SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 09/05/23 TIME: 1:30 P.M. DEPT: A CASE NO: CV1802570

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER: CLERK: Q. ROARY

PLAINTIFF: KIERA HYNES vs. DEFENDANT: BUCK INSTITUTE FOR RESEARCH ON AGING	

NATURE OF PROCEEDINGS: MOTION – GOOD FAITH SETTLEMENT

RULING

The motion for good faith settlement brought by Defendant Buck Institute for Research for Aging is **DENIED.**

Allegations in Plaintiff's First Amended Complaint

Plaintiff alleges that on August 16, 2016, she went into the bathroom just outside the Kennedy Lab at the Buck Institute for Research on Aging (the "Institute"). While on the toilet, she suddenly suffered a stroke, causing her to be unable to see sufficiently to make a cell phone call for help. Plaintiff was able to get herself to the bathroom door but she could not open the door due to a defective lock. Plaintiff remained entrapped in the bathroom for approximately three hours. (First Amended Complaint ("FAC"), ¶3.) The First Cause of Action for premises liability is asserted against the Institute. The Second Cause of Action for strict products liability and the Third Cause of Action for negligent products liability are asserted against Defendants Dormakaba USA Inc. ("Dormakaba"), Access Hardware Supply, Inc. ("Access"), and Automatic Door Systems, Inc. ("ADSI"), who were substituted in as Doe defendants on April 8, 2019, December 28, 2020 and June 26, 2019, respectively. The Fourth Cause of Action for negligence is asserted against all defendants.

Standard

Code of Civil Procedure Section 877.6 provides in part:

> (a)(1) Any party to an action in which it is alleged that two or more parties are joint tortfeasors or co-obligors on a contract debt shall be entitled to a hearing on the issue of the good faith of a settlement entered into by the plaintiff or other claimant and one or more alleged tortfeasors or co-obligors, upon giving notice in the manner provided in subdivision (b) of Section 1005. Upon a showing of good cause, the court may shorten the time for giving the required notice to permit the determination of the issue to be

> made before the commencement of the trial of the action, or before the verdict or judgment if settlement is made after the trial has commenced . . .
> (b) The issue of the good faith of a settlement may be determined by the court on the basis of affidavits served with the notice of hearing, and any counteraffidavits filed in response, or the court may, in its discretion, receive other evidence at the hearing.
> (c) A determination by the court that the settlement was made in good faith shall bar any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor or co-obligor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault.
> (d) The party asserting the lack of good faith shall have the burden of proof on that issue . . .

(Code Civ. Proc. § 877.6.)

Although the party asserting the lack of good faith has the burden of proof on that issue, (Code Civ. Proc., § 877.6(d)), where the application is contested, as here, the settling party must make a prima facie showing of all the *Tech-Bilt* factors, either through the moving papers or in counter-declarations. (*Mattco Forge, Inc. v. Arthur Young & Co.* (1995) 38 Cal.App.4th 1337, 1350, n. 6; *City of Grand Terrace v. Superior Court* (1987) 192 Cal.App.3d 1251, 1261-1262; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2022) ¶ 12:872, p. 12(ll)-98.) The principal *Tech-Bilt* factors include: a rough approximation of the plaintiff's total recovery and the settlor's proportionate liability; the amount paid in settlement; the allocation of the settlement proceeds among plaintiffs; a recognition that a settlor should pay less in settlement than he would if he were found liable after trial; settlor's financial condition and insurance policy limits; and existence of collusion, fraud or tortious conduct. (*Tech-Bilt,Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488, 499; *Mattco Forge,* Cal.App.4th at p. 1349.) The prima facie showing must be based on facts presented through counsel's affidavits, expert declarations, or other means. Without such an evidentiary showing, there is no substantial evidence to establish the nature and extent of the settling party's liability. (*Mattco Forge,* 38 Cal.App.4th at p. 1350.)

The Settlement

The Institute seeks a determination that a settlement it reached with Plaintiff (the "Settlement") has been made in good faith. Among other things, the Settlement provides that the Institute will pay Plaintiff $10 million, take certain actions with respect to the bathrooms at the Institute, assign its indemnity rights to Plaintiff, and cooperate with Plaintiff regarding the production of its witnesses. The assignment of indemnity rights is found in Paragraph 1C of the Settlement, which provides as follows:

> Upon satisfaction of all of the PAYMENT CONDITIONS, DEFENDANT, including its insurance carrier, hereby agrees to comprehensively assign PLAINTIFF any and all of its rights to equitable/implied indemnification and/or contribution against all other Defendants in the ACTION without reservation. DEFENDANT further agrees to reasonably cooperate with PLAINTIFF in the production of witnesses and/or declarations

> sworn to thereby of DEFENDANT as drafted by counsel for PLAINTIFF to the extent true and correct, to testify at trial and in prosecution by her of said assigned rights after trial.
> For purposes of this AGREEMENT only, the PARTIES agreed that DEFENDANT'S assignment of its and its insurance carrier's rights to equitable/implied indemnification, subrogation, and/or contribution arising from the payment in this ACTION shall presently and in the interim, based on facts presently known, and without, among other things, the benefit of further pending deposition testimony from defendant Dormakaba USA, LLC's Person Most Qualified, be valued at $500,000, which amount represents a reasonable, good faith, interim estimate regarding the approximate, estimated value of said rights as of the date of this AGREEMENT based upon a roughly 5% recovery of the $10 million amount of the SETTLEMENT FUNDS being paid out by DEFENDANT in settlement to PLAINTIFF. Said valuation is based upon the fact that a portion of the $10 million is due to non-products liability related negligence, insurance coverage, the cost of subsequent litigation, the risk of subsequent litigation, the failure of unknowns of litigation and discovery, and the defenses raised. It is the express intention of the PARTIES that this valuation shall not be binding on the litigants in the ACTION pursuant to the authority set forth in, inter alia, *Gouvis Engineering v. Superior Court* (1995) 37 Cal.App.4th 642.

