement or privity between the parties requires the court to SUSTAIN the demurrer. The court cannot find, as plaintiff's case law suggests, "the express object of the contract is the mental and emotional well-being of one of the contracting parties" in the complete absence of the terms and the mutual agreement to such terms necessary to create a contract. (See Erlich v. Menezes (1999) 21 Cal.4th 543, 559-560; see also Civil Code § 3301 [Contract damages must be clearly ascertainable in both nature and origin.]

In the second cause of action, civil liability for vandalism in a cemetery, pursuant to Health & Safety Code section 8102, plaintiffs contend defendants have committed vandalism by "unlawfully failing to maintain and by removing grave stones and grave markers." (Complaint ¶69.) Defendants correctly remark that an action pursuant to this statute may only be brought in the name of a cemetery authority. The court notes, however, that plaintiffs raise this claim as a Private Attorney General Act representative action. To the extent such claim has been properly exhausted, the court nonetheless SUSTAINS the demurrer because plaintiff does not state what cemetery authority on whose behalf they are acting. (See Health & Saf. Code, §7018 [cemetery authority defined].)

Plaintiff's third cause of action alleges defendants have failed to keep and maintain the records of all remains interred pursuant to Health & Safety Code sections 8110 and 8111. (Complaint at p. 15.) Defendants contend Commerce did not acquire Greenlawn until 1980 and there is nothing in the statute which indicates Commerce should go back in time "to recreate records undoubtedly long lost." (MPA ISO Demurrer, p.10.) Additionally, there is nothing providing for a private right of action. As a claim brought as a representative action, however, to the extent such claim has been properly exhausted, the court finds plaintiff states a legal cause of action as to whether or not defendant has maintained accurate records of all remains interred and reinterred. Accordingly, the court OVERRULES the demurrer as to the third cause of action.

The demurrer as to the fourth cause of action for violation of Business & Professions Code section 17200 is SUSTAINED WITH LEAVE TO AMEND. The court finds the complaint does not clearly identify a cause of action for unfair competition pursuant to this statute. (Bus. & Prof. Code § 17200; see also Kim v. Westmoore Partners, Inc. (2011) 201 Cal.App.4th 267, 285 [Business and Professions Code section 17200 does not state a cause of action for unfair business practices because statute does not actually prohibit any conduct but is merely definitional].)

Fifth, the demurrer to the entire complaint should be sustained as to Steve Doukas because the complaint is "devoid of any facts to show that Mr. Doukas specifically authorized, directed or participated in the allegedly wrongful conduct." (MPA ISO Demurrer at pp.14-15.) "[A]n officer or director will not be liable for torts in which he does not personally participate, of which he has no knowledge, or to which he has not consented.... While the corporation itself may be liable for such acts, the individual officer or director will be immune unless he authorizes, directs, or in some meaningful sense actively participates in the wrongful conduct." [Citations and quotations omitted] (Frances T. v. Village Green Owners Assn. (1986) 42 Cal.3d 490, 503-504.) Here, the court notes that the complaint names defendant Doukas personally but contains no allegations against him that defendant Doukas specifically authorized directed or participated in the conduct. Accordingly, the court SUSTAINS the demurrer as to the complaint WITH LEAVE TO AMEND.

Accordingly, the demurrer is SUSTAINED as to causes of action One, Two, Four and Five. Demurrer is OVERRULED as to the Third Cause of Action.

Plaintiff is allowed leave to amend. Plaintiff has ten days from notice of entry of order to file an amended complaint.

If the tentative ruling is uncontested, it shall become the order of the court. Thereafter, counsel for defendants shall prepare a written order consistent with the court's ruling for the court's signature, pursuant to California Rules of Court, rule 3.1312, and provide written notice of the ruling to all parties who have appeared in the action, as required by law and the California Rules of Court. The court alerts the parties to revised Local Rule 3.403(b) (iv) (amended effective January 1, 2024) regarding the wording of proposed orders.

2:00
LINE:8

23-CIV-04119 GRAND LODGE OF CALIFORNIA VS. COMMERCE HOLDING
COMPANY, INC., ET AL.

GRAND LODGE OF CALIFORNIA
COMMERCE HOLDING COMPANY, INC.

TODD A. ROBERTS
CANDACE H. SHIRLEY

MOTION TO STRIKE DEMAND FOR PUNITIVE DAMAGES BY DEFENDANTS COMMERCE
HOLDING COMPANY, INC., STEVE DOUKAS AND TULA DOUKAS

TENTATIVE RULING:

Motion to Strike Demand for Punitive Damages

"A motion to strike can be used to attack the entire pleading, or any part thereof--i.e., even single words or phrases (unlike demurrers). [Citations]." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group, June 2024 Update) ¶ 7.156.) The grounds for a motion to strike must appear on the face of the pleading at issue. (Id. at ¶ 7.168.) The court's authority to strike out any improper matter in any pleading as well as any part of a pleading not filed in conformity with the laws of the state is found in Code of Civil Procedure section 436. Exemplary damages, commonly referred to as punitive damages, are allowable in an action for the breach of an obligation not arising from contract, when it is proven by clear and convincing evidence that a defendant is guilty of oppression, fraud or malice. (Civ. Code, § 3294, subd. (a) [emphasis added].) A motion to strike punitive damages allegations may lie where the claim sued upon would not support an award of punitive damages as a matter of law. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group, June 2024 Update) ¶ 7.186.) Because punitive damages are not available under the statute for breach of contract. (Civ. Code § 3294, subd. (a), the motion is granted with respect to the first cause of action, breach of contract.

As to the remaining three claims, the court reviews the statutory definitions in turn. "Malice" is defined as "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." Despicable conduct has "the character of outrage associated with crime." (Butte Fire Cases (2018) 24 Cal.App.5th 1150, 1159.) The element of conscious disregard requires a defendant to have "actual knowledge of the risk of harm" he or she is creating and, knowing that, fails to take steps to reduce or eliminate the risk of such harm. (Ehrhardt v. Brunswick, Inc. (1986) 186

Cal.App.3d 734, 742.) "Oppression" means "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (Civ. Code, § 3294, subd. (c).) Finally, "[f]raud means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." (Civ. Code, § 3294, subd.(c)(3).)

Defendant contends none of the remaining three causes of action support the recovery of punitive damages. Plaintiffs (assumptively, as they have not filed a response in opposition to defendants' motion to strike, nor do they substantiate the request for relief other than its assertion) claim is that defendants' actions were so egregious as to require punitive damages. However, the court believes more is required to meet the statutory definition. Nor has plaintiff demonstrated by any evidence, let alone clear and convincing, the level of conscious disregard or "evil motive" an award of punitive damages necessitates. (See Taylor v. Superior Court (1979) 24 Cal.3d 890, 895-896 [clarifying that to justify an award of punitive damages on the basis of fraud, plaintiff must establish that the defendant was aware of the probable dangerous consequences of his conduct, and that he willfully and deliberately failed to avoid those consequence].) Accordingly, the motion to strike the demand for punitive damages is GRANTED.

Requests for Judicial Notice

On March 1, 2024 defendants filed two separate requests for judicial notice with respect to the instant motion: a request for judicial notice in support of defendants' demurrer to the complaint and a request for judicial notice in support of defendants' motion to strike the demand for punitive damages. The requests are GRANTED but not for the truth of the matter asserted. (Evid. Code § 452.)

If the tentative ruling is uncontested, it shall become the order of the court. Thereafter, counsel for defendants shall prepare a written order consistent with the court's ruling for the court's signature, pursuant to California Rules of Court, rule 3.1312, and provide written notice of the ruling to all parties who have appeared in the action, as required by law and the California Rules of Court. The court alerts the parties to revised Local Rule 3.403(b)(iv) (amended effective January 1, 2024) regarding the wording of proposed orders.

2:00
LINE:9

23-CIV-04189 PSHATOIA LAROSE VS. INSTAGRAM LLC, ET AL.