(Declaration of Justin Knight ("Knight Decl.", Exh. A.)

Discussion

The *Tech-Bilt* factor regarding recognition that the settlor should pay less in settlement weighs in favor of granting the Institute's motion, while the factors of financial conditions and insurance policy limits weigh against. The Institute presents no evidence that it does not have any additional insurance or funds that could cover a greater settlement amount.

The factors that require additional analysis are the Institute's proportionate liability and whether the valuation of the assignment of indemnity rights was determined through collusion with Plaintiff. The Court addresses these two factors together as they are interrelated as it pertains to the valuation of the assignment of indemnity rights, the key issue in dispute.

The Institute's Position

The declaration of Justin Knight, the Institute's counsel, provides the following information regarding Plaintiff's alleged damages. Plaintiff's alleged past medical expenses total approximately $57,135.52, and her future care is estimated to range between $10,623,257 and $33,110,656, although this has yet to be established by expert opinion. Plaintiff also alleges lost future earnings of $4,491,803. (Knight Decl., ¶10.) The Institute argues that when accounting for Plaintiff's alleged damages, her total alleged claim value for purposes of economic damages is roughly between $15,172,195.50 and $38,172,195.50. (*Id.*, 11.) Plaintiff has not identified a specific amount of alleged non-economic damages. (*Id.*, ¶12.)

Referencing a summary judgment motion it has filed (which has not yet been heard), the Institute contends that it has strong defenses to Plaintiff's claims. Among other things, the Institute argues that Plaintiff cannot establish any breach of duty of care by the Institute because the Institute had no actual or constructive notice of any issue concerning the bathroom, any delay in receiving treatment was not a substantial factor in causing Plaintiff's injuries, and Plaintiff waived her rights against the Institute in her internship agreement. (See Knight Decl., Exh. B.) In light of these defenses, the Institute argues, the payment of $10 million is well within the ballpark of its proportionate share of liability.

The Institute also contends that the $500,000 valuation of the assignment of indemnity rights is reasonable. The Institute justifies this amount by assuming an approximate 50/50 split between economic damages and non-economic damages Plaintiff may recover. Because the Institute could only pursue indemnity against the Non-Settling Defendants for economic damages for which it could be jointly liable, the Institute argues that under this model, it would only be able to pursue $5 million in indemnity from the Non-Settling Defendants out of the $10 million settlement amount. The Institute continues: "Thus, a valuation of 10% of $500,000 with respect to the Institute's assignment of its indemnity rights to Plaintiff is well within the ballpark of reasonableness given the strong no liability positions taken by Non-Settling Defendants coupled with their collective position that, in the event and to the extent that Plaintiff's claims have merit, the Institute is solely liable for the injuries and damages alleged." (MPA, p. 13:17-21.)

The Non-Settling Defendants' Position

Dormakaba, Access and ADSI (collectively, the "Non-Settling Defendants") state that they do not challenge the adequacy of the $10 million payment, but contend that the Institute has undervalued the Institute's assignment of indemnity rights to Plaintiff. Non-Settling Defendants argue that this particular value did not result from an adversarial process (although the $10 million did, following several mediations, settlement conferences and direct negotiations). They argue that because they get a credit for this amount against the economic portion of any judgment against them (*Regan Roofing Co. v. Superior Court* (1994) 21 Cal.App.4th 1685, 1700), Plaintiff would naturally request a very low valuation. The Institute would not care about the valuation as it would be insulated from all equitable indemnity claims regardless if the Settlement is approved. Non-Settling Defendants argue that there is no evidence presented that shows this valuation was reached as a result of the adversarial process in an arms-length transaction.

Non-Settling Defendants also challenge the methodology used by the Institute to reach a valuation of $500,000. They point to the language in Paragraph 1.C of the Settlement which states that the $500,000 valuation is "based upon a roughly 5% chance of recovery of the $10 million", and argue that 5% is an unfairly low estimate of Plaintiff's chances of recouping up to $10 million in settlement funds in a cross-indemnity action. With the Institute out as a defendant following settlement, Plaintiff's position at trial will be that Non-Settling Defendants are solely responsible for her injuries, so that she can drive up the value of the indemnity claim she has been assigned. Non-Settling Defendants argue that the indemnity right must be valued by the chance of recovery on the indemnity if liability is found as to the Non-Settling Defendants and no liability is found – consistent with the position Plaintiff will take – as to the Institute. They contend the likelihood of this happening is much higher than 5%.

Non-Settling Defendants also challenge the Institute's 50/50 allocation between economic and noneconomic damages, noting that Plaintiff claims over $38 million in economic damages alone and thus the lion's share of any damage award will be economic rather than noneconomic.

Analysis

In *Regan Roofing*, *supra*, a group of individual homeowners brought an action against the developer of their homes, as well as a number of subcontractors, tradespeople and design professions. The plaintiffs and developer reached a settlement which contemplated a $2 million payment to the plaintiffs and a $5,000 assignment of indemnity and contribution rights from the developer to the plaintiffs. The non-settling defendants contended that the settlement was not in good faith because, among other things, the $5,000 value given to the assignment was too low. The trial court found the settlement to be in good faith, and the Court of Appeal affirmed as to all but one issue. The court found that there were insufficient facts supporting the $5,000 valuation of the assignment. (*Regan Roofing Co.*, 21 Cal.App.4th at p. 1715.)

Discussing the assignment of indemnity rights, the court first noted the possibility of "double recovery" for plaintiffs, who would have claims both against the non-settling defendants directly and as assignee of the settling defendant's rights of indemnity. (*Id.* at p. 1712.) The court then stated that to avoid double recovery, courts must require an adequate evidentiary basis for the valuation and showing that the valuation was reached in negotiations of an appropriate adverse nature, and provide for an accurate award of credit to the non-settlors. "The value placed upon such an assignment of rights should be credited as against any eventual judgment against the nonsettlors on the same claims as were settled by the settling parties, i.e., plaintiffs' direct action, not any indemnity recovery through the assignment of rights." (*Id.* at p. 1713.) The court reasoned there is no possibility of double recovery under these circumstances as the direct action and the derivative action for indemnity constitute wholly independent rights. (*Ibid.*) "Although valuation of any settlement asset must necessarily include some estimation and extrapolation, the valuation of assigned indemnity rights should normally be made at the time of settlement as part of the overall good faith showing for the settlement." (*Id.* at p. 1714.)

The court identified three factors to consider in determining the valuation of an assignment of indemnity rights: the cost to prosecute the claims, the probability of prevailing on them, and the likelihood of collecting on a judgment on them. (*Id.*) The court stated: "Although no firm guidelines can be established as to the proportional value of an assignment of rights as compared to the potential recovery that it represents, that proportion should not represent 'peanuts' in order to be within the *Tech-Bilt* ballpark. Because a proper valuation of the indemnity rights is necessary to accord appropriate credit to the nonsettling defendants against any eventual plaintiffs' judgment that they may suffer, more than guesswork or arbitrary choice of a particular value is required." (*Id.* at p. 1715 [citation omitted].) The court concluded there was an inadequate factual showing supporting the $5,000 valuation and therefore remanded the case to the trial court to receive and consider evidence about the appropriate valuation. The court reasoned:

> Here, the $5,000 valuation of this potential $2 million indemnity claim represents .0025 percent of the potential indemnity recovery. All we have in support of the valuation is plaintiffs' counsel's letter stating that the $5,000 valuation had been reached, without supporting evidence or explanation, and an offered stipulation at

> the hearing that these indemnity rights are completely valueless. We have been given no information about the additional cost to plaintiffs to prosecute these indemnity claims against the 22 nonsettling defendants, any probability of prevailing on them, or any likelihood on collecting on a judgment on them. It may be that the $5,000 valuation represents an accurate assessment when all the relevant factors are considered. However, without more information about the assignment value, we are unable to make a reasoned evaluation of it.

(*Id.* at p. 1715.)

The same problems exist with the Institute's motion in this case. The Institute bears the burden of showing this component of the Settlement is reasonable. (*Erreca's v. Superior Court* (1994) 19 Cal.App.4th 1475, 1491; *Mattco Forge*, 38 Cal.App.4th at p. 1351 ["Section 877.6 and *Tech-Bilt* require an evidentiary showing, through expert declarations or other means, that the proposed settlement is within the reasonable range permitted by the criterion of good faith"].) The only evidence the Institute presents is the declaration of its counsel, Mr. Knight. Mr. Knight states that the settling parties believe the valuation is reasonable given Non-Settling Defendants' strong contention of non-liability (Knight Decl., ¶6), the assignment was "mutually valued" by the Institute and Plaintiff at $500,000 (¶14), and negotiations with Plaintiff were "extensive" and "arms length" (¶¶6, 21). Counsel also makes a number of conclusory statements regarding the extensive time and cost and uncertainty of continued litigation (¶¶7, 18) and the reasonableness of the valuation (¶¶6, 13, 14, 16-19).[1]

This showing is insufficient. The Institute presents no evidence supporting the 50/50 allocation between economic and non-economic damages that it uses to justify the valuation, or its estimation that there is a 5% chance of Plaintiff recovering on an indemnity claim, or evidence of discussions or negotiations between Plaintiff and the Institute showing the $500,000 was reached through an adversarial process. Under the Settlement, Plaintiff would receive rights which could potentially value $10 million, for only $500,000. There must be an adequate factual showing to support such a low valuation, and the Institute has not provided one.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

The Zoom appearance information for September, 2023 is as follows:
https://www.zoomgov.com/j/1602925171?pwd=NUdsaVlabHNrNjZGZjFsVjVSTUVqQT09
Meeting ID: 160 292 5171
Passcode: 868745

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[1] The Court does not consider new evidence submitted with the Institute's Reply. Even if it did, that evidence (a supplemental declaration by another attorney for the Institute) still does not satisfy the Institute's burden.

If you are unable to join by video, you may join by telephone by calling (669) 254-5252 and using the above-provided passcode. Zoom appearance information may also be found on the Court's website: https://www.marin.courts.ca.gov

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 09/05/23 TIME: 1:30 P.M. DEPT: A CASE NO: CV1904348

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER: CLERK: Q. ROARY

PLAINTIFF: STEPHEN ECKDISH, ET AL vs. DEFENDANT: WILLIAM RAND DOBLEMAN, ET AL	

NATURE OF PROCEEDINGS: MOTION – LEAVE TO FILE FIRST AMENDED COMPLAINT AND FOR SANCTIONS

RULING

The Motion for Leave to Amend is **GRANTED**. Plaintiffs shall file the proposed First Amended Complaint within ten (10) days from the date of this Order. The Motion for Sanctions is **DENIED**.

BACKGROUND

This Quiet Title action arises between neighbors over a shared boundary line dispute. With this Motion, Plaintiffs seek leave to amend their complaint and seek Code of Civil Procedure section 128.5 sanctions against Defendants in the amount of $7,500.

LEGAL STANDARD – MOTION FOR LEAVE TO AMEND

Under Code of Civil Procedure section 473, subdivision (a)(1), the Court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding. As judicial policy favors resolution of all disputed matters in the same lawsuit, courts liberally permit amendments of the pleadings. (*Nestle v. Santa Monica* (1972) 6 Cal.3d 920, 939.) Denial is rarely justified unless opposing parties demonstrate unreasonable delay plus prejudice if the motion is granted. A mere showing of unreasonable delay by the plaintiff without any showing of resulting prejudice to defendants is an insufficient ground to justify denial of the plaintiff's motion. (*Higgins v. Del Faro* (1981) 123 Cal.App.3d 558, 564-565.) Prejudice exists where the amendment would require delaying the trial, resulting loss of critical evidence or added costs of preparation, and an increased burden of discovery, inter alia. (*Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 486-488.)