PSHATOIA LAROSE
INSTAGRAM LLC

PRO SE
JACOB M. HEATH

DEMURRER TO COMPLAINT BY DEFENDANTS INSTAGRAM, LLC AND FACEBOOK ENTERTAINMENT, LLC

TENTATIVE RULING:

For the reasons stated below, Defendants Instagram, LLC's ("Instagram") and Facebook Entertainment, LLC's ("Facebook") (collectively, "Defendants") demurrer to Plaintiff Pshatoia Larose's Sept. 7, 2023 Complaint is SUSTAINED WITH LEAVE TO AMEND. (Code Civ. Proc. Sect. 430.10(e), (f).)

Defendants' 2-21-24 unopposed Request for Judicial Notice (RJN) is GRANTED. (Evid. Code Sect. 452(h).)

Background. The first page of Plaintiff's 9-7-23 Complaint states: "Product liability; data breach; intellectual property; personal injury to plaintiff; monetary loss; violation of privacy rights; monetary stress; unintentional negligence to plaintiff." The Complaint alleges damages in the form of "wage loss; loss of use of property; general damage; loss of earning capacity; emotional distress; current and future lost earnings ... monetary damage in the amount of 371 million; recovery of hacked accounts ... punitive damages." (9-7-23 Cmplt.)

As to the specific claims being asserted, the hand-written Complaint is difficult to decipher. The Complaint contains almost no factual allegations shedding light on what Defendants allegedly did that forms the basis of the Complaint. Plaintiff did not check any of the boxes under Section 10 of the Form Complaint, which is intended to identify the asserted claims. Elsewhere, however, including in the attached "Demand Letter" that Plaintiff mailed to Defendants, Plaintiff refers to "hacked accounts," and states, in conclusory terms:

Failure to prevent and Protect against Reusing of [IP] and Phone Contents or Media, Failure to Recover Hacked Accounts, Data Breach, Failure to investigate and Remove Images or Account Users Accounts reusing [plaintiff's] Data, Invasion of Privacy, Unauthorized Access; Interactions on Platforms to Several Individuals, Resulting in Injury to [plaintiff].

Plaintiff appears to allege that numerous "celebrities" have "tampered with" and/or used Plaintiff's "phone contents" via Instagram, without Plaintiff's approval. The final paragraph of the Complaint alleges that in addition to "hacking" and using Plaintiff's phone contents, various third-party have "caused personal injury and premeditated threats to cause harm to [plaintiff] and/or [plaintiff's] family." None of these allegations are explained.

The demurrer is SUSTAINED on grounds of uncertainty. (Code Civ. Proc. Sect. 430.10(f).) Uncertainty demurrers, although generally disfavored, are appropriate where a complaint is so lacking in clarity/explanation that a defendant cannot reasonably respond. (Khoury v. Maly's of Calif., Inc. (1993) 14 Cal.App.4th 612, 616.)

Here, Plaintiff's Form Complaint consists of conclusions and an unexplained list of supposed "causes of action," with virtually no supporting factual allegations shedding light on what the named Defendants purportedly did that forms the basis for the asserted "claims." Plaintiff's attached "Demand Letter," which Plaintiff sent to Defendants in Aug. 2023, appears to allege that various third-party celebrities have "tampered with" and/or used Plaintiff's "phone content" via Instagram. But Plaintiff does not identify what content she alleges is at issue, how these various third parties used that content, or how such alleged use is improper. And as noted, the Complaint alleges no facts explaining what the Defendants did, or did not do, that forms the factual basis for their alleged liability.

As noted above, as to the specific causes of action, the Form Complaint does not check any of the boxes under Section 10, which is intended to identify the claims being asserted. The Complaint references a laundry list of purported causes of action ("Failure to Prevent and Protect against Reusing of Intellectual Property and Phone Contents on Social Media, Failure to Recover Hacked Accounts, Data Breach, Failure to Investigate and Remove Images or Account Users Account [sic] reusing Ms. Larose Data, Invasion of Privacy, Unauthorized Access to Users Interactions on Platforms to Several Individuals ...") Elsewhere, the Complaint also makes unexplained references to "product liability," "data breach," and "intellectual property." Many of these supposed claims are not even recognized as causes of action. And for those that are, Plaintiff has not alleged sufficient facts establishing the elements of any such claim(s).