Generally, arguments attacking the merits of the proposed amendments do not justify denial of the motion. Courts allow the amendment and then let the parties test the legal sufficiency in other appropriate proceedings such as a demurrer. (*See Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1048, and *Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 760.)

A party requesting leave to amend must also comply with California Rules of Court, rule 3.1324. Compliance with the Rules of Court is satisfied by including a copy of the proposed amended pleading, detailing what changes will be made from the previous pleading by stating what allegations are to be deleted or added as compared to the previous pleading including page, paragraph and line number, and attaching a declaration by plaintiff's counsel, as to: (1) the effect of the amendment; (2) why the amendment is necessary and proper; (3) when the facts giving rise to the amended allegations were discovered; and (4) why the request was not made earlier.

DISCUSSION – MOTION FOR LEAVE TO AMEND

Moving party asserts that there will be no prejudice to Defendants if the Motion is granted because no trial date is set and the amendment has been "on the table" for quite some time. In opposition, Defendants counter that they will suffer prejudice due to increased discovery costs as the parties' depositions have already been taken and they will have to be re-deposed to cover the added allegations. The Court finds that this alone does not constitute prejudice. "Prejudice exists where the proposed amendment *would require delaying the trial, resulting in* added costs of preparation and increased discovery burdens." (*Miles v. City of Los Angeles* (2020) 56 Cal.App.5th 728, 739. Emphasis added.) Here, there will be no delay of trial (since no trial date is set). Defendants have been aware of the proposed amendments for quite some time and can utilize cost effective written discovery requests to address the issues raised by the amendment if they prefer.

Accordingly, the Motion for Leave to Amend is granted.

LEGAL STANDARD – MOTION FOR SANCTIONS

Under Section 128.5, sanctions may be imposed against a party, the party's attorney, or both to pay the reasonable expenses, including attorneys' fees, incurred by another party due to bad faith actions or tactics taken by the offending party and/or attorney. The actions must be frivolous or solely intended to cause unnecessary delay. "Frivolous" for purposes of Section 128.5 means actions or tactics that are totally and completely without merit, or for the sole purpose of harassing the opposing party. (Code Civ. Proc., § 128.5, subd. (b)(2).) An order awarding attorneys' fees under Section 128.5 is reviewed under an abuse of discretion test. (*Olive Properties v. Coolwaters Enterprises, Inc.* (2015) 241 Cal.App.4th 1169.)

DISCUSSION – MOTION FOR SANCTIONS

Here, the Court finds that moving party has failed to show that Defendants' opposition was frivolous or solely intended to cause delay. The amendments have expanded since the parties and the Court discussed the potential amendment at the Case Management Conference. The fact a motion lacks merit is not enough by itself to justify an award of sanctions under section 128.5. "A bad faith action or tactic is considered "frivolous" if it is "totally and completely without

merit" or instituted "for the sole purpose of harassing an opposing party." (Code Civ. Proc., § 128.5, subd. (b)(2).) Whether an action is frivolous is governed by an objective standard: any reasonable attorney would agree it is totally and completely without merit. (*Finnie v. Town of Tiburon* (1988) 199 Cal.App.3d 1, 12; *In re Marriage of Reese & Guy* (1999) 73 Cal.App.4th 1214, 1220-1221.) There must also be a showing of an improper purpose, i.e., subjective bad faith on the part of the attorney or party to be sanctioned. (*Campbell v. Cal-Gard Surety Services, Inc.* (1998) 62 Cal.App.4th 563, 574.)

The Court finds that this standard has not been met and the request for sanctions is denied.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 09/05/23 TIME: 1:30 P.M. DEPT: A CASE NO: CV2200992

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER: CLERK: Q. ROARY

PLAINTIFF: ONE SILVER SERVE, INC. vs. DEFENDANT: COLORADO STRUCTURES INC., ET AL	

NATURE OF PROCEEDINGS: DEMURRER

RULING

Cross-Defendants' MOC Insurance Services LLC and Symphony Risk Solutions Insurance Services, Inc. (aka "Brokers") demur to the causes of action for Breach of Oral Contract and Breach of Fiduciary Duty alleged in Defendants/Cross-Complainants' Monahan-Parker, Inc. and 1201 Fifth Avenue LLC's First Amended Cross-Complaint ("FACC"). Defendants also move to strike the claims for punitive damages and for attorney's fees.

For the reasons discussed below, the demurrer to the cause of action for Breach of Oral Contract is **OVERRULED**. The demurrer to the cause of action for Breach of Fiduciary Duty is **SUSTAINED**.

The motion to strike the claim for punitive damages is **GRANTED**. The motion to strike the claim for attorney's fees under the Tort of Another doctrine is **DENIED**.

BACKGROUND

The FACC alleges that Cross-Complainants 1201 Fifth Avenue LLC owned, and Monahan-Parker, Inc. managed, a hotel that was being constructed in San Rafael. Cross-Complainants (collectively "Owners") had contracted with DLR Group, Inc. (DLR) to be the project architect and with Colorado Structures, Inc. (CSI) to be the general contractor. Around September 30, 2019, Owners entered into an oral agreement with Cross-Defendants, their longtime insurance brokers, and procured a builder's risk insurance policy (the "Policy") for the Project that met certain specifications demanded by Owners and the Owners' lender that financed the Project. (¶s 17-18.) The Brokers' representative told Owners the Policy they procured "complied with all of the lender requirements." (¶87.)

As a result of a series of severe storms in October 2021, the Project suffered over $20 million of damage, allegedly due to the contractor's failure to properly stormproof the Project. (¶s 28-29.) After promptly Owners notified them, the Insurers began making policy payments totaling approximately $5 million. (¶ 38.) On June 2, 2022, Owners informed the insurance adjusters that more than $10 million was still owing under the Policy for this loss (¶ 39), but on June 27, 2022 the insurers informed Owners that the $5 million already paid out was the coverage limit for interior water damage. (¶ 40.)