In sum, the Complaint is not drafted in a manner that enables the Defendants to fairly/reasonably respond. It does not clearly identify the asserted claims, and it does not allege facts explaining/shedding light what the Defendants allegedly did that forms the basis for the asserted claims.

The demurrer is SUSTAINED for failure to state facts sufficient to constitute any cause of action. (Code Civ. Proc. Sect. 430.10(e).) For largely the same reasons, Plaintiff's Form Complaint fails to state facts sufficient to constitute a cause of action. As stated above, the Complaint is drafted in conclusory terms. It identifies a laundry list of supposed causes of action, but without supporting factual allegations explaining what the named Defendants did that forms the basis for the asserted claims. Absent supporting factual allegations, no cause of action is stated.

Sect. 230 of the Communications Decency Act appears to bar at least some of Plaintiff's intended claims. Although the Complaint is unclear as to what claims are being asserted, and as to what Defendants did (or did not do) that forms the basis for the claims, it appears that Section 230 of the Communications Decency Act bars at least some of Plaintiff's intended claims. As argued in the demurrer and not addressed in Plaintiff's Opposition, Section 230 provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." (47 U.S.C. § 230(c)(1).) The statute bars claims based on a service provider's decision(s) regarding whether to "publish, withdraw, postpone or alter content created by third parties." (Murphy v. Twitter, Inc. (2021) 60 Cal.App.5th 12, 17; Cross v. Facebook, Inc. (2017) 14 Cal.App.5th 190, 206-207.)

Here, Plaintiff appears to target Defendants, at least in part, for Defendants' act of permitting third parties to steal and then post/use Plaintiff's content on Defendants' websites, and for third parties' alleged acts of posting their own content on Defendants' websites. To the extent Plaintiff intends to hold Defendants liable as the "publisher" or "speaker" of third-party content, including by virtue of Defendants' alleged failure to remove content posted by others, such claims are presumptively barred by Section 230(c)(1).

Plaintiff's intended claims appear, at least in part, to be contractually barred. Plaintiff has not opposed Defendants' Request for Judicial Notice, which seeks judicial notice of portions of Defendants' publicly-available websites. (Evid. Code Sect. 452(h).) These publicly-available webpages include Facebook's and Instagram's "Terms of Service" and "Terms of Use," which Defendants contend all users of their websites (including, necessarily, Plaintiff) agreed to as a prerequisite to using Defendants' platforms. (RJN, Ex. A, B.) The aforementioned terms state that Plaintiff, as with all users, agreed to Defendants' user terms ("Terms of Use") when they created their accounts. These user agreements include several limitations of Defendants' liability, including "all liability for third-party conduct." (RJN, Ex. A § 3, Ex. B.) They also include express waivers of all warranties. (Id.) In her Complaint, Plaintiff appears to fault Defendants, at least in part, for the functionality of Defendants' websites, including Defendants alleged

failure to protect Plaintiff's information posted on Defendants' sites. And all of Plaintiff's claims appear to be based on third-party conduct. Thus, it appears that at least a portion of Plaintiff's intended claims would also be contractually barred.

For each of the foregoing independent reasons, the demurrer is SUSTAINED.

Leave to amend. The Court generally takes a lenient stance with respect to permitting amendments to pleadings. Here, it is unclear whether Plaintiff's Complaint is capable of amendment. However, given that there have been no prior demurrers/challenges to any pleading, the Court SUSTAINS the demurrer WITH LEAVE TO AMEND.

If the tentative ruling is uncontested, it shall become the order of the Court. Thereafter, counsel for Defendants shall prepare a written order consistent with the Court's ruling for the Court's signature, pursuant to California Rules of Court, Rule 3.1312, and provide written notice of the ruling to all parties who have appeared in the action, as required by law and the California Rules of Court.

The Court alerts the parties to revised Local Rule 3.403(b)(iv) (amended effective January 1, 2024) regarding the wording of proposed orders.

POSTED: 3:00 PM