It is alleged throughout that the Brokers procured a policy that contained sub-limits for certain risks, like water damage, which were far below the specifications demanded by Owners and Lender; that Brokers did not disclose this fact, but instead affirmatively represented to Owners that the Policy met all Owners' and Lender's conditions. (¶s 19, 81, 88, 91, 93, 96.) Owners allege that Brokers had no reasonable grounds to believe the representations made to the Owner that the Policy met the Owners' and Lender's specifications, were true. (¶ 89.) Had Owners known of this low sub-limit coverage, they would have purchased a different policy. (¶ 93.) Only after purchasing the policy did Owners discover the policy was issued by non-admitted carriers, a fact the Brokers did not disclose to Owners. (¶ 19.)

On April 11, 2022, Plaintiff One Silver Serve, Inc., the company that performed remediation work on the storm damage suffered by the Project, sued Owners for nonpayment of services. (¶ 36.) On December 12, 2022, Owners filed an answer to the First Amended Complaint and a Cross-Complaint which alleged, *inter alia*, these causes of action against Brokers: 1 – negligence; 2 – negligent misrepresentation; 3 – intentional misrepresentation; and 4 – breach of fiduciary duty, based on Brokers' failure to procure the policy demanded by Owners and which Brokers agreed to obtain.

This FACC was filed on May 19, 2023 and it asserts causes of action against Brokers for: 1 – negligence (5th cause of action); 2 – breach of oral contract (6th cause of action); 3 – negligent misrepresentation (7th cause of action); and 4 – breach of fiduciary duty (8th cause of action). This demurrer and motion to strike followed.

DEMURRER

Legal Standard

A demurrer tests whether the complaint, as it stands, unconnected with extraneous matters, states a cause of action. (*Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 747.) Because a demurrer tests only the legal sufficiency of the pleading, the facts alleged in the pleading are deemed to be true. (*Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1034.) On demurrer, the focus is on whether the pleading alleges facts sufficient to state a cause of action under any possible legal theory. (*Gutierrez v. Carmax Auto Superstores California* (2018) 19 Cal.App.5th 1234, 1242.)

Cause of Action for Breach of Oral Agreement Is Timely

Brokers contend that the Sixth Cause of Action for Breach of Oral Agreement fails to state a claim because it is time-barred. (MPA p. 3.)

Relying on the rule that the statute of limitations for breach of an oral contract is two years (Code Civ. Proc., § 339(1)), Brokers contend Owners knew or should have known of the breach, i.e., that the Policy contained a limitation of coverage for interior water damage, when they received the policy around September 30, 2019. (MPA p. 4.) Brokers assert the limitations period expired on September 30, 2021, before the filing of the original Cross-Complaint (December 12, 2022) and the FACC (May 19, 2023). (MPA p. 4.)

" 'A demurrer on the ground of the bar of the statute of limitations will not lie where the action may be, but is not necessarily barred.' [Citations.] It must appear clearly and affirmatively that, upon the face of the complaint, the right of action is necessarily barred. [Citations.]" (*Lockley v. Law Office of Cantrell* (2001) 91 Cal.App.4th 875, 881.)

For all statutes of limitations, the statute begins to run when the "cause of action accrues." (*Fox v. Ethicon Endo–Surgery, Inc.* (2005) 35 Cal.4th 797, 806.) "Generally speaking, a cause of action accrues at 'the time when the cause of action is complete with all of its elements.' " (*Ibid.*) " 'The standard elements of a claim for breach of contract are: (1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) damage to plaintiff therefrom. [Citation.]' (*Regan Roofing Co. v. Superior Court* (1994) 24 Cal.App.4th 425, 434–435.)" (*Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1178.) "Where, as here, 'damages are an element of a cause of action, the cause of action does not accrue until the damages have been sustained. [Citation.] "Mere threat of future harm, not yet realized, is not enough." [Citation.] "Basic public policy is best served by recognizing that damage is necessary to mature such a cause of action." [Citation.] Therefore, when the wrongful act does not result in immediate damage, "the cause of action does not accrue prior to the maturation of perceptible harm." ' (*City of Vista v. Robert Thomas Securities, Inc.* (2000) 84 Cal.App.4th 882, 886.)" (*Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 604.)

The facts allege that, at the earliest, Owners did not suffer appreciable harm until they received the allegedly deficient $5 million as payment in full for interior water damage in June 2022. (See *Hydro-Mill Co. v. Hayward, Tilton & Rolapp Ins. Assocs., Inc.*, (2004) 115 Cal. App. 4th 1145, 1157 [claim against insurance brokers for negligently procuring an earthquake policy that did not provide the requested coverage accrued when insured received total policy payment that did not include damages to negligently omitted properties.].) Before that time, any damage arising out of Brokers' alleged breach of the agreement to procure adequate coverage was a mere expectancy and the cause of action had not yet matured.

Since both the original Cross-Complaint (filed December 12, 2022) and the FACC (filed May 19, 2023) were filed within two years of that date, the action is timely. The demurrer is overruled on this ground.

This conclusion also covers any limitations period for the claim of Breach of Fiduciary Duty: two years for professional negligence (Code Civ. Proc., § 339(1)); or four years where the code does not specify a limitations period. (Code Civ. Proc., § 343). (See *Thomson v. Canyon, supra,* 198 Cal.App.4th at p. 606 ["The Code of Civil Procedure does not specify a statute of limitations for breach of fiduciary duty. The cause of action is therefore governed by the residual four-year statute of limitations in Code of Civil Procedure section 343 governing '[a]n action for relief not hereinbefore provided for' in the code. [Citation.]".) (MPA p. 5:19-20.)

Eighth Cause of Action Does Not State Facts to Support Breach of Fiduciary Duty

Brokers contend this cause of action fails because no fiduciary duty exists between Owners and Brokers as a matter of law. (MPA p. 4-5.) The court agrees.

Owners allege the Brokers breached their fiduciary duties by 1 – failing to obtain the type and amount of insurance coverage Owners requested; 2 – misrepresenting the nature, scope and extent of the coverage afforded by the Policy; 3 – failing to procure adequate coverage or explain the Policy limitations; and 4 – failing to procure clear and certain coverage. (¶ 96.) This cause of action relies on the same conduct as alleged in the fifth cause of action for Negligence (¶ 75) and incorporates language from the Negligent Misrepresentation cause of action – Brokers had no reasonable grounds to believe their representations that the Policy contained all of Owners' and Lender's requirements. (¶ 89.)

A fiduciary relationship is "any relation existing between parties to a transaction wherein one of the parties is duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where a confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent." (*Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 29, internal quotations and citations omitted.)

" 'Insurance broker' means a person who, for compensation and on behalf of another person, transacts insurance other than life, disability, or health with, but not on behalf of, an insurer." (Ins. Code § 33.)

The courts note the uncertainty that exists regarding whether a fiduciary *relationship* exists between an insured and the independent insurance broker in all circumstances. It has been recognized that the insurance brokers may act in a fiduciary *capacity* in some situations. (See *Hydro-Mill Co., supra,* 115 Cal. App. 4th at p. 1158 ["An insurance broker does act in a fiduciary capacity when he receives and holds premiums or premium refunds. (Ins. Code, § 1733.)"].) However, the consensus view of court decisions is that the relationship between an independent broker and its insured imposes no greater duty than "the duty to use reasonable care and diligence in procuring insurance", i.e., professional negligence. (*Mark Tanner Constr. v. Hub International Insurance Services* (2014) 224 Cal.App.4th 574, 583-586.)

"Insurance brokers owe a limited duty to their clients, which is only 'to use reasonable care, diligence, and judgment in *procuring* the insurance requested by an insured.' [Citations.] Accordingly, an insurance broker does not breach its duty to clients to procure the requested insurance policy unless '(a) the [broker] misrepresents the nature, extent or scope of the coverage being offered or provided ... , (b) there is a request or inquiry by the insured for a particular type or extent of coverage ... , or (c) the [broker] assumes an additional duty by either express agreement or by "holding himself out" as having expertise in a given field insurance being sought by the insured.' (*Fitzpatrick v. Hayes* (1997) 57 Cal.App.4th 916, 927.)" (*Pac. Rim Mech. Contractors, Inc. v. Aon Risk Ins. Services West, Inc.* (2012) 203 Cal. App. 4th 1278, 1283, emphasis added.)

Other courts have similarly treated a breach of an independent broker's duty to procure the insurance requested by the insured as professional negligence. (E.g., *Hydro-Mill Co.,supra,*115 Cal. App. 4th at p.1158-1159 [the failure to obtain the requested insurance coverage and not disclosing that failure, amounts to a claim for professional negligence]; *Kotlar v. Harford Fire Ins. Co.* (2000 83 Cal.App.4th 1116, 1123 ["The duty of a broker, by and large, is to use reasonable care, diligence, and judgment in procuring the insurance requested by its client."]; same *Nowlon v. Koram Ins. Ctr., Inc.* (1991) 1 CA4th 1437, 1447 ["A broker's failure to obtain the type of insurance requested by an insured may constitute actionable negligence and the proximate cause of injury."].)

In rebuttal, Plaintiff cites *Eddy v. Sharp* (1988) 199 Cal.App.3d 858, in which the insurance broker, Sharp, prepared an insurance proposal for commercial building insurance for Plaintiffs' review before purchasing the policy. (Oppo. p. 16.) In that case, the broker negligently represented that the policy was "All Risk" subject to certain enumerated exclusions, but failed to inform the insureds that the policy, which Plaintiffs ultimately purchased, also excluded loss from water backing up through sewers/drains. After Plaintiffs' property was damaged by this very event, they sued the broker alleging, in part, negligent misrepresentation, i.e., misrepresentation of a material fact without reasonable grounds for believing it to be true. (*Id.* at p. 864.) In reversing a demurrer to this cause of action, the appellate court determined that Defendant independent broker was an "agent of the insured" and concluded: "Where the agency relationship exists there is not only a *fiduciary duty* but an obligation to use due care. [Citation.] Sharpe owed a duty of due care to the Eddys under agency principles. [Citations.]" (*Id.* at p. 865, emphasis added.) *Eddy* is part of a minority view that would find a fiduciary duty in the present circumstances.

In *Westrec Marina Management, Inc. v. Jardine Ins. Brokers Orange County, Inc.* (2000) 85 Cal.App.4th 1042, the jury found brokers liable for breach of their professional and fiduciary duties where they failed to obtain insurance at best available price. The issue on appeal was whether trial judge properly refused to hold second phase of punitive damages trial, it did. (*Id.* at p. 1045.) There was no discussion upon whether independent broker owes a fiduciary duty separate from the usual professional duty to exercise the due care.

Here, the causes of action for Negligence, Negligent Representation and Breach of Fiduciary Duty rely on the same acts – Defendant Brokers' failure to obtain the requested insurance coverage and misrepresenting the nature, scope, and extent of the coverage. The court finds that, as alleged, this conduct does not extend beyond the usual duties of any professional to conscientiously use the special skill, knowledge, and reasonable care in performing the duties requested by a client, and which the consensus of authorities defines as professional negligence. (See *Hydro-Mill Co., supra,* 115 Cal. App. 4th at pp. 1158–1159 ["regardless of appellation" claims of failing to obtain the requested insurance coverage and not disclosing that failure amount to claims of professional negligence].)

The demurrer is sustained without leave to amend. It does not appear reasonably possible that Owners can cure the defect with an amendment. (See *Kumaraperu v. Feldsted* (2015) 237 Cal.App.4th 60, 65-66.)

MOTION TO STRIKE

Legal Standard

A motion to strike may be used to excise "all or any part of any pleading not drawn or filed in conformity with the laws of this state. . .." (Code Civ. Proc., § 436(b), 437).

In ruling on a motion to strike, "judges read allegations of a pleading subject to a motion to strike as a whole, all parts in their context, and assume their truth. [Citation.]" (*Turman v. Turning Point of Central California, Inc.* (2010) 191 Cal.App.4th 53, 63.)

Punitive Damages

Brokers move to strike the claim for punitive damages alleged in the cause of action for Breach of Fiduciary Duty and in the Prayer (¶ 3).[1]

First, in light of this court's decision to sustain the demurrer to this cause of action, the motion to strike these paragraphs is granted. However, assuming for the sake of argument, the cause of action was adequately pled, the court provides the following analysis.

"In order to survive a motion to strike an allegation of punitive damages, the ultimate facts showing an entitlement to such relief must be pleaded by a plaintiff. [Citation.]" (*Clausen v. Superior Court* (1998) 67 Cal.App.4th 1253, 1255.) Under the proper circumstances punitive damages may be recovered in connection with a claim for breach of fiduciary duty. (*Heller v. Pillsbury Madison & Sutro* (1996) 50 Cal.App.4th 1367, 1390.) However, to recover punitive damages under his cause of action, the requirements of Civil Code section 3294 must be satisfied.

Punitive damages are available where plaintiff shows by *clear and convincing evidence* that defendant's tortious conduct resulted from "oppression, fraud or malice." (Civ. Code § 3294(a).) Malice means conduct intended to cause injury to plaintiff, or "despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (Civ. Code § 3294(c)(1).) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. (Civ. Code § 3294(c)(2).) "Despicable" refers to conduct that is "base, vile or contemptible." (*College Hosp. Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725.) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the Defendant with the intention on the part of the Defendant of thereby depriving a person of property or legal rights or otherwise causing injury." (§ 3294(c)(3).)

The significance that a fiduciary duty may exist is the availability of punitive damages under the theory of *constructive fraud.* (*Day v. Rosenthal* (1985) 170 Cal.App.3d 1125, 1160 [constructive fraud is an appropriate basis for an award of punitive damages].) " 'In addition to the traditional liability for intentional or actual fraud, a fiduciary is liable to his principal for *constructive fraud*

[1] In their opposition, Owners concede they are seeking punitive damages only in connection with the cause of action for Breach of Fiduciary duty. (Oppo. p. 8:23-26.)

even though his conduct is not actually fraudulent. Constructive fraud is a unique species of fraud applicable only to a fiduciary or confidential relationship.' [Citation.] [¶] '[A]s a general principle constructive fraud comprises any act, omission or concealment involving a breach of legal or equitable duty, trust or confidence which results in damage to another *even though the conduct is not otherwise fraudulent.* Most acts by an agent in breach of his fiduciary duties constitute constructive fraud. The failure of the fiduciary to disclose a material fact to his principal which might affect the fiduciary's motives or the principal's decision, which is known (or should be known) to the fiduciary, may constitute constructive fraud. Also, a careless misstatement may constitute constructive fraud *even though there is no fraudulent intent.*' [Citation.]" (*Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 562, emphasis in original [real estate broker acts as fiduciary].)

The FACC alleges the Brokers failed to procure the policy specifically requested by Owners, did not inform them of the lower sub-limit for interior water damage, and misrepresented to Owners that the Policy met all their requirements without reasonable grounds to believe this representation to be true. (¶ 89.) These allegations do not charge the Brokers with deliberately misleading Owners with the intent to deprive them of their property or legal rights or otherwise causing injury. (§ 3294(c)(3).)

As discussed, "constructive fraud" may be committed without actual fraudulent conduct, as through a careless misstatement. Here, in the absence of facts alleging corrupt motive, reprehensible conduct or deliberately injurious behavior, Owners' allegations do not justify an award of punitive damages on what is essentially a claim of negligent misrepresentation. (See *Delos v. Farmers Group, Inc.* (1979) 93 Cal. App. 3d 642, 656–657 ["Punitive damages are not recoverable for negligent misrepresentation."].)

"[A] breach of a fiduciary duty alone without malice, fraud or oppression does not permit an award of punitive damages. [Citation.] The wrongdoer must act with the intent to vex, injure, or annoy, or with a conscious disregard of the plaintiff's rights. [Citations.] Punitive damages are appropriate if the defendant's acts are reprehensible, fraudulent or in blatant violation of law or policy. The mere carelessness or ignorance of the defendant does not justify the imposition of punitive damages.... Punitive damages are proper only when the tortious conduct rises to levels of extreme indifference to the plaintiff's rights, a level which decent citizens should not have to tolerate. [Citation.]" (*Lackner v. North* (2006) 135 Cal.App.4th 1188, 1201, *internal quotations and citations omitted.*)

Thus, for this alternative reason the motion to strike is granted. Leave to amend is denied, as it does not seem reasonably possible that Owners can cure this defect.

Tort of Another

Brokers' motion to strike the prayer for attorney's fees is denied. The FACC prays for attorney's fees and costs incurred in "seeking to obtain the benefits to which Owners are entitled to under the Policy and in pursuit of this complaint against the Insurers." (Prayer ¶ 8.)

Owners argue they are entitled to recover attorney's fees and costs under the Tort of Another doctrine because they have had to defend the actions for nonpayment of services by Plaintiff One Silver Serve and the general contractor CSI, which was caused by Brokers' failure to procure the requested coverage for interior water damage; and they have had to sue the Insurers to obtain the unpaid benefits Owners believe they are entitled to under the Policy terms. (Oppo. p. 5.)

The Tort of Another doctrine is not an exception to the general "American rule" that parties bear their own attorney fees "but an application of the usual measure of tort damages [] in the same way that medical fees would be part of the damages in a personal injury action." (*Sooy v. Peter* (1990) 220 Cal. App. 3d 1305, 1310.) The doctrine, announced in *Prentice v. North Amer. Title Guaranty Corp.* (1963) 59 Cal.2d 618, provides that "[a] person who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover compensation for the reasonably necessary loss of time, attorney's fees, and other expenditures thereby suffered or incurred." (*Id.* at p. 620; *Watson v. Dep't of Transportation* (1998) 68 Cal. App. 4th 885, 893.) The elements of such a claim are: 1 – plaintiff's involvement in a lawsuit with a third-party because of defendant's tortious conduct; 2 - that attorney fees were incurred in that third-party litigation; and 3 - the attorney fees and expenses incurred were the natural and necessary consequence of bringing or defending the third-party lawsuit. (*Prentice*, *supra* at p. 621.)

The FACC adequately pleads facts showing that as a result of Brokers' professional negligence and negligent misrepresentation in procuring the Builders' Risk insurance policy that provided less coverage for interior water damage than specifically requested, Owners did not have sufficient funds to pay for the clean-up and that they have had to defend this action brought by Silver Serve arising from Brokers' conduct. (¶s 34-36.) For that same reason, Owners allege they were compelled to file this cross-complaint against Insurers for covered losses from water damage under the Policy terms. (Causes of Action Nos. 1-4.)

The motion to strike Tort of Another attorney's fees is denied.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

The Zoom appearance information for September, 2023 is as follows:
https://www.zoomgov.com/j/1602925171?pwd=NUdsaVlabHNrNjZGZjFsVjVSTUVqQT09
Meeting ID: 160 292 5171
Passcode: 868745

If you are unable to join by video, you may join by telephone by calling (669) 254-5252 and using the above-provided passcode. Zoom appearance information may also be found on the Court's website: https://www.marin.courts.ca.gov

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 09/05/23 TIME: 1:30 P.M. DEPT: A CASE NO: CV2202529

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER: CLERK: Q. ROARY

PLAINTIFF: NATE ACCOMAZZO vs. DEFENDANT: BILL FORD	

NATURE OF PROCEEDINGS: MOTION – SET ASIDE/VACATE DEFAULT

RULING

The motion to set aside the default taken against plaintiff and cross-defendant Nate Accomazzo ("Plaintiff") pursuant to Code of Civil Procedure section 473, subdivision (b) is **GRANTED**. (Code Civ. Proc., § 473, subd. (b).) Plaintiff's counsel shall pay reasonable attorney fees and costs in the amount of $100.00. (*Ibid.*)

PROCEDURAL HISTORY

On August 11, 2023, Plaintiff filed his complaint against defendant Bill Ford ("Defendant") for breach of contract and declaratory relief in response to an attorneys' fees dispute. (See Complaint, 8/11/22.) On January 19, 2023, Defendant answered Plaintiff's complaint and filed a cross-complaint against Plaintiff, as well as Tyler Accomazzo, Steven Accomazzo, Brandon Accomazzo,[1] and Jesse Accomazzo alleging breach of contract (attorney-client fee agreement), breach of contract, (written contract to pay amounts owed), breach of covenant of good faith and fair dealing, and common counts. (See Cross-Complaint, 1/19/23.) Represented by attorney Samy S. Henein, on March 10, 2023, Steven[2] filed his answer. Similarly, answers were filed by Tyler and Brandon, as well as Jesse, on April 12, 2023.

On May 1, 2023, a request for entry of default was filed by Defendant against Plaintiff. Currently before the Court is Plaintiff's motion to set aside the default. Plaintiff bases his motion on Code of Civil Procedure section 473, subdivision (b)—attorney affidavit of fault, mandating the Court to set aside the default at issue.

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[1] Brandon Chilton is erroneously sued as Brandon Accomazzo

[2] The Court references to the parties by their first names for clarity and no disrespect is intended by the same.

LEGAL STANDARD

A court has broad discretion to vacate a judgment, dismissal, order, or other proceeding where the moving party timely establishes a proper ground for relief. (*Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 495.) Code of Civil Procedure, section 473, subdivision (b) contains two distinct provisions for relief. The first provision is discretionary and broad in scope, providing: "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken." (Code Civ. Proc., § 473, subd. (b).)

The second provision is mandatory. The Court is obligated to set aside a default, default judgment, or dismissal if the motion for mandatory relief "(1) is filed within six months of the entry of judgment, (2) is in proper form, (3) is accompanied by the attorney affidavit of fault, and (4) demonstrates that the default or dismissal was in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." (*Martin Potts & Associates, Inc. v. Corsair, LLC* (2016) 244 Cal.App.4th 432, 443 citing to Code Civ. Proc. § 473, subd. (b), internal citations omitted.)

DISCUSSION

Plaintiff provides the declaration of his counsel,[3] Samy S. Henein, that attests to his inadvertent failure to timely file an answer on behalf of Plaintiff. (See Declaration of Samy S. Henein, ¶ 5.) Mr. Henein's declaration is an attorney declaration of fault. (*Ibid.* ["I forgot about the deadline"].) Based upon Mr. Henein's representations, the failure to file an answer was a mistake and subject to the mandatory relief afforded by Code of Civil Procedure section 473, subdivision (b).

Accordingly, the Court grants the motion to set aside the default.

Whenever relief based upon an attorney's affidavit of fault is granted, the Court is required to direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties. (Code Civ. Proc., § 473, subd. (b).) Based upon the record before the Court and interactions between Defendant and Mr. Henein, the Court finds payment of $100.00 reasonable for compensatory legal fees and costs in this instance.

Plaintiff is to file his proposed answer within ten (10) days of the final order of this Court.

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[3] The court file identifies Plaintiff as being self-represented and fails to contain a substitution of counsel for attorney Henein. However, if authorized by the client, the new attorney may file pleadings on the client's behalf even before a substitution of attorney is obtained: "Where the actual authority of the new or different attorney appears, courts regularly excuse the absence of record of a formal substitution ... particularly where the adverse party has not been misled or otherwise prejudiced." (*Baker v. Boxx* (1991) 226 Cal.App.3d 1303, 1309.)

